

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

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA )  
 )  
 vs. )  
 )  
 1) ANIBAL ACEVEDO-VILA ) CR. 08-036/08-297 (PJB)  
 10) LUISA INCLAN-BIRD )

JURY SELECTION - Afternoon Session - **EXCERPTS**

held before the HONORABLE JUDGE PAUL J. BARBADORO, on  
Tuesday, February 10, 2009, at 1:30 p.m.

FOR THE GOVERNMENT:  
MARIA DOMINGUEZ-VICTORIANO, AUSA  
TIMOTHY R. HENWOOD, AUSA  
ERNESTO LOPEZ-SOLTERO, AUSA

FOR THE DEFENDANTS:  
HARRY ANDUZE-MONTANO, ESQ.  
BRADFORD ALLAN BERENSON, ESQ.  
THOMAS C. GREEN, ESQ.  
JOSE ORTIZ-VELEZ, ESQ.  
ERIC A. CALLI, ESQ.  
MICHAEL PASANO, ESQ.  
ELISEO ROQUES-ARROYO, ESQ.

1 \*\*\*\*\*

2 (Break.)

3 MR. ANDUZE-MONTANO: Your Honor, we are  
4 ready to proceed.

5 THE COURT: Mr. Anduze or Mr. Berenson, I  
6 understand there is a motion that the parties  
7 want to present to me.

8 MR. BERENSON: Your Honor, I'm going to  
9 address the Court on behalf of the Defense and  
10 also the Government for the first and maybe  
11 last time in this proceeding. There is an  
12 important matter on which we agree. And I  
13 think Mr. Henwood from the Government is going  
14 to follow up and supplement my remarks with any  
15 additional thoughts he might have.

16 THE COURT: All right.

17 MR. BERENSON: For the third and final  
18 phase of jury selection, we both jointly move  
19 the Court to conduct the individual voir dire  
20 in closed session, that is, to close the  
21 courtroom, with a transcript to be released  
22 upon sequestration of the jury once selected.

23 We are familiar with the Press Enterprise  
24 standard and the high burden that exists in  
25 order to close this portion of the proceedings,

1 but we think this is the rare and unusual case  
2 in which that standard has been met.

3 Under Press Enterprise the Court would  
4 have to find that the interest in public access  
5 to this portion of the proceeding is outweighed  
6 by an overriding interest of another sort, of a  
7 weightier sort.

8 The First Circuit in "In Re Globe  
9 Newspaper" at 729 F.2d 47 has found the sixth  
10 amendment interests of a criminal defendant,  
11 particularly in a fair and impartial jury, to  
12 be a sufficient overriding interest to justify  
13 closing a portion of proceedings.

14 In this case the individual voir dire is a  
15 portion of the process that is likely to be  
16 essential to selecting a petit jury that  
17 ultimately will be truly fair and impartial,  
18 and the ability to be select fair and impartial  
19 jurors will be compromised if this portion of  
20 the proceedings is conducted in full public  
21 view. And that is the judgment both of defense  
22 counsel and the prosecution in this case.

23 The reasons are essentially twofold.

24 First, we believe that the willingness and  
25 ability of jurors to be completely candid about

1           their views and about some of the issues on  
2           which we'll need to conduct voir dire will be  
3           impaired if that is being done in public view  
4           and in a way that they could expect to see  
5           their responses published in the news media  
6           tomorrow.

7           Your Honor is familiar with the saturation  
8           coverage that this case has received prior to  
9           trial and now that trial has begun --

10          THE COURT: Perhaps we can take a moment  
11          and try to make a record about that to the  
12          extent the parties can support my general  
13          impressions here, or if they are wrong, to  
14          contradict them.

15          I have been concerned about media coverage  
16          in this case from the first day that I was  
17          assigned the case.

18          Indeed, my review of the matter shortly  
19          after I was assigned, suggests to me that there  
20          was an extraordinary amount of publicity  
21          associated with this case that even predates  
22          the indictment by many months.

23          It was a matter of almost obsession in the  
24          media over the course of the last year.

25          The then-Governor Anibal Acevedo-Vila was

1 in the midst of an election campaign. It was  
2 one of the principal focuses of the media's  
3 attention during the course of that campaign.  
4 And it has been my impression that throughout,  
5 from the time of indictment until now, that the  
6 press attention to the case has been  
7 extraordinary almost unprecedented.

8 Certainly, in my experience as a trial  
9 judge, unprecedented, but as far as I can  
10 determine, even in Puerto Rico, a place in  
11 which it is common for the press to be very  
12 active and engaged, this is a case that has  
13 attracted almost unprecedented pretrial  
14 publicity.

15 My sense also is that the publicity has  
16 been quite extreme and often harshly partisan  
17 nature with very extreme allegations being made  
18 against both sides in the case in the media.

19 It's been a concern of mine from the  
20 beginning of this case. And I have tried  
21 during the course of the case to take measures  
22 to address that concern.

23 I originally offered the parties an early  
24 trial date prior to the he election season.

25 Understandably, the parties felt better

1           that they could be better prepared with some  
2           additional time, so I arranged to have the  
3           trial conducted several months after the  
4           election in the hope that the pretrial  
5           publicity would abate.

6                     I have considered requests by the  
7           Government at one time during the midst of the  
8           election season to in effect restrain certain  
9           comments by people in the media and felt that I  
10          could not constitutionally constrain the  
11          speakers from speaking during the course of  
12          that heated election campaign.

13                    I felt that Mr. Anibal Acevedo-Vila needed  
14          to have a right to fully address the electorate  
15          about the issues that were being raised during  
16          the course of the campaign, one of which, of  
17          course, was the pendency of these charges. And  
18          I felt that he had a constitutional right to  
19          address those charges in public. And I  
20          considered and rejected a proposal to restrain  
21          him from doing that.

22                    I have during the course of pretrial  
23          proceedings reminded the parties of the local  
24          rule here that restricts their ability to  
25          comment in the case in certain ways; but it's

1           been my experience that other lawyers  
2           unconnected with the case have not felt  
3           constrained about their ability to comment and  
4           that they have commented extensively and  
5           speculated extensively about the case.

6                     One example that came to my mind was the  
7           weekend before I got down here. There was a  
8           discussion in the media about Mr. Anibal  
9           Acevedo-Vila mulling a possible Plea Agreement  
10          that was proposed to him.

11                    Obviously, that kind of speculation is  
12          quite problematic for the Defense and for me  
13          trying to conduct the trial.

14                    The media seems to be concerned with  
15          matters that ordinarily aren't the concern of  
16          the media in criminal cases.

17                    I can use as an example my own case. At  
18          least twice Puertorican media outlets have sent  
19          reporters to New Hampshire to try to find  
20          information about me.

21                    The names and ages of my children are  
22          regularly printed in the Puertorican papers.

23                    The media was staking out the airport when  
24          I arrived to try to get pictures of me. They  
25          called every hotel in Puerto Rico to try to

1 find out where I'm staying.

2 There has been commentators in the media  
3 who have said quite disturbing things that have  
4 concerned me.

5 It's been reported to me that people have  
6 been suggesting that the political parties  
7 should go out and investigate potential jurors.

8 There have been suggestions by other  
9 commentators that all it takes is one juror to  
10 create a hung jury, in a way kind of inviting  
11 that kind of conduct.

12 The coverage of the jury selection process  
13 has been extraordinarily detailed. Sometimes  
14 inaccurate but in extraordinarily detailed.

15 There was a detailed discussion of what  
16 Ms. Dominguez had for lunch yesterday, reported  
17 in the paper.

18 There was a discussion, a completely  
19 baseless discussion suggesting that, well, I  
20 was questioning one juror, I turned red and  
21 then stared intently at Mr. Anibal  
22 Acevedo-Vila, as if somehow suggesting that I  
23 had some hostility towards him.

24 These kinds of things have not occurred in  
25 my experience in criminal trials. And I know,

1           for example, that there are four radio stations  
2           that are currently covering this case virtually  
3           non-stop, 24/7, with panels of commentators  
4           speculating about the case and discussing  
5           evidence.

6                     A speech that the then-Governor Anibal  
7           Acevedo-Vila gave about this case early on is  
8           being replayed over and over again.

9                     So it is my sense that this is truly an  
10          unusual situation with respect to both the  
11          intensity of the media coverage and the  
12          approach that the media has taken to covering  
13          it, which raises disturbing concerns for me  
14          about my ability to protect the integrity of  
15          this jury.

16                    It is not the usual case, even in  
17          highly-publicized cases where people are going  
18          out in the media and urging others to go out  
19          and investigate potential jurors.

20                    And these things have caused me  
21          substantial concern.

22                    Now, the parties are here, many of the  
23          lawyers are here full time, speak Spanish.

24                    If I have exaggerated the situation. If I  
25          have misstated anything about my understanding

1 of the media coverage, I would like the parties  
2 to please correct me.

3 Have I essentially got it right from your  
4 perspective concerning the issue of media  
5 coverage?

6 MR. BERENSON: Your Honor, I'll defer to  
7 Mr. Anduze in a moment, but I think generally  
8 from the Defense perspective, you've got it  
9 exactly rights. You have detailed some of the  
10 problems far better than I could have.

11 All of those are compounded by the fact  
12 that much of what has been reported is false.

13 The falsity extends equally to Ms.  
14 Dominguez' reported chicken sandwich yesterday  
15 and to the notion that some Plea Agreement had  
16 been extended to the governor that he is  
17 considering.

18 Neither is true, as far as I know. And  
19 our concern really is with the integrity of the  
20 jury, the possibility of efforts to tamper with  
21 the jury or efforts to encourage a hung jury.

22 And, indeed, just this morning in the  
23 course of voir dire on hardship, I know Your  
24 Honor will recall that there was at least one  
25 juror who expressed concern about what she

1 described as the peace and security of her  
2 family were she to be identified as someone  
3 under consideration.

4 And the problem here really arises from  
5 the fact that this next phase of jury selection  
6 is occurring before there has been any  
7 sequestration. So if individual potential  
8 jurors are identified, they would be vulnerable  
9 to those kinds of things.

10 THE COURT: I would add to what you just  
11 said. Another juror made a point of telling me  
12 how as a government employee, he was exposed to  
13 extensive discussions about the case by his  
14 supervisors.

15 And the fear, frankly, is in environments  
16 like that before the jury can be sequestered  
17 that even if the media itself doesn't over  
18 reach and try to contact jurors that the very  
19 pervasiveness and highly partisan nature of  
20 much of the discussion of the case will prompt  
21 those with passionate feelings to go out and  
22 try to contact jurors.

23 Those are the kinds of concerns that are  
24 almost case specific and highly unusual, at the  
25 very least, that lie behind my thinking and my

1 concern about the effect of publicity on the  
2 jury selection process, and to a significant  
3 degree motivated my decision to very  
4 reluctantly conclude in that sequestration was  
5 necessary here to insure the integrity of the  
6 jury process.

7 MR. BERENSON: Mr. Anduze has some  
8 thoughts to add.

9 MR. ANDUZE-MONTANO: Your Honor, I just  
10 rise to confirm what you have said. It's just  
11 as you spoke, but just to confirm that it is  
12 more deeply rooted and that it has been more  
13 pervasive because it did start one year ago,  
14 unfortunately, and it was part of a political  
15 campaign.

16 Just yesterday I heard on a news station  
17 that former candidate for resident commissioner  
18 against whom my client ran and defeated, came  
19 out giving public expressions of how he desired  
20 that he was found guilty.

21 I take that as a directive to any member  
22 of his party that may be sitting in this jury  
23 to take it up as a political instruction more  
24 than a reflection privately on the part of that  
25 defeated candidate.

1           So that's the reason why, Your Honor, that  
2 we believe that it is appropriate to close the  
3 room for individual voir dire.

4           THE COURT: Ms. Dominguez, did you want to  
5 comment on my observations concerning pretrial  
6 publicity?

7           MS. DOMINGUEZ-VICTORIANO: Yes, Judge. I  
8 just want to supplement what both brother  
9 counsel have indicated to the Court.

10           We concede and wholeheartedly agree that  
11 this case has been the subject of intense media  
12 scrutiny. The attention has at times bordered  
13 on the absurd, as the Court has noted for the  
14 record, and has extended not only to the  
15 defendants but also to the attorneys and at  
16 time, as this Court is well aware, to Your  
17 Honor.

18           Our overt message to potential jurors have  
19 been publicized. And I think that the  
20 empirical experience that we have had here in  
21 Puerto Rico teaches all of us who have  
22 practiced here for some time that the media  
23 will sometimes go to absurd lengths to  
24 contaminate jurors, to get reach out to jurors,  
25 to get messages to jurors.

1           And I point the Court out to a case that I  
2           tried with Mr. Anduze some years ago. It was a  
3           highly-publicized case where I was actually  
4           prosecuted someone who was associated with the  
5           opposition party.

6           In that particular case, we had media  
7           members who were calling out to the jurors,  
8           overtly sending messages to the jurors and  
9           telling them it was their sworn duty to acquit.

10           We know that in Puerto Rico the media goes  
11           a little bit too far.

12           We know that this is not a routine  
13           situation that you encounter in the United  
14           States.

15           Puerto Rico in many cases is anomalous  
16           because politics is such polarizing factor  
17           here, because this is very incestuous society  
18           where most people know each other, where people  
19           are related, where if they don't know each  
20           other directly, they know each other indirectly  
21           through third parties, and where touching  
22           someone or getting in touch with someone or  
23           finding out information about someone is much  
24           easier than in a metropolitan city in New York  
25           or other places on the mainland.

1           So we think, Judge, that that type of  
2 discourse that we have been hearing and the  
3 degree of publicity that this case has been  
4 subjected to, causes the lawyers grave concern  
5 in this case. And I think that all of us would  
6 with like for the Court to be put in a position  
7 really understand what the jurors are thinking  
8 for the parties to truly be able to  
9 meaningfully exercise their peremptory strikes.  
10 And we really and truly believe that this is  
11 the only means by which that end can be  
12 achieved.

13           The jurors have to feel that they are able  
14 to candidly and freely express themselves  
15 without any fear of retribution, without any  
16 fear of being scrutinized by the media.

17           And I know that this Court is very  
18 sensitive to the first amendment concerns in  
19 this case, but I believe that the interests in  
20 being able to select a fair and impartial jury  
21 in this case are of utmost importance to the  
22 defendant and also to the Government.

23           THE COURT: I'm going to ask for some  
24 responses to specific questions to  
25 Mr. Berenson. But let me just underscore a

1 point.

2 I believe deeply in the right of public  
3 access to courtroom proceedings. And I think  
4 I've tried to take what steps I can here to  
5 ensure that there is absolutely as much public  
6 access to these proceedings as can be had,  
7 given the unusual nature of the case.

8 I also don't in any way believe it is up  
9 to any of us to determine what is newsworthy.

10 That is up to the media.

11 We may not like what they decide to cover,  
12 but that's part of what the first amendment  
13 guarantees, is that it's up to the media to  
14 decide what is newsworthy. And they will do  
15 what they're going to do.

16 I used the example of my own case, not in  
17 any way to be critical of the media.

18 I'm a public figure, and the media can do  
19 whatever it wants to do, as long as it behaves  
20 lawfully. And I'm in no way, shape, or form am  
21 attempting to deter anyone in the media from  
22 doing whatever it is that they need to do.

23 But I have to respect the media's right of  
24 access. And I also have to respect the  
25 defendants' right to a trial by a fair and

1           impartial jury, and it has in trying to strike  
2           that balance that has motivated me in the  
3           decision making that has occurred in this  
4           matter in the last several months.

5           Mr. Berenson, as I hear you and Mr. Anduze  
6           and Ms. Dominguez talking, it seems to me that  
7           there are really are potentially three  
8           categories of concerns that lie behind your  
9           request that I close the courtroom.

10           First is there is a concern that jurors  
11           will be chilled in their ability to answer  
12           questions frankly.

13           What can you tell me about what underlies  
14           that particular concern?

15           MR. BERENSON: With respect to that  
16           particular concern, Your Honor, it comes back  
17           to some of the extraordinary partisanship that  
18           exists on the island that Mr. Anduze referred  
19           to a moment ago.

20           It is going to be necessary in order to  
21           pick a fair and impartial jury to engage in  
22           some expropriation of people's political  
23           commitments and loyalties.

24           Many people are not comfortable discussing  
25           those things publicly, certainly not in a

1           circumstance in which what they say about their  
2           own views and their political commitments and  
3           loyalties may well be spread across the pages  
4           of the island's newspapers tomorrow.

5           So if we are to have any hope of ferreting  
6           out the jurors who harbor some strong bias  
7           either for or against the governor based on the  
8           political party of which he is a member or  
9           based on his own politics or career, there is  
10          going to need to be some questioning of  
11          witnesses on that. And I think that kind of --

12           THE COURT: What do you say to the  
13          argument that the use of anonymous jury will be  
14          sufficient to prevent jurors from being chilled  
15          in their ability to respond frankly?

16           MR. BERENSON: Well, I don't think that  
17          anonymity alone will be sufficient in part,  
18          because I'm skeptical that we'll be able to  
19          truly ensure it if jurors are brought up one by  
20          one and put in the witness box or the jury box  
21          in full view of the press.

22           We've had many circumstances in the course  
23          of the second phase of jury selection where we  
24          were just trying to work through hardship  
25          issues where an individual juror was identified

1 or identifiable, either themselves or through  
2 what they said about their own work. And  
3 undoubtedly that will be the case in the third  
4 phase, as well.

5 Some of the jurors would remain anonymous,  
6 but I suspect that others would not. So I do  
7 think it's a problem.

8 THE COURT: Well, a good example. Say,  
9 jurors who are government employees, I know  
10 that that will prompt questioning, and they  
11 will inevitably be required to reveal the  
12 agency where they work. And those who are,  
13 then, determined to identify them, will have an  
14 easy means of doing so.

15 And that affects both the first concern  
16 I'm talking about, the potential chilling  
17 effect, and what I'm considering the third,  
18 which is a potential tampering concern.

19 And when I use the term "tampering," it's  
20 certainly not to suggest that the parties would  
21 engage in any inappropriate tampering. I have  
22 no basis to believe that.

23 It's a concern that media people may try  
24 to contact jurors; and secondly, that the  
25 publicity associated with the process might

1 lead others who learn of the juror's identity  
2 to reach out and contact and attempt to present  
3 their case as to how the matter should be  
4 decided before the juror hears the evidence.  
5 And that's what I mean by the tampering  
6 concern.

7 So what you're saying to me is during  
8 questioning, many jurors' identity will be  
9 effectually revealed, even though their names  
10 will not be listed in the public. And that  
11 will both cause jurors to be chilled in their  
12 ability to respond and could result in the  
13 disclosure of information that would enable  
14 others to identify and contact the jurors  
15 before we could get them sequestered.

16 MR. BERENSON: That's correct, Your Honor.

17 THE COURT: Another concern that I hear  
18 being talked about is a kind of spillover  
19 concern.

20 I know from the questionnaire responses  
21 that a number of jurors have strongly-held  
22 views about either Mr. Anibal Acevedo-Vila or  
23 the Government and that they are likely to  
24 express those views in very strong terms during  
25 the course of voir dire.

1           And you may be required during the course  
2 of voir dire to question them quite closely  
3 about the nature of those concerns.

4           Is that something that you are concerned  
5 about and that is affecting your decision here  
6 to seek to have the courtroom closed?

7           MR. BERENSON: Yes. The Court is quite  
8 correct that that's really a third category of  
9 concern that the Defense is very much focused  
10 on.

11           I suspect that many of the jurors may say  
12 in the course of individual voir dire, things  
13 that would be quite disparaging or inflammatory  
14 to one side or the other.

15           I suspect that because many of them did so  
16 in their questionnaires already.

17           And undoubtedly, the main news coming out  
18 of today for tomorrow's paper or coming out of  
19 tomorrow for Thursday's paper, will be those  
20 kinds of inflammatory remarks if the press is  
21 exposed to them.

22           And although Your Honor has been very  
23 careful to instruct the jurors coming through  
24 here to disregard press coverage between now  
25 and the time a jury is impaneled, there is too

1 much risk, in our view, of leakage, not through  
2 willful disobedience of Your Honor's  
3 instructions, because the environment and  
4 ambiance is so saturated with the press  
5 coverage. and some juror who might be fair and  
6 impartial could then be exposed to some of  
7 these extremely partisan or biased views of  
8 others jurors who cannot be fair and impartial.  
9 And we would hate to have that kind of  
10 spillover effect occur.

11 THE COURT: I can't sequester 500 jurors.  
12 So that's not an option.

13 I suppose one could argue that I could  
14 find out about any such inappropriate spillover  
15 during the individual voir dire process itself.

16 So that at least is one possible  
17 alternative that I can consider.

18 The problem is that I know jurors have the  
19 best of intentions. They will be testifying  
20 under oath. We will do our best to find out  
21 about pretrial publicity. But the reality is  
22 that it could be quite difficult to find that  
23 out, and not just to find out about things that  
24 they may have read in the media, but also to  
25 find out whether other people in the work place

1 have been discussing the charges with them and  
2 charges with them and that they may learn of  
3 these kinds of comments by other jurors second  
4 and third hand. It might be difficult to find  
5 that out during the limited amount of time we  
6 have available to conduct voir dire for each  
7 potential juror.

8 What else would you like to say on this  
9 subject?

10 MR. BERENSON: I think that's all I have,  
11 Your Honor. I think that between your comments  
12 and the comments of the Counsel for the  
13 Government and Mr. Anduze, I think we have  
14 painted pretty complete picture of the  
15 circumstance we face.

16 I know we need to give careful  
17 consideration of whether there are less  
18 restrictive alternatives than closing the  
19 courtroom. But, frankly, I can't think of a  
20 less restrictive alternative that will  
21 ameliorate all three of the concerns that have  
22 been expressed.

23 There are some less restrictive  
24 alternatives that might help with some of the  
25 candor concerns, if there were opportunities

1 for the jurors to somehow signal that they wish  
2 to discuss certain matters privately. But, of  
3 course, those kinds of options would not deal  
4 with what we have been referring to as the  
5 tampering concern, nor necessarily the  
6 spillover concern, because some of the people  
7 who hold some of the most extreme views may not  
8 be at all shy about expressing them publicly.

9 So we have made a conscientious effort to  
10 think about whether there is something short of  
11 closing the courtroom that will address all  
12 three of these concerns and have been unable to  
13 do that.

14 Beyond that, I don't think I have anything  
15 further.

16 THE COURT: All right. Could I ask --

17 MR. BERENSON: Mr. Pasano reminds me to  
18 reiterate, as I said, that at the outset that  
19 we have no objection to the release of  
20 transcripts once the sequestration has been  
21 effected and the jury is effectively insulated  
22 from these other problems.

23 THE COURT: Thank you.

24 Mr. Pasano, do you join in the request of  
25 Mr. Berenson?

1           MR. PASANO: Absolutely.

2           THE COURT: Ms. Dominguez, do you want to  
3 add anything else to what has been said?

4           MS. DOMINGUEZ-VICTORIANO: No. I think  
5 Mr. Berenson and Mr. Anduze have captured the  
6 essence of what our position is.

7           And we commend the Court for really  
8 considering alternatives that are going to  
9 safeguard this process.

10           We would like to be heard, however, after  
11 the Court makes its decision with respect to  
12 areas for individual voir dire with respect to  
13 recent events.

14           THE COURT: All right.

15           I'm going to reluctantly grant the  
16 request, the joint motion to close the  
17 courtroom because, considering the test  
18 articulated by the Supreme Court in the Press  
19 Enterprise case, it seems to me that I really  
20 don't have another viable alternative in this  
21 case other than to close the courtroom in order  
22 to ensure that the defendants' sixth amendment  
23 right to a fair trial is protected.

24           Of course, Press Enterprise counsels trial  
25 judges that closing the courtroom during any

1 part of the voir dire process must be an  
2 exception rather than the general rule.

3 Of course, merely because there is a  
4 public interest in the voir dire process, does  
5 not justify closing the courtroom.

6 Instead, it is my view and my  
7 interpretation of the Press Enterprise test  
8 that a Court cannot close a courtroom unless  
9 it's necessary to further the compelling  
10 governmental interest in this case of ensuring  
11 that the defendants receive their  
12 constitutional right to a fair trial and that  
13 the degree of closure ordered by the Court is  
14 as narrow and as limited as necessary to  
15 achieve that purpose.

16 In this case it's clear that the  
17 Government and the defendants have a compelling  
18 interest in seeing that the defendants are  
19 accorded their constitutional right to a fair  
20 trial.

21 In my view, there is no way short of  
22 closing the courtroom here during the  
23 individual voir dire phase of the process, no  
24 way other than that to ensure that that right  
25 to a fair trial is satisfied.

1           I think that there are three different  
2 concerns that have been expressed, all of which  
3 require closure, in my view.

4           There is a very serious concern here that  
5 jurors will be chilled in their ability to  
6 frankly respond to the questions that we are  
7 going to put to them.

8           In order to respond to the anticipated  
9 voir dire, jurors are going to have to express  
10 their views on whether they have any  
11 preconceived ideas about the guilt or innocence  
12 of the defendants.

13           They are going to have to express their  
14 views as to whether they have a partisan  
15 affiliation or political views that could  
16 affect their judgment in this case.

17           Many jurors are going to be fearful about  
18 expressing those views in a public setting.  
19 And it's not simply because there is a great  
20 deal of media attention in this case, it's  
21 because of the highly-partisan nature of the  
22 media coverage and the highly-politicized  
23 environment in which this trial is occurring.

24           I think those conditions are almost  
25 unique. And I do think in light of those

1 conditions that jurors will be chilled in their  
2 willingness to frankly respond to voir dire  
3 questions if I allow voir dire to occur in a  
4 public setting.

5           There are other jurors who would be all  
6 too willing to express their views, especially  
7 if there is going to be media coverage of their  
8 views. They will be looking forward to a  
9 chance to condemn Mr. Anibal Acevedo-Vila or to  
10 condemn the Government and to do so publicly in  
11 ways that they anticipate that will be reported  
12 in the media. And I think that does create a  
13 danger of spillover publicity that could affect  
14 other jurors who will be later called into  
15 court to respond to questions.

16           Some of them might have already been  
17 called into court and questioned and won't be  
18 questioned again about it before peremptory  
19 challenges will be exercised.

20           So it seems to me that it's going to be  
21 very difficult to try to uncover whether there  
22 is any kind of spillover prejudice, such as the  
23 prejudice that Mr. Berenson has talked about,  
24 unless I close the courtroom and prevent that  
25 kind of prejudicial commentary from occurring.

1           I also am concerned with the potential for  
2 tampering with jurors in this case.

3           The parties in this case agreed to an  
4 anonymous jury, I think, because the parties  
5 recognize that there was a danger that others  
6 would reach out and try to contact and  
7 influence potential jurors in this case.

8           In particular I mention the public  
9 commentary in which people were urged, the  
10 political parties were urged to go out and try  
11 to investigate potential jurors.

12           That suggests a willingness to go out and  
13 do things that might well result in jurors  
14 being contacted.

15           Secondly, the extensive and  
16 highly-partisan nature of the publicity in this  
17 case raises a real risk that if jurors are  
18 identified, that even if the media doesn't try  
19 to contact them directly, that other members of  
20 the public will who have passionate political  
21 views that affect their thinking about this  
22 case. And until I can get that jury  
23 sequestered, I think there is a substantial  
24 danger here that potential jurors will be  
25 improperly contacted if their identities can be

1 uncovered.

2 And given the nature of the voir dire that  
3 the parties expect to conduct, I think there is  
4 a substantial risk that jurors will be  
5 contacted inappropriately. And, again, that  
6 contact may well occur after I complete the  
7 third phase of voir dire and I might not even  
8 be able to find out about it.

9 So these are all very significant  
10 concerns. And I have to take them seriously,  
11 especially in view of the fact that I have  
12 highly-experienced counsel on opposite sides of  
13 the case joining in a motion here to conduct  
14 the voir dire in this way.

15 I think some deference has to be given to  
16 the judgment of experienced counsel when  
17 counsel on both sides of a case join in making  
18 a request such as that which has been made  
19 here.

20 I've tried to think about alternatives to  
21 closing the courtroom.

22 Of course, I have considered the  
23 possibility of bringing jurors in open court,  
24 instructing them that if they have a reason to  
25 speak privately with the Court and the parties,

1           that they can request a sidebar.

2                     But in thinking about that, it doesn't  
3           seem to me that that is an adequate way of  
4           addressing this concern, because jurors will  
5           not necessarily take me up on that opportunity.

6                     And a juror who is determined to say  
7           damaging things about Mr. Anibal Acevedo-Vila  
8           or the Government in this case for the purpose  
9           of causing media coverage about their comments,  
10          obviously will not take me up on an offer like  
11          that.

12                    I have considered the possibility of  
13          conducting the entire voir dire at sidebar, but  
14          I can tell you that ten or 15 minutes of  
15          questioning a juror at side bar with ten or 12  
16          lawyers standing around them, is simply not a  
17          practical way of addressing jurors. It will  
18          not encourage the kind of open and frank  
19          discussion that we want to have occur with  
20          jurors, and I simply don't think it will work.  
21          And in any event will provide members of the  
22          public with very little additional information  
23          than they will get if I accept Mr. Berenson'  
24          proposal, which is to make transcripts of the  
25          selection available after the jury is

1 sequestered.

2 So I tried to consider whether there are  
3 other alternatives that will satisfy my need to  
4 protect the defendants' right to a fair trial;  
5 and I cannot think of another alternative that  
6 will address the concerns that have been  
7 expressed here today.

8 So while I do so reluctantly, I believe  
9 it's necessary to grant the joint motion of the  
10 parties in this case to conduct voir dire in  
11 the manner in which they propose.

12 So the courtroom will be closed during the  
13 voir dire process.

14 Transcripts will be maintained of the  
15 proceedings. And once the jury is sequestered,  
16 those transcripts will be made part of the  
17 public record and will be made available for  
18 inspection by the public or the media.

19 The joint motion is granted.

20 Is there anything else that I need to say  
21 that I haven't said?

22 MR. GREEN: Nothing that you have to say.  
23 Just a question of Your Honor.

24 Are you inclined to do it here rather than  
25 in a more intimate setting?

1           THE COURT: As I have thought about it, I  
2 think that it may be uncomfortable for jurors  
3 to be in such close confines with so many  
4 lawyers.

5           You don't seem to be a particularly  
6 intimidating guy, Mr. Green, but --

7           DEFENSE ATTORNEY3: Loveable.

8           THE COURT: I do think that so many people  
9 in such a small narrowly-confined space might  
10 be uncomfortable.

11           What I'm going to propose to do is to sit  
12 the juror in the jury box so that there can be  
13 questioning of a juror that's comfortable for  
14 them. So I would rather do it here in court.

15           Anything else on this matter?

16           You want to talk to me about some voir  
17 dire issues before we bring in the jurors.

18           MS. DOMINGUEZ-VICTORIANO: Just very  
19 briefly, Judge.

20           THE COURT: Okay.

21           MS. DOMINGUEZ-VICTORIANO: Judge, briefly,  
22 we wanted to alert the Court that there are  
23 some are some recent events that prompt us to  
24 ask the Court to ask specific voir dire  
25 questions with respect to these topics of

1 prospective jurors.

2 THE COURT: I just want to make one other  
3 thing clear here.

4 The hearing we have just held on your  
5 joint motion has been held in open court on  
6 the record. I just wanted that to be noted.

7 MS. DOMINGUEZ-VICTORIANO: First of all,  
8 Judge, last Friday, which is the last business  
9 day before the initiation of this jury  
10 selection process, a former assistant U.S.  
11 attorney in our office filed a lawsuit  
12 alleging, among other things, gender  
13 discrimination.

14 Essentially the allegations in the  
15 complaint included the allegation that there  
16 was a girls' club operating within the office  
17 that received the favor of the U. S. attorney,  
18 who is also a female, and specifically claimed  
19 that I was a member of the girls' club and  
20 therefore received benefits from the U.S.  
21 attorney in favorable treatment.

22 I would suggest that the fact that I was  
23 assigned this case is clear evidence to rebut  
24 that, but in any event --

25 THE COURT: I seem to recall that one of

1 colleges from New Hampshire came down to try a  
2 case alleging that the U.S. attorney  
3 discriminated against women.

4 MS. DOMINGUEZ-VICTORIANO: Right. It was  
5 a boys' club there, but now it's a girls' club.  
6 But I wasn't here. I wasn't in the office  
7 during the last lawsuit.

8 In any event, Judge, the filing of that  
9 lawsuit was a matter that received some media  
10 attention.

11 There was a televised press conference  
12 that occurred on that day.

13 We were told, and I don't have first-hand  
14 knowledge of this, but I was told by members of  
15 the press that it was the press officer for the  
16 Popular Democratic Party that delivered a copy  
17 of that complaint to the press office here and  
18 also noticed the press conference.

19 In any event, Judge, there were  
20 disparaging remarks made against the U.S.  
21 attorney during the course of that conference.

22 And, of course, understanding that the  
23 former AUSA is in his legal right to file the  
24 lawsuit and the media to cover it. We are just  
25 concerned that that might have some prejudicial

1 spillover effect.

2 THE COURT: How do we address that  
3 concern?

4 MS. DOMINGUEZ-VICTORIANO: I think that's  
5 a good point, because you don't want to bring  
6 attention to that if the person is not  
7 specifically aware of that. But I would  
8 suggest perhaps in the context of the questions  
9 that ask whether there is any particular  
10 adverse feeling against the Government in the  
11 case, whether they have recently become aware  
12 of any court cases or legal actions that might  
13 affect their opinion.

14 THE COURT: All right. I can do that.

15 If you're not comfortable with the way I  
16 phrase it with the first juror, you can tell me  
17 when we bring in the second, and we will try to  
18 come up with a formulation that you are  
19 satisfied with.

20 MS. DOMINGUEZ-VICTORIANO: I appreciate  
21 that, Your Honor.

22 And lastly, yesterday, Judge -- and I  
23 spoke with Mr. Berenson about this yesterday  
24 via e-mail.

25 There were some unfortunate comments that

1           were also made by a former judge by the name of  
2           Angel Hermida (phonic). This is a person that  
3           has been very vocal in the context of this  
4           case.

5                       Yesterday he made disparaging remarks  
6           concerning the U.S. attorney and myself as the  
7           lead prosecutor in the case suggesting that we  
8           were liars and we would do anything to secure a  
9           conviction in this case.

10                      And while I do not know this gentleman,  
11           and his personal opinion of me is of no moment,  
12           again, I am concerned of the prejudicial effect  
13           that this could have, particularly with jurors  
14           that have not yet been sequestered.

15                      I know that if the jurors followed the  
16           Court's instructions yesterday, they would not  
17           have had any reason to hear these comments that  
18           were highly publicized, not only in the  
19           newspapers today, but also yesterday throughout  
20           various radio stations. And there was even a  
21           video of the comments that was placed on the  
22           Internet.

23                      THE COURT: One of the things, frankly,  
24           that has surprised me about the coverage in  
25           this matter is not so much the media in Puerto

1 Rico, but the willingness of members of the bar  
2 in Puerto Rico to say things that essentially  
3 reflect prejudice of the case, attack the  
4 motives of the lawyers involved in the case,  
5 and effectively urge potential jurors to vote  
6 in a particular way before any evidence is  
7 heard.

8 This seems to be a very common occurrence  
9 in Puerto Rico. And it's quite unusual and  
10 quite surprising. And it's another one of the  
11 reasons that I was quite concerned about  
12 publicity in this case and how it may affect  
13 potential jurors.

14 MS. DOMINGUEZ-VICTORIANO: Just to put the  
15 Court in a position to understand the context  
16 of these statements, this is a person who has  
17 been reported to be a close friend of  
18 Mr. Acevedo-Vila's and also is the person who  
19 is in charge of his legal defense fund. And he  
20 has been very, very focal in his opinions.

21 THE COURT: I don't mean to suggest that  
22 it's been one sided here.

23 I think there are plenty of people making  
24 comments on the other side of the case, as  
25 well, not prosecutors, government people, but

1 people who support the other side of the case.

2 It's that lawyers seem less constrained in  
3 their willingness to comment in ways that  
4 suggest prejudice.

5 It's common for lawyers to serve as  
6 commentators in the media, but it's much less  
7 common, in my experience, for lawyers to be  
8 expressing views about guilt or innocence,  
9 essentially urging people to vote in a  
10 particular way before the evidence in the case  
11 is heard. That is highly unusual.

12 MS. DOMINGUEZ-VICTORIANO: Those are  
13 unusual comments coming from officers of the  
14 court. And that is another anomalous situation  
15 here in Puerto Rico.

16 To the extent that the Court can, perhaps  
17 questioning with respect to this topic should  
18 be prefaced by a question as to whether they  
19 listened to the news regarding the case or read  
20 any new accounts or heard any news accounts  
21 regarding the case.

22 THE COURT: I'm going to ask them, 'What  
23 do you know about this case?' and follow up  
24 appropriately, and the lawyers can follow up  
25 further if they need to.

1           I think it's the kind of thing that we'll  
2 work out a balance as we go through the  
3 questioning as to how to address these issues.  
4 But I certainly want to find out if people have  
5 been listening to radio commentary about the  
6 case in way that suggest prejudgment, I need to  
7 know what their views are about it, if they in  
8 any way feel that they have prejudged the case  
9 or whether they are able to set that aside  
10 would be something I intend to explore.

11           MS. DOMINGUEZ-VICTORIANO: And I just want  
12 to make it clear for the record, Judge, that I  
13 am not imputing any wrongdoing to any of the  
14 attorneys here. I'm not suggesting that they  
15 are using this individual as their mouthpiece.  
16 I simply wanted to bring it to the attention of  
17 the Court.

18           THE COURT: I think we can find a way to  
19 address those concerns.

20           MS. DOMINGUEZ-VICTORIANO: Lastly, Your  
21 Honor, this esteemed colleague also yesterday  
22 during his comments made reference to the fact  
23 that the Court's dismissal of the wire fraud  
24 count was further evidence of the fact that the  
25 Government had lied in the indictment.

1           So to the extent that the Court can touch  
2 upon whether there is some preconceived notion  
3 regarding the Government's case by virtue of  
4 the fact that these counts were dismissed.

5           THE COURT: I will do it in a generalized  
6 way and then follow up as necessary.

7           I don't want to talk to them about  
8 specific rulings, but I can try to find out  
9 whether they have any preconceived views.

10           Anything else that either side needs to  
11 take up with me before we bring in the jurors?

12           Do we need to take a break before we are  
13 ready to bring in jurors?

14           COURTROOM DEPUTY CLERK: They are ready,  
15 Your Honor.

16           THE COURT: Did they get a copy of the  
17 witness list?

18           COURTROOM DEPUTY CLERK: I have it here.

19           THE COURT: Let me tell the parties that.

20           COURTROOM DEPUTY CLERK: This is what I  
21 have here.

22           (Off-the-record discussion between the  
23 Court and the courtroom deputy clerk.)

24           THE COURT: Excuse me. Let me ask the  
25 parties about this.

1           I had envisioned that jurors would be  
2 given the list of witnesses and entities whose  
3 names may come up during the course of the  
4 trial.

5           It's my understanding that those names and  
6 entities were forwarded by e-mail to Becky.

7           Is that who got them?

8           MS. DOMINGUEZ-VICTORIANO: Yes, sir.

9           THE COURT: I think Becky has a different  
10 list.

11           You can tell me. What list did you email  
12 to Becky?

13           MS. DOMINGUEZ-VICTORIANO: We emailed a  
14 three-page list that was divided along private  
15 companies, government agencies, and mainland  
16 companies, as well.

17           MR. BERENSON: The defense emailed a list,  
18 as well.

19           THE COURT: Do we need to get that?

20           MS. DOMINGUEZ-VICTORIANO: No. This is  
21 the Government's witness list that was filed,  
22 but there was an additional one that was not  
23 filed that was emailed.

24           THE COURT: What I had I envisioned was  
25 that the jurors would have this list.

1           So what I suggest we do is let's take a  
2 brief recess and ensure that copies are made of  
3 that and that the ten or 11 jurors in there  
4 have a chance to read that list before they  
5 come in, because I'm going to ask them, 'Do you  
6 anybody on this list? Have you had any  
7 business dealings with any of the entities on  
8 this list? What do you know about them?' that  
9 kind of thing.

10           So we can take a brief break and then we  
11 can bring jurors in.

12           If you can find Becky, she should have  
13 gotten the emails.

14           Print the attachments. Show them to  
15 counsel just to make sure that they agree.  
16 Make then copies of them. Give them to the  
17 jurors. And give the first juror a couple of  
18 minutes to look at the list. And then we'll  
19 reconvene in closed session and start to go  
20 through the individual voir dire.

21           Anybody need to take up anything else  
22 before we start?

23           MR. ANDUZE-MONTANO: Yes, Your Honor.

24           THE COURT: Yes.

25           MR. ANDUZE-MONTANO: Yes, Your Honor.

1           On the defense side, Your Honor, we have a  
2 grave concern that we want to share with you  
3 and we have a request.

4           Of the jurors that are still available for  
5 service, we have a listing, as I have indicated  
6 to you previously, of persons who are either  
7 federal employees or related to federal  
8 employees or retired from federal employment or  
9 related to federal services by some kind of  
10 relation.

11           It is worrisome to us because most of the  
12 persons on the first, let's say, 200 potential  
13 jurors as they were drawn or listed, appear to  
14 have some kind of situation related to a  
15 government employee, a government employment,  
16 or a government relationship.

17           Of the total work force in Puerto Rico,  
18 the federal employees do not amount to more  
19 than .059 percent.

20           THE COURT: May I stop you for just a  
21 minute. Let me ask my clerk.

22           If you need to leave the courtroom while  
23 this is going on, just go ahead and try to get  
24 whatever you need.

25           COURTROOM DEPUTY CLERK: Okay.

1 THE COURT: Go ahead, sir.

2 MR. ANDUZE-MONTANO: Thank you.

3 And the statistical projections that have  
4 been provided to us by the persons that we have  
5 requested to do these numbers for us have shown  
6 that, for example, of the first 400 available  
7 potential jurors at this time, almost  
8 10 percent are either federal employees or  
9 related, relatives of federal employees.

10 That's like almost a thousand percent over  
11 what is the natural distribution of employment  
12 in Puerto Rico.

13 For that reason, we are bound to request  
14 from you to consider, and that is our request,  
15 that the jurors that are available for service,  
16 in order to avoid the, lets say, the top-heavy  
17 situation that we confront with the first 200  
18 and something, maybe 300 hundred jurors, that  
19 are so heavily loaded toward that federal  
20 relationship, federal service, federal  
21 employment, that they be, like we have done in  
22 almost all cases, put down on the lottery and  
23 they be called by pulling their numbers out of  
24 that lot.

25 THE COURT: You're asking me to redo the

1 draw here, because these jurors were, as I  
2 explained to you at the outset of the process,  
3 all 1,000 jurors were drawn using the random  
4 selection process called for by the District of  
5 Puerto Rico's jury selection plan. And the way  
6 we proposed to address the issue was to  
7 maintain that randomization and to keep that  
8 order from beginning to end so that the parties  
9 would know which jurors would be potentially in  
10 the jury box and at what position when they  
11 made decisions to seek challenges for cause.

12 What you're now proposing is you're saying  
13 that you have looked at the list, and the top  
14 of the list contains a higher percentage of  
15 government employees than the bottom of the  
16 list, and so you want it redrawn.

17 That's what you're saying?

18 MR. ANDUZE-MONTANO: That Your Honor. And  
19 in order to avoid the situation in which, even  
20 if we execute every one of our peremptory  
21 challenges, we will not be able to secure, I  
22 believe, in that sense, a jury that we feel  
23 will be fair to our clients.

24 THE COURT: I'm still not sure what it is  
25 you want me to do.

1           If what you're saying is, 'Judge, we have  
2 a lot of government employees or people who are  
3 related to government employees in this panel,  
4 and we want to question them about whether that  
5 affiliation will affect their ability to be  
6 fair and impartial,' that's fine with me. Have  
7 at them.

8           If you're suggesting that our analysis of  
9 the data shows that the first 250 names contain  
10 a higher proportion of government employees  
11 than the last 250 and, therefore, if you  
12 reshuffle the deck, it will produce a better  
13 jury panel and that's what you want to do, we  
14 can talk about that although it seems to be an  
15 unusual request.

16           Beyond that, I'm not sure what I can do  
17 for you or what you want me to do.

18           MR. ANDUZE-MONTANO: Well, our request  
19 goes toward the latter part of your point.

20           See, the situation is I didn't even know  
21 that there were so many border patrol people in  
22 Puerto Rico.

23           And to have A.T.F. officers as members of  
24 this draw, brother-in-law of F.B.I.

25           Your Honor, I have been in this court for

1           forty years, and I have never seen a jury draw  
2           like this ever.

3           THE COURT: Well, I don't know what to say  
4           to you about that except that this jury was  
5           drawn in accordance with the jury plan in a  
6           purely randomized fashion.

7           I'm aware of no evidence to suggest that  
8           there has been any deviation from the plan in  
9           the way in which the jury has been selected.

10          I know you didn't see this particular  
11          problem until you actually got the  
12          questionnaires. But the time for challenging  
13          the jury selection process would have been much  
14          earlier in the proceedings.

15          And, indeed, one of your  
16          then-co-defendants did pursue a challenge like  
17          that. And we at great time and expense  
18          provided her with a great deal of data  
19          concerning the jury selection process so that  
20          she could satisfy herself that indeed the  
21          process was a lawful selection process.

22          As far as I can see, to the extent that  
23          you are correct, and I don't know that you are,  
24          that the first 250 have a greater percentage of  
25          government employees than the last 250, it is

1 purely a statistical fluke.

2 I don't see that we should be reshuffling  
3 the deck based on something like that.

4 On the other hand, I want to be very  
5 clear. If a juror is a law enforcement witness  
6 or related to a law enforcement witness or if  
7 they have some kind of tie to the federal  
8 government, that an appropriate subject for  
9 voir dire. And if we find that they are in any  
10 way biased, I will excuse them for cause.

11 So if somebody tells me, 'I work for  
12 border patrol. I believe law enforcement  
13 witnesses are more truthful than other  
14 witnesses,' they are going to be gone.

15 If they tell me that, 'I work for the  
16 federal government, and the federal government  
17 is on this side of the case, I'm going to favor  
18 them,' I will excuse them for cause. You will  
19 not have to exercise a peremptory challenge.

20 So I will look at your request. But you  
21 ought to give me a memorandum, give me some  
22 law. And, frankly, if you want me to do it  
23 before we start the process, we are going to  
24 have to put off the people we want to deal with  
25 today, because I can't re-randomize the

1 process.

2 I've already got the first ten jurors in  
3 here. It's not like I can do much about it at  
4 the moment, unless we decide to delay the  
5 selection process to give you time to present  
6 that argument.

7 And, frankly, I need some legal framework  
8 in which to analyze your request: What is the  
9 stature you're relying on? What is the  
10 provision of the jury selection plan that  
11 you're relying on? What is the case law that  
12 suggests that this is a constitutional right  
13 that you have? What is the basis and precedent  
14 for the specific remedy that you're seeking?

15 That's the kind of thing that I would need  
16 to have briefed to me.

17 And I know you only recently as of the  
18 time of the questionnaires were in a position  
19 to start to formulate your argument on this  
20 point but, frankly, I need a better legal  
21 argument from you to consider the specific  
22 request that you're making.

23 Mr. Green?

24 MR. GREEN: Your Honor, if I may.

25 (Mr. Green is speaking with

1                                   Mr. Anduze.)

2                   MR. GREEN:  May I speak for a moment?

3                   THE COURT:  Yes.

4                   MR. GREEN:  Let me try to articulate what  
5                   I think is our fundamental concern.

6                   I'm not a statistician and I'm not a  
7                   Puertorican practitioner.  So some of my input  
8                   comes from gentlemen like Mr. Anduze.  But the  
9                   bottom line is that, from what I understand,  
10                  the statistics are so out of sync with what  
11                  would be normally expected, that it's not a  
12                  proposition that the plan is flawed, it's a  
13                  proposition that the representation inherent in  
14                  what happened, that is, that the selection was  
15                  truly random, without any manipulation with  
16                  small "m" of any kind whatsoever, doesn't seem  
17                  to comport with the reality as known to these  
18                  lawyers who have practiced in this jurisdiction  
19                  but also is incompatible with the statistical  
20                  analysis.

21                  So I think the relief, what we are really  
22                  looking for here, is some, perhaps abbreviated  
23                  but short explanation.  If someone from the  
24                  clerk's office needs to come and literally take  
25                  a moment to tell this Court how this random

1 selection was undertaken. Because it just  
2 doesn't, it just doesn't -- it's not compatible  
3 with the process, as these lawyers know with  
4 the statistics.

5 THE COURT: The problem is I need some  
6 basis from you that's more solid than 'I've  
7 looked at these numbers; this is outrageous.'

8 Because I can tell you -- and I'm not a  
9 statistician either, but I'm a person who is  
10 interested in science and mathematics and  
11 statistics and how it applies to the law, I can  
12 tell you that if we did a string of ten million  
13 coin flips, we would find certain streams  
14 during those ten million coin flips that are  
15 perfectly random in which you have a hundred  
16 heads in a row. And that can occur purely by a  
17 random chance. And it is not unusual, given  
18 the size of a sample, for something like that  
19 to occur.

20 If you try to support this argument, it  
21 seems to me you need to come into court with a  
22 statistician who can demonstrate that what you  
23 are saying is, in fact, statistically valid.

24 I'm open to considering it, if it's not  
25 too late in the process to do it. But I don't

1 think that it can -- I don't see how it can be  
2 done today.

3 MR. GREEN: May I ask this?

4 THE COURT: Yes.

5 MR. GREEN: It's now 3:30. And I know we  
6 are burdening some individuals here, and I'm  
7 acutely aware of that. But in as much as it  
8 may be that we would not finish this initial  
9 tranche of jurors, perhaps you would consider  
10 allowing us to look at this overnight and bring  
11 to your attention early in the morning if we  
12 have the kind of showing that we think you  
13 would be interested in.

14 THE COURT: Are you saying that we not do  
15 the voir dire of these ten people?

16 MR. GREEN: I'm suggesting that we pause  
17 in the proceedings here before we start these  
18 ten individuals, knowing the imposition I'm  
19 causing them by making this request. But I do  
20 think this is significant and important enough  
21 that we should try to ascertain whether the  
22 showing that Your Honor has suggested is  
23 necessary is.

24 I have not been personally and intimately  
25 involved in this facet, but I would immerse

1           myself in it in the next few hours and see  
2           whether or not that can be done.

3           THE COURT: Mr. Green, let me ask you  
4           this. What's the harm in doing the voir dire  
5           of the people we have here, and if you are  
6           correct, that some kind have reshuffling,  
7           re-randomization should be in order, we can  
8           simply re-randomize them and we don't have to  
9           do the voir dire again?

10          What you're concerned about is -- you're  
11          not concerned about in what order do we  
12          question them. Your concern is in what order  
13          do we potentially seat them before I exercise  
14          my peremptories.

15          So we might be able to accommodate your  
16          request if we go forward, voir dire the people  
17          we have, and let this debate be about not what  
18          is the order in which we question them, but do  
19          we do a re-randomization before we give you an  
20          opportunity to exercise peremptories.

21          Do you see what I'm saying?

22          That might be able to address your  
23          concern. And that might be able to give you a  
24          couple of days to try to get your argument  
25          together for me on that.

1           Because we could always do the voir dire,  
2           and if your right, the relief you're requesting  
3           is put them all in a box and redraw them.

4           And we could do that before you exercise  
5           your peremptories and come up with that 42.

6           So that might be a way to give you a  
7           chance to make the case and not upset the  
8           procedures that we are talking about.

9           How does that strike you?

10          MR. GREEN: That's a good idea, Your  
11          Honor.

12          THE COURT: What do you think?

13          MS. DOMINGUEZ-VICTORIANO: May I be heard  
14          very briefly, Judge?

15          THE COURT: Yes.

16          MS. DOMINGUEZ-VICTORIANO: Judge,  
17          obviously, the Court is not going to make a  
18          decision on this now, but let me just say that  
19          we strenuously oppose the request to reshuffle  
20          the jurors.

21          We think that when you do that -- I know  
22          the Court has been adverse to doing that even  
23          so far as jurors that have identified  
24          inadvertently in the jury questionnaires.

25          With respect to the statistical

1 observations that Mr. Anduze is making, I think  
2 his comments, with all due respect to him, have  
3 no statistical significant, because he is  
4 trying to extrapolate statistics from the  
5 qualified jurors to the Commonwealth of Puerto  
6 Rico. And they are two universes that are  
7 distinct and different.

8 And I believe in that sense, even though  
9 none of us are statisticians, but this Court,  
10 if you are sort of a part time statistical  
11 genius, you're going to know that they are two  
12 distinct universes and that there is no  
13 significance in --

14 THE COURT: You can talk about things that  
15 are, say, for example, if you asked everybody  
16 in the room here what their birthday was, you  
17 would find an apparently extraordinarily number  
18 of people who share the same birthdates. And  
19 you would say, 'How is that possible, given the  
20 number of different days available on  
21 birthdates?'

22 Well, it is just a fact of the way  
23 statistics work that the probability is quite  
24 high that there will be several people in this  
25 room right now that share the same birthday.

1           And that's why you need experts. That's  
2 why you need statisticians to tell you whether  
3 something -- that someone looks at it on the  
4 surface and says, 'Oh, this is really strange.  
5 This couldn't happen by chance.'

6           Another example is what they talk about  
7 what they call "cancer clusters."

8           If you look at a map of cancer cases, you  
9 will find areas that you can draw circles  
10 around and say, 'Look at are that. There are  
11 30 people in this one little area that have  
12 developed a particular kind of cancer. That  
13 couldn't be by chance.'

14           Well, in fact, a statistician will tell  
15 you it could very well be by chance.

16           So you need to be very careful with how  
17 you look at statistics. And, frankly, this is  
18 an area where I think if we were to find even  
19 to be able to consider the argument potentially  
20 meritorious, we would need to hold a hearing  
21 and take statistical evidence on it.

22           Now, that having been said, and  
23 notwithstanding the jury selection plan in  
24 Puerto Rico not requiring a redraw again, it  
25 may simply be more expedient to address the

1 concern.

2 If we do all the voir dire and then the  
3 Government decides, 'You know, we don't really  
4 care in what order these people are taken. If  
5 that will satisfy the defense, put them all in  
6 a box and redraw them again, and then we'll all  
7 exercise our peremptories.'

8 At the end of the process you may be  
9 willing to do that just to after avoid the  
10 problem. And if that's what's necessary to  
11 satisfy the defendants and it doesn't harm The  
12 government, I'm willing to consider doing it  
13 even though Mr. Anduze has not made a legal  
14 case for doing it.

15 I'm for doing what is expedient and fair  
16 and satisfies the parties if it doesn't disrupt  
17 the process and the parties can do it by  
18 agreement.

19 So it may be that that issue can be made  
20 to go away simply by agreement.

21 MS. DOMINGUEZ-VICTORIANO: Right. And,  
22 Judge, beyond the observations this Court has  
23 made about there being a streaks or patterns,  
24 even when there are random drawings, beyond  
25 that, my point is that there was a different

1 cross section. So it's unfair to compare the  
2 statistics to extrapolate.

3 THE COURT: I would say something else.

4 We would have to example very closely what  
5 Mr. Anduze is saying. Because if you're  
6 talking about people who are currently  
7 employed, that's one thing. If you're talking  
8 about people who were currently or formerly  
9 employed, that's another. If you talk about  
10 family members who are currently employed or  
11 formerly employed, that's yet another thing.  
12 If you're talking about grandparents, uncles,  
13 cousins, then again, statistics will show that  
14 while only 3 percent of Puerto Rico may be  
15 currently employed by the federal government,  
16 30 percent of Puerto Rico has a relative who  
17 is.

18 So you need to be very careful about what  
19 it is you are comparing. You have to compare  
20 apples to apples for statistical comparisons to  
21 be meaningful.

22 So I don't want to spend much more time on  
23 the subject now.

24 Mr. Anduze has raised a concern.

25 I want him to be given an opportunity to

1 evaluate that concern, even though it comes  
2 somewhat late in the process, if I can do so  
3 without disrupting the jury selection process.

4 It seems to me we have hit on a way of  
5 doing that, which is to continue with the voir  
6 dire while giving them an opportunity to  
7 present their legal argument with the idea that  
8 at the end of the day, what he is requesting is  
9 a re-randomization of the people who are found  
10 to be qualified.

11 And that is something that I think has to  
12 wait to that part of the process.

13 I will need a brief with some case law, a  
14 legal argument, and I may well need an  
15 affidavit from a statistician to try to support  
16 what he is saying.

17 And I may need to give you an opportunity  
18 to get your own statistician to respond; or at  
19 the end of the day you might be able to agree  
20 with him that even though you think his  
21 argument is without merit, the relief he is  
22 requesting is not burdensome so you are willing  
23 to go along with it.

24 MS. DOMINGUEZ-VICTORIANO: Judge, I would  
25 just like to put on the record that I just

1           briefly perused the list of the jurors that we  
2           have summarized during this process while Mr.  
3           Anduze was delivering his argument to the  
4           Court.  And I just want to note for the record  
5           that through Juror 226 of qualified jurors,  
6           there are five former or current federal  
7           employees and seven local employees.

8                     And of the first ten jurors who were here  
9           for individual questioning, there is only one  
10          federal employee.

11                    THE COURT:  Well, I understand.  And we  
12          can all have fun with statistics.  We have to  
13          be careful about it.  Let's say no more about  
14          it at the present time, because I think we have  
15          found a way of going forward.

16                    Mr. Berenson?

17                    MR. BERENSON:  Your Honor, may we approach  
18          briefly at side bar?  There is a matter we need  
19          to apprise the Court.

20                    THE COURT:  Yes.

21                    (AT sidebar as follows.)

22                    MR. BERENSON:  We have just learned that  
23          contrary to our mutual understanding, the  
24          courtroom was closed when we were arguing the  
25          joint motion.  The doors were apparently locked

1 and nobody could get in.

2 The marshal just escorted the press in en  
3 mass just a few minutes. And we've learned  
4 from Mr. Acevedo-Vila's family that they, too,  
5 were excluded during that argument.

6 THE COURT: I'm going to have to represent  
7 the issue in an abbreviated fashion so that the  
8 parties can -- I want to be clear, and I don't  
9 fault the clerk, but before I started, I think  
10 I stated on the record or said that it was in  
11 open court; but I asked to clerk to make sure.  
12 I said this is an opening proceeding; right?  
13 The courtroom is not closed.

14 And I saw one person come in, but it was  
15 apparently someone associated with the  
16 Government.

17 MS. DOMINGUEZ-VICTORIANO: Litigation  
18 support staff.

19 THE COURT: I thought that was a reporter.  
20 And I thought it was just part of the people  
21 who had covered it.

22 So I had been assured that the courtroom  
23 opened. So it happened to be an inadvertent  
24 failure.

25 So what we are going to need to do is I

1 will summarize what has happened to date;  
2 represent and give you a brief opportunity to  
3 state your positions on the record; and I will  
4 make a full transcript of the portion of the  
5 proceeding that occurred previously, available.

6 I don't think there is anything else I can  
7 do, given the circumstances.

8 And we'll have to take a break, because  
9 I'm going to have to give the report a break.  
10 And then we'll come back in with the closed  
11 session and do the voir dire of the jurors.

12 MS. DOMINGUEZ-VICTORIANO: Is it  
13 sufficient if we also present it in an  
14 abbreviated fashion?

15 THE COURT: Yes. I'm simply going to ask  
16 you to note what the motion is, that it's a  
17 joint motion, and to briefly summarize the  
18 concerns that lie behind the motion.

19 And if you can perhaps reference the three  
20 areas that seem to me were the specific  
21 concerns. And then will I will explain that I  
22 had heard argument on it and that I will make a  
23 transcript of that argument available and we  
24 will go from there.

25 MR. BERENSON: Before we do this, do you

1 want to make absolutely certain that the  
2 courtroom was in fact closed?

3 I mean, we have this just from the family.

4 THE COURT: Sure.

5 MS. DOMINGUEZ-VICTORIANO: Either that or  
6 we were extraordinarily lucky.

7 MR. PASANO: It's my observation that up  
8 until ten minutes ago, right during the start  
9 of Ms. Dominguez' presentation of other  
10 concerns after the argument, up to that point,  
11 no one was in the courtroom.

12 My reaction was actually that Your Honor  
13 was right, the press was getting less  
14 interested in the voir dire process. And then  
15 I noticed when the marshal opened the door.

16 THE COURT: I'll clarify that on the  
17 record.

18 MR. ANDUZE-MONTANO: From the security  
19 officer, and he said the door has never been  
20 closed.

21 THE DEPUTY MARSHAL: As soon as I would  
22 take the judge out of the chambers to the  
23 lawyers, the door was open. The doors were  
24 never closed.

25 THE COURT: Okay. They may have been.



1           that this step of the process would be open to  
2           the media.  And we asked the marshal out there.  
3           And he said, no, that we couldn't do that.  And  
4           we waited and we spoke with the clerk here.  
5           And she was going to go inside and ask if we  
6           could come into the process.  And the marshal  
7           led us into the court.

8                    THE COURT:  Okay.  So were standing  
9           outside the courtroom during the proceeding.  
10          And you were given the impression that you  
11          weren't allowed in, so you didn't come in; is  
12          that right?

13                   MR. LUIS GUARDIOLA:  Yes.

14                   THE COURT:  Okay.  Thank you, sir.  You  
15          can take your seat.

16                   Let me explain the situation.

17                   I apologize to the members of the public  
18          and the media that were kept out for a while.

19                   That was a mistake.  I intended it to be  
20          an open proceeding.  And it was  
21          mischaracterization.

22                   I had talked to my clerk about it.  And  
23          she thought that you were not being restricted.

24                   And, indeed, the doors were not locked,  
25          but apparently the message didn't get through

1 to all of the Court security officers. And one  
2 of them kept you out for a brief period of  
3 time. And I apologize for that.

4 It's just a lack of communication. And I  
5 want to be sure that the members of the public  
6 understand what is happening here. So I'm  
7 going to tell you what happened while you were  
8 gone. And I'm going to have the lawyers  
9 represent their argument about what you missed.

10 And I will have a transcript prepared of  
11 what happened previously and make that  
12 available as soon as possible.

13 So you'll get everything that you need to  
14 get, I hope. And I apologize. We'll try not  
15 to let that happen again. And I'll do what I  
16 can to make sure that you don't miss out on  
17 anything that can happen in the public record.  
18 Okay?

19 \*\*\*\*\*

20 .

21

22

23

24

25

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

REPORTER'S CERTIFICATE

I, JOYCE DEL VALLE, Official Court Reporter;  
DO HEREBY CERTIFY that the foregoing  
transcript is a full, true and correct record of the  
testimony that was taken down by me by machine shorthand and  
thereafter transcribed by means of computer aided  
transcription method.

I FURTHER CERTIFY that I am in no way  
interested in the outcome of the case mentioned in said  
caption.

Signed electronically: /Joyce Del Valle