

DAVINA PUJARI
PARTNER
DIRECT DIAL (415) 995-5077
DIRECT FAX (415) 995-3526
E-MAIL dpujari@hansonbridgett.com



October 23, 2019

VIA ECF

Hon. James Donato
United States District Court
Northern District of California

Re: Request to Consider Recusal from Hunters Point-Related Cases

Dear Judge Donato:

On behalf of defendants Tetra Tech EC, Inc. and Tetra Tech, Inc. (collectively, "TtEC"), we write pursuant to 28 U.S.C. § 455 to request that Your Honor consider recusal from this case and the related cases identified in Exhibit 1 on the grounds that Your Honor's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a); *see also* Civ. L. R. 3-14, Commentary (issue may be raised by letter). We have a duty to raise this issue to Your Honor. *In re Bernard*, 31 F.3d 842, 847 (9th Cir. 1994) ("Counsel for a party who believes a judge's impartiality is reasonably subject to question has not only a professional duty to his client to raise the matter, but an independent responsibility as an officer of the court. . . . A lawyer who reasonably believes that the judge before whom he is appearing should not sit must raise the issue so it may be confronted and put to rest. Any other course would risk undermining public confidence in our judicial system.")

The basis for TtEC's request is that Your Honor's statements in recent orders in Hunters Point-related cases, along with prior statements made during a criminal proceeding also related to Hunters Point, indicate Your Honor has prejudged the evidence on a critical disputed matter of fact in this case—whether the U.S. Navy paid TtEC for work TtEC did not do. TtEC denies this allegation. However, Your Honor's recent ruling on remand motions in *Pennington, et al. v. Tetra Tech, Inc., et al.*, Case No. 3:18-cv-05330-JD, and related cases, particularly when read together with prior statements made by Your Honor, indicates that Your Honor has already decided the issue.

A. Legal Standard for Recusal Pursuant to Section 455(a).

Title 28 U.S.C. § 455(a) provides that a judge "of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." "The goal of section 455(a) is to avoid even the appearance of partiality." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988) (quoting *Health Services Acq. Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986)). Where the question of the appearance of impartiality is a close call, such questions should be decided in favor of recusal. *See Republic of Pan. v. Am. Tobacco Co.*, 217 F.3d 343, 347 (5th Cir. 2000); *In re United States*, 158 F.3d 26, 30 (1st Cir. 1998) (citing *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995)); *United States v. Dandy*, 998 F.3d 1344, 1349 (6th Cir. 1993); *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989).

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In determining whether there is a question of impartiality, the standard is “whether a reasonable person with knowledge of all the facts would conclude that the judge’s impartiality might reasonably be questioned.” *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986) (citations omitted). This “reasonable person” is considered to be an “objective, disinterested observer” who has full knowledge of the applicable circumstances. *United States v. Bayless*, 201 F.3d 116, 126 (2d Cir. 2000) (quoting *Diamondstone v. Macaluso*, 148 F.3d 113, 120 (2d Cir. 1998) (quotation omitted)). The “reasonable person” is not, however, a judge; rather, it is an outside observer “less inclined to credit judges’ impartiality and mental discipline than the judiciary” *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990).

Recusal is warranted where a judge has made statements that suggest to a reasonable observer that he or she has pre-judged a contested issue of fact at issue in the litigation. See *In re Boston’s Children First*, 244 F.3d 164, 170 (1st Cir. 2001), *as amended on denial of reh’g and reh’g en banc* (Mar. 2, 2001) (holding recusal was required when “a reasonable person might interpret [the Judge’s] comments as a preview of a ruling on the merits” of a pending issue); *United States v. Antar*, 53 F.3d 568, 576-77 (3d Cir. 1995) (finding appearance of partiality when statements by judge in criminal case indicated his goal of obtaining restitution to the government in a civil proceeding, particularly when considered in context with other statements made by the judge), *overruled on other grounds by Smith v. Berg*, 247 F.3d 532 (3d Cir. 2001).

As discussed below, Your Honor recently made statements in the ruling on motions for remand in several related cases that, when coupled with prior statements Your Honor made during a hearing, would cause a reasonable observer to believe that Your Honor has already determined a disputed issue of fact in the False Claims Act (“FCA”) and related cases.

B. Statements Indicating the Court’s Impartiality Might Reasonably Be Questioned.

In the October 18, 2019 Orders on the motions for remand in several related cases (*e.g.*, Case 3:18-cv-05330-JD, *Pennington et al. v. Tetra Tech, Inc. et al.*), the Court made the following statements:

“The United States Navy is the lead agency responsible for the environmental remediation of HPNS. It hired defendants Tetra Tech, Inc. and Tetra Tech EC, Inc., to do the clean-up work, and has paid them approximately three hundred million dollars in federal funds for work they did not do, as plaintiffs allege. A substantial amount of litigation has ensued, much of which is pending before this Court.” (Emphasis added.)

The underlined statement would cause a reasonable observer to believe that Your Honor has come to a conclusion on a disputed issue of fact, in favor of the Navy and against TtEC. The Navy alleges that it paid TtEC for work that was not done; TtEC denies that allegation. This dispute of fact is central to the FCA and related litigation. Further, the very next sentence noting that a “substantial amount of litigation has ensued” is apparently based on a premise that TtEC was paid for work it “did not do,” because litigation would not ensue solely from TtEC being hired.

These statements are particularly concerning when read in conjunction with prior statements by Your Honor related to the Hunters Point litigation. Specifically, during the sentencing of Justin

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Hubbard in Case No. CR 17-00278-JD, the following colloquies would cause a reasonable observer to believe that Your Honor has a pre-judged view of disputed facts.

Transcript of *Hubbard* Sentencing Hearing (“*Hubbard* Transcript”, attached as Exhibit 2), at 8:5 to 9:13 (emphasis added):

THE COURT: I really -- this is really kind of beside the point. I just don't get that. I mean, I don't understand how a man just decides one day he's going to substitute clean dirt for dirty dirt on his own out of the blue. Who wakes up in the morning and says, I'm going to go to the jobsite today and swap out the test samples. Just something I'm going to do. I find that to not be a common sense -- it just doesn't make any sense to me, that a guy rolls out of bed and says, Hey, today is the day I'm going to swap out the test samples, sua sponte, just because I feel like it. I don't get that, Mr. Long.

MR. LONG: Your Honor, I have a murder case --

THE COURT: I don't want to hear about that. I want to hear about Mr. Hubbard. Just tell me why does that make sense? I don't get it.

MR. LONG: All I'm saying is in 22 years of this, that crimes usually do not make sense.

THE COURT: This is a regulatory crime, Mr. Long. I understand a fit of passion, an anger -- murder is completely comprehensible in that respect. It's tragic but comprehensible. For the life of me, I just don't get how a guy at a jobsite gets up in the morning and says, I'm going to swap out the test samples. They're not my test samples. They're just dirt in the earth that I'm working on at a site, and it just feels right to me to swap it -- that makes no sense to me. I'm very skeptical that this was something that he came up completely on his own in his own personal choice and acted on it. This just makes very little sense to me. Anyway, it's just an observation. I don't -- you know, it's not doing any fact-finding. 3553(a) allows me to do broad inquiries, and I'm responding to the idea that this was something that was purely a personal choice. When --

***Hubbard* Transcript, at 18:2-7 (emphasis added):**

MR. LONG: Your Honor, 49 years old, no prior record. The crime that he did has been rectified. It's been rectified financially --

THE COURT: That's not what the Navy says. The Navy see says this is getting up to \$300 million and no end in sight.

***Hubbard* Transcript, at 19:3-17 (emphasis added):**

THE COURT: What are the odds -- this is just -- we're just talking here, but what are the odds that Tetra Tech will pay most of that expense?

MR. MCCARTHY: Your Honor, that's a question for the civil side of things. I'm not a -- I haven't been a civil lawyer in many years and I just can't answer that. I would hope as a citizen that we can do that, but I --

THE COURT: But they're an ongoing business with some money; right?

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MR. MCCARTHY: They are in -- I believe they are an ongoing business. Yes. They are an ongoing business with a significant dispute --

THE COURT: This has nothing to do -- but this is just big picture for me. Okay. All right. Thank you.

* * * * *

When read together, Your Honor's statements in the Orders on the motions for remand and Your Honor's statements during the sentencing of Justin Hubbard would lead a reasonable observer to conclude that Your Honor has pre-judged the facts regarding whether the Navy paid TtEC for work TtEC did not do, and that Your Honor has decided that TtEC should be held responsible for the unauthorized and criminal acts of Mr. Hubbard.¹

The issue of whether TtEC may be found liable under the FCA or for breach of contract for the unauthorized and criminal acts of two low-level employees whose conduct was investigated and remedied by TtEC is a significant disputed issue in the FCA and other related matters. In addition, the scope of the admitted criminal conduct by those employees (which was discussed in their plea agreements and which TtEC remedied) does not come close to \$300 million dollars' worth of work.

This is not a situation in which the Court has made statements in reaction to what the Court has observed during the course of the ongoing FCA and related Hunters Point civil proceedings. *See In re Huntington Commons Associates*, 21 F.3d 157 (7th Cir. 1994) (finding that an acknowledgment of a "predisposition" by district court "as a result of things that have taken place in this very courtroom" did not render fair judgment impossible). The FCA and related civil matters are still in the pleadings stage, no substantive hearings have occurred, and no evidence regarding the FCA allegations has been admitted, much less evaluated. Moreover, the issues in the FCA and related civil cases are far different in nature and scope than the issues in the completed criminal cases. Thus, there is no basis for Your Honor to conclude that TtEC was paid for work it did not do. *See Liteky v. United States*, 510 U.S. 540, 550 (1994) (wrongful bias arises where "it is undeserved, or because it rests on knowledge that the subject ought not to possess"). Finally, the disposition in the Orders on the motions to remand did not require any such finding.

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¹ We have not yet reviewed the transcript of the sentencing hearing in the case of *United States v. Steven Rolfe*, CR 17-0123 JD. Although that case was ordered unsealed on May 2, 2018 (see *Hubbard* Transcript at 24:22 to 25:7), the *Rolfe* sentencing transcript remains under seal and the Court declined our request on February 7, 2019, to obtain the transcript. TtEC has separately moved the Court to unseal that transcript.

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In summary, based on the foregoing, we respectfully request that Your Honor consider recusal pursuant to 28 U.S.C. § 455(a) from all Hunters Point-related cases identified in Exhibit 1.

Respectfully,

A handwritten signature in blue ink, appearing to read 'DP', with a long horizontal line extending to the right.

Davina Pujari

cc: All counsel in cases listed on Exhibit 1, via ECF/Email

EXHIBIT 1

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I. False Claims Act actions – all related to each other

1. *US ex rel. Arthur Jahr v. Tetra Tech EC, Inc., et al.*, Case No. 3:13-cv-03835-JD (lead case)
2. *US ex rel. Donald Wadsworth v. Tetra Tech EC, Inc., et al.*, Case No. 3:16-cv-01107-JD
3. *US ex rel. Anthony Smith v. Tetra Tech EC, Inc., et al.*, Case No. 3:16-cv-01106-JD

II. Shipyard Parcel A Homeowner actions, all related to each other, and to the "Bayview Hunters Point Residents Action."

4. *Pennington, et al. v. Tetra Tech, Inc., et al.*, Case No. 18-cv-05330-JD (lead case)
5. *Ellington, et al. v. Tetra Tech, Inc., et al.*, Case No. 18-cv-05352-JD
6. *Lin, et al. v. Tetra Tech, Inc., et al.*, Case No. 18-cv-05771-JD
7. *Farrell, et al. v. Tetra Tech Inc., et al.*, Case No. 19-cv-00248-JD
8. *Yegorov v. Tetra Tech Inc., et al.*, Case No. 19-cv-00252-JD
9. *Darden v. Tetra Tech Inc., et al.*, Case No. 19-cv-00247-JD
10. *Fried v. Tetra Tech Inc., et al.*, Case No. 19-cv-00249-JD
11. *Lupton v. Tetra Tech Inc., et al.*, Case No. 19-cv-00251-JD
12. *Bravo v. Tetra Tech, Inc., et al.*, Case No. 19-cv-00667-JD
13. *Hershowitz v. Tetra Tech, Inc., et al.*, Case No. 19-cv-02698-JD
14. *Kaplan v. Tetra Tech, Inc., et al.*, Case No. 19-cv-02740-JD
15. *Yun, et al. v. Tetra Tech, Inc., et al.*, Case No. 19-cv-02771-JD
16. *Castro, et al. v. Tetra Tech, Inc., et al.*, Case No. 19-cv-02810-JD
17. *Zhu, et al. v. Tetra Tech, Inc., et al.*, Case No. 19-cv-03932-JD
18. *LaRrett, et al. v. Tetra Tech, Inc., et al.*, Case No. 19-cv-03941-JD

19. *Yang, et al. v. Tetra Tech, Inc., et al.*, Case No. 19-cv-03992-JD
20. *Theresa Duncan v. Tetra Tech, Inc., et al.*, Case No. 19-cv-05408-JD
21. *Anirvan Raja Datta v. Tetra Tech, Inc., et al.*, Case No. 19-cv-05405-JD
22. *Chen v. Tetra Tech, Inc., et al.*, Case No. 19-cv-03955-JD
23. *San Francisco Shipyard Residents, et al. v. Tetra Tech, Inc., et al.*, Case No. 19-cv-06137-JD

III. Bayview Hunters Point Residents Action – related to Shipyard Parcel A Homeowner actions

24. *Bayview Hunters Point Residents et al v. Tetra Tech EC, Inc. et al.* Case No. 19-cv-01417-JD

EXHIBIT 2

EXHIBIT 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable James Donato, Judge

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
VS.)	NO. CR 17-00278-JD
)	
JUSTIN E. HUBBARD,)	
)	
Defendant.)	
_____)	

San Francisco, California
Wednesday, May 2, 2018

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

DAVID L. ANDERSON
United States Attorney
450 Golden Gate Avenue
San Francisco, California 94102

**BY: MATTHEW L. MCCARTHY
ASSISTANT UNITED STATES ATTORNEY**

For Defendant:

KENNETH W. LONG
2600 S. Rainbow - Suite 200
Las Vegas, NV 89146

BY: KENNETH W. LONG, ESQUIRE

Reported By: Pamela Batalo-Hebel, CSR No. 3953, RMR, FCRR
Official Reporter

1 Wednesday - May 2, 2018

10:38 a.m.

2 P R O C E E D I N G S

3 ---000---

4 **THE CLERK:** Calling under seal matter CR 17-278,
5 United States vs. Justin E. Hubbard.

6 **MR. LONG:** Good morning, Your Honor. Kenneth Long,
7 Nevada Bar No. 6042, on behalf of Mr. Hubbard, who is present
8 out of custody.

9 **MR. MCCARTHY:** Good morning, Your Honor. Matt
10 McCarthy for the United States.

11 **THE PROBATION OFFICER:** And good morning, Your Honor.
12 Karen Mar for Probation.

13 **THE COURT:** Okay. We are here for a continued
14 sentencing. So last time I laid out all of the Guidelines
15 Range and the offense level and the criminal history, so I'm
16 not going to do that again. Is that all right, counsel?

17 **MR. MCCARTHY:** Yes.

18 **THE COURT:** Mr. long?

19 **MR. LONG:** Yes.

20 **THE COURT:** I was pausing only because of the fact
21 that there is another defendant in this same case who pled
22 guilty to the same crime for basically the same conduct whose
23 Guideline offense level was the same as the defendant here and
24 whose criminal history category was also the same as
25 Mr. Hubbard's.

1 Now, I wanted you two to address the 3553(a) concern I had
2 about the disparity in the proposed sentences, so I shared that
3 material with Mr. Long and his client and I got your
4 memorandums and I have read them and I just -- let me start
5 with the Government.

6 So what is now your current recommendation for a sentence?

7 **MR. MCCARTHY:** Eighteen months, Your Honor, the high
8 end of the Guideline Range found by the Government --

9 **THE COURT:** How do I square that with Mr. Rolfe, who,
10 as I said, is, for sentencing purposes, effectively identical
11 to Mr. Hubbard?

12 **MR. MCCARTHY:** Well, your Honor, I think there is a
13 very significant difference between the two.

14 **THE COURT:** What is that?

15 **MR. MCCARTHY:** That is Mr. Rolfe's cooperation with
16 the Government.

17 The Government moved under 5K1.1 and the Court granted our
18 motion to reduce his sentence by two levels because of his
19 cooperation with the Government's investigation of Hunter's
20 Point. We do not have that motion here because there has been
21 no similar cooperation for Mr. Hubbard.

22 **THE COURT:** But Mr. Hubbard and Mr. Rolfe have the
23 same offense level; right?

24 **MR. MCCARTHY:** Prior to the Government's 5K motion.
25 The Government moved for a reduction.

1 **THE COURT:** Let me just ask you about that. So what
2 did Mr. Rolfe do at a high level --

3 **MR. MCCARTHY:** At a high --

4 **THE COURT:** -- that makes a difference, in your view?

5 **MR. MCCARTHY:** Mr. Rolfe explained not only his own
6 conduct but the conduct of other people, including superiors of
7 his at Hunter's Point, which has assisted the Government's
8 criminal and civil investigations.

9 **THE COURT:** It has?

10 **MR. MCCARTHY:** Yes, it has.

11 And Mr. Hubbard simply took credit for his own actions,
12 which is laudable and has resulted in a three-level downward
13 departure --

14 **THE COURT:** So he took responsibility, not credit.

15 **MR. MCCARTHY:** He provided no information that could
16 assist in our investigation of any other person who has
17 committed an offense, which is the threshold required under
18 5K1.

19 **THE COURT:** So he declined any participation?

20 **MR. MCCARTHY:** His position is that he is not aware of
21 any additional -- his position is that he is not aware of any
22 information that he could share, but that is neither here nor
23 there under 5K1.

24 The 5K1 language is specific and amplified in the
25 Application Notes that to get the credit under 5K1, you have to

1 provide information about others, and providing information
2 about yourself is what gets you acceptance of responsibility,
3 and so they're just different tests. And that's why the
4 Government believes --

5 **THE COURT:** You think that is a ten-month difference?
6 Mr. Hubbard is worthy of a ten-month additional sentence above
7 Mr. Rolfe's just for that?

8 **MR. MCCARTHY:** I do. I think that the cooperation was
9 significant and important.

10 **THE COURT:** Mr. Long?

11 **MR. LONG:** Your Honor, the terminology used, "declined
12 any participation," I don't believe correctly frames what
13 Mr. Hubbard has done.

14 Since this investigation began years ago, Mr. Hubbard took
15 phone calls from the EPA. He took phone calls from the Nuclear
16 Regulatory Commission. He took phone calls from every law
17 enforcement agency that contacted him, and he was entirely
18 candid about what he did.

19 Now, we came back here to --

20 **THE COURT:** Let me just jump in.

21 Tell me what those phone calls would be like.

22 **MR. LONG:** Those phone calls were we found
23 discrepancies in some of the labels. *We believe that you*
24 *mislabeled some of these samples that you took dirt from*
25 *elsewhere and he said, Yes, I did.*

1 There has never been a time -- and the whole crew of law
2 enforcement officers sitting back there can attest -- that he
3 has denied responsibility or tried to blame anyone else.

4 **THE COURT:** Let me just pause on that.

5 Now, is that right, Mr. McCarthy, that Mr. Hubbard was
6 unguarded and open in his communication with EPA and NRC?

7 **MR. MCCARTHY:** Can I have just one second to check?

8 **THE COURT:** Of course.

9 (Pause in proceedings.)

10 **MR. MCCARTHY:** Your Honor, I have just spoken to one
11 of our investigators from the Nuclear Regulatory Commission,
12 and he does dispute that characterization. He says that in
13 initial conversations, Mr. Hubbard denied his involvement and
14 only admitted it later.

15 **THE COURT:** Why don't you call that person up. Who is
16 it?

17 Come on up, whoever had the direct conversations with
18 Mr. Hubbard.

19 **MR. BIGONESS:** Good morning, Your Honor.

20 **THE COURT:** Good morning. Just tell us who you are,
21 please.

22 **MR. BIGONESS:** My name is Jerome Bigoness,
23 B-I-G-O-N-E-S-S. I'm a senior special agent with the NRC's
24 Office of Investigations.

25 **THE COURT:** Okay. So you do the criminal

1 investigations?

2 **MR. BIGONESS:** Yes. I'm one of the initial
3 investigators involved in this case.

4 **THE COURT:** Did you have any contact with Mr. Hubbard
5 before he was indicted?

6 **MR. BIGONESS:** Yes. I interviewed him under oath a
7 few years ago, and during that time when I interviewed him, I
8 asked him questions about his alleged misconduct, and he denied
9 virtually any wrongdoing whatsoever during that first
10 interview.

11 **THE COURT:** Mr. Long just told me that as soon as he
12 got called, he said, *Yes, I did it and here are the details.*
13 Is that not consistent with your recollection?

14 **MR. BIGONESS:** That is not consistent with my
15 recollection.

16 **THE COURT:** Mr. Long?

17 **MR. LONG:** Your Honor, Mr. Hubbard went to a meeting
18 that he didn't even have to go to with this gentleman under
19 oath without an attorney. By the time I got in this case, he
20 had already confessed several times to the conduct.

21 I have never sat down and spoke with Mr. Bigoness. I
22 cannot cross-examine him effectively, but Mr. Hubbard has
23 always accepted responsibility from day one.

24 They want the maximum, frankly, that they can get at this
25 adjusted level because Mr. Hubbard doesn't have anyone to

1 squeal on.

2 He accepted responsibility. He's the one that did it.
3 Nobody told him to do it. He didn't tell anyone else to do
4 it --

5 **THE COURT:** I really -- this is really kind of beside
6 the point. I just don't get that. I mean, I don't understand
7 how a man just decides one day he's going to substitute clean
8 dirt for dirty dirt on his own out of the blue. Who wakes up
9 in the morning and says, *I'm going to go to the jobsite today*
10 *and swap out the test samples. Just something I'm going to do.*

11 I find that to not be a common sense -- it just doesn't
12 make any sense to me, that a guy rolls out of bed and says,
13 *Hey, today is the day I'm going to swap out the test samples,*
14 *sua sponte, just because I feel like it.* I don't get that,
15 Mr. Long.

16 **MR. LONG:** Your Honor, I have a murder case --

17 **THE COURT:** I don't want to hear about that. I want
18 to hear about Mr. Hubbard. Just tell me why does that make
19 sense? I don't get it.

20 **MR. LONG:** All I'm saying is in 22 years of this, that
21 crimes usually do not make sense.

22 **THE COURT:** This is a regulatory crime, Mr. Long. I
23 understand a fit of passion, an anger -- murder is completely
24 comprehensible in that respect. It's tragic but
25 comprehensible.

1 For the life of me, I just don't get how a guy at a
2 jobsite gets up in the morning and says, *I'm going to swap out*
3 *the test samples. They're not my test samples. They're just*
4 *dirt in the earth that I'm working on at a site, and it just*
5 *feels right to me to swap it -- that makes no sense to me.*

6 I'm very skeptical that this was something that he came up
7 completely on his own in his own personal choice and acted on
8 it. This just makes very little sense to me.

9 Anyway, it's just an observation. I don't -- you know,
10 it's not doing any fact-finding. 3553(a) allows me to do broad
11 inquiries, and I'm responding to the idea that this was
12 something that was purely a personal choice.

13 When --

14 **MR. LONG:** Your Honor --

15 **THE COURT:** I'm sorry -- is it Mr. Bigoness?

16 **MR. BIGONESS:** Yes, Your Honor.

17 **THE COURT:** So when did Mr. Hubbard, in your view,
18 start taking responsibility for the acts?

19 **MR. BIGONESS:** To the best of my recollection,
20 Your Honor, it wasn't until we sat down with the U.S.
21 Attorney's Office in the Northern District of California. By
22 that time, he had representation and he provided some
23 admissions that we used in our case.

24 **THE COURT:** All right. But it's your recollection
25 that in your initial contacts with him, he outright denied any

1 responsibility?

2 **MR. BIGONESS:** Yes.

3 **MR. MCCARTHY:** And, Your Honor, I will agree that once
4 my office contacted Mr. Hubbard, he was very forthright in
5 accepting his own responsibility, that's correct.

6 **THE COURT:** Well, yes. And he did get a two-level
7 reduction for that.

8 **MR. MCCARTHY:** And an additional third point.

9 **THE COURT:** And an additional third point. That's
10 right. Okay.

11 I'm ready to proceed. Any closing comments, Mr. -- I'll
12 let you go -- let Mr. Long go last. Go ahead.

13 Any closing comments, Mr. McCarthy?

14 **MR. MCCARTHY:** Your Honor, I think it was covered
15 pretty extensively in our papers. I think we addressed both
16 the risk of environmental harm and actual financial harm.

17 If the Court would like, I do have some comments I could
18 make that were not in the papers just about the sentencing, the
19 technical sentencing argument the defense made in their papers
20 and --

21 **THE COURT:** Sure. Go ahead.

22 **MR. MCCARTHY:** -- I just want to address a few things.

23 And I want to say I disagree with some of his
24 calculations. I don't impute any misconduct or malintent by
25 defense counsel. Federal sentencing is complicated.

1 But I just want to say he notes in his papers that the
2 eight-month sentence imposed against Mr. Rolfe could result in
3 four months in custody and four months in home confinement.
4 That's not correct. The only way that can happen is if the
5 Court imposes such a sentence.

6 Under the BOP's regs, for a sentence of less than one full
7 year, the most he could get would be a 10 percent credit in a
8 halfway house.

9 **THE COURT:** Oh, it's only 10 percent, so it's not the
10 15 that --

11 **MR. MCCARTHY:** So there is two different issues.
12 There is the good time credit, 15 percent.

13 **THE COURT:** Right.

14 **MR. MCCARTHY:** Which you are ineligible for if you are
15 serving less than a year and a day.

16 **THE COURT:** Oh, is that right?

17 **MR. MCCARTHY:** Which is why defense attorneys often
18 ask for a year and a day rather than a year. That's the magic
19 of the --

20 **THE COURT:** Is that right, Ms. Mar, in your view?

21 **THE PROBATION OFFICER:** Correct.

22 **THE COURT:** Okay. I did not know that.

23 So BOP does not award the good-time credit of 15 percent
24 for less than a year?

25 **MR. MCCARTHY:** Yes. That's by regulation.

1 **THE COURT:** Okay.

2 **MR. MCCARTHY:** It is true that up to 10 percent or six
3 months, whichever is less of a sentence, can be served in a
4 community confinement, usually a halfway-house environment, but
5 that's limited to 10 percent, and so with an eight-month
6 sentence, that would be 24 days.

7 So in all likelihood, assuming good conduct and everything
8 else, Mr. Rolfe will serve seven months in BOP, which he is
9 serving right now, and then at the most could serve about three
10 weeks in a halfway house before returning home.

11 **THE COURT:** I --

12 **MR. MCCARTHY:** There is no possibility he will serve
13 four months in his house.

14 **THE COURT:** I didn't order the halfway house.

15 **MR. MCCARTHY:** All prisoners can possibly get up to 10
16 percent of their sentence or six months --

17 **THE COURT:** Oh, BOP will decide that?

18 **MR. MCCARTHY:** Yes. It's a way of transitioning back
19 to -- back to custody. That's true for, I think, everyone up
20 to murderers.

21 And so to the point of -- we've addressed the legal
22 framework of disparity, but it is important to note that the
23 defendant here is asking for twelve months of home confinement
24 when his cooperating co -- not co-defendant but the other
25 defendant who cooperated got eight months in prison. So this

1 is a vastly lower sentence and, in fact, it's a request for a
2 downward departure below the Guidelines. And I -- obviously
3 for the reasons we've set forth, we don't think that is
4 warranted here.

5 He notes that the Sentencing Guidelines say that home
6 confinement is appropriate at this level, and just to clarify
7 that, the Sentencing Guidelines say that at most, the -- a
8 defendant in Zone C of the Sentencing Table, which is where we
9 are, can get one day of confinement -- community confinement
10 for one day of imprisonment.

11 So, again, the low end, the absolute low end of the
12 Guideline Range we're talking about, would be a 12-month
13 sentence split between BOP and home confinement. The
14 Government does not think that's a reasonable sentence here,
15 but that's the low end. Anything below that is a downward
16 variance.

17 **THE COURT:** Ms. Mar, anything to add?

18 **THE PROBATION OFFICER:** No, Your Honor. I'm just
19 looking at the fact that to avoid a sentencing disparity, just
20 because of what Mr. Rolfe was sentenced to.

21 **THE COURT:** All right.

22 And, Mr. Long, final comments.

23 **MR. LONG:** Yes, Your Honor.

24 I can tell, as you were speaking, that you may not believe
25 that Mr. Hubbard on his own decided to mislabel samples, and as

1 I mentioned last time, he was at Hunter's Point for eight and a
2 half years, away from his home. There were a lot of
3 circumstances about his job that were taxing on him
4 emotionally.

5 The United States Attorney and the law enforcement did not
6 believe him either, and that's why Mr. Kearney, Phil Kearney,
7 came to Las Vegas, and Mr. Hubbard was polygraphed in the FBI
8 office.

9 I -- I have mixed feelings about polygraphs but not about
10 FBI polygraphs. I began my career as an FBI agent, and I think
11 that they are very accurate.

12 And --

13 **THE COURT:** Let me just ask a question.

14 So were you representing Mr. Hubbard at the time?

15 **MR. LONG:** Yes. I was there. Mr. Kearney was there.

16 And the polygraph was inclusive. And the polygraph
17 examiner said the reason why it's inconclusive was because he
18 called Mr. Hubbard -- his word for him was a "bleeder."

19 **THE COURT:** A what?

20 **MR. LONG:** A "bleeder."

21 **THE COURT:** Bleeder?

22 **MR. LONG:** A "bleeder," somebody who bleeds a lot.
23 Because he felt so guilty and so responsible for what he had
24 done.

25 The way a polygraph works --

1 **THE COURT:** Oh, I've had them in cases. Yeah.

2 **MR. LONG:** Okay.

3 And so he sat in a room, and I was with him, and it took
4 all afternoon where he was questioned by the EPA, the NRC, and
5 everyone. He has nothing to hide. He has laid everything out
6 on the table.

7 When I got involved in this case, I already had several
8 confessions, so -- and I came up here and I talked to
9 Mr. Kearney for a day. There wasn't a whole lot to work with
10 because he has accepted responsibility.

11 I would love to cross-examine Mr. Bigoness. I would love
12 to see his early notes because what I was told from the time I
13 started this case was that he has always been forthright.

14 And I have a problem with some of the information in the
15 Government's additional Sentencing Memorandum --

16 **THE COURT:** All right. Let's hear about that.

17 **MR. LONG:** Okay. If you go to the affidavit --

18 **THE COURT:** Which one?

19 **MR. LONG:** It is Exhibit B.

20 **THE COURT:** B. Is that the physicist?

21 **MR. LONG:** Yes.

22 Go over to the third page of that affidavit, paragraph B.
23 It talks about how plutonium is a radioactive material that is
24 produced in nuclear reactors. Only trace amounts occur
25 naturally. The most common plutonium is plutonium isotope 239.

1 Exposure to this causes cancer. Cancers are lung, bone, liver.

2 The Department of Air -- plutonium is not at Hunter's
3 Point. The place where Mr. Hubbard mislabeled the samples was
4 rechecked entirely by Tetra Tech at their expense. In the
5 eight-plus years this man worked at Hunter's Point, he never
6 had to wear a protective suit. He never had to wear a
7 regulator, no hat, no coverings over his boots.

8 Mentioning plutonium and that somehow Justin exposed
9 people to a risk of cancer, that's outright misleading.

10 **THE COURT:** Well, let me ask you this. What about the
11 Navy's victim letter, which I found to be interesting?

12 **MR. LONG:** I saw that, Your Honor, and I don't believe
13 that the Superfund has the best reputation as it is. And this
14 is something that can be addressed civilly. This is a matter
15 of money. Superfund has been a go-to for lawyers, for bankers.
16 There has been mismanagement in that since the 1980s,
17 Your Honor.

18 And I do not believe this one instant at Hunter's Point in
19 which, you know, they said, *Oh, they spent \$280 million out*
20 *there* -- the Government is asking you to ignore eight years of
21 good work, of work that has been rechecked over and over again
22 and focus on this one thing and lock him up for a year and a
23 half. That's absurd, Your Honor. The punishment doesn't fit
24 the crime.

25 **THE COURT:** Well, let me --

1 **MR. MCCARTHY:** Your Honor, I have some factual --

2 **THE COURT:** Then we'll close. Let me ask you this. I
3 am very concerned about the identity, for sentencing purposes,
4 between Mr. Rolfe and Mr. Hubbard. Why is anything less than
5 the same sentence appropriate?

6 **MR. LONG:** Well, if Your Honor is willing to impose
7 the same sentence, I believe that would be fair. But as I said
8 in my memorandum, at least -- and I understand that I'm a
9 Nevada lawyer. In Nevada, we go two to one. Sometimes we go
10 three to one.

11 **THE COURT:** What does that mean?

12 **MR. LONG:** That means like if you have a 30-day jail
13 sentence for driving drunk, you can serve 90 days house arrest.

14 **THE COURT:** The federal --

15 **MR. LONG:** The federal --

16 **THE COURT:** Totally different.

17 **MR. LONG:** And I explained that. Here you go to one
18 to one, and as I explained in my memorandum, I do not believe
19 there is much of a difference between eight months in a federal
20 detention center and twelve months of home confinement.

21 **THE COURT:** I think the people in the federal
22 detention center and the people on home confinement would give
23 you a very different answer to that. One is not an adequate
24 punishment, in my view.

25 But, anyway, closing remarks, and I'm ready to deliver the

1 sentence.

2 **MR. LONG:** Your Honor, 49 years old, no prior record.
3 The crime that he did has been rectified. It's been rectified
4 financially --

5 **THE COURT:** That's not what the Navy says. The Navy
6 see says this is getting up to \$300 million and no end in
7 sight.

8 **MR. MCCARTHY:** Your Honor, I strongly object to the
9 idea that the retesting is complete, that the retesting has
10 shown no other misconduct, that the cleanup is done. All of
11 those things are factually inaccurate.

12 The cleanup is ongoing, retesting is ongoing. It's
13 ongoing right now. It's costing us millions of dollars, and
14 "us" is the taxpayers. The idea that this was an isolated
15 incident that has been civilly remedied is simply not supported
16 by the record, and it should not be part of the sentencing
17 because it's not true.

18 **THE COURT:** Let me just add as a side point, is that
19 company still in business?

20 **MR. MCCARTHY:** Tetra Tech? They are still in
21 business. They are in negotiations with the Government. There
22 are -- as set forth in the Navy's declaration, other companies
23 have been brought in to monitor them at the cost of millions of
24 dollars. There is a dispute about who is going to pay for
25 that, obviously, but the idea that Tetra Tech has ridden in on

1 a white horse and fixed all of this could not be farther from
2 the truth.

3 **THE COURT:** What are the odds -- this is just -- we're
4 just talking here, but what are the odds that Tetra Tech will
5 pay most of that expense?

6 **MR. MCCARTHY:** Your Honor, that's a question for the
7 civil side of things. I'm not a -- I haven't been a civil
8 lawyer in many years and I just can't answer that.

9 I would hope as a citizen that we can do that, but I --

10 **THE COURT:** But they're an ongoing business with some
11 money; right?

12 **MR. MCCARTHY:** They are in -- I believe they are an
13 ongoing business.

14 Yes. They are an ongoing business with a significant
15 dispute --

16 **THE COURT:** This has nothing to do -- but this is just
17 big picture for me. Okay. All right. Thank you.

18 So I have been giving an extraordinary amount of
19 consideration to the 3553(a) factors in this case. I do in
20 every case, but this one was particularly pointed for me
21 because, as I've said several times, I sentenced just a few
22 months ago an individual who was a defendant in this same case
23 or same ultimate set of facts whose Guidelines Offense Level,
24 Criminal History Category, and conduct are identical to
25 Mr. Hubbard's, and the crime to which he pled guilty is the

1 same crime for which Mr. Hubbard entered a guilty plea as well.

2 There are some minor differences between the two
3 individuals. The prior individual, Mr. Rolfe, had no financial
4 means to pay a fine. It looks like Mr. Hubbard actually does,
5 so we'll get to that in a moment.

6 And as the Government and Mr. McCarthy have pointed out,
7 there was a high degree of cooperation with Mr. Rolfe,
8 entitling him to an extraordinary reduction on the sentencing
9 end in light of the help that he gave the Government, and there
10 is nothing of the same kind on Mr. Hubbard's part.

11 Now, I am not going to make any determinations -- this is
12 not the time or place for it -- on who's right, on who's wrong
13 on the cooperation level. It is an interesting point, but I
14 find that I'm not going to rely on it in terms of the sentence
15 that I'm going to impose.

16 I do find absolutely no good grounds or common-sense basis
17 for imposing a sentence on Mr. Hubbard that is in any way less
18 than the sentence that his work colleague, Mr. Rolfe, got a few
19 months ago in this courtroom.

20 So he is sentenced to eight months of custody in the
21 Bureau of Prisons, and I am also imposing a \$10,000 fine, as
22 the Government proposed, on top of that.

23 So that will be the sentence of the Court.

24 I'm also going to impose three years of supervised release
25 as I did in the other case, and the terms of that are as

1 follows.

2 Just one moment, please.

3 All right. So in addition to the standard conditions
4 adopted in this district, Mr. Hubbard will be subject to the
5 following special conditions. And, by the way, for the
6 standard conditions, he is exempted from the mandatory drug
7 testing, okay, so no mandatory drug -- is that right,
8 Mr. McCarthy? I don't see any reason for that.

9 **MR. MCCARTHY:** Yes, Your Honor.

10 **THE COURT:** All right. So he is exempted from the
11 mandatory drug testing provisions, but here are the special
12 conditions.

13 A, he will not commit another federal, state, or local
14 crime; B, he will pay any fine and special assessment that is
15 imposed by this judgment and remains unpaid at the commencement
16 of the term of supervised release; C, he will provide the
17 Probation Office with access to any financial information,
18 including tax returns, and will authorize the Probation Office
19 to conduct credit checks and obtain copies of income tax
20 returns; D, he will cooperate in the collection of DNA as
21 directed by the Probation Office.

22 And is there a search condition, Mr. McCarthy?

23 **MR. MCCARTHY:** Just the standard one that is in the
24 proposed --

25 **THE COURT:** The standard reasonable cause?

1 **MR. MCCARTHY:** Actually, Your Honor, sorry. Let me
2 double check the Plea Agreement.

3 **THE COURT:** It's in the Plea Agreement?

4 **MR. MCCARTHY:** The Plea Agreement -- I honestly --

5 **THE COURT:** Mr. Long, do you remember if there was a
6 special search condition?

7 **MR. LONG:** I believe we don't have an objection to a
8 search clause, Your Honor. *United States vs. Knight*, which
9 went up to the Supreme Court, which actually started down in
10 Nevada with me --

11 **THE COURT:** Is that right?

12 **MR. LONG:** Yes.

13 As a probationer, he doesn't have any Fourth Amendment
14 rights.

15 **THE COURT:** Well, I'll tell you what. It will be a
16 standard search clause without electronic devices based on
17 reasonable cause. Okay. Not suspicionless. Based on
18 reasonable cause.

19 **MR. LONG:** Thank you.

20 **THE COURT:** And I'm also imposing a criminal fine of
21 \$10,000. Mr. Hubbard will pay to the United States also a
22 special mandatory assessment of \$100. All payments for the
23 fine and for the assessment will be made to the Clerk of the
24 United States District Court, 450 Golden Gate Avenue, Box
25 36060, San Francisco, California, 94102.

1 And during imprisonment, the payment of the assessment and
2 the criminal fine are due at the rate of not less than \$25 per
3 quarter, and payment will be made through the Bureau of Prisons
4 Inmate Financial Responsibility Program.

5 Any request for location or housing?

6 **MR. LONG:** The federal prison that you used to be on
7 Nellis Air Force Base near Las Vegas is now closed, as
8 Your Honor, I'm sure, is aware --

9 **THE COURT:** I did not know that.

10 **MR. LONG:** Yeah. It's now Clark County Detention
11 Center overflow.

12 I believe the closest one to Las Vegas is Victorville.

13 **THE COURT:** I can only recommend. It's up to the
14 Bureau of Prisons --

15 **MR. LONG:** I would ask for Victorville.

16 **THE COURT:** I will make the recommendation.

17 What about date of surrender? What would you like to do
18 for that?

19 **MR. LONG:** Between 60 and 90 days.

20 **THE COURT:** Pick a date. July something. I think
21 sooner rather than later would be good.

22 **MR. LONG:** After the 4th of July. How about July 9th.
23 Would that be --

24 **THE COURT:** Any objection, Mr. McCarthy?

25 **MR. MCCARTHY:** No, Your Honor.

1 **THE COURT:** All right. I will put this in the order,
2 but Mr. Hubbard will surrender to the custody of the United
3 States Marshal or the facility to which he is assigned by the
4 Bureau of Prisons by 2:00 p.m. California time on July 9th,
5 2018.

6 **MR. LONG:** Thank you.

7 **THE COURT:** Anything else?

8 **MR. MCCARTHY:** Yes, Your Honor. Some housekeeping.

9 At the last hearing, we discussed, now that the criminal
10 matter is concluded, unsealing the --

11 **THE COURT:** Oh, yes.

12 **MR. MCCARTHY:** -- the Information, the Plea Agreement,
13 and also Sentencing Memoranda and the Judgment. I would renew
14 that motion, I think without objection.

15 **THE COURT:** Any objection, Mr. Long?

16 **MR. LONG:** How many co-defendants are left in this
17 case?

18 **MR. MCCARTHY:** There are no criminal co-defendants
19 left.

20 **MR. LONG:** Then I don't have any objection. It's a
21 moot point.

22 **MR. MCCARTHY:** We submitted a written stipulation to
23 the Court for Mr. Rolfe's case which I believe you signed last
24 time, but I have not gotten back, so I think the Court still
25 has that. For unsealing portions of Mr. Rolfe's case.

1 **THE COURT:** You didn't get it? I think I signed it.

2 **MR. MCCARTHY:** You signed it from the bench, and I --
3 my memory is that you said you were going to hold onto it until
4 today so they were all unsealed at once.

5 **THE COURT:** The motion -- unopposed motion to unseal
6 here is granted, and I will enter Mr. Rolfe's, if I haven't
7 done that already.

8 **MR. MCCARTHY:** Thank you, Your Honor.

9 **THE COURT:** Anything else?

10 **MR. LONG:** Thank you, Your Honor.

11 (Proceedings adjourned at 11:05 a.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Monday, January 28, 2019

Pamela Batalo Hebel

Pamela Batalo Hebel, CSR No. 3593, RMR, FCRR
U.S. Court Reporter