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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Larry Berke,)	
)	File No: CA-12-1347
Plaintiff,)	
)	Date: Tuesday,
vs.)	September 25, 2012
)	Time: 9:47 a.m.
Federal Bureau of Prisons,)	
)	EVIDENTIARY HEARING
Defendant.)	

TRANSCRIPT OF EVIDENTIARY HEARING
HELD BEFORE
THE HONORABLE ELLEN SEGAL HUVELLE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Mr. Constantinos Panagopoulos Ms. Alli Mollenhauer Ballard Spahr 1909 K Street, NW, 12th Floor Washington, DC 20006
For the Defendant:	Ms. Tricia D. Francis United State's Attorneys Office Civil Division 555 4th Street, NW Washington, DC 20530

Also Present:

Ms. Elizabeth E. Gardner, Disability Project
Ms. Deborah Golden, DC Prisoners' Project
Mr. Richard Hansford, US DOJ, Federal Bureau of Prisons

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1 THE DEPUTY CLERK: This is Civil Action 12-1347,
2 Larry Berke versus the Federal Bureau of Prisoners.

3 I'm going to ask that counsel come forward,
4 identify themselves for the record. And while they're doing
5 so, we have an interpreter, Mindy Lanie, and she has been
6 sworn, for the record.

7 MR. PANAGOPOULOS: Good morning, Your Honor. Dino
8 Panagopoulos for Mr. Berke. And with me are Alli
9 Mollenhauer, Elaine Gardner and Deborah Golden.

10 THE COURT: Good morning.

11 MS. FRANCIS: Good morning, Your Honor. Tricia
12 Francis here on behalf of the Bureau of Prisons. Along with
13 me is agency counsel Richard Hansford.

14 THE COURT: Okay. Great.

15 Now, how do you want to proceed, just for purposes
16 of organizing us?

17 MR. PANAGOPOULOS: Well, Your Honor, first, I'd
18 like to thank you for agreeing to take this case in this
19 matter and for handling it up to here so quickly. I believe
20 that they're -- based on a declaration that was filed by the
21 Government last night, that there's agreement as to some of
22 the accommodations that are to be provided. We don't
23 consent to the declaration itself, but we can stipulate that
24 that takes care of many of the issues that -- that we were
25 concerned about.

1 THE COURT: Is there some reason not to allow the
2 declaration to be filed?

3 MR. PANAGOPOULOS: Well, Your Honor, the only
4 objection we have to it is that there's a contention in the
5 declaration that it allows the Government to comply with its
6 obligations. We, of course, dispute that. I believe it's
7 paragraph 6 in the declaration. But other than that, we're
8 fine with the declaration itself.

9 There's also just a tiny bit of, you know,
10 wordsmithing that I believe Ms. Francis and I talked about
11 and agreed to last night. And that's that in the paragraph
12 that talks about when interpreters are to be provided, it
13 lists medical, educational and disciplinary. And then
14 there's a phrase that says "and other circumstances as
15 needed." We just wanted to make sure that the "as needed"
16 applied to the other circumstances that interpreters are to
17 be provided in those other -- the first items listed.

18 THE COURT: That's what it says. But they're
19 entitled to file this, if you have substantive objections.
20 But the motion to file is granted.

21 MR. PANAGOPOULOS: Well, Your Honor, the only
22 objection we have is that the declarant is not here and
23 subject to cross-examination, so we can't cross-examine him
24 on that one paragraph.

25 THE COURT: What one paragraph?

1 MR. PANAGOPOULOS: The paragraph number 6, I
2 believe it is.

3 THE COURT: There's nothing to cross-examine. The
4 motion's granted.

5 Okay. Gwen, this is 14-2.

6 Okay. The -- I mean, we're here on one issue and
7 one issue only still.

8 MR. PANAGOPOULOS: We are. And the issue --

9 THE COURT: So it's -- whether he's here or not is
10 not relevant to me.

11 Okay. So how would you like to proceed on that
12 issue, which has to do with whether they're required to
13 provide an accommodation to the plaintiff regarding the
14 videophone system versus whether -- it's ITT?

15 MR. PANAGOPOULOS: TTY.

16 THE COURT: TTY.

17 MR. PANAGOPOULOS: Right.

18 THE COURT: Okay.

19 MR. PANAGOPOULOS: Your Honor, the way we'd like
20 to proceed with that is we have -- we have provided the
21 Court with the deposition of Dr. Cokely. I don't know if
22 Your Honor's had the opportunity to review that yet. But we
23 also have --

24 THE COURT: Did you get a written hard copy of
25 that? Can I see it, please? I read his report. And I have

1 not read his deposition, but my law clerk has.

2 Go ahead.

3 MR. PANAGOPOULOS: We would also call Craig Todd,
4 one of the Government's witnesses, to talk about what the
5 Bureau of Prison has and has not done and the alleged burden
6 in this circumstance.

7 We would then call Richard Ray, our other witness,
8 who will talk about the two technologies, and that involves
9 a short demonstration of the technologies and a very short
10 two-minute video clip that shows the differences between the
11 two technologies. And --

12 THE COURT: I think it would be better for --
13 frankly, for my point of view -- to understand the
14 technologies and then hear from the Bureau of Prisons.

15 MR. PANAGOPOULOS: Okay. We can --

16 THE COURT: Just because -- I read Mr. Ray's
17 report. But the page that's really critical is not entirely
18 understandable without the video, I think.

19 MR. PANAGOPOULOS: We're happy to do it that way
20 if that --

21 THE COURT: Is that all right with you? I'd just
22 like to understand what they're talking about about
23 monitoring and things.

24 Gwen, do you have a stapler?

25 MS. FRANCIS: Yes, Your Honor. Just for the

1 record, I just wanted to lodge an objection as to the use of
2 the video. Mr. Panagopoulos did provide me with a copy of
3 the video last night. I understand that the video depicts a
4 -- it's a two party -- it's a conversation between two
5 parties: One is with the TTY, one is with the videophone.
6 However, I was told that it's actually Mr. Berke himself and
7 his wife.

8 And I do know that one of the issues, at least
9 from the BOP's perspective, is -- I understand it's whether
10 or not the communication will be effective. However, you
11 know, it's up for debate. There were some discussion about
12 whether or not the wife knows how to use the TTY; whether or
13 not, you know, conversation among parties on the TTY is
14 either slow or cumbersome or halting.

15 And, you know, Your Honor, it's our position that
16 this is in a way indirect testimony by Mr. Berke himself,
17 and he's not even here. And so, therefore, we would rather,
18 if there was testimony from this witness, that the witness
19 would be more than able to explain to the Court the
20 different technologies, how they are used, without the use
21 of this specific video.

22 THE COURT: I'll take it for whatever it's worth.
23 I understand what you're saying.

24 Okay. We'll -- the witness can testify? He's
25 going to authenticate the --

1 MS. FRANCIS: And, Your Honor, since I'm
2 accustomed to --

3 THE COURT: Do you have a stapler?

4 Huh?

5 MS. FRANCIS: Since I'm accustomed to dealing with
6 the Court in a criminal context, is there a rule on
7 witnesses that needs to be invoked at this time?

8 THE COURT: If you want to. But who -- well, but
9 not for the experts.

10 MR. PANAGOPOULOS: Not for the experts.

11 THE COURT: You know, experts can sit in --

12 MR. PANAGOPOULOS: It's only Craig Todd.

13 MS. FRANCIS: His name is Todd Craig.

14 MR. PANAGOPOULOS: Todd Craig.

15 THE COURT: He can stay, right? You don't have
16 any objection to --

17 MR. PANAGOPOULOS: I don't have any objection.

18 THE COURT: No, I think that's fine.

19 (Court and Deputy Clerk confer.)

20 (The oath administered to the interpreter.)

21 THE COURT: Right up here.

22 RICHARD RAY,

23 after having been first duly

24 sworn upon oath, was examined

25 and testified as follows:

DIRECT EXAMINATION

1
2 BY MR. PANAGOPOULOS:

3 Q. Good morning, Mr. Ray.

4 A. Good morning.

5 Q. Would you please state your full name for the record.

6 A. Richard Ray.

7 Q. And your address, please, sir?

8 THE COURT: We don't think he needs to put -- his
9 business address, please.

10 BY MR. PANAGOPOULOS:

11 Q. Your business address, please.

12 THE INTERPRETER: Your Honor, may the interpreter
13 ask for a repetition?

14 THE COURT: Sure.

15 THE WITNESS: 201 North Figueroa Street, Suite
16 100, Los Angeles, California 90012.

17 BY MR. PANAGOPOULOS:

18 Q. And, Mr. Ray, could you briefly describe for the Court
19 your educational background?

20 THE COURT: He can put into evidence, unless the
21 Government objects, his report and his curriculum vitae.

22 MS. FRANCIS: No objection.

23 BY MR. PANAGOPOULOS:

24 Q. All right. Mr. Ray, I'm going to hand you and put into
25 evidence your report and curriculum vitae.

1 Does your curriculum vitae correctly describe your
2 professional experience and educational experience?

3 A. Yes, it does.

4 MR. PANAGOPOULOS: Your Honor, I'm happy to go
5 through it in more detail, unless the Court would be willing
6 to rely on the CV.

7 THE COURT: No, not necessary. What's the exhibit
8 number?

9 MR. PANAGOPOULOS: Exhibit No. 1. Plaintiff's
10 Exhibit No. 1.

11 THE COURT: You have no objection, Ms. Francis?

12 MS. FRANCIS: No objection.

13 THE COURT: 1 is admitted for the plaintiff.

14 MR. PANAGOPOULOS: Thank you, Your Honor.

15 (Plaintiff's Exhibit 1 received in evidence.)

16 BY MR. PANAGOPOULOS:

17 Q. Could you please tell us what your current job is?

18 A. I am an Americans With Disabilities Act compliance
19 coordinator for the City of Los Angeles, the Department of
20 Americans With Disabilities -- excuse me -- the Department
21 of -- on Disability.

22 Q. Okay. And what are your duties and responsibilities in
23 that position, sir?

24 A. I work with all departments in the City of Los Angeles
25 to ensure that their programs and services are fully

1 accessible, and I specifically work with programs and
2 people, individuals, who are deaf, deaf-blind or hard of
3 hearing.

4 Q. Do you deal with issues under the Rehabilitation Act in
5 addition to the ADA?

6 A. Yes, I do.

7 Q. Do you hold any other positions or responsibilities?

8 THE INTERPRETER: Your Honor, the interpreter
9 would ask for a repetition of the name that was just
10 finger-spelled.

11 THE COURT: Sure.

12 THE WITNESS: Outside of my work, I was also
13 appointed by the Federal Communications Commission as -- by
14 Director Genachowski. And codirector for Emergency Access
15 Advisory council.

16 THE INTERPRETER: The interpreter needs to
17 correct. Not "council" but "Committee."

18 THE WITNESS: And also for the record, for the
19 National Advisory Committee for NENA, the National Emergency
20 Number Association. And I am the accessibility director for
21 NENA.

22 I'm also involved with the National Preparedness
23 Emergency Response and Research Center with UC Berkeley,
24 University of California in Berkeley. And that was funded
25 by the National Center for Disease Control.

1 BY MR. PANAGOPOULOS:

2 Q. And in your -- whether in your position or some of these
3 other responsibilities that you have described, have you had
4 the opportunity to evaluate telecommunications equipment for
5 people who are deaf or hard of hearing?

6 A. Yes, I have.

7 Q. Approximately how much of your job involves analyzing
8 those issues, sir?

9 A. Ninety percent of my job focuses on communications
10 technology and emergency technology.

11 Q. And have you ever been asked to render an expert opinion
12 as to those issues before this case, sir?

13 A. Yes.

14 Q. Approximately how many times?

15 A. Two times.

16 Q. And have you testified as an expert in those cases?

17 A. Yes, I have.

18 Q. Okay. Have you asked -- have you been asked to render
19 an expert opinion in this case relating to Mr. Berke?

20 A. Yes.

21 MR. PANAGOPOULOS: Your Honor, before proceeding
22 with this part of his testimony, we'd like to offer
23 Mr. Berke as an expert on telecommunication devices for
24 individuals who are deaf and hard of hearing.

25 THE COURT: Any objection?

1 MS. FRANCIS: No objection. I just want to note
2 for the record counsel referred to it as "Mr. Berke."

3 MR. PANAGOPOULOS: I'm sorry. Mr. Ray. My
4 apologies.

5 THE COURT: Okay. He'll be accepted.

6 MR. PANAGOPOULOS: Thank you, Your Honor.

7 BY MR. PANAGOPOULOS:

8 Q. What documents have you reviewed in rendering your
9 opinion in this case, sir?

10 A. I reviewed Mr. Berke's complaint and I developed a
11 report based on Mr. Berke's complaint.

12 Q. Okay. Did you also review the various types of
13 technologies that are available?

14 A. Yes.

15 Q. And do you have an opinion as to the telecommunications
16 equipment that should be provided to Mr. Berke to allow him
17 to communicate effectively while in Bureau of Prisons'
18 custody?

19 A. Yes, I do.

20 Q. Could you please tell the Court what telecommunications
21 equipment you believe Mr. Berke should be provided.

22 A. Videophone technology, VRI, VRS, a visual paging system,
23 and a visual alarm.

24 Q. Mr. Ray, we're going to focus on the first three items
25 you mentioned, the videophone, the VRI and the VRS, because

1 the visual paging and visual alarm are issues that have been
2 resolved in this case.

3 Could you please describe to the Court what a
4 videophone is and how it works.

5 A. A videophone is a piece of technology that allows deaf
6 or hard of hearing people to see each other on a screen.
7 That equipment allows us to see each other, and we use
8 American Sign Language as our primary mode of communication.
9 And I actually do have that equipment with me.

10 Q. Okay. Could you please show that equipment to the
11 Court.

12 A. This is actually the video camera. That would sit on
13 top of a television monitor. And this is the special unit
14 box that has -- it has an ethernet cable connected to the
15 unit box and another cable --

16 THE INTERPRETER: Your Honor, the interpreter
17 would like to ask for repetition. He was signing while I
18 was putting on my microphone.

19 THE WITNESS: On one side there's the ethernet
20 cable, and on the other side of the unit there is a cable
21 that is an adapter for electrical power. And on the back of
22 the unit there are also audio and visual out jacks. Those
23 can be connected to a DVD player for downloading purposes or
24 for recording purposes.

25 BY MR. PANAGOPOULOS:

1 Q. Okay. You also mentioned a VRI. What is a VRI, sir?

2 A. VRI is video remote interpreting services. So suppose
3 that I as a deaf person were in a room with a hearing person
4 and there was no interpreter physically in the room with us
5 or available, we could connect to a video remote
6 interpreting service, and it would be using the same
7 equipment that I've just explained to the Court, to have an
8 interpreter who is in another area, remotely, on the screen,
9 and that person would facilitate communication between
10 myself and the hearing person in the room. So I would be
11 using sign language, the interpreter would interpret that
12 into spoken language, and vice versa.

13 Q. And you also mentioned VRS. What is VRS?

14 A. VRS is video relay service. That would be -- suppose
15 that I wanted to contact someone who didn't have the
16 equipment that I described for the Court, a hearing person
17 who didn't have this equipment. I would contact a video
18 relay interpreting center, and on my screen I would see an
19 interpreter. I would let the interpreter know whom I wanted
20 to call, and the interpreter would connect to the hearing
21 person and then they would interpret the conversation.

22 Q. Okay. And --

23 THE INTERPRETER: The interpreter -- Your Honor,
24 the interpreter needs to finish the interpretation.

25 THE WITNESS: That person may be at home or at

1 work. The person could be anywhere outside of the building.

2 THE COURT: Which person? The interpreter or --

3 THE INTERPRETER: The hearing person would be
4 outside of the building. It would not be two people in the
5 same room.

6 BY MR. PANAGOPOULOS:

7 Q. And, Mr. Ray, I believe you've already said this, but do
8 all three technologies use the exact same equipment?

9 A. Yes, they do.

10 Q. So if the Government has already agreed to provide a VRI
11 system for communication, that same system could be used to
12 provide videophone services?

13 MS. FRANCIS: Objection. It calls for
14 speculation.

15 THE COURT: No. Is it not factually accurate?

16 MS. FRANCIS: Yes and no.

17 THE COURT: Well, what do you disagree with with
18 respect to his premise? Has the Government agreed to
19 provide the VRI system?

20 MS. FRANCIS: Yes, we have.

21 THE COURT: All right. So he wants to know
22 whether the same equipment could be used.

23 MS. FRANCIS: Fair enough.

24 THE WITNESS: Yes, that equipment can be used for
25 both VRS and VRI.

1 THE COURT: And what equipment are we talking
2 about?

3 THE WITNESS: Your Honor, the equipment that I
4 have here with me, this particular device is called a
5 Sorenson notch (sic).

6 THE COURT: It's called the what?

7 THE INTERPRETER: Sorenson notch (sic).

8 THE WITNESS: And it can be used for VRS, for VRI,
9 and for point-to-point communication.

10 THE COURT: And they are both connected to the
11 internet?

12 THE WITNESS: Yes.

13 BY MR. PANAGOPOULOS:

14 Q. Now, Mr. Ray, when you say they're both connected to the
15 internet, does that simply mean that they use a DSL line in
16 order to transmit their communication?

17 A. This actually uses a connection to DSL. And -- so this
18 unit is connected directly to DSL but is not connected to
19 the general internet. It is -- the equipment is specific to
20 that usage of VRS, VRI. It is not connected to the general
21 internet.

22 Q. So, for example, would a prisoner using that system as a
23 videophone be allowed to access the internet through that
24 equipment?

25 A. You cannot do that. You cannot use this equipment to

1 access or navigate websites. It is not intended for that
2 purpose. It's not built for that purpose. It is a
3 standalone unit that is specifically made and transmits only
4 for the purposes of the video, VRS or VRI, and
5 point-to-point.

6 Q. And do you know what the approximate cost of that unit
7 is, sir?

8 A. It's about \$99. However, if you sign up for service
9 through the provider, Sorenson, then it's free. The unit is
10 free.

11 THE COURT: Well, what is -- how does Sorenson get
12 paid? What do they get paid for?

13 THE WITNESS: They actually receive funding from
14 the Federal Communications Commission, the FCC. There is a
15 fund called NECA, the National Exchange Carrier Association,
16 and that particular fund is what provides payment to -- to
17 companies that are providing services. They get paid based
18 on the minutes of service provided.

19 THE COURT: So you pay Sorenson for the minutes
20 used?

21 THE WITNESS: No. The service is free to whoever
22 is using the unit.

23 THE COURT: So somebody could talk on that service
24 for an hour and it wouldn't cost anybody anything?

25 THE WITNESS: That's correct, Your Honor. They

1 would not be charged for that.

2 BY MR. PANAGOPOULOS:

3 Q. Is the Sorenson the only model of videophone that's
4 available out there?

5 A. No.

6 Q. What other solutions are there other than a hard unit
7 like that?

8 A. There's a Sorenson VP200, a ZVRS150, a Z20, Z340. And
9 there are also apps. There's Purple 3, Z4. And there are
10 actually several providers and several different pieces of
11 equipment that can be used.

12 Q. Okay. I'd like to hand you what was previously
13 marked --

14 MR. PANAGOPOULOS: Well, Your Honor, actually I'd
15 like to submit into evidence the videophone equipment
16 that -- that's there.

17 THE COURT: Any objection?

18 MS. FRANCIS: No objection, Your Honor.

19 THE COURT: Okay. Exhibit 2 is admitted.

20 (Plaintiff's Exhibit 2 received in evidence.)

21 MS. FRANCIS: If I could see what counsel is
22 handing the witness.

23 MR. PANAGOPOULOS: I will give you your copy, yes.
24 You've seen it before in the deposition.

25 (NOTE: Mr. Panagopoulos handing document to

1 Ms. Francis.)

2 BY MR. PANAGOPOULOS:

3 Q. Mr. Ray, I've handed you what's been marked as Exhibit
4 No. 3. Could you identify that document for the record,
5 please?

6 A. It's entitled "Use Your Z4 App."

7 Q. Okay. And is this an application that can be downloaded
8 onto any computer system to allow for videophone service?

9 A. Yes.

10 Q. You explained to the Court one of the ways that
11 Exhibit 2 could be recorded. Can the Z4 also be recorded?

12 A. Yes.

13 Q. Okay. I'd like to turn your attention to pages 15
14 through 18 of the manual. Does that describe how the Z4 can
15 be recorded as well?

16 A. Yes.

17 MR. PANAGOPOULOS: Your Honor, I'd like to move
18 for the admission of Exhibit 3.

19 MS. FRANCIS: No objection.

20 THE COURT: Okay. So it is recording the images
21 of the people.

22 (Plaintiff's Exhibit 3 admitted into evidence.)

23 MR. PANAGOPOULOS: It is, Your Honor.

24 THE COURT: And where -- where is the recording
25 being stored?

1 THE WITNESS: There are several ways to store that
2 information. There are four columns when you look at the
3 app. The application. Phone number, date, time. And when
4 you are finished with the conversation, you can export that
5 to be copied onto a DVD. Or it can be put onto a thumb
6 drive and can be transferred to another location as you
7 desire. And with the thumb drive, if that information is
8 exported to another location, it can be stored on their
9 system.

10 BY MR. PANAGOPOULOS:

11 Q. And approximately how much does an application like the
12 Z4 cost?

13 A. It's free.

14 Q. How much do calls on the Z4 cost?

15 A. They're free.

16 Q. Okay. Is any call made through a videophone, a VRI or
17 VRS essentially free?

18 A. VRI is actually a service that you would pay for. And I
19 believe that it is in the vicinity of \$3.95 per minute.
20 However, point-to-point and VRS are both free.

21 Q. Okay. So --

22 THE COURT: And -- I have a question. If it is
23 being recorded, who has access to deleting the recording?

24 THE WITNESS: I imagine DOP (sic) staff.

25 THE COURT: Well, how does the equipment -- can

1 the person who's using it delete the call? Or delete the
2 recording of the call?

3 THE WITNESS: They could. However, if there was a
4 person from DOP (sic), a DOP staff person there monitoring
5 the call, then they could ensure that the call was not
6 deleted.

7 BY MR. PANAGOPOULOS:

8 Q. Could the computer also be set up with administrative
9 rights to require a password before a call is deleted?

10 A. Yes.

11 Q. So there are protections that could be put in place to
12 prohibit deletion?

13 A. Yes.

14 Q. So the only service that costs any money is the VRI,
15 which the Government has agreed to provide. The other two
16 services do not cost anything.

17 THE COURT: Other two? What's two?

18 MR. PANAGOPOULOS: Videophone and the video relay
19 service, Your Honor.

20 THE COURT: Well, when you draw a distinction, the
21 videophone and video relay --

22 MR. PANAGOPOULOS: The distinction, Your Honor, is
23 the videophone is point-to-point communication, two people
24 seeing each other on the screen and communicating. Video
25 relay is what happens when you have one person on the

1 computer screen and the other person on a traditional
2 telephone. So, for example, if I called in Mr. Ray, we
3 would do the call through a video relay service. The
4 interpreter would sign to Mr. Ray in ASL, and he would in
5 turn sign to me, and the interpreter would tell me what he
6 said.

7 THE COURT: And do these phones require land
8 lines?

9 THE WITNESS: You could use a land line, but you
10 can also connect via modem. So a modem can be connected to
11 that line.

12 THE COURT: But what if it's video relay and the
13 other person's on a phone or on a computer?

14 THE INTERPRETER: Your Honor, the interpreter
15 needs clarification. When you say "the other person," do
16 you mean the hearing person or the deaf person?

17 THE COURT: Yeah, the hearing person. The one
18 just described by counsel.

19 THE INTERPRETER: Your Honor, I apologize. I'm
20 not sure that I clearly understand your question.

21 MR. PANAGOPOULOS: Your Honor, if I could clarify,
22 and perhaps Mr. Ray could tell me if I'm -- if I'm wrong.

23 With the video relay service, any person can use
24 any telephone to pick up and call an interpreter. And --
25 and then that interpreter is on a computer screen or

1 videophone screen with the person who is deaf or hard of
2 hearing and they are signing. Consider it, you know, the
3 videophone that has been described with one of the people on
4 the telephone as well telling someone who's hearing what's
5 happening. So it would be like our interpreter here
6 translating to me on a phone, if I'm in another room.
7 That's the only difference.

8 THE COURT: And the point-to-point requires both
9 people on both ends to have the same equipment.

10 THE WITNESS: Similar equipment. I could use the
11 Sorenson notch (sic), and the other person could be using
12 the Z4 or the Z150, depending on what it is that they want.
13 But the communication would still be completely available
14 regardless of the fact that we have different providers.

15 THE COURT: And so his family in Arizona live
16 where again?

17 MR. PANAGOPOULOS: His family is in the Phoenix
18 area, Your Honor.

19 THE COURT: And they have what equipment?

20 MR. PANAGOPOULOS: Your Honor, they have a
21 videophone.

22 THE COURT: And that's what portion of the family?
23 That's the wife and who else?

24 MR. PANAGOPOULOS: That is the wife and the
25 daughter, but there are also other family members in other

1 parts of the country who -- there's a brother in Washington,
2 D.C., who is also deaf. And they communicate -- Mr. Berke
3 and his brother communicate on a weekly basis. They have a
4 real estate business together in the Washington, D.C. area.

5 He -- his ex-wife is ill and dying of cancer in
6 California. One of his other sons is there taking care of
7 her.

8 THE COURT: How many are under court supervision?

9 MR. PANAGOPOULOS: Your Honor, I believe that it's
10 only -- only the wife is under court supervision.

11 THE COURT: Not the son?

12 MR. PANAGOPOULOS: I don't believe so.

13 THE COURT: And the distance between their home in
14 Phoenix and the Tucson facility?

15 MR. PANAGOPOULOS: I believe it's approximately
16 two hours.

17 BY MR. PANAGOPOULOS:

18 Q. Mr. Ray, could you describe for the Court what the BOP
19 would have to do to set up a videophone or -- or VRI?

20 A. My understanding is that they would have to install a
21 DSL line and then connect the video equipment to that DSL
22 line. And then they would just use that equipment for
23 point-to-point or VRS or even VRI.

24 Q. Okay. Mr. Ray, the BOP has agreed to provide Mr. Berke
25 with a TTY. Are you familiar with the TTY?

1 A. Yes, I am.

2 Q. Is there a TTY on the stand there in front of you?

3 A. Yes.

4 Q. Could you please show that piece of equipment to the
5 Court.

6 A. (Witness complying.)

7 MR. PANAGOPOULOS: Your Honor, I move for the
8 admission of TTY as Exhibit --

9 THE COURT: This is Exhibit what? 3 or 4?

10 MR. PANAGOPOULOS: -- No. 4.

11 THE COURT: 4? Any objection?

12 MS. FRANCIS: No objection.

13 THE COURT: Okay. When was that made? Exhibit 4
14 is admitted.

15 (Plaintiff's Exhibit 4 received in evidence.)

16 BY MR. PANAGOPOULOS:

17 Q. Could you describe for the Court how the TTY works?

18 A. Yes. Do you want me to put it up on -- yes?

19 (Pause.)

20 A. This device is approximately 60 years old. And it's
21 very rare to have that used at this point in time by deaf
22 and hard of hearing people.

23 Basically, you would take the phone receiver, the
24 handset, and put it on the coupling here (indicating). And
25 all of the signals that you're hearing will be transmitted

1 to another TTY, and that is through a phone land line. So
2 the other person is required to also have a TTY in order for
3 communication to happen between two people.

4 So the chirping noises that you're hearing, that's
5 called a baud, and that is the transmission through the
6 phone line of the information. And with this device you can
7 type 33 to 40 words per minute. It's definitely not a fast
8 way of communication. And it's based on the limitations of
9 the technology.

10 Q. So is it fair then that no matter how fast you type, the
11 TTY will transmit at that slower speed?

12 A. That's correct.

13 Q. So if you typed on that device right now, would we then
14 be able to hear the chirping as it sends whatever you're
15 typing?

16 A. Yes.

17 Q. Would you do just a brief demonstration? Type a
18 sentence or two.

19 A. (Witness complying.)

20 Q. So the device continues to transmit long after you're
21 done typing.

22 A. Yes.

23 Q. Thank you. You can turn that off if you like.

24 THE COURT: Where's the -- do you see a written
25 product somewhere?

1 THE WITNESS: Yes, Your Honor.

2 THE COURT: Okay. So we'll mark this as
3 Exhibit 5. This is what he typed. This is Richard Ray and
4 him doing a demonstration on -- I don't know what the last
5 two words are, but -- okay.

6 Here, Gwen, if you don't mind, if you'd show this
7 to counsel.

8 Okay. That's Exhibit 6?

9 THE DEPUTY CLERK: 5.

10 THE COURT: 5? Oh, yeah. 5. Okay.

11 (NOTE: Mr. Panagopoulos showing exhibit to
12 Ms. Francis.)

13 BY MR. PANAGOPOULOS:

14 Q. Other than the speed, are there any problems with using
15 TTY as a communication device, sir?

16 A. So there is a limitation on like the number of
17 characters, and the text that is outgoing is capitalized and
18 the text that is coming in is lower case. And you don't see
19 emotion. It's very flat, and people typically because of
20 that will keep the conversation short and to the point, and
21 not have extended communication or communication that would
22 require anything other than, you know, the time to meet or
23 -- you know, and then when people are face to face, then
24 they will sign to each other.

25 THE COURT: What's the difference between this and

1 just doing email? Assuming the person can read English and
2 type it.

3 THE WITNESS: Well, email is quicker. And you can
4 text -- email or text, so that's much quicker. With a TTY
5 there's no opportunity for overlapping or interrupting.
6 With an IM, an instant message, you can interrupt and the
7 conversation is much more fluid because of that. With a
8 TTY, though, you cannot interrupt. If the person tries to
9 interrupt while a message is coming in, then everything
10 becomes garbled and jumbled. And that's part of the reason
11 why we don't use TTYS very much anymore, other than just
12 very basic communication, say, setting a time of a meeting.

13 THE COURT: So you can use a computer and AOL or
14 Gmail -- you can use email on a computer to accomplish the
15 same thing, as far as I understand. Only better.

16 THE WITNESS: Well, most people do prefer to use
17 the videophones for conversations and communications.

18 THE COURT: I understand that. That's not my
19 question. I'm saying that you can use Gmail or AOL better
20 than the TTY.

21 THE WITNESS: Well, I don't know that the BOP uses
22 email. That might be prevented in their system. I don't
23 know. For Gmail, AOL, IMs, I'm not sure. I believe that
24 they're -- what they have is very limited.

25 MR. PANAGOPOULOS: Your Honor, I will proffer that

1 you will hear through Mr. Craig that email is sequestered
2 and quarantined, so that there could be -- it wouldn't be
3 uncommon to have a 48-hour lag between the time one email is
4 sent, quarantined, reviewed by the BOP, sent to the
5 prisoner, and then the same 24-hour lag outgoing. So -- and
6 that will come in through -- I'm just giving the Court a
7 brief proffer since you've asked that question.

8 THE COURT: Okay.

9 BY MR. PANAGOPOULOS:

10 Q. Mr. Ray, we've set up a very brief video demonstration
11 to compare communication with the TTY with communication by
12 a videophone. The screen in front of you should show that
13 video shortly.

14 Could you please walk us through the video and
15 explain what we are seeing as it's going?

16 A. Yes.

17 (NOTE: Video recording being played.)

18 A. This shows someone calling in. And the woman is
19 explaining to the little girl. The mom's asking questions
20 to the girl. And she's explaining what the TTY is saying.
21 She's saying: "Who."

22 And you'll notice that a lot of time is spent
23 trying to communicate with the little girl, talking about
24 what the person on the phone is saying. So a lot of time is
25 spent on that explanation. The woman is saying: "What do

1 you want me to tell him?" So the woman here is facilitating
2 communication between the adult on the other line and the
3 little girl.

4 Q. Okay. And is that typical of how a TTY conversation
5 would go?

6 A. Yes.

7 Q. Are the conversations in your experience typically so
8 short and stilted?

9 A. Yes. Very short. Very short and to the point.

10 Q. The next clip shows the use of a videophone. I'd like
11 you to walk us through that next.

12 A. Sure.

13 (NOTE: Video recording being played.)

14 A. You'll notice that the little girl is using the remote.

15 MR. PANAGOPOULOS: That's the voice of the
16 interpreter, Your Honor.

17 A. You'll notice that the little girl is able to
18 communicate with the man on the screen, and the mother, the
19 woman, doesn't have to sign to facilitate communication.
20 The little girl and the man on the screen are able to have
21 direct communication.

22 Q. What type of videophone solution was being used in this
23 case, do you know?

24 A. That was the Sorenson notch (sic).

25 THE INTERPRETER: Your Honor, the interpreter

1 would like to ask for clarification on the unit name.

2 The interpreter needs to make a correction for the
3 record. It's the N, as in the letter N, and then the word
4 "touch." The ntouch, which is a Sorenson unit.

5 MR. PANAGOPOULOS: Thank you.

6 BY MR. PANAGOPOULOS:

7 Q. And --

8 THE COURT: Did you mark the video?

9 MR. PANAGOPOULOS: Yes, Your Honor. We'd like to
10 mark the video as I believe it's Exhibit 6.

11 THE COURT: Gwen, 6 or 7? What number are we on?

12 THE DEPUTY CLERK: 6.

13 THE COURT: Any objection?

14 MS. FRANCIS: No objection, Your Honor.

15 THE COURT: Okay.

16 (Plaintiff's Exhibit 6 admitted into evidence.)

17 BY MR. PANAGOPOULOS:

18 Q. Now, you've I believe described for the Court a couple
19 of the ways that these videophone conversations can be
20 recorded. Are there other ways that -- that these
21 conversations could be recorded, as well?

22 A. Yes. There are several ways, actually, to be able to
23 record them. Like how we just saw on the video. That could
24 be -- that's one way that could be done. It could be
25 recorded in that way.

1 And there are three more basic ways. With the
2 videophone unit that we have here, there are video and audio
3 outputs that could be connected to a DVD player and recorded
4 to a DVD, which could be, you know, kept as storage and
5 could be played at some later point.

6 And as I mentioned earlier, with the Z4 app, it
7 could be recorded through the actual application, as I
8 mentioned earlier. And as I said, there are several ways
9 that that could happen.

10 Q. In your view, how effective is videophone communication
11 as -- for people who are deaf as compared to a telephone for
12 people who are not deaf?

13 A. Can you repeat the question?

14 Q. Certainly. How effective for communication purposes is
15 a videophone for people who are deaf compared to how
16 effective a telephone is for people who are not deaf?

17 A. I would say that they are the same. Because with a
18 videophone you can see the person's signs, you can see their
19 facial expression and their body language. Because that's
20 what we depend on. That's the tone of voice. The
21 equivalent of that is the facial expression. We can -- the
22 speed is the same, so it would be the same as a hearing
23 person talking on the phone and hearing the other person on
24 the line's tone of voice.

25 Q. Earlier when you talked about the TTY, you said you

1 can't hear emotion, that it's flat. Is that what you mean,
2 that you can't hear tone of voice and it impedes
3 communication?

4 A. Yes, that is correct.

5 THE COURT: Arguably it's better, because if
6 you're on a phone you don't see the person. I mean, it's
7 not the same as phone communication. It's like video
8 conferencing.

9 MR. PANAGOPOULOS: Your Honor, I guess our
10 position is that because signing is part of the language and
11 part of the --

12 THE COURT: I understand.

13 MR. PANAGOPOULOS: -- tone of voice, for someone
14 who is deaf it is the same.

15 BY MR. PANAGOPOULOS:

16 Q. Mr. Ray, what about TTY? Is TTY as effective a method
17 of communication for people who are deaf as a telephone is
18 for people who are not deaf?

19 A. No. The -- the disparity is quite marked. The speed of
20 spoken language is three to four times faster than what a
21 TTY can handle, so most definitely not effective. And
22 communication is very, very slow.

23 And as I said, there are no markers for emotion,
24 so you cannot tell what the emotion of the person is just
25 from seeing that on the TTY. So those two technologies are

1 very, very different.

2 Q. What about the language itself? Is ASL equivalent to
3 the English language?

4 MS. FRANCIS: Objection, Your Honor.

5 THE COURT: Why?

6 MS. FRANCIS: Well, based on the advanced
7 knowledge -- the basis of -- this witness has been offered
8 as an expert on the issue of technology. Whether or not
9 this witness can testify whether a person can communicate in
10 ASL -- I'm hoping I'm not misunderstanding counsel's
11 question -- and English, the effectiveness of both
12 languages, that would be --

13 THE COURT: I don't think that's the question.
14 Let's hear the answer. I think the question has to do with
15 whether this is the language.

16 Go ahead.

17 THE WITNESS: Well, American Sign Language is my
18 natural language and it's the language that I've been using
19 ever since I started learning language. It is a visual
20 language. There's structure and grammar. So it would not
21 be necessarily the same as English.

22 So there are some things that there are no sign
23 equivalents for, no sign-to-English word equivalents. This
24 particular phrase that I've just signed in ASL uses the
25 signs for "train go very fast." Those are the actual signs

1 that are used. But it means that I lost my train of
2 thought. But the sign that's are used are "train go very
3 fast." So there are some things that there's no equivalent
4 for between the two languages.

5 So it's not just the grammar. But we also rely on
6 visual cues, such as this particular sign for "want." If I
7 raise my eyebrows with that sign, the implication is a
8 question. If I furrow my brow when I use that particular
9 sign and I flip the sign from palms facing up to palms
10 facing down, the implication is you don't want. That is the
11 meaning of that is that you don't want. So the brow up and
12 the brow down have two different meanings.

13 So when I give training for our 911 operators for
14 how to read sentences from the TTY -- because the people who
15 are calling in using the TTY, they're using -- their natural
16 language is ASL, but they're calling in through the TTY
17 system. So they might say -- "Blood, blood, blood" might be
18 what the 911 operator sees on the TTY. What they mean is
19 that someone is bleeding. Because the sign itself is the
20 sign for "blood," and repeatedly. So the sign for "blood"
21 signed repeatedly two or three times is the English
22 equivalent of the word "bleeding."

23 THE COURT: I thought on the TTY the person was
24 typing in words.

25 THE WITNESS: That's correct. So when a person is

1 typing, depending on their language and their skills with
2 language, what a person -- what the operator sees on the TTY
3 may not be equivalent to English.

4 MR. PANAGOPOULOS: Your Honor, in other words,
5 someone who is fluent in the English language using a TTY
6 would type in: "I am bleeding."

7 THE COURT: Right.

8 MR. PANAGOPOULOS: Someone who is not fluent would
9 type: "Blood, blood, blood," and the 911 operator would
10 have to be able to interpret it, and that's one of the
11 things that Mr. Ray trains people on is interpreting what
12 people mean because of the gap in communication.

13 THE COURT: But do we -- do we know how fluent the
14 plaintiff is in English?

15 MR. PANAGOPOULOS: Your Honor, I know that the
16 plaintiff speaks English, but I also know that his primary
17 language is American Sign Language. His daughter, the
18 four-year-old that we saw on the video, her primary language
19 is American Sign Language. It's the same with the rest of
20 his children and with others that he would communicate with.

21 So it's not simply, you know, his use of the
22 language that is important here; it's -- it's the people
23 that he would be communicating with, as well. And they're
24 at all different levels, and using a TTY would obviously
25 impede that communication.

1 THE COURT: And so that's his granddaughter and
2 his daughter?

3 MR. PANAGOPOULOS: That was his daughter and his
4 wife on the -- on the screen.

5 THE COURT: The little child is his daughter?

6 MR. PANAGOPOULOS: The little child is his
7 four-year-old daughter.

8 THE COURT: And that's his wife?

9 MR. PANAGOPOULOS: And that's his wife.

10 THE COURT: And -- but she can speak.

11 MR. PANAGOPOULOS: I believe that she's -- she
12 can't. She's also deaf and ASL is her primary language.
13 The voice you heard in the video was the voice of an
14 interpreter who was there.

15 THE COURT: Okay.

16 MR. PANAGOPOULOS: Your Honor, I believe with
17 that, that I am finished with the direct examination of
18 Mr. Ray, unless the Court has any other questions.

19 THE COURT: How old's the plaintiff?

20 MR. PANAGOPOULOS: The plaintiff is -- I believe
21 he's -- in his 50s? I believe he's in his 50s, Your Honor.
22 47? 47.

23 MS. FRANCIS: Your Honor, in the presentence
24 report I put him as late 40s, early 50s.

25 THE COURT: Well -- okay. There should be a date

1 of birth.

2 Do you have the PSI?

3 MS. FRANCIS: Unfortunately, Your Honor, I don't
4 have the PSI with me. It's 83 pages long.

5 THE COURT: Any questions, Ms. Francis?

6 CROSS-EXAMINATION

7 BY MS. FRANCIS:

8 Q. Good morning, Mr. Ray.

9 A. Good morning.

10 Q. I'm going to ask a few questions about some points you
11 raised in your testimony.

12 Mr. Ray, is it fair to say that at this time TTY
13 technology is still available, correct?

14 A. Yes. It is still available but it's diminishing.

15 Q. Okay. But at the very least, it is still available.

16 A. Yes.

17 Q. And from your experience -- if you can please remind me.
18 You work for the City of Los Angeles?

19 A. Yes.

20 Q. Okay. And you're familiar that there are government
21 entities that still make the TTY system available to the
22 public?

23 A. Yes.

24 Q. Okay. So the use of the videophone technology is not
25 the only technologies that are available to those who are

1 deaf or hearing impaired.

2 A. Well, most individuals do use the videophone technology.

3 The use of the TTY, as I said, is diminishing greatly.

4 Perhaps people who are deaf and blind are still relying on

5 that -- on the TTY technology as an accommodation. But

6 generally speaking, most people are using the videophone.

7 Q. Okay. But just to be clear, but there are those who can

8 still use the TTY technology.

9 MR. PANAGOPOULOS: Your Honor, objection as to the

10 relevance. The issue isn't whether or not TTY is still

11 available. We showed a 60-year-old machine up there, so

12 it's still available. The issue is effectiveness.

13 THE COURT: I don't think, frankly -- and I wish

14 everybody would focus on it -- that's not the issue either.

15 The issue is whether or not the Bureau of Prisons has any

16 legitimate penologically -- penological issues that would

17 preclude the use of this.

18 MS. FRANCIS: And, Your Honor, I will be getting

19 to that.

20 THE COURT: Yes.

21 MS. FRANCIS: But just -- just to put on the

22 record, the basis of these questions is to show that the

23 existence of this technology --

24 THE COURT: It's undisputed.

25 MS. FRANCIS: -- is it's still -- it's not totally

1 ineffective.

2 THE COURT: Well, that's -- it exists. It's
3 available. It was used. I don't know whether you call it
4 totally ineffective or not. But I -- I don't think you can
5 quibble with the fact that the other technology is better in
6 some fashion. The question is, is it -- should be put into
7 the system in Tucson.

8 Okay. Let's go ahead.

9 MS. FRANCIS: Thank you, Your Honor.

10 BY MS. FRANCIS:

11 Q. Mr. Ray, have you any experience with the -- well, let
12 me start back.

13 So just to be clear, you're stating that the
14 videophone -- the TTY system is not as effective as the
15 videophone system, correct?

16 A. That's correct. The TTY system is not as effective as
17 the videophone system.

18 Q. And the reason you're saying this is because it's slow?

19 MR. PANAGOPOULOS: Objection. Mischaracterizes
20 his testimony.

21 THE COURT: No, it doesn't. Overruled. I think
22 he's testified to this, but --

23 THE WITNESS: It is slow.

24 BY MS. FRANCIS:

25 Q. Okay. And it doesn't reflect each person's tone of

1 voice as they're using it?

2 A. That's correct.

3 Q. And that it causes conversation to be short and to the
4 point?

5 A. Yes.

6 Q. And are you -- and are you aware that within -- in the
7 BOP correctional facility that inmates' calls are limited in
8 the time duration?

9 A. Yes.

10 Q. Okay. And so a conversation that is short and to the
11 point would be in line with that BOP policy, correct?

12 THE COURT: What's the policy in this facility?

13 THE WITNESS: No.

14 THE COURT: I'm sorry. Did he answer?

15 THE INTERPRETER: He did.

16 THE COURT: What did he --

17 THE INTERPRETER: He said, "No."

18 BY MS. FRANCIS:

19 Q. Are you familiar with -- are you aware of any cases
20 where a TTY phone system was found to be ineffective?

21 THE COURT: Like what? Who? A court?

22 MS. FRANCIS: By a court.

23 MR. PANAGOPOULOS: Objection, Your Honor. Legal
24 research is not his area of expertise.

25 THE COURT: Right. I don't know if he can

1 answer -- I don't know that the word I'm looking for is
2 "effective" or "ineffective," but --

3 MS. FRANCIS: Should the witness answer,
4 Your Honor, or --

5 THE COURT: Yeah, he can answer.

6 THE WITNESS: Can you repeat the question, please?

7 BY MS. FRANCIS:

8 Q. All right. I'll withdraw --

9 THE COURT: The question is whether or not -- are
10 there any court cases that you're aware of where a TTY
11 system has been rejected under the Rehab or ADA?

12 THE WITNESS: I -- I don't know.

13 THE COURT: Huh?

14 THE WITNESS: I don't know.

15 THE COURT: Okay.

16 BY MS. FRANCIS:

17 Q. Okay. Let me talk with you for a moment about the
18 videophone technology. If a person wants to -- if a person
19 is using videophone and communicating with another party,
20 can the person on one end have a simultaneous conversation
21 with another party by way of videophone?

22 THE INTERPRETER: Your Honor, the interpreter
23 needs clarification.

24 BY MS. FRANCIS:

25 Q. Can a person -- can a caller on a videophone have

1 conversation with more than one person at the same time?

2 MR. PANAGOPOULOS: I'm going to object as to
3 relevance, Your Honor.

4 THE COURT: Overruled.

5 THE WITNESS: It depends on your setup.
6 Generally, you have two people on either end of the
7 conversation that can communicate simultaneously. There are
8 ways that you can have three- or four-way communication, but
9 generally speaking, you're limited to two-way communication
10 with two people.

11 BY MS. FRANCIS:

12 Q. Okay. And you had testified earlier that it's possible
13 for a person to delete a -- to delete a recording of a call
14 once the call is finished?

15 A. Yes. It depends on the equipment that is being used.

16 Q. Okay. And if the call is to be recorded, in addition to
17 getting the videophone equipment, a person would also have
18 to get software to record any videophone conversation; is
19 that correct?

20 A. No, you can use a DVD player to record and the
21 conversation can be saved onto a disk, so it doesn't
22 actually require a software program to be able to do that.

23 Q. And are you familiar with the Bureau of Prisons'
24 computer network?

25 A. Yes.

1 Q. Have you ever tested the software on the Bureau of
2 Prisons' computer network?

3 THE COURT: What software? He just said --

4 MS. FRANCIS: I'm sorry. This equipment, rather.

5 MR. PANAGOPOULOS: Objection, Your Honor. The DSL
6 is not on the network, neither is the phone system that this
7 equipment is on. So the network itself is irrelevant.

8 MS. FRANCIS: It isn't irrelevant, Your Honor.

9 THE COURT: Well, you can't argue with him. That
10 doesn't help. He's not testifying.

11 BY MS. FRANCIS:

12 Q. Are you -- are you familiar with the implementation of
13 this videophone system in a -- in a high security
14 correctional complex?

15 MR. PANAGOPOULOS: Again, relevance. Mr. Berke is
16 in a minimum security camp, Your Honor.

17 THE COURT: Right. Can you explain how this
18 system would be installed at a place such as Tucson? FCC
19 Tucson?

20 THE WITNESS: Sure. We do not connect to BOP's
21 network system. It's on a separate system. It's a
22 standalone network that is through the telephone line and
23 through a high speed DSL modem.

24 THE COURT: Does it have to be installed?

25 THE WITNESS: And that cable uses an ethernet

1 connection.

2 Yes. And that's a connection between the modem
3 and the unit, not from the current internet system of the
4 BOP. It's not on their network -- on the BOP's network
5 system.

6 THE COURT: As far as you know, this connection
7 doesn't exist now. Correct?

8 MR. PANAGOPOULOS: Your Honor, that's not the
9 case. There is a DSL --

10 THE COURT: Wait, wait. No, you can't -- he's
11 here. If he's wrong, we'll figure it out, but --

12 THE INTERPRETER: Your Honor, the interpreter
13 would request a repetition of your question.

14 THE COURT: Yeah. Does this connection that he's
15 describing exist at the Tucson facility now? As far as he
16 knows.

17 THE WITNESS: Yes, they do have that for VRI.

18 THE COURT: And they have VRI now as we speak?

19 THE WITNESS: From my understanding is that they
20 are working on that. That's my understanding, at least.

21 THE COURT: If people visit by video conferencing,
22 whether it be family members or lawyers -- I mean, we have
23 it here -- is that using a similar connection? Or is that
24 using the internet?

25 THE WITNESS: No, they would use videophone

1 equipment.

2 THE COURT: Okay. So if I communicate with an
3 inmate anywhere in the country at a facility, I'm going
4 through this connection?

5 THE WITNESS: For using that videophone equipment,
6 if it were approved by the BOP.

7 THE COURT: Well, no, no. What I'm asking,
8 though, is that a lot of visits or even court proceedings
9 can be arranged with various BOP facilities all over the
10 country, and you can see the inmate.

11 Is this the same kind of equipment we're talking
12 about or is this something different? This has no,
13 obviously, either interpreter or sign language aspect. But
14 many people -- I can call a facility anywhere in the
15 country, and they can put a prisoner in most cases on the
16 phone and I can see him.

17 THE WITNESS: No, that is not the same equipment,
18 Your Honor.

19 THE COURT: Okay.

20 THE WITNESS: There's different equipment for
21 video conferencing calls among several different parties.
22 There's different equipment that you would use for that.

23 THE COURT: And that's not the DSL modem
24 connection? That's something else?

25 THE WITNESS: They do use something else.

1 THE COURT: Okay.

2 THE WITNESS: They don't use the DSL.

3 THE COURT: But what you're describing would
4 require the DSL modem?

5 THE WITNESS: Yes, for videophone technology, that
6 is correct.

7 THE COURT: Okay.

8 THE WITNESS: And for point-to-point for VRI and
9 for VRS.

10 MS. FRANCIS: May I -- I'm sorry, Your Honor. I
11 didn't want to interrupt the Court.

12 THE COURT: Okay. Go ahead.

13 BY MS. FRANCIS:

14 Q. This DSL connection at the BOP's facility in Tucson, are
15 you aware that it is unsecured and unmonitored?

16 A. Yes, I'm aware of that.

17 Q. And are you aware that the BOP's system for recording
18 calls is on a secured and monitored computer network?

19 A. I'm not aware of that.

20 Q. Okay. Have you ever addressed with any person at the
21 BOP the security risks that are involved with recording a
22 call from a line that is unsecured and placing it onto a
23 secured network?

24 THE COURT: I don't know what it means to take it
25 from an unsecured line and placing it on a secured network.

1 MR. PANAGOPOULOS: I also object to the question,
2 Your Honor, because he testified that's not how -- what
3 happens. It would be recorded on a DVD.

4 THE COURT: Well, she's talking about a secure
5 line, though. I don't know what that means.

6 MS. FRANCIS: I'll have the witness -- a BOP
7 witness explain that, Your Honor.

8 BY MS. FRANCIS:

9 Q. Are you -- okay. Mr. Ray, you just demonstrated for the
10 Court how a TTY machine is used, correct?

11 A. Yes.

12 Q. Okay. And that was both from your demonstration in
13 court and on the video, correct?

14 A. For clarification, you mean from here in this room,
15 correct?

16 Q. Yes.

17 A. Yes.

18 Q. And you were able to demonstrate how one could type a
19 message in English on that equipment, correct?

20 A. Well, I've been signing American Sign Language and the
21 interpreter's been actually interpreting that into English.

22 Q. Do you recall when you were standing there before Judge
23 Huvelle and you were typing on the TTY machine?

24 A. And, yes, I was using English for that, yes.

25 Q. Okay. And do you recall showing -- well, let me -- let

1 me rephrase that.

2 Do you recall after you typed your message that a
3 transcript in written English came up, correct?

4 A. Yes.

5 Q. Okay. And you also, through the video, showed -- or
6 described that two people on a telephone call using a TTY
7 will be able to type messages back and forth, correct?

8 A. Yes.

9 Q. Okay. Although it was a little slower than the
10 videophone, correct?

11 A. Yes.

12 Q. Okay. And through the use of the TTY, is it fair to say
13 that you can express thoughts, correct?

14 A. Not effectively.

15 Q. Well, you can make statements. You can type a statement
16 into the TTY machine and the other party will get it,
17 correct?

18 A. Yes. They can read that.

19 Q. Okay. And the other party can do the same in return,
20 correct?

21 A. Yes.

22 Q. Okay. And that is -- and it is still used as a form of
23 communication between two people, correct?

24 MR. PANAGOPOULOS: Objection. Asked and answered.

25 THE COURT: Overruled.

1 THE WITNESS: Can you repeat your question?

2 BY MS. FRANCIS:

3 Q. The use of the TTY machine can be, as we just described
4 where parties were typing messages back and forth, can be --
5 therefore, can be used as a tool of communication. Correct?

6 A. It can be, yes.

7 Q. Also, with the videophone, you had testified earlier
8 that a person can possibly disconnect -- I'm sorry -- delete
9 a phone call that the machine had previously recorded; isn't
10 that correct?

11 A. It depends on the equipment. If you're using this
12 particular device that I have here in front of me, you
13 actually have to make an effort to delete that from the DVD.
14 If you're using an app, you can delete it. You do have to
15 go through steps, but you can delete it from an app. But
16 there are steps involved within the application.

17 Q. Okay. But it is possible, is what I'm asking.

18 A. Yes.

19 Q. And you --

20 THE COURT: What I understand him to say, it's
21 possible to block that, too, by use of some secret password.

22 Is that right?

23 THE WITNESS: Yes, that is correct.

24 BY MS. FRANCIS:

25 Q. And what I was also going to ask, Mr. Ray, is you had

1 also testified that another way to prevent a person from
2 manipulating that system is to have someone --

3 A. Go ahead. Manipulating the system?

4 Q. Delete the call is what I'm referring to. Is to have
5 someone present and watching the inmate as they're using
6 that system.

7 A. Yes, that's correct. To have someone monitoring to
8 ensure that the person is not deleting and that they are
9 maintaining a record of the conversation.

10 Q. And -- I'll withdraw that.

11 MS. FRANCIS: Your Honor, may I have a moment to
12 confer with agency counsel? Thank you.

13 (Pause.)

14 MS. FRANCIS: Your Honor, I have a couple more
15 questions to ask. I'm going to try to ask them as carefully
16 as I possibly can.

17 BY MS. FRANCIS:

18 Q. Mr. Ray, if a videophone is used in a prison facility,
19 is it fair -- well -- is it fair to say that the two parties
20 on the call can see each other, correct?

21 A. With using a videophone, yes.

22 Q. Okay. And with the person who was not at the prison
23 facility, it's fair to say that there's no way to control
24 how that person is going to behave on the other end of that
25 video call, correct?

1 A. I'm not following your question.

2 Q. Okay.

3 A. Sorry. Can you repeat that?

4 Q. Yes, I can. On a videophone call between two people,
5 while there may be a person sitting with an inmate observing
6 this call, is it fair to say that the person on the other
7 end of that call who is outside of the prison facility,
8 their behavior on that phone call cannot be controlled?
9 Isn't it fair to say that?

10 I can give an example if it will help.

11 MR. PANAGOPOULOS: Objection on relevance,
12 Your Honor. The same is true of a phone.

13 THE COURT: Not exactly, but it may -- same may be
14 true with visitors.

15 MS. FRANCIS: Well, Your Honor, I'm asking this
16 question to show that there are some interests, security
17 interests, that the BOP --

18 THE COURT: Well, what kind of visitation do they
19 have there? Low security. I don't --

20 MS. FRANCIS: Well, for example -- if I can ask
21 Mr. Ray.

22 BY MS. FRANCIS:

23 Q. There's no way to control whether or not the caller on
24 the other end may be in the privacy of his or her home, may
25 decide to strip naked in front of the camera.

1 MR. PANAGOPOULOS: Same objection, Your Honor.
2 There's no control over whether a person on a telephone says
3 things that are sexual in nature.

4 THE COURT: I don't know if there are -- they
5 don't monitor simultaneously calls.

6 MS. FRANCIS: They can.

7 THE COURT: They can but they don't.

8 MS. FRANCIS: At times they do, Your Honor.

9 THE COURT: Well, what do you mean "at times they
10 do"?

11 MS. FRANCIS: I can have the -- Mr. Craig talk
12 about that, but there are times -- there are certain
13 circumstances where calls are live monitored and --

14 THE COURT: Live monitored by having somebody
15 listening in at the time or --

16 MS. FRANCIS: Yes.

17 THE COURT: Well, then there could be
18 circumstances here where they can have live monitoring, too.
19 Most calls, at least that I'm aware of, are not
20 simultaneously monitored. It depends on whether this is
21 being monitored, I suppose, that somebody could do
22 something. But --

23 MS. FRANCIS: Well, let me ask --

24 THE COURT: You better tell me about your visiting
25 policy. Visiting policies in low security aren't that

1 monitored either, for that matter. I think we're getting
2 kind of beyond the --

3 MS. FRANCIS: If I can just have a moment,
4 Your Honor, to make sure I don't have any further questions
5 to ask.

6 THE COURT: Does the IT -- the TTY use a secured
7 and monitored line?

8 MS. FRANCIS: From -- Your Honor, would you -- the
9 witness that we have can testify to that much better than I
10 can.

11 THE COURT: Okay. Fine. Any more questions for
12 this witness?

13 MS. FRANCIS: I can check with agency counsel.
14 One moment, Your Honor.

15 (Pause.)

16 MS. FRANCIS: Nothing further, Your Honor.

17 THE COURT: Any redirect?

18 MR. PANAGOPOULOS: Just a little bit, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. PANAGOPOULOS:

21 Q. You were asked a question as to whether you're aware of
22 any cases rejecting the use of a TTY as ineffective.

23 Let me ask you a related question. Are you aware
24 of any prison systems that have adopted videophone
25 technology for use by deaf prisoners?

1 A. I actually know of three prison systems.

2 THE COURT: Where?

3 THE WITNESS: Virginia.

4 THE COURT: State, we're talking? Or federal?

5 THE WITNESS: Yes. The federal prison.

6 THE COURT: Which -- which one?

7 THE WITNESS: The federal prison in Virginia.

8 Department of Corrections in Virginia, I believe. Is that
9 state?

10 THE COURT: What?

11 THE WITNESS: That a state?

12 MR. PANAGOPOULOS: "The Department of Corrections
13 in Virginia" is what he said. I believe that's the state
14 prison system in Virginia.

15 THE COURT: Okay.

16 THE WITNESS: Minnesota, also. And there is a
17 county jail in Texas, as well.

18 THE COURT: Have you ever visited any of these
19 places where they have such a system?

20 THE WITNESS: No, I haven't.

21 BY MR. PANAGOPOULOS:

22 Q. You were asked a question as to whether you knew whether
23 or not the DSL line that's being put in place at Tucson is
24 unsecured and unmonitored.

25 I'd like to ask you a related question. Is it

1 possible to monitor the equipment that's put on that line
2 eventually, sir?

3 THE COURT: Are you drawing a distinction between
4 the equipment and the line?

5 MR. PANAGOPOULOS: There -- there is a
6 distinction, Your Honor. The -- the line itself is just
7 simply a line that connects the two pieces of equipment. It
8 doesn't do anything. It's like this piece of (indicating)
9 -- it's like this piece of cord. What's important is the
10 communication that takes place; and that can be monitored.

11 THE COURT: Let's have him testify.

12 MR. PANAGOPOULOS: Okay.

13 THE WITNESS: Can you repeat your question,
14 please?

15 BY MR. PANAGOPOULOS:

16 Q. Sure. Describe to the Court what is a DSL line. Just
17 the line itself.

18 A. It's a telephone line. It would be connected -- plugged
19 into a telephone port. And then also connected to the modem
20 on the other side.

21 Q. Okay.

22 A. And we have an ethernet from the modem, ethernet cable
23 from the modem. You can see the port on the back of the
24 equipment there.

25 Q. All right. So without a piece of equipment actually

1 attached to that line, can you communicate using the line
2 alone?

3 A. No.

4 Q. Okay. So something has to be attached to that line for
5 communication to occur.

6 A. That's correct.

7 Q. And we've talked about attaching videophones like the
8 Sorenson ntouch, right?

9 A. Yes.

10 Q. And that Sorenson ntouch can be monitored.

11 THE COURT: I don't know what --

12 THE WITNESS: Yes.

13 THE COURT: -- the word "monitor" means. Do you
14 mean that you can watch the video or do you mean that you
15 can take a DVD? That you make a disk or some kind of thumb
16 drive?

17 THE WITNESS: Both. For this particular unit?

18 THE COURT: Yeah.

19 THE WITNESS: You can use it to record onto a DVD.

20 THE COURT: So when you say "monitor," what you're
21 saying is that to have simultaneous monitoring you would
22 have to be present and watch. To obtain the transcript of
23 what happened would be subsequent to the call. You'd have
24 to have it translated.

25 MR. PANAGOPOULOS: Just like any other foreign

1 language call, Your Honor, yes. We'll get to that with
2 Mr. Craig.

3 THE COURT: But that's what you mean by
4 "monitoring." You can either stand there and watch what's
5 happening, but you wouldn't understand it if it's two people
6 communicating with sign.

7 MR. PANAGOPOULOS: Unless you had someone who
8 understood sign language, right.

9 THE COURT: But -- or, alternatively, you get the
10 -- some kind of disk or DVD.

11 MR. PANAGOPOULOS: Right, which is --

12 THE COURT: And you translate it.

13 MR. PANAGOPOULOS: Which would be exactly the same
14 thing if I were communicating with a prisoner in Greek.

15 THE COURT: He should be -- you're not the
16 witness.

17 Okay. All right. If we're finished with this
18 witness, we should take a break. One second.

19 (Off-the-record discussion with the law clerk.)

20 THE COURT: I just have one further question. Is
21 it -- can you have the video transmitted to a different room
22 if somebody wanted to watch it, the way you watch the front
23 door of a courthouse on video?

24 THE WITNESS: I think that there are several
25 possible ways to do that. If you don't mind giving me a

1 moment to think about that. It really depends on the
2 equipment that you're using. And I believe that it can be
3 done.

4 MR. PANAGOPOULOS: Can I ask a follow-up question
5 as to that, Your Honor?

6 THE COURT: Go ahead.

7 BY MR. PANAGOPOULOS:

8 Q. We showed a video here, played on a laptop, that was
9 then transmitted to -- one, two, three, four, five -- six or
10 so different monitors in the courtroom.

11 Couldn't a simple video splitter be used to
12 monitor via another video what was happening on the
13 telephone?

14 A. Absolutely.

15 THE COURT: But the most likely use of this is --
16 in this particular case for this particular plaintiff is to
17 have it between two people who are using ASL.

18 They can't monitor the lawyer's calls. So you're
19 not part of the mix.

20 THE WITNESS: Your Honor?

21 THE COURT: Huh?

22 THE WITNESS: I actually do have that setup at
23 home. I have this piece of equipment and then I have two TV
24 monitors. And I have my laptop connected to all of them.

25 So --

1 THE COURT: My point, though --

2 THE WITNESS: -- I would switch to a monitor video
3 from the laptop, so --

4 THE COURT: Right. But my point is that the most
5 frequent use of this for somebody at Tucson would be to
6 communicate with somebody who's doing sign, so the
7 simultaneous monitoring, unless you happen to have somebody
8 who speaks the language, isn't going to work.

9 MR. PANAGOPOULOS: Well --

10 THE COURT: I understand you're going to say the
11 same thing --

12 MR. PANAGOPOULOS: Right.

13 THE COURT: -- for a Spanish speaker or whatever.

14 MR. PANAGOPOULOS: Well, the other issue is the
15 concern about inappropriate conduct that Ms. Francis raised.
16 It probably keep someone from taking off their clothes if
17 they knew they were monitored.

18 THE COURT: Anything further for this witness?

19 MR. PANAGOPOULOS: Nothing further from me,
20 Your Honor.

21 THE COURT: All right. We're going to take a
22 short break. I'm supposed to actually participate in a
23 training program by video at 12.

24 So what's our next -- who's testifying next?
25 We're not going to finish before then.

1 MR. PANAGOPOULOS: Your Honor, our next --

2 THE COURT: Thank you, sir. You may step down.

3 (Witness excused.)

4 MR. PANAGOPOULOS: Our next witness is --

5 THE COURT: You don't have anything else, right?

6 MS. FRANCIS: No, Your Honor.

7 MR. PANAGOPOULOS: Our next witness is Todd Craig
8 from -- from BOP. We -- we have, also, the -- you have the
9 expert report of Mr. Cokely.

10 THE COURT: Yes.

11 MR. PANAGOPOULOS: Or, Dr. Cokely, rather. I
12 would move that into evidence so that it's officially in the
13 record.

14 MS. FRANCIS: No objection, Your Honor.

15 THE COURT: Okay. And the deposition itself is
16 coming in?

17 MR. PANAGOPOULOS: The deposition also.

18 THE COURT: Here's the deposition. This will be
19 going in as -- what's the two numbers?

20 MR. PANAGOPOULOS: I believe No. 7 is the report
21 and No. 8 is the deposition, Your Honor.

22 THE COURT: Okay.

23 (Plaintiff's Exhibits 7 and 8 received in evidence.)

24 MR. PANAGOPOULOS: Yeah. I will also note that
25 there's an agreement of the parties that some of the

1 information relied upon by Mr. Cokely for his report -- you
2 know, for example, you know, where the brother is and what
3 equipment he uses, so on and so forth -- has been stipulated
4 to by the parties so that there was no need to bring
5 Mr. Berke here to testify as to those issues.

6 THE COURT: And so if he's -- somebody -- an
7 ex-wife in LA, right, who's sick, and then there's family
8 members in Texas -- I mean, in Phoenix --

9 MR. PANAGOPOULOS: In the District of Columbia --

10 THE COURT: Oh, yeah.

11 MS. FRANCIS: If I could just --

12 THE COURT: The business that he got in trouble
13 for has nothing to do with the business in the District of
14 Columbia?

15 MR. PANAGOPOULOS: Nothing to do with that,
16 Your Honor.

17 THE COURT: Is there any stay-away orders in that?
18 Coming out of the New Jersey proceedings?

19 MR. PANAGOPOULOS: Your Honor, I believe that
20 there are some restrictions with respect to financial
21 transactions, if I recall correctly, on the extension order
22 that we got that extended his report date. But I believe
23 that's the only limitation that I recall. I'd have to
24 review the order to confirm that, but that's all I recall.

25 THE COURT: I probably have the judgment. Just a

1 minute. I'd like to see the PSI.

2 MS. FRANCIS: If Your Honor wants, I can bring a
3 copy -- I don't know if counsel has a copy of the PSI
4 available.

5 MR. PANAGOPOULOS: Do not.

6 MS. FRANCIS: I -- I have a copy of the PSI. I
7 could download it off my -- I have to print it off my
8 computer.

9 THE COURT: Well, it may be on ECF. The PSI may
10 -- have you ever seen it? It's not available to you on ECF.
11 You've never seen it?

12 MR. PANAGOPOULOS: Never seen it. I don't believe
13 it's available on PACER.

14 THE COURT: Does your client have any objection to
15 us making it available? I mean, not make it available.
16 They probably have access to it. I must have access to it
17 on ECF.

18 You don't know?

19 THE LAW CLERK: I don't know.

20 MS. FRANCIS: If I could step away for a moment.

21 THE INTERPRETER: Your Honor, can the interpreter
22 step back?

23 THE COURT: Go as you wish. You mean --

24 (Off-the-record discussion with the law clerk.)

25 THE COURT: Well, then, Ms. Francis, if you bring

1 it back after lunch, I'd like to see it.

2 MS. FRANCIS: I can, Your Honor.

3 THE COURT: Okay. I'm looking at the conditions
4 of supervised release.

5 MS. FRANCIS: I just have -- when the Court is
6 through, I just have one quick representation to piggyback
7 off what Mr. Panagopoulos just stated.

8 THE COURT: Okay, go ahead.

9 MS. FRANCIS: With respect to the stipulation,
10 yes, the parties are willing to stipulate to the statements
11 made by Dr. Cokely about what current technology Mr. Berke
12 and his family members -- Mr. Berke's household, his mother,
13 his sons, his brother -- what they have, whether they access
14 to -- I think it was a DSL line versus a land line. And I
15 just want to get on the record before we actually take that
16 next step and enter it, is to just confirm that the
17 demonstration that took place on this video -- I don't
18 recall which exhibit it was -- with Mr. Berke and his wife,
19 whether or not that was done at Mr. Berke's home.

20 MR. PANAGOPOULOS: It was not done at Mr. Berke's
21 home.

22 MS. FRANCIS: Okay. Then that's fine, Your Honor.
23 We do stipulate.

24 THE COURT: Okay. All right. I don't see
25 anything here about who he can communicate with other than

1 not communicating with felons.

2 MR. PANAGOPOULOS: Your Honor, I don't know how
3 long Ms. Francis has with Mr. Craig, but --

4 THE COURT: Who's calling Mr. Craig? You?

5 MR. PANAGOPOULOS: I am. But I was thinking of
6 the cross-examination. I think I -- I think I could easily
7 be done with him by -- by noon.

8 THE COURT: Well, let's see. Go ahead. We can
9 start.

10 He was forfeited -- he was ordered to forfeit
11 \$2.5 million. Did he have \$2.5 million?

12 MR. PANAGOPOULOS: We don't -- we don't know, no.
13 If he does, I might need a different retainer.

14 TODD R. CRAIG,
15 after having been first duly
16 sworn upon oath, was examined
17 and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. PANAGOPOULOS:

20 Q. Good morning, Mr. Craig.

21 A. Good morning.

22 Q. Would you please state your full name for the record?

23 A. Yes. Todd Roderick Craig.

24 Q. And what is your business address?

25 A. 320 First Street, Northwest, Washington, D.C. 20534.

1 Q. And what is your job title, sir?

2 A. I'm the acting chief of the Office of Security
3 Technology for the Federal Bureau of Prisons.

4 Q. Okay. And what are your job responsibilities?

5 A. Our branch is charged with the technical evaluation of a
6 myriad number of technologies to enhance the security of our
7 117 institutions, to increase the safety of 37,000 staff,
8 and to provide safeguards for approximately 200,000 inmates
9 in our care and custody and control.

10 THE COURT: Does that include all levels of
11 security? 200,000, that sounds very low to me. That's why
12 I ask.

13 THE WITNESS: Yes, Your Honor, with the exception
14 there are about approximately 20,000 criminal aliens that
15 are housed in private prisons.

16 THE COURT: And that doesn't include halfway
17 houses.

18 THE WITNESS: No, ma'am.

19 BY MR. PANAGOPOULOS:

20 Q. Mr. Craig, are you aware that Larry Berke has requested
21 access to a videophone?

22 A. Yes, I am.

23 Q. Okay. And are you aware that the Bureau of Prisons has
24 denied that request?

25 A. Yes, I am.

1 Q. Has the Bureau of Prisons reached a conclusion that
2 providing the videophone would fundamentally alter or burden
3 the Bureau of Prisons?

4 A. No. I believe -- may I answer?

5 THE COURT: Yeah.

6 BY MR. PANAGOPOULOS:

7 Q. Go ahead.

8 A. Okay. As we discussed in the deposition, our office --
9 if I would have been tasked with formally evaluating the
10 videophone as an assistive technology to meet our security,
11 both our prison security and our IT computer network
12 security protocols, then a formal evaluation process of six
13 months to a year would take place, as with the approximately
14 40 to 45 other technologies that my branch is reviewing at
15 this time.

16 Q. This is an accommodation request, and is this the first
17 accommodation request that has been made for a videophone to
18 the Bureau of Prisons?

19 A. To my knowledge.

20 Q. What about Mr. Bryant? Are you aware of the Bryant
21 case?

22 A. Just peripherally, yes.

23 Q. And that individual asked for a videophone as well, did
24 he not?

25 A. That is my understanding.

1 Q. Okay. And that happened much earlier than Mr. Berke's
2 request, didn't it?

3 A. I became aware of it this summer.

4 Q. Okay. You became aware of it this summer. And since
5 that time the Bureau of Prisons, as far as you're aware, has
6 done nothing to evaluate whether or not it would be
7 appropriate to grant that accommodation to Mr. Bryant.

8 A. My office has not been tasked with a formal evaluation
9 request for a videophone.

10 Q. Okay. So the answer to my question is, no, you haven't
11 evaluated it?

12 A. No.

13 Q. All right. And the same is true with respect to
14 Mr. Berke's request, no, you haven't evaluated it, right?

15 A. That would be accurate.

16 Q. Okay. So there's no written document that explains what
17 the burden allegedly is for implementing videophone.

18 A. Other than my deposition that listed a number of
19 security concerns, you're correct, Counsel.

20 Q. Okay. Now, if I under- -- you've provided a declaration
21 in this case, and in that declaration you note that the
22 Bureau of Prisons is concerned that a videophone would
23 provide, quote: Unsecured and unmonitored access to a
24 secured network. Is that correct?

25 A. That's correct.

1 THE COURT: It would provide -- say it again? I'm
2 sorry. I just lost this.

3 MR. PANAGOPOULOS: Certainly, Your Honor. The
4 concern is that the videophone would provide "unsecured and
5 unmonitored access to a secured network."

6 THE COURT: Let's go back to what I didn't note
7 before just now. Someone in the ordinary course, if they
8 decided that they wanted eval- -- to buy new equipment for a
9 reason, whatever reason it may be, you would do a -- you
10 would get a request and you would do an analysis to find out
11 what's out there and what issues there are, right?

12 THE WITNESS: Yes, Your Honor.

13 THE COURT: You would evaluate the technology, or
14 technologies, that were available to accomplish this.

15 THE WITNESS: Yes, Your Honor.

16 THE COURT: And that evaluation -- and is there
17 some protocol that you follow to do that evaluation?

18 THE WITNESS: Yes, Your Honor. Our office is
19 typically scanning the environment for any new
20 security-related technologies. We may initiate that formal
21 evaluation or our agency executive staff may task us with
22 such a formal evaluation of a technology that provides a
23 solution to a security issue.

24 THE COURT: You could also evaluate -- it's not
25 just technology where there's -- that's a security

1 technology. You can evaluate -- what do you do? Get some
2 subcontractor or you contract out to have somebody study,
3 say, that equipment that was shown to us a minute ago?

4 THE WITNESS: We do the evaluation, Your Honor.

5 THE COURT: You do it in-house.

6 THE WITNESS: Yes. And as -- you are correct,
7 Your Honor. It's a wide-ranging portfolio from not only
8 less lethal munitions and delivery systems or cell phone
9 forensics. But, basically, with any technology used by
10 staff in any correctional program, will that meet our
11 security requirements?

12 THE COURT: Okay. And so you don't know anything
13 about this other case, Bryant. That's in administrative
14 posture at the moment?

15 MR. PANAGOPOULOS: It is.

16 THE COURT: Okay. And so -- okay. And --

17 MR. PANAGOPOULOS: It's also in district court at
18 the same time, Your Honor.

19 THE COURT: Well, they stayed it to allow the
20 administrative proceeding to --

21 MS. GOLDEN: I'm sorry, Your Honor. I'm counsel
22 in the Bryant matter.

23 THE COURT: Your name?

24 MS. GOLDEN: Deborah Golden from the Washington
25 Lawyers' Committee.

1 THE COURT: Okay.

2 MS. GOLDEN: The proceeding has -- the district
3 court hearing has been ordered to mediation at the end of
4 October while the administrative proceeding continues.

5 THE COURT: You mean it's going to go
6 simultaneously to mediation and --

7 MS. GOLDEN: Yes.

8 THE COURT: And -- but nobody has gotten to the
9 stage for asking for this kind of analysis.

10 MS. GOLDEN: I -- we haven't had discovery in that
11 case, so I don't know what's happened in the BOP side. But
12 Mr. Bryant has been asking for a videophone through counsel
13 for six years now.

14 THE COURT: Oh, he's been there for six years?

15 MS. GOLDEN: Yes.

16 THE COURT: And that's how long the litigation has
17 been pending? Six years?

18 MS. GOLDEN: There were -- the exhaustion of
19 administrative remedies took several years. And then the
20 litigation has been pending for a few more.

21 THE COURT: And why does it take six months to a
22 year to do this? Just because you're backed up and
23 understaffed and the federal government is losing all its
24 money?

25 THE WITNESS: Yes, Your Honor.

1 THE COURT: All right. I do think I need to break
2 actually in order -- I'm supposed to get online ten minutes
3 before 12. And we're not going to finish with this witness
4 anyways.

5 I need to know -- when we come back I want to see
6 the PSI, first of all. And maybe we can't get access to it.
7 So if you would bring a copy.

8 And second of all, I want to know how they monitor
9 visits there at this -- you got a low -- medium -- no, it's
10 low security. Or is it a camp?

11 MS. FRANCIS: This is a camp, Your Honor.

12 THE COURT: Camp. So it's the lowest.

13 MS. FRANCIS: Lowest.

14 THE COURT: Yeah, so I want to know their
15 telephone policies, I want to know how they monitor
16 visitors.

17 And then we'll continue with the testimony at
18 2:00, please.

19 THE WITNESS: Yes, Your Honor.

20 THE COURT: All right. Thank you.

21 MS. FRANCIS: Your Honor, if I were to get this
22 information from a staff member at Tucson, I know they're
23 three hours behind us. Does the Court want the
24 representation from me?

25 THE COURT: Well, I'll take whatever -- you'd

1 think that they -- I told you before that I wanted to know
2 their policies on phone use.

3 MS. FRANCIS: Because I do have their telephone
4 policies.

5 THE COURT: Okay. Can you give a copy to the
6 other side and to my law clerk, please, for that? And
7 whatever you can learn about the others, obviously we'll
8 have to take your representation unless they can just send
9 you by email a written policy. I mean, camps run -- you
10 know, I was only a lawyer at camps, but they're run a little
11 differently than other institutions. Okay.

12 MS. FRANCIS: Okay.

13 THE COURT: Thank you. We'll resume at 2.

14 (Break in the proceedings at 11:45 a.m.)

15

16 (Upon resuming at 2:10 p.m.)

17 THE COURT: Good afternoon. Now, just to make the
18 record complete, over the lunch hour chambers was provided
19 the phone policy for Tucson Bureau of Prisons in the
20 correctional facility in Tucson, Arizona. The visitation
21 policy for -- of the same institution. We also were given
22 the Bureau of Prisons' policy for visitation and phone
23 usage. And the final thing was the PSI.

24 So I think we ought to mark -- do you have extra
25 copies, by chance?

1 MS. FRANCIS: I have a copy -- an extra copy here.
2 I don't know if the Court -- I'll move to the microphone.

3 THE COURT: Yes, please.

4 MS. FRANCIS: I don't know if the Court -- I can
5 share with the Court. I had checked with my office -- I
6 don't know if this is where the Court is going -- but I've
7 talked to other colleagues within the office. I know that
8 the sharing of a presentence report --

9 THE COURT: Yeah, I can't put it on the public
10 record.

11 MS. FRANCIS: Can't put it on the public record.
12 I had also been cautioned about giving it over to counsel in
13 this case. And I even asked, Well, it seems
14 counterintuitive since it's about his client. And I got a
15 variety of reasons, and some of them were just articulated
16 by my agency counsel, it is not our document to share. I
17 had even asked if maybe Mr. Berke had a copy that he could
18 have provided to his counsel. But -- and I'm told that he
19 has not. But I was told that I really should not be sharing
20 it, period.

21 THE COURT: So he didn't get that. Okay. Well,
22 then I won't rely on it. But the other four documents, can
23 you provide and we'll mark them as exhibits?

24 MS. FRANCIS: I'm going to see if I have an extra
25 copy of the program statement for --

1 MR. PANAGOPOULOS: Four or three documents,
2 Your Honor?

3 MS. FRANCIS: I'm going to look and see if I have
4 a fourth.

5 THE COURT: Four.

6 MS. FRANCIS: Because I know I provided, like the
7 Court said, the visiting and the telephone policies for
8 Tucson specifically. And then I provided the Court with a
9 program statement for the telephone as well as program
10 statement for Tucson.

11 MR. PANAGOPOULOS: Right.

12 THE COURT: Can I see --

13 MS. FRANCIS: I don't think I have a copy of the
14 program statement for --

15 THE COURT: I don't think the court reporter can
16 hear you when you talk over there, unless you -- either turn
17 on the mic or come forward.

18 MS. FRANCIS: I apologize. Can you hear me now?

19 I'm going to see if I have extra --

20 (Court and the Deputy Clerk conferring.)

21 THE COURT: We have copies -- an extra copy of --

22 MS. FRANCIS: Okay.

23 THE COURT: -- Bureau of Prison policies.

24 MS. FRANCIS: Okay. Thank you, Your Honor.

25 THE COURT: But not the Tucson policies.

1 MS. FRANCIS: I gave counsel a copy of the Tucson
2 policy, so he has those.

3 MR. PANAGOPOULOS: Your Honor, I have three
4 documents. I have a December 19th Inmate Visiting
5 Regulation Policy, a corrected copy February 2008 Telephone
6 Regulation Policy, and a 2010 Telephone Regulation Policy.
7 I don't have a fourth.

8 MS. FRANCIS: Right. They're going to give you an
9 extra copy, but the --

10 THE COURT: Wait, wait, you're doing just what we
11 talked about a minute ago.

12 MS. FRANCIS: I'm sorry. Can court reporter hear
13 me?

14 Yeah, the two -- the two copies, the one dated
15 June 17th of 2010 -- they're both dated June 17th of 2010.
16 Woops.

17 I apologize. Court's indulgence, please.

18 I'm going to check with agency counsel to see if
19 he has an extra copy of the visitation policy for Tucson.

20 THE COURT: We'll get it cleared up, so we can
21 have -- let us mark them --

22 Gwen, what's our last number?

23 THE DEPUTY CLERK: 9.

24 THE COURT: So 10 will be the Bureau of Prisons
25 Program Statement dated 5-11 of 2006 on visitation.

1 Then 11 is the Bureau of Prisons telephone
2 privileges. It's these two. And that also is dated
3 January 24th, 2008. Program Statement, Department of
4 Justice, Bureau of Prisons, and it's the telephone
5 privileges.

6 But then specifically as to Tucson -- okay. 11
7 will be -- 10 and 11. I'm sorry. So 12 -- my mistake -- 12
8 will be the Telephone Regulations For Inmates at the Tucson,
9 Arizona FCI. That's 12.

10 And then 13 is Inmate Visitation Regulations for
11 the Tucson, Arizona FCI.

12 All right. And then --

13 (Pause.)

14 MR. PANAGOPOULOS: Your Honor, could the Court
15 repeat again the exhibit numbers and the dates of these
16 documents? Because I'm not sure I have them all.

17 THE COURT: Exhibit 11 is the Program Statement of
18 Telephone Privileges dated, I think, 1-24, 2008. Corrected
19 copy says 2-11, 2008, for telephone privileges at the BOP.
20 And there's also a BOP Policy for Visitation dated 5-11,
21 2006, is the one I have. It's a program statement covers
22 visitation.

23 Then we have the two policies. 12 is the one that
24 has to do with Tucson telephone. And 13 is Tucson's
25 visitation. Okay?

1 MR. PANAGOPOULOS: Okay. Your Honor, agency
2 counsel has handed us two different dates for the visiting
3 regulations. One is December 2009, the other is July 2011.
4 I don't know which one the Court has.

5 THE COURT: For which? Tucson or --

6 MR. PANAGOPOULOS: For Tucson Inmate Visiting
7 Regulations.

8 THE COURT: Which one are we on, visitation or
9 telephone?

10 MR. PANAGOPOULOS: Visitation.

11 THE COURT: Well, what I have here is 2009. Is
12 there something --

13 MR. PANAGOPOULOS: There is. There's a July 7,
14 2011.

15 THE COURT: Oh. Okay. Well, do you have a copy
16 of that?

17 MR. HANSFORD: It's right here.

18 MR. PANAGOPOULOS: There's one copy.

19 THE COURT: That's 13. And we'll delete -- that
20 2011 will be Exhibit 13. If you can give it to my law
21 clerk, because this has now been superseded. So I don't
22 need to get hung up on --

23 MR. PANAGOPOULOS: Your Honor, and I don't have a
24 copy of Exhibit 10. Is that something I could look at when
25 the Court gets a moment? It doesn't have to be now.

1 THE COURT: Yeah, I don't -- I'm not sure how
2 relevant it is. We'll take a look at it.

3 Do you have a copy of this, by the way? Did you
4 give him what you gave us over the lunch hour?

5 MS. FRANCIS: I -- I did. I gave it to him via
6 email. And I thought I had all of the copies here, but it
7 turns out that I may have just gotten -- my assistant gave
8 me multiple copies of the phone and not enough of the
9 visitation.

10 MR. PANAGOPOULOS: Yeah. We didn't go back to the
11 office.

12 THE COURT: Okay. One second here.

13 (Pause.)

14 THE COURT: Okay. Shall we proceed?

15 (Off-the-record discussion with the law clerk.)

16 THE COURT: All right. Do we want to continue
17 with the witness's testimony?

18 MR. PANAGOPOULOS: Yes, Your Honor. I'm prepared
19 to continue.

20 THE COURT: Okay. For the record, I would say
21 from the PSI that it's quite clear that the phone systems
22 we've been talking about were critical to his offense. Are
23 you aware of that?

24 MR. PANAGOPOULOS: I -- I am aware of that,
25 Your Honor. Although, obviously, the access that we're

1 talking about here that he would be having would not affect
2 any of those issues. He wouldn't have any -- any type of
3 opportunity to deal with -- with those types of issues in
4 simply using that phone system.

5 THE COURT: I don't know enough about it. But
6 it's not irrelevant to the Court that the phone system we're
7 discussing was also used to perpetuate the fraud. Okay.

8 MR. PANAGOPOULOS: Yes. Your Honor, I guess what
9 I would suggest in that regard is that, you know, there are
10 many inmates who are in prison who perpetuated a fraud using
11 phones and telephone systems. That doesn't mean that they
12 can't use those phone systems in prison.

13 BY MR. PANAGOPOULOS:

14 Q. I believe where -- where we were before the -- the break
15 was that we had marked Exhibit 9. And that's in front of
16 you.

17 Would you please review that document, sir, and
18 let me know when you're ready to proceed?

19 (Pause.)

20 A. I'm ready.

21 Q. Okay. Do you recognize this document, sir?

22 A. Yes.

23 Q. What is it?

24 A. It is a waiver for the connection of a DSL line at
25 FCC Tucson.

1 Q. Okay. And who provided the waiver?

2 A. Who provided the copy to me?

3 Q. Excuse me?

4 A. Who provided --

5 Q. No, the waiver itself. Who decided to provide a waiver
6 for the installation of the --

7 A. The chief information officer of the Department of
8 Justice.

9 Q. Okay. And that's Luke McCormack?

10 A. Correct.

11 Q. Had you been provided with a copy of this memorandum
12 before this case?

13 A. No.

14 Q. Okay. Were you aware that there was a waiver for the
15 Tucson facility to install a DSL line before your
16 deposition?

17 A. I was aware in talking to my former boss over the
18 summer, but I was not part or parcel of any of the decision
19 making.

20 Q. Okay. And this memorandum permits the installation of a
21 DSL line at the Tucson facility where Mr. Berke is going to
22 be housed for a VRIS system; is that correct?

23 A. I understand it will be used for that system. It will
24 be connected for discreet events, such as interaction with
25 the health services department or discipline hearing in the

1 associate warden's complex, but then will be disconnected
2 after that discreet event is done.

3 In no circumstance, as the waiver clearly states,
4 will it be connected to the JUT system, which is the Justice
5 Unified Telecommunication Network which the BOP and the
6 Trust Fund networks are part and parcel of.

7 Q. Okay. The --

8 THE COURT: I'm sorry. Can you run that by me
9 again?

10 THE WITNESS: Yes, Your Honor. The Justice
11 Unified -- JUTNet, as we call it -- Justice Unified
12 Telecommunications Network -- is the overall DOJ information
13 system, and that has very strict security requirements. And
14 underneath that is the Bureau of Prisons' BOPNET, BOPWARE --

15 THE COURT: BOP what?

16 THE WITNESS: Bureau of Prisons net. I'm sorry
17 all these acronyms. BOPNET. And then the Trust Fund
18 network. And I don't know their acronym, per se. But they
19 are also under it. And the Trust Fund is the one who
20 administers the inmate telephone system in a secure manner.

21 But the security requirements for the main network
22 and all the subsidiary networks are very stringent, and we
23 do not have the option to opt out of those, including
24 encryption, monitoring transactional data, and monitoring
25 traffic across the network.

1 BY MR. PANAGOPOULOS:

2 Q. Let's focus for a minute on the last system you
3 identified, and that's the telephone system that inmates
4 use. That's not on the Justice Department secure network,
5 is it?

6 A. It is.

7 Q. Okay.

8 THE COURT: The Trust Fund network is on the DOJ
9 network?

10 THE WITNESS: Yes. It is stand alone from the
11 Bureau of Prisons Network, BOPNET.

12 BY MR. PANAGOPOULOS:

13 Q. Okay. Do you remember testifying in your deposition
14 that the telephone system was on its own network?

15 A. It is.

16 Q. Okay. And is there any -- and is the DSL line also on
17 its own network, then?

18 A. As far as I know, it's a stand alone -- what's called a
19 stove pipe, one line.

20 Q. One line. Okay. And so that's separate and apart from
21 all these other networks that you were talking about?

22 A. That would be correct.

23 Q. Okay. Have you done anything to analyze -- well, let me
24 ask you this question. I asked you this in your deposition,
25 as well. The DSL line itself, until something is connected

1 to it, can't really transmit any information, right?

2 A. No, but in a prison environment the availability of that
3 DSL line 24/7, if someone hooks a device, the inmate inside
4 to somebody outside, it can be used for nefarious purposes.

5 Q. Well, this -- this jack where the DSL line is located,
6 is it located in an area where any prisoner can walk up and
7 plug something into it, sir?

8 A. They're usually located in the secure staff areas.

9 Q. Okay. So this DSL line is located in a secure area,
10 right?

11 A. Yes.

12 Q. Okay. And back to my question, which I asked and I
13 don't believe you answered, until someone connects something
14 to that DSL line, it can't transmit any information, right?

15 A. You're correct.

16 Q. Okay. So if someone connects a videophone to that DSL
17 line, that's what would be used to use the VRIS system,
18 correct?

19 MS. FRANCIS: Objection, Your Honor, leading.

20 MR. PANAGOPOULOS: Well, he's a hostile witness.

21 THE COURT: Overruled. Go ahead.

22 THE WITNESS: A device would facilitate that.

23 BY MR. PANAGOPOULOS:

24 Q. Right. And it would be a videophone, right? Or
25 something compatible with --

1 A. Something compatible with that technology, yes.

2 Q. Okay. And you heard Mr. Ray testify as to how that
3 videophone can be recorded, right?

4 A. Yes.

5 Q. And you reviewed his expert report.

6 A. I read it.

7 Q. Okay. And you also reviewed Dr. Cokely's expert report,
8 right?

9 A. That's correct.

10 Q. Okay. You didn't disagree with anything you saw in
11 Mr. Ray's expert report, right?

12 A. Not on its face, no.

13 Q. Okay. And you didn't disagree with anything you saw in
14 Dr. Cokely's report either, right?

15 A. No, because both reports were their considered opinion
16 of the technology, and neither one gave any specified
17 application to a correctional environment.

18 Q. Okay. Well, the specified application for the
19 correctional environment, as we discussed in your
20 deposition, is that the phone call -- you have to be able to
21 monitor the phone call, correct? That's the primary
22 concern?

23 A. Monitor it and record it.

24 Q. Okay.

25 THE COURT: What?

1 MR. PANAGOPOULOS: Monitor it and record it.

2 BY MR. PANAGOPOULOS:

3 Q. What do you mean by monitoring it?

4 A. The Trust Fund system in the secure network has a very
5 sophisticated intelligence system. It allows for both live
6 monitoring and recorded monitoring of any call that an
7 inmate places on the inmate telephone system.

8 Q. How is a phone call live monitored?

9 A. There is an interface screen that comes up. The staff
10 member can click on that particular call if it's in
11 progress. For example, the inmate's not on a work
12 assignment and he's using his phone privilege, and they can
13 listen in on the conversation.

14 Q. Okay. What happens in the case of a foreign language
15 conversation other than Spanish, which I understand you have
16 bilingual -- bilingual personnel at your facility. So a
17 foreign language conversation, you know, what happens there
18 with respect to live monitoring?

19 A. If the SIS, which is the Special Investigative Section,
20 had reason to believe there was actual intelligence in that
21 phone call, it would be sent out for translation --

22 Q. Okay.

23 A. -- via a contract.

24 Q. All right. And if it just happened to be a random
25 monitor of a -- of a conversation that was in a foreign

1 language, what would happen then?

2 A. If the staff member was not bilingual in that language
3 or fluent, they would probably move on to the next call.

4 Q. Okay. So the call would continue then, unmonitored
5 live?

6 A. But it would be recorded and could be analyzed future.

7 Q. Of course. Okay. Which takes to us the second piece
8 here: Recording. When these phone calls are recorded, what
9 happens to them?

10 A. In terms of?

11 Q. The recordings.

12 A. They're stored in a secure database on the Trust Fund
13 network.

14 Q. Okay. And when they need to be reviewed, when the
15 transcripts need to be reviewed, how does that occur?

16 A. They're downloaded.

17 Q. They're downloaded where?

18 A. By the Special Investigative Section, downloaded -- for
19 example, there's two processes. One is internal or
20 administrative to maintain security, gather intelligence for
21 the inmate discipline process that's codified in Code of
22 Federal Regulations. And also, secondly, if there's a
23 possible -- if there's actionable language that is part of
24 an ongoing criminal case on the street, we would receive a
25 subpoena from the U.S. Attorney's Office and the court for

1 those recorded -- recorded phone calls.

2 Q. Okay. So someone then translates those calls, whether
3 it's done locally or whether it's done somewhere else,
4 because you've been subpoenaed, correct?

5 A. Correct.

6 Q. All right. Now, you heard Mr. Ray talk about how it is
7 possible to hook up multiple monitors in order to monitor
8 video of calls. Do you recall that testimony?

9 A. I recall it.

10 Q. Okay. Doesn't that provide, then, the BOP with the
11 ability to live monitor those calls?

12 A. It would for live monitoring. It would absolutely not
13 suit our purpose for recorded information that's suitable
14 for evidence.

15 Q. All right. Well, let's talk about recording. I don't
16 know if you saw the video of the -- of the call, but you'd
17 see that the screen has the pictures of both individuals and
18 they sign to each other. And that can be recorded,
19 according to Mr. -- Mr. Ray. So why doesn't that fulfill
20 the BOP's requirements that a call be recorded?

21 A. Well, let's go back to the waiver you handed me,
22 Counselor. It's a stand alone line in this application. My
23 understanding is it would be unmonitored, it will not be
24 recorded -- let me finish -- for any device on the network.
25 The storage and protection of data is governed by those same

1 stringent DOJ IT security safeguards.

2 For example, I'm exploring an audio surveillance
3 system that for the last several years has not had an
4 internal serving -- server solution. It would have to be
5 hosted on a third party. DOJ IT security policy
6 specifically prohibits that. So if --

7 THE COURT: Prohibits what?

8 THE WITNESS: Prohibits storing evidence outside
9 the secure DOJ network.

10 THE COURT: Well, I don't -- I just don't
11 understand what that means, outside the network. How do you
12 store evidence -- how do you store evidence in the network?

13 THE WITNESS: Like this Trust Fund system,
14 Your Honor, it's within our secure network; therefore, we
15 maintain control of the data, the protection of the data.

16 THE COURT: Well, so the recording is where that
17 wouldn't be if you had this system? I don't understand.

18 THE WITNESS: The DSL line?

19 THE COURT: Yeah, if you had the --

20 THE WITNESS: Videophone?

21 THE COURT: Yeah, videophone.

22 THE WITNESS: I don't know where it would be
23 because we -- we're not configured to record that device
24 within our secure network.

25 THE COURT: So now if a prisoner is talking on the

1 phone, what is that -- how is that call recorded?

2 THE WITNESS: It's recorded in the Trust Fund
3 database called Truphone.

4 THE COURT: So it's being simultaneously recorded
5 and it's not being -- and it's just there? So if I ask the
6 Bureau of Prisons to get me a telephone call from such and
7 such a date, it's sort of like the way we record what's
8 going on in the courtroom, it's in our system?

9 THE WITNESS: Absolutely.

10 THE COURT: Okay. But this other one wouldn't be
11 because it's on a disk or it's on a VCR. Is that what
12 you're saying?

13 THE WITNESS: What I'm saying is, Your Honor, the
14 DSL stand alone line, there's no provision to monitor it.
15 There's no provision to record it within that secure inmate
16 telephone system.

17 THE COURT: Right. It's obvious it wouldn't be in
18 the same system. But the witness before testified there's a
19 way to record and preserve it. He'd have to --

20 THE WITNESS: Yeah, but that recording solution
21 would have to meet those DOJ security requirements, and then
22 be placed on our secure network.

23 THE COURT: I don't understand what that means.

24 THE WITNESS: Just because a device records it, we
25 can't testify or verify as to the veracity of the data. For

1 example, like cell phone forensics data which we set up,
2 there's a forensic hash that runs through that digital
3 evidence that, you know, is used to -- to validate the
4 evidence authenticity. But if you're recording outside the
5 secure network, there's no real validation other than it was
6 recorded on that device.

7 BY MR. PANAGOPOULOS:

8 Q. Let's go back to my question which relates to recording.
9 They can be recorded, right?

10 A. Your expert testified the device can record.

11 Q. Now, if you have a DVD that records someone's face here
12 signing in the BOP, are you telling me that there's a
13 dispute at that point as to who it is who's signing?

14 A. I'm telling you the storage of the evidence, Counselor,
15 doesn't meet the DOJ standards.

16 THE COURT: Where do the DOJ standards exist?

17 THE WITNESS: The federal -- they're called FIPS,
18 Your Honor. The Federal Information Processing Standard.
19 140-2, 197. They have to do with encryption of data.

20 THE COURT: What was that? Encouragement of data?

21 THE WITNESS: Encryption of data. Yeah. Because
22 everything over that secure line, whether it's an inmate
23 making a call, a staff member on the other system, the
24 BOPNET sending an email, all of that is encrypted for
25 security purposes.

1 THE COURT: So besides storing things securely, is
2 your system such that it can't be hacked from the outside?

3 THE WITNESS: That's correct.

4 THE COURT: So when we set up lines here to
5 communicate with Guantanamo, there's secure lines that no
6 one else can get into other than in the courtroom where
7 they're at. Is that what you're saying that the inmates are
8 using for phone calls?

9 THE WITNESS: I'm saying that that data is
10 encrypted, yes.

11 THE COURT: So even if they're talking to their
12 mother, you're saying that somebody can't hack into that.

13 THE WITNESS: Never say never, but it's very
14 protected.

15 THE COURT: But is not the same thing true if you
16 have a DSL line? Or is that sort of more available to
17 hackers?

18 THE WITNESS: My understanding, Your Honor, is
19 that that DSL line doesn't necessarily meet those same FIPS
20 standards. And the device, because we've not done a formal
21 analysis, I don't know if the videophone would meet that
22 device -- those -- those same DOJ standards or not.

23 BY MR. PANAGOPOULOS:

24 Q. So then you don't know whether a recording would meet
25 DOJ standards because you haven't analyzed it.

1 A. I can't say that it would.

2 Q. Okay. And you can't say that it wouldn't.

3 A. Correct.

4 Q. And you haven't taken any steps since 2005 when
5 Mr. Bryant was incarcerated to analyze whether that system
6 would?

7 A. Let me put this in context, Counselor. I found out this
8 summer about it. I have not been tasked with a formal
9 evaluation of the videophone, as I've previously testified.

10 Q. I understand that. But Mr. Bryant was incarcerated in
11 2005. And what you're telling us is over the last several
12 years since 2005, you haven't even been told that you --

13 THE COURT: Well, I don't understand -- without
14 knowing more about this case, I don't understand why anybody
15 didn't -- has there been a court order telling the
16 defendants to do anything?

17 MR. PANAGOPOULOS: No, Your Honor. But the
18 regulations require that if a prisoner asks for an
19 accommodation, that the prisoner's preference for
20 accommodation is to be given priority. And unless the BOP
21 can demonstrate that it is an undue burden -- and it has to
22 do so in writing -- that the prisoner should be provided
23 that accommodation.

24 THE COURT: Well, but in a PI you've got the
25 burden. So I'm a little confused.

1 MR. PANAGOPOULOS: Well, we have the burden of
2 showing what we need to show, but the Government bears the
3 burden of showing that there is an undue burden, and that's
4 why they're not providing this information -- or they're not
5 providing this accommodation, rather. And the Government
6 has done nothing to do that. And that's one of the reasons
7 that they're in violation of the Rehabilitation Act.

8 MS. FRANCIS: Your Honor, I would ask if counsel
9 -- which regulation is counsel referring to?

10 MR. PANAGOPOULOS: 39.160. I'm sorry. It's
11 29 C.F.R. 39.160.

12 THE COURT: Yes. Do you know what's the subpart?

13 MR. PANAGOPOULOS: Subsection (d) --

14 THE COURT: (d).

15 MR. PANAGOPOULOS: States that -- in relevant part
16 -- "In those circumstances where agency personnel believe
17 the proposed action would fundamentally alter the program or
18 activity, or would result in undue financial and
19 administrative burdens, the Agency has the burden of proving
20 that compliance would result in such alteration or burdens"
21 -- I'm sorry -- "would result in such alteration or burdens.
22 The decision that compliance would result must be made by
23 the Attorney General or his or her designee after
24 considering all regency -- agency resources available."

25 (Sic)

1 MS. FRANCIS: And, Your Honor, I don't know if the
2 Court is accepting a -- another representation at this time
3 or if the Court wants me to wait until afterwards, but I
4 have another regulation that shows -- that counters that to
5 an extent in terms of BOP's obligations to follow an inmate
6 -- a complaint. I have here 28 C.F.R. 39.170, I believe
7 it's subsection (d) (2).

8 THE COURT: What's that say?

9 MS. FRANCIS: And it says: Before filing a
10 complaint -- well, from talking with agency counsel and from
11 looking at this, it shows that in order for a complaint to
12 be filed it would need to be filed by an inmate.

13 Mr. Berke at this time is not in BOP custody. And
14 before filing a complaint, he would have had to have gone
15 through BOP's administrative remedies and exhaust those
16 before taking it to the Department of Justice.

17 THE COURT: He did not -- you haven't argued that
18 to me now. What -- you're not saying that he can't invoke
19 -- or are you -- 29 C.F.R. 39.160?

20 MS. FRANCIS: What we're saying, Your Honor, is
21 that before he can even seek relief, the type of relief that
22 he's seeking -- and before he can even claim that the BOP is
23 in violation, there is a set of steps that he would need to
24 take. He would need to be in -- if I'm understanding my
25 agency counsel correct on the regulations, he would need to

1 be in BOP custody. He would need to make -- he would need
2 to exhaust the administrative remedies that are afforded to
3 him as an inmate.

4 THE COURT: He didn't ask me, as far as I recall
5 to, to throw this out on the grounds that I don't have
6 jurisdiction.

7 MS. FRANCIS: Well, Your Honor, that would have
8 been part of a dispositive motion, which I did point out to
9 the Court in a phone call recently that we would like to
10 have been able to file before now but unable to do so, but
11 we still have time to do so.

12 THE COURT: Well, you have time to do so, but if
13 nobody raises this jurisdictional issue, I'm supposed to be
14 ruling on a PI. I can't rule on a PI if I don't have
15 jurisdiction.

16 MR. PANAGOPOULOS: Your Honor, it's pretty clear
17 that you do have jurisdiction because he's not in custody
18 and he doesn't have to go through the administrative
19 process.

20 THE COURT: Well, no. She's saying that -- I
21 don't know whether he can take -- invoke 29 C.F.R.
22 39.160(d).

23 MR. PANAGOPOULOS: Your Honor, that regulation
24 doesn't state that it is only invoked when someone is in
25 custody. It talks about what the Agency is required to do

1 with respect to --

2 THE COURT: It talks about an inmate, though. Can
3 I see the reg? It talks about an inmate.

4 MR. PANAGOPOULOS: Well, it talks about
5 applicants, participants, personnel of other federal
6 entities and members of the public. So it's not limited
7 only to inmates.

8 MS. FRANCIS: And, Your Honor, I can show the
9 Court --

10 THE COURT: Wait a minute.

11 MS. FRANCIS: I'm sorry, Your Honor.

12 THE COURT: You know, the Government -- you can't
13 put -- I can't decide anything without jurisdiction. But if
14 no one tells me, makes the argument, it's not exactly --
15 although I have a *sua sponte* obligation to determine it --

16 Can you put on the buzzer, please? Have a seat.

17 (Off-the-record discussion with the law clerk.)

18 THE COURT: Sorry. Can we turn off the buzzer?

19 All right. I don't know what the Government's
20 argument is, per se. I mean, they're relying on a
21 regulation that would talk in general about people that are
22 participating in government programs. So -- and he isn't in
23 there yet. And you don't have any authority to tell me I
24 don't have jurisdiction, as far as I can tell. You might
25 argue that once he gets in there. But that's why they filed

1 ahead of time.

2 But I think he can invoke 39.160 of the C.F.R. It
3 isn't limited to inmates; it's just limited to people who
4 participate in federal programs.

5 MR. PANAGOPOULOS: And I believe, Your Honor, that
6 under the PLRA, the Prison Litigation Reform Act, only an
7 inmate would be required to go through that administrative
8 process.

9 THE COURT: Right. But that's the way Bryant
10 went, so I just don't know what I can make out of Bryant in
11 a sense. I just don't have any idea what the administrative
12 process that he has to go. So whether or not he's been
13 tasked or not tasked, this case was filed a couple weeks
14 ago.

15 MR. PANAGOPOULOS: Right. However --

16 THE COURT: What is the imminency here, Counsel,
17 by the way?

18 MR. PANAGOPOULOS: Well, the imminency --

19 THE COURT: He has to check himself in, but he has
20 means of communication.

21 MR. PANAGOPOULOS: Your Honor, the imminency was
22 that when we -- when we first filed this action, Mr. Berke
23 had requested numerous accommodations. And those were not
24 being provided at any facility. And we filed this lawsuit.
25 And after we filed the lawsuit, the Government -- and after

1 we had the initial phone call with the Court, the Government
2 decided to move Mr. Berke to the Tucson facility where they
3 could provide him with some of the accommodations that have
4 been requested.

5 And, you know, we will say that the Government has
6 done that. That's part of the declaration that was filed.
7 But they haven't provided him with everything that we
8 believe is necessary and appropriate. And, you know, this
9 is the last piece that we believe is -- is necessary and
10 appropriate for him to have communication.

11 THE COURT: Right. But my point is if he got it
12 five months from now or three months, that's nice, but it's
13 not -- the PI implies a certain urgency.

14 MR. PANAGOPOULOS: I will agree with the Court
15 that the level of urgency is a little bit different now that
16 he has gotten several different accommodations that he
17 had -- he's -- that he had asked for. It's not -- you know,
18 honestly, it's not at the exact same level. However, you
19 know, you have someone who's going to be in there for -- for
20 two years or less. We've had the Bryant case --

21 THE COURT: 24 hours (sic).

22 MR. PANAGOPOULOS: 24 months. We've had the
23 Bryant case that has been going on for a very long time, and
24 the Government hasn't done what it's required to do. It
25 hasn't analyzed. He's requested this phone.

1 THE COURT: Who?

2 MR. PANAGOPOULOS: Mr. Berke. We allege in our
3 complaint that he called the prison, he requested this
4 phone, and it was denied.

5 Mr. Craig testified that the BOP has denied the
6 request for the videophone. Yet --

7 THE COURT: You did?

8 THE WITNESS: I -- I said I had not completed an
9 evaluation, Your Honor.

10 THE COURT: Yeah, I didn't think he said that.

11 MR. PANAGOPOULOS: Well, I asked him if he was
12 aware that the BOP had denied that request, and he said yes.

13 THE COURT: They have denied it formally?

14 MS. FRANCIS: Well, Your Honor, and I -- this is
15 -- this has been our question in terms of has there been a
16 formal request by Mr. Berke for such a phone. The first
17 time that anyone from the BOP became aware that Mr. Berke
18 wanted such a videophone was when he filed his complaint,
19 but there was no other, I guess, communication between
20 Mr. Berke and the BOP where BOP would have been able to look
21 back at him and say, No, we're not going to give this to
22 you. The first time that anyone from BOP is even learning
23 about Mr. Berke's, quote/unquote, request is when he filed
24 his complaint back in August.

25 MR. PANAGOPOULOS: No, there were several phone

1 calls Mr. Berke made and that we also made on his behalf to
2 the facility where he is to be located.

3 THE COURT: All right. Let's finish up. Finish
4 up with the witness.

5 MR. PANAGOPOULOS: All right.

6 BY MR. PANAGOPOULOS:

7 Q. Okay. The recording of -- of calls. You -- I believe
8 that when calls are recorded in a foreign language, those
9 have to be sent off to a contractor to -- to translate; is
10 that correct?

11 A. Unless we have a staff member who is bilingual in that
12 specific language.

13 Q. All right. So unless you have a staff member who's
14 bilingual in a specific language, the phone call has to be
15 sent off site somewhere to be translated.

16 A. That's correct.

17 Q. Okay. And when it's sent off site somewhere, it's no
18 longer within the DOJ's secure system, right?

19 A. No. But when those calls are sent off site for
20 translation, it's through the government contractual
21 process. The company is vetted, as well as individual
22 contractors working on it have a security clearance.

23 Q. Okay. And you haven't done anything to investigate
24 whether or not you can have an ASL translate -- whether any
25 of those companies perhaps even have ASL translators, right?

1 A. I have not been tasked with that, Counselor.

2 Q. And you have no idea whether or not the current phone
3 system you use might be able to store and translate those
4 calls.

5 A. I have not been tasked with that, Counselor.

6 Q. Now, if you were able to record and monitor the calls,
7 that would address your monitoring concerns, correct?

8 A. You're asking me a hypothetical. What I would say is,
9 whatever the device is, if it was able to be hosted on the
10 secure network and follow the same stringent DOJ IT security
11 protocols, the answer to your hypothetical would be yes.

12 Q. Okay. Do you remember in your deposition I asked you
13 about the Z4 system? That's one of the same systems that
14 Mr. Ray testified about today.

15 A. I believe you showed me a handout of it.

16 Q. Okay. And you -- you looked at the fact that it could,
17 in fact, record telephone calls. Correct?

18 A. The literature stated that, yes.

19 Q. And I asked you, So if you could record those
20 conversations, does that alleviate the burden? Do you
21 remember that question?

22 A. I do.

23 Q. And do you remember that you answered, It addresses the
24 burden?

25 A. Yes.

1 Q. Okay. And if you could record those conversations and
2 send them off for translation, then you'd be treating those
3 phone calls essentially the same way you treat those foreign
4 language calls for which you don't have in-house
5 translators, correct?

6 A. If we could do it within the same secure computer
7 network.

8 Q. Right. And again, let's assume that, because you
9 haven't done anything to determine whether you can or not,
10 right?

11 A. I have not completed a formal analysis.

12 Q. All right. So, again, assuming that you can, if you are
13 able to send those to translations just like foreign calls,
14 you'd be treating them the same way, right?

15 A. Possibly.

16 Q. "Possibly." Well, do you recall again in your
17 deposition when I asked you if it made the burden the same
18 as the BOP recording foreign language calls.

19 A. Vaguely.

20 Q. Do you need me to show you your deposition, sir?

21 (NOTE: Document being provided to the witness.)

22 Q. I'd ask you to turn to page 55.

23 A. 51?

24 Q. 55.

25 A. 55. Okay, I'm there.

1 Q. Okay. And -- well, actually -- actually it does start
2 at the bottom of 54.

3 I asked you: "It addresses the burden, so it is
4 no longer burdensome at that point."

5 And you responded: "I would say it reduces the
6 burden."

7 And I asked you: "Does it reduce the burden to
8 the same burden the BOP has with recording other telephone
9 calls?"

10 And your answer was: "Potentially."

11 And then I asked you: "Same as foreign language
12 calls, right?"

13 And what was your answer?

14 A. "They are comparable."

15 Q. "They are comparable." Okay. So it's the same burden,
16 right?

17 A. That's my testimony.

18 Q. Okay.

19 THE COURT: Do you know how many hearing-impaired
20 people there are in the Bureau of Prison system?

21 THE WITNESS: I do not, Your Honor.

22 THE COURT: And do you know how many people there
23 are who don't speak either Spanish or English?

24 THE WITNESS: I know from my 25 years of
25 experience, a high percentage.

1 THE COURT: That don't speak either?

2 THE WITNESS: I'm sorry, I didn't hear the
3 question.

4 THE COURT: I asked you if you knew how many
5 people in the Bureau of Prisons system don't speak either
6 English or Spanish.

7 THE WITNESS: No, I do not, Your Honor.

8 BY MR. PANAGOPOULOS:

9 Q. Does the Bureau of Prison have an English-only rule for
10 those people who do speak English? Do you require them to
11 speak English on the phone?

12 MS. FRANCIS: Objection, Your Honor, as to
13 relevance.

14 THE COURT: No. If he knows.

15 THE WITNESS: I'm not sure I understand what
16 you're asking, Counselor.

17 MR. PANAGOPOULOS: Sure.

18 THE COURT: Are people supposed to use English if
19 they have more than one language --

20 THE WITNESS: That's the expectation. There's not
21 a written English-only rule.

22 BY MR. PANAGOPOULOS:

23 Q. Okay. So people could use --

24 A. To my knowledge.

25 Q. People could use any language they were comfortable with

1 on the phone.

2 A. If they could effectively communicate with a staff
3 member, yes.

4 Q. Well, I'm talking about a telephone call with someone
5 outside the system.

6 A. Yes.

7 Q. Any language they want?

8 A. There is no restriction.

9 Q. Okay.

10 MR. PANAGOPOULOS: Your Honor, I don't believe I
11 have any further questions for Mr. Craig. If you'd give me
12 just one moment to check with co-counsel.

13 (Pause.)

14 MS. FRANCIS: May I, Your Honor?

15 THE COURT: Yes.

16 CROSS-EXAMINATION

17 BY MS. FRANCIS:

18 Q. Good afternoon, Mr. Craig.

19 A. Good afternoon.

20 Q. You testified earlier that your office -- you were not
21 tasked with doing a formal evaluation of this videophone
22 technology. Do you remember that?

23 A. That is correct.

24 Q. Has -- has there been any form of evaluation of -- of
25 videophone technology as it relates to BOP's computer

1 system?

2 A. Not to my knowledge.

3 Q. Have you conducted any -- any evaluation, informal or
4 otherwise, of the videophone technology?

5 A. All I've done is reviewed the literature and reviewed
6 the expert opinions for this case.

7 Q. And why did you do that?

8 A. In preparation for testimony.

9 Q. Okay.

10 THE COURT: What do you do to do an evaluation?
11 What's it all about for something like this?

12 THE WITNESS: Yes, Your Honor. It's typically a
13 six-month to year process. We field the -- we take the
14 device or technology into the field for evaluation. Does it
15 meet its stated purpose from the manufacturer? For example,
16 if its a less lethal munition, does it have the effect
17 without harming human subjects that it says it does?

18 Then we do a review of the law, the policy. We
19 bring in subject matter experts from the different
20 disciplines that would be affected. And then we do a
21 recommendation to the agency executive staff, which is the
22 director, regional director, assistant director -- I believe
23 there are 17 in total -- as to adoption of that technology
24 for the agency.

25 We rely heavily on information from the military

1 intelligence communities, and specifically their human
2 effects models, as to their safety in the example of less
3 lethal evaluation. But we do the evaluation, we field test
4 it, and then we make the recommendation to the agency
5 executive staff.

6 MS. FRANCIS: Can I go on, Your Honor?

7 (Off-the record with the law clerk.)

8 THE COURT: Okay. Go ahead.

9 MS. FRANCIS: May I proceed, Your Honor?

10 THE COURT: Yup.

11 BY MS. FRANCIS:

12 Q. Does your office have -- follow standards as to when a
13 formal evaluation should be done?

14 A. Yes. It's codified in our program statement.

15 Q. Okay. Do you know right now, basically, what triggers a
16 formal evaluation?

17 A. We can recommend that one be done from my office or it
18 can be assigned to us by the agency executive staff or the
19 chief information officer for whom we work.

20 Q. Okay. And did any -- did the chief information officer
21 task your office with doing a formal evaluation of the
22 application of videophone in a correctional facility?

23 A. No, she did not.

24 Q. Okay. And would your office recommend the
25 implementation of technology such as this videophone into a

1 correctional facility without a formal evaluation being
2 done?

3 A. We would -- we would never recommend the adoption of any
4 technology without a complete evaluation being done.

5 Q. Why is that?

6 A. For legal reasons, safety reasons, and professional
7 standards. It's what we do.

8 Q. Okay. Now, with respect to an informal evaluation, did
9 your office reach any conclusion -- well, not reach any --
10 well, yeah, reach any conclusion as far as would they --
11 would BOP -- would a BOP facility be able to immediately
12 implement a videophone in its -- on its -- would such a
13 technology be able to be implemented in a BOP facility?

14 A. Based on the very limited informal review that I've done
15 for this case, I am not convinced it meets the IT security
16 requirements. We would have to do a complete formal
17 evaluation.

18 Q. Okay. And then -- okay. With respect to counsel's
19 questions about the fact that a videophone can record a
20 conversation, a video conversation between people, does that
21 address all of the -- all of your office's concerns
22 regarding recording and monitoring of the calls?

23 A. Just the mere fact it can be recorded?

24 Q. Yes.

25 A. No.

1 Q. Why is that?

2 A. Again, I go back to the concerns I previously stated to
3 the opposing counsel. Secure storage of the call for
4 further administrative or prosecutorial action. Maintaining
5 security of the network. And then having the recorded call
6 we -- we would have to look for, as you mentioned earlier,
7 inappropriate conduct or if signals were flashed, or
8 whatever.

9 Q. Okay. Like, really, what are -- what are the concerns?
10 If you were to record something off of a videophone and then
11 try to store it on the current network that's being used in
12 BOP, would that pose a problem?

13 A. It's not configured to accept it, as far as I know.

14 Q. Okay. And when you say as far as you know, what do you
15 know about the current system?

16 A. I know the Trust Fund Truphone inmate telephone system
17 has years of development, millions of dollars of
18 infrastructure development to develop a secure database,
19 secure system for inmates to place their calls.

20 But more importantly, for staff to maintain the
21 security of the institution and the public safety. Because
22 within that database there's a true intel function that
23 allows staff to search recorded calls for buzz words, such
24 as attempted introduction of contraband into a facility,
25 drugs, weapons, contraband cell phones, what have you. It

1 allows --

2 THE COURT: Well, you admit that you can't do that
3 if there's sign language. You can do that if they're using
4 the TTY, by the way?

5 THE WITNESS: Your Honor --

6 THE COURT: In other words, you can search that
7 for words, is that what you're saying?

8 THE WITNESS: Your Honor, that would be -- that
9 would be an individual review by the staff of the transcript
10 from the TTY machine.

11 THE COURT: So here what you'd have -- you have to
12 get a transcript made. There the transcript exists. So
13 you'd have to pay a contractor to do the transcript the way
14 you would with a non-English speaker.

15 THE WITNESS: For the ASL, correct.

16 THE COURT: But with the TTY, the transcripts
17 started coming out of the machine.

18 THE WITNESS: Yes, Your Honor.

19 THE COURT: How do they secure that, since it
20 looks a little bit -- the way the reporters used to do with
21 a little -- on their machine?

22 THE WITNESS: My understanding is there's a
23 logbook where the TTY call is logged, and then attached to
24 that log is the actual transcript. And, obviously, staff
25 would review it. If there's any immediate concerns, they

1 would take the next steps.

2 BY MS. FRANCIS:

3 Q. Getting back to the use of the videophone, let's say
4 that a call is recorded -- from what you know so far, if you
5 can answer this question -- if the call is recorded from a
6 -- either recorded and put on a DVR or a flash drive, what,
7 if anything, would prevent BOP from taking that call, that
8 recording of that call, and putting it on their secured
9 network for storage?

10 A. You mean technically or policy-wise?

11 Q. Policy-wise. Let's start with that.

12 A. Well, the integrity of the data, the safeguards of the
13 data. I mean, physically could we somehow reconfigure the
14 system? I'm sure that's technically possible. But it's a
15 matter of capturing that information, maintaining the
16 authenticity of the data through the storage process that's
17 outside the secure network. And I -- I've never heard of
18 any other example of that being done.

19 Q. What are the -- are there any IT security concerns?
20 What are the specific IT security concerns that BOP would
21 have with doing such a thing, as far as you know?

22 A. With taking outside information and loading it into our
23 system?

24 Q. Yes.

25 A. There -- well, there are potentially -- if that was

1 infected with a virus, infected with a Trojan Horse, not
2 only would it start with the Trust Fund network, but because
3 of the gateway to the BOP Network to review those calls, it
4 could infect that and then spread to the entire Justice
5 Telecommunications information system.

6 Q. So are you saying -- let's say a virus was introduced
7 into the secured network, would it -- just to be clear,
8 would that just affect BOP's internal network?

9 A. No, it's all part of the JUST network, JUTNet, and it
10 could affect the whole network.

11 Q. Okay. And would taking such information that was
12 obtained through that DSL line, when you plug in the
13 videophone and when you record that information, does it
14 meet the standards, the FIPS standards -- F-I-P-S, for the
15 court reporter's benefit -- standards that you had talked
16 about earlier with the Court?

17 A. To my knowledge, it does not. And the IT security staff
18 would not let us just blindly download it into any system.

19 Q. Okay. So is it fair to say, then, then this technology
20 would not be immediately implementable at a BOP facility?

21 A. My sense is that it would have to follow a parallel
22 development like the inmate telephone system where a system
23 is configured to store that data for future monitoring
24 purposes.

25 Q. Has your office ever received any information to show

1 that the use of the TTY system within the Bureau of Prisons
2 is not allowed?

3 THE COURT: Say that again.

4 BY MS. FRANCIS:

5 Q. Has his office ever received any information, whether it
6 be from a court or any -- any information anywhere that a
7 TTY phone system can no longer be used?

8 A. Not only -- not during the four years I've been in my
9 office, nor the time I spent in the field as an associate
10 warden or warden was any such information received.

11 THE COURT: But the TTY, as far as you know, meets
12 FIPS?

13 THE WITNESS: It's -- well, the TTY line,
14 Your Honor, is actually used on a secure staff line which
15 configured, and it meets those same standards.

16 THE COURT: What same standards?

17 THE WITNESS: The FIPS standards.

18 BY MS. FRANCIS:

19 Q. And when you say "FIPS standards," what are you speaking
20 of specifically?

21 A. The encryption standards, 140-2 and 197.

22 Q. And --

23 MS. FRANCIS: Court's indulgence, please.

24 BY MS. FRANCIS:

25 Q. Other than the IT security concerns, what other

1 concerns, if any, would your office have about implementing
2 the use of a videophone in a correctional facility?

3 A. Well, one concern I have as a former warden is that --
4 and obviously it's incumbent on staff to supervise the
5 device -- but an inmate who would have that special kind of
6 access. Because the inside prison world is not the same as
7 the free world. Inmates that view other inmates getting
8 special privileges, such as they would view this analogous
9 to face-timing with family members, even though the
10 individual is deaf, even though the individual has to use
11 ASL to communicate, it would be perceived as getting
12 preferential treatment. That's one concern I would have as
13 a 25-year veteran of the Agency.

14 Another one is, how do you control what happens on
15 end of the phone, the other videophone? And as was
16 previously testified today, with a splitting capability,
17 could you split it off to somebody else and perhaps codes or
18 even signs be flashed to continue criminal enterprise on the
19 street? I can't rule that out.

20 So there would be several concerns I would have as
21 a field administrator or in my current position as acting
22 chief of this office.

23 Q. And how would you compare the use of this videophone to,
24 say, the use of video conferencing within the Department of
25 Justice, specifically within a Bureau of Prisons facility?

1 A. Apples and oranges.

2 Q. Why is that?

3 A. In fact, the video conferencing system in the Bureau of
4 Prisons, which we use on a regular basis for the director
5 and his executive staff to communicate with wardens or, as
6 the Court noted earlier, for the court to hold hearings with
7 inmates, is the Tandberg system. It's a very secure video
8 conferencing system, but it is set up within the secure
9 JUTNet computer network.

10 It is not a stand alone system. It is integrated.
11 It is part and parcel of our internal computer network and
12 meets all those same IT security requirements, such as the
13 data being encrypted. So nobody could hack in and hear the
14 court when they conducted a hearing or nobody could hack in
15 and hear the director give direction to his field wardens.

16 Q. Okay. So is it fair to say, then, just because the two
17 might use similar technology, that the security concerns are
18 different?

19 A. They're light years apart.

20 Q. Okay. With regards to --

21 MS. FRANCIS: Court's brief indulgence, please.

22 BY MS. FRANCIS:

23 Q. You had testified a moment ago about -- I believe you
24 testified about a moment ago about being able to monitor
25 what's going on on the other end of the call.

1 Currently -- well, would the use of a videophone
2 system require placing a staff member to monitor the phone
3 call as it's taking place?

4 A. If I was the warden in that facility, I would have it
5 directly supervised, yes.

6 Q. Why is that?

7 A. For the concerns I -- I raised earlier, whether or not a
8 coded message is being passed. You know, if the individual
9 had a propensity for criminal conduct -- let me give you
10 analogy.

11 When an inmate uses the inmate telephone system,
12 some inmates have committed crimes via telephone. A public
13 safety factor can be approved by the warden to limit or even
14 prevent their telephone use because it is a privilege, not a
15 right, when you're incarcerated in the Bureau of Prisons.

16 So if similar conduct had been carried out through
17 a videophone by that particular inmate -- I'm not saying
18 that's the case in this case, but for example -- then I
19 would want that directly supervised to prevent the
20 occurrence of that happening again and protect the public.

21 Q. Okay. In your 25 years of experience within the Bureau
22 of Prisons, have you ever worked at a, for example,
23 satellite camp?

24 A. Yes. I built and was the first administrator of the
25 satellite work camp outside the U.S. penitentiary in Lompoc,

1 California, from -- I'm sorry -- outside of the U.S.
2 penitentiary in Lompoc, L-O-M-P-O-C, California, in Santa
3 Barbara County from --

4 Q. If you could spell it for the court reporter.

5 A. Lompoc, L-O-M-P-O-C. It's Chumash Indian for stagnant
6 water.

7 Outside Lompoc, California, from 1991 to 1995.

8 Q. Okay. And generally speaking, do you know what the
9 staffing level is at such -- at a satellite camp facility?

10 A. Camp inmates, by virtue of their classification as
11 minimum security, do not present the same concerns for
12 immediate acts of violence, although the propensity is
13 there. The staffing pattern compared to a medium or high
14 security facility, of which I've both served as associate
15 warden and warden, is minimal.

16 For example, at that particular camp there were
17 300 inmates at that work camp. I had one officer a shift,
18 three shifts a day, 24/7, 365 a year. But in terms of
19 staff, other staff to help supervise and deter and -- detect
20 and deter criminal conduct or violation of institution rules
21 and regulations, I typically had three -- two- to three-unit
22 staff members, such as a unit manager, case worker and a
23 counselor.

24 Q. Okay. So if one of those people had to go and monitor a
25 phone call, if it was done by videophone, what would be the

1 problem with that?

2 A. Well, if you just do the math, Counselor, you can tell
3 the fewer eyes you have watching the inmates, the more
4 opportunity they're going to have to circumvent the rules.
5 And criminals don't stop being criminals when they come to
6 prison, even in a minimum security environment.

7 Q. Okay. Getting back to the use of the -- you testified
8 earlier about the Truphone system. Are there any security
9 -- security mechanisms in place with that system?

10 A. It's heavily invested with security features. Such as
11 it's part of the true -- one software package for our
12 investigators ties the inmate phone numbers they call on
13 that system. Through link analysis you can see if any other
14 inmates are calling that for a potential drug drop on the
15 street, to try to introduce drugs or another dangerous
16 contraband item back into the secure environment. It has
17 the search feature for keywords in those conversations that
18 would trigger us to listen to it. It has a number of
19 built-in security features.

20 Q. Let me ask you this: How does an inmate place a phone
21 call on the -- on the Truphone system?

22 A. Well, first of all, they pay for the phone call through
23 their commissary account, which is also run by the Trust
24 Fund. They're assigned a unique identifier, a PAC number.
25 So they would have to enter their PAC number. And then they

1 have up to 30 numbers approved by the unit team of
2 individuals, family, friends, et cetera, in the community.
3 Now, they can put their attorney on that list, but they're
4 advised it's subject to monitoring.

5 There's another procedure if they want to make an
6 unmonitored attorney phone call that has to be approved
7 through the unit team for compelling or exigent legal
8 circumstances. So they go up, if they dial one of the 30
9 approved numbers, they put their PAC number in first, then
10 they dial that number.

11 Q. When you say "PAC number," how do you spell "PAC," for
12 the court reporter?

13 A. P-A-C. It's analogous to a PIN number we would use for
14 a credit card.

15 Q. And why is that used?

16 A. That's to -- for identity -- positive ID. That if that
17 phone call has actionable language in it for either
18 administrative rule violation or possible criminal
19 prosecution, then the fact it was that inmate using his
20 account. And the policy specifically prohibits inmates from
21 giving that PAC number to other inmates. Do they try to do
22 that? Do we catch them? Do we discipline them?

23 Absolutely.

24 Q. Okay. So once they enter a number, the PAC number which
25 is their identifying number, they make the call. What

1 happens to the call right after the call is complete?

2 A. Well, during the call it may be live monitored, but
3 after it's complete, Counselor, it is downloaded and stored
4 in our secure database.

5 Q. And that secure database is under -- what's the name of
6 that database?

7 A. Trust Fund.

8 Q. Okay. And from the Trust Fund, can anybody from an
9 outside network get access to those calls within that Trust
10 Fund network?

11 A. No, it's secure, it's encrypted.

12 Q. Why is that?

13 A. Several reasons. One, most importantly, is institution
14 security. Two, is privacy. And then, three, is protection
15 of the data for evidence or administrative hearings.

16 Q. Are there any other -- is there any other reason why
17 we're protecting this data for other than evidentiary
18 purposes?

19 A. Because the DOJ requires it.

20 Q. Okay. Is there any highly sensitive data in these data
21 -- in this -- that's being saved or could be saved through
22 these phone calls?

23 A. At certain locations there are national security cases,
24 yes.

25 Q. Okay. Any other types of data that's saved?

1 A. There's transactional data: Who, what, when, where,
2 why, who made the call, what time was it, et cetera. As
3 well as -- or, metadata -- as well as the actual call.

4 Q. Okay. And with the use of a videophone, would we be
5 able to capture all of this information and then put it on
6 that secured network for storage without imposing a security
7 risk?

8 A. I'm not aware of a method.

9 Q. Okay. Earlier counsel had asked you about whether or
10 not you had read the information that was provided by both
11 experts, Mr. Ray and Mr. Cokely. Do you recall that?

12 A. Yes.

13 Q. Okay. And do you recall responding in your deposition
14 that you didn't disagree with what they -- with what they
15 had said. Not -- you said, "Not on its face." Do you
16 recall that?

17 A. Yes, I do.

18 Q. What did you mean by that?

19 A. I meant it was their expert opinion of the status of
20 videophone technology, which, again, I said I've just done
21 an informal review of, but it had no specific applications
22 or recommendations relative to the correctional environment,
23 particularly high security, that I would agree or disagree
24 with.

25 Q. Okay. Were there any other -- aside from that, are

1 there any items that you have read in their reports that you
2 do disagree with?

3 A. Other than their recommendations to the BOP, no.

4 Q. Okay. With regards to comparing the recording of a call
5 on a videophone to, say, recording a call -- or not -- or
6 recording -- recording and translating a call that was
7 recorded on a videophone and comparing it to recording a
8 call on the current Truphone system, Trust Fund system, and
9 then having it interpreted, do you recall your testimony
10 during your deposition -- I think -- what did you say? That
11 they were comparable?

12 A. Yes.

13 Q. Are they identical? Are there identical issues
14 presented with those two types of calls?

15 A. Foreign language translation, ASL translation, I assume
16 would have their own unique set of characteristics.

17 Q. Okay. But are there any security concerns once again
18 between storing and collecting and recording a call that's
19 on the current phone system and taking a phone call from the
20 videophone system?

21 A. Every day across the United States calls are retrieved
22 from the secure encrypted inmate telephone system for
23 evidentiary purposes by the court system. Videophone we
24 have no experience with. There is no system, there is no
25 encryption, there is no secure apparatus.

1 THE COURT: What happens when this VSI (sic) is
2 used? That's not on the secure system.

3 THE WITNESS: No, Your Honor. My understanding --
4 and I was not part of the Bryant case -- but my
5 understanding is that it's hooked up for certain events such
6 as when --

7 THE COURT: A medical appointment.

8 THE WITNESS: -- a medical appointment or a
9 discipline hearing, or what have you. And then it's
10 disconnected. So as it's directly supervised by staff, we
11 would --

12 THE COURT: So it's not recorded and monitored and
13 then retained.

14 THE WITNESS: No, Your Honor.

15 THE COURT: It's just a way of, like you can call
16 a phone AT&T, and they'll put an interpreter on for you for
17 a specific event and then hang up.

18 THE WITNESS: Yes, Your Honor.

19 MS. FRANCIS: Your Honor, let me -- may I just
20 step away and confer with agency counsel, Your Honor?

21 THE COURT: Uh-huh.

22 MS. FRANCIS: Thank you.

23 (Pause.)

24 BY MS. FRANCIS:

25 Q. Mr. Craig, with respect to the BOP's policies on email,

1 are you aware of those inmate emails?

2 A. Yes, I am.

3 Q. Okay. And are you aware that emails -- emails --
4 inmates have access to email?

5 A. Yes. That was implemented several years ago. It's --
6 the system we used is TRULINCS, and it's administered by the
7 same organization, the Trust Fund.

8 Q. Okay. And in terms of --

9 THE COURT: Yeah, how does that work? There was
10 some discussion about it being days late.

11 THE WITNESS: Yeah. Right. That, Your Honor, I
12 would like to address that. That system was being
13 implemented as I was being moved from the field to the
14 central office in 2008. I was not there for its full
15 implementation.

16 When it was originally conceived, there was a
17 quarantine period -- well, let me start off, first of all,
18 the email system, TRULINCS, does not have a direct internet
19 connection to the free world. It is fire-walled off. It is
20 only for email. And it meets those same security
21 requirements we talked about today, Your Honor. The FIPS
22 standards.

23 That system, when it was first conceived, was set
24 up to ensure institution security, protection of the public,
25 that when inmates would send messages out -- because,

1 remember, that's a new technology. And particularly in the
2 prison environment, we're very slow and cautious to adopt
3 new technology unless we can ensure institution security and
4 the public safety.

5 But when that system was implemented, the original
6 concept was a 24-hour quarantine period, as opposing counsel
7 testified, and that I testified to previously in my
8 deposition. 24 hours before the message would be sent out
9 to allow investigative staff to review it to see if there
10 were like any threats to the public. For example, a sex
11 offender. Or coming back in, if there was any coded
12 language for attempted escape plot, for example.

13 I now understand upon further research that that
14 is a two-hour window of quarantine. But the concept is the
15 same. It is not direct realtime communication. There is no
16 direct inmate access. And just like the inmate telephone
17 system, it's maintained on a secure encrypted network, and
18 the inmates pay for that service. I think it's five or ten
19 cents an email, whatever it is, and those funds, like the
20 funds from the telephone system, go back into the general
21 inmate benefit fund, if you will, for different equipment.

22 THE COURT: Wait. How are they charged now?
23 There was a lot of litigation on that. If you make a
24 telephone call, they're not calling collect anymore, are
25 they?

1 THE WITNESS: No, Your Honor. They must pay for
2 the call -- they can make up to 300 minutes a month in
3 15-minute intervals. So they could go to their housing unit
4 after work, make a 15-minute call after they stood in line
5 and waited their turn, up to a maximum of 300, unless the
6 associate warden approves more.

7 THE COURT: And what does that cost a month that
8 comes out of the Trust Fund?

9 THE WITNESS: I don't have the current figure.

10 THE COURT: I mean, they are charged something per
11 minute.

12 THE WITNESS: Absolutely. And they pay for it out
13 of their commissary account either sent in by the outside or
14 from their institution earnings of a 12 to 40 cents an hour.

15 THE COURT: Is that true for this TTY?

16 THE WITNESS: No.

17 THE COURT: That's free?

18 THE WITNESS: That -- it's an accommodation we
19 provide.

20 THE COURT: And it would presumably be free for
21 the video. I don't know.

22 THE WITNESS: I don't know, but I would -- I
23 wouldn't think it would be the same kind of market as the
24 inmate telephone system.

25 BY MS. FRANCIS:

1 Q. What about social visits? Are social visits available
2 to inmates?

3 A. Yes. Within the local implementing policy of our
4 national program statement, they can have social visits,
5 face-to-face contact in the visiting room.

6 Q. Okay. What about mail?

7 A. U.S. mail, yeah, absolutely. And there's also special
8 privileged mail, attorney mail, et cetera.

9 MS. FRANCIS: Okay. Court's brief indulgence,
10 please. Thank you.

11 (Pause.)

12 BY MS. FRANCIS:

13 Q. All right. Mr. Craig, before we wrap up, I just wanted
14 to ask, are you aware of the comparison between regulations
15 between -- for visiting privileges in the high security
16 facilities and the low security facilities at a -- at a BOP
17 correctional institution?

18 A. Yes. I've worked at both.

19 Q. Okay. And are they the same? Are they different?

20 A. The amount of manpower dedicated to a high security
21 visiting room operation, the number of surveillance cameras,
22 by definition is much higher. But the same institution
23 rules and regulations, the same prohibition against
24 interdiction of contraband, et cetera, exist in the camp
25 visiting room for social visits as exist in the

1 penitentiary. That's why we have national program
2 statements.

3 MS. FRANCIS: Okay. I have no further questions,
4 Your Honor.

5 THE COURT: Thank you.

6 REDIRECT EXAMINATION

7 BY MR. PANAGOPOULOS:

8 Q. Mr. Craig, there's a TTY there in front of you. And I
9 don't know if you saw it earlier. There's a small tape,
10 paper, that comes out of it that's the transcription,
11 correct?

12 A. I saw the demonstration.

13 Q. All right. How is that tape placed into the BOP secure
14 network?

15 A. It is not, to my knowledge.

16 Q. It's not? Yet it's a recording that is maintained, and
17 it's maintained outside this secure system that you're
18 telling us about?

19 A. It's a paper copy. It's not digital.

20 Q. It's a paper copy. But it's okay to maintain that paper
21 copy outside the secured network?

22 A. That's the way I understand they do it at Tucson, yes.

23 Q. Okay. What is to prevent an inmate, after that inmate
24 types something into the TTY, to ripping that little piece
25 of paper off, chewing it up and swallowing it?

1 A. Nothing, except staff supervision.

2 Q. Staff supervision. So does staff supervise TTY calls?

3 A. Yes. It's placed on a secure staff line, as I
4 previously testified.

5 Q. So the fact that you said as a warden you would also
6 have videophone supervised doesn't really change anything
7 with respect to communication of a deaf inmate; that either
8 way you're either supervising that deaf inmate making that
9 TTY call or supervising that inmate making that videophone
10 call, right?

11 A. They both have similar security concerns, yes.

12 Q. And so you'd have someone monitoring there. Cost burden
13 the same, right?

14 A. I would -- I would require direct supervision.

15 Q. Well, I know. I'm just saying that you require it
16 either way. So the cost and burden are the same. That was
17 my question. Right?

18 A. Yes, they would be.

19 Q. Okay. Thank you.

20 Do you know what -- what the IT requirements are
21 for the Virginia Department of Corrections system?

22 A. No, I don't.

23 Q. Do you know what they are for Harris County, Texas?

24 A. No, I don't.

25 Q. Do you know what they are for the Minnesota Department

1 of Corrections?

2 A. No, I don't.

3 Q. So no investigation has been done with respect to any
4 other -- even any other prison systems that have implemented
5 videophone technology?

6 A. We have not completed a formal analysis or evaluation in
7 my office, Counselor.

8 Q. Okay. Now, counsel asked you a few questions about
9 telephone monitoring. You can't control what someone on the
10 other end of a telephone says to an inmate, can you?

11 A. No, but it's recorded.

12 Q. Okay. You also mentioned the concern that codes or
13 signs might be used on a videophone. Codes and signs can be
14 used on a telephone too, can't they?

15 A. Verbal or nonverbal, correct.

16 Q. They can tap on the receiver in Morse Code, for -- I
17 think was an example you gave me, right?

18 A. Right. But Bureau of Prisons staff have a skill set in
19 detecting that coded language, particularly in high security
20 facilities.

21 Q. And you have no idea whether or not a -- someone who can
22 translate ASL could pick up coded language, do you?

23 A. I can't testify to that, but I imagine that might be the
24 case.

25 Q. Okay. What about when someone sends mail in to a

1 prison, is that reviewed and monitored?

2 A. In high security facilities, yes.

3 Q. Okay. What about in the facility where Mr. Berke will
4 be? At the camp.

5 A. At the camp? On a selected basis, random basis.

6 Q. Okay. And is mail ever used as evidence?

7 A. Absolutely.

8 Q. Well, how do you put that on your secure network?

9 A. It's paper versus digital.

10 Q. Paper. Okay. So you store that piece of paper where?
11 In a file cabinet somewhere on the facility?

12 A. In a fireproof safe that meets evidentiary standards.

13 Q. In a fireproof safe. And is that where you store the
14 little pieces of paper from the TTY too?

15 A. I can't speak for the warden at Tucson, but that would
16 be -- with any evidence in an institution -- let me finish
17 -- with any evidence in an institution that's not of that
18 digital media, it would be stored in a secure evidence safe
19 with chain of custody protocols and safeguards.

20 Q. Okay. So I take my DVD out of the computer after
21 recording my videophone conversation, put it in my case and
22 stick it in that fireproof safe. Why can't you do that?

23 A. Why would I want to store your DVD?

24 Q. Well, I think what we're -- okay. If you didn't
25 understand the question, let me rephrase it. I assumed you

1 knew what we were talking about.

2 We talked about how videophone calls can be
3 recorded on a DVD using a DVR. Do you recall that
4 testimony?

5 A. Yes, I do.

6 Q. Okay. Thank you.

7 And so once it's recorded on a DVD, then you have
8 an actual DVD. Do you understand that?

9 A. I understand your question, Counselor.

10 Q. Okay. You were just having fun.

11 A. Let me address your question.

12 Q. So you take that DVD. Why can't you put it in a
13 fireproof safe?

14 A. We could, except for one very important consideration.
15 As it originates as digital media, the IT security
16 requirements are controlling, compelling. It's not
17 something the Bureau of Prisons can simply opt out of.

18 Q. What about closed-circuit cameras that record? What
19 happens to those recordings? That's digital, right?

20 A. Absolutely.

21 Q. Okay. Where do those digital recordings go?

22 A. They're on a secure DVR within the institution control
23 center. Again, within our network.

24 Q. Okay. So you could potentially record these videophone
25 calls on a secure DVR just like your security cameras.

1 A. Technically, it's possible.

2 Q. Okay. And if you technically did that, because it's
3 technically possible, then you'd be in compliance?

4 MS. FRANCIS: Objection.

5 THE COURT: What?

6 MS. FRANCIS: Counsel needs to be more specific.
7 In compliance with what?

8 MR. PANAGOPOULOS: Well, in compliance just like
9 the closed-circuit camera recording would be in compliance,
10 which I believe is what he testified to.

11 THE WITNESS: Well, to be in compliance,
12 Counselor, would have to be almost within the institution
13 confines within the secured network. Because those cameras
14 are not out in the community like the other end of the
15 videophone would be.

16 BY MR. PANAGOPOULOS:

17 Q. I'm asking you that if you recorded it on a secured DVD
18 system, what's the difference?

19 A. Technically, they would be comparable, but we're not
20 configured for that.

21 Q. Okay. So they would be comparable --

22 A. And I testified to that previously. If there was a
23 system comparable to the ITS recording system with the IT
24 security requirements, encryption, all those things that
25 could be configured for the videophone, yes, they would be

1 equivalent.

2 Q. Okay. And you have no idea whether that exists because
3 you haven't looked at them.

4 A. Correct.

5 Q. Great.

6 You talked about how the phone system can search
7 for certain words so that you can flag calls that might be
8 potentially security risks or criminal content; is that
9 correct?

10 A. That's correct.

11 Q. Okay. That cannot be done with the TTY, right?

12 A. That's correct. But it is done *de facto* by the direct
13 staff supervision.

14 Q. Okay. Which would be the case, *de facto* with --

15 A. The videophone.

16 Q. -- the video camera, right? The video recording?

17 A. We're going around the same questions, Counselor.

18 Q. Well, I mean, I didn't ask you a question. You just
19 chose to tell me that.

20 A. Yes.

21 Q. And the answer is the same, it could be done either way.

22 A. The answer is the same.

23 Q. Yeah, thank you.

24 You indicated that you were not aware of a method
25 by which a videophone could be monitored, recorded and

1 stored. Do you recall that testimony when counsel asked you
2 that?

3 A. I think it was a little more specific, within the secure
4 network that we have.

5 Q. Right. And you indicated you were not aware of a
6 method.

7 A. For a videophone device, that is correct.

8 Q. But you're not aware of a method because you haven't
9 looked at a method.

10 A. I've not completed the formal analysis.

11 Q. Okay. Well, you've said that a couple of times, that
12 you haven't done a formal analysis. What analysis have you
13 done?

14 A. I think I previously testified, the review of the
15 literature and your expert reports.

16 Q. That's it. You've just reviewed our expert reports.

17 A. We've done no field evaluation. As you said, Counselor,
18 we've not looked at other systems, experience with it.

19 Q. All right. Yeah, I just wonder what you meant by an
20 "informal evaluation." There really hasn't been inform --
21 there really hasn't been any type of evaluation. You just
22 read expert reports.

23 A. And looked at the literature, correct.

24 Q. All right. Okay.

25 MR. PANAGOPOULOS: No further questions.

1 THE COURT: Anything else?

2 MS. FRANCIS: No, Your Honor.

3 THE COURT: You may step down. All right. Any
4 more testimony?

5 THE WITNESS: Thank you.

6 (Witness excused.)

7 MR. PANAGOPOULOS: Your Honor, we have no other
8 witnesses.

9 THE COURT: Just a couple clarifications here,
10 first of all. He's to be -- he's to report on the 28th to
11 Tucson.

12 MR. PANAGOPOULOS: To Tucson, yes, Your Honor.

13 THE COURT: And I take it Tucson, no matter which
14 way you put it, is better than Florence would have been.

15 MR. PANAGOPOULOS: Tucson is better than Florence
16 would have been.

17 THE COURT: I mean for his purposes.

18 MR. PANAGOPOULOS: Right.

19 THE COURT: Okay. And he got 24 months.

20 MS. FRANCIS: That's correct, Your Honor.

21 THE COURT: So, effectively, that's -- 15 percent
22 less is what?

23 MR. PANAGOPOULOS: Three-and-a-half months,
24 roughly.

25 THE COURT: Three-and-a-half?

1 MR. PANAGOPOULOS: It's 15 percent of 24 is
2 three-and-a-half, I think.

3 THE COURT: It's 21 months.

4 MR. PANAGOPOULOS: Right.

5 THE COURT: Okay. And his wife is out but she's
6 under home detention?

7 MR. PANAGOPOULOS: That's correct.

8 THE COURT: And we're here on a PI still. I mean,
9 that's our procedural posture. I think everybody agrees.
10 Correct?

11 MS. FRANCIS: Yes, Your Honor.

12 MR. PANAGOPOULOS: That is correct.

13 THE COURT: And maybe I could ask counsel. You
14 know, he was sentenced in December.

15 MR. PANAGOPOULOS: That's correct.

16 THE COURT: Where is -- I'm a little troubled by
17 the lag time here.

18 MR. PANAGOPOULOS: Your Honor, the lag time, as I
19 understand it, had nothing to do with this case at all other
20 than the last request, if I recall correctly.

21 THE COURT: No, no, no, no, I don't -- I know.
22 The judge gave him a report date way down the road, but no
23 one filed the lawsuit until August 14.

24 MR. PANAGOPOULOS: Right. Well, Your Honor, we
25 filed the lawsuit after calls had been made to the BOP to

1 request the accommodations.

2 THE COURT: When was the first call made?

3 MR. PANAGOPOULOS: The first calls were made, that
4 I am aware of, I believe in late July. Mr. Lippert of my
5 office made some of those calls. And if I recall correctly,
6 that was in late July.

7 THE COURT: All right. So about seven months went
8 by where --

9 MR. PANAGOPOULOS: Well, we filed the lawsuit
10 in --

11 THE COURT: August 14.

12 MR. PANAGOPOULOS: -- August 14 -- on August 14.

13 THE COURT: All right. I will hear you briefly.

14 MR. PANAGOPOULOS: Okay. Your Honor, I think the
15 key here is the regulation that requires the Bureau of
16 Prisons to provide for effective communication and access
17 within its -- within its programs. And obviously, what --
18 you know, what is an effective communication and what is a
19 method of communication changes over time. You know, in 490
20 BC it may have been acceptable for someone to run 26 miles
21 to report a victory in a battle.

22 As Dr. Cokely testified in his deposition, Native
23 Americans used smoke signals to communicate some minor
24 information. I believe he said in his deposition where the
25 Buffalo were and whether they were coming, and where the

1 soldiers were and whether they were coming. But technology
2 changes significantly. Years ago there were party lines on
3 telephones. Technology has changed.

4 And we have uncontroverted expert testimony that a
5 TTY system is no longer used by people who are deaf in the
6 American deaf community. We have uncontroverted expert
7 testimony that the current state of technology is
8 videophone, and it's been used for at least ten years. And
9 we have at least one circumstance that we know of, the
10 Bryant case, where a videophone was requested five years ago
11 and the BOP has not acted. And we --

12 THE COURT: You know, I have nothing before me
13 about that case. I don't know what's going on. It could be
14 lost in an administrative review hearing and out of the
15 courts. So to say that it was requested five years ago, I'm
16 focusing on Mr. Berke who wants a PI.

17 MR. PANAGOPOULOS: Right, but what we --

18 THE COURT: The relevance of Bryant is attenuated,
19 in my view.

20 MR. PANAGOPOULOS: Well, let me see if I can make
21 it a little less attenuated. We've heard testimony from the
22 person responsible for reviewing new technology that he
23 hasn't been asked to review it. And he's been in that
24 position for at least four years.

25 THE COURT: I agree.

1 MR. PANAGOPOULOS: And the regulations do require
2 that once that the -- that the Agency has the burden of
3 proving that compliance would result in an altercation --
4 alteration of the program or burdens. And if -- if they
5 make that decision, they have to show us that decision in
6 writing. And that has not been done in our case. That has
7 not been done in any other case. So there's clearly a
8 violation of the regulations and of the Rehabilitation Act.

9 And there's also a violation because they're --
10 they're basically declining to provide this videophone,
11 which is in this day and age the only effective means of
12 communication for a deaf person.

13 THE COURT: Well, you would agree, hypothetically,
14 if it weren't consistent with the need for security at an
15 institution, it wouldn't matter if it were more effective.

16 MR. PANAGOPOULOS: Well, Your Honor --

17 THE COURT: The Court's job is not to control,
18 regulate or run a Bureau of Prisons. I mean, the Supreme
19 Court's told us that. So that the mere fact that it is
20 better and would put him in a better position than the TTY
21 is certainly not dispositive.

22 MR. PANAGOPOULOS: Although it is the question
23 under the Rehabilitation Act. And if there is a security
24 issue or a security concern, then that is the Government's
25 burden and obligation to prove. And you've heard from their

1 witness that they can't do it.

2 THE COURT: They can't do it today. But you just
3 filed for a TRO and a PI in August.

4 MR. PANAGOPOULOS: Well, they haven't done
5 anything since August. You know, there's a VRIS system
6 that's going into that particular facility. So someone has
7 looked at the DSL line. Someone has looked at the
8 videophone.

9 THE COURT: I don't think it's a technological
10 issue the way -- yeah, you can plug one in, but --

11 MR. PANAGOPOULOS: Well, but we also heard
12 testimony that with anything that goes on that system
13 they're going to have to look at their IT security
14 requirements.

15 THE COURT: Well, I don't know that if it were a
16 temporary call that was made to get an interpreter to be --
17 for medical, but --

18 So you would ask, for your relief at this stage,
19 is that they install this system.

20 MR. PANAGOPOULOS: The relief that we would ask
21 for at this stage is that they install this system. And if
22 the Court is not willing to grant that relief, we would at a
23 minimum ask the Court to order that they do what the
24 Rehabilitation Act requires and work with all deliberate
25 speed to -- to review and implement the system.

1 THE COURT: Why didn't you sue with all deliberate
2 speed, if you -- if I may ask?

3 MR. PANAGOPOULOS: Well, Your Honor, we sued --

4 THE COURT: Because your client was on notice on
5 December 14th that he was going for at least 24 months to an
6 institution.

7 MR. PANAGOPOULOS: Well, the question is -- I
8 mean, simply because someone is sentenced to go to prison
9 doesn't necessarily mean that that person understands at
10 that sentencing what accommodations will or will not be
11 provided. And, you know, phone calls were made. We were
12 retained late in the summer. We made additional phone
13 calls. And we filed this -- this suit.

14 THE COURT: Now, but I have to tell you, it puts
15 you in a somewhat -- I understand everybody doesn't
16 understand their rights, but you're -- you're here under
17 extraordinary relief. You're not here in the ordinary
18 course asking for extraordinary relief. So it's not the
19 lawyer necessarily, I understand. But --

20 MR. PANAGOPOULOS: Well, Your Honor, even --
21 again, even with respect to Mr. Berke, there's --

22 THE COURT: What did he think? He was going to go
23 and all -- I mean, you've obtained for him enormous numbers
24 of accommodations in short order.

25 MR. PANAGOPOULOS: Right, Your Honor. But what

1 we're seeking is complete compliance with the Act; and that
2 we, unfortunately, have not been able to secure yet. And we
3 hope that the Court can -- can help us with that. I mean,
4 obviously if he had been ordered to go in to prison
5 sooner --

6 THE COURT: Yeah, he would have been then stuck
7 under the prisoner litigation.

8 MR. PANAGOPOULOS: Well -- or he would have
9 called --

10 THE COURT: I don't know why the judge gave him a
11 six-month stay.

12 MR. PANAGOPOULOS: Well, Your Honor, I would
13 suggest that we would be in a very similar position.
14 Because if he called, you know, shortly before entering to
15 determine what accommodations were available and asked for
16 them, and then talked to us to -- you know, to represent him
17 on that issue, then, again, we'd be seeking the same relief
18 and we'd be in the same position.

19 THE COURT: No, you wouldn't, because you'd be
20 covered by the PSLA. Because if a judge had done what's
21 often done, is step him back, he'd be an inmate, and then he
22 would be on conditions. So he got an enormous break from
23 the judge to have a six-month -- I'm not sure why he got six
24 months stay of when he went in, but it is a significant
25 change from the normal. But -- all right.

1 All right. Finish up, please.

2 MR. PANAGOPOULOS: Well, Your Honor, again, our
3 position is that the BOP cannot -- you know, cannot and has
4 not met its burden of showing that this system that we're
5 asking for poses any type of threat to the BOP; that it
6 would alter or affect the program in any way. We believe we
7 have shown that without this system Mr. Berke will not be
8 able to communicate effectively with his family.

9 THE COURT: Well, they can communicate. We admit
10 that. They can -- portions of them can visit. He can use
11 the TTY, he can use email, and he can use mail.

12 MR. PANAGOPOULOS: He can use email in the same
13 way that other prisoners can use email. He can visit the
14 same way that other prisoners can visit. What he cannot do
15 is communicate by phone the same way other prisoners can
16 communicate by phone.

17 The TTY is stilted. It takes twice as long to
18 communicate. It's not in his native language. You've seen
19 how small the screen is and how small the transcript is that
20 you get of these calls. It is not the same at all, and so,
21 therefore, he's not getting the same benefits and privileges
22 of the program as other prisoners are, because the other
23 prisoners are getting those telephone privileges, in
24 addition to the email, in addition to the visits. So it's
25 not the same.

1 And so he's not getting the same benefits and the
2 same program. So the question is whether or not --

3 THE COURT: I have to tell you the problem -- just
4 to point out a few things -- people that get sentenced here
5 get sent all over the country. They don't ever see their
6 family ever, because of the Bureau of Prisons' policy that
7 we have no institution. You have to look at this in a
8 relative sense, I'm sorry to say, which is that people end
9 up leaving here and get sent to Ohio, to Texas, and they
10 never have visits ever.

11 So, you know, the Bureau of Prisons is not an easy
12 place to spend time. But I'd point out to you that having
13 his family two hours a way, at least some of his family
14 members, beats 90 percent of any District of Columbia
15 resident who gets -- the closest you can get -- well, the
16 closest low security is in Pennsylvania.

17 MR. PANAGOPOULOS: I certainly won't argue with
18 the Court about that. However, those prisoners who are sent
19 long distances do have telephone privileges and can
20 communicate with -- with their families via the telephone.
21 And, yes, his --

22 THE COURT: If they can afford it.

23 MR. PANAGOPOULOS: If they can afford it. His
24 wife and daughter may be able to communicate with him, but
25 what about his brother in DC? What about his sons at

1 Gallaudet? You know, they don't have, you know, TTYS.
2 Your -- the BOP is placing a burden on them, as well, by
3 requiring this outdated system.

4 And we have seen from the expert reports that
5 there's no burden with respect to cost.

6 THE COURT: Well --

7 MR. PANAGOPOULOS: And the BOP isn't arguing that
8 there's a burden with respect to cost. Administratively --
9 again, there should be no burden there, either, Your Honor.
10 Because TTY's are monitored physically. They're telling us
11 they may monitor this videophone physically. It's the same.
12 TTYS, they take the transcript, they put it in a logbook,
13 stick it in a fireproof safe. They could record the
14 videophones in exactly the same way and put themselves in
15 the exact same position.

16 And that's the only evidence as to what the burden
17 is here. And we have testimony that it can be done, and we
18 have testimony that it's the exact same burden as with TTYS,
19 and we have testimony that it's the exact same burden with
20 respect to translating as you have when you have prisoners
21 who make a call in a foreign language.

22 THE COURT: I don't -- yeah, I don't know what the
23 relevant cost of that is. I don't know much about ASL
24 interpretation.

25 But, okay, let's hear from the Government, please.

1 One second.

2 (Off-the-record discussion with the law clerk.)

3 THE COURT: Ms. Francis?

4 MS. FRANCIS: Yes, Your Honor. Thank you. Good
5 afternoon again.

6 Your Honor, we take an opposing view to counsel's
7 motion for PI. We believe that -- that the plaintiff has
8 not met any burden -- met his burden at all with respect to
9 the four-prong test that's laid out for seeking injunctive
10 relief.

11 THE COURT: What do you have to say about -- I
12 thought this really came down to likelihood of success on
13 the merits. Do you have something to say on the other
14 prongs?

15 MS. FRANCIS: Well, with respect to the other
16 prongs, Your Honor, it's clear -- and I'll get back to the
17 likelihood of success portion of the analysis. But with
18 respect to Mr. Berke suffering any irreparable injury or
19 harm, as the Court has already pointed out through her
20 colloquy with plaintiff's counsel, that not only will
21 Mr. Berke have access to a TTY machine, TTY technology,
22 which to date has not been declared ineffective or out of
23 use, completely out of use, it is still the technology that
24 is in circulation, machines are still available, people can
25 still use them. It provides an effective means of

1 communication. Is it the fastest means of communication?
2 No. But even through the testimony and the evidence that
3 was presented to the Court today, it shows -- or it has not
4 been shown to be a completely ineffective means of
5 communication.

6 But in addition to that, Your Honor, Mr. Berke has
7 received many accommodations. And as the Court has pointed
8 out, many accommodations that many inmates going into BOP
9 custody do not have. He is going to be -- he was moved from
10 a facility that was -- where he was previously assigned in
11 Colorado to a facility that is two hours from his home. So
12 he will have access to his family through social visits
13 where they can communicate with each other through American
14 Sign Language.

15 He will have access to email. There is nothing in
16 the -- in the record to support a finding that Mr. Berke is
17 not able to -- to submit emails. And for the record, as I
18 was conferring with agency counsel, I will point the Court
19 and counsel, plaintiff's counsel, to the documents on PACER
20 for Mr. Berke's case that came out of New Jersey where not
21 only was there use of videophone technology, but there was
22 also use of email in connection with that case. So there's
23 nothing in the record to show that Mr. Berke is unable to
24 communicate with anyone, any of his loved ones by email.

25 He will have access to postal mail. He will have

1 access to all of the other privileges that all of the other
2 inmates have in terms of communication. But -- and that's
3 going to be at his immediate disposal when he gets to the
4 Tucson facility.

5 He is going to -- plaintiff's counsel, although
6 they take a different view about whether or not the
7 provision of a videophone is going to injure BOP, Mr. Craig
8 through his testimony talked about the many security
9 concerns, IT security concerns, as well as other general
10 security concerns to the integrity of the BOP's network, in
11 terms of to inmate safety and security concerns, and staff
12 at BOP. There are concerns there of having access to
13 technology that may be incompatible with their system.

14 And to impose that burden on BOP, which is in the
15 best position, as the Court has noted, to determine what
16 would be the best -- what's in the best interest of
17 maintaining the safety and security of their facility, we
18 would ask the Court to continue to honor that and not order
19 BOP to immediately implement a videophone.

20 Mr. Craig has --

21 THE COURT: Do you know or does anyone know
22 why the judge ordered actually that he self-report on
23 January 30th? That's the judgment and commitment. Which
24 would have been about six weeks after the sentence, the
25 judgment was entered on the record. Do you have any idea

1 how it then turned into -- when the case was filed with me,
2 he was to be reporting I think on August -- I'm sorry --
3 August 23rd, and then I called Judge Pisano and asked if he
4 would mind putting it off a little bit in order for us to
5 consider this matter.

6 MS. FRANCIS: Your Honor, I'm looking at some
7 emails that have been provided to me by agency counsel, and
8 they seem to be in line with what plaintiff's counsel here
9 is stating. It appears as though there was a -- he had an
10 86-year-old mother who was -- who had a health problem. I'm
11 just reading these emails for the first time, Your Honor.
12 But there seemed to be --

13 MR. PANAGOPOULOS: Your Honor, I believe his
14 mother was ill and died.

15 THE COURT: I see. Okay.

16 Okay. Can you address briefly the argument by
17 counsel that you haven't complied? Well, don't I have to
18 reach your own -- the regulations, Section 39.160(d)?

19 MS. FRANCIS: Well, with respect to that section,
20 Your Honor, once again, it's not been made very clear by
21 plaintiff's counsel how or when plaintiff had formally put
22 BOP on notice that he wanted a videophone, and where BOP
23 flat out said back to him, no. That there was like an
24 interactive process of some sort where there was a period of
25 time where they could have. Because under the

1 Rehabilitation Act, at least in other contexts, there is at
2 least an interactive process.

3 Here we have --

4 THE COURT: I understand that counsel -- somebody
5 at his office contacted you, I think they said July. Does
6 anyone have any more specifics on that?

7 MS. FRANCIS: When you say "contacted,"
8 quote/unquote, "you," are you referring to --

9 THE COURT: BOP or somebody. I don't know.

10 MR. PANAGOPOULOS: Yes, Your Honor. Our office
11 specifically called.

12 THE COURT: Who?

13 MR. PANAGOPOULOS: Called a woman at BOP -- I
14 don't have her name -- who was at the facility where he was
15 going to be remanded to ask about those accommodations.

16 THE COURT: Florence?

17 MR. PANAGOPOULOS: It was originally Florence,
18 yes.

19 THE COURT: And that would have been sometime
20 when?

21 MR. PANAGOPOULOS: That would have been sometime
22 in -- in July. I'd have to look at Johnny's time sheets to
23 give you the exact date.

24 MS. FRANCIS: And I take it July of 2012?

25 MR. PANAGOPOULOS: Yes.

1 MS. FRANCIS: Okay.

2 THE COURT: Yes, he wasn't sentenced until
3 December 2011.

4 MS. FRANCIS: Okay. Well, if the Court were to
5 look at that as notice, that BOP received notice, which
6 arguably we're not -- we don't -- we take a different
7 view -- to merely inquire about whether -- I don't know even
8 the content of that discussion. I don't know if it was --
9 you know, whether or not do you all carry videophones?
10 Would we be able -- would I be able to have one? I don't
11 know. And I don't know if that person would have been in a
12 position to answer for BOP, other than saying, Well, we have
13 TTY or access to TTY.

14 But assuming that the Court looks at that as
15 notice, as Mr. Craig has testified, in order to be able to
16 do a full, exhaustive, formal evaluation before getting a
17 written determination, before saying, Okay, after our
18 evaluation, we have concluded that we cannot use this
19 technology. And then having to go to -- I think it's the
20 Associate Attorney General's office to get that written
21 determination, sufficient time needs to have been given.

22 THE COURT: His complaint is nobody's done it. I
23 don't know why it wasn't done in the Bryant case, but we all
24 know it wasn't done here.

25 MS. FRANCIS: Right. And I can't speak to the

1 Bryant case, Your Honor, other than I do understand that
2 that inmate went through a completely different channel.
3 That person was an inmate. That person went through the
4 administrative process.

5 THE COURT: Yeah, he had to.

6 MS. FRANCIS: I don't -- and maybe my agency
7 counsel, if I confer with him, can even confirm that there
8 may have even been a finding that a TTY phone was effective
9 communication, and that's where it ended.

10 THE COURT: Well, I -- I wouldn't speculate.

11 MS. FRANCIS: But I don't want to speculate. I
12 don't want the Court to speculate.

13 But all I can say, Your Honor, that even if BOP
14 has -- it's been considered that the Bureau of Prisons has
15 been officially put on notice as of July of 2012; well,
16 we're now in the month of September. And as Mr. Craig has
17 pointed out that there, first of all, are standards in terms
18 of how -- there's certain things that take place that
19 triggers a formal -- a formal evaluation. Which has not
20 taken place here; i.e., his office being tasked with that
21 responsibility to conduct a formal evaluation. And even if
22 one was to take place, it would take six months to a year.
23 It's not something that could be done in a two-month
24 turnaround.

25 And so what we would argue is that -- that until

1 we have sufficient time to be able to conduct a formal
2 evaluation and an exhaustive evaluation, we are not out of
3 compliance. We have at least started the process by once
4 Mr. Craig's office was put on notice that this was a -- a
5 request that was coming in from an inmate, that at least
6 the -- we would argue at least they started with the
7 informal process. And then if they are tasked with the
8 formal process right afterwards, that they be allowed to go
9 through that evaluative process before -- and being able to
10 come to a conclusion, being able to get a written
11 determination, before anyone can cite the BOP for being out
12 of compliance.

13 We would argue that we are not out of compliance
14 because insufficient time has passed.

15 THE COURT: Well, yeah, but you haven't started.
16 So that's the problem. Would you agree to start this thing
17 forthwith?

18 MS. FRANCIS: I would have to confer with
19 Mr. Craig and see how his office would be able to start such
20 an undertaking. I can't speak for him on that.

21 THE COURT: Well, I'll give you a few moments to
22 confer.

23 MS. FRANCIS: Okay.

24 THE COURT: Thank you.

25 MS. FRANCIS: All right.

1 THE COURT: Take a 15-minute recess.

2 (Break in the proceedings at 3:57 p.m.)

3

4 (Upon resuming at 4:20 p.m.)

5 THE COURT: We'll go back on the record, then.

6 MS. FRANCIS: Okay. Are we back on the record,
7 Your Honor?

8 THE COURT: Yes. You said there's one more point
9 about 39 --

10 MS. FRANCIS: Yeah, there were -- there were a
11 couple of points, Your Honor. I think I started to make
12 them before the Court had asked that final question.

13 Under 39.160(a), I believe 2, subsection (2), it
14 says: "Where the agency communicates" -- and the agency
15 speaking -- they're speaking of the Department of Justice --
16 "with applicants and beneficiaries by telephone,
17 telecommunication devices for deaf persons (TDDs) or equally
18 effective telecommunication systems shall be used."

19 That right there in the regs, Your Honor, shows
20 that that is -- that that is considered to be at least a
21 very acceptable and effective form of communication. It's a
22 form of communication that is still being used, and -- and
23 there has been no finding to the contrary.

24 Also, Mr. Bryant -- sorry to bring up Mr. Bryant's
25 case again, but I know some of the parties sitting at

1 plaintiff's table are aware that Mr. Bryant had gone through
2 an administrative process. He went through the EEO process
3 pursuant to -- I think it was 2839.170. And pursuant to
4 that process, there was an investigation, there was a legal
5 analysis that had taken place. And although the EEO --
6 because there was -- even though he's a prison inmate, he
7 did have to go through the EEO process.

8 And in that finding -- and, unfortunately, Your
9 Honor, I don't have a copy that I was able to put my hands
10 on before Your Honor retook the bench. But even in that
11 finding -- and I do believe plaintiff's counsel should be
12 aware of this -- that in there it was found that the TTY
13 phone system was found to be at least an acceptable form of
14 communication. I don't want to use the wrong terminology,
15 but it was not found to be ineffective. And that is why
16 Mr. Bryant is still using the TTY phone system today.

17 THE COURT: Who made that finding?

18 MS. FRANCIS: That was the EEO, DOJ. If I can
19 have --

20 THE COURT: An internal administrative -- I don't
21 know. The counsel's here for Mr. Bryant. Maybe she has --

22 MS. GOLDEN: If I may interrupt.

23 THE COURT: Yes.

24 MS. GOLDEN: Your Honor, under that process, it
25 was the -- sorry, Your Honor -- the EEO counselor for the

1 Bureau of Prisons was tasked with doing the internal
2 investigation. And then the -- Mr. Bryant appealed parts of
3 that finding, including that a videophone wasn't required.
4 And that administrative process continues. And then --

5 THE COURT: What institution is he at?

6 MS. GOLDEN: He is at USP Tucson. He's at the
7 high security.

8 MS. FRANCIS: The high security side.

9 THE COURT: Depending on -- you know, I don't
10 think we can whomp all prisoners, high security, low
11 security. Everything is different. A camp is different.

12 MS. GOLDEN: Yes. Yes.

13 THE COURT: So I don't find one way or another --
14 I think security concerns at camps are slightly different.

15 Okay. All right. The Court is prepared to rule
16 here. I think I've heard -- we have --

17 The Court is confronted by a motion for
18 preliminary injunction brought by Mr. Berke. Mr. Berke is a
19 resident of Arizona. He has been sentenced by a court in
20 New Jersey to 24 months, I believe for mail fraud. And that
21 sentence was -- the judgment was entered on December 19th,
22 2011. The surrender date was continued from January, then
23 it was continued later. He was to surrender on August 23rd.
24 He brought suit in this court on August 14th.

25 I called the judge in New Jersey and asked if

1 there was any objection to a delay because we were,
2 basically, about two -- two days away from surrender,
3 because he has to travel to the site and get there in time
4 to self-surrender. So, graciously, Judge Pisano agreed, and
5 the surrender date is this Thursday.

6 As I said, we are here now on a PI instead of a
7 TRO. The bureau -- the charge here, the claim is that the
8 Bureau of Prisons has violated the Rehabilitation Act. And
9 the complaint as originally drafted included many issues of
10 auxiliary aids and other kinds of assisted devices, because
11 Mr. Berke as well as some of his family members are
12 profoundly deaf. And I don't think there's any question
13 that he has a disability.

14 In response to that, I must say that many changes
15 have been made. He was redesignated to Tucson to a low
16 security or camp in Tucson closer to his family members. At
17 least his wife and one or two sons live in Phoenix.

18 And if you look at Scott Pennington's declaration
19 filed on the 24th, you can see the number of accommodations
20 that have been made. That's relevant to where we are today.
21 And I don't need to repeat them, but they're documented in
22 what's document 14-2.

23 So what we are now confronted with is whether or
24 not he should only have the TTY system or whether the
25 Department of Corrections -- or Bureau of Prisons, I should

1 say -- should be required not to have a more -- obviously
2 more modern and better system, which is videophone.

3 The TTY system has been demonstrated here today.
4 It uses -- basically, it's a little bit like email insofar
5 as there's a typed English version. It's not in Mr. Berke's
6 native language. It's not as -- it's certainly comparable
7 to using ASL, which is what he uses for communication
8 purposes, and all his family does. His family doesn't have
9 a TTY, although it's my understanding that the machinery
10 itself could be provided to them. But you do not get to see
11 the person on the other end.

12 So the question for the Court is whether or not
13 plaintiff has sustained his burden under the requirements
14 for preliminary injunction with respect to its request -- or
15 his request -- that the Bureau of Prisons install in Tucson
16 a system, a videophone system.

17 We all are well aware of the standards for a PI.
18 The plaintiff has to establish that he is likely to succeed
19 on the merits; that he is likely to suffer irreparable harm
20 in the absence of this relief; the balance of equities tip
21 in his favor; and an injunction is in the public interest.
22 Movant bears the burden of persuasion, and must demonstrate
23 by a clear showing that the requested relief is warranted.

24 Now, while the four factors that have been set out
25 by the Supreme Court in *Winter*, 555 U.S. 7, at page 20,

1 typically they have been evaluated on a sliding scale, it is
2 particularly important for the movant to demonstrate a
3 substantial likelihood of success on the merits. And as the
4 DC Circuit recognized in *Sherley, S-H-E-R-L-E-Y, versus*
5 *Sebelius*, we read *Winter* at least to suggest, if not to
6 hold, that a likelihood of success is an independent,
7 freestanding requirement for a preliminary injunction. That
8 is Judge Kavanaugh's concurrence. Moreover, the movant must
9 demonstrate an actual likelihood of success, not merely the
10 existence of serious -- a question so serious, substantial,
11 difficult and doubtful as to make them fair ground for
12 litigation.

13 Now, as I noted, this case has been brought under
14 the Rehabilitation Act, Section 504, which prohibits
15 discrimination on the basis of disability in programs
16 conducted by federal agencies. To make a case under
17 Section 504, plaintiff must be an individual with a
18 disability -- that's not disputed here -- who is otherwise
19 qualified for participation in a program or activity of an
20 executive agency who has denied the benefits or subjected to
21 discrimination under that program of activity.

22 I am citing from the *American Council of the Blind*
23 *versus John W. Snow*, 311 F.Supp.2d 86, page 88, DC, it's a
24 district court case, 2004.

25 Also, key to the Court's analysis here are the DOJ

1 regulations that provide the Bureau of Prisons must provide
2 inmates or program participants who are deaf with
3 appropriate auxiliary aids where necessary to afford a
4 handicapped person an equal opportunity to participate in,
5 and enjoy the benefits of, a program or activity conducted
6 by the agency. This is 28 C.F.R. Section 39.160(a)(i).

7 Nonetheless, assuming it follows the proper
8 procedures, the regulations provide the BOP is not required
9 to take any action that it can demonstrate would result in a
10 fundamental alteration in the nature of a program or
11 activity or in undue financial and administrative burdens.
12 That's Section (d) of the 28 C.F.R.

13 Now, in opposing Mr. Berke's motion for
14 preliminary injunction, it's the Government's position that,
15 basically, he will not succeed on the merits. There isn't
16 really much focus by anyone on the other factors, although I
17 find that plaintiff's showing as to the other factors are
18 not as strong as is often the case when emergency relief is
19 sought.

20 As I've pointed out, he will be able to
21 communicate with family while at the institution. He will
22 have at least his wife and other members less than two
23 hours' travel time away so that they can visit. And as I
24 said, there are many, many people from this jurisdiction
25 that do not see family members during their entire time of

1 incarceration.

2 He does have email privileges. He'll have TTY.
3 And he will be able to correspond. So it is not -- he is
4 not in a situation of total lack of communication, unless
5 some kind of disciplinary proceeding were to be commenced
6 against him while he's there. It will certainly -- the
7 extent he can use these things are -- they're available to
8 him and he will be treated like all others with respect to
9 everything other than the phone is not going to be equal to
10 the videophone that he would have available to him and that
11 was shown to us here today.

12 Now, as I said, the defendants argue here that the
13 provision of the text telephone system and electronic mail
14 through the Bureau of Prisons' Trust Fund limited inmate
15 computer system will provide him with meaningful access to
16 BOP programs and activities.

17 The Court is not persuaded that I can agree with
18 this. It is clear from the record that a videophone is the
19 communications technology that would enable Mr. Berke's
20 participation in BOP programs or activities to be more
21 effective. And it would allow him to communicate with those
22 outside the prison on an equal, but I must also say perhaps
23 even a better, basis than those who are not profoundly deaf.

24 This regulation, as far as I can determine, that
25 counsel for the Government just pointed out, 39.160(a)(2)

1 talking about TDDs is a fairly dated regulation. I don't
2 know that it's been updated since 1984. And this is an area
3 where the technology has changed, which is not surprising.

4 It's clear from the record before the Court that a
5 videophone is the communications technology that would
6 enable him to participate in programs or activities,
7 including those outside the prison, on an equal, as I said,
8 if not better, basis than those who are not profoundly deaf.

9 His primary language is clearly the American Sign
10 Language, or ASL. The same is true for his wife and at
11 least two of his children who are profoundly deaf. And I
12 guess he communicates with both deaf family members as well
13 as non-deaf family members through ASL, through the video
14 system; that they don't have the TTY. The TTY is slower.
15 There's no question. It doesn't have the ability to capture
16 the language, obviously, because people are writing in
17 English, which is not their native language. I do not know
18 what his level of English capabilities are or his family
19 members' ability. So I can't determine whether or not TTY
20 would be a particularly inappropriate system or not. But it
21 is available to him and it's available to other prisoners.

22 So what I have here, though, is that the defendant
23 has raised the defense, which they're entitled to raise
24 under the regulations. To quote the regulations, it says
25 that: "The agency is not required to take any action that

1 it can demonstrate would result in a fundamental alteration
2 in the nature of a program or activity or in undue financial
3 and administrative burdens. In those circumstances where
4 agency personnel believe that the proposed action would
5 fundamentally alter the program or activity, or would
6 result in undue financial and administrative burdens, the
7 agency has the burden of proving that compliance with
8 Section 39.160 would result in such alteration or burdens."

9 And that decision has to be made ultimately by the
10 Attorney General or his or her designee after considering
11 all agency resources available for use in the funding and
12 operation of the conducted program or activity. It must be
13 accompanied by a written statement of the reasons for
14 reaching that conclusion.

15 And then it goes on to say that if they find -- if
16 they reach that conclusion, then they should take other
17 actions. Well, they've taken other actions here. But they
18 haven't raised -- they haven't done the analysis. Mr. Craig
19 has testified here that he does not know because he hasn't
20 analyzed whether or not they can install this system
21 consistent with FIPS, the requirements that govern their
22 security or their -- the security of their phone system.

23 The law is very, very clear starting with the
24 Supreme Court case of *Turner versus Safley*, S-A-F-L-E-Y,
25 482 U.S. 78, 987 (sic), that it is not the Court's

1 obligation to tell the Bureau of Prisons what or what not to
2 do. I cannot, consistent with the law or the regulations,
3 order them to install this upon his arrival.

4 I do intend, though, to order -- to grant the
5 preliminary injunction in part only, and to tell the
6 government to comply with the regulations. They should have
7 done it. I think that this is what's required. We have to
8 know about the cost. We have to know about monitoring. We
9 have to know about security.

10 At that point in time, you know, they're entitled
11 to a lot of deference, clearly, because it's the Bureau of
12 Prisons and these are federal institutions. And the law is
13 very clear. But if they don't do it, I have no basis to
14 accord deference.

15 So the Court is going to order them, and grant
16 this motion in part, to undertake an investigation or
17 examination to determine whether or not this -- the proposed
18 system could be installed consistent with their security
19 requirements of the institution that he's going to. We're
20 talking about a low risk defendant who's going to a camp.

21 So I would suggest -- and I have to say, you know,
22 you asked for them to meet -- to move immediately. Well,
23 the plaintiff in this case didn't move immediately. I'm
24 going to give the department -- Bureau of Prisons the same
25 eight months that Mr. Berke has sat on his rights, frankly.

1 I'm not terribly moved that he thinks this is such an
2 emergency. I think he -- I've read his PSI. He's a pretty
3 savvy guy and has been able to manage quite well, and he
4 could have invoked his rights long before now so we could
5 have gotten them going before.

6 So the Court will allow them eight months from
7 today. Would put us -- well, I think it's May 25th. Is
8 that right?

9 So the Court -- it's my view at this time, I think
10 out of fairness, I will retain jurisdiction. I'm going to
11 enter an order saying the motion's granted in part only. I
12 do not find that I can order it for a variety of reasons,
13 including the plaintiff's failure to make a strong showing
14 on all four criteria. I cannot and will not order the
15 installation of the phone.

16 I'm giving the department of -- or Bureau of
17 Prisons eight months to complete the analysis so that we can
18 find out whether or not this system can be installed or
19 whether it would fundamentally alter the program or activity
20 or would result in undue financial or administrative
21 burdens; and in the context of a prison, administrative
22 burdens implicate both security and safety.

23 At that point in time, the nature of the case
24 would change dramatically because it would be an
25 administrative review, and it would no longer be strictly a

1 case of whether or not he's -- it wouldn't be in the same
2 posture it is now.

3 Are there -- are there any questions?

4 MR. PANAGOPOULOS: No, Your Honor. Thank you.

5 There is one item of clean-up, and that's with
6 respect to the accommodations that are listed in that --

7 THE COURT: Right.

8 MR. PANAGOPOULOS: -- in the declaration.

9 THE COURT: Yeah, they've agreed. These are
10 agreed to, is my understanding.

11 MR. PANAGOPOULOS: Right. And we just wanted to
12 make sure that that was part of a stipulation and also
13 something that the Court would retain jurisdiction of to
14 review and ensure that the department actually implements
15 those -- those accommodations.

16 THE COURT: Well, you can come up with an
17 agreement.

18 MR. PANAGOPOULOS: Thank you.

19 THE COURT: I'm not going to sign off on this.
20 The parties have settled the case up -- except for one
21 aspect.

22 MR. PANAGOPOULOS: Right.

23 THE COURT: I am prepared -- what I intend to do,
24 if you want -- if you're agreeable, Ms. Francis, to a
25 stipulation of what you've agreed to. And the Court is

1 ordering the study to be done in eight months from today.
2 Then the case is over from my point of view, be
3 administratively closed. If you want to amend the complaint
4 down the road when you get the report, I will consider
5 keeping jurisdiction for that purpose.

6 MR. PANAGOPOULOS: Thank you, Your Honor. I'll
7 talk to Ms. Francis about finalizing the stipulation on the
8 parts of the case we've agreed to, and we'll submit that --

9 THE COURT: I want it by Thursday, first thing on
10 Thursday morning.

11 MR. PANAGOPOULOS: Will do. Absolutely.

12 THE COURT: And I'll issue an order on this one
13 issue. But this is a court order that it's going to be done
14 eight months. I've given you enough time. Mr. Todd says
15 six to twelve. He should have done it by now, so -- but he
16 could have asked for it before now too.

17 Okay. I will sign off on the stipulation and --

18 MS. FRANCIS: And just so we can be clear on the
19 record, Your Honor, because counsel and I had started to
20 talk about the nature of the stipulation. It's largely
21 going to mirror what the Court has in the form of Scott
22 Pennington's declaration.

23 I anticipate that there may be one minor issue
24 that counsel and I will need to discuss. I've started to
25 discuss it with him already. But I can just share for the

1 Court that I believe that the -- what we are able to
2 stipulate to is going to be largely what's already captured
3 on the -- on the declaration.

4 THE COURT: I don't understand what you're saying.
5 What's the problem? I don't want to hear problems. No more
6 telephone calls. It's paragraph 5.

7 MS. FRANCIS: Yes, paragraph 5. There is a --

8 THE COURT: That's it.

9 MS. FRANCIS: I can state what the issue will be,
10 and we can possibly try to flush it out now.

11 THE COURT: There's no more issues to litigate.

12 MS. FRANCIS: As far as I'm concerned --

13 THE COURT: I've got paragraph 5, that's what he
14 said, and I don't -- and I didn't litigate anything else.
15 And if, in fact, it turns out this is the phone system he'll
16 get in the interim, you've already provided for it here in
17 the fourth bullet.

18 You're getting more time. And with the TTY, and
19 then at the end of the eight months, if you feel that
20 there's further grounds to argue that their results
21 shouldn't be deferred to by the Court, then so be it. But I
22 think there's a pretty strong presumption the Court does not
23 get into running Bureau of Prisons programs.

24 So I'll see -- I'll be happy to sign off if you
25 want the Court to sign off on -- you've agreed to these

1 things and the Court's ordering the following. This takes
2 care of the matter, at least until something changes. Okay?

3 MR. PANAGOPOULOS: Thank you, Your Honor.

4 THE COURT: Thank you. The presentation was very
5 helpful. I learned a lot. And I appreciate it. It's not
6 an easy issue.

7 MR. PANAGOPOULOS: Your Honor, we can take the
8 TTY?

9 THE COURT: Oh, yeah, yeah. Keep your --
10 everybody gets to keep their own exhibits, please. So you
11 can keep this. And I guess the rest -- so everybody's
12 responsible for retaining their exhibits.

13 Anything else, Gwen?

14 THE DEPUTY CLERK: No, Judge.

15 THE COURT: Okay. We'll issue an order from
16 chambers after we get the stipulation.

17 MR. PANAGOPOULOS: Thank you again, Your Honor.

18 MS. FRANCIS: Thank you, Your Honor.

19 (Court adjourned at 4:47 p.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, VICKI EASTVOLD, do hereby certify that the above and foregoing, consisting of the preceding 173 pages, constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 6th day of November, 2012.

s/Vicki Eastvold

Official Court Reporter
United States Courthouse
Room 6722
333 Constitution Avenue, NW
Washington, DC 20001