UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
HONORABLE LARRY ALAN BURNS, JUDGE PRESIDING

UNITED STATES OF AMERICA, PLAINTIFF, VS. JARED LEE LOUGHNER, DEFENDANT.	CASE NO.: 4:11-CR-00187-LAB TUCSON, ARIZONA MAY 25, 2011 11:00 A.M.

REPORTER'S TRANSCRIPT

COMPETENCY HEARING

APPEARANCES:

FOR THE GOVERNMENT:
DENNIS K. BURKE, U.S. ATTORNEY
BY: BEVERLY ANDERSON, ESQ.
MARY SUE FELDMEIER, ESQ.
WALLACE KLEINDIENST, ESQ.
CHRISTINA CABANILLAS, ESQ.
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CONTINUED APPEARENCES:

FOR PHOENIX NEWSPAPERS, ET AL.:	STEPTOE & JOHNSON BY: DAVID BODNEY, ESQ. COLLIER CENTER 201 EAST WASHINGTON STREET SUITE 1600 PHOENIX, ARIZONA 85004-2382
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TUCSON, ARIZONA - WEDNESDAY, MAY 25, 2011 - 11:00 A.M.

THE CLERK: CALLING NO. 1 ON THE CALENDAR, 11CR00187-LAB, UNITED STATES OF AMERICA VERSUS JARED LEE LOUGHNER, ON FOR MOTION HEARING AND COMPETENCY HEARING.

IF COUNSEL WOULD PLEASE STATE YOUR APPEARANCES FOR THE RECORD.

MS. CLARKE: GOOD MORNING, YOUR HONOR.

JUDY CLARKE, MARK FLEMING, ELLIS JOHNSTON, AND REUBEN CAHN ON BEHALF OF MR. LOUGHNER, WHO IS PRESENT IN COURT.

THE COURT: GOOD MORNING, MS. CLARKE.

MR. KLEINDIENST: GOOD MORNING, YOUR HONOR.

WALLACE KLEINDIENST, DENNIS BURKE, THE U.S. ATTORNEY FOR THE DISTRICT OF ARIZONA, MARY SUE FELDMEIER, BEVERLY ANDERSON, AND DOMINIC LANZA FOR THE GOVERNMENT.

THE COURT: GOOD MORNING.

GOOD MORNING, LADIES AND GENTLEMEN.

THERE ARE A NUMBER OF MATTERS ON CALENDAR TODAY.

I DON'T SEE MR. BODNEY.

OH, THERE HE IS.

MR. BODNEY, I'D LIKE TO BEGIN WITH YOUR REQUEST FOR MODIFICATION OF THE PROTECTIVE ORDER.

DO YOU WANT TO SPEAK TO THAT THIS MORNING?

THIS HAS TO DO WITH THE PROTECTIVE ORDER THAT THE COURT ISSUED THAT ESSENTIALLY FORBADE THE DISSEMINATION OF RAW

INVESTIGATIVE MATERIAL BY THE PIMA COUNTY SHERIFF. AND YOU ARE ASKING THAT I RECONSIDER THAT AND FOCUS ON SOME OF THAT MATERIAL. I'M NOT INCLINED TO DO THAT, BUT I'M HAPPY TO HEAR FROM YOU BEFORE MAKING A FINAL DECISION.

MR. BODNEY: YOUR HONOR, THANK YOU.

I'M HERE TODAY ON BEHALF OF *THE WASHINGTON POST*, *THE ARIZONA REPUBLIC-PHOENIX* NEWSPAPERS, AND KPNX BROADCASTING COMPANY AS REQUESTED INTERVENORS IN THIS PROCEEDING.

AND WE REQUEST MODIFICATION OF THE ORDER, YOUR HONOR, BECAUSE THERE IS CURRENTLY IN PLACE AN ORDER THAT IS IMPERMISSIBLY OVERBROAD. IT IS -- AND THE SOLUTION TO THAT PROBLEM IS RATHER SIMPLE. IT IS THE ISSUANCE OF AN ORDER THAT REQUIRES THE GOVERNMENT TO DO WHAT IT PROMISED TO DO BACK ON MARCH 16TH WHEN IT FIRST SOUGHT A MOTION FOR PROTECTIVE ORDER IN THIS CASE.

THE ORDER IS IMPERMISSIBLY OVERBROAD BECAUSE IT ENJOINS THE PIMA COUNTY SHERIFF FROM RELEASING DOCUMENTS THAT ARE PLAINLY SUBJECT TO PUBLIC INSPECTION UNDER THE LAW EITHER --

THE COURT: THAT'S THE POINT, THOUGH.

WHAT LAW?

MR. BODNEY: UNDER --

THE COURT: YOU'VE TAKEN THE POSITION THAT THIS COURT IS BOUND BY ARIZONA'S PUBLIC DISCLOSURE LAW, AND I DON'T THINK THAT'S CORRECT.

MR. BODNEY: YOUR HONOR --

THE COURT: I THINK THE STANDARDS ARE VERY DIFFERENT. AND AS I READ THE ARIZONA LAW AND AS I'VE STUDIED IT IN THE PAST EXPOSURES I'VE HAD TO FOR MOTIONS THAT YOU'VE BROUGHT, I DON'T KNOW THAT THERE'S A BROADER PUBLIC DISCLOSURE LAW THAN THE ONE THAT EXISTS IN ARIZONA NOW. IT DOES NOT EVEN ALLOW LAW ENFORCEMENT IN THE ORDINARY CASE TO KEEP SECRET INVESTIGATIVE MATERIALS PERTAINING TO ONGOING INVESTIGATIONS.

MR. BODNEY: YOUR HONOR, THAT'S, WITH ALL DUE RESPECT, NOT THE ARIZONA LAW. AND WHETHER THE LAW IS THE FEDERAL FREEDOM OF INFORMATION ACT OR THE ARIZONA PUBLIC RECORDS LAW, ARS 39-121, THE COURT HAS THE AUTHORITY TO REVIEW THE DECISION OF LAW ENFORCEMENT AND TO REVIEW THE DOCUMENTS IN CAMERA, IF IT CHOOSES, TO DETERMINE WHETHER ANY OF THE RECORDS, IF RELEASED, WOULD VIOLATE EITHER THE FAIR TRIAL RIGHTS OF THE DEFENDANT OR THE PRIVACY RIGHTS OF ANY PERSON.

THE COURT: ISN'T THERE A PROBLEM HERE, MR. BODNEY? I MEAN, THERE'S A DEFINITE DIFFERENCE BETWEEN SEARCH WARRANT MOTIONS --

BY THE WAY, YOU SAW THE ORDER I ISSUED CLEARING UP THE DOCKET?

MR. BODNEY: YES, YOUR HONOR.

THE COURT: THOSE THINGS ARE ALL WITHIN MY CONTROL AND MY PURVIEW BECAUSE THEY'RE JUDICIAL RECORDS. I'VE NEVER SEEN THESE THINGS THAT YOU'RE TALKING ABOUT. AND THEY HAVE

NOT BEEN LODGED WITH THE COURT. THEY HAVEN'T BEEN FILED WITH THE COURT.

I THINK THERE'S A BIG DISTINCTION BETWEEN DOCUMENTS HELD BY LAW ENFORCEMENT, OBTAINED FOR LAW ENFORCEMENT PURPOSES, AND THEN JUDICIAL RECORDS, THINGS THAT ARE LODGED OR FILED WITH THE COURT. OVER THOSE, I AGREE WITH YOU, I HAVE CONTROL.

BUT YOU'RE ASKING ME TO REACH OUT AND ESSENTIALLY RECATEGORIZE A BODY OF DOCUMENTS THAT I DON'T EVEN HAVE ACCESS TO, I HAVEN'T SEEN MYSELF.

WHY WOULD I HAVE AUTHORITY TO DO THAT?

MR. BODNEY: BY THE SAME REASON THAT YOUR HONOR HAD THE AUTHORITY ON MARCH 22ND TO SIGN AN ORDER THAT ENJOINED THE SHERIFF FROM RELEASING PUBLIC RECORDS, SOME OF WHICH THE SHERIFF HAD ALREADY RELEASED, SOME OF WHICH THE GOVERNMENT SAYS THE SHERIFF CAN RELEASE WITHOUT HARM TO ANY INTERESTS.

THE PROBLEM TODAY, YOUR HONOR, IS THE ORDER IS IMPERMISSIBLY OVERBROAD. AND HERE'S HOW.

THE COURT: I'M PREPARED TO MODIFY IT TO ALLOW THE GOVERNMENT TO GO BACK AND LOOK AT THINGS AND, IF IT CHOOSES, TURN DOCUMENTS THAT DON'T IMPLICATE PRIVACY CONCERNS OR THE DEFENDANT'S FAIR TRIAL RIGHTS OVER.

NOW, I DON'T KNOW WHETHER YOU'RE PARTICULARLY INTERESTED IN THOSE THINGS, BUT THE GIST OF THE ORDER THAT I ISSUED WAS TO MAKE SURE THAT THE CASE GETS TRIED IN THE COURT

AND NOT IN THE PRESS BEFOREHAND. AND THE RELEASE OF RAW MATERIALS, PHOTOGRAPHS, AND WITNESS ACCOUNTS THAT HERETOFORE HAVE NOT BEEN MADE PUBLIC IS GOING TO JEOPARDIZE THOSE INTERESTS. SO THAT'S MY CONCERN.

NOW, IF YOU WANT OTHER THINGS AND THE GOVERNMENT IS WILLING TO TURN OVER THOSE OTHER THINGS, THEN I'LL MODIFY THE ORDER TO SAY THIS DOESN'T FORECLOSE THE GOVERNMENT FROM DOING WHAT THEY PROMISED.

BUT I THINK WHEN THEY GOT MY ORDER, THEY SAID, "LOOK, THE ORDER CHANGES EVERYTHING. AND WE WERE TRYING TO WORK OUT A COMPROMISE WITH YOU ON THIS, AND THAT LED TO THE NEGOTIATIONS THAT YOU SPEAK OF." BUT ONCE THE COURT RULED ON THIS -- I MEAN, THE REAL DISAGREEMENT YOU HAVE IS WITH THE COURT ORDER, NOT WITH THE GOVERNMENT.

MR. BODNEY: WELL, ACTUALLY, YOUR HONOR, IT'S A LITTLE BIT DIFFERENT BECAUSE THE FIRST WE REALLY HEARD OF THIS WAS WHEN THE GOVERNMENT FILED ITS MOTION FOR PROTECTIVE ORDER. AND IN THE GOVERNMENT'S MOTION, THEY WROTE, AND I QUOTE, "THE UNITED STATES INTENDS TO DILIGENTLY REVIEW THE CONTENTS OF THE PCSO'S FILE IN THE COMING WEEKS TO DETERMINE WHICH MATERIALS MAY BE EXCLUDED FROM COVERAGE UNDER THE PROTECTIVE ORDER AND DISCLOSED TO *THE POST*," CLOSE QUOTE.

THE GOVERNMENT ALSO SAID "THUS, ONCE THE GOVERNMENT'S REVIEW IS COMPLETE, THE UNITED STATES WOULD PROPOSE SUBMITTING MATERIALS AT ISSUE TO THE COURT FOR

IN-CAMERA REVIEW BY APRIL 6."

NOW, THE GOVERNMENT UNDERSTANDS AND THEY UNDERSTOOD BEFORE THE COURT ENTERED THE MARCH 22 ORDER THAT SOME OF THESE RECORDS THE PUBLIC HAS A RIGHT TO SEE WHETHER UNDER FOIA OR UNDER THE STATE LAW.

AND THE RISK OF THE PROCEEDING AS WE HAVE DONE IS THAT THIS OBSESSION WITH SECRECY NOT ONLY DENIES THE PUBLIC A FUNDAMENTAL RIGHT TO KNOW HOW LAW ENFORCEMENT BEHAVE AND TO EVALUATE THAT BEHAVIOR AS THE LAW REQUIRES, FEDERAL, STATE, COMMON LAW, IT ALSO ENGENDERS A LACK OF TRUST AND CONFIDENCE POTENTIALLY IN THESE PROCEEDINGS WHEN THERE IS AN ORDER ENJOINING THE RELEASE OF DOCUMENTS THAT THE SHERIFF HAD RELEASED AND WHICH THE GOVERNMENT ADMITS THE SHERIFF COULD RELEASE.

SO WE'RE LIVING IN A WORLD TODAY WHERE ONE OF MY CLIENTS, FOR EXAMPLE, OBTAINED SOME OF THESE RECORDS FROM THE SHERIFF'S OFFICE BEFORE THIS ORDER WAS ENTERED. TODAY IF A COLLEGE STUDENT WANTED TO WRITE A REPORT ON THIS CASE, HE WOULD NOT BE ABLE TO GET THOSE SAME DOCUMENTS FROM THE SHERIFF'S OFFICE.

MOREOVER, THE BURDEN UNDER FEDERAL LAW OR STATE LAW RESTS WITH THE GOVERNMENT TO JUSTIFY THAT THE DISCLOSURE OF THE RECORD WOULD PROBABLY IMPACT THE FAIR TRIAL RIGHT.

THE COURT: THAT'S WHERE YOU AND I DIVERGE HERE, BECAUSE YOU SAY IT RESTS WITH THEM TO JUSTIFY WITHHOLDING

THESE RECORDS. AND I THINK IT'S THE NATURE OF THE RECORDS THAT'S THE TALE OF THE TAPE HERE, MR. BODNEY. THESE ARE NOT JUDICIAL RECORDS. THEY'RE NOT. THIS IS RAW INFORMATION.

THE GOVERNMENT AT THIS POINT EVEN OBJECTS TO YOUR INTERVENING HERE BECAUSE THEY'RE NOT JUDICIAL RECORDS. THEY SAY THERE'S NO CASE THAT THEY CAN FIND WHERE SOMEONE'S BEEN ALLOWED TO INTERVENE, IN FEDERAL COURT AT LEAST, TO SAY, "WE WANT WHAT IS OTHERWISE DISCOVERY MATERIAL IN THE POSSESSION OF THE PARTIES."

AND THE FEDERAL LAW, AS YOU KNOW, IS CONTRARY TO THAT PROPOSITION. DISCOVERY IS NOT CONSIDERED A JUDICIAL RECORD, IS NOT SUBJECT TO GENERAL INSPECTION BY PRESS AND PUBLIC. AND THAT'S THE TROUBLE THAT I'M HAVING WITH IT.

I'LL SAY AGAIN, I HAVEN'T SEEN THESE THINGS. YOU HAVE A BETTER UNDERSTANDING OF WHAT'S OUT THERE, BECAUSE APPARENTLY SOME HAS ALREADY BEEN GIVEN OVER TO ONE OF YOUR CLIENTS, THAN I DO. THESE AREN'T IN MY CONTROL.

WHAT WAS WITHIN MY CONTROL WAS THE ABILITY TO ENTER AN INJUNCTION FORBIDDING PEOPLE, WHO HAD SOME HISTORICAL CONNECTION TO THE INVESTIGATION IN THIS CASE, FROM DISSEMINATING INFORMATION THAT MIGHT LIKELY COMPROMISE BOTH SIDES' FAIR TRIAL RIGHTS, AND THAT'S ALL I DID.

MR. BODNEY: AND SO, YOUR HONOR, THE SOLUTION IS SIMPLE, AND IT GOES BACK TO REQUIRING THE GOVERNMENT TO DO WHAT IT PROMISED TO THE COURT IT WOULD DO AND COOPERATE WITH

ITS FELLOW LAW ENFORCEMENT AGENCY, THE PIMA COUNTY SHERIFF'S OFFICE, REVIEW THE DOCUMENTS AS THEY SAID THEY WOULD REVIEW, AND PRODUCE THOSE WHICH THEY KNOW THEY CAN PRODUCE, AND PROVIDE AN INDEX JUSTIFYING THE WITHHOLDING OF THOSE OTHER DOCUMENTS.

THE COURT: I DON'T HAVE ANY PROBLEM WITH THE FIRST PART OF THE PROPOSAL. IF THEY WANT TO DO THAT, THEN THAT'S A MATTER I'M NOT GOING TO INTERVENE IN.

I DO HAVE A PROBLEM WITH THE OTHER PART OF THE PROPOSAL BECAUSE, AS I SAID, IT MORPHS THE DISTINCTION BETWEEN JUDICIAL RECORDS AND DISCOVERY, AND IT PUTS AN ADDED BURDEN ON THE COURT.

NOW I'M GOING TO BE LOOKING AT DISCOVERY TO DETERMINE WHETHER THEY'VE MADE NICE DISTINCTIONS ABOUT WHETHER YOU SHOULD OR SHOULDN'T GET PARTICULAR REPORTS, AND THE FEDERAL LAW IS TOTALLY CONTRARY TO THAT. IT SAYS YOU HAVE NO RIGHT IN THE FIRST INSTANCE TO MATERIALS THAT ARE FAIRLY CLASSIFIED AS DISCOVERY.

MR. BODNEY: THE GOVERNMENT HAS CREATED A CATCH-22 FOR THE PUBLIC THAT WOULD MAKE JOSEPH HELLER PROUD. THEY HAVE TOLD US THAT THE ONLY WAY TO SEE THESE DOCUMENTS IS UNDER FOIA. AND THEY KNOW THAT WITH YOUR ORDER IN PLACE, THEIR AGENTS REVIEWING THOSE DOCUMENTS WILL SAY, "CAN'T SEE THEM. THERE'S A FEDERAL ORDER IN THIS CASE THAT PROHIBITS THEIR RELEASE. NO IFS, ANDS, OR BUTS."

AND THE PUBLIC INTEREST IN EVALUATING THE PERFORMANCE OF LOCAL LAW ENFORCEMENT IS SUFFICIENTLY WEIGHTY THAT YOUR HONOR IS THE PERSON IN THE BEST POSITION TO SAY TO THEM, "DO WHAT YOU PROMISED TO DO."

THE COURT: HOW IS THIS DIFFERENT FROM ANY OTHER HIGH-PROFILE CASE THAT THE PUBLIC MAY HAVE AN INTEREST IN?

LET'S TAKE THIS LITIGATION THAT'S CURRENTLY PENDING AGAINST LEXUS OR TOYOTA. I'M SURE THERE'S A LOT OF DISCOVERY ABOUT BRAKES AND ACCELERATION THAT IS BEING EXCHANGED BETWEEN THE PARTIES THAT HAS NOT YET BEEN FILED WITH THE COURT OR LODGED WITH THE COURT.

IS IT YOUR POSITION THAT IN A CASE LIKE THAT THE COURT SHOULD INTERVENE AND SAY, "GIVE ME THE STUFF BECAUSE I WANT TO LOOK AT IT AND DETERMINE WHETHER IT OUGHT TO BE PUBLICLY DISSEMINATED NOW EVEN THOUGH NONE OF THIS HAS SEEN THE LIGHT OF DAY"? THAT SEEMS PARALLEL TO THIS ISSUE WE'RE DEALING WITH HERE.

MR. BODNEY: ALL WE'RE SAYING, YOUR HONOR, IS THAT THE MARCH 22 ORDER LODGED ON THE 23RD NEEDS TO BE MODIFIED TO FIX A PROBLEM OF OVERBREADTH. AND WE UNDERSTAND HOW WE GOT THERE. BUT IF IN THE TOYOTA CASE OR SOME OTHER CIVIL ACTION A FEDERAL JUDGE HAD SAID TO THE TUSCON POLICE DEPARTMENT "THOU SHALT NOT RELEASE ANY PUBLIC RECORDS. NO IFS, ANDS, OR BUTS," I THINK THERE WOULD BE AN ABILITY TO RECALIBRATE THE ORDER.

RULE 57.2, WHICH THEY CITE, BEGINS WITH TWO WORDS

THAT I THINK ARE IMPORTANT: AND ONE OF THEM IS "GUIDELINE," AND THE OTHER IS "BALANCE." IT'S ALL ABOUT BALANCE.

AND WE RESPECTFULLY SUBMIT THAT THE BALANCE IS OUT OF WHACK BECAUSE THERE'S NOW AN ORDER THAT DOES NOT ALLOW THE PUBLIC ANY OVERTURE INTO -- ANY APERTURE, RATHER, INTO THE RECORDS IN A CASE WHERE THE INVESTIGATION IS OVER AND WHERE YOUR HONOR KNOWS BETTER THAN I HOW LONG IT WILL BE BEFORE THE PUBLIC WILL EVER BE ABLE TO SEE THEM.

THE COURT: BUT THE CASE HASN'T BEEN TRIED YET. THAT'S THE PROBLEM THAT I HAVE WITH IT. IF WE RELEASE ALL THIS RAW MATERIAL, IT FORECLOSES THE POINT OF THE TRIAL. AND SOME OF IT MAY CHANGE. WITNESSES MAY BE SUBJECT TO HARASSMENT OR TO EVEN INTERVIEWS BY THE PRESS AT THIS POINT BEFORE THEY'RE ALLOWED TO TESTIFY AND BE CROSS-EXAMINED IN A COURT OF LAW.

NONE OF THAT, I THINK, IS GOOD FOR THE FINAL OUTCOME HERE. YOU SPOKE ABOUT CONFIDENCE IN THE OUTCOME. I THINK WE OUGHT TO CLEAVE TO THE WAY TRIALS ARE DONE, WHICH IS THEY GET TRIED IN COURT ON THE BASIS OF TESTED EVIDENCE, NOT IN A NEWSPAPER BEFOREHAND.

MR. BODNEY: AND I DON'T DISAGREE, BUT I WOULD JUST ADD ONE LITTLE WORD TO THE MIX, AND THAT'S "REDACTION." THE GOVERNMENT DOES IT ALL THE TIME, AND THEY'VE OFFERED TO DO IT HERE.

IF THERE ARE NAMES OF PERSONS THAT NEED TO BE

REDACTED, YOUR HONOR CAN, WITH THE SAME PEN THAT ENJOINED PCSO FROM PRODUCING ANYTHING, SAY TO THEM, "REDACT THAT WHICH IS PRIVATE. REDACT THAT WHICH WOULD VIOLATE SOMEONE'S FAIR TRIAL RIGHTS. BUT LET'S NOT DEPRIVE THE PUBLIC OF ANY OPENING INTO" --

THE COURT: YOU HAVE ANOTHER STEP BEHIND. I THINK YOU WANT ME TO LOOK OVER THEIR SHOULDER AND SAY, "THAT REDACTION IS OKAY. THAT ONE IS NOT. THAT ONE GOES TOO FAR"; RIGHT? THEY'RE NOT MAKING ANY REDACTIONS. YOU'RE JUST HANDING OVER WHAT'S LEFT.

MR. BODNEY: WELL, AS A PRACTICAL MATTER, YOUR HONOR, WE'RE BEHIND THE 8 BALL. AND WE TRUST YOUR HONOR, AND WE MUST TRUST THE GOVERNMENT.

UNFORTUNATELY, THE GOVERNMENT PROMISED ONE THING AND DID SOMETHING VERY DIFFERENT HERE, WHICH IS NOT TO DO WHAT IT PROMISED TO DO. SO LET THEM PRODUCE THAT WHICH THEY KNOW THEY CAN PRODUCE. THAT WILL INSTILL TRUST AND WON'T HARM ANYTHING.

THE COURT: LET'S SEE WHAT THEIR POSITION IS. I'LL LET YOU HAVE THE FINAL WORD AFTER I HEAR FROM MR. KLEINDIENST OR WHOMEVER SPEAKS FOR THE GOVERNMENT ON THIS.

MR. BODNEY: THANK YOU, YOUR HONOR.

MR. KLEINDIENST: MR. LANZA WILL ARGUE THE CASE FOR THE GOVERNMENT, YOUR HONOR.

MR. LANZA: GOOD MORNING. THANK YOU, YOUR HONOR.

THE GOVERNMENT'S POSITION IS THE COURT HAD THE RIGHT

WHEN IT ISSUED A PROTECTIVE ORDER HERE THAT NO MODIFICATION IS NECESSARY. THE CRUX OF THIS CASE IS WHAT THE PRESS IS ESSENTIALLY SEEKING ACCESS TO IS UNFILED DISCOVERY IN A FEDERAL CRIMINAL PROSECUTION. THE COURT GOT IT DEAD RIGHT IN ITS ORDER. THAT'S NOT THE TYPE OF THING THAT THE PRESS TRADITIONALLY HAS ACCESS TO.

AT A MINIMUM, THE WAY THAT THE PRESS SEEKS ACCESS TO THAT TYPE OF MATERIAL ISN'T INTERVENING IN THE UNDERLYING CRIMINAL CASE AND ASKING THE JUDGE TO GO PAGE BY PAGE THROUGH WHAT THE GOVERNMENT MAY THINK IS SENSITIVE OR NOT SENSITIVE AND SECOND-GUESS THOSE DETERMINATIONS.

AND SO OUR POSITION HERE IS THAT THIS IS THE WRONG PROCESS TO THE EXTENT THE PRESS BELIEVES IT HAS A LEGITIMATE RIGHT TO THESE RECORDS. IF THE PRESS WANTS ACCESS TO THESE MATERIALS, THEY SHOULD FILE A FOIA REQUEST. THAT IS A PROCESS THAT HAS WELL-ESTABLISHED STANDARDS FOR DETERMINING WHAT'S SENSITIVE AND WHAT ISN'T AND HAS A ROBUST JUDICIAL REVIEW PROCESS THAT IF THEY WERE ULTIMATELY DISSATISFIED WITH THE AGENCY DETERMINATION OF WHAT'S SENSITIVE OR WHAT ISN'T, THEY COULD FILE A NEW CIVIL LAWSUIT IN FEDERAL COURT TO CHALLENGE THAT DETERMINATION.

THE COURT: MR. BODNEY SAYS THAT YOU'RE MOUSETRAPPING HIM BY PUTTING HIM IN THAT POSITION BECAUSE WITH THE COURT'S PROTECTIVE ORDER IN EFFECT, THE FOIA REVIEWERS ARE GOING TO SAY, "YOU DON'T GET ANYTHING."

MR. LANZA: AND I DISAGREE WITH THAT. THEY COULD USE SOME COLORFUL LANGUAGE IN THEIR BRIEFS AND JOSEPH HELLER REFERENCES AND KAFKA REFERENCES.

THE COURT'S ORDER SIMPLY SAYS, "TO THE EXTENT YOU'RE TRYING TO END-RUN FOIA AND GO TO THE PIMA COUNTY SHERIFF AND TRY TO SEEK THESE RECORDS, THAT'S A NONSTARTER HERE." THIS IS A FEDERAL CRIMINAL PROSECUTION THAT INVOLVES A CRIME, AS WE'VE SET FORTH, AND INVOLVES UNIQUELY STRONG FEDERAL INTERESTS.

THE COURT: DO THEY HAVE AN OPTION OF FILING A WRIT OF MANDAMUS WITH THE NINTH CIRCUIT AT THIS POINT? THAT'S WHAT HAPPENED IN ASSOCIATED PRESS VERSUS U.S. DISTRICT COURT, 705 F. 2D 1143. IS THAT AN OPTION?

MR. LANZA: I THINK PROCEDURALLY THAT WOULD BE MORE APPROPRIATE THAN TRYING TO INTERVENE IN THIS CASE. OUR RESEARCH HAS SAID -- WE HAVEN'T FOUND A CASE EXCEPT FOR THIS PATKAR CASE WHERE IT APPARENTLY WASN'T REALLY CONSIDERED BY THE PARTIES AND CONCEDED THAT THE PRESS COULD INTERVENE TO CHALLENGE A PROTECTIVE ORDER IN A FEDERAL CRIMINAL CASE. I'M NOT SURE ON THE MERITS THEY WOULD SUCCEED IN A MANDAMUS PROCEEDING. BUT AT THE MINIMUM, THAT IS PROCEDURALLY MORE PROPER THAN TRYING TO HEAR ME IN HERE.

I THOUGHT IT WAS TELLING IN THEIR REPLY BRIEF THEY CITED A CASE CALLED DAVIS WHERE THE DAVIS COURT SAID, "WELL, THEY MOVED TO INTERVENE HERE. REALLY, THE REMEDY FOR THE PRESS IN THESE CIRCUMSTANCES IS TO SEEK MANDAMUS OR TO FILE A

NEW CIVIL ACTION, BUT THAT'S FORM OVER SUBSTANCE. SO CLOSE ENOUGH. WE'LL LET THEM INTERVENE."

I UNDERSTAND PERHAPS WHY THE COURT REACHED THE CONCLUSION IN THAT CASE. BUT RESPECTFULLY, FEDERAL COURTS ARE TYPICALLY PRETTY NARROW AND CAREFUL ABOUT CONSTRUING WHAT THEIR JURISDICTION IS AND WHO CAN BE IN FRONT OF THEM. SO FORM IS IMPORTANT WHEN IT COMES TO DETERMINING FEDERAL JURISDICTION AND FEDERAL STANDING.

THE COURT: YOUR POSITION IS THEY DON'T EVEN HAVE A RIGHT TO INTERVENE ON THIS ISSUE BECAUSE THE MATERIALS ARE FAIRLY CHARACTERIZED AS DISCOVERY?

MR. LANZA: CORRECT. OUR POSITION IS THAT IT IS UNDISPUTED THAT FEDERAL STATUTORY LAW AND THE FEDERAL RULES DO NOT ALLOW THIRD-PARTY INTERVENTION IN A CRIMINAL CASE. WE ACKNOWLEDGE AND WE SET FORTH IN OUR BRIEF THAT THERE IS THIS LINE OF CASE LAW THAT HAS RECOGNIZED THIS IMPLICIT RIGHT OF INTERVENTION IN THE CIRCUMSTANCES WHERE THE PRESS IS SEEKING ACCESS TO COURT RECORDS.

BECAUSE COURT RECORDS, AS THE COURT HAS RECOGNIZED, ARE PRESUMPTIVELY OPEN. AND IF THERE WAS A PRESUMPTIVE RIGHT OF ACCESS YET THERE WERE NO PROCEDURAL VEHICLE FOR VINDICATING IT, A RIGHT TO THAT REMEDY IS MEANINGLESS. THAT'S THE WHOLE POINT HERE. THESE AREN'T JUDICIAL RECORDS, AND THEY'RE ESSENTIALLY TRYING TO COME INTO A FEDERAL CRIMINAL PROSECUTION AND ASK THE TRIAL JUDGE TO DO THIS VERY GRANULAR WEIGHING OF

WHAT'S SENSITIVE AND WHAT ISN'T.

THE COURT: MR. BODNEY SAYS, AS I UNDERSTAND THE ARGUMENT BECAUSE I ASKED HIM ABOUT THAT, TOO -- HIS POSITION SEEMS TO BE THAT MAYBE THE CHARACTER OF THE RECORDS MORPHED WHEN I ISSUED THE PROTECTIVE ORDER; THAT ALL OF A SUDDEN, THEY CAME UNDER FEDERAL COURT AUTHORITY BECAUSE I TOLD THE SHERIFF, "DON'T RELEASE THESE THINGS."

MR. LANZA: THAT'S INCORRECT, YOUR HONOR. WE DISAGREE WITH THAT. I MAY BE A CYNIC. I THINK IF THE COURT WERE TO GO DOWN THE PATH OF MODIFYING THE PROTECTIVE ORDER UNDER WHAT THEY CLAIM IS A VERY SIMPLE NARROW RELIEF OF JUST ALLOWING US TO RELEASE WHAT WE BELIEVE IS SENSITIVE -- AGAIN, I MAY BE CYNICAL -- I BELIEVE OUR FRIENDS IN THE PRESS MAY HAVE A DIFFERENT VIEW OF WHAT'S SENSITIVE AND WHAT ISN'T.

THE COURT: I THINK THAT'S INEVITABLE.

BUT WHAT ABOUT HIS OTHER PROPOSAL? YOU SAID YOU'D GIVE THEM SOME STUFF. APPARENTLY, THAT WAS BASED ON A REVIEW AND AN UNDERSTANDING THAT THERE ARE SOME THINGS THAT, IN YOUR JUDGMENT, WON'T AFFECT PRIVACY RIGHTS, WON'T AFFECT FAIR TRIAL RIGHTS. ARE YOU WILLING TO REINSTATE THAT COMMITMENT, GO BACK AND LOOK AT THESE THINGS AND TURN OVER THINGS THAT DON'T JEOPARDIZE EITHER MR. LOUGHNER'S RIGHT TO A FAIR TRIAL OR THE GOVERNMENT'S?

MR. LANZA: I THINK THAT'S ONE ALTERNATIVE. WE DON'T BELIEVE THE COURT SHOULD DO THAT. THE COURT COULD DO

THAT. AND I JUST WANT -- I THINK IT'S A MATTER OF PROCESS. IF WE GO DOWN THAT ROUTE, I HAVE NO DOUBT THAT THE PRESS IS GOING TO BE DISSATISFIED WITH OUR SENSITIVITY DETERMINATIONS AND COME BACK IN HERE, AND WE'RE GOING TO HAVE ROUNDS AND ROUNDS OF SERIAL LITIGATION WHERE YOU ULTIMATELY ARE GOING TO BE ASKED DOWN TO EVERY HOOK, LINE, AND SINKER OF EVERY LAST REDACTION WHAT'S APPROPRIATE.

THE COURT: THAT'S SORT OF WHAT I AM AFRAID OF.

MR. LANZA: I'D SUBMIT THAT THE REASON WHY THERE'S NO RIGHT OF INTERVENTION UNDER THESE CIRCUMSTANCES IS BECAUSE THERE'S A TOTALLY SEPARATE PROCESS OTHER THAN JETTISONING INTO THE FEDERAL CRIMINAL PROCESS FOR DOING THAT DETERMINATION, AND IT'S FOIA.

THEY FILE A REQUEST TO THE FEDERAL AGENCY. WE REVIEW IT. IF THEY'RE DISSATISFIED, IT GOES TO A JUDGE WHO CAN APPLY ESTABLISHED FEDERAL STANDARDS, FOIA STANDARDS, RATHER THAN THE AD HOC PROCESS WE'D HAVE HERE FOR MAKING THESE DETERMINATIONS.

SO WE ARE SENSITIVE TO THE NOTION THAT WE'RE SOMEHOW CREATING A CATCH-22. THIS IS A PROCESS ISSUE. THE COURT GOT IT RIGHT IN ITS INITIAL ORDER. AND WE THINK THE CORRECT WAY AND THE REASONABLE WAY AND THE EFFICIENT WAY IS FOR THEM TO FILE A FOIA REQUEST.

IT'S TELLING THAT THEY HAVEN'T DONE THAT. THE COURT RECOGNIZED THAT IN ITS PROTECTIVE ORDER. IT'S TELLING THAT

THEY KEEP TRYING TO USE THIS END-RUN TO PIMA COUNTY INSTEAD OF JUST FILING A REQUEST WITH OUR OFFICE. YOU CAN PERHAPS READ INTO IT WHATEVER YOU WANT ABOUT THEIR OWN VIEW OF THE MERITS OF FOIA ENTITLEMENT UNDER THESE CIRCUMSTANCES. BUT PROCEDURALLY, THAT'S OUR POSITION.

THE COURT: THANK YOU.

MR. BODNEY, I'LL HEAR FROM YOU IN REBUTTAL.

MR. BODNEY: THANK YOU, YOUR HONOR.

MOST OF THE WORDS WE'VE HEARD SO FAR HAVE RELATED TO THE RIGHT OF MY CLIENTS EVEN TO APPEAR AND SEEK INTERVENTION. AND LET ME ADDRESS EACH OF THOSE POINTS VERY BRIEFLY, IF I MAY.

THE FIRST POINT MADE AND THE LAST POINT RETURNED TO WAS FILE A FOIA REQUEST. THE VERY LAW REVIEW ARTICLE CITED BY THE GOVERNMENT IN ITS BRIEF, THE ONE BY JANICE TORAN FROM THE *GEORGIA LAW REVIEW* SAYS THAT THIS WOULD BE, AT BEST, A CHARADE, AND THAT'S BECAUSE SOME OTHER FEDERAL COURT THAT GETS A FOIA LAWSUIT IS GOING TO SAY, "WELL, YOU NOW ESSENTIALLY ATTEMPT EXCEPTION UNDER FOIA, BUT THERE'S A SEALING ORDER WITH NO EXCEPTIONS." SO THAT'S NOT AN EFFECTIVE REMEDY.

THE SECOND, JUST TO CLEAR THE AIR, THIS IS ANYTHING BUT AN END-RUN. AS THE COURT KNOWS FROM OUR EXHIBITS, THESE REQUESTS WERE MADE IN EARLY JANUARY, LATE JANUARY. THEY WERE ALL MADE BEFORE THE PUBLIC KNEW WHETHER THE COURT WOULD EXERCISE FEDERAL JURISDICTION, WHETHER THERE WOULD BE

FOUR COUNTS OR 400 COUNTS. WHO KNEW? JUST LIKE THE SEARCH WARRANTS WERE SOUGHT FROM THE STATE COURT JUDGE.

SO WE HAVEN'T BEEN ANGLING FOR STATE COURT PROCESS. WE HAVE BEEN VERY CONFIDENT IN YOUR HONOR'S ABILITY TO DECIDE THESE ISSUES FAIRLY, WHICH IS WHAT IT'S ALL ABOUT, AND JUST TO DO IT WITH BALANCE.

THIRD, ON INTERVENTION, I WOULD SUGGEST THE COURT LOOK AT ONE OF THE MORE RECENT CIRCUIT COURT CASES, THE BLAGOJEVICH CASE FROM THE SEVENTH CIRCUIT, WHERE THE COURT SAYS THE INTERVENTION SHOULD BE ALLOWED WHENEVER THE POTENTIAL INTERVENOR HAS A LEGITIMATE INTEREST IN THE OUTCOME AND CANNOT PREVENT THAT INTEREST WITHOUT IT BECOMING A PARTY.

THE COURT: I'M PREPARED TO RECOGNIZE THE MEDIA OUTLET'S RIGHT TO INTERVENE IN THIS CASE. FRANKLY, I READ THE CASES AS PERTAINING JUST TO JUDICIAL RECORDS. BUT BECAUSE THE RESOLUTION OF THAT QUESTION ALSO INFORMS WHETHER YOU HAVE A RIGHT TO INTERVENE, I WOULD HAVE TO RESOLVE THE SUBSTANTIVE QUESTION WITHOUT INPUT FROM YOU, AND I DON'T WANT TO DO THAT. SO I'M SORT OF FORCED INTO IT HERE.

BUT I'VE GOT TO TELL YOU, MR. BODNEY, ALL OF THE CASES THAT I'VE LOOKED AT, EVEN BLAGOJEVICH, WHERE THE ISSUE IS THE ANONYMOUS IMPANELING OF JURORS, WHAT WAS CLEAR THERE IS AT LEAST THE COURT KNOWS WHO THOSE PEOPLE ARE. THE COURT HAS SOME RECORD OF WHAT ACTUAL IDENTITIES ARE. WHILE IT MAY DENOMINATE THEM AS JURORS 1 THROUGH 12 OR 1 THROUGH 14, THERE

IS A COURT RECORD THAT AT SOME POINT SHOULD BE MADE AVAILABLE AS TO AT LEAST WHO THOSE FOLKS ARE.

THAT'S NOT THE SITUATION HERE. I DON'T HAVE THIS STUFF. I'VE NEVER HAD IT. AT SOME POINT, I SUPPOSE, IF IT INFORMS SOME SUBSTANTIVE MOTION, MAYBE A REPORT OR SOMETHING MAY BE LODGED WITH ME. BUT TYPICALLY, IN A CRIMINAL OR CIVIL CASE, FOR THAT MATTER, I NEVER SEE THE UNDERLYING STUFF. IT COMES UP FROM TIME TO TIME, AS YOU KNOW AS A TRIAL LAWYER, WHEN SOMEONE GETS IMPEACHED. BUT OTHERWISE, THERE'S NOT A DISCOVERY DUMP ON THE COURT.

MR. BODNEY: RIGHT.

THE COURT: THAT'S VERY DIFFERENT, I THINK, WITH BLAGOJEVICH AND THE OTHER CASES THAT YOU CITE WHERE THERE ARE CLEARLY JUDICIAL RECORDS INVOLVED. THIS IS NOT -- THIS IS CLEARLY THE OTHER WAY. IT'S DISCOVERY STUFF.

MR. BODNEY: EXCEPT IT'S NOT A REQUEST FOR DISCOVERY STUFF. WE DON'T KNOW, FOR EXAMPLE, WHETHER THE SAME MATERIALS WE'VE REQUESTED ARE MATERIALS THAT THE GOVERNMENT HAS PRODUCED TO THE DEFENDANT OR NOT.

THE COURT: HOW WOULD THAT ENTITLE YOU TO THIS? THEY HAVE AN OBLIGATION UNDER THE RULES TO GIVE THE DEFENSE MATERIALS THAT PERTAIN TO THE CASE, BUT THAT DOESN'T CONVERT THOSE TO JUDICIAL RECORDS.

ONCE AGAIN, I NEVER SEE THOSE. THAT DISCOVERY TAKES PLACE QUITE INDEPENDENT OF THE COURT RECEIVING ANY OF THE

INFORMATION. I MAY ISSUE ORDERS RESPECTING DISCOVERY AND HOW THE MATERIALS ARE TO BE EXCHANGED, BUT I DON'T GET IT. IT'S NOT LODGED WITH THE COURT TYPICALLY.

MR. BODNEY: YOUR HONOR, JUST -- NOT TO BELABOR THE POINT, BUT IT ULTIMATELY COMES DOWN TO THIS: YOUR HONOR HAS, WHAT THE GOVERNMENT HAS ARGUED, THE INHERENT POWER TO BALANCE THESE ISSUES. AND THE CURRENT ORDER IS IMBALANCED FROM OUR PERSPECTIVE, AND IT CAN BE RIGHTED BY TELLING THE GOVERNMENT TO DO WHAT IT PROMISED TO DO.

WE'RE RELYING NOT ONLY ON A 1ST AMENDMENT RIGHT OF ACCESS, BUT ALSO A COMMON LAW RIGHT OF ACCESS AND A STATUTORY RIGHT OF ACCESS THAT THE COURT CAN WEIGH. WE ARE, IN ALL CANDOR, IN ONE OF THOSE INTERSTICES OF THE LAW THAT IS VERY UNIQUE. IT PUTS THIS WITHIN THE CONTEXT OF THE STATUTE UNDER WHICH THE UNDERLYING PROCEEDINGS MOVE FORWARD IN RARIFIED SPACE IN TERMS OF PRECEDENT.

AND IN TERMS OF THE WORRY THAT WE'RE GOING TO BE BACK HERE AND REQUIRING YOUR HONOR TO SERVE AS A SPECIAL MASTER, IN EFFECT, OVER A BUNCH OF DOCUMENTS YOU HAVEN'T SEEN, ALLOW ME TO ALLAY THAT CONCERN. THIS IS EXPENSIVE STUFF. AND THE ABILITY OF A PARTY TO COME INTO FEDERAL COURT AND SAY, NOT SIMPLY AS A MATTER OF PRINCIPLE AND IMPORTANT PRINCIPLE, THAT WE NEED TO HAVE NOT ONLY THE REALITY, BUT THE APPEARANCE OF OPENNESS.

THE COURT: YOU DIDN'T OBJECT TO ANY OF THE

REDACTIONS THAT I ORDERED IN THE SEARCH WARRANT MATERIAL; RIGHT?

MR. BODNEY: DID NOT. DID NOT.

THE COURT: ARE YOU SATISFIED WITH THE ORDER ON THE DOCKET?

MR. BODNEY: WE ARE.

YOUR HONOR, PART OF THAT COMES DOWN TO THERE'S AN AWFUL LOT OF TRUST INVOLVED. AND SO WE UNDERSTAND THAT THINGS NEED TO BE BALANCED. THEY JUST NEED TO BE RECALIBRATED IN A WAY THAT PUTS NO GREATER BURDEN ON THEM THAN THEY OFFERED TO UNDERTAKE ON DAY ONE.

SO WITH THOSE ISSUES IN MIND, YOUR HONOR, WE HOPE THAT THE ORDER WILL BE MODIFIED.

THE COURT: THANK YOU, MR. BODNEY.

MS. CLARKE, I DIDN'T MEAN TO IGNORE YOU.

DO YOU HAVE ANY POSITION ON THIS BEYOND THE ONE THAT YOU'VE TAKEN?

MS. CLARKE: NO, YOUR HONOR.

THE COURT: HERE IS THE COURT'S CONCLUSION ON THIS.

AND A WRITTEN ORDER, MR. BODNEY, WILL GO OUT LATER TODAY TO FACILITATE ANY REVIEW THAT YOU MAY WANT TO TAKE FROM THIS ORDER.

LET ME BEGIN, MR. BODNEY, BY REPEATING SOMETHING I THINK I TOLD YOU WHEN I FIRST MET YOU IN INFORMAL CONVERSATION. I'M SENSITIVE TO THE INTERESTS THAT YOU

MENTIONED. I'M NOT OBLIVIOUS TO THOSE. I UNDERSTAND THAT THIS IS A CASE THAT HAS A LOT OF PUBLIC ATTENTION AND PEOPLE DON'T WANT TO BE KEPT IN THE DARK, AND I GET THAT. AND I UNDERSTAND THAT TO THE EXTENT POSSIBLE, THAT THE COMMUNITY OUGHT TO BE INFORMED ABOUT THIS CASE. THIS IS AN IMPORTANT EVENT THAT HAPPENED.

I THINK I MENTIONED TO YOU I WENT THROUGH A PRELIMINARY HEARING ONCE AS A YOUNG LAWYER 30 YEARS AGO WHERE WE HAD THREE MONTHS IN A LOCKED COURTROOM, AND NOBODY KNEW WHAT WAS GOING ON. I DIDN'T LIKE IT THEN. AND WE'RE SHAPED BY OUR EXPERIENCES, AND THAT CERTAINLY HAD AN EFFECT ON MY VIEW OF HOW CRIMINAL CASES OUGHT TO GO. SO I HAVE THOSE CONCERNS IN MIND. I WANT YOU TO KNOW THAT.

THE WASHINGTON POST REQUESTED FROM THE PIMA COUNTY SHERIFF RELEASE OF ALL RECORDS RELATING TO THE INVESTIGATION OF THE JANUARY 8TH, 2011 SHOOTING IN TUCSON AND THE APPARENT REFUSAL OF THE SHERIFF TO DENY THAT REQUEST.

WHEN I WAS INFORMED OF THAT, I WAS ASKED TO ENTER A PROTECTIVE ORDER -- AND I DID SO ON MARCH 23RD -- THAT DIRECTED THE SHERIFF NOT TO RELEASE INVESTIGATIVE REPORTS, FILES, OR MATERIALS RELATING TO THE INVESTIGATION OF THE CASE.

THE MEDIA OUTLETS, *WASHINGTON POST* NOW JOINED BY PHOENIX NEWSPAPERS ASSOCIATION -- INCORPORATED AND KPNX BROADCASTING, ASKED ME TO MODIFY THAT ORDER. THEY'D TAKEN THE POSITION THAT THE ORDER IS OVERBROAD AND THAT UNDER ARIZONA'S

OWN PUBLIC RECORDS LAW THE SHERIFF'S INVESTIGATION MATERIALS SHOULD BE OPEN TO INSPECTION BY THE PRESS AND THE PUBLIC.

AS A FALLBACK POSITION, THE NEWS ORGANIZATIONS HAVE REQUESTED THAT REDACTED COPIES OF THOSE MATERIALS BE MADE AVAILABLE HOLDING BACK ONLY THE PARTS THAT PERTAIN TO PRIVACY AND CONFIDENTIALITY CONCERNS.

THE NEWS ORGANIZATIONS' REQUEST PRESENTS TWO QUESTIONS: THE FIRST IS WHETHER THEY HAVE A RIGHT TO BEGIN WITH TO INTERVENE IN THIS CASE AND SEEK THE MODIFICATION OF THE PROTECTIVE ORDER. ASSUMING THEY DO -- AND THE GOVERNMENT CONTESTS THAT YOU HAVE A RIGHT TO INTERVENE -- THEN THE SECOND QUESTION IS WHETHER ANY MODIFICATION OF THE EXISTING PROTECTIVE ORDER IS WARRANTED.

THIS IS NOT THE FIRST TIME THAT THE PRESS HAS ATTEMPTED TO INTERVENE IN A CASE. IN PARTICULAR, PNI AND KPNX AREN'T STRANGERS TO THIS COURT. THEY SOUGHT TO INTERVENE IN JANUARY IN THE STATE CASE, AS MR. BODNEY HAS MENTIONED. THAT ACTION, ONCE IT WAS FILED, WAS REMOVED TO THIS COURT. I ULTIMATELY RULED ON THAT.

THE REQUEST INITIALLY WAS THAT SEARCH WARRANT MATERIAL BE RELEASED BECAUSE UNDER ARIZONA LAW AND THE LAW IN OTHER JURISDICTIONS, SEARCH WARRANTS ARE OPEN TO THE PUBLIC ONCE THEY'VE BEEN SERVED AND ONCE THE INVESTIGATION HAS ENDED AND FINAL CHARGES ARE BROUGHT.

I RESOLVED THAT MATTER ON THE MERITS FIRST AGAINST

THE INTERVENORS BECAUSE UNDER THE AUTHORITY OF *TIMES-MIRROR*, THEY WEREN'T ENTITLED TO THEM, THE INVESTIGATION WAS ONGOING, AND THE GOVERNMENT PREDICTED THAT THERE WOULD BE ADDITIONAL CHARGES.

LATER AFTER THOSE DEVELOPMENTS OCCURRED, THE INVESTIGATION WAS FINISHED AND CHARGES WERE FILED, THE COURT RECONSIDERED THE MATTER AND RULED IN FAVOR OF THE INTERVENORS AND ULTIMATELY RELEASED SEARCH WARRANT MATERIAL. STILL LATER, THE COURT ALLOWED PNI TO INTERVENE AND SEEK AN ACCOUNTING OF SEALED ENTRIES IN THE CASE DOCKET.

I THINK I'VE EXPLAINED TO YOU, MR. BODNEY, THAT THE PROCEDURE FOLLOWED HERE IN THE DISTRICT OF ARIZONA, AT LEAST IN THE TUCSON DIVISION, IS DIFFERENT FROM WHAT I WAS USED TO. THE LAWYERS LODGE THINGS WITH A REQUEST FOR SEAL, AND THEY'RE AUTOMATICALLY SEALED. AND I, THROUGH AN ORDER, HAD -- I DON'T WANT TO SAY PUT A STOP TO THAT PRACTICE, BUT WE'RE DOING IT DIFFERENTLY IN THIS CASE. THE REQUEST TO SEAL MUST COME TO ME BEFORE ANYTHING IS SEALED IN THE DOCKET.

AND THEN JUST AS OF YESTERDAY OR THE DAY BEFORE, I WENT THROUGH WITH THE LAW CLERK, AND WE HAVE CLEANED UP THE DOCKET AND ACCOUNTED FOR ALL GAPS AND UNEXPLAINED SEALING OF PRIOR PROCEEDINGS. SOME REMAIN SEALED. BUT THE REASONS FOR SEALING, IN GENERIC TERMS, ARE IDENTIFIED.

BUT THIS TIME, HOWEVER, THE GOVERNMENT OBJECTS TO THE INTERVENTION. ITS BASIC ARGUMENT IS INTERVENTION IS ONLY

WARRANTED, AS WITH THE SEARCH WARRANTS AND THE DOCKET ENTRIES, WHEN THE PRESS IS SEEKING ACCESS TO MATERIALS THAT ARE FAIRLY CHARACTERIZED AS JUDICIAL RECORDS. AS TO THAT CATEGORY, AS MR. BODNEY CORRECTLY POINTS OUT, THERE'S A PRESUMPTIVE RIGHT OF ACCESS.

BUT IN CONTRAST, THE SEARCH WARRANTS, WHICH IN THIS CASE WERE FILED WITH THIS COURT AND BEFORE THAT FILED WITH THE STATE COURT, AND THE PLEADINGS THAT WERE FILED IN THE DOCKET, THE GOVERNMENT ARGUES THAT THE PIMA COUNTY SHERIFF'S OFFICE INVESTIGATIVE MATERIALS ARE NOT JUDICIAL RECORDS. THEY HAVEN'T BEEN FILED NOR LODGED WITH THE COURT FOR ANY PURPOSE. AND INDEED, AS I HAVE ASSURED YOU, MR. BODNEY, I HAVEN'T EVEN SEEN THEM.

I THINK THERE'S SOME FACIAL MERIT TO THE GOVERNMENT'S POSITION THAT THE RULES OF CIVIL PROCEDURE EXPLICITLY ALLOW FOR INTERVENTION, BUT THERE IS NO COUNTERPART IN THE RULES OF CRIMINAL PROCEDURE. AND AS THE GOVERNMENT ARGUES, INTERVENTIONS TYPICALLY IN CONNECTION WITH YOKE TO THE PUBLIC'S PRESUMPTIVE RIGHT OF ACCESS.

AS I MENTIONED TO MR. BODNEY, I'M IN THIS CASE NOT GOING TO ASSUME THAT YOU HAVE NO RIGHT TO SPEAK BECAUSE I THINK THE SUBSTANTIVE ISSUE IS INTERRELATED TO A PROCEDURAL ONE. I THINK I HAVE TO DEFINE THE CHARACTER OF THE RECORD SOUGHT, IF THAT INFORMS WHETHER YOU HAVE THE RIGHT TO INTERVENE IN THIS CASE.

YOU HAVE RELIED IN YOUR PAPERS ON BEHALF OF YOUR CLIENTS ON THE WECHT CASE TO ASSERT THE RIGHT OF INTERVENTION. IN WECHT, AT THE BEHEST OF THE PRESS, THE DISTRICT COURT UNSEALED PERSONNEL FILES OF AN FBI INVESTIGATOR/WITNESS AFTER THE PROSECUTION ASKED FOR GUIDANCE ON WHETHER IT HAD TO PRODUCE THOSE RECORDS TO THE DEFENSE.

AND THE COURT OF APPEALS IN THAT CASE HELD THAT THE UNSEALING -- UPHELD THE UNSEALING ORDER, BUT IT DID SO ONLY ON THE GROUNDS THAT THE MATERIALS HAD ACTUALLY BEEN FILED WITH THE DISTRICT COURT; IN OTHER WORDS, THE COURT HAD THOSE MATERIALS IN ITS POSSESSION.

I DON'T THINK THE MATERIALS IN WECHT ARE ANALOGOUS TO THE INVESTIGATION MATERIALS HERE. AS I'VE MENTIONED, AND I REITERATE AGAIN, THESE MATERIALS THAT ARE THE SUBJECT OF THIS ORDER HAVE NEITHER BEEN LODGED -- AND LODGING IS ENOUGH, I GRANT YOU, TO CONVERT THESE INTO JUDICIAL RECORDS. THEY'VE NEITHER BEEN LODGED NOR FILED WITH THIS COURT.

AND LIKEWISE, YOU MENTIONED BLAGOJEVICH. I'M NOT MOVED BY THE HOLDING IN BLAGOJEVICH. AS I SAID, THAT GRANTED THE PRESS THE RIGHT TO INTERVENE, SEEK THE NAMES OF THE JURORS WHO WERE ANONYMOUSLY IMPANELED. BUT IT WAS FAIRLY CLEAR THAT THE COURT AND THE COURT RECORDS REFLECTED THEIR REAL NAMES AND THAT THERE WAS A JUDICIAL RECORD REFLECTING THOSE NAMES, WHICH COULD PROPERLY BE THE SUBJECT OF AT LEAST REQUEST TO OPEN THAT UP.

NOTWITHSTANDING MY DOUBT ABOUT THE RIGHT TO INTERVENE IN THIS CASE, I'M GOING TO ASSUME THAT YOU HAVE THAT RIGHT, AS I SAID, BECAUSE I THINK IT'S TIED TO THE RIGHT OF ACCESS GENERALLY.

THE NEWS ORGANIZATIONS HERE HAVE ARGUED THAT THEY'RE ENTITLED TO INVESTIGATIVE MATERIALS OR SOME PORTION OF THEM BECAUSE THE GOVERNMENT PROMISED AS MUCH IN ITS ORIGINAL MOTION FOR A PROTECTIVE ORDER. THIS IS NOT A FRIVOLOUS ARGUMENT, BUT I THINK IT MISSES THE POINT.

AS I MENTIONED TO MR. BODNEY, THE GOVERNMENT DID AVOW AN INTENT IN ITS MOTION TO REVIEW DILIGENTLY THE CONTENTS OF THE SHERIFF'S OFFICE FILES AND DETERMINE WHAT MATERIALS OUGHT TO BE EXCLUDED FROM COVERAGE UNDER THE PROTECTIVE ORDER AND THEN DISCLOSE THOSE MATERIALS TO *THE WASHINGTON POST*.

BEHIND THE INTENT, THOUGH, WAS THE RECOGNITION THAT SOME OF THE MATERIALS IN THE FILE WOULD NOT TRIGGER PRIVACY OR FAIR TRIAL INTEREST OR OTHER PUBLICITY CONCERNS. AND THE GOVERNMENT ITSELF PROPOSED REVIEWING THE RECORDS AND THEN SUBMITTING THEM TO THE COURT TO MAKE A FINAL REVIEW.

I FOUND ON FIRST BLUSH WHEN THAT WAS PRESENTED TO ME THAT THE NEWS ORGANIZATIONS HAD NO ENFORCEABLE RIGHT OF ACCESS TO THOSE MATERIALS BECAUSE, AS I SAID, THEY FALL INTO THE CATEGORY OF DISCOVERY AND, AS SUCH, THEY'RE NOT CONSIDERED JUDICIAL RECORDS UNDER FEDERAL LAW.

THIS SORT OF LEADS TO THE ISSUE OF WHAT'S THE EFFECT

OF THE STATUTE HERE THAT CRIMINALIZES THE ATTEMPTED ASSASSINATION OF A MEMBER OF CONGRESS? THE GOVERNMENT'S TAKEN THE POSITION THAT IT PREEMPTS STATE AND LOCAL ENFORCEMENT OF THEIR LAWS UNTIL THIS CASE IS COMPLETED. AND INDEED, SECTION (F) OF 351 --

IS THAT THE STATUTE, MR. KLEINDIENST, 351?

MR. KLEINDIENST: I BELIEVE SO.

THE COURT: YEAH.

-- DOES STATE THAT. AND I'VE LOOKED EVEN AT THE PREEMPTION CASES TO TRY TO DECIDE THIS.

I THINK WHAT'S HAPPENED IS THAT JURISDICTION OVER THIS MATTER, MR. BODNEY, HAS BEEN CEDED TO THE FEDERAL COURT, WHICH MEANS FEDERAL LAW APPLIES. FOR THE TIME BEING, FEDERAL LAW APPLIES. I'M NOT REALLY MOVED BY THE ARIZONA STATUTE HERE. I DON'T THINK IT HAS ANY APPLICATION TO WHAT I DO.

I MEAN THAT IN THE MOST RESPECTFUL SENSE. I'M WILLING TO BE COGNIZANT OF IT. I'M WILLING TO RECOGNIZE LOCAL TRADITION AND THAT WE'RE IN THE STATE OF ARIZONA, ALBEIT IT IN A FEDERAL COURT, BUT IT'S NOT BINDING ON ME.

WHAT IS BINDING ON ME ARE THE FEDERAL CASES WHICH DRAW A DISTINCTION BETWEEN JUDICIAL RECORDS AND DISCOVERY, AND THIS CLEARLY FALLS INTO THE LATTER CATEGORY, THESE INVESTIGATIVE RECORDS DO. THEY'RE NOT JUDICIAL RECORDS.

AND LET'S ASSUME FOR A MINUTE THAT I'M WRONG ON THAT SCORE, MR. BODNEY. YOU HAVE BROUGHT TO MY ATTENTION THE

GOVERNMENT'S FALLBACK POSITION, WHICH IS UNDER THE LOCAL RULE 57.2, THAT THE COURT HAS THE POWER HERE, UNDER THIS FEDERAL COURT'S LOCAL RULE, TO CUT BACK ON THE DISSEMINATION OF INFORMATION.

THE RULE PROVIDES "IN WIDELY PUBLICIZED OR SENSATIONAL CRIMINAL CASES, THE COURT, ON MOTION OF EITHER PARTY OR ON ITS OWN MOTION, MAY ISSUE A SPECIAL ORDER GOVERNING SUCH MATTERS AS EXTRAJUDICIAL STATEMENTS BY THE PARTIES AND WITNESSES THAT ARE LIKELY TO INTERFERE WITH THE RIGHT OF AN ACCUSED TO A FAIR TRIAL AND AN IMPARTIAL JURY AND ANY OTHER MATTERS WHICH THE COURT MAY DEEM APPROPRIATE FOR INCLUSION IN SUCH ORDER."

I'VE DONE MY BEST TO BE BALANCED AND FAIR AND SENSITIVE TO THE CONCERNS AS I'VE TOLD YOU I WOULD BE, BUT I'M VERY CONCERNED ABOUT THE DISSEMINATION OR RELEASE OF THE RAW INVESTIGATIVE MATERIALS HERE. I THINK THERE'S A REAL RISK THAT THOSE THINGS WOULD DENY ONE SIDE OR THE OTHER A FAIR TRIAL AND ACTUALLY INVITE THE SPECTER OF THE CASE BEING TRIED IN THE MEDIA BEFORE IT EVER GETS TRIED IN COURT.

SOME OF THE THINGS THAT ARE IN THE REPORTS MAY NEVER COME IN, NEVER SEE THE LIGHT OF DAY IN A COURTROOM BECAUSE THEY'RE INADMISSIBLE; HEARSAY ACCOUNTS OR ACCOUNTS FROM PEOPLE THAT ARE SPECULATING OR DON'T REALLY KNOW THE BASIS FOR WHAT THEY'RE REPORTING.

SO I HAVE A CONCERN ABOUT THAT. ASSUMING I'M WRONG

ON THIS ISSUE, ASSUMING THAT THE ARIZONA LAW HAS MORE PLAY THAN I'M GIVING IT IN MY FINDINGS TODAY --

THE DEFENDANT: THANK YOU FOR THE FREE KILL. SHE DIED IN FRONT OF ME. YOUR CHEESINESS.

(DEFENDANT REMOVED FROM COURTROOM BY MARSHALS)

THE COURT: ANYWAY, MR. BODNEY, AS I WAS SAYING, EVEN IF YOU'RE RIGHT AND I'M WRONG ON THIS SCORE ABOUT THE APPLICATION OF THE ARIZONA PUBLIC DISCLOSURE LAW, I WOULD STILL INVOKE MY DISCRETION UNDER 57.2 TO PREVENT THE DISSEMINATION OF A LOT OF THE MATERIAL THAT MY SENSE TELLS ME ARE PART OF SHERIFF'S INVESTIGATIVE MATERIALS.

NOW, HERE'S ONE LAST POINT. AND AS I SAID, I'LL GIVE YOU AN ORDER THAT THOROUGHLY VETS WHAT MY REASONS ARE ON THIS.

THE LAST POINT IS THIS: YOU HAVE CHARACTERIZED THIS AS A SHERIFF'S INVESTIGATION. IT NEVER REALLY WAS THAT. IT WAS ALWAYS A JOINT INVESTIGATION. WHAT LITTLE I KNOW ABOUT THE HISTORICAL BASIS IS THAT THE FBI WAS INVOLVED FROM THE GET-GO. OTHER FEDERAL AGENCIES WERE INVOLVED.

AND INDEED SECTION 351, ANOTHER SUBSECTION MANDATES THAT THE FEDERAL BUREAU OF INVESTIGATION SHALL INVESTIGATE CASES ARISING UNDER THAT TITLE, UNDER THAT SECTION. AND EVEN THE SHERIFF'S COUNSEL IN HIS LETTER TO THE GOVERNMENT ACKNOWLEDGES THAT IT WAS ALWAYS A JOINT INVESTIGATION.

AND SO I THINK THAT ACKNOWLEDGMENT, THAT REALITY

GIVES THE COURT THE RIGHT AND INDICATES THAT THE COURT SHOULD RELY ON FEDERAL LAW, INCLUDING THE LOCAL RULES HERE.

NOW, ALL THOSE THINGS HAVING BEEN SAID, I DID -- NEVER INTENDED WHEN I ISSUED THE ORDER TO FORBID THE GOVERNMENT FROM RELEASING, PURSUANT TO THE AGREEMENT THAT IT HAD EARLIER MADE WITH THE PRESS, THOSE MATERIALS THAT DON'T IMPACT ON PRIVACY CONCERNS, FAIR TRIAL RIGHTS, AND THE LIKE.

SO I AM GOING TO MODIFY THE ORDER TO MAKE THAT CLEAR. I'M NOT GOING TO DIRECT YOU TO DO ANY PARTICULAR THING. I'M NOT GOING TO DIRECT YOU, IN PARTICULAR, TO COMPILE AN INVENTORY AND PRESENT ANYTHING IN CAMERA TO ME.

MR. BODNEY, I STILL THINK THAT -- I DON'T EVEN KNOW THE SCOPE OF THESE RECORDS, BUT I'M ASSUMING THERE'S PROBABLY THOUSANDS OF PAGES. AND I JUST THINK IN A CASE WHERE IT'S NOT REQUIRED THAT I DO THAT, WHY WOULD I UNDERTAKE TO DO THAT? WHY WOULD I LOOK OVER THEIR SHOULDER AND LOOK AT ALL OF THESE THINGS?

BUT TO THE EXTENT THERE'S ANY MISUNDERSTANDING I'VE DIRECTED THE GOVERNMENT NOT TO GIVE ANYTHING OVER, I'M GOING TO MODIFY THE PROTECTIVE ORDER. IF YOU WANT TO LOOK AT THOSE THINGS AND HONOR THE PUBLIC AND PRESS' REQUEST TO THE EXTENT THAT IT DOESN'T INTERFERE WITH THE RIGHTS OF THE DEFENDANT OR YOUR OWN RIGHTS TO A FAIR TRIAL, THEN I URGE YOU AND ENCOURAGE YOU TO DO THAT.

SO A WRITTEN ORDER WILL FOLLOW TODAY, MR. BODNEY,

AND YOU'LL -- IF YOU -- I'M NOT ENCOURAGING YOU TO APPEAL, BUT MAYBE OUR FRIENDS ON THE NINTH CIRCUIT WILL SEE IT DIFFERENTLY THAN I DO. YOU'LL HAVE THAT AVENUE WITH A WRITTEN ORDER.

MR. BODNEY: THANK YOU, YOUR HONOR.

MR. KLEINDIENST: YOUR HONOR, MAY I BE HEARD?

THE COURT: YES.

MR. KLEINDIENST: OBVIOUSLY, THE COURT IS AWARE OF WHAT JUST HAPPENED HERE. I WOULD, JUST FOR THE RECORD, NOTE AT ABOUT 11:40, THE DEFENDANT SAID SOMETHING OUT LOUD AND WAS REMOVED FROM THE COURTROOM BY THE DEPUTY MARSHALS.

THE COURT: HE DID. THAT'S CORRECT.

MR. KLEINDIENST: I DON'T KNOW WHAT THE COURT'S INTENTION IS THEREAFTER.

THE COURT: MY INTENTION IS TO GO FORWARD AND DO WHAT WE WERE SUPPOSED TO DO TODAY. THERE HAS BEEN, I THINK, SOME DISCUSSION BETWEEN THE PARTIES ABOUT WHETHER EVEN MR. LOUGHNER WANTED TO ATTEND TODAY. BUT IF HE CAN COMPOSE HIMSELF, THEN HE'S ENTITLED TO BE HERE. THE CASE LAW IN THE NINTH CIRCUIT IS THAT A COMPETENCY HEARING IS A CRITICAL STAGE AND THE DEFENDANT HAS A RIGHT TO ATTEND.

NOW, THAT RIGHT IS CONDITIONED ON GOOD BEHAVIOR AND COMPLYING WITH THE COURT PROTOCOL. SO I DON'T WANT HIM TO ACT OUT OR SPEAK UP. HE'S HERE TO LISTEN AND HEAR THE BASES FOR RULINGS AND HEAR ARGUMENT MADE ON HIS BEHALF. BUT --

MS. CLARKE?

MS. CLARKE: WE'RE PREPARED TO PROCEED AND WAIVE HIS PRESENCE, YOUR HONOR.

THE COURT: YOU'RE FAMILIAR WITH THE CASE THAT I'VE REFERRED TO?

MS. CLARKE: I AM.

THE COURT: I'M, ON THE ONE HAND, A LITTLE WORRIED ABOUT TAKING A WAIVER FROM HIS COUNSEL RATHER THAN FROM HIM.

LET ME ASK THE MARSHAL, IS MR. LOUGHNER -- HAS HE CALMED DOWN A LITTLE BIT IN THE BACK?

MS. CLARKE: YOUR HONOR, COULD WE JUST HAVE A MOMENT. WE HAD ARRANGED THE OPTION OF A TELEVISION VIEWING FOR MR. LOUGHNER.

THE COURT: I'LL EMBRACE THAT, MS. CLARKE, BUT I WANT TO MAKE SURE -- I WANT TO TALK TO HIM FOR JUST A SECOND ABOUT IF HE'S GOING TO STAY HERE, HE HAS TO SIT AND COMPOSE HIMSELF AS A GENTLEMAN. IF I GET HIS ASSURANCE THAT HE WILL, THEN WE'LL TRY AGAIN. IF HE ACTS UP AGAIN, THEN WE'LL GO TO PLAN B, WHICH I EMBRACE, WHICH IS LET HIM WATCH THE PROCEEDINGS IN A ROOM.

BUT NOW THAT I'M TOLD HE'S CALMER, I'M GOING TO TALK TO HIM AND SEE IF I CAN CALM HIM DOWN A LITTLE BIT.

MS. CLARKE: IN THAT EVENT, COULD WE TAKE A BRIEF RECESS?

THE COURT: SURE.

YOU WANT TO TALK TO HIM FIRST?

MS. CLARKE: YES.

THE COURT: OKAY. WE'LL BE IN RECESS, WHAT, TEN MINUTES, MS. CLARKE? WILL THAT DO?

MS. CLARKE: YES.

THE COURT: TEN MINUTES.

(RECESS)

THE COURT: IS THE DEFENDANT WILLING TO COME BACK OUT? ARE YOU PLANNING TO BRING HIM OUT?

MS. CLARKE: MY UNDERSTANDING IS THAT GOVERNMENT COUNSEL IS ASKING THAT THE COURT TAKE A WAIVER OF HIS PRESENCE DIRECTLY FROM HIM IF THAT'S HIS CHOICE.

THE COURT: MR. LOUGHNER --

THE DEFENDANT: YES.

THE COURT: -- YOU HAVE A RIGHT TO BE HERE IN COURT AND TO LISTEN TO WHAT'S GOING ON, WHAT'S BEING ADVOCATED ON YOUR BEHALF, AND THE COURT'S RULINGS. YOU HAVE A RIGHT TO BE PHYSICALLY PRESENT. IF YOU DON'T WANT TO EXERCISE THAT RIGHT, YOU DON'T HAVE TO.

I UNDERSTAND THAT A TV SCREEN THAT WILL BROADCAST THE PROCEEDINGS HAS BEEN SET UP INSIDE. AND IF YOUR PREFERENCE IS TO SIT INSIDE AND WATCH IT ON THE TV SCREEN, THEN I'LL HONOR THAT PREFERENCE.

WHAT DO YOU WANT TO DO?

THE DEFENDANT: I WANT TO WATCH THE TV SCREEN.

THE COURT: OKAY. DO YOU JOIN IN HIS WAIVER, THEN,

OF HIS RIGHT TO BE PRESENT HERE, MS. CLARKE?

MS. CLARKE: YES, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. LOUGHNER, THEN, MAY BE INSIDE. WE'LL HAVE -- THERE WILL BE A MARSHAL IN THERE. IF HE CHANGES HIS MIND AT ANY POINT, I'M TO BE NOTIFIED. IF HE WANTS TO COME BACK OUT AND BE PRESENT, THEN LET ME KNOW RIGHT AWAY.

THE MARSHAL: YES, SIR.

MS. CLARKE: ONE OF THE DEFENSE COUNSEL WILL BE WITH HIM.

THE COURT: VERY GOOD. THANK YOU, MS. CLARKE.

MR. KLEINDIENST, ARE YOU SATISFIED THAT HE PROVIDED A WAIVER OF ANY RIGHT HE HAS TO BE PRESENT?

MR. KLEINDIENST: YES, YOUR HONOR.

THE COURT: THERE'S ANOTHER HOUSEKEEPING MATTER THAT I CAN JUST MOVE QUICKLY. THERE WAS SOME B.O.P. PROTOCOL, I UNDERSTAND.

THOSE HAVE BEEN BEFORE THE COURT AND ARE NOW THE SUBJECT OF AGREEMENT AND STIPULATION BETWEEN THE PARTIES?

MS. CLARKE: THAT'S WHAT WE EXPECT, YOUR HONOR.

THE COURT: IS THAT RIGHT, MR. KLEINDIENST?

MR. KLEINDIENST: YES, YOUR HONOR.

THE COURT: THEN I WON'T DEAL WITH ANY OF THAT.

THE TWO REMAINING ISSUES THAT I SEE ARE THE QUESTION OF THE DEFENDANT'S COMPETENCY AND THEN THE MATTER OF SOME

LETTERS THAT WERE SENT THAT I PASSED ON TO YOU, MS. CLARKE. BUT I THINK THE TWO THINGS KIND OF BLEND TOGETHER AT THIS POINT, SO I'LL DEAL WITH THE COMPETENCY ISSUE FIRST.

THE COURT HAS RECEIVED REPORTS FROM TWO MEDICAL PROFESSIONALS: A PSYCHOLOGIST, PHD; AND A PSYCHIATRIST. THOSE WERE DISSEMINATED TO COUNSEL, WHO'VE HAD A CHANCE TO REVIEW THEM.

I THEN SENT OUT AN ORDER ASKING IF EITHER SIDE THOUGHT THAT THERE WOULD BE A NEED TO FOLLOW UP WITH QUESTIONING OF EITHER OF THE EXAMINERS AND WAS TOLD THAT NEITHER PARTY THOUGHT THERE WOULD BE A NEED TO HAVE THEM HERE PRESENT TO BE EXAMINED ON THEIR REPORTS OR THEIR FINDINGS.

YOU CONFIRM THAT DECISION TODAY ON BEHALF OF THE DEFENDANT, MS. CLARKE?

MS. CLARKE: YES, WE DO.

THE COURT: MR. KLEINDIENST, ON BEHALF OF THE UNITED STATES?

MR. KLEINDIENST: THAT'S RIGHT, YOUR HONOR.

THE COURT: DOES EITHER SIDE WANT TO PRESENT ANY ADDITIONAL EVIDENCE BEYOND WHAT APPEARS IN THOSE REPORTS?

MS. CLARKE: WE HAVE NO ADDITIONAL EVIDENCE.

THE COURT: MR. KLEINDIENST?

MR. KLEINDIENST: LIKEWISE FOR THE GOVERNMENT.

THE COURT: ANY ADDITIONAL ARGUMENT ON THEM OR ARE YOU PREPARED TO LET ME MAKE MY FINDINGS BASED ON THE REPORTS

AND WHAT'S BEEN SUBMITTED?

MR. KLEINDIENST: WE REST ON THE REPORTS.

MS. CLARKE: SAME HERE.

THE COURT: THE QUESTION OF DEFENDANT'S COMPETENCY TO STAND TRIAL WAS RAISED IN AN EARLIER PROCEEDING. THE LEGAL STANDARD FOR WHETHER A DEFENDANT IS COMPETENT TO STAND TRIAL IS A STRAIGHTFORWARD AND FAMILIAR STANDARD.

THE QUESTIONS FOR THE COURT ARE THESE: DOES THE DEFENDANT HAVE A RATIONAL UNDERSTANDING OF THE PROCEEDING? THAT'S THE FIRST QUESTION. SECOND, IS HE ABLE TO ASSIST HIS ATTORNEY IN HIS OWN DEFENSE?

THIS COURT APPOINTED TWO EXPERIENCED AND QUALIFIED EXPERTS TO ADDRESS THE QUESTION OF WHETHER MR. LOUGHNER MEETS THIS STANDARD AT THE PRESENT TIME. ONE OF THE EXPERTS THAT I APPOINTED WAS DR. CHRISTINA PIETZ. SHE HAS BEEN A STAFF PSYCHOLOGIST FOR THE PAST 21 YEARS AT THE UNITED STATES MEDICAL CENTER FOR FEDERAL PRISONERS LOCATED IN SPRINGFIELD, MISSOURI.

DR. PIETZ HOLDS A PHD IN COUNSELING PSYCHOLOGY. SHE HAS A MASTER'S DEGREE IN CLINICAL PSYCHOLOGY AND A BACHELOR'S DEGREE IN PSYCHOLOGY. SHE'S BOARD CERTIFIED IN FORENSIC PSYCHOLOGY, MEANING PSYCHOLOGY HAVING TO DO WITH COURTS AND COURT PROCEEDINGS.

AMONG HER MANY PROFESSIONAL AFFILIATIONS, SHE'S BOTH A MEMBER AND THE PRESIDENT ELECT OF THE AMERICAN BOARD OF

FORENSIC PSYCHOLOGY.

THE COURT LIKEWISE APPOINTED A PSYCHIATRIST ON THIS CASE, DR. MATTHEW CARROLL. DR. CARROLL IS BOARD CERTIFIED IN FORENSIC PSYCHIATRY. HE RECEIVED A BACHELOR'S DEGREE IN BIOLOGY AND A MEDICAL DEGREE FROM GEORGE WASHINGTON SCHOOL OF MEDICINE IN 1989.

AFTER COMPLETING HIS CLINICAL TRAINING AND HIS FELLOWSHIP, HE SERVED FOR MANY YEARS AS A STAFF PSYCHIATRIST IN VARIOUS HOSPITALS AND MEDICAL FACILITIES. SINCE 2002, HE HAS MAINTAINED HIS OWN PRACTICE SPECIALIZING IN FORENSIC PSYCHIATRY.

THE COURT IS PERSONALLY FAMILIAR WITH DR. CARROLL. HE'S A FREQUENT EXPERT WITNESS IN CASES IN THE SOUTHERN DISTRICT OF CALIFORNIA.

DR. CARROLL HOLDS NUMEROUS PROFESSIONAL CERTIFICATIONS, INCLUDING BOARD CERTIFICATIONS IN PSYCHIATRY AND FORENSIC PSYCHIATRY.

ADDITIONALLY, HE IS AN ASSISTANT CLINICAL PROFESSOR OF PSYCHIATRY AT THE UNIVERSITY OF CALIFORNIA, SAN DIEGO SCHOOL OF MEDICINE.

THE COURT WILL PUT THE COMPLETE CURRICULUM VITAE FOR BOTH DOCTORS INTO THE RECORD. THEY WILL BE RECEIVED AND MADE PART OF THE RECORD THAT CAN BE REVIEWED BY ANYONE WHO HAS INTEREST.

DR. PIETZ AND DR. CARROLL ADDRESSED THE QUESTION OF

MR. LOUGHNER'S PRESENT COMPETENCY IN COMPREHENSIVE, WRITTEN REPORTS. WITH THE COOPERATION OF BOTH COUNSEL -- ALL COUNSEL IN THIS CASE, BOTH DOCTORS WERE GIVEN ACCESS TO AND THEY CONSIDERED A WIDE SPECTRUM OF RECORDS AND INFORMATION THAT INFORMS THE ISSUE THAT THEY WERE ASKED TO ADDRESS.

MUCH OF THE INFORMATION THAT THE DOCTORS CONSIDERED WAS HISTORICAL AND PREDATED THE DATE OF THE CHARGED OFFENSES. IT INCLUDED OBSERVATIONS AND ANECDOTES AND FIRSTHAND ACCOUNTS FROM MANY WITNESSES WHO ARE PERSONALLY FAMILIAR WITH THE DEFENDANT OR HAD ONGOING CONTACT WITH HIM.

ALTHOUGH DR. PIETZ AND DR. CARROLL HAD SOME CONTACT WITH ONE ANOTHER DURING THE EXAMINATION PERIOD, EACH PREPARED A SEPARATE REPORT, AND EACH REPORT WAS BASED ON THE DOCTOR'S OWN INDIVIDUAL ANALYSIS AND EXPERIENCE. THEY DID NOT COLLABORATE IN THEIR FINDINGS. INSTEAD, THEY REACHED CONCLUSIONS INDEPENDENTLY.

BOTH DOCTORS SUBMITTED THEIR REPORTS IN A TIMELY MANNER TO THE COURT. AND I, AS I SAID, IN TURN PROVIDED THEM TO BOTH SIDES.

DR. PIETZ'S REPORT IS 52 PAGES LONG. DR. CARROLL'S REPORT IS 43 PAGES LONG.

AFTER RECEIVING THE DOCTORS' REPORTS, COUNSEL WERE GIVEN THE OPPORTUNITY TO EXAMINE THE DOCTORS UNDER OATH. THERE WAS AN ORDER THAT WENT OUT TO THAT EFFECT. YOU'VE HEARD TODAY THAT THEY DECLINED AN OPPORTUNITY. THEY'VE INDICATED

THEIR WILLINGNESS AT THIS POINT TO LET THE COURT MAKE A DECISION ON THE BASIS OF THEIR REPORTS.

THE DOCTORS' CLINICAL EXAMINATIONS OF THE DEFENDANT WERE VIDEOTAPED PURSUANT TO THE COURT'S ORDER, AND THE VIDEOTAPES WERE ALSO MADE AVAILABLE TO BOTH PARTIES. IN ADDITION TO CANVASSING THE REPORTS THAT I MENTIONED TO YOU FROM THE DOCTORS, THE COURT HAS ALSO VIEWED APPROXIMATELY 18 HOURS OF VIDEOTAPED INTERVIEWS WITH THE DEFENDANT THAT WAS CONDUCTED BY THE DOCTORS.

BECAUSE THE REPORTS AND THE VIDEOTAPES CONTAIN MATERIAL THAT IS GENERALLY PRIVILEGED, CONFIDENTIAL, SUBJECT TO PRIVACY CONCERNS THAT WE ALL HAVE AS AMERICAN CITIZENS WITH RESPECT TO OUR MEDICAL RECORDS, THUS, IN THEIR PRESENT UNREDACTED FORM, THEY'RE PROTECTED FROM PUBLIC DISCLOSURE BY LAW. THE COURT HAS ORDERED THAT THEY'RE NOT TO BE PUBLICLY FILED IN THEIR UNREDACTED FORM IN THE CASE DOCKET IN THIS CASE.

AND THERE'S NOTHING MYSTERIOUS ABOUT THIS. AS I SAID, MUCH OF THE MATERIAL IS PRIVATE MEDICAL MATERIAL. IT'S PRIVILEGED. SOME OF IT IS MATERIAL THAT WAS PRESENTED TO THE GRAND JURY THAT IS STATUTORILY PROTECTED AT THIS POINT, AND THERE ARE RULES THAT FORBID THAT FROM BEING DISSEMINATED.

HOWEVER, UNDERSTANDING THE GREAT PUBLIC INTEREST IN THE CASE GENERALLY AND IN THE COMPETENCY DETERMINATION THAT THE COURT ANNOUNCES TODAY, I'M GOING TO SUMMARIZE THE

CONCLUSIONS OF BOTH DOCTORS AS THEY PERTAIN TO THE QUESTION OF PRESENT COMPETENCY AND TO THE EXTENT PERMITTED BY LAW TO TELL YOU WHAT THE BASES FOR THE DOCTORS' FINDINGS ARE.

BOTH DOCTORS WHO EXAMINED MR. LOUGHNER IN THIS CASE DETERMINED THAT HE IS NOT PRESENTLY COMPETENT TO STAND TRIAL.

DR. PIETZ CONCLUDES THAT MR. LOUGHNER SUFFERS FROM MAJOR MENTAL ILLNESS, SCHIZOPHRENIA, WHICH SHE DIAGNOSES AS UNDIFFERENTIATED TYPE.

SHE SAW THE DEFENDANT DAILY OVER AN APPROXIMATE ONE-MONTH PERIOD. SHE CONDUCTED A SERIES OF 12 INTERVIEWS WITH THE DEFENDANT THAT SPANNED APPROXIMATELY NINE HOURS. SHE FOUND AT THE PRESENT TIME THAT HIS THOUGHTS ARE RANDOM AND DISORGANIZED, THAT HE DEMONSTRATES DISORGANIZED THINKING, AND THAT HE HAS PROMINENT DELUSIONS. AT TIMES, HE ANSWERED SIMPLE QUESTIONS WITH LENGTHY ANSWERS THAT WERE NONSENSICAL. IN MANY INSTANCES, IT WAS NEVER CLEAR HOW THE RESPONSES WERE RELEVANT TO THE QUESTIONS THAT HAD BEEN PUT TO HIM.

DURING THE ONE-MONTH-LONG PERIOD THAT DR. PIETZ EXAMINED MR. LOUGHNER, SHE ATTEMPTED TO ADMINISTER A VARIETY OF STANDARDIZED PSYCHOLOGICAL TESTS. SHE REPORTS THAT IT WAS DIFFICULT TO KEEP MR. LOUGHNER ON TASK AND THAT HE FREQUENTLY DID NOT COMPLETE THE TESTS OR ANSWER ALL OF THE QUESTIONS THAT WERE PUT TO HIM. AS A CONSEQUENCE, THERE WAS VERY LITTLE IN THE WAY OF HELPFUL DATA THAT WAS GENERATED BY THE ATTEMPTED ADMINISTRATION OF THESE PSYCHOLOGICAL TESTS.

HAVING REVIEWED THE VIDEOTAPES OF DR. PIETZ'S INTERVIEW WITH THE DEFENDANT, THE COURT AGREES WITH HER CHARACTERIZATIONS OF THE DEFENDANT'S DEMEANOR AND WITH HER DESCRIPTIONS OF HIS ANSWERS.

THE CLINICAL INTERVIEW TAPES DEMONSTRATE THAT DR. PIETZ ASKED THE DEFENDANT STRAIGHTFORWARD QUESTIONS ABOUT THE LEGAL SYSTEM AND HOW IT'S SUPPOSED TO FUNCTION AND THAT THE DEFENDANT GENERALLY WAS UNABLE TO PROVIDE RATIONAL OR COHERENT ANSWERS TO THOSE QUESTIONS.

ALSO, WHILE IT APPEARS THAT HE HAD SOME SUPERFICIAL UNDERSTANDING OF THE CHARGES AGAINST HIM, HE WAS NOT ABLE TO COMPREHEND THE NATURE OF THE CHARGES WITH ANY RATIONAL UNDERSTANDING. INDEED, MANY OF THE ANSWERS THAT HE GAVE ILLUSTRATED AN IRRATIONAL THOUGHT PROCESS ABOUT THE CHARGES AND ABOUT THE LEGAL PROCESS IN GENERAL.

MORE PARTICULARLY, HIS ANSWERS TO QUESTIONS ABOUT THE LEGAL PROCESS NEVER MADE IT CLEAR THAT HE UNDERSTOOD WHAT THE ROLE OF THE JUDGE IS, WHAT THE ROLE OF THE JURY IS, HOW THE PROSECUTION AND DEFENSE ARE SUPPOSED TO FUNCTION.

LIKEWISE, DR. PIETZ OPINES AND THE COURT'S REVIEW OF THE INTERVIEW TAPES CONFIRMS THAT HE HAS NO PRESENT UNDERSTANDING OF THE POTENTIAL PLEAS OR STRATEGIC CHOICES THAT ARE AVAILABLE TO HIM.

DR. PIETZ ALSO CONCLUDED FROM HER INTERVIEWS THAT THE DEFENDANT DOES NOT AT THE PRESENT TIME HAVE A RATIONAL

UNDERSTANDING OF THE PROCEEDINGS IN WHICH HE'S IMMERSED, AND THE COURT CONCURS WITH THAT CONCLUSION.

SHE ALSO CONCLUDED THAT MR. LOUGHNER'S ANSWERS TO QUESTIONS IN SOME INSTANCES MANIFEST WHAT SHE CHARACTERIZES AS IRRATIONAL DISTRUST IN HIS LAWYERS AND OF THE COUNSEL AND ADVICE THAT THEY'VE PROVIDED HIM SO FAR.

I USE THE TERM "IRRATIONAL DISTRUST" BECAUSE THE COURT IS AWARE OF THE ATTEMPTS AND THE EFFORTS THAT MR. LOUGHNER'S LAWYERS HAVE MADE TO TRY TO REPRESENT HIM IN THIS CASE. AND ALL OF THE EFFORTS OF WHICH I'M AWARE WERE PERFECTLY REASONABLE AND THEY'RE INDICATED AND THEY'RE RIGHT.

DR. PIETZ CONCLUDED THAT HIS MENTAL ILLNESS AT THIS POINT IS A SIGNIFICANT BARRIER TO HIS ABILITY TO ASSIST IN HIS OWN DEFENSE AND TO ASSIST WITH HIS LAWYERS AND THAT HE HAS DELUSIONS THAT PREVENT HIM FROM RATIONALLY CONSIDERING THE VARIETY OF LEGAL STRATEGIES AND POTENTIAL CONSEQUENCES THAT HE FACES.

IF HE CAN'T CONSIDER THE COURSES OF ACTION AVAILABLE TO HIM, HE CAN'T MEANINGFULLY ASSIST IN HIS OWN DEFENSE. DR. PIETZ, THEREFORE, CONCLUDES THAT HE'S NOT PRESENTLY ABLE TO RATIONALLY CONSULT WITH HIS LAWYERS AND TO ASSIST THEM IN DEFENDING THIS CASE. THE COURT CONCURS WITH THAT CONCLUSION AS WELL.

DR. CARROLL, THE PSYCHIATRIST, INTERVIEWED MR. LOUGHNER OVER TWO DAYS FOR APPROXIMATELY SEVEN HOURS. HE

CONDUCTED FIVE INTERVIEWS WITH THE DEFENDANT. HE CONCLUDED THAT THE DEFENDANT PRESENTLY SUFFERS FROM SCHIZOPHRENIA, PARANOID TYPE.

DR. CARROLL OPINED WITH REASONABLE MEDICAL CERTAINTY THAT MR. LOUGHNER HAS EXPERIENCED DELUSIONS, BIZARRE THINKING, HALLUCINATIONS FOR GREATER THAN A SIX-MONTH PERIOD OF TIME. BASED ON HIS REVIEW OF THE AVAILABLE MATERIALS, HE CONCLUDES THE DEFENDANT'S MENTAL HEALTH HAS BEEN IN DECLINE FOR THE PAST TWO OR THREE YEARS AND THAT HE HAS A HISTORY OF SUFFERING FROM SEVERE MENTAL ILLNESS.

DR. CARROLL DETERMINED THAT WHILE MR. LOUGHNER HAS A BASIC AND RUDIMENTARY UNDERSTANDING OF THE NATURE OF THE PROCEEDINGS, HE DOESN'T IN ANY REALISTIC SENSE GRASP THE GRAVITY OR THE CONSEQUENCES OF THE CHARGES THAT HE'S FACING OR THE SITUATION THAT HE'S IN. HE INSTEAD SEEMS TO BE FIXATED ON INCONSEQUENTIAL AND UNRELATED ISSUES.

DR. CARROLL DETERMINED THAT THE DEFENDANT'S THINKING ABOUT THE CHARGES AND ABOUT CRIMINAL PROCEEDINGS IN GENERAL IS CLEARLY ILLOGICAL AND CONFUSED. IN TURN, THIS RESULTS IN A SEVERE IMPAIRMENT TO HIS PLANNING OF LEGAL STRATEGIES. HE DOESN'T HAVE A REASONABLE UNDERSTANDING OF THE ROLE OF WITNESSES IN THE CASE, AND HIS PSYCHOTIC BELIEFS ABOUT THE EVIDENCE CAUSE HIM TO BELIEVE HE WILL NOT RECEIVE A FAIR TRIAL DUE TO A CONSPIRACY.

DR. CARROLL CONCLUDES THAT MR. LOUGHNER AT THE

PRESENT TIME IS UNABLE TO RATIONALLY UNDERSTAND THE NATURE AND CONSEQUENCES OF THE PROCEEDINGS AGAINST HIM. HAVING THOROUGHLY STUDIED DR. CARROLL'S REPORT, HAVING VIEWED THE VIDEOTAPES ALSO OF HIS INTERVIEWS WITH THE DEFENDANT, THE COURT AGREES WITH DR. CARROLL'S CHARACTERIZATIONS OF HIS PRESENT MENTAL STATE AND WITH THE CONCLUSION THAT THE DEFENDANT IS UNABLE AT THE PRESENT TIME TO UNDERSTAND RATIONALLY THE PROCEEDINGS.

DR. CARROLL ALSO CONCLUDED THAT THE DEFENDANT AT PRESENT LABORS UNDER A PSYCHOTIC THOUGHT PROCESS WITH RESPECT TO HIS LAWYERS. HIS COMPLAINTS ABOUT HIS LAWYERS ARE RAMBLING AND DISORGANIZED, AND HIS LEVEL OF IRRATIONALITY ABOUT THEIR EFFORTS IS MANIFEST.

DR. CARROLL OPINES THAT THE DEFENDANT'S PRESENT LEVEL OF IRRATIONAL AND PSYCHOTIC THOUGHT PROCESS INTERFERES WITH HIS INTERACTIONS WITH HIS OWN LAWYERS AND PREVENTS HIM FROM WORKING WITH THEM OR WITH ANY LAWYER IN AN EFFECTIVE MANNER IN HIS OWN DEFENSE AT THIS TIME.

IT'S DIFFICULT, DR. CARROLL CONCLUDES, IF NOT IMPOSSIBLE -- WOULD BE DIFFICULT, IF NOT IMPOSSIBLE, FOR ANY ATTORNEY TO TRY TO REASON WITH THE DEFENDANT. HE IS, IN SHORT, UNABLE AT THE PRESENT TIME TO WORK WITH HIS LAWYERS TO MAKE THE KIND OF STRATEGIC CHOICES THAT A PERSON IN MR. LOUGHNER'S SITUATION MUST BE PREPARED TO MAKE.

DR. CARROLL CONCLUDES THAT MR. LOUGHNER AT THE

PRESENT TIME CAN'T PROPERLY ASSIST IN HIS DEFENSE DUE TO MENTAL ILLNESS. AND AGAIN, HAVING THOROUGHLY CANVASSED HIS REPORT AND THE REASONS GIVEN FOR HIS OPINION AND HAVING VIEWED THE ENTIRETY OF THE INTERVIEWS ON VIDEOTAPE, THE COURT AGREES WITH DR. CARROLL'S CONCLUSION THAT THE DEFENDANT IS UNABLE TO ASSIST HIS LAWYERS IN DEFENDING HIMSELF ON HIS OWN DEFENSE.

NOW, IN A FORENSIC SETTING, IN A COURTROOM SETTING WHERE THERE ARE CONSEQUENCES FOR CONDUCT, THE EXAMINERS IN THE COURT ALWAYS HAVE TO BE CONCERNED WITH MALINGERING. IN LAY TERMS, "MALINGERING" MEANS FAKING A MENTAL DISORDER.

BOTH DR. PIETZ AND DR. CARROLL CONSIDERED THE POSSIBILITY THAT MR. LOUGHNER WAS MALINGERING, AND THEY REJECTED IT.

INDIVIDUALS WHO MALINGER OR FAKE A MENTAL ILLNESS TYPICALLY EXHIBIT AN INCONSISTENT PRESENTATION. THAT MEANS THEY CAN'T KEEP IT UP OVER A LONG PERIOD OF TIME. THEY ALSO TEND TO GROSSLY OVEREXAGGERATE THEIR SYMPTOMS OF MENTAL ILLNESS. THEIR ANSWERS TEND TO BE TELLINGLY SELF-INTERESTED, SELF-SERVING.

IN CONTRAST, IN HIS PROFILE, DR. PIETZ CONCLUDED THAT THE DEFENDANT PRESENTED IN A CONSISTENT MANNER IN ALL OF HER INTERACTIONS WITH HIM. SPECIFICALLY, HE DIDN'T APPEAR TO HER TO BE OVERENDORSING SYMPTOMS OF MENTAL ILLNESS.

ONE OF THE PSYCHOLOGICAL TESTS THAT DR. PIETZ WAS ABLE TO PERFORM SPECIFICALLY IS DESIGNED TO FLUSH OUT

MALINGERING, AND NONE OF THE DEFENDANT'S ACHIEVED SCORES ON THAT TEST PUT HIM IN THE PROBABLE OR DEFINITE FEIGNING RANGE.

IN ADDITION, DR. PIETZ SAYS ON THE BASIS OF HISTORICAL EVIDENCE THAT SHE BELIEVED THAT THE DEFENDANT'S THINKING BEHAVIOR HAD, EVEN BEFORE THE DATE OF THE CHARGES IN THIS CASE, BECOME INCREASINGLY ODD AND BIZARRE FOR THE PAST TWO YEARS. THIS IS A TELLTALE SIGN, SHE CONCLUDES, OF MENTAL ILLNESS, NOT MALINGERING.

FINALLY, SHE POINTS OUT THAT MOST PEOPLE WHO TRY TO FAKE MENTAL ILLNESS WANT TO BE PERCEIVED AS MENTALLY ILL, AND YET MR. LOUGHNER DOES NOT. HE DOES NOT WANT TO BE PERCEIVED THAT WAY.

SIMILARLY, DR. CARROLL CITES EXTENSIVE DOCUMENTATION OF THE DEFENDANT'S PREVIOUS BIZARRE BEHAVIOR AND PSYCHOTIC THINKING. HE, TOO, STATES THAT THE DEFENDANT DENIES BEING MENTALLY ILL. IN FACT, HE SCOFFS AT THE IDEA.

DR. CARROLL ADDITIONALLY POINTS OUT THAT SOME OF DEFENDANT'S ANSWERS TO THE QUESTIONS THAT DR. CARROLL PUT TO HIM WERE NOT PARTICULARLY HELPFUL OR BENEFICIAL TO THE DEFENDANT. AND THIS, TOO, RUNS COUNTER TO THE DESIRE TO FAKE MENTAL ILLNESS.

THE COURT TODAY AND AT THE TIME I REVIEWED THE REPORTS AND THE VIDEOTAPES WAS ALSO MINDFUL OF THE POTENTIAL FOR A DEFENDANT TO FAKE MENTAL ILLNESS, AND I'VE CONSIDERED AND ALSO REJECTED THAT AS A POSSIBILITY HERE.

ON THIS ISSUE, THE COURT FINDS THAT THE JUDGMENT OF THE PROFESSIONAL EXAMINERS IS REASONED AND SOUND AND THERE'S AMPLE EVIDENCE TO SUPPORT THEIR CONCLUSIONS THAT THE DEFENDANT DID NOT MASQUERADE A MENTAL INCAPACITY AT THE PRESENT TIME TO EITHER AVOID THE CRIMINAL CHARGES HE FACES OR FOR THE PURPOSE OF UNDULY DELAYING THAT CASE. I'M CONVINCED OF THAT TODAY.

UNDER SECTION 4241(A) OF TITLE 18 OF THE UNITED STATES CODE, A DEFENDANT HAS TO MEET TWO CRITERIA TO BE FOUND INCOMPETENT TO STAND TRIAL: FIRST, IT MUST BE SHOWN HE'S SUFFERING FROM MENTAL DISEASE OR DEFECT. AND SECOND, THE MENTAL DISEASE OR DEFECT MUST EITHER PREVENT THE DEFENDANT FROM BEING ABLE TO UNDERSTAND THE NATURE AND CONSEQUENCES OF THE LEGAL PROCEEDINGS, OR ALTERNATIVELY, IT MUST PREVENT THE DEFENDANT FROM ASSISTING PROPERLY IN HIS DEFENSE.

THE COURT FINDS, BASED ON THE EVIDENCE THAT I'VE SUMMARIZED BY A CLEAR PREPONDERANCE OF EVIDENCE, THAT BOTH CRITERIA ARE MET IN THIS CASE. AT THE PRESENT TIME, MR. LOUGHNER DOESN'T HAVE A RATIONAL UNDERSTANDING OF THESE PROCEEDINGS, AND I FURTHER FIND IS UNABLE TO ASSIST HIS LAWYERS IN MOUNTING A DEFENSE TO THE CHARGES THAT HE FACES. THE COURT FINDS THAT HE IS PRESENTLY INCOMPETENT TO STAND TRIAL.

NOW, WHEN THAT FINDING IS MADE BY THE COURT IN SUBSECTION (D) OF THIS PROVISION OF LAW, 4241, DURESS, THAT IF, AFTER A HEARING OF THIS TYPE, THE COURT FINDS BY A

PREPONDERANCE OF EVIDENCE THAT THE DEFENDANT IS SUFFERING FROM A MENTAL DISEASE OR DEFECT THAT RENDERS HIM INCOMPETENT TO THE EXTENT THAT HE CAN'T UNDERSTAND THE NATURE AND CONSEQUENCES OF THE PROCEEDINGS OR CANNOT ASSIST PROPERLY IN HIS DEFENSE, THE COURT SHALL COMMIT THE DEFENDANT TO THE CUSTODY OF THE ATTORNEY GENERAL.

THE ATTORNEY GENERAL THEN SHOULD HOSPITALIZE THE DEFENDANT FOR TREATMENT IN A SUITABLE FACILITY FOR A REASONABLE PERIOD OF TIME, NOT TO EXCEED FOUR MONTHS, AS IS NECESSARY TO DETERMINE WHETHER THERE'S A SUBSTANTIAL PROBABILITY THAT IN THE FORESEEABLE FUTURE THE DEFENDANT WILL ATTAIN THE CAPACITY TO PERMIT THE PROCEEDINGS TO GO FORWARD.

THE LANGUAGE OF THE STATUTE THAT CONTROLS IN THIS CASE IS MANDATORY AND THERE'S NO DISCRETION HERE.

THE COURT, THEREFORE, ORDERS THAT THE DEFENDANT BE COMMITTED TO THE CUSTODY OF THE ATTORNEY GENERAL FOR A PERIOD OF FOUR MONTHS OR FOR SUCH SHORTER PERIOD OF TIME IN WHICH A DETERMINATION MAY BE MADE ABOUT WHETHER HE CAN ATTAIN MENTAL COMPETENCY SO THAT THESE PROCEEDINGS CAN GO FORWARD IN THE FUTURE.

THE COURT SETS THE HEARING DATE FOR THAT DETERMINATION AT THIS TIME AS SEPTEMBER 21ST. I'LL SET THAT AT 10:00 ON THE 21ST OF SEPTEMBER IN THIS COURT.

THE COURT ORDERS FURTHER THAT THE ATTORNEY GENERAL OR ITS DESIGNATE SHALL PREPARE A REPORT INFORMING THE COURT ON

THE ISSUE OF THE LIKELIHOOD THAT THE DEFENDANT WILL REGAIN COMPETENCY OR CAN BE RESTORED TO COMPETENCY SUCH THAT THE PROCEEDINGS SHALL GO FORWARD.

THE REPORT SHALL BE FILED WITH THE COURT NO LATER THAN AUGUST 31ST. UPON RECEIPT OF THE REPORT, I WILL, OF COURSE, PROVIDE COUNSEL FOR BOTH PARTIES WITH COPIES OF THE REPORT.

ANY QUESTIONS REGARDING MY FINDING ON COMPETENCY FROM THE DEFENSE?

MS. CLARKE: NO, YOUR HONOR.

THE COURT: FROM THE GOVERNMENT?

MR. KLEINDIENST: NO, SIR.

THE COURT: THE LAST ISSUE, AS I SAID GOING INTO THIS, IS I GOT SOME LETTERS DECLARING SOME CONFLICT WITH HIS COUNSEL.

THE COURT FINDS THAT MR. LOUGHNER IS NOT COMPETENT AT THIS POINT. AND I THINK, FRANKLY, THOSE COMPLAINTS IN THOSE LETTERS ARE A SYMPTOM OF WHAT THE DOCTORS FOUND, AND I INTEND TO TABLE THEM AT THIS TIME. AT SUCH POINT THAT HIS COMPETENCY IS RESTORED, IF HE WANTS TO BRING UP THE MATTER OF COUNSEL, HE CAN RENEW IT THEN.

MS. CLARKE: YES, YOUR HONOR.

THE COURT: ANYTHING ELSE FROM EITHER COUNSEL?

MS. CLARKE: JUST ONE MOMENT.

MR. KLEINDIENST: NOTHING FROM THE GOVERNMENT, YOUR

HONOR. THANK YOU.

(PAUSE IN PROCEEDINGS)

MS. CLARKE: THANK YOU, YOUR HONOR.

THE COURT: WE'RE IN RECESS.

--OOO--

I HEREBY CERTIFY THAT THE TESTIMONY ADDUCED IN THE FOREGOING MATTER IS A TRUE RECORD OF SAID PROCEEDINGS.

S/EVA OEMICK 6-7-2011

EVA OEMICK DATE

OFFICIAL COURT REPORTER