SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

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UNITED STATES OF AMERICA :

vs. : No. F320-00

ANTHONY R. JENKINS, :

Defendant. :

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Washington, D.C.
Tuesday, April 5, 2005

The ruling on a hearing in the above-entitled matter before the HONORABLE RHONDA REID WINSTON, Associate Judge, in Courtroom No. 302, commencing at approximately 10:50 a.m.

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P R O C E E D I N G S

THE DEPUTY CLERK: Calling the matter of United States v. Raymond Jenkins, case number F320-00.

MR. AMBROSINO: Good morning, Your Honor. Michael Ambrosino for the United States.

THE COURT: Good morning.

MR. SAYBOLT: Good morning, Your Honor. David Saybolt on behalf of the United States.

THE COURT: Good morning.

MR. UNGVARSKY: Edward Ungvarsky on behalf of Mr. Jenkins. Good morning.

THE COURT: Good morning.

MR. FLOOD: Good morning. Christopher Flood on behalf of Mr. Jenkins.

THE COURT: Good morning. Counsel, let me apologize to you all. I know I asked you to be here over an hour ago, but it didn't happen as I expected.

All right. The case today is before the Court because the Government has evidence that DNA profiles of, I believe, 30 or so samples from the crime scene in this case matched the defendant's DNA profile. The government proposes that at trial it be permitted to present this evidence, or evidence of this match, to the jury by eliciting what's called the random match

probability to express the rarity of the profile in the population, and ultimately it's the government's desire to have its expert testify that Mr. Jenkins was the source of these samples. When I refer to the random match probability in this case, I'm referring to that number as modified, or corrected rather, by the data factor that has been spoken of in the literature and I think that almost all of the experts who testified in this case agree that the FBI uses.

Now, the defendant contends that the government should not be allowed to present evidence of the random match probability alone. The defendant claims that presentation of the random match probability is not generally accepted within the relevant scientific community. The government contends that all the Court needs find is that there is a lack of controversy over how the random match probability, itself, is calculated and that whether some additional calculation, in addition to the RMP, should be presented to the jury is a matter of relevance, which the Court can determine without regard to what the scientists think.

When the government says that whether or not the Court determines that another calculation ought to be presented to the jury, it's referring to the existence of theories that different scientists hold as

to how -- what method should be used to present statistics or statistical probabilities in a case involving a cold hit match, and that cold hit is a match that is first made by comparing crime scene sample DNA profiles to DNA profiles in a database. So, the government believes that all the Court needs to do is to determine whether or not the method of calculation of the RMP is generally accepted, and government claims that it is, and I don't think there is any real dispute about whether the method of calculating RMP is generally accepted. It is. But the defendant claims that not only must the Court decide whether or not the calculation of RMP is done according to generally acceptable principles, but that also the Court must find whether the method that the government proposes to use to elicit the statistics before the jury is acceptable.

Now, in deciding whether or not the method which the Court understands to be RMP alone is generally accepted, well first I have to decide whether or not I must apply the Porter and Frye analysis to the specific method that the government intends to use. I'm going to acknowledge that there are four views, and I will discuss them later in this order, but I start with the language in the Porter case.

The Porter case acknowledges that when DNA

evidence is presented, that statistics are at the heart of the evidence, I mean the evidence doesn't really mean anything without the statistics, and that convinces the Court, along with several other things, that the Frye analysis must be applied not only to the method of calculating RMP but also to the method or the approach that's used to present the statistics to the fact finder in this case. And because members of the scientific community and the Court acknowledges that there are a number of views about what approaches should be used, but the NRC 1 report first acknowledged that when a match is made from a database search, that the fact that the match was made from such a search has to be acknowledged and has to be taken account of. Similarly, the NRC II report, although it recommended a different approach, espoused that the fact that the match came from a database search had to be taken into account when the statistics were presented. So, those are further reasons that the Court is convinced that the Frye analysis has to be applied with regard to the approach. And I would also note that in the case of State of California v. Robinson, which is in the pleadings, and it's a trial court decision from California, that the judge there applied what they called the Kelly-Frye test, which is similar to our Frye test that's used in

this jurisdiction to the various approaches to determine whether or not the various approaches that were proffered in that case were generally accepted within the relevant scientific community. So, I do think that the Frye analysis has to be undertaken when I decide whether or not this approach that the government proffers, that is to suggest or to present just RMP alone, should be presented.

But before I undertake that analysis, I think it's important to refer to the language of Porter, and I read Porter a number of times before and at the beginning of this hearing, but it was instructive, frankly, going back and reading it again and just some language from Porter that I think is very important for everyone to keep in mind as this Frye analysis is undertaken.

The Court in Porter said that the issue is consensus versus controversy over a particular technique and not its validity. Now, while the Porter court certainly said that unanimity is not required, it stated that if scientists significant in number or expertise publicly oppose a technique as unreliable, that that technique does not pass muster under Frye. It causes the Court not to resolve, or attempt to resolve, any scientific dispute among opponents, and it spoke -- it

recognized that the Frye standard, when applied, often retards, it says, the admission of proof based on new scientific methods. But even acknowledging that, and acknowledging that for that reason some jurisdictions had changed to more liberal standards, it reiterated that the Frye standard is the standard that's applied in this jurisdiction. So, it's against that background that I undertake this discussion of whether or not that any RMP alone is permissible in this case in which the match was first made from the database search.

Again, starting with the National Academy of Sciences, NRC 1 report in 1992. The scientists and the group, the individuals who made up that committee recognized that there had to be some different approach taken when the match was first made from the database search. NRC 1 came up with what's now viewed as a very conservative means of taking the database search into account. It recommended discarding the first several loci, based on which the match was made, investigatory match was made, and to use for identification purposes only additional loci beyond the investigatory loci. Then later in 1996, the NRC II report espoused a different view of the approach that should be taken when the database search was the first means of identifying a suspect; and even after NRC II, it seems that at least

members of the scientific community thought that there was still some controversy because the DNA advisory board, which consisted of individuals who were recommended by the National Academy of Sciences, felt the necessity to try to explain what NRC II meant, and the DNA advisory board says that NRC II required the reporting of two numbers; first, the random match probability; and then secondly, what's called the data match probability, which is a number, or calculation rather, that's arrived at by multiplying the RMP times the number of samples in the database or individuals in the database. So, it's pretty clear that at least through 1996 and then to some degree after 1996, there was some -- there was a view that in these database searches, that presentation of the RMP was not appropriate, and what the debate was about was the appropriate method to take into account the ascertainment bias that the scientific community was concerned with. So, the question is whether or not today, five years after DAB, whether or not the approach taken in which RMP alone is generally accepted. We have heard from a number of experts, or three experts, that reams of paper included in these exhibits on which are printed the views of scientists about whether RMP or the presentation of RMP alone is appropriate, and the Court

is mindful of the opinion of Dr. Crow, who has been called the dean of genetics, at least by one of the experts, and it's his view that technology has advanced to such a state, and especially with the discriminatory powers of PCRSTR testing, that it is safe now, for lack of a better term, to present just RMP alone, but the Court is also mindful of the testimony of Dr. Chakraborty, who was also the Government's expert, and in response to the Court's questions, he testified that presentation of RMP alone is not generally acceptable and that presenting RMP alone doesn't present the full picture and what's generally acceptable is presenting the whole picture, which requires a presentation of DMP as well.

The Court is mindful of the testimony of Dr. Bieber, who again, sort of consistent with Dr. Crow, believes that because of the advances in technology, that it is now safe and perfectly acceptable to present RMP alone. And I am also aware of the testimony of Dr. Bieber, I believe, that RMP -- and some of the other experts whose materials were cited with the exhibits -- that RMP is presented in or is reported by forensic laboratories worldwide. So, I'm aware of all those, but I'm not sure or I don't believe that the opinions of Dr. Crow and Dr. Bieber and the legions of people who

work in the forensic labs throughout this country and in other countries means that the presentation of RMP alone is generally acceptable. And again I refer to Dr. Chakraborty's testimony, and in fact it was Dr. Chakraborty's testimony that the DAB approach is used in many labs throughout the country and that has some connection with the requirement that labs have access to CODIS comply with the DAB guidelines. But at any rate, despite the testimony of Dr. Crow and Bieber and Dr. Budowle and some of the other government -- or individuals cited in the government's papers, in light of the fact that DAB suggests that this two-number approach be taken and in light of Dr. Chakraborty's testimony that that's what's required -- and I must say that the Court had enormous respect for Dr. Chakraborty and his testimony -- I just can't find that presentation of RMP alone is generally acceptable.

So, the question then becomes, at least under Porter, whether there is any other approach to presenting the statistics in a cold hit case that is generally acceptable, even though it may yield more conservative numbers. And so it's important for the Court to at least acknowledge what the other approaches are. And depending on whose viewpoint you subscribe to, there are two, maybe three other approaches. Some of

the scientists, including Dr. Krane who testified here and Dr. Kay, who was cited by the -- whose materials were included with the defense submissions, suggest that NRC II espoused an approach whereby one number would be presented to the fact finder, that number being the data match probability. Other members of the scientific community interpret, including the members of the DNA advisory board, who wrote the 2000 report, interpret NRC II not to have said that RMP should not be calculated but that in addition to it, that DMP should be calculated.

To the extent that NRC II does support the presenting of one number, there's very little, if anything, to suggest that that approach has ever gained any general acceptance within the scientific community. And I'll stop here because I think it's important for the Court to define its view of the relevant scientific community, and I think it's really been acknowledged by both sides in this case that that community consists of forensic scientists but also geneticists, human population, geneticists, as well as statisticians. But the one number NRC II approach, if indeed that's an approach, espoused by NRC II just has never gained general acceptance within that scientific community that the Court has just described. But the question about

which there was a lot of discussion during the hearing is whether or not the two-number NRC approach or interpretation has gained general acceptance within the relevant scientific community, and I'll call that the DAB approach because I think it just makes it clearer what I'm referring to because the DAB suggests, and Dr. Chakraborty and Dr. Krane agree, that NRC II should be interpreted as requiring the presentation of two numbers, the DMP in addition to the RMP. The government indicates that it didn't have a problem with the presentation of this DAB approach, except that it was concerned about some prejudice that might flow to the defendant if the Court were to require that the DAB approach, I'll call it, be presented to the fact finder.

But before we get there, I have to undertake the same analysis under Fry about whether or not that approach is generally accepted. Again I'll refer to Dr. Chakraborty's testimony, in which he testified that he believed the DAB requires the presentation of both numbers, and he was explicit because even when the numbers or the calculations showed such a degree of rarity as is alleged in this case, Dr. Chakraborty's position is that DAB would still require the presentation of two numbers. Now, Dr. Bieber believes that technology has advanced to a state such that RMP

can be presented alone but doesn't really quarrel with whether RMP and DMP are generally acceptable methods of reporting out the answers to two questions, as long as it's clear to the fact finder what questions are being asked and what questions are being answered.

Dr. Crow, although he seems to suggest that RMP is appropriately reported out alone, from his affidavit the Court doesn't understand that he would find that an approach that required the reporting out of RMP and DMP is not acceptable, as long as the two questions better asked and answered are appropriately identified.

And then I note that Dr. Budowle, who is the head scientist at the FBI lab, while he states that RMP is routinely reported by forensic labs, indicate that the FBI will report out RMP plus DMP, or at least will report out RMP the fact that the search comes from -- or the match was first made from a database search and also the size of the database. So he doesn't seem to quarrel with the idea that presenting two numbers is a generally accepted approach to presenting the statistics. And nobody really mentioned this gentleman's affidavit, and I don't know whether this is the correct pronunciation of his name. It's either Conneally or Connelly whose material was submitted in the government's submissions,

but I actually found his affidavit quite helpful. And he is a medical genetics and neurology professor. It's his view that it's appropriate to report out both numbers, but that reporting out either, I believe it's his testimony through his affidavit, is appropriate as long as the two questions are properly identified and answered. Then again, Dr. Chakraborty seemed to have a different view than Dr. Bieber about what's happening with the labs in this country because Dr. Bieber seemed to suggest that RMP -- or maybe it's Dr. Budowle suggested that worldwide RMP is being reported out. But Dr. Chakraborty's position is that in the United States and Canada, the DAB approach is being followed, although he acknowledged that in 12 or so cold hit cases of which he was aware, the labs didn't go so far as to report out the actual DMP calculations, but they reported RMP, the fact that the search was made or match was made from database search and also in most cases the size of the database. So, there are these conflicting views about what's happening in the labs in the country.

So, it would seem from those authorities that the DAB interpretation of NRC II is subscribed to by a number of prominent individuals in the relevant scientific community. However, there is another group of people, including statisticians, who disagree with

the DAB interpretation of NRC II or that is the appropriate method of reporting out the statistics in a cold hit case, and so a lot of people in that camp of statisticians. And I can't ignore the statisticians, since there is a commonly held view and it's logical that statistics go to so much at the heart of this evidence and what it should be meaning when a jury hears about it.

And then there is another highly respected geneticist, Dr. Newton Morton, who believes that NRC II is not the appropriate method of reporting out statistics in a cold hit case, and he seems to take the view in his 1996 article that it's the NRC 1 approach that should be reported out.

But in addition to them, there is Professor Stockmarr. It's not really clear where he falls. NRC II seems to suggest that their approach is somewhat consistent, maybe even based on Stockmarr's approach, but Dr. Stockmarr's article in the biometrics journal suggests that he believes that the NRC 1 method is the appropriate method to report out.

Dr. Krane, who testified here, who is also a geneticist and who subscribes to the DNA that -- or the NRC II approach or the interpretation of it, that would allow him to report out one number. As I've said,

nobody really agrees with that, but the point is that he disagrees with this DAB interpretation of NRC II.

And then there is Dr. Speed, and in his affidavit there's one paragraph that suggests to the Court that he is not familiar with what the FBI is really doing, and he has some quarrels with the way DNA evidence is presented for reasons other than the approach that should be taken, where he is concerned with laboratory errors and a number of other issues. So, I mean he is respected. Even Dr. Bieber acknowledged that, although he could not -- it seemed to be incredulous that Dr. Speed said some of the things that he said in his affidavit.

And then there is the group of statisticians into which fall Balding and Donnelly and the individuals who agree with them. They believe that NRC II asks the wrong question, and so they don't really quarrel with the calculations that are recommended by NRC II, at least the interpretation of the DNA advisory board, but they don't really agree that the calculations mean much because they believe that the DAB NRC II calculation -- they believe that a database search really strengthens the evidence against a suspect rather than weakens it, as the NRC II\DAB approach seems to do. So the question is whether the existence of this group of people that is

made up of not only statisticians but geneticists -- and I believe Dr. Stockmarr is a forensic geneticist. And then there is the group with -- so that the question is whether or not I can find that the DAB\NRC II approach is generally accepted.

And I will say that, having listened to all the evidence in this case, the Court is convinced that the DAB/NRC II position is sound. It allows the fact finder to hear very relevant evidence about the rarity of the profile, while at the same time taking into account this ascertainment bias with which members of the scientific community are concerned. And again, I was tremendously impressed by the testimony of Dr. Chakraborty, but even though that's the Court's view, I'm reminded of what Porter holds, it's not what the Court believes, and I'm not to choose sides or to decide whether this group of people disagree with the NRC II approach or DAB approach are less worthy of belief than the individuals who espouse the view that RMP and DMP should be reported, and so I do believe that there is still a controversy about whether the DAB/NRC II approach is generally accepted.

And I was reading again this -- I suppose it's a chapter in a book that was edited by Buckleton and Triggs and Walsh, and that is an exhibit that I

admitted over the government's objection, but I do think that a couple paragraphs in chapter 12 of that -- what appears to be chapter 12 of that book, I guess, at pages 464 and 465, sort of characterize or describe the state of the lay of the land, I'll say, with respect to the acceptability of the DAB/NRC II report. They say that the strength of the DNA evidence resulting from an intelligence database match is often presented without any mention that the hit was obtained from a database. It is usually not in the suspect's interest to let a jury know that he\she has a sample on the DNA database, and the question of whether searching an intelligence database for a match affects the strength of the evidence has been discussed extensively and forcefully in the literature. The issue also affects any search among suspects whether they are on a database or not. Unfortunately, there is much confused writing, and it would be very difficult for a court to make a reasoned decision based on a simple assessment of literature recommendations.

And then it goes on to chronicle the different viewpoints that are held by members of the scientific community. The first National Research Council report suggested that those loci used in the matching process should not be used in assessing the weight of evidence.

The second NRC report recommended that an adjustment be applied by multiplying the match probability -- and I'm not going to refer to these figures that they use -- by the number of people on the database. And then they give an example, which I won't quote primarily because I'm not sure how to quote these, some of these symbols in the sentence.

To date, Aitken, Balding and Donnelly, Balding, et al, Berry, Dawid, Dawid and Mortera, Donnelly and Friedman, Evett, Evett and Weir, Evett, et al. and Finkelstein and Levin have all suggested that the evidence is slightly stronger after a database search and hence no correction is required. Meester and Sjerps suggest that a flat prior be assumed and that the posterior probability be reported, but essentially support an unadjusted, like LR for likelihood ratio. Taroni, et al take a Bayes -- B-A-Y-E-S -- net approach and reach the same conclusion. The result of the database search has the character of an additional piece of evidence.

The two NRC reports, Devlin, Lempert and Stockmarr, have suggested that the match probability be multiplied by the number of people on the database (termed the NP approach). Lempert suggests multiplying by the size of the suspect population and not the

database. Morton suggests confirmatory markers or the use of the NP approach, and the National Commission of the Future of DNA Evidence appears undecided. And I think that that's one group that has not been mentioned during this hearing. It's unclear what Goldman and Long desired, but they did suggest that the estimated match probability must be adjusted to take into account multiple testing. Then they cite one of what they call their favorite pieces, and I quote, "Because the probative effect of a match does not depend on what occasioned the testing, we conclude that the adjustment recommended by the committee (NRC II) should not be made. The use of Bonferroni's adjustment (multiplying by the size of the database) may be seen as a frequentist attempt to give a result consistent with Bayesian analysis without a clear-cut Bayesian formulation. (Finkelstein and Levin)

And then they say that Gornick, et al. give an interesting practical demonstration of the problem with regard to the identification of war victims using reverse paternity. Again, they say the only scientific safeguard is confirmation at additional loci. We must recommend continued scientific investigation to foster an understanding and assessment of these risks. It seems likely that the public, at least in New Zealand,

is not fully informed of these risks nor has informed public debate occurred.

What would a biologist or court make of this? And the mathematical arguments given by either side appear impressive; however, we believe the weight of logical argument is on the "no correction" side. And then they go on to explain why they think the approach that they espoused should be used.

Those several paragraphs say in a much more succinct way than the Court has and could that there is a controversy about the method that should be used when a match is made from a database search. And it's not a manufactured controversy, it's not an insignificant one because there are esteemed members of the community on, I would say, both sides but on all the several sides of this issue. So, with the information that's set forth in those several paragraphs, as well as what the other submissions from both sides have shown the Court and as well as what the testimony of the three experts who have testified in this hearing have informed the Court on, it would simply be -- and as much as I say the Court believes that the DAB\NRC II approach is appropriate, it is simply designed to suggest that there is no controversy over how this evidence should be presented when there is a cold hit.

Now, where does that leave us? The only approach that the Court has not discussed and that the defense believes that the Court could somehow use as a -- and for lack of a better term, I'll say a fall-back position is as Porter suggests that the Court should seek, but I would like to hear if the government wishes to be heard what the government's view is of whether the Court can find that the NRC 1 approach is generally acceptable because although it certainly is conservative, it's ultra conservative as almost everybody has testified, conservatism is just not enough. It still has to be generally accepted. So, I ask the government whether they wish to be heard on that.

MR. AMBROSINO: Well, our position, Your Honor, I think as Your Honor knows, is that as long as the DAB approach is sound, I mean we believe that's the end of the issue. I don't think that as long as it's mathematically and statistically sound, although there might be a controversy over whether it's the best approach, it's unlike the controversy that existed in the past over the other issues that have been resolved by the courts and that all the controversy here that's being talked about, the same controversy existed over the applicable and prior rule and all the other issues

that the courts have resolved. And so our position, Your Honor, is that I don't believe there is general acceptance. You can find general acceptance of a principle that's never been, as far as the evidence in the record shows, implemented by any forensic lab. I don't believe it was ever implemented because, as the witnesses testified, it's impractical and it's outdated and it's something that nobody does. And, no, I don't think the Court could hold there is general acceptance of something that's never been done even since it's recommendation in '92. And I think all the witnesses agreed it's not being done by any forensic lab anywhere today. So, our position would be as long as DAB approach is sound, statistically and scientifically, regardless of whatever discussions are going on in the scientific community, under Porter it can be admitted and should be admitted.

THE COURT: All right. That just is not my reading of Porter because I think that that view is really more appropriate to a Dauber jurisdiction, and Porter is clear that where there is controversy, not validity I think is what it says, it's whether it's acceptable. And so, you know, I heard the defense when you suggested that, you know, the NRC 1 approach is acceptable. I can't find that because, although it's

conservative and nobody disagreed with the method that was used to calculate it, you know, it wasn't ever implemented. Everybody agrees that it -- to use the words of one of the submissions -- it wastes evidence, and I think the Court has to be -- has to figure into this general acceptable calculus whether or not it can be or has been implemented, and some of the scientists and even couple of the witnesses here believe that it can't be now because it espouses using some of the loci for investigatory purposes and then using additional ones for identification purposes, and now everybody is testing the maximum number of loci that are available. So, it would be difficult to implement.

Even though the Court is mindful of the existence of these two kits, I believe you refer to that test for additional loci, I just don't know how I can find NRC 1 is generally acceptable. That leaves the Court in the difficult and undesirable position of finding there is no generally acceptable method, and that's the last thing the Court wants, but I think that that's where I am forced to end up.

Where does that leave us, counsel?

MR. AMBROSINO: Probably in the Court of Appeals, Your Honor.

(General laughter.)

THE COURT: Oh, how I know. All right.

MR. SAYBOLT: Maybe we'll get your Dauber test, Your Honor. Maybe you'll be -- You are the test case.

THE COURT: Well, I sure don't want to be the test case, but --

MR. AMBROSINO: Your Honor, the only thing -- and I understand Your Honor's reasoning and I understand Your Honor has put a lot of time and has given a very thoughtful and extensive decision. The only thing I would say is that in our view, there was clearly in Porter -- and I know Your Honor has read and reread, given a lot of thought to the wording of Porter -- and I think the one thing I would point out is that in Porter, there was clearly controversy in the scientific community about the sealing principle, and there are certainly those people who said it should be implemented, it shouldn't be implemented. But because the science -- at least the principle underlying both giving the sealing principle and not giving it were sound, that the Court allowed both numbers to come in. And I don't think that would be any different than allowing both the RMP and DNRC to approach -- come in because I don't think that there's any controversy over the soundness of principles on both numbers. And that's

the only thing I'd say, but obviously I probably said that before. I don't think I'm persuading the Court, but --

THE COURT: Well, you know, we are where we are, but I want to thank all of you for litigating this case in a way that the Court understood, even though I understood it differently than the government, that the Court came to understand a lot about this issue, and you all presented your viewpoints very well. So, thank you.

So, shall we set a status hearing?

MR. UNGVARSKY: Court's indulgence.

MR. AMBROSINO: Can the parties talk, Your Honor?

THE COURT: Counsel, you all just want five minutes? All right, how about ten?

THE DEPUTY CLERK: Court stands in brief recess.

(Court recess. 11:45 a.m.)

(Proceeding resumed. 11:55 a.m.)

THE DEPUTY CLERK: Calling the matter of United States v. Raymond Jenkins, case number F320-00.

THE COURT: The Court notes the presence of all counsel. Status, counsel?

MR. UNGVARSKY: Your Honor, this is our request. I don't think the government has decided their

view on our request yet. We'd like to come back on Monday, and we'd like to come back in the current posture we are in now, which is pretrial, and we'd like to try to use the intervening days to see if there is any possibility of some accommodation, where the lawyers being -- You know, we want to talk to Jimmy Klein of our office, and I expect they are going to talk to John Fisher of their office, and they are going to talk to their division chief to see whether there's any way in which we reach any sort of stipulation of any kind that could -- that may -- if something can be reached. If it's possible -- I am not saying it is -- but if a stipulation is possible, then I'd like to try it and then try the case. If a stipulation is not possible, then, you know, so be it, but I'd rather not lose the ability to try the case now, if we could find some stipulation. So I'm asking if we can come back in a pretrial posture on Monday. Meanwhile, the lawyers will do, you know, what lawyers do, and Ms. Allison is going to try to get a transcript of the ruling. And it may be that when we come back on Monday, we'll then be saying to the Court that they are going to notice an appeal and we'd like a status date at a certain time out. And it may be -- and I'm not saying this is a high likelihood -- but it's a worthy likelihood, given the age of the

case and given the complexity of the case, there is a likelihood perhaps some stipulation can be reached and we can actually present it to the Court, see if the Court agrees with it. I think courts have to agree to stipulations. In any event, we can actually move the case forward. I say that, obviously, for the Court of Appeals. We are pleased with the Court's ruling, but I also want -- you know, I don't want the Court to think that we are not pleased, but we want to -- you know, we don't want to -- you know, if we can do something that would head off an appeal and that would head off all the work we have done on appeal and that would head off a delay that's occasioned by an appeal, then I think that that would be in the interest of our client if we can reach stipulation. I'm not saying we can't.

MR. AMBROSINO: Your Honor, I don't think the -- I think the approach suggested by defense is a reasonable one. I'm not as optimistic or -- I don't know if that's the right word -- I'm maybe not as desperate as Mr. Ungvarsky is here, but I think it's a reasonable request. We will be prepared to come back Monday and at that time notify the Court if we are, in fact, taking the case up on appeal or how we think everything should proceed at that time. That gives us a little time to absorb the Court's decision and talk with

the appropriate folks.

THE COURT: I am not objecting to that. So, monday morning at 9:30. Let me just ask this, though, because I have another case that's scheduled for trial. If there is any possibility that you all know what posture you are going to be in, say, Friday afternoon, I would appreciate just somebody sending a FAX, copy to the other side. Thank you very much, counsel.

MR. FLOOD: Thank you, Your Honor.

MR. AMBROSINO: Thank you, Your Honor.

THE COURT: Counsel, since we don't know -- Well, if you reach some stipulation, is it your thought that -- who knows whether that will happen? But would you want Mr. Jenkins brought up Monday?

MR. UNGVARSKY: No, because if we are just -- if we are going to be continuing the case, then I think he would rather not be here; and if we are going to be proceeding ahead, we still have some preliminary matters to discuss, and we probably wouldn't be picking a jury. It's sort of we would be doing what we are doing today, and I don't -- he has a strong preference, as the Court may have observed and heard, to not come. So, until the jury actually comes in the room.

THE COURT: All right. Then let's come back Monday. If you can let me know something Friday

afternoon, I would appreciate it.

MR. UNGVARSKY: Very well.

MR. AMBROSINO: Thank you.

THE COURT: Thank you.

(Proceedings adjourned. 12:00 noon)

CERTIFICATION OF REPORTER

I, MARIA M. ALLISON, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had upon the motions hearing in the case of the UNITED STATES OF AMERICA vs. ANTHONY RAYMOND JENKINS, Criminal Action No. F320-00, in said court on the 5th day of April, 2005.

I further certify that the foregoing 32 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the backup tape of said proceedings.

In witness whereof, I have hereto subscribed my name, this, the 11th day of April, 2005.

MARIA M. ALLISON, R.P.R.
Official Court Reporter