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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

PEOPLE OF THE STATE OF MICHIGAN,

v

No. 06-877-FH

KENNETH RICHARD GOURLAY,

Defendant./

EXCERPT OF JURY TRIAL - TESTIMONY OF KURT EICHENWALD

BEFORE THE HONORABLE ARCHIE C. BROWN

Ann Arbor, Michigan - Thursday, March 8, 2007

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EXHIBITS:

RECEIVED:

None offered.

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Ann Arbor, Michigan
Thursday, March 8,

2007 - 8:53 p.m.

* * * * *

THE CLERK: You may

be seated.

THE COURT: Good

morning, Mr. Eichenwald. If you'll retake the witness
stand and I'll remind you you are still under oath.

KURT EICHENWALD

recalled at 8:53 a.m., by the People, having been
previously sworn by the Court, testified as follows:

DIRECT EXAMINATION CONTINUES

BY MR. BAKER:

Q Good morning, Mr. Eichenwald.

A Good morning.

Q I believe when we left off yesterday we had reached
that point in your testimony where it was July 8, 2005.
And I believe you had testified that--that the
complainant, Justin Berry, had arrived there in Dallas
and was agitated, upset, and so forth.

A I didn't say he was agitated and upset when he arrived.

Q Okay. How was he then when he arrived?

1 A He was agitated and upset before he came. He actually
2 was fairly calm except for stomach problems when he
3 arrived.

4 Q And I believe you had also testified that you thought
5 at that point in time that he was ready to cooperate
6 against the industry?

7 A A few days previously during that telephone call.

8 Q Now going to the 8th of July, did he spend the night
9 there at your house?

10 A Well, on a lounge chair out by our pool.

11 Q What then was the next step with him? Where was he to
12 stay and what was the plan of action--(indiscernible).

13 A That was the big problem, where was he to stay? And
14 the--it was not something that I was prepared to
15 actually figure out. I had a friend, Kevin Huddleston
16 (ph) who is an Episcopal minister, who I knew had a lot
17 of connections with Community Social Services in
18 Dallas. And I thought he might be able to help both in
19 managing the situation and in finding a location for
20 Justin. And so we went and visited with him. And he
21 spoke with Justin for a while. I was not privy to that
22 conversation.

23 Q Is this the next day?

24 A It's--this one--this is one--there are a series of
25 events that happened over the next three days and I

1 don't remember exactly when each one happened; this is
2 either the 8th or the 9th. And at the end of their
3 discussion which lasted for about an hour, Kevin spoke
4 to me and the first words out of his mouth were, this
5 kid cannot go back to Bakersfield and he cannot go back
6 to Mexico.

7 But he also told me
8 there were some very complicated problems, because he
9 sort of fell into the never-never-land of community
10 services. He was over 18 at that point--was 18, so
11 programs for children were not available. But--I
12 forget what the other issue was but basically, we were
13 in a--in a situation where, um, we were talking about
14 things like homeless shelters. I mean there were
15 really not a lot of programs for him and that would
16 have been very inappropriate for the circumstance.

17 Q Did that state of affairs eventually or lead to
18 reaching out to some relatives of Justin's that lived
19 in Texas?

20 A That same day, I discovered--and I don't remember if it
21 was from Justin or from a kind of conversation with his
22 mother, but I discovered that Justin had cousins in
23 Allen, Texas. And Allen is about 30 minutes from
24 Dallas. He had last seen them a number of years

1 before, before all of these events started. And so I-
2 -we drove out to Allen Texas to meet with them.

3 Q And did you share with--with them what the situation
4 was and some of the events that brought you and he to
5 their door?

6 A Yeah. We sat in their living room for about an hour
7 and I told them the story of--not of our encounter, but
8 of what had happened--what I now at that point knew had
9 happened to Justin from ages 13 to 18.

10 Q And what walk of life were they in, the men--the
11 cousins, what did they do?

12 A It was--it was--it was probably the most unbelievable
13 thing to have heard. And you can imagine my relief.
14 They were ordained ministers, who specialized in
15 dealing with troubled teenagers, 30 minutes from my
16 house, who were related to him. So I was--I was greatly
17 relieved.

18 Q And--

19 A I'm not sure. I'm sorry. I may have used--I'm not
20 sure if they were ordained. But they--I know that they
21 have some sort of degree or certification or
22 qualification. They're not just people who call
23 themselves ministers. They are not lay ministers.

24 Q --and did they agree to allow then Justin to stay
25 there?

1 A The request didn't even have to be made. They
2 immediately said he--they--he could stay with them as
3 long as he wanted.

4 Q And physically, what kind of a situation was it? What
5 did he--where was he still out there--

6 A These were not wealthy people. They had a spare room
7 about the size of this jury box, if you start from a
8 little bit further up that had--I don't remember if it
9 was a bed or a daybed or a couch, but there was
10 something in there that Justin slept on for the next
11 number of months.

12 Q Now once that was resolved--you now have a place for
13 him to stay, and did you give him the advice not to go
14 back to either Bakersfield or Mexico or what have you?
15 Was it just--

16 A No.

17 Q --understood he was going to stay there or not?

18 A From the point when I said to him, you have to stop
19 using drugs and he said, okay. I realized that, um,
20 this was somebody who honestly was very easy to
21 manipulate. And if you, you know--you know, knowing
22 his life, I recognized that he had been manipulated
23 over and over again. And that I could very easily
24 manipulate him into doing what I wanted. And so I had
25 to be extremely careful in dealing with that situation,

1 was very eager. He kept saying he wanted to destroy the
2 Webcam world. And I said, you know, I cannot--I cannot
3 do my job. Because given the circumstances under which
4 we came together, we have this check outstanding that
5 you've already said you are going to repay. And, you
6 know, I had assumed it would be get a job, something
7 like that. I said, you have to come up with a way you
8 are going to repay this. And--

9 Q Why was that significant to you, if you can explain?

10 A I couldn't be in a situation where there was a source,
11 you know. A person who received money from me when he
12 was not a source was now becoming a source. And I have
13 never confronted a situation like this in my career.
14 It was--it was a very bizarre situation and I had to
15 work to unwind that because people who are sources for
16 articles can't be paid. Anybody could look at that
17 situation and be uncomfortable with it and I had to,
18 you know, undo it. And so what Justin did was contact
19 his grandmother in Bakersfield and asked to borrow the
20 money from her. And that's--that's how I was repaid.

21 But again, this was
22 my--it wasn't--it wasn't a repayment because I wanted
23 the money back. You know, this was money that we had
24 determined we were just going to throw away. But it

1 was--it was the issue of the nature of the relationship
2 had changed.

3 Q I believe you said that--that became clear to you when
4 you realized that he was preparing and desiring to
5 become a witness against the people in the industry?

6 A Not a witness, but a--but a source--

7 Q Source. If he's a source?

8 A --he was at that point an off-the-record source.

9 Q Okay.

10 A Or a non-background source.

11 Q All right.

12 A Meaning, that I would not be able to use his name in a
13 story.

14 Q Now after the residency issue is settled, what do you
15 do next in terms of developing this source?

16 A The story that eventually emerged in the paper was not
17 the story I envisioned. And in fact making this the
18 Justin Berry story was a decision of my editors. What
19 I wanted to do and what I originally wrote was a story
20 about the Webcam pornography world in general. And so
21 what I viewed Justin as was my tour guide; somebody who
22 could show me how these things worked. Show me where,
23 you know, how do people get paid? How do people, uh,
24 how are these sites hosted? How do--how does the-
25 -the--the video get streamed?

1 I didn't even know
2 these were the questions I needed to know, because I
3 didn't know enough about computers. But eventually as
4 we were going through getting it done, that's what, you
5 know, I was learning each leg. But the very first
6 thing 'cuz I understood it the best, I'm a business
7 reporter, was how does the money get paid?

8 Q And what did you do to investigate that aspect of it?

9 A Well until that point, and this is--I believe this is
10 Sunday, July 10, if I have my calendar correct in my
11 head. At that point, I--I thought that somehow or
12 other, this Yahoo site with the 300 members was the way
13 things were operated. And it was not.

14 There was a credit
15 card processor called Neova. And Justin showed me the
16 credit card processor. And put in--he had a password
17 that would give him access to his account on Neova.
18 And that password allowed him to see the underlying
19 details of the transactions. And so on that Sunday,
20 he--he sat at my computer and went into Neova, and went
21 into that account. And I was looking at the numbers.

22 At first, what came
23 up was just a single name--was what he was showing me.
24 And I was looking at the numbers. And there was a
25 category I didn't understand. I don't remember if it

1 was total or--it was some total records or something
2 like that. And I said, what's this? And he said
3 that's my number of members. And the number was
4 somewhere in excess of 1500 people.

5 Q Now did that lead to actually developing a list of
6 those people or seeing a list?

7 A Yes. In fact the first thing I did was open up--you
8 could-- you could search these by city. And the first
9 thing I did was--this was one of the issues with the
10 story. I kept going back between the personal and the
11 professional. I suddenly realized I had a list of
12 people who were paying to view child pornography by
13 city. And the first thought in my head was is there
14 anyone who is near my kids who is on this list.

15 Q All right. Now, the--the list. When you get it off of
16 the computer, is it literally a list of names?

17 A No. No, no, no. What--

18 Q Explain how that--

19 A You would click on a category and you would get, you
20 know, a single name would come up. But you could slice
21 that name a lot of different ways. You could look at
22 them by--I may be incorrect, but you could look at them
23 by state; I think you could. But you could definitely
24 look at them by city and determine, you know, there are
25 70 members in Dallas; there are 80 members in Los

1 Angeles. And so one of the first things I--the first
2 thing I did once I realized that was look at who are
3 the members in Dallas because I wanted to see if there
4 was anyone near my children.

5 Q Now when you looked at those members, what does it tell
6 you besides their name?

7 A Name, credit card number, an address and what is called
8 an IP Address which I believe stands for Internet
9 Protocol, which is basically the--the number that is
10 attached to a computer. So it's like the--it's like a
11 computer signature. And it would register the IP
12 Address from the location that had signed onto the
13 account.

14 Q So--

15 A Or signed up for the account.

16 Q All right. So Justin was in effect making this list
17 available to you--

18 A Yes.

19 Q --for investigation and inspection?

20 A Yes.

21 Q Here is over 1500 people. You can query this list by
22 city and you can see who has been paying to watch this
23 stuff, correct?

24 A Mm-hmm.

25 Q So you--you go at first to Dallas?

1 A The first one I looked at was Dallas.

2 Q All right. And what's--what do you do for the first
3 few names? What do you look for?

4 A Well I try and figure out who--first I looked through
5 all of them, looking for names I recognize. I found
6 none. Then I went back and I was wondering who these
7 people were, and I took the first name that we came up
8 with and put it into Google. And I put the name and
9 then Dallas into Google. And did the search and had a
10 hit, and called that up.

11 And it was--I don't
12 remember if it was his Web page or if it was just a Web
13 page that talked about him, but it was a Web page
14 talking about an individual with that name. And that
15 individual was a lawyer who represented children in
16 Dallas. I subsequently confirmed that--that was, in
17 fact, the man whose name I was looking at.

18 Q Well did you do that to some of the other names?

19 A Yes.

20 Q What--

21 A The second individual was a pediatrician. The third
22 was a teacher. There were an overwhelming number of
23 teachers. And there were youth counselors. In the
24 aftermath of all this, I found out--because this
25 individual was visited by the police not too re--not

1 back. And I couldn't understand what he was saying.
2 But it was sort of--it was not his tone; it was
3 not--and it--I realized he was operating under the
4 instructions of his lawyer. I didn't see any reason
5 not to give him back his material, so I copied one for
6 myself and handed it over to him. That he turned over
7 to his lawyer. His lawyer then turned that over to a
8 Congressional committee that was investigating--was
9 doing a child porn investigation on the basis of the
10 Justin Berry story. The committee then referred those
11 documents to State Attorneys General--
12 Q Yes, includ--
13 A --throughout the Country.
14 Q --including this office.
15 A Including Michigan.
16 Q Now going back, now, to this particular time where you
17 are investigating the payment process, this Neova.net.
18 And then you are getting this investigation, what do
19 you do to investigate the pornography, itself? The--do
20 you--
21 A I don't understand what you mean.
22 Q --visit any websites with him? Do you--
23 A Yes, okay.
24 Q --do anything of that nature as part of your
25 investigation?

1 A He was--he was showing--once we had done Neova, which
2 was Sunday, and that was--that took the entire day. In
3 fact it took weeks into the--I mean, printing 700 pages
4 takes a very long time. And--but that's what I needed
5 from him. The rest of it was pretty much just, make
6 work.

7
8 Once we had--I
9 should note, I--at their--Justin had figured out a way
10 to download the data. And so at some point we had a
11 downloaded version of that data. But that--that went
12 onto a hard drive of my Dell Computer which then
13 crashed and we ended up losing it eventually. But we
14 used that downloaded data in the future.

15 The--on Monday,
16 which I believe is January 10--July 10. Justin was
17 showing me something called an FTP site. I don't know
18 what it stands for, but he was trying to show how the
19 structure of things went from--from videos being
20 loaded here and how the Web posts play a role. I was
21 learning about computers as well. And he began opening
22 up some of these videos, trying to show me that--the
23 nature of what was happening and who was involved.

24 Q Do you recall a particular video involving a youngster
by the name Doo (ph)?

1 A No. I remember one involving a youngster by the name
2 of Taylor which led to something that had nothing to do
3 with Justin that involved Doo.

4 Q Okay. What was the one involving Taylor?

5 A Justin opened--there was a video that--that Justin
6 didn't know, and he opened that one. And it opened
7 with a hand-held sign--just a piece of paper that
8 someone had written something on. And it said, Hi,
9 Doo. And then the paper went away and there was a
10 teenager, lying clothed on a bed in front of the
11 camera. And that--it began to quickly become evident
12 that this was going to be a pornographic video. I
13 stopped it because something disturbed me a lot about
14 that video which was--we had been talking about Webcam
15 pornography. What I believed that meant, was that kids
16 were turning on the camera in their rooms and stripping
17 for an audience that was distant.

18 Somebody held that
19 sign. Somebody had held that in front of the camera
20 and then moved it. So the first thought in my head was
21 who was in that room? And Justin said, oh. That's
22 Greg. Which--Greg Mitchell. It was very clear. I
23 said, how do you know it's Greg? There was a Diet Coke
24 in the shot. And he said Taylor doesn't drink Diet

1 Coke, Greg does. Which I thought was a little bit
2 thin, you know, for proof.

3 But--around that
4 moment, he told me that Taylor was 14. And I don't
5 know why it didn't occur to me that Taylor was 14,
6 since I started with the idea that this was child porn.
7 But Taylor was 14. And so suddenly I realized this has
8 gone into a new realm, that this is--there is an adult
9 in a room--maybe an adult in a room filming a child, a
10 child engaged in child porn.

11 It was what I
12 originally thought was going on when all of this
13 started. And I realized I hadn't asked Justin, at any
14 point, if he knew of other kids who were being filmed?
15 And I asked him. And he said, yes. I said. Well,
16 who? He said. Well, there's Doo. And--who's Doo?
17 And Doo ended up being a kid--he'd never met him. He
18 was a kid somewhere in the South who was on a video
19 show with a man who called himself Casey.

20 And Justin took me
21 to that site. And we looked at--he didn't have access
22 to the site. I didn't have access to the site. I had
23 no idea if there was any actual pornography going on.
24 But there was a preview video. And in the preview
25 video, this very young looking boy--and I subsequently

1 learned he was 13, says--is in a car with an older man
2 who looked in his mid-twenties, and says something to
3 the effect of, one of our members wants to know if
4 we'll have a threesome with him? And everyone starts
5 laughing. And I realize in the backseat is a woman who
6 I couldn't identify. And I said to Justin, do you know
7 who that is? And he said. That's Doo's mom.

8 The rest of that
9 afternoon was spent with Justin, with me asking Justin
10 do--tell me every kid you know about who is being
11 filmed by an adult. And we started--he started taking
12 me around the Internet to show me where those things
13 were.

14 Q Was Casey--Casey ultimately identified?

15 A Yes.

16 Q And that was Tim Richards?

17 A That was a man named Tim Richards.

18 Q And he's been prosecuted?

19 A He has been prosecuted for his involvement in Justin
20 Berry's websites.

21 Q And--

22 A And--and other websites involving children that have
23 nothing to do with Justin.

24 Q And Doo has been identified?

1 A Doo has been identified. And he was removed--I believe
2 he was removed from the custody of his mother and
3 placed with his father.

4 Q What about Taylor, now? What information were you
5 learning about the person named Taylor?

6 A Taylor was the focus of more conversations with Justin
7 than anything else. Taylor was an individual who a few
8 weeks before, when Justin was still in the business,
9 that Justin had worked with Greg Mitchell to recruit
10 into this business. He was basically going to be the
11 next Justin. And by the time Justin was in Dallas, and
12 it was on this day that it started, Justin began to
13 realize the enormity of what he had done. And he was
14 wracked with guilt and he agonized about this. And
15 it--and it became the driving force of every decision.
16 He said a thousand times, I have to save Taylor. And
17 Taylor--Taylor was in danger and Justin knew it. It
18 didn't take a rocket scientist to know that Justin was
19 right.

20 Q And Taylor at this time was connected up with this Greg
21 Mitchell?

22 A According to Justin, yes. Now, I subsequently
23 confirmed that--that was true.

24 Q And that was--Greg Mitchell was the person that was
25 living in Virginia?

1 A Yes.

2 Q Now do you at some point take steps to bring Justin
3 forward as a witness?

4 A Well that--that day, I recognized that I was dealing
5 with a circumstance that was unlike anything I had been
6 prepared for.

7 Q I mean you were covering an ongoing criminal activity
8 (indiscernible).

9 A There were children who were being filmed on an ongoing
10 basis, more than Doo and Taylor. But those are the
11 ones whose names I remember. There were children who
12 were being filmed by adults. And the chances that they
13 were being abused in addition to being exploited was
14 dangerously high. And so I called my editors at the
15 Times and said we have a very different situation here
16 and this is what's going on. I was not a witness to
17 anything and so I said, I think we need to try and
18 convince Justin--I think--basically what I think I said
19 was, I think we need to take this kid to the Feds. I
20 could--which is journalistically a very complicated
21 decision. And there are people who disagreed with that
22 decision.

23 I was in a dual
24 role. I was not going to sit there and do reporting,
25 go to bed at night knowing that these kids were out

1 there and--well, a few months later when the story ran,
2 it will all be taken care of. This was something that
3 I had--I had to be able to look at myself in the
4 mirror. And so the Times agreed that--that Justin, if
5 he would do it, Justin should go to the Feds.

6 Q Did you have a discussion along those lines at that
7 point with Justin?

8 A No, it was a couple of days later. And the first thing
9 I did--before I do anything, I always want to know--try
10 and know what I'm dealing with. And the next day,
11 which I believe is the 12th, Tuesday, I have--there's a
12 number of lawyers that I consult in my--in my job, just
13 to get an understanding of legal issues. And I called
14 a fellow by the name of Steve Ryan who I had actually
15 been talking to about the Enron case. But I knew that
16 he was a former Federal Prosecutor. And the problem
17 here is that at this moment, Justin was still a
18 confidential source and I was about to persuade him by
19 persuading him to go to the government. Actually,
20 obviously, I'm now, you know, the--what I said about I
21 never persuaded him anything, I need to amend it. This
22 is when I did try. And if by taking him to the
23 government, I was by the very nature revealing a
24 confidential source. And I needed to be aware of what
25 the implications were for him.

1 Congress. That while Ryan represented him at a greatly
2 reduced fee, he didn't just want to give it away.

3 He wanted Justin to
4 have some respect for what he was receiving because
5 Steve Ryan is a very expensive lawyer. He represents
6 Hewlett-Packard and, you know, major corporations. And
7 so he told--he charged Justin a \$10,000 dollar
8 retainer.

9 Q Now with that offer that he was going to represent him,
10 what was next in the sequence? Did you then share this
11 with Justin? Was there some discussion about what to
12 do?

13 A Well, Justin didn't know about the whole issue of going
14 to the Feds. And so what I did was sit down and tell
15 him, you know, you are aware of kids being abused. And
16 you know where they are--at least where some of them
17 are. You know who they are and you know who is doing
18 it. And it's got to stop. And, you know, I would like
19 to suggest that you go and talk to law enforcement. He
20 asked me what would happen to him, and I told him. You
21 might go to jail. This is the reason I don't really
22 count it as I persuaded him. I laid--I did start off
23 by saying, you need to do this. But then it was, I
24 laid out the facts. And I said you might go to jail.
25 And there was about 10 seconds where I was waiting for

1 him to ask the next question and he said, fine. I'll
2 do it.

3 Q After he made that statement, then what? What do you-
4 -what is the next thing that happens?

5 A There was a call while I was in the room, between
6 Justin and Steve Ryan, where they were discussing his
7 circumstances. And Ryan ended it by saying, well I
8 will give you a decision as to whether or not I'm
9 representing you in a few days.

10 And Justin--I had a
11 conversation with Steve Ryan later that day where he
12 asked me, do you have all the material you need from
13 this kid? And I was thinking, you know, I'd been
14 reporting since last Friday and now it's Tuesday. And
15 I said, no. I don't. And he said, what do you still
16 need? And I said, he's got--by that point, Justin had
17 told me he had six or so hard drives that had existed
18 in his computers throughout the time he had been
19 running his pornography sites, that he believed had
20 financial transactions and chat transcripts on them,
21 and I wanted to get those.

22 I told Ryan there
23 are these hard drives that I want to inspect. And he
24 said well do it fast. Because the first thing I am

1 going to tell him when I represent him is to stop
2 cooperating with you.

3 Q What then do you do to complete your investigation?

4 A We make arrangements that day to go to Bakersfield,
5 California the next day.

6 Q Now as far as you knew, did anyone know he was in Texas
7 besides--

8 A This was a very busy period of days. That same day, I
9 signed on--I don't remember why. I signed onto the e-
10 mail account that I had been using on AOL to
11 communicate with Greg Mitchell and with Justin Berry,
12 during the time that I was acting as a private citizen.
13 And there were a number of e-mails there from Greg
14 Mitchell going back days. And I opened the most recent
15 one and at that point, Greg knew who I was because he
16 had learned about it from Justin. And the e-mail said,
17 if you don't respond to me and tell me where Justin is,
18 I am coming to your house in Dallas.

19 Q Did you take that e-mail seriously?

20 A I took it very seriously.

21 Q What did you do then?

22 A I was--I was very angry at myself. Because I believed
23 I had put my family at risk. And it was sort of at
24 that moment that I felt like my--my attempts to do what
25 I had done had been a little too reckless.

1 dollars of which Justin was going to receive \$1,000
2 dollars.

3 Q What was the charade, then?

4 A He called each of those individuals and just started
5 saying--he actually used my line. He said, its
6 Justin's Friends, it's not Greg's Friends. I'm getting
7 only one-fifth of the money; I want more of the money.
8 And they refused, which was fairly persuasive that he
9 did not control the money. But they wanted to send him
10 the \$1,000 dollars, Greg in particular. Because Greg
11 was now doing exactly what I had done. If Justin said,
12 you know, okay. Send me money, he would have to reveal
13 part of where he was, which reminds--that this tells me
14 how Western Union works. You do have to identify the
15 city.

16 Q So what do you do? How do you approach the next step?

17 A Justin told Greg, okay. Wire me the \$1,000 dollars to
18 Bakersfield, California, where we were going the next
19 day. The intent of that being Greg is not going to
20 come to Dallas, Texas, looking for Justin if Justin has
21 just said, wire me money in Bakersfield, California.

22 Q In part that's to take care of the issue of you being
23 visited and your family being visited?

24 A Yes.

1 Q Now he gets the \$1,000 but he doesn't get the whole
2 five?

3 A He gets the \$1,000.

4 Q Right. Do you then--do you go to Bakersfield with him
5 the next morning?

6 A But it's not--it doesn't come like right then. I mean,
7 it's, um, 'cuz it's going to Bakersfield; we go to
8 Bakersfield the next day.

9 Q Okay. And what happens when you get there? What--and
10 you're going there to complete your investigation of
11 his--

12 A To get the documents necessary for me to continue my
13 work. Remember, it wasn't the Justin Berry story. It
14 was Webcam pornography and teenagers. And I was hoping
15 to get more leads out of whatever records he had.

16 We arrive in
17 Bakersfield, and literally as the plane lands, my cell
18 phone starts ringing. I had-- just like yesterday, I
19 forgot to turn it off. I answer it and it is Justin's
20 mother. And she is very distraught and she tells me
21 that there are people in Bakersfield who are hunting
22 for Justin. And in fact, his father who by that point
23 I knew had played a role in mexicofriends, had
24 just--had come up the night before with someone from
25 Mexico. Some other people from Mexico, looking for

1 Justin in Bakersfield, had come to his mother's house
2 and they were now doing a hotel-to-hotel sweep looking
3 for Justin.

4 Q With that, what do you do then? Where do you go?

5 A Well the biggest problem--I mean, when I realized--what
6 was obvious at that point was that Greg Mitchell was
7 communicating with Justin Berry's father. Because the
8 only person who heard the Bakersfield line was Greg
9 Mitchell. And so Justin's mother had arranged for us
10 to avoid hotels all together. We had a reservation at
11 a hotel, but instead we were taken to the home of a
12 friend of hers and that's where we stayed for the next
13 two days.

14 Q And then what do you do there for the next two days?
15 What was the--if you could just describe generally what
16 was--what was your--

17 A Justin's mother brought the hard drives over and I
18 searched through them with Justin's assistance.

19 Q What sorts of information did you glean from those
20 searches? What types of things did you see and what--

21 A The--the biggest jackpot was literally hundreds and
22 hundreds of chat transcripts. These were conversations
23 that Justin had held with people online over the years.
24 And they were so large in number that it was clear to
25 me that I would be able to, at the very least,

1 establish what this person, you know, what--that what
2 this person was telling me was corroborated by
3 documentation.

4 Q Do you see any particular videos that you recall?

5 A Yes, I saw two. One was a video that began with a man
6 making a bed in a bedroom that I now know was the video
7 bedroom in Mexico where Justin filmed his pornography.

8 Q Have you looked at stills from the videos on evidence
9 in this case that are in the forensic report?

10 A You showed me stills from the forensic report and that
11 was the bedroom. And there was a gentleman who was
12 making the bed, uh, while Justin was sitting at the
13 computer apparently turning on the camera. And I asked
14 him, who is this man? And he said that's my dad.

15 He--the man leaves
16 the room and then a woman comes in who Justin
17 identified as a prostitute and it rapidly started to
18 become pornographic. And I had, even at that point, I
19 had trouble believing this. I start--went back to the
20 beginning of the video and froze the frame. And
21 Justin's mother was in the other room. I called her in
22 and I said, who is this? She says that's my
23 ex-husband. And all of the reporting confirmed
24 that--that is exactly who it was.

25 Q Then you said there was a second video?

1 A A second video--we found this in, I believe it was a
2 file within an e-mail account for attachments. And
3 this was something that had been received by Justin.
4 And I said, what is this? He said, I didn't (sic)
5 know. So he clicked on it and opened it. Usually,
6 these videos when they--you have at least a minute or
7 two before they become horrific. And so, you know,
8 opening them--okay, this will put us in place. But it
9 opened and it was immediately pornographic. And it was
10 a video of Justin at the age of about 14. The camera
11 was being held by a man whose body you could see, and
12 it was a video of Justin being molested.

13 Q And was that person ultimately identified who was
14 molesting him in the video that you saw at that time?

15 A Yes.

16 Q And who was that?

17 A His name is Gilo Tunno.

18 Q And he has been prosecuted, is that correct?

19 A He has not been prosecuted in this case. Gilo Tunno
20 was never a major concern because in terms of my
21 reporting and, you know, is this man off the streets?
22 Because, you know, I quickly did research on who is
23 Gilo Tunno? And what came up in the Google search was,
24 he was a gentleman who was already in prison on charges

1 Q And what was his decision?

2 A He said that--that this thing, this video had been
3 deeply traumatic. That he--that Justin was better, was
4 calmer; he didn't need to go to an emergency room, but
5 that I should not open any more videos with Justin. I
6 should not open any more videos, basically.

7 Q Does he spend the night there, then, in that particular
8 home?

9 A Yes.

10 Q Okay.

11 A He--after that--it's somewhere past three o'clock in
12 the morning. Justin's mom takes him into a bedroom
13 and--actually he lies down and she sits by him and
14 actually starts reading to him. He calms down and he
15 falls asleep. And she just sort of sits by him,
16 stroking his hair.

17 I went out to the
18 living room and sat down. And I just--I felt like I'd
19 been shot in the belly with a cannon. This was--I'm
20 not trained to do this. I was way past what I knew how
21 to deal with.

22 Q The next day, you are still there in Bakersfield. Is
23 Justin contacted by anybody that very next day?

24 A Yes.

25 Q Tell us who contacts him.

1 A Taylor. The boy who was in the video that we saw a few
2 days before.

3 Q And is some information shared with Justin concerning
4 what Taylor's plans are?

5 A Yes.

6 Q And what is that?

7 A Taylor tells Justin that Greg Mitchell has arranged to
8 take him on a trip that weekend to Boston.

9 Q What does Justin--how is that significant to Justin
10 according to what he expresses?

11 A Justin--it was very hard for me to understand what was
12 happening, because Justin had been very much under
13 control at that moment. And he just suddenly says to
14 Taylor, I have to call you back. And he hangs up and
15 he tells me this thing about the trip to Boston, and he
16 is becoming horribly unnerved. We're back--we're not
17 as bad as we were the night before but, you know, he is
18 starting to cry again. And it's like--Justin, what's
19 wrong? And he said that's how Greg molested me.

20 That's what he does. He takes you to a hotel and he
21 molests you; Taylor is going to be molested tomorrow.

22 Q Now with that information, what do you do?

23 A Recognize that I'm past my ability to deal with this.
24 At--at first, the primary question--well, the first
25 thing I do is, I try to call Steve Ryan because we are

1 now in a circumstance where there is an impending
2 crime, potentially. There is the potential of an
3 impending crime involving a minor. And Ryan is not in
4 the office.

5 Justin calls back
6 Taylor and I don't remember whose idea this was, but
7 tells him, you know, get on your computer in 10 minutes
8 and let's have a conversation by Instant Message.
9 Because that would allow Justin not to have to talk,
10 which was very hard because he was crying so much. And
11 we go to the computer that is in the house and he turns
12 it on. And he gets very upset because he realizes
13 that, number one, the computer does not have an Instant
14 Message program, which could easily be downloaded, but
15 that it is not a broadband computer. It is a dial-up
16 which would mean it would take a long period of time to
17 download it and Taylor was going to be online in about
18 10 minutes.

19 Q How is that corrected then and dealt with?

20 A We all get into the car and go back to Justin's mom's
21 house. You know, where two nights before there had
22 been people hunting for him. But Justin insisted; this
23 had to be dealt with.

24 I called the New
25 York Times on the way and said, we have a major issue

1 going on now and I have no idea what to do. And the
2 first thought was calling law enforcement once again.
3 It's a source issue, what- --where--where do we draw the
4 line? What are the duties, what are the
5 responsibilities? And a meeting was convened between
6 my boss and members of the Legal Department of the
7 Times.

8 Q As a result of that, was there some consensus or some
9 decision that was arrived at?

10 A There was a consensus that we had no good choices. And
11 I came up with a proposal. And everyone hated the
12 proposal, including me. But I said if anyone has a
13 better idea tell it to me now and I'll do it. And no
14 one did. So--

15 Q And what was your idea?

16 A That I sit down at the computer with Justin at my
17 shoulder, and assist in the communication with Taylor.

18 Q And does that happen?

19 A Yes.

20 Q And what is the result of that?

21 A Taylor promises Justin that he will not go to Boston.
22 He also promises Justin that he will never take his
23 clothes off on the video again and that he will never
24 let an adult touch him. I don't want to say that I had
25 this conversation. It was--I was more like a filter.

1 I wasn't going to sound like Justin. And Justin would
2 tell me what to say and I would type it. And there
3 were times when he would go too far--it's like, don't--
4 don't go too far, you know? But he was basically--I
5 mean, he said to Taylor, you know, you are like my
6 brother to me. And he just implored him not to let
7 himself get degraded or hurt.

8 Q What did it accomplish by having you do the messaging
9 as opposed to Justin doing it directly?

10 A Justin wasn't in a state that he could have handled it.
11 He couldn't--I don't think he could have written a
12 complete sentence. And he had a lot of trouble getting
13 his thoughts together. And so in the beginning, in
14 particular, it was trying to get him focused.

15 Q Now do you confer with his attorney, Ryan, at some
16 point in these events?

17 A At that point--you know, as you can tell I've been
18 saying repeatedly over these days, I am out of my
19 element. This is beyond my ability to deal with this.
20 And at that point, my mind set is, I have got to get
21 out of this because I am going to make a mistake on
22 some scale and people are going to get hurt. And so my
23 point of view is, I've got to pass this kid off to his
24 attorney.

1 me, and also to Ryan, that Mitchell was working to get
2 rid of evidence.

3 Q Now do you take him then--er, travel back to Dallas at
4 this point?

5 A Yes.

6 Q So the conversations with Taylor had taken place in
7 Bakersfield--

8 A Yes.

9 Q --as you told us. When you conferred with your people
10 from the New York Times, that was also from
11 Bakersfield?

12 A Not my equal, my boss.

13 Q Okay. And is it then the next day that you are
14 traveling back to--

15 A No, same day.

16 Q Same day. So you're back in--back in Dallas. Now, did
17 you at that point--have you seen all of the video or
18 websites and so forth that you were to see in your
19 investigations of this, as far as Justin goes? Or was
20 there--

21 A I saw a--at that period up front was when I saw most of
22 them. And I saw a few more in the week or so that
23 followed. But, you know, by that time I had seen the
24 videos I was going to see.

1 Q Had you seen a video, in the course of all those that
2 you saw, which had the image of the person you later
3 learned to be Ken Gourlay?

4 A Yes.

5 Q And do you see the person that I've named as Ken
6 Gourlay in the Court now?

7 A Yes.

8 Q And would you point to him, please?

9 A It's that man over there.

10 MR. BAKER:
11 Indicating that the witness has pointed to the
12 defendant.

13 BY MR. BAKER:

14 Q Can you recall when in these events you saw a video
15 with the defendant?

16 A Sometime in July. It was early July. There were so
17 many things happening that were emotionally huge. The
18 video of Gourlay was just one event. And so it was
19 not--it didn't have quite the emotional impact of all
20 the other things.

21 Q Do you recall that video?

22 A Yes, I do.

23 Q Would you describe what you saw?

24 A It's a video of Justin and Gourlay sitting on an edge
25 of a bed. It's the bed in the video room in Mexico.

1 And they are sitting at a--at a laptop computer, which,
2 uh, just looking at--looking at what's on the computer.
3 Eventually, Mr. Gourlay gets up and walks out of the
4 shot. And shortly after that, the camera--the visual
5 field is adjusting as if the camera is being moved.
6 And around that point, Justin begins taking off his
7 clothes. It quickly becomes pornographic and that was
8 the end of what I saw.

9 Q So is that consistent with him, Mr. Gourlay, coming
10 behind the camera--

11 MR. HOWARTH: No. No,

12 Your Honor--

13 BY MR. BAKER:

14 Q --and filming--

15 MR. HOWARTH: --Your

16 Honor, I object to that. Whether that's consistent,
17 whether or not--

18 THE COURT: Well I
19 need to hear the question first. Finish the question
20 before I hear the objection.

21 BY MR. BAKER:

22 Q Is what you saw consistent with Mr. Gourlay getting up,
23 getting behind the camera that he had been filming, and
24 sitting there at the computer, and then shooting the
25 rest of what you saw?

1 THE COURT: Don't
2 answer the question. Your objection?

3 MR. HOWARTH: I
4 object to that, Your Honor. It's speculation. And
5 it--that's a matter for the jury to decide whether it's
6 consistent or whether it happened, or whether it is Mr.
7 Gourlay--is in the camera. There is--if he can see Mr.
8 Gourlay going and using the camera, that's fine. But
9 whether it is consistent with it or not that is a
10 matter for the jury to decide.

11 THE COURT: Objection
12 sustained.

13 BY MR. BAKER:

14 Q Well, just one more. I'll just have a few more
15 questions then for you. When the video opens, is there
16 any movement of the scene that you are seeing?

17 A Not that I recall.

18 Q And it is the defendant and Justin? And where are they
19 sitting?

20 A They are sitting at--there's the bed and they are
21 sitting at the end of the bed. And the camera is kind
22 of at an angle to them.

23 Q All right. And you say at some point you see the
24 defendant stand up?

25 A Yes.

1 Q And what--what do you see him do?

2 A He leaves the field of view--of the shot.

3 Q And how long after that does the field of view begin to
4 move or change?

5 A Um, my recollection is not long.

6 Q Are we talking seconds, minutes, hours?

7 A I--it's not minutes--it's not minutes. It would be--it
8 would be less than 30 seconds.

9 Q And is the video appearing continuous from Justin
10 sitting there, and then you see the defendant move off
11 out of the scene? Does the scene change or is it still
12 of Justin sitting there?

13 A No, it's still Justin sitting there.

14 Q Then what do you see next?

15 A I don't know what I see next. I mean, this is--it's--
16 certainly when I saw it I never thought I'd be
17 testifying about it. What I know is that, you know,
18 the visual field begins to move as if the camera is
19 moving. And that at that point, you know, Justin
20 starts taking off his clothes.

21 Q Then does the video end or do you just stop watch--

22 A I never saw the end of the video. Once--once a video
23 became pornographic, I knew what I needed to know. And
24 I just had this standard in my head that--the one
25 exception to this was the father video, where we went--

1 it became pornographic when we fast forwarded it to the
2 end. Because I wanted to see if the father came back
3 in, but he didn't. But otherwise, once the video
4 became pornographic, I shut it down.

5 Q Do you recall anything about how in the Ken Gourlay and
6 Justin Berry video, how either was dressed?

7 A I vividly recall--this will sound very strange. I
8 vividly recall a dark green shirt. I cannot tell you
9 which one of them was wearing it. It was a--it was a
10 green shirt that wasn't like a kind of shirt that was
11 very common. I mean, there was nothing special about
12 it, but one of them was wearing a dark green shirt.

13 Q Was it short-sleeved, long-sleeved, if you can recall?

14 A I don't remember.

15 Q All right. Now--

16 A I think I would remember if it wasn't short-sleeved,
17 because I did know this was Mexico, you know, it's not
18 exactly cold.

19 Q Now do you know if that video--was it on a hard drive,
20 was it on the Internet when you saw it? Was it--

21 A I have no idea.

22 Q --a site?

23 A I do not recall. Justin showed me videos from his--he
24 had his laptop with him. He showed me videos from his
25 laptop, he showed me videos on the Internet, he showed

1 me videos on his FTP site. And that was, you know, it
2 was from some location that he had access to.

3 Q Now, let me go back to when you arrived back in Dallas.
4 You've talked to--

5 A Can I take a break for a minute? Is it--will I be able
6 to take a break for a minute?

7 THE COURT: A short
8 recess?

9 THE WITNESS: A very
10 short recess.

11 THE COURT: All
12 right. Yes, if you'll stand (indiscernible) the
13 jurors. You can go. You can step down, Mr. Eichenwald.

14 (At 10:07 a.m., witness is excused.)

15 THE COURT: The
16 jurors can be excused for about five minutes.

17 THE CLERK: All rise.

18 THE COURT: All
19 right, we'll stand in recess for about five minutes or
20 so.

21 (At 10:07 a.m., jurors exit Courtroom - Court
22 in recess.)

23 (At 10:21 a.m. Court reconvenes.)

24 THE CLERK: All rise.

1 (At 10:22 a.m., jury enters Courtroom and
2 witness resumes the stand.)

3 THE COURT: You may
4 proceed.

5 MR. BAKER: Thank
6 you, Your Honor.

7 BY MR. BAKER:

8 Q Mr. Eichenwald, I just want to go back on one thing
9 about the person identified to you as Taylor. Had you
10 come across that name or that person earlier on in your
11 investigation? Particularly at a time when you were
12 not acting as a reporter--

13 A I in fact had--had an online communication with
14 somebody identifying himself as Taylor. So I knew--I
15 knew there was a Taylor in Virginia. I did not know
16 until July 12, that Taylor was a minor or the scope of
17 what was happening.

18 Q So your first encounter with that name and that person
19 was before you met, in person, Justin Berry?

20 A It may have even been before I knew that his name--his
21 full name was Justin Berry. I don't--I don't recall
22 exactly at what point in the whole series of events.
23 But I do know that, uh, that I had--I want to say one
24 conversation with somebody identifying himself as

1 Taylor. And obviously he contacted me because I didn't
2 know his screen name.

3 Q Also another thing I wanted to ask you a question
4 about. You mentioned that it appeared that there was
5 the deletion or the destruction of evidence that was
6 going on. Was the Justice Department notified of that
7 possibility? Either by you or by anyone acting at your
8 directions?

9 A I've seen a letter written about on that date, July
10 14/15th, to the Justice Department, to the Child
11 Exploitation and Obscenity Section that reiterates
12 statements made in a phone call--it's a letter by Steve
13 Ryan. And the letter states that he has a client who
14 wants to come in, wants to tell about his experiences.
15 That there are other children who are being exploited.
16 That evidence is being destroyed and that co-
17 conspirators are hunting for his client. And so that
18 his client is at a degree of personal risk.

19 Q Now let's go back here to the point where you are back
20 in Dallas. You've had these conversations with Taylor
21 and you're back in Dallas. At some point does then
22 Steve Ryan become the attorney and is sort of taking
23 over the handling of this matter, as far as Justin
24 Berry is concerned?

1 A On July 15, Steve Ryan takes Justin as a client--I
2 believe it's July 15; it is that Friday. And the
3 result of that is that now, you know, Justin's personal
4 situation is being managed by his family out in Allen.
5 His legal situation is being managed by an attorney
6 and, um, my--the crisis state of my involvement is
7 being greatly relieved.

8 Q After Ryan takes over, as you say like the handling or
9 the management of the situation legally, do you
10 continue to question or (sic) Justin about this--his
11 pornography world, or are you working on the data
12 you've already generated?

13 A I continue talking to him about it. It is much less
14 intense. A lot of our conversations at this time are
15 more on the scale of hand-holding, source-management,
16 keeping him calm, keeping him feeling safe. He felt
17 very, very threatened at this point, and--and doing
18 what I could do to alleviate some of that fear.

19 Q Now does there come a point in later July where you
20 take Justin Berry to Washington D.C., to meet with or
21 to get with Steven Ryan?

22 A Yes.

23 Q Had they met in person--

24 A No.

1 Q --before that? So this was the point where you were
2 going to bring him and there will be a face-to-face
3 meeting with Steven Ryan?

4 A Yes.

5 Q And by this point, were you aware of the decision that
6 they were going to be seeking immunity, and seeking to
7 have him cooperate as a witness? Were you privy to
8 that?

9 A I'm--I'm very familiar with cooperation agreements.
10 They are reached all the time in Securities Law cases.
11 And so even before they told me what they were doing, I
12 knew that they would be going in where Justin would
13 give a--it's called queen for a day. You come in and
14 you get to say everything you've ever done and they
15 can't use it against you. And this proffer as it is
16 called would then be used for--to determine whether or
17 not they are going to grant you immunity or prosecu--or
18 instead, open an investigation and prosecute you.

19 Q Let's go to the 25th of July. Was there a point where
20 you were driving in a car in the DC area, taking Justin
21 Berry to the office of Steven Ryan?

22 A Yeah, I was going to drop him off with his lawyer and
23 we were in the car.

24 Q Did you have your son with you?

1 A This trip coincided with a trip that I take with each
2 one of my children in the summer after fourth grade; it
3 is arranged years in advance where we go to a mountain
4 top in Canada. And it is very difficult to access. And
5 we were supposed to be starting on the horseback ride
6 from Canada on--in Canada on--we'll say, July 27 or
7 July 28. And so what I decided was that I would go to
8 Washington to hand Justin off, making sure that he made
9 it, and then my son and I would travel around
10 Washington for a day or so and then go up to Canada.
11 So, yes, my son was in the car because we were about to
12 go do sightseeing in Washington.

13 Q And how old would your son have been at that time?

14 A Ten.

15 Q So there is you, Justin and your son in the car. You
16 are on your way to Mr. Ryan's office. Do you remember
17 a particular conversation you had with Justin during
18 that time--

19 A Yes.

20 Q --during the ride?

21 A Yes.

22 Q Can you tell me how it started?

23 A Well Justin understood that while my--that my middle
24 son was not going to know anything about the
25 circumstances involving his case and that I did not

1 want him to know anything. And so he sort of talked
2 around it and said, I need to ask you something. And
3 it became very clear that he wanted me to pull over so
4 we could get out of the car and talk, without my son
5 hearing.

6 Q Did you pull over?

7 A Yes, I did.

8 Q Did you get out of the car?

9 A Yes.

10 Q What was the conversation?

11 A Justin asked me, do I have to identify everyone who
12 molested me?

13 Q And what did you say?

14 A Well, actually he proceeded for a while. Well--I'm not
15 sure if I asked him a question or if he just kept
16 going. But he said, there was a man who molested him
17 who was his friend. And who had--he said, it's just
18 the way he is. He apologized to me and I don't want to
19 hurt him. And he identified that man as Ken Gourlay.

20 Q What did you say to him?

21 A I said you have to ask this to your lawyer. It's not a
22 question I can answer.

23 Q Was he saying this in a calm and collected manner? Was
24 there any emotion connected to it?

1 A He--he sounded almost afraid. Almost--I mean, it was
2 very--he was very torn. It--it was very clear that he
3 felt some degree of--I mean, the phrase was, he is my
4 friend. And he kept coming back with, he's my friend,
5 I don't want to hurt my friend. And so he was very,
6 you know, connected to this idea that by going in for
7 the purpose of revealing the information pertaining to
8 other children, that it could end up falling back onto
9 his friend who had molested him in the past.

10 Q Did you state that--that was something he would have to
11 take up with his lawyer?

12 A Mm-hmm. Yes.

13 Q Then--now this conversation is outside of the car, or
14 outside of the hearing of your son?

15 A Yes.

16 Q You get back in and then what happens?

17 A We drive to--I don't remember if I dropped him off at
18 the--this place called the Bond Building. I dropped
19 him off--there's a place called the Bond Building which
20 is the second building of the Justice Department and I
21 took him there. And that's where he met Steve Ryan.

22 Q Then you go on your trip, maybe the next day or the day
23 after or whatever?

1 A Justin is interviewed by the FBI and we are--Ryan--my
2 son and I are wandering around Washington and we were
3 there for two and a-half days.

4 Q Okay. Then you leave on that trip?

5 A Yes.

6 Q And about how long are you gone?

7 A A couple weeks.

8 Q When you come back, you go--do you stop over in DC or
9 do you go--

10 A No.

11 Q --back to Dallas?

12 A I go--we go--straight back to Dallas.

13 Q Now when you get back a couple of weeks later, had
14 there been an investigation started by the Justice
15 Department? And what progress had it made?

16 A Well, I considered the interview of Justin Berry to be
17 the opening of the investigation. And when I got back
18 my expectation was that at the very least, the Taylor
19 situation would have been addressed. And when I got
20 back at some point, I called Justin to find out what
21 was going on. And he told me that nothing had
22 happened.

23 Q Are we now into the middle of August?

24 A We're in the middle of August, now.

25 Q He's in Allen, Texas--

1 A Mm-hmm.

2 Q --at this time and you are home. Are you seeing him or
3 just talking to him on a day-to-day basis or how does
4 that--

5 A I talk to him every day. I don't see him every day
6 because now, at this point, I'm branching out into
7 other reporting, based on leads that Justin provided.
8 And he is not the integral element of the story
9 anymore. You know. He was necessary for me to get an
10 understanding of how this all worked.

11 So now, you know, we
12 had--I actually started having a lot of conversations
13 with him by Instant Message because he was very
14 comfortable with that. And we had conversations with
15 him--and I had conversations with him by phone. And
16 then also we had face-to-face conversations at times.
17 There are also times where I just, you know, part
18 of--part of dealing with somebody is, you know,
19 being--not just disappearing on them. And so there
20 were times when I would take him out to lunch for no
21 particular purpose, other than giving him something to
22 do.

23 I knew that his
24 existence in Allen, Texas, was--was very, very
25 different from what he was ex--had experienced in

1 Mexico. He had no money. He had no car; he wasn't
2 allowed to drive which was great because they were
3 trying to make sure he stayed safe. He slept in this
4 very small room and he--after speaking to the FBI, he
5 wasn't allowed to speak to anybody in his prior life
6 and wasn't meeting anybody in his new life. So his
7 days were spent sitting at a kitchen table in Allen,
8 doing Google searches and talking to me because I was
9 about the only person he could talk to.

10 Q Was there concern expressed at this time about Taylor
11 and was that the theme of your conversations with him?

12 A There was--there was frequent concern. That was--the
13 largest topic of conversation was his fears about
14 Taylor and his--his guilt about Taylor; his sense of--
15 -his sense of responsibility for Taylor.

16 Q Now did you take any steps to determine what was being
17 done to make official contact with Taylor, to get him
18 out of this world by the authorities?

19 A Could you ask the question again?

20 Q Yeah. What--did you do anything to determine that the
21 authorities had been making any effort to reach out to
22 Taylor, to deal with that situation? Or where it was
23 at?

24 A Yes. Well--I had conversations that gave me
25 information about what was happening. But it wasn't--I

1 immunity agreement takes a long time to put together.
2 And they have to check, you know, on your story. And
3 he replied, fine. I'll plead guilty if they'll go save
4 Taylor. And he kept insisting that he would plead
5 guilty if that meant the Justice Department would speed
6 up going for Taylor.

7 This had to be in
8 person because he called-- he called his lawyer while I
9 was there. He called Steve Ryan and Ryan told him you
10 do not, you know, defendants don't cut deals with the
11 government for the purpose of getting the government to
12 do its job. And he said he was not going to--he
13 dissuaded him from taking that course of action.

14 Q And it did in fact, a number of weeks passed before the
15 situation was addressed as far as you know, in terms of
16 policing the situation, and bringing charges and
17 getting Taylor and--(indiscernible).

18 A A very, very long time passed.

19 Q And approximately how long?

20 A It was from--July 15 was about the date of the--again,
21 I could be off a few days. But July 15 was when I
22 believe Steve Ryan contacted the Justice Department for
23 the first time. And there was no action in the case
24 until I would say September 8, 9 or 10. And the first
25 arrests didn't happen--the arrest of Greg Mitchell, the

1 person who was the concern in relation to Taylor, was
2 not until September 12.

3 And there was a--by
4 that point, there was a very extreme sense of urgency
5 to the case again. Because Justin was not permitted to
6 talk to Taylor and the conversation of July--the middle
7 of July. Again, I think it's July 15, wasn't holding
8 apparently, because Taylor sent an e-mail to Justin's
9 account on something called Myspace, which is a
10 community networking thing. And he knew Justin's
11 e-mail address. Justin couldn't reply but he opened it
12 and found out that Justin--I'm sorry. That Taylor was
13 going to go to Las Vegas with Greg Mitchell sometime
14 after the 15th of September.

15 Q And so again that ratcheted up the urgency--
16 (indiscernible).

17 A That ratcheted up the urgency once again. Steve Ryan
18 dealt with that by sending numerous letters to the
19 Justice Department, making numerous calls, getting no
20 response and ultimately telling them that he was going
21 to take Justin to a State Attorney General if they
22 couldn't get a resolution.

23 Q Now there finally was some action taken on a Federal
24 level as to some of this, am I correct?

25 A Yes.

1 Q In fact, you said there was the arrest of Greg
2 Mitchell?

3 A Mm-hmm.

4 Q And Tim Richard?

5 A Tim Richards, also known as Casey was arrested in late
6 September.

7 Q And Aaron?

8 A An individual by the name of Aaron Brown who was never
9 a concern, because he was just a credit card processor.
10 He was arrest--but he was not arrested until many, many
11 months later.

12 The first two
13 arrests were dealing with the issue at hand, which is
14 adults with children in their reach. Where there was
15 reason to be concerned, you know. For example,
16 Justin--based on records I've seen, Justin had told the
17 government and subsequently Greg Mitchell had told the
18 government that Tim Richards had admitted to Greg
19 Mitchell who told Justin that he was engaged in a
20 sexual relationship with Doo, the 13-year- old boy.
21 And so there was a lot of, you know, those-- those were
22 the cases that had to be dealt with because there was
23 an ongoing issue pertaining to Taylor, other kids in
24 Virginia connected to Greg Mitchell and Doo.

1 Q Was Taylor finally reached out to by officials? Was
2 he--his--

3 A Yes.

4 Q --situation changed?

5 A Yes.

6 Q His living situation? And how about Doo?

7 A Yes.

8 Q Now I want to maybe kind of go forward here in time.

9 Did there come a time when there was another

10 conversation with you by Justin Berry, regarding Ken

11 Gourlay? And I'll be talking in the fall, October--

12 (indiscernible)?

13 A There were--there were a number of conversations

14 regarding Ken Gourlay, yes.

15 Q And did these start in--after--well you've told us

16 about the one in July, on the way to the attorney's

17 office. Was there another one in particular after the

18 fall, after a dinner?

19 MR. HOWARTH: Well,
20 Your Honor, this is a very open question. And I don't
21 know what the answer is. But if the answer is
22 something indicting that Ken Gourlay committed some
23 kind of crime, then it is clearly hearsay.

24 THE COURT: Mr.

25 Baker?

1 MR. BAKER: Well,
2 Your Honor, I think the defense went into--with Justin
3 Berry, that there wasn't anything mentioned about Ken
4 Gourlay and the FBI 302 Form. And so I am responding
5 to that by indicating that this wasn't some sort of
6 recent revelation on the part of Justin Berry, to
7 anyone, about Ken Gourlay. But it was coming out
8 during this particular period of time starting in July.
9 Because I think the implication that the defense was
10 reaching for, was that this was some sort of much more
11 recent statement on his part. And I'm trying to show
12 that this was coming out all along.

13 THE COURT: Which is
14 a statement that is being offered to prove the truth of
15 the matter that is being asserted by a different
16 witness and not this witness.

17 MR BAKER: Well, it's
18 not--

19 THE COURT: It's
20 hearsay.

21 MR. BAKER:--even the
22 truth but that it was being stated at that time. There
23 wasn't a holding back in trying to put into a time
24 frame when it was coming out. I rely on Justin Berry
25 for the truth of the matter.

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THE COURT: I'll

overrule the objection to that question, although I think it's frankly a close question as to whether or not we are really talking about hearsay here, go ahead. The witness may answer that question.

BY MR. BAKER:

Q All right, well I'll just ask you a series of questions and we'll--

A Okay.

Q --walk through this. Was there a particular dinner that you recall, in October, involving a youth group?

A Yes.

Q And tell us about that and what that was about?

A My wife--there is a woman, a young--a younger--a girl my--that my wife knew who babysat for us occasionally. And at some point or other, I had told--I had been talking with Theresa while this girl was there. And she had heard elements of the story about Justin Berry. The girl attended a Bible college in Dallas. And she said that she had a number of friends and that they were a very close group. And she wanted to reach out to Justin Berry to sort of give him something to hold onto.

I was ex--I was actually--I had been talking to Theresa about the

1 trouble Justin was having. That he wasn't allowed to
2 talk to anybody and he was by himself all the time.
3 And so I gave that woman, that young woman, his phone
4 number.

5 Q And did there come a time when he had some social event
6 with her?

7 A Yes. There was a dinner he attended with them.

8 Q Now after that dinner, were you in the presence of
9 Justin Berry?

10 A Yes, he came to my house.

11 Q After the dinner?

12 A Yeah.

13 Q All right. And did he have a particular--if not
14 conversation, at least some sort of revelation to you
15 at that time?

16 A The evening had been sort of an evolution of
17 revelations. He had an enormous amount of difficulty
18 with people being kind to him. And I saw this. I saw--
19 because they met at our house. And I saw Justin among
20 a group of teenagers treating him with respect. Him
21 knowing they knew his background, they were kind. They
22 were friendly, open and giving and he started really
23 pulling away. It was almost as if there was some sort
24 of, you know, danger or some bad thing that was
25 happening. I couldn't quite understand it.

1 By the time they
2 finished up their dinner and Justin was at the house,
3 'cuz that's where, you know, we had to take him back,
4 he came in and he sat down for a minute. And out of
5 nowhere launched into this monologue.

6 Q How long did it last?

7 A About four hours.

8 Q And was it attended with emotion?

9 A It started very matter-of-fact. It was staring at a
10 floor and just talking. It-it--he had never done
11 anything like this and never did it since then. And it
12 was--as it went on, it got progressively more and more
13 intense. More and more emotional; he began crying.
14 The crying became so extreme he began retching. And
15 suddenly, we were in an emotional hurricane that the
16 only thing I had seen even close to it was back when we
17 were in Bakersfield and he had seen the videotape of
18 himself being molested.

19 Q And was there a theme to this monologue?

20 A Yes.

21 Q And did that theme center around a particular person?

22 A Yes, it did.

23 Q And who was that person?

24 A Ken Gourlay.

1 Q And did he recount events from the relationship and
2 feelings about the relationship?

3 A Yes. It focused a great deal--the center of it was
4 about--he used this word--I'll use another word as
5 well, friendship and betrayal. He wasn't really my
6 friend. That was sort of the underpinning of
7 everything that was being said. And, you know, when in
8 the past Justin would say, he molested me, suddenly I
9 was getting graphic and very disturbing detailed
10 statements about--about--about molestations and
11 betrayal. And he used me, and it just--it just
12 really--really took off. And I was literally just
13 sitting there as it was going, until finally it got so
14 extreme that I began to, once again, fear for Justin's
15 psychological health and did what I could to get him to
16 stop.

17 Q How did that come to an end, that session or that
18 particular time?

19 A I told him to stop. I said that--that you are not
20 going to a good place, you've got to stop. We've got
21 to bring this back down. And he actually wasn't really
22 able to, you know, it sort of dwindled. But I got him
23 home and his cousin was there. And she was very
24 distraught at what she (sic) was saying. And the
25 decision was made that Justin, while he shouldn't go to

1 an emergency room, that Justin needed an emergency
2 appointment with his psychologist.

3 Q And was that done?

4 A Yes.

5 Q Now, going from that event to the Congressional
6 hearing. And that was in April, correct?

7 A Yes.

8 Q Of the next year, April '06, where in the fall of '05
9 there is this event. From that time until, let's say
10 the Congressional investigation, that block of time,
11 are you still seeing Justin and talking to him at least
12 on a regular basis?

13 A Talking to him every day.

14 Q Is he under--is he getting counseling at this time?

15 A Yes. He was getting counseling from early August and
16 fairly frequent counseling.

17 Q Now this particular block of time covers, does it not,
18 publication of the articles in the New York--

19 A Which block of time?

20 Q Well, going from fall to--up to the Congressional--

21 A Yes.

22 Q --investigation? So if we're going from October,
23 November, December, January, February, March, April,
24 that period of time includes the publication of the
25 articles?

1 A Yes.

2 Q And when did those hit?

3 A December 19, 2005.

4 Q Now I believe you stated earlier that it wasn't your
5 intention to make Justin Berry central to those
6 articles, am I correct?

7 A No, it wasn't.

8 Q All right. Tell me about that. What was--

9 THE COURT: Wait.

10 Would counsel approach?

11 (At 10:56 a.m., bench conference.)

12 THE COURT: This is
13 all very interesting, but how is any of this stuff
14 relevant to the charges facing the defendant?

15 MR. BAKER: Well, I
16 think the--what we've just gone through, is.

17 THE COURT: Mm-hmm.

18 MR. BAKER: The--I
19 think part of the defense is going to be that this is
20 all about headline grabbing. And this is all about on
21 both the part of Kurt Eichenwald and possibly of Berry
22 himself. And I'm trying to put it in the perspective
23 that it was never the intention to make Berry the
24 central figure of the article. That ended up being
25 some last minute decisions by editors and that that's

1 what led to his fame. It was him being in the
2 articles, in the New York Times that led to the--and
3 that had nothing to do with anything Justin was trying
4 to orchestrate, or even this witness. And then that
5 led to the outpouring of interests and deals and so
6 forth. And I think that it's going to be a theme of
7 the defense that all of these things are motivating
8 factors in a negative way. That's why I'm--

9 THE COURT: Well, it
10 really wasn't gone into in the cross-examination of
11 Justin Berry in any significant way. All right, I'll
12 allow it. It's just that--

13 MR. BAKER: I'm--

14 THE COURT:
15 --there's a lot of hearsay that obviously has not been
16 objected to. And it's an interesting story. But I'm
17 not interested in this witness being on the stand for
18 seven hours today, fellas, okay?

19 MR. HOWARTH: No.
20 Well, my only follow-up point is that if Mr. Baker
21 wants to go there, I'm going to cross-examine him.

22 THE COURT: Yeah, I
23 understand. All right.

24 MR. BAKER: I'm not
25 (indiscernible). I'm coming to the end of this.

1 THE COURT: Okay, all
2 right.

3 (At 10:57 a.m., bench conference concluded.)

4 THE COURT: All
5 right, you may proceed.

6 BY MR. BAKER:

7 Q Now the articles. Was it--I believe you said it was
8 not your intention to make Justin Berry the centerpiece
9 of the articles?

10 A No, it wasn't.

11 Q How did that come about that--the articles and the wet
12 form which they took?

13 A The article development at the newspaper is a very long
14 process. And you talk about your ideas ahead of time
15 and there is a lot of back and forth. And the proposal
16 which had been accepted, was that this was going to be
17 a three-part series.

18 And the main
19 article, the first article--I don't even recall if
20 Justin Berry was mentioned in that. The first article
21 was about the phenomenon of Webcam child pornography.
22 And children putting their images up on the Internet
23 for money. By that time--I mean, as an example, I had
24 found the administrative file of an advertising site.

1 A site where people were advertising their Webcam
2 pornography sites.

3 And there were--for
4 teenagers, there were 585 sites listed. You know,
5 there were videos, based on the headings and the
6 entries, there were videos being swapped on news groups
7 all designated Webcam for, in one week, I counted 90
8 different children. At least by the names on the
9 headings.

10 And so to me, as
11 much--as intense as my relationship with Justin Berry
12 was, he was not the story. The story was this
13 phenomenon. And that was the focus of the first
14 article. Justin served as an example in the second,
15 which was a much more contained version. And then the
16 third was about law enforcement challenge in dealing
17 with the creation of pornography that is being
18 generated by the children themselves.

19 Q All right. But were those the articles that got
20 published in fact?

21 A No.

22 Q All right. So the editors had something to say about
23 how that actually got written up?

24 A This was a first in my experience with the Times. That
25 the stories had been accepted at every level, almost

1 every level. And we expected that the publication
2 would be coming very quickly. In fact, I heard that
3 the pages were laid out, meaning that they had the
4 photographs and everything all set.

5 And at the last
6 minute, I was told that there was a level of
7 discomfort--well, I was told they wanted it to be
8 reduced to one story. And they wanted it to focus on a
9 single individual. And the concern expressed--somebody
10 said this isn't World War II. Meaning, three parts
11 coming off the front page of the New York times as
12 serious as this issue was, my best number were 585 and
13 90. And so there was a concern that it would be making
14 this seem--just the very nature of the packaging would
15 make it seem far worse than we knew it to be. So at
16 that point, the decision was one kid, use him as a tour
17 guide into this world and pick the kid. I only had one
18 kid on the record--er, willing to go on the record and
19 that was Justin Berry.

20 Q So Justin Berry didn't have anything to do with being
21 featured or made the centerpiece of these articles?

22 A No. Actually, at that point I had to talk to him about
23 it. Because, you know, in dealing with sources I do
24 try--I don't like to surprise people. And so he, until
25 this point, did not expect that he was going to be the

1 centerpiece of an article. Or at least not the
2 centerpiece, you know. Again, the second part which
3 was not going to be the high-impact part--it might not
4 even have been on the front page, was going to be on
5 his story as an example. But it was not that he was
6 going--his story was going to carry the day for the
7 entire exploration of this phenomenon.

8 And so I talked to
9 him about that in October and he was--his reaction was
10 more sorrow for me because he had the recognition that
11 I had a lot of work that I had to do very quickly.

12 Q When the article got in the shape or form it was, and
13 that ultimately got published, you had discussions with
14 him about that. Did you tell him that it was becoming
15 an article that was going to be featuring him
16 basically?

17 A Well, I talked to him about that at the beginning. And
18 there was a very important reason I was talking to him
19 about this.

20 Justin was on the
21 record as an adolescent victim of sexual abuse. And I
22 believed you couldn't apply, you know, the standards
23 of, well you've gone on the record so be it. Justin
24 offered to go on the record--I'll say late July. And
25 at the time, I did not believe he was competent to make

1 Q --that--a subcommittee hearing where Justin testified,
2 is that correct?

3 A Yes.

4 Q Were you in his presence when he saw Ken Gourlay at
5 that time?

6 A Yes.

7 Q Did you observe his reactions at that time?

8 A Yes.

9 Q And what was--just describe his reactions?

10 A Rage, tumult. He actually had to step out of the
11 hearing room and out of the building. And he walked
12 over to the wall of, you know, this House office
13 building and put his head against it, and started
14 kicking the wall. And, you know, first--it's always
15 first anger, then tears. And he said. I can't do
16 this. I said. What do you mean, you know. You can't
17 testify? And he said, no. I can't--I can't point out
18 Ken Gourlay. I can't ident--I can't look at him. I
19 can't deal with him. What had happened was--

20 Q Well-let me ask you this.

21 A I'm sorry.

22 Q Did he get himself together and then, in fact, go in
23 and testify?

24 A Yes.

1 Q All right. Let me ask you this? Did you see some of
2 that reaction in the course of this own trial?

3 A Yes.

4 Q When?

5 A Two mornings ago.

6 Q And what were the circumstances?

7 A Justin was walking down the hall and Ken Gourlay was
8 walking the other way and they crossed paths. And
9 Justin went pale, his teeth clenched. He had a box of
10 Tic Tacs in his hand that he crushed. And he came and
11 sat down on the sofa, next to his mother and began
12 sobbing.

13 Q Now let me just jump to another topic, quickly. And
14 that was going to the summer of '06. Were you present
15 or did you see him having some sort of emotional
16 breakdown that necessitated him going back to
17 Bakersfield, California?

18 A Beginning in May of '06, he had been every step of the

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10 Q And that was--what month?

11 A May.

12 Q May of '06?

13 A May of '06.

14 Q And he goes back to Bakersfield?

15 A Which stunned me. Because I can't tell you the flight
16 back to Dallas after the--the Congressional hearing,
17 Justin--a stewardess stopped by and said to Justin, you
18 know, there was some conversation she was having. She
19 said. Boy, I wish--I hope my son grows up to be like
20 you. She didn't know who he was. He looked at her and
21 said, no, you don't. And she walked away. He said no
22 one has ever said anything like that to me in my life.
23 And he was feeling happy and proud. And I thought,
24 we're done.

1 the Today Show, you really don't need to think about
2 any of the other ones.

3 And so he went off
4 and called me. And he said, Oprah hunts predators. I
5 said, yeah, that's one of the things she does. He
6 says, I want to go on Oprah. So that was why he went
7 on Oprah. It had nothing to do with he was awed by
8 Oprah Winfrey or knew who Oprah Winfrey really was. It
9 was because on Oprah Winfrey's website, she hunts
10 predators.

11 Q And there was testimony that came in about a book deal
12 that was offered to him?

13 A Yes.

14 Q Conditioned upon him not going on Oprah?

15 A Yes.

16 Q Did he have a conversation with you about that?

17 A Yes.

18 Q And what was that?

19 A I had received an e-mail from Steve Ryan that included
20 a copy of an e-mail he had received, from the Reagan
21 Books Imprint of Harper Collins Publishing. And Reagan
22 Books was offering Justin a book deal valued at
23 \$500,000 dollars. And it had as a--it had several
24 conditions. But the primary condition was they had
25 learned from Ryan that he was about to appear on Oprah.

1 he looked at me and said, Kurt, you don't understand.
2 I already took the masturbation money. And at that
3 moment, I understood. I said. Fine.

4 MR. BAKER: Nothing
5 further.

6 THE COURT:
7 Cross-exam.

8 THE WITNESS: Can I
9 have a break? I will not make it through cross-exam.
10 Thank you.

11 THE COURT: We'll
12 take a five-minute recess. All rise for the jury.
13 Will you step forward so the jury (indiscernible).

14 THE WITNESS:
15 (Inaudible).

16 THE COURT: Thanks.
17 Go ahead, ladies and gentlemen.

18 (At 11:17 a.m., jurors exit Courtroom.)

19 THE COURT: You've
20 got to drink less water.

21 THE WITNESS: I
22 actually have to (indiscernible) medication and it
23 dries me out. I have to drink a lot (indiscernible).

24 THE COURT: I
25 understand.

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THE WITNESS:

Actually, can I leave now because I'm not sure I'll make it back.

THE COURT: Right.

(At 11:17 a.m., witness is excused.)

MR. HOWARTH: Your

Honor, I want to put something on the record. We learned for the first time this morning about the conversation that Mr. Eichenwald supposedly had on the way to the Department of Justice in Washington, on July 25 of the year 2005. In which, Mr. Berry says, do I have to name all of the people. And Mr. Eichenwald says, I'll leave that up to your attorney.

We already know that

Mr. Berry did not mention Mr. Gourlay. I would like to have permission of the Court to amend my witness list. I intend to make immediate preparations to secure a witness from the United States Attorney's Office in Detroit, to testify on the propriety of a person giving a proffer offer and intentionally leaving out a potential defendant in a case.

THE COURT: Mr.

Baker?

MR. HOWARTH: And the

only reason I don't name the person is, I have to--I'm

CROSS-EXAMINATION

1

2 BY MR. HOWARTH:

3 Q Good morning Mr. Eichenwald.

4 A Good morning.

5 Q This is our first meeting, I believe.

6 A Uh, we've been introduced in the past. I believe at
7 the preliminary hearing.

8 Q Actually I believe that was another attorney who I can
9 actually say was a little bit stouter than I am.

10 A I'm sorry. Yes. He introduced me to you. I'm sorry.
11 I thought he introduced me to you.

12 Q Nice choice of term. Mr. Eichenwald, you are probably
13 considered--and you would know this, you are probably
14 considered a very prominent investigative journalist,
15 would that be correct?

16 A I've had some success. I'm not sure what I'm
17 considered.

18 Q All right. As you have already told us, you were the
19 major New York Times writer on the Enron scandal?

20 A Yes.

21 Q On the accounting firm Arthur Andersen, which I guess
22 is no longer even with us?

23 A Yes.

1 Q Partially, as a result of articles about them in the
2 New York Times, which led to Federal investigations,
3 which led to the demise of the firm.

4 A I can't take credit for the investigations of Arthur
5 Andersen. That really stemmed from the Enron collapse.

6 Q And what was the Texaco one about?

7 A Texaco was--

8 Q We don't have Texaco here.

9 A The Texaco was the case where there was a
10 discrimination case that had been filed by a class of
11 employees at Texaco. And there had been a point when--
12 I can't remember his title, when a corporate treasurer,
13 I think--

14 Q Well, I just need a short version.

15 A An executive had recorded senior officers of the
16 company engaging in actions to--that appeared to
17 withhold documents. And there was a--

18 Q Okay, that's all.

19 A Okay.

20 Q Now the Enron investigation led to a book deal,
21 Conspiracy of Fools. I'm sorry. Yes, that was Enron,
22 right?

23 A Yes.

24 Q Conspiracy of Fools. And I think it was your testimony
25 yesterday that--that book sold fairly well?

1 A It did well.

2 Q Right. So you made some money?

3 A Yeah.

4 Q Did any of your other investigations as a New York
5 Times investigative journalist lead to books?

6 A Yes.

7 Q Could you tell us what book and what investigation?

8 A Um, I did an investigation of Prudential Securities
9 which was a fraud that resulted in eight billion
10 dollars being defrauded from 340,000 people. That led
11 to a book in 1995, called Serpent On The rock. And
12 then there was--

13 Q Did that do okay?

14 A I think okay is the right word.

15 Q All right.

16 A It did okay.

17 Q Made some money.

18 A Now, I don't make money off of sales of the books. I
19 get an advance. It made money for the publisher, I
20 assume.

21 Q And you, from the advance.

22 A From the advance.

23 Q Go ahead.

24 A Um--

25 Q That's Serpent On The Rock.

1 A Serpent On The Rock. Then there was at Archer Daniels
2 Midland, there had been a senior executive who had
3 become a cooperating witness with the FBI on an
4 undercover basis. And--but unknown to the FBI, while
5 he was working for them, he was simultaneously losing
6 his mind. And that case spun out of control. I
7 covered that for four years. And that resulted in my
8 second book called The Informant.

9 Q So Serpent On The Rock is your third book?

10 A No, Serpent On The rock is my first book.

11 Q Okay.

12 A The Informant is my second.

13 Q And then Conspiracy Of Fools.

14 A And then Conspiracy Of Fools. And in the middle
15 somewhere is a--I wrote a section of a New York Times
16 book whose title escapes me, I'm sorry, about personal
17 investing.

18 Q Would it be a fair statement, Mr. Eichenwald, that it
19 is not particularly unusual when an investigative
20 journalist gets involved in a big case, that they end
21 up writing a book?

22 A It happens.

23 Q Sure.

24 A It happens with a fair amount of frequency.

25 Q Fair amount of frequency, is that correct?

1 A Mm-hmm.

2 Q Mr. Eichenwald, do you consider yourself to be an
3 ethical journalist?

4 A I try to be.

5 Q But do you think you are?

6 A I think so, yes. I mean, I hate making judgments on my
7 own ethics. That's sort of, you know, that's the kind
8 of thing that needs to be judged by the profession, I
9 would think.

10 Q Who knows better than you? Mr. Eichenwald, we've had a
11 document admitted into evidence.

12 MR. HOWARTH: And I'd
13 like to approach, Your Honor, and show Mr. Eichenwald
14 the document.

15 THE COURT: Mm-hmm.

16 BY MR. HOWARTH:

17 Q Do you recognize that document, sir?

18 A Yes. Well--I know what it is.

19 Q It's a copy of--

20 A I haven't seen it in a long time.

21 Q All right. And you had told us in the course of your
22 direct examination about a \$200,000 dollar payment that
23 you made to--

24 A No. I didn't talk about a \$200,000 dollar payment.

1 Q I mis-spoke. A \$2,000 dollar payment. I got confused
2 in the other figures. A \$2,000 dollar payment that you
3 made to Justin Berry in June of the year 2005, is that
4 correct?

5 A June 8, yes.

6 Q Now you have explained to us how that came about. And
7 you've told us, well I wasn't really working as a
8 newsman. I was working as a private citizen, is that
9 right?

10 A Mm-hmm.

11 Q And if you had been working as a newsman, would you
12 have been able to do that?

13 A I couldn't have been doing 90 percent of what I was
14 doing.

15 Q Right.

16 A I would not have been able to be misleading about who I
17 was. I wouldn't have been able to do this. I wouldn't
18 have been able to have the conversations I had.

19 Because the conversations--I was adopting a persona to
20 try and keep the conversations going. And all of that
21 as a journalist, if I was a journalist, would have been
22 unethical.

23 Q Now when you came to change from a private citizen or
24 into a newsman, at the July 3, party where your best
25 friend came over--

1 A July 5. I mean, that--that was when it starts
2 enumerating in my head, it's not until July 5. I
3 didn't know that I would ever see Justin Berry again.
4 So July 5 is the real--

5 Q Well July 5, is the operative date. You switched from
6 being the private citizen to being the investigative
7 journalist, am I right?

8 A Yes.

9 Q And you contacted the Times and you got permission to
10 do that?

11 A Yes.

12 Q Did you tell the editors of the New York Times, back in
13 2005, that incidentally while I was working as a
14 private citizen, I paid this source--er, I sent this
15 source, \$2,000 dollars?

16 A No, I didn't.

17 Q When you wrote your article, the December 19, 2005
18 article?

19 A Mm-hmm.

20 Q Did you tell your readers in the course of that
21 article, incidentally, early on when I was meeting
22 Justin Berry, I sent him a check for \$2,000 dollars?

23 A Well, as I said, I handed it to him and he handed it
24 back. But, no. I didn't say that.

25 Q As soon as you handed it to him, he handed it back?

1 A My testimony in my direct explains the timing of that.

2 Q Yes, it wasn't handing it to him and him saying, I

3 don't want it; here it is back.

4 A Okay.

5 Q Am I right?

6 A No. I did no disclose it in the article.

7 Q And, uh, Mr. Eichenwald, have you just recently come

8 into some problems about that with the New York Times?

9 A I don't work at the New York Times.

10 Q I understand that. Were you aware that Tuesday of this

11 week, the New York Times published an Editor's Note

12 that concerns you?

13 A Yes.

14 Q All right. Tell the jury, please, what an Editor's

15 Note is?

16 A And Editor's Note is something that runs when the paper

17 decides there is additional information relating to a

18 story that they need to disclose.

19 Q And did they run this Editor's Note about you?

20 A Yes.

21 Q Did they run this Editor's Note saying Mr. Eichenwald

22 did not disclose to us, the \$2,000 dollar check,

23 correct?

24 A (Inaudible).

1 Q Did they run in that story, that Editor's Note, Mr.
2 Eichenwald did not disclose to his readers about the
3 \$2,000 dollar check?

4 A Yes.

5 Q And would it be a fair reading of that Editor's Note
6 that it was critical of you?

7 A That would be a fair reading of it.

8 Q Wouldn't that concern you, sir? That was on page A-2
9 of Tuesday's New York Times. Wouldn't that be of
10 concern to you as whether you consider yourself a
11 journalist or an author, or whatever? You are in the
12 publication media?

13 A I'm not sure. What do you mean? Why would it be a
14 concern to me?

15 Q The New York Times criticizing you. You worked there
16 20 some years.

17 A The New York Times did not criti--you asked me if it
18 could be read as criticism? The New York Times did not
19 criticize me. The New York Times revealed, you know,
20 ran an Editor's Note supplying the additional
21 information. There is no criticism in the Editor's
22 Note. Whether that can be read--you asked me, could it
23 be read as criticism? And I agreed. Some people have
24 read this as criticism.

1 Q There is just one para--last paragraph in it. Tell me
2 if you think this is criticism or not? And it is just
3 one paragraph long. The check should have been
4 disclosed to editors and readers. Like the other
5 actions on the youth's behalf that Mr. Eichenwald, who
6 left the Times last fall, described in his article and
7 essay. You don't think that is criticism?

8 A As I say, it can be read as criticism and it--maybe it
9 is criticism. To me, it is criticism is--would be more
10 of a strong stance. Editor's Notes are not meant to be
11 criticism. They are not meant to be opinionated. They
12 are meant to lay out the facts and then say why that
13 information now needs to be told.

14 Q That came about because of this case, didn't it?

15 A Yes, it did.

16 Q And now here you are, testifying in this case?

17 A Yes.

18 Q And you took great pains did you not--although Mr.
19 Baker is asking the questions, you only get to answer
20 them. But you took great pains to defend the fact that
21 what you did with that \$2,000 dollar check was fine.

22 A I didn't defend anything. I answered Mr. Baker's
23 questions.

24 Q Let's--let's go back to the beginning of this
25 investigation which I think takes us back to a time

1 when you said, you were thinking about writing a book.
2 You had--the editors at the Times had said, you know,
3 maybe you ought to go off and write books, right?

4 A No.

5 Q How do I misstate the facts?

6 A The editors of the New York Times--their approach is
7 more, please do not go off and write another book.
8 Whenever I am writing a book, that means my attention
9 is divided. And so the editors of the New York Times
10 are not--are not usually big supporters of book writing
11 projects. But all of--many of us still do them. It's
12 the nature of being a journalist.

13 Q Well, I could have gotten your testimony entirely
14 wrong. I had the impression that you said that your
15 editor said, well why don't you write books full time.

16 A I'm sorry. I have two editors. I have my editors at
17 the New York Times. And I have an editor at my
18 publishing house.

19 Q Okay. It's your publishing editor that said--

20 A My publishing editor, yes.

21 Q Okay. Your publishing editor says, why don't you give
22 up this reporter job and become a full-time author?

23 A It wasn't said that way to me. It was the structure of
24 the deal and what was said to my agent, who in turn
25 said it to me.

1 Q But that was the gist of it, wasn't it?

2 A That was the gist of it--

3 Q Okay.

4 A --yes.

5 Q And the first thought you had was, perhaps a book on

6 Terrorism?

7 A No, it was based on that book. I had already--I had

8 already had a discussion with the people at Random

9 House. And had described the kind of book that I

10 wanted to do. And they had already--and they had come

11 back--I mean, the offer was based on a book. It wasn't

12 based on, Gee. Write a book about something and we'll

13 give you a lot of money.

14 Q Well what kind of book were you thinking about writing?

15 A A book about Intelligence and Terrorism in the

16 aftermath of 911.

17 Q And you ended up at the end of the day, as they say,

18 with a New York Times article about Justin Berry and

19 child pornography. It's--I mean we started out with

20 International Terrorism and International Finance, and

21 we end up with a book about--excuse me, a newspaper

22 article about Justin Berry and child pornography.

23 A Well, Mr. Howarth, I--I do two jobs. This is not the

24 end of the day. The

25 end of the day is my

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book on Intelligence and Terrorism will be published. That is still underway. The impact of the Justin Berry episode and the following stories that I wrote that spun out from that, related to child pornography, wasn't that I was proceeding down a path related to my book project. In fact, what I might say about that is that it was served to such a destruction--distrac tion, it--it slowed me down.

Q What served as a distraction?

1 A The exper--the rather intense experience with Justin
2 Berry. And working on that story, certainly limited my
3 work during that time on my book project.

4 Q But you were working strictly as a private citizen
5 until that July 5, conversation with your editors in
6 New York. Am I right?

7 A Um, yes. I mean, there are--there are times when, you
8 know, I begin to get a sense of there is some sort of
9 story here. But it is like wading into the pool, you
10 know? You're not in the pool until you finally get
11 there. And that moment of transition when I am going
12 to do a story was on July 5.

13 Q And when did you first come to know that there was
14 something involved here with child pornography? How
15 long before July 5? Did you get an inkling that--

16 A Well, June--

17 Q --there's something going on with child pornography,
18 and Webcams, and the Internet?

19 A Late May/early June. I didn't--Webcams I didn't know
20 until--for a while. I--because remember, I was working
21 off of--originally I was working off of a digital
22 photo--I'm sorry, I actually now know it's a film
23 photograph. A photograph which I think is on a board
24 somewhere just of Justin Berry's face. And so the
25 whole evolution of what it was, I was dealing with and

1 A I'm just saying, I was doing other work and there was a
2 lot of work involved. And so I--

3 Q You can justify cashing the paycheck, right?

4 A Yeah, well--but I'm just saying, you are saying I spent
5 a lot of time. I'm going, well I don't really know how
6 much it was. I was having conversations off and on
7 with him.

8 Q Well would it be fair to say you--you spent 20 or 30
9 hours, between the beginning of May and the beginning
10 of July, in trying to locate Justin Berry when--even
11 when you just had a name and you were doin' searches?

12 A I can't tell you the amount of time I spent.

13 Q Cannot?

14 A No.

15 Q Can't even estimate it for us?

16 A No. I wasn't keeping track of it that way.

17 Q It was more than a few minutes?

18 A It was definitely more than a few minutes. It was--it
19 was--I'll do my best to answer your question. It was
20 not the most time I had ever invested in something that
21 was designed for, you know, human purposes. But it was
22 certainly not the least.

23 Q Somehow or another, a Tallahassee law firm became one
24 of your--your early leads in this. Am I correct?

25 A Mm-hmm.

1 Q Yes?

2 A Yes.

3 Q Okay. And you said you found out that--that
4 Tallahassee law firm doesn't exist?

5 A Yes.

6 Q And you found that out by going online to a website
7 called Martindale Hubbell?

8 A No. I did a Nexis search through the Martindale
9 Hubbell Directory.

10 Q That's what I mean. It's the same thing.

11 A Yeah.

12 Q Martindale Hubbell is a publishing company, first and
13 foremost. Am I right?

14 A Yes.

15 Q And they publish these big Web books for every State in
16 the United States. Sometimes three or four States if
17 they are smaller. Am I right?

18 A Mm-hmm.

19 Q Yes?

20 A I--I don't know. I only deal with them online.

21 Q Okay. 'm just asking you. We can't have uh-huh or huh-
22 uh.

23 A I'm sorry.

24 Q That's all right.

25 A I apologize.

1 Q That's all right. All right. Are you aware, sir, that
2 Martin Hubbell does not list every attorney in the
3 United States?

4 A Yes.

5 Q As a matter of fact, you've got to pay to get
6 Martindale Hubbell?

7 A That's why I called Information in Tallahassee.

8 Q I just wanted to clarify that.

9 A Okay.

10 Q Now while you are doing this work, there were many
11 times when you hit what you thought were dead ends. Am
12 I right?

13 A Yes.

14 Q One of those times was when you kind of figured you
15 could trace Justin back into mexicofriends.com. And
16 then you found out that they weren't in existence
17 anymore? Didn't you feel that maybe you hit a dead end
18 there?

19 A No. Because I wasn't trying to locate Justin Berry
20 when I was doing that effort. I was trying to determine
21 what the nature of this purported INTERPOL fraud
22 investigation was. And so whether or not a particular
23 site came up when I looked for it, was irrelevant to
24 me.

1 I just wanted to
2 know as much information as I could before I called the
3 Tallahassee law firm, which would ob--you know, if
4 they--if--had any of the posting been true, would have
5 then been able to tell me well, here's the full detail
6 of that stor--of what we are talking about.

7 Q I am sure you are trying to answer my question. But
8 what I am--what I am really trying to ask you is,
9 weren't there times once you decided you were looking
10 for a Justin--

11 A Okay.

12 Q --that--that you kind of like hit a wall? I mean, you
13 felt--now what am I gonna' do?

14 A Um, yeah. Well there were times when things I tried
15 did not work.

16 Q But you didn't give up?

17 A No.

18 Q Kept going for it?

19 A Yes.

20 Q Eventually, you felt that you had Justin Berry?

21 A Well, within a day of starting, I felt that I had an
22 Instant Message address.

23 Q That's when you got blocked a couple of times?

24 A It was in--it wasn't like it took one day. I mean it
25 was like in the next few days that happened, you know.

1 It was--I found the Instant Message address the day I
2 started looking for him. And then I loaded that in and
3 it was either the next day or sometime like that. But
4 I was on the computer at the same time someone was on
5 under that screen name.

6 Q Eventually you had some kind of messaging between you
7 and a person purporting to be Justin or Justin Berry,
8 am I right?

9 A Purporting to be Justin. I didn't know the name Justin
10 Berry.

11 Q All right. And this Justin--this is the same Justin
12 you eventually paid the \$2,000 dollars to?

13 A I don't know if the person I spoke to the first time,
14 was the person who--I don't know if I was speaking to
15 Greg Mitchell or Justin Berry.

16 Q You didn't know who you were speaking to?

17 A No.

18 Q You could have been speaking to me?

19 A True. In fact, I could have been speaking, actually,
20 other people that I am no aware of at this point.

21 Q You could have been speaking to a police officer.

22 A I could have been.

23 Q Are you aware, sir, of what are called in police
24 circles, if not journalistic circles, internet sex
25 stings, s-t-i-n-g-s?

1 A Yes.

2 Q Yeah. And that's where a police officer who is very
3 computer savvy, gets on the Internet and poses as an
4 under 16-year-old boy or girl? Right so far?

5 A Mm-hmm.

6 Q Yes?

7 A I'm sorry.

8 Q And then that person tries to set up some kind of a
9 sexual liaison or a payment, or something in exchange
10 for sexual favors?

11 A I don't know anything about setting up payment. I do
12 know about setting up a sexual liaison. I've seen
13 these on Dateline NBC.

14 Q I guess Chris Hansen has a whole program on it now,
15 doesn't he?

16 A It seems like it's all he does now, so.

17 Q Well he's from here.

18 A Really?

19 Q Weren't you concerned when you heard that we're
20 auctioning off Justin for a night in bed, and you sent
21 \$2,000 dollars to that Justin supposedly to pay for
22 that night, as far as he was going to be concerned, to
23 pay for that night with him? Weren't you--

24 A Now--now, wait, wait, wait, wait. That's absolutely a
25 misrepresentation of my testimony. That is not what I

1 get somebody to say something, or do something, that
2 would tell me for sure what I was dealing with,
3 Q According to your testimony, it would be untrue that
4 Justin Berry electronically said to you, if you want to
5 talk to me, if you want the privilege of talking to me,
6 I want \$2,000 dollars for it. Did that happen?
7 A No, the \$2,000 dollars was my figure.
8 Q I understand, but that never happened?
9 A No. He just asked for donations.
10 Q But it was not in exchange for talking to you?
11 A It wasn't expressed in that way, no.
12 Q Eventually, you came up with a Greg Mitchell in Dublin,
13 Virginia?
14 A Yes.
15 Q And you had good reason to believe that at that point
16 in time that Greg Mitchell was a sexual predator?
17 A I--that was one of the concerns I had. The man I found
18 on--in my search was a 36-year-old man. And based on
19 the--the--Justin was supposed to be a teenager. So
20 that was certainly in the realm of possibilities.
21 Q Actually, maybe probabilities?
22 A That he was a sexual--I believed he was a sexual
23 predator, but I had no basis for decision--this
24 actually was a source of a very lengthy conversation

1 between my wife and I. We were out by the pool, and
2 I--

3 Q Well, you really answered my question.

4 A I'm sorry.

5 Q If you feel it's necessary to go on, you can. But--

6 A Well, I was just agonizing over the fact of are we
7 dealing with, um, you know, the older boyfriend of a
8 troubled young man and this is his support network? Or
9 are we dealing with a sexual predator who is abusing
10 the minor?

11 Q And you had an address, right?

12 A I had an address, yeah.

13 Q Did it ever occur to you at that time or within the
14 next few days, that maybe it would be a good idea to
15 call the police down in Dublin, Virginia? And ask them
16 whether they've got any investigation or they know
17 anything about this, because we've got a suspicious
18 circumstance here.

19 A I had no evidence of anything. Every piece of
20 information I had was that--for example. On Justin's
21 website that I saw, you know, there were references
22 that he was 18. I had nothing but a suspicion. And I,
23 you know, looking--looking back on it, I'm not sure if
24 I should have called the police, but I'm not exactly

1 what I would have told them. Because it was simply
2 nothing more than, this is suspicious.

3 Q Well wouldn't that be up to them to decide, after you
4 told them I've got something suspicious here?

5 A There is certainly an argument to be made that at that
6 point I should have called the police.

7 Q But you didn't.

8 A I--but I did not. I didn't think I had anything to
9 tell them other than I was suspicious.

10 Q And certainly it would not be because of the fact that
11 it might kill your story?

12 A I had no story. And bear in mind, Mr. Howarth, we did
13 contact the police.

14 Q Who is we?

15 A We, the New York Times.

16 Q When?

17 A In the month of July when there was a story. So within
18 days of there being, you know, the beginnings of a
19 story, we did contact the police when we knew of
20 ongoing criminal activity. So contacting the police
21 would have had no effect on a story.

22 Q Did you contact them?

23 A No. I explained the circumstances under which the
24 Federal--the FBI was contacted.

25 Q It wasn't you that called?

1 A No.

2 Q Now the \$2,000 dollars that you sent, what would have
3 happened if--in your mind at that time, what would have
4 happened in your mind--what would have happened if you
5 just never heard from anybody again?

6 A So be it.

7 Q So be it? \$2,000 gone? Right?

8 A Well, I think I testified--I don't remember. I think I
9 testified that it's--while it's not unusual for my wife
10 and I to give away money, in this instance because we
11 were kind of basically throwing it out there and maybe
12 losing it all together. I decided it would be a good
13 idea to offset that by agree--by doing a speech that I
14 hadn't been planning to do at a local community
15 college.

16 Q Yes, you did. You did talk about that. Are you saying
17 to us that, well if it wasn't for this offsetting
18 speech at the community college for which you were
19 going to get \$2,500 dollars for it, am I right?

20 A Mm-hmm. Correct, I'm sorry.

21 Q One-quarter of your usual fee, right? If it hadn't
22 been for that fortuitous circumstance, you wouldn't
23 have sent the \$2,000?

24 A I would have sent the \$2,000 anyway.

1 Q Then why did you enlighten us about the community
2 college, and the \$2500, and one-quarter of your fee?

3 A Because that gives an understanding of where the number
4 2000 came from. I mean in truth, in the circumstances
5 we were in, facing a situation where we were looking at
6 the possibility that a child was being abused, I'm not
7 sure what the limit would have been on what we would
8 have sent in the hopes that this would work out. There
9 would have been a limit. But, you know, you've eluded
10 to the fact that I've made money on my books, and I
11 have. My wife and I do not drive fancy cars, but we do
12 give away a lot of money.

13 Q Good for you. Eventually what happens is, that you
14 find a way in which you think that you and Justin can
15 come together at LAX. That's the main airport in Los
16 Angeles?

17 A That's correct.

18 Q And you find this way, am I right?

19 A You mean--

20 Q And you think he's coming?

21 A I don't--what do you mean by this way?

22 Q A method that you two can get together and talk.

23 A I convince him to meet me in LA.

24 Q Yes. That's what I meant.

25 A Yes.

1 Q I'm sorry that I'm inarticulate. And you have told us
2 about the rather clever plan you put together for the
3 two-seater car, and top down, and he's got to put the
4 bag in the trunk. And did you ever consider having
5 somebody else around, even just to watch?

6 A I have already acknowledged that there came a point
7 when I realized I had been reckless in this. And those
8 circumstances--I mean, I look back on those events and,
9 you know, standing in the bedroom with Theresa and her
10 expressing her concern for my safety, and I really do--
11 I realize there were things that I did in that
12 circumstance that I would not do again.

13 Q When you first met Justin, you got in the car and you
14 said, I'm going to tell you something--what? That will
15 shock you? I'm trying to remember your words?
16 Something that will surprise you, something that will
17 shock you?

18 A Mm-hmm.

19 Q Am I right?

20 A Correct.

21 Q And the first thing you told him is, I'm not gay.

22 A Correct.

23 Q I'm married, right?

24 A Mm-hmm.

25 Q Yes?

1 A Correct.

2 Q All right. I've got children, am I right?

3 A Correct.

4 Q Now you're going to come out to him now as an author,
5 am I right?

6 A Mm-hmm. I'm sorry, I'm still mumbling.

7 Q Why--why the emphasis on I'm not gay? Are there no gay
8 investigative journalists?

9 A At the time I believed based on the circumstances that
10 Justin was gay. I believed that Justin was a--was not
11 unfamiliar with meeting with men who were interested in
12 him sexually. And so the very nature of this meeting,
13 while in my mind, you know, it was going down one path.
14 I suspected that in his mind, he believed this was
15 simply meeting another person who was interested in him
16 sexually.

17 And by eliminating
18 that in the very beginning, and also stating that I had
19 a family and my family knew where I was, it was
20 all--and who I was meeting with and what I was doing,
21 it established very, very clearly to him that this
22 was--that this was no secret, that I was not hiding
23 something and this was not designed--this was not what
24 he had anticipated in any way.

1 Q You took pains at that time to tell Justin Berry that
2 you were an author, is that correct?

3 A Well I handed him a copy of my book which I thought
4 would be the best way to identify myself because it has
5 my name and my picture.

6 Q But you were telling him, I'm an author; I write books?

7 A That's who I am, yes.

8 Q You didn't say to him primarily, I'm a New York Times
9 journalist?

10 A It all came--what I did was, I handed him a copy of
11 Conspiracy Of Fools because it was--I didn't think that
12 this kid was going to necessarily believe the
13 circumstance he was in. Because, let's face it, he was
14 in a world of--where people are lying all the time.
15 And I felt that I needed to prove to him very quick--I
16 could show him my driver's license. You know, again, I
17 saw his driver's license. But that wouldn't establish
18 anything. And this was to establish who I was and the
19 nature of who I was.

20 Q And certainly it didn't have anything to do with any
21 plans for a book.

22 A I don't even know what possible book I would write at
23 that point.

24 MR. HOWARTH: May we
25 approach, Your Honor?

1 (At 12:09 p.m., bench conference.)

2 MR. HOWARTH: I just
3 didn't know when you wanted to break for lunch and I'm
4 not (indiscernible) this is a period where--

5 THE COURT: Okay,
6 well why don't we keep going.

7 MR. HOWARTH: --a
8 whole different subject.

9 THE COURT: Okay. I
10 mean I'd like to get done with the cross before lunch
11 if we can, but we'll see.

12 MR. HOWARTH: Okay.

13 THE COURT: Okay.

14 (At 12:09 p.m., bench conference concluded.)

15 BY MR. HOWARTH:

16 Q You indicated that one of the first things that you did
17 with Justin Berry after giving him some lunch and that,
18 was you told him, I have to have my money back, am I
19 right?

20 A We spoke about the money on the second day.

21 Q Second day, okay. But you said, you've got to give me
22 the money back?

23 A I didn't say it that way. It wasn't about getting the
24 money back. It was--it was truly about pushing him in
25 a direction where he understood the nature of what he

1 was doing. That people providing him money wasn't
2 good. And when I said--what I said to him again, I
3 mean it sounds very hyper-religious and I didn't mean
4 it that way. But these are the way--these (sic) are
5 what I said, that we sent you that money to save your
6 soul. It was sent for all the best of reasons and you
7 took it for the worst. You've made it bad. You've made
8 it evil money and you have to give it back. And that's
9 what I said.

10 Q That's logic. Is that correct?

11 A My logic at the time.

12 Q And what you said on direct examination was, it wasn't
13 about the money.

14 A The request?

15 Q Yeah.

16 A No, it was not.

17 Q Wasn't about the money. All right, we have the party,
18 we have the conversation with your friend about the
19 fact that you can now become a reporter.

20 A No. It was not about how I can now become a reporter.
21 You know, as far as I was concerned, my interactions
22 with Justin Berry were probably--were now going on the
23 downside. I mean there were--there was--I knew that he
24 was not a child. I knew that he was an adult. I had
25 done what I could to infuse him with some sense of self

1 respect. And I believed that he was heading back to
2 Mexico. I might hear from him again in the future when
3 there are problems, but Justin Berry was not--it was an
4 episode that had pretty much been resolved.

5 Q When you talked to your editors in New York, after you
6 found out that--found out more about Greg Mitchell, you
7 found out more about Taylor, you found out about Doo
8 and Carey (sic). That all comes in kind of a sequence.
9 I mean, finding out about those people, doesn't it?

10 A Um, yes.

11 Q All right. And you told you editors then, we've got to
12 take Justin Berry--you used the term, Feds, am I right?

13 A Mm-hmm.

14 Q Got to take him to the Feds?

15 A Mm-hmm.

16 Q Yes?

17 A Correct.

18 Q Okay. And the reason for that was, we got to get him
19 to name the sexual predators?

20 A Well it was more. We were aware of children who were
21 being exploited and almost certainly abused. And I did
22 not feel that I could, under any circumstance, just
23 stand by and let that unfold.

24 Q You made a determination that Justin Berry might need
25 legal counsel if that was going to happen, right?

1 A I did not.

2 Q Well you indicated, sir, that you called Steve Ryan,
3 didn't you?

4 A Correct.

5 Q And wasn't that to see if Justin Berry needed legal
6 counsel?

7 A That was--my question to him was what would happen if
8 Justin--if this hypothetical person went to the Justice
9 Department and told the story. This was a journalistic
10 question, because Justin Berry was at that point not an
11 on-the-record, source. And there are--there are issues
12 before I talk to him and raise this, I had to
13 understand the potential consequence of what I was
14 doing to this source.

15 It never occurred to
16 me until the words came out of his mouth that Steve
17 Ryan would represent him. I thought Steve Ryan was a
18 white collar defense attorney. And so it just seemed
19 sort of a far-fetched thing until--until Ryan just
20 said, you know, is this hypothetical? No. Fine, I'll
21 represent him.

22 Q And you had worked with Steve Ryan before on the Enron
23 case? Or the--

24 A I interviewed him--

25 Q --Enron story?

1 A --in the same capacity. I interviewed him as a legal
2 expert and quoted him in news analyses about Enron-
3 -about Enron. That was actually the first time I had
4 encountered him. And I was very impressed with his
5 understandings of law and his abilities to see cases
6 through in terms of their--how they would unfold in a
7 prosecution. And so he was the--I'm not sure if he was
8 the first person I thought to all, but he was the first
9 person I reached that I thought to call.

10 Q And Steve Ryan said to you, and again not the exact
11 words, Well, in any other administration, or I guess
12 you would say in any other Justice Department, they
13 wouldn't prosecute this young man, but in this one they
14 probably would.

15 A Correct. Yes, that's true.

16 Q I guess Steve Ryan is a Democrat.

17 A Actually he is. He formerly worked on Capitol Hill on
18 the Democratic staff.

19 Q All right. Now when Steve Ryan and you were talking
20 about they might prosecute, they might prosecute Justin
21 Berry for what?

22 A Justin Berry had very quickly confessed to me, to a
23 series of crimes he had committed in his life. I
24 didn't know of the truth of any of them, but he

1 confessed to credit card fraud. He confessed to
2 bringing Taylor into child pornography--

3 Q In other words, enticing a minor into child
4 pornography?

5 A Right. That had happened very recently. He--

6 Q Credit card fraud was stealing numbers over the
7 Internet and buying goods?

8 A No. It was actually much more simple than that.
9 Remember, he had a list of credit card numbers from the
10 adults who were paying him. And he just took those
11 credit card numbers and bought things with them.
12 Somewhere in the neighborhood of \$5,000 dollars worth
13 of materials. Like, PDAs and I don't remember what
14 that stands for.

15 Q Got me.

16 A Like a Palm Pilot.

17 Q All right.

18 A He had--and he described a series of other criminal
19 activities that he had committed and I knew that if he
20 went to the government, he was going to have to admit
21 to all of those. But the big issues were, of course,
22 you know, the child pornography issues. There were
23 issues about maybe attempted insurance fraud.

24 Q Or didn't you know of them?

1 A I'm not sure at that point if I knew about his little
2 insurance caper that sounds like the most ridiculous
3 conspiracy of all time. I may have known about it at
4 that point, I'm not--I'm not sure. Justin--remember,
5 Justin was going through drug withdrawal. And so
6 conversation with him was exceedingly difficult. He--
7 he couldn't stay on a topic for more than, you know, 30
8 seconds before suddenly moving on. So I was sort of
9 piecing things together as I could. But, again, I
10 don't know if he told me about the insurance fraud at
11 that point.

12 Q What about smuggling illegal aliens?

13 A Again, I don't know if he told me about that--that
14 soon. I know he told me about that. Certainly I knew
15 about those prior to his meeting with the Justice
16 Department.

17 Q What about money laundering?

18 A Justin wouldn't know what money laundering was.

19 Q Well he might--he'd know the facts that constitute
20 money laundering?

21 A He--he knew that he had spent the money he had obtained
22 illegally. But he wouldn't--there is no way that he
23 would have known that spending, you know, taking the
24 money that he spent illegally--er, that he obtained
25 illegally and spending it would be classified as money

1 A Yes.

2 Q So that Mr. Berry would have some respect for him?

3 A Steve Ryan said to me, you never appreciate what you
4 get for free. And, you know, he was in a
5 circumstance--I believe he charges something like \$650
6 dollars an hour. This was not a man who needed the
7 money. But what he did need is for Justin to
8 understand--and this is the words he said, that--that
9 I'm providing him something of value. And that he has
10 to dig deep to get that value. And paying that
11 retainer was actually very difficult for his family.

12 Q But not for Justin?

13 A No. It was very difficult for Justin.

14 Q He didn't pay it, did he?

15 A The retainer?

16 Q Yeah.

17 A Again, he borrowed the money. His grandmother sold a
18 piece of property. He borrowed the money from his
19 grandmother and paid it, as I understand it. He had no
20 money at that point. He had left his business and it
21 was gone.

22 Q All right. I--I don't want to dwell on this, but it--
23 it's, you know, the \$10,000 dollars was for respect. I
24 mean, is there a price tag on respect? I mean, \$10,000
25 instead of a \$1,000?

1 A This was not my judgment or determination.

2 Q That's fine.

3 A This is Steve Ryan's.

4 Q I think I got this wrong, I honestly do.

5 A Okay.

6 Q But--because I try to listen and write at the same time
7 and it's tough. Did you say at one point, just when
8 you were talking about that retainer that Steve Ryan
9 said to you that, I must tell Justin Berry to stop
10 cooperating with you? I could have written down
11 something you said just the opposite of.

12 A No, that's--that's--prior to his--to his actually
13 becoming Steve Ryan's client. And what he said was, he
14 asked me if I had gathered all the information I
15 needed? And I said, no. And, you know, I knew that
16 things were going through his committee at the Manatt
17 Phelps and Phillips, that's his firm, to make a
18 judgment of whether or not they were going to represent
19 this kid. And he said, well you better hurry. Because
20 when I represent him, the first thing I'm going to do
21 is tell him to stop cooperating with you.

22 Q He did continue to cooperate with you, did he not?

23 A Not with--I mean, there were no more records or things
24 like that. There were--it was basically, by that
25 point, conversation. I had obtained all of the--

1 (At 12:22 p.m., testimony interrupted by
2 witness's cell phone.)
3 --I apologize again. I thought I had turned this off.
4 I don't think I understand my phone well enough. I-
5 -I'm sorry, I lost my train of thought.
6 Q So did I.
7 A Okay.
8 Q So we'll forget it.
9 A Okay.
10 Q Happens--
11 A I apologize.
12 Q That's all right--
13 A I thought--
14 Q --it happens.
15 A --I turned it off.
16 Q It's okay. There came a point in time when there was a
17 threatening e-mail from Greg Mitchell. Now was that
18 threatening e-mail, about coming to your house, was
19 that sent--
20 A Oh.
21 Q --or phone call? I'm not sure which it was.
22 A No, it was an e-mail. It wasn't--he wasn't
23 threatening. He was just saying he was going to come
24 to my house.

1 Q Did that not sound threatening to you under this
2 totality--
3 A It--
4 Q --of the circumstances?
5 A --it scared me.
6 Q Sure.
7 A It scared me a lot.
8 Q You've got kids there.
9 A Yes.
10 Q You've got a wife there.
11 A And I was very angry at myself.
12 Q And you didn't want Greg Mitchell comin' around them?
13 A No.
14 Q Did you notify the Dallas or whatever would have been
15 the appropriate police department about that threat?
16 A I did not.
17 Q Is that one of the things that you might look back at
18 now and say, I'm not sure that I acted totally--
19 A What I--
20 Q --(indiscernible) common sense?
21 A --what I did is, I called the New York Times. And we
22 had a discussion about what I should do. They--we had
23 a discussion about whether or not they would hire
24 security for my house. I don't--I don't--the
25 conversation didn't get very far. Because before that

1 was resolved, Justin had this brainstorm. I thought it
2 was brilliant, to have the money wired to Bakersfield.

3 Q That's what you called the charade?

4 A Yes. Well, no. That was--the charade was trying to get
5 more than \$1,000 dollars.

6 Q All right. But then the--the brainstorm is, we'll send
7 the money to Bakersfield, correct?

8 A Mm-hmm. Correct.

9 Q Yes? And that way Greg Mitchell will think that Justin
10 is in Bakersfield?

11 A Correct.

12 Q But if Greg Mitchell is after you, or your wife, or
13 your children, what difference does it make where
14 Justin Berry is?

15 A Greg Mitchell could not have cared less about me, or my
16 wife, or my children. Greg Mitchell was going to come
17 to my--his e-mail was, I'm going to come to your house
18 if you don't tell me where Justin is. Greg Mitchell
19 was a person who was involved in criminal activities
20 surrounding this individual, Justin Berry, and that
21 person had vanished. And all he cared about was,
22 where's Justin?

23 Q The--there comes a situation where Taylor comes into
24 contact with Greg Mitchell and says that Greg Mitchell
25 is going to take him to Boston?

1 A Yes.

2 Q And--and Justin Berry just really falls apart when he
3 hears that?

4 A Yes.

5 Q Because he thinks Greg Mitchell is going to molest
6 Taylor, am I right?

7 A That's correct.

8 Q And we--you now know where Greg Mitchell is, right?

9 A That's correct.

10 Q Did you think at that time about calling the police to
11 prevent Greg Mitchell from taking Taylor to Boston?

12 A Absolutely.

13 Q Did you?

14 A Did I call the police? No. What I did is, I called
15 the New York Times. Acting as a reporter, I cannot
16 just willy-nilly pick up the phone and call the police.
17 I am acting on behalf--not as a private citizen. I am
18 acting on behalf of an institution that is guided by
19 journalistic principles. And whatever decision I made
20 had to be an institutional decision.

21 There was a very
22 strong question about calling the police and what
23 impact that would have on a confidential source
24 relationship. And I am sure everyone is very aware,
25 journalists go to jail not to reveal a confidential

1 source relationship. I don't know what the answer
2 would have been, had circumstances unfolded another
3 way. But this was a very, very tough decision which is
4 why it required the legal department, and news editors,
5 and all of us on the phone simultaneously trying to
6 come up with an answer.

7 Q A very, very difficult decision regarding you calling
8 the police in Dublin, or the State Police in Virginia,
9 am I correct?

10 A I'm not sure. If there was a call made, I don't think
11 it would have been from me. I think it would have been
12 from the New York times.

13 Q Well how about from Justin Berry?

14 A I don't understand your question?

15 Q Why couldn't Justin Berry have called the police?

16 A I suppose he could have.

17 Q But he didn't.

18 A No, he didn't.

19 Q But he's actually falling apart--

20 A He--Justin (indiscernible) the idea--actually, I'm
21 going to reverse that. I'm now thinking about that day.
22 The idea that this--this mess of a human being who was
23 falling in--in--into 23 pieces, will be able to pick up
24 the phone and actually have a police officer listen to
25 him right before thinking that he was insane, was very

1 money? Who provides the Web posting? Who provides
2 the--the means by which that child can sit in his room,
3 flick on a camera and get paid for degrading himself.
4 Q Eventually you saw a video, Justin sitting on a bed.
5 And you say Mr. Gourlay sitting next to him. Am I
6 right?
7 A Correct.
8 Q Was there any sexual contact?
9 A Between the two of them?
10 Q Yes.
11 A No, there was none.
12 Q Both fully clothed?
13 A Um, at first.
14 Q Well, while they were still there together?
15 A While they were still there together, yes.
16 Q Yeah, they were both fully closed--clothed, while they
17 were still there, together?
18 A Yes, sir.
19 Q And then you say to us that Mr. Gourlay leaves the room
20 or leaves the--the--
21 A Field of view. I can't--
22 Q --view of the camera?
23 A --I can't see anything other than the field of view.
24 Q Yeah. You don't know where he went?
25 A No, I don't.

1 Q And Justin proceeds to do a pornographic act, am I
2 right?

3 A Yes.

4 Q Do you have (indiscernible) video?

5 A I'm sorry?

6 Q Do you have the video?

7 A I do not.

8 Q Do you know where it is?

9 A I don't.

10 Q No idea?

11 A No idea.

12 Q Did you seek to preserve it in some way after you saw
13 it?

14 A 'Cuz that would have been a felony. I cannot obtain,
15 preserve child pornography.

16 Q Well, I'm just talking about the first part.

17 A I don't know. Again, I'm not a computer guy. I don't
18 know how to break a file like that. And--

19 Q Well, you were with Justin at that time, weren't you?

20 A I was, yes.

21 Q He's--he's a computer guy.

22 A Yes, but remember. I wasn't in the process of trying
23 to preserve evidence. I was working on a news story.

24 Q July of 2005, on your way to this--

1 THE COURT: Will
2 counsel approach, please?

3 MR. HOWARTH: Yeah.

4 (At 12:31 p.m., bench conference.)

5 THE COURT: I'm not
6 going to hold you to this. How much longer do you
7 think your Cross is?

8 MR. HOWARTH: Can I
9 just look at my notes quickly before I answer that,
10 because I'm going from my notes?

11 THE COURT: Well, all
12 I'm saying is if you're going to be done in say five or
13 ten minutes, I'd keep going.

14 MR. HOWARTH: Okay.

15 THE COURT: Otherwise
16 I'd say, let's break for lunch. What do you want to
17 do?

18 MR. HOWARTH: I
19 really want to go into this trip to Washington.

20 THE COURT: Go ahead.
21 All right, then we'll break after that.

22 MR. BAKER: Then
23 we'll--

24 THE COURT: Then
25 we'll break after that.

1 MR. HOWARTH: Okay.

2 THE COURT: Its 12:35

3 right now. So--I mean, I don't want to keep the jury

4 out here until 1:00.

5 MR. BAKER: They look

6 uncomfortable.

7 THE COURT: Yeah, I

8 know, so. I know you want to--

9 MR. HOWARTH: Yeah,

10 but I have stuff after the trip to Washington.

11 MR. BAKER: Can't we

12 just break now, then?

13 MR. HOWARTH: That

14 might be--it's a good time.

15 THE COURT: If you

16 want to break now, we'll break now.

17 MR. HOWARTH: I'd

18 really like to because--

19 THE COURT: Okay.

20 MR. HOWARTH: --this

21 is a whole new subject.

22 THE COURT: Okay,

23 fair enough.

24 MR. BAKER: Thank

25 you.

1 MR. HOWARTH: Thank
2 you.

3 (At 12:32 p.m., bench conference concluded.)

4 THE COURT: All
5 right, then, we'll break for lunch. You may step down,
6 Mr. Eichenwald.

7 THE WITNESS: Thank
8 you. Who--

9 (At 12:32 p.m., witness is excused.)

10 THE COURT: You can
11 hand that back to Mr. Howarth.

12 THE WITNESS: Mr.
13 Howarth?

14 THE COURT: Ladies
15 and gentlemen, we'll break for lunch. If we could have
16 you back here at 1:35, we'll try and get started an
17 hour from now. All rise for the jury.

18 (At 12:33 p.m., jurors exit Courtroom.)

19 THE COURT: Court
20 will stand in recess for an hour.

21 (At 12:33 p.m., Court in recess.)

22 (At 1:50 p.m., Court reconvenes.)

23 THE CLERK: Recalling
24 docket number one, People versus Kenneth Gourlay,
25 docket number 06-877 FH.

1 THE COURT: For
2 purposes of the record, if we could have your
3 appearances--

4 MR. BAKER: Oh.

5 THE COURT: --since
6 we recalled the case?

7 MR. BAKER: Douglas
8 Baker on behalf of the People.

9 MR. HOWARTH: Your
10 Honor, James Howarth on behalf of Kenneth Gourlay.

11 THE COURT: Thank
12 you.

13 THE CLERK: All rise.

14 (At 1:51 p.m., jury enters Courtroom -
15 witness resumes the stand.)

16 THE COURT: Thank
17 you. Mr. Howarth, you may continue with cross.

18 BY MR. HOWARTH:

19 Q Good afternoon, Mr. Eichenwald.

20 A Good afternoon.

21 Q Just to go back quickly, on the brainstorm that Mr.
22 Berry had about wiring the money to Bakersfield?

23 A You said the what?

24 Q Mr. Berry had--

25 A Oh, I'm sorry. I'm caught up with you, I'm sorry.

1 Q Yeah. I said we're going back just a little bit. I'm
2 sorry, my voice is--did that money, that \$1,000 dollars
3 ever get wired to Bakersfield?

4 A I know Justin received the thousand dollars, yes.

5 Q Do you know what happened to it?

6 A Yes, I do.

7 Q What happened to it?

8 A He deposited it in a church collection plate. He
9 used--

10 Q Okay.

11 A --part of it to buy a carton of cigarettes, because he
12 was out. But other than that, the rest of the money
13 went into a church collection plate.

14 Q It wasn't preserved as evidence for any investigation
15 or anything of that nature?

16 A Well the evidence--I mean, there's--the wire transfer
17 is evidence and all the documents in terms of obtaining
18 that is evidence, so that--the preservation of the cash
19 certainly wasn't anything that occurred to anyone.

20 Q I'd like to take you to the trip to the Department of
21 Justice on July 25, 2005, where you drove Justin Berry
22 along with your 10-year-old son.

23 A Yes.

24 Q You're with me? Okay. At some point--had you been
25 with Justin before that drive?

1 A I met him at the hotel lobby that morning, yes.

2 Q And he didn't discuss his testimony with you at that
3 time, am I correct? In the lobby?

4 A No.

5 Q But when you got in the car, you went a certain
6 distance and he said--or gave you a signal to pull
7 over, he wanted to talk to you?

8 A He told me there was something he wanted to ask.

9 Q And of course he didn't want to ask it in front of your
10 son?

11 A We just--we just had--I had a very explicit instruction
12 to him that my son--my children--and at any time if
13 there was ever an instance where he was around them,
14 were not to hear any details of the circumstances
15 surrounding his life.

16 Q That's reasonable. You got out of the car and you
17 talked to Justin.

18 A Yes.

19 Q And Justin asked you a very specific question, did he
20 not?

21 A Yes, he did.

22 Q Okay. And that question was, if I go and become, as
23 you call it, the queen for a day, do--and they are
24 going to question me about sexual predators, do I have

1 to name all the sexual predators that I have personal
2 knowledge of? That's the gist of the question?

3 A That's the gist of it. I don't think that it was
4 anywhere nearly that specific, but that's what--

5 Q Well that's what you understood the question to be?

6 A As he spoke, I understood that was the question. I
7 think the (indiscernible) question was much more
8 general.

9 Q All right. But he was specific as to, do I have to
10 name Ken Gourlay?

11 A Yes. That was the only name he mentioned.

12 Q Only name he mentioned. And he said that his concern
13 was, I don't want to name him because he is my friend?

14 A Yes.

15 Q Did you know that Mr. Berry gave up a list of names, if
16 you will, to the FBI special agent who questioned him?

17 A I'm sure he did.

18 Q And did you know that he even gave up the name of his
19 father?

20 A Uh, I'm sure--I know--I know that--I'm--I do not have
21 specific knowledge of that, no. But I know that he has
22 told me that he said so.

23 Q And your advice to him was, you know, that's a legal
24 matter; you talk to Steve Ryan--

25 A I was not--

1 Q --about that?

2 A --I could not be in a position of answering that
3 question. That had to be asked--

4 Q I agree with you.

5 A --of Steve Ryan.

6 Q I agree with you. And are you aware now, as you are
7 testifying, that Mr. Berry did not tell the FBI
8 anything about Ken Gourlay?

9 A In that first meeting?

10 Q Yeah.

11 A I am aware of it because you are telling me.

12 Q Hearing it now for the first time?

13 A Well, I've heard it from--from--this all sounds
14 strange. It wasn't an explicit statement. It wasn't--
15 did you name Ken Gourlay? I actually didn't ask Justin
16 a lot about what he said. But it was very--it was
17 clearly communicated that he had not--he had not named
18 Ken Gourlay.

19 Q You have indicated to us that in October--let's see.
20 That was the end of July and--I should go back again,
21 too. Did you know that Mr. Berry testified--gave
22 information to the FBI over a two-day period?

23 A Yes, July 25 and July 26.

1 Q Approximately three months later, there is the social
2 event which leads to the four-hour monologue. And that
3 was at your home?

4 A The monologue was at my home, yes.

5 Q And at that point, Mr. Berry is concentrating on the
6 fact that he was betrayed?

7 A Yes.

8 Q And that's a lot of what the monologue was about?

9 A He--I don't know--I don't think he ever used that word,
10 but that would be how I would summarize the four hours.
11 That was--that he had expec--that he expected more of a
12 friend and realized that someone who had done the
13 things that had been done wouldn't--would not be--that
14 he was saying had been done, would not be a friend.

15 Q Do you know of any contact between Mr. Gourlay and Mr.
16 Berry between the date of July 26, 2005, and the
17 October four-hour monologue?

18 A I don't.

19 Q You also indicated that when Mr. Berry went to testify
20 before Congress that you were physically there to see
21 him see Mr. Gourlay?

22 A I was there to testify--

23 Q Yes.

24 A But I did see him see Mr. Gourlay.

25 Q And he almost had a breakdown?

1 A He--I wouldn't call that a breakdown. He got very
2 upset.

3 Q Had to go outside the building?

4 A Yes.

5 Q Kicked the wall, was it?

6 A Yes.

7 Q And said, I can't point out Mr. Gourlay. Didn't he?

8 A He said he was not emotionally able to handle the ex-
9 -they had told him that at the end of his cross-
10 examination, they were going--er, his examination by
11 the Congressmen, they were going to ask him to identify
12 Ken Gourlay. And he was overwhelmed at that point by
13 it. And said--basically said, I can't talk to him. I
14 can't handle this. I can't do that.

15 Q Can't point at him?

16 A No.

17 Q In point of fact, when he was asked the question before
18 the subcommittee of Congress, he went and pointed right
19 at Mr. Gourlay, didn't he?

20 A That's because in the middle of--

21 Q I didn't ask you for the because.

22 A Okay.

23 Q Did he or didn't he?

24 A Yes, he did.

1 Q All right. And you said that you saw a lot of the same
2 attitude or affect on Tuesday of this week here in the
3 Courthouse, is that right?

4 A Much more contained. It was--it was a very fast anger
5 that dissolved very quickly into sobbing.

6 Q All right. He went pale?

7 A Yes.

8 Q He--his teeth clenched?

9 A Yes.

10 Q He crushed a Tic Tac box?

11 A Yes.

12 Q I assume a plastic one or some--

13 A Yes.

14 Q And he was sobbing?

15 A After he sat down. And he was angry for about 15 more
16 seconds and then he started sobbing, yes.

17 Q You wouldn't know one way or the other, I imagine,
18 whether he demonstrated any of those emotions during
19 his fairly lengthy testimony in this Courtroom?

20 A I have no idea.

21 Q Of course not, because you couldn't be here.

22 A Right.

23 Q All right. Now Mr. Berry was on a--well, first of all
24 he was before Congress. Did you also testify before the
25 Congress?

1 A I was subpoenaed to testify before Congress, that's
2 right.

3 Q And you did testify?

4 A Yes. I was subpoenaed, I have to.

5 Q Did you also appear on Larry Night King? Larry Night
6 King.

7 A Larry King Live. Yes, I did.

8 Q Were you subpoenaed to testify there?

9 A No, I was not.

10 Q Did you testify on the Oprah show?

11 A I appeared on the Oprah show, I didn't testify.

12 Q All right. But you didn't get a subpoena for that?

13 A No, I did not.

14 Q Were you on Today, also?

15 A Yes, I was.

16 Q Nobody forced you to be on?

17 A No.

18 Q Now he--this \$500,000 dollar book deal. That was
19 mentioned rather prominently on the Oprah show, wasn't
20 it?

21 A Yes.

22 Q It was talked about quite a bit?

23 A I know it was mentioned. I don't think it was talked
24 about quite a bit. But I know--

25 Q Oprah talked about it quite a bit, didn't she?

1 A Yes, she did. She was very impressed. They had this
2 circumstance happen before where people were offered
3 money not to appear on the program. And as far as
4 anyone knew, that was the only time that someone had
5 said, no.

6 MR. HOWARTH: I have
7 nothing further.

8 THE COURT:
9 Re-direct.

10 MR. BAKER: Just a
11 couple of questions--a couple of little areas.

12 RE-DIRECT EXAMINATION

13 BY MR. BAKER:

14 Q You said that at the Congressional hearing, he
15 identified Ken Gourlay. But there was an initial
16 problem with that or he was--

17 A Yes.

18 Q --having problems with that. Did you have anything to
19 do to work with him at that time?

20 A I'm sorry?

21 Q Did you work with him at all or--

22 A I did not.

23 Q Okay.

24 A I was in the position of just witnessing what was
25 taking place.

1 Q And what took place, from the time he said he couldn't
2 do it until he went out there and did it, that you
3 witnessed?

4 A There was a break in the testimony. And when the--when
5 there is a break, the witnesses go back into a witness
6 area which is a hallway. And the Congressmen walk back
7 as do the staffers from there. And I was standing next
8 to Justin who was standing next to Steve Ryan, who was
9 also there. And he suddenly reversed himself and said,
10 I have to do it. I have to identify Ken.

11 And Steve Ryan
12 pulled aside a fellow by the name of Mark Paoletta, who
13 was the Chief Counsel of the subcommittee, and told him
14 that Justin was prepared-- they had already been told
15 that Justin was not going to be able to do it,
16 emotionally be able to handle it. And they asked him
17 if he was sure? Justin said, yes. That he couldn't
18 leave, he had to do it.

19 At that point, a
20 Congressman whose name I forget, but he was a former
21 radio announcer is walking by the hallway and--walking
22 through the hallway, and Mr. Paoletta stops him and
23 tells him this. And so, we go back into the hearing
24 room, we finish the testimony and the Congressman who
25 is the former radio announcer just injects at a point

1 when it seems like everyone is done. He says, I have
2 one more question. And he asks, do you see anybody in
3 this hearing room who is among the men--who are among
4 the men who molested you? And Mr. Berry acknowledges,
5 yes he does and then he identified Ken Gourlay.

6 Q One other area I just want to go to quickly, and that
7 is the issue that was raised about the New York Times
8 and the disclosure of the \$2,000 dollars. I believe
9 you testified quite clearly that at that time, you
10 thought you were acting as a private citizen as opposed
11 to a journalist?

12 A Yes.

13 Q All right. After you thought you had crossed that line
14 and was acting as a journalist, there were still
15 certain things, benefits of some kind that were flowing
16 to Justin, the doctor, getting the residence--all of
17 the things that you may have been doing for him.

18 A Yes.

19 Q Did you disclose those things to the Times?

20 A I consulted the Times each step before I did any of
21 those things.

22 Q Okay. And was there any discussion about whether that
23 should be in the article?

24 A There was extensive and very acrimonious discussion
25 about whether that should be in the article.

1 Q Did you want them in the article?

2 A I wanted to write a separate article disclosing
3 everything I had done while acting as a reporter that
4 resulted in some form of benefit going to Justin; be it
5 getting him to a doctor which he payed for. The
6 situation with Steve Ryan a lawyer; fighting, you know,
7 getting him lodging, you know, when he ended up living
8 with this relatives in Allen.

9 And I in fact wrote
10 an article to appear as a sidebar with the story that
11 revealed all of those things. I did believe that I
12 would be open to some criticism for what I had done.
13 But I also believed that I really didn't have very many
14 good choices and that what I had done in regards to
15 those issues, were what I felt I had to do. But I
16 thought readers had to be aware that Justin had
17 received an actual benefit from the relationship.

18 When I filed that
19 story, I was contacted by an editor, a senior
20 editor--very senior editor of the paper, who told me,
21 Kurt. You're a better journalist than that. We don't
22 do this. And thus began several weeks of argument with
23 the editors of the Times, insisting we were not going
24 to disclose what I had done. And me insisting that I
25 had to. And that finally was resolved when I said, I

1 could not see publishing the story without disclosing
2 this information. A compromise was reached that it
3 would not run in the newspaper, but it would run in an
4 online sidebar.

5 Q That's the same New York Times that has published this
6 latest note, raising the fact you didn't talk about the
7 \$2,000 when you were working as a private citizen?

8 A Yes. And I raised that when they called me on Monday
9 and told me they were running an Editor's Note that
10 said that I failed to disclose what I did prior to
11 working as a reporter. I said, don't you think the
12 Editor's Note needs to include that everybody--every
13 edi--that the editors of the New York Times argued
14 incessantly that we shouldn't disclose anything? And
15 that it was only because of the continuous fighting to
16 get it disclosed led--that I was pushing, that any of
17 that information was disclosed at all. And I was told
18 that--that was too much detail to get into for the
19 editors now.

20 Q You are no longer with the Times, is that correct?

21 A I'm not, no.

22 Q Where do you--what entity are you working for now?

23 A I work for a company called Conde Nast which is, I
24 believe, the largest private magazine publisher in the
25 United States. And they are starting what is expected

1 to be the largest magazine start-up in history, of a
2 magazine called Portfolio. They are putting a hundred
3 million dollars behind it.

4 Q What is your position with that--

5 A I am a senior writer and investigative reporter.

6 Q And did going to that position, did that have anything
7 to do with this incident? The Justin Berry--

8 A No. This had to do with when I was called by Portfolio.
9 They told me I could write about pretty much anything I
10 want. I wanted--pretty much any length I wanted with a
11 significantly better financial situation. It still
12 took five months of discussion but ultimately I decided
13 it was too exciting an opportunity to pass up.

14 MR. BAKER: Nothing
15 further.

16 THE COURT: Re-cross.

17 RE-CROSS EXAMINATION

18 BY MR. HOWARTH:

19 Q Can we in a way summarize this dispute between the
20 editors and the New York Times--editors of the New York
21 Times and you, by saying Kurt Eichenwald got framed by
22 the New York Times?

23 A No, not at all. Not at all. I did--I had a failure
24 and I made a mistake. I made the mistake. Again, not
25 out of malice but I did not inform my editors of the

1 transaction. Because they always just struck me as a
2 zero--I'm getting too much thought behind it.
3 Truthfully, there was so many things going on. And it
4 was such an emotional circumstance, and it was so
5 overwhelming, that it was an issue that just
6 disappeared in my head under the wash of chaos and
7 tumult.

8 And even
9 with--certainly-even today I don't believe there is a
10 issue that in any way should concern a reader. Justin
11 Berry had no financial connection to me when he was
12 working as a source. There is an internal issue, and
13 in fact this is--there is a person at the Times who is
14 very aware of all of the facts surrounding this. And
15 his position is, this is an internal issue. It is not
16 a readership issue.

17 And I am a little
18 flummoxed at what the standard is. If they were arguing
19 against publishing what I did as a reporter that
20 brought certain benefits to Justin Berry, but that I
21 should have known despite that position, that I needed
22 to publish what I did as a private citizen that brought
23 no benefits to Justin Berry.

24 Q One last matter.

25 A Mm-hmm.

1 Q Does Conde Nast publish Gourmet Magazine?

2 A I don't know. Do they?

3 Q Well, what about Traveler?

4 A I'm sorry?

5 Q What about the travel magazine?

6 A They do publish Conde Nast Travel something. Some
7 travel--I know they have a travel magazine.

8 Q Okay, any chance of my getting a discount through you?

9 A Any chance of me getting a discount?

10 MR. HOWARTH: No, I
11 have nothing further, thank you.

12 THE COURT: Anything
13 else? May this witness be excused, then?

14 MR. BAKER: Yes, Your
15 Honor.

16 THE COURT: Thank
17 you, you're excused, Mr. Eichenwald.

18 THE WITNESS: Thank
19 you.

20 (At 2:11 p.m., witness is excused; excerpt
21 concluded.)

22 * * * * *

23

1 COUNTY OF WASHTENAW) ss.

2 STATE OF MICHIGAN)

3

4 I certify that this transcript consisting of 149 pages
5 is a true and accurate transcription to the best of my
6 ability of the proceeding in this case before the Honorable
7 Archie C. Brown as recorded by the clerk.

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15 Dated: March 18, 2007

16 _____

17 Sandra Traskos, CER 7118