No. 17-312

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RENE SANCHEZ-GOMEZ, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

NOEL J. FRANCISCO
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Counsel of Record
for Petitioner

REUBEN CAMPER CAHN
Federal Defenders of
San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101
Reuben_Cahn@fd.org
(619) 234-8467

Counsel of Record
for Respondent

PETITION FOR A WRIT OF CERTIORARI FILED: AUG. 29, 2017
CERTIORARI GRANTED: DEC. 8, 2017

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 13-50561

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RENE SANCHEZ-GOMEZ, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
11/21/13	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Reporters Transcript required: Yes. Sentence imposed: n/a. Transcript ordered by 12/11/2013. Transcript due 01/10/2014. Appellant briefs and excerpts due by 02/19/2014 for Rene Sanchez-Gomez. Appellee brief due 03/21/2014 for United States of America. Appellant's optional reply brief is due 14 days after service of the answering brief. [8872176] (HC)
11/22/13	Received copy of amended notice of appeal from district court. [8878910] (Turcios, Margoth)
11/27/13	Filed clerk order (Deputy Clerk: KG): The court sua sponte consolidates interlocutory appeal Nos. 13-50561, 13- 50562, and 13-50566. The previously established briefing schedule

DATE	PROCEEDINGS
	shall govern these consolidated appeals. [8880541] [13-50561, 13-50562, 13-50566] (WL)
	* * * * *
4/30/14	Submitted (ECF) Answering brief and Supplemental Excerpts of Record for review and filed Motion to file oversized brief. Submitted by Appellee USA in 13-50561, 13-50562, 13-50566, 13-50571. Date of service: 04/30/2014. [9078581] [13-50561, 13-50562, 13-50566, 13-50571] (Hoffman, Kyle)
	* * * * *
8/25/15	FILED OPINION (MARY M. SCHROEDER, JACQUELINE H. NGUYEN and JACK ZOUHARY) VACATED; REMANDED. Judge: MMS Authoring, FILED AND ENTERED JUDGMENT. [9659006] [13-50561, 13-50562, 13-50566, 13-50571] (RMM)
	* * * * *
11/23/15	Filed (ECF) Appellee USA in 13-50561, 13-50562, 13-50566, 13-50571 petition for rehearing en banc (from 08/25/2015 opinion). Date of service: 11/23/2015. [9767667] [13-50561, 13-50562, 13-50566, 13-50571] (Zipp, Daniel)
	* * * * *
8/5/16	Filed Order for PUBLICATION (SIDNEY R. THOMAS) Upon the vote of a majority of

DATE	PROCEEDINGS
	non-recused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit. Judge Owens did not participate in the deliberations or vote in this case. [10076928] [13-50561, 13-50562, 13-50566, 13-50571] (MM)
	* * * * *
8/16/16	Received 12 paper copies of excerpts of record in 4 volume(s) filed by Appellants. (sent to en banc court) [10089237] [13-50561, 13-50562, 13-50566, 13-50571] (SML)
	* * * * *
8/18/16	Filed clerk order (Deputy Clerk: WL): The parties are ordered to file, within 14 days of the filing date of this order, simultaneous briefs not to exceed 10 pages on the following question: whether we lack appellate jurisdiction over these appeals, contrary to our holding in United States v. Howard, 480 F.3d 1005, 1011 (9th Cir. 2007). See, e.g., Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106-14 (2009) (describing the types of collateral rulings that may be appealed as sufficiently "final"); Abney v. United States, 431 U.S. 651, 657 (1977) (describing the application of the collateral-order doctrine to

DATE	PROCEEDINGS
	appeals in criminal cases). [10092207] [13-50561, 13-50562, 13-50566, 13-50571] (WL)
	* * * * *
9/1/16	Submitted (ECF) Supplemental Brief for review. Submitted by Appellee USA in 13-50561, 13-50562, 13-50566, 13-50571. Date of service: 09/01/2016. [10110772] [13-50561, 13-50562, 13-50566, 13-50571] (Zipp, Daniel)
9/1/16	Submitted (ECF) Supplemental Brief for review. Submitted by Appellee USA in 13-50561, 13-50562, 13-50566, 13-50571. Date of service: 09/01/2016. [10110864] [13-50561, 13-50562, 13-50566, 13-50571] (Zipp, Daniel)
	* * * * *
5/31/17	FILED OPINION (SIDNEY R. THOMAS, MARY M. SCHROEDER, STEPHEN REINHARDT, ALEX KOZINSKI, DIARMUID F. O'SCANNLAIN, BARRY G. SILVERMAN, SUSAN P. GRABER, RICHARD A. PAEZ, MARSHA S. BERZON, CONSUELO M. CALLAHAN and SANDRA S. IKUTA) DENIED. Opinion by Judge Kozinski; Concurrence by Judge Schroeder; Dissent by Judge Ikuta. FILED AND ENTERED JUDGMENT. [10453287] [13-50561, 13-50562, 13-50566, 13-50571] (RMM)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 13-50562

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MOISES PATRICIO-GUZMAN, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
11/21/13	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Reporters Transcript required: Yes. Sentence imposed: n/a. Transcript ordered by 12/11/2013. Transcript due 01/10/2014. Appellant briefs and excerpts due by 02/19/2014 for Moises Patricio-Guzman. Appellee brief due 03/21/2014 for United States of America. Appellant's optional reply brief is due 14 days after service of the answering brief. [8872225] (HC)
11/22/13	Received copy of amended notice of appeal from district court. [8878901] (Turcios, Margoth)
11/27/13	Filed clerk order (Deputy Clerk: KG): The court sua sponte consolidates interlocutory appeal Nos. 13-50561, 13-50562, and 13-50566. The previously established briefing schedule shall govern these consolidated

DATE	PROCEEDINGS
	appeals. [8880541] [13-50561, 13-50562, 13-50566] (WL)
	* * * * *
4/30/14	Submitted (ECF) Answering brief and Supplemental Excerpts of Record for review and filed Motion to file oversized brief. Submitted by Appellee USA in 13-50561, 13-50562, 13-50566, 13-50571. Date of service: 04/30/2014. [9078581] [13-50561, 13-50562, 13-50566, 13-50571] (Hoffman, Kyle)
	* * * * *
8/25/15	FILED OPINION (MARY M. SCHROEDER, JACQUELINE H. NGUYEN and JACK ZOUHARY) VACATED; REMANDED. Judge: MMS Authoring, FILED AND ENTERED JUDGMENT. [9659006] [13-50561, 13-50562, 13-50566, 13-50571] (RMM)
	* * * * *
11/23/15	Filed (ECF) Appellee USA in 13-50561, 13-50562, 13-50566, 13-50571 petition for rehearing en banc (from 08/25/2015 opinion). Date of service: 11/23/2015. [9767667] [13-50561, 13-50562, 13-50566, 13-50571] (Zipp, Daniel)
	* * * * *

DATE	PROCEEDINGS
8/5/16	Filed Order for PUBLICATION (SIDNEY R. THOMAS) Upon the vote of a majority of non-recused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit. Judge Owens did not participate in the deliberations or vote in this case. [10076928] [13-50561, 13-50562, 13-50566, 13-50571] (MM)
	* * * * *
8/16/16	Received 12 paper copies of excerpts of record in 4 volume(s) filed by Appellants. (sent to en banc court) [10089237] [13-50561, 13-50562, 13-50566, 13-50571] (SML)
	* * * * *
8/18/16	Filed clerk order (Deputy Clerk: WL): The parties are ordered to file, within 14 days of the filing date of this order, simultaneous briefs not to exceed 10 pages on the following question: whether we lack appellate jurisdiction over these appeals, contrary to our holding in United States v. Howard, 480 F.3d 1005, 1011 (9th Cir. 2007). See, e.g., Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106-14 (2009) (describing the types of collateral rulings that may be appealed as sufficiently "final"); Abney v. United States,

DATE	PROCEEDINGS
	431 U.S. 651, 657 (1977) (describing the application of the collateral- order doctrine to appeals in criminal cases). [10092207] [13-50561, 13-50562, 13-50566, 13-50571] (WL)
	* * * * *
9/1/16	Submitted (ECF) Supplemental Brief for review. Submitted by Appellee USA in 13-50561, 13-50562, 13-50566, 13-50571. Date of service: 09/01/2016. [10110772] [13-50561, 13-50562, 13-50566, 13-50571] (Zipp, Daniel)
	* * * * *
9/1/16	Submitted (ECF) Supplemental Brief for review. Submitted by Appellant Rene Sanchez-Gomez in 13-50561. Date of service: 09/01/2016. [10110866] [13-50561, 13-50562, 13-50566, 13-50571] (Johnston, Ellis)
	* * * * *
5/31/17	FILED OPINION (SIDNEY R. THOMAS, MARY M. SCHROEDER, STEPHEN REINHARDT, ALEX KOZINSKI, DIARMUID F. O'SCANNLAIN, BARRY G. SILVERMAN, SUSAN P. GRABER, RICHARD A. PAEZ, MARSHA S. BERZON, CONSUELO M. CALLAHAN and SANDRA S. IKUTA) DENIED. Opinion by Judge Kozinski; Concurrence by Judge Schroeder;

DATE	PROCEEDINGS
	Dissent by Judge Ikuta. FILED AND ENTERED JUDGMENT. [10453287] [13-50561, 13-50562, 13-50566, 13-50571] (RMM)

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 13-50566

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JASMIN ISABEL MORALES, A.K.A. JASMIN MORALES,
DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
11/21/13	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Reporters Transcript required: Yes. Sentence imposed: n/a. Transcript ordered by 12/11/2013. Transcript due 01/10/2014. Appellant briefs and excerpts due by 02/19/2014 for Jasmin Isabel Morales. Appellee brief due 03/21/2014 for United States of America. Appellant's optional reply brief is due 14 days after service of the answering brief. [8873120] (HC)
11/22/13	Received copy of amended notice of appeal from district court. [8877922] (EL)
11/27/13	Filed clerk order (Deputy Clerk: KG): The court sua sponte consolidates interlocutory appeal Nos. 13-50561, 13-50562, and 13-50566. The previously established briefing schedule

DATE	PROCEEDINGS
	shall govern these consolidated appeals. [8880541] [13-50561, 13-50562, 13-50566] (WL)
	* * * * *
4/30/14	Submitted (ECF) Answering brief and Supplemental Excerpts of Record for review and filed Motion to file oversized brief. Submitted by Appellee USA in 13-50561, 13-50562, 13-50566, 13-50571. Date of service: 04/30/2014. [9078581] [13-50561, 13-50562, 13-50566, 13-50571] (Hoffman, Kyle)
	* * * * *
8/25/15	FILED OPINION (MARY M. SCHROEDER, JACQUELINE H. NGUYEN and JACK ZOUHARY) VACATED; REMANDED. Judge: MMS Authoring, FILED AND ENTERED JUDGMENT. [9659006] [13-50561, 13-50562, 13-50566, 13-50571] (RMM)
	* * * * *
11/23/15	Filed (ECF) Appellee USA in 13-50561, 13-50562, 13-50566, 13-50571 petition for rehearing en banc (from 08/25/2015 opinion). Date of service: 11/23/2015. [9767667] [13-50561, 13-50562, 13-50566, 13-50571] (Zipp, Daniel)
	* * * * *
8/5/16	Filed Order for PUBLICATION (SIDNEY R. THOMAS) Upon the vote of a majority of

DATE	PROCEEDINGS
	non-recused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit. Judge Owens did not participate in the deliberations or vote in this case. [10076928] [13-50561, 13-50562, 13-50566, 13-50571] (MM)
	* * * * *
8/18/16	Filed clerk order (Deputy Clerk: WL): The parties are ordered to file, within 14 days of the filing date of this order, simultaneous briefs not to exceed 10 pages on the following question: whether we lack appellate jurisdiction over these appeals, contrary to our holding in United States v. Howard, 480 F.3d 1005, 1011 (9th Cir. 2007). See, e.g., Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106-14 (2009) (describing the types of collateral rulings that may be appealed as sufficiently "final"); Abney v. United States, 431 U.S. 651, 657 (1977) (describing the application of the collateral- order doctrine to appeals in criminal cases). [10092207] [13-50561, 13-50562, 13-50566, 13-50571] (WL)
	* * * * *

DATE	PROCEEDINGS
8/25/16	Filed order (SIDNEY R. THOMAS) The parties are directed to file, on or before September 1, 2016, supplemental briefs of no more than 7,000 words on (1) the effect, if any, of the order filed in Diaz-Lopez v. Presiding United States Magistrate Judge, no. 15-cv-1935-H, and (2) whether the change in procedure described in Diaz-Lopez renders this case moot. [10101386] [13-50561, 13-50562, 13-50566, 13-50571] (WL)
	* * * * *
9/1/16	Submitted (ECF) Supplemental Brief for review. Submitted by Appellee USA in 13-50561, 13-50562, 13-50566, 13-50571. Date of service: 09/01/2016. [10110772] [13-50561, 13-50562, 13-50566, 13-50571] (Zipp, Daniel)
9/1/16	Submitted (ECF) Supplemental Brief for review. Submitted by Appellee USA in 13-50561, 13-50562, 13-50566, 13-50571. Date of service: 09/01/2016. [10110864] [13-50561, 13-50562, 13-50566, 13-50571] (Zipp, Daniel)
	* * * * *
5/31/17	FILED OPINION (SIDNEY R. THOMAS, MARY M. SCHROEDER, STEPHEN REINHARDT, ALEX KOZINSKI, DIARMUID F. O'SCANNLAIN, BARRY G. SILVERMAN, SUSAN P. GRABER, RICHARD A. PAEZ, MARSHA S. BERZON,

DATE	PROCEEDINGS
	CONSUELO M. CALLAHAN and SANDRA S. IKUTA) DENIED. Opinion by Judge Kozinski; Concurrence by Judge Schroeder; Dissent by Judge Ikuta. FILED AND ENTERED JUDGMENT. [10453287] [13-50561, 13-50562, 13-50566, 13-50571] (RMM)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 13-50571

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARK WILLIAM RING, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
11/26/13	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Reporters Transcript required: Yes. Sentence imposed: n/a. Transcript ordered by 12/16/2013. Transcript due 01/15/2014. Appellant briefs and excerpts due by 02/24/2014 for Mark William Ring. Appellee brief due 03/26/2014 for United States of America. Appellant's optional reply brief is due 14 days after service of the answering brief. [8878541] (HC)
	* * * * *
2/13/14	Filed clerk order (Deputy Clerk: GS): The appellants' motion to consolidate No. 13-50571 with 13-50561, 13-50562, and 13-50566 is granted. The briefing schedule is amended as follows. The opening briefs are due February 24, 2014. The answering

DATE	PROCEEDINGS
	brief is due March 26, 2014. The optional reply briefs are due April 9, 2014. The parties are reminded of the court's preference for a joint brief. See 9th Cir. R. 28-4 (In a consolidated case involving multiple separately represented appellants or appellees, all parties on a side are encouraged to join in a single brief to the greatest extent practicable). [8978060] [13-50561, 13-50562, 13-50566, 13-50571] (WL)
	* * * * *
4/30/14	Submitted (ECF) Answering brief and Supplemental Excerpts of Record for review and filed Motion to file oversized brief. Submitted by Appellee USA in 13-50561, 13-50562, 13-50566, 13-50571. Date of service: 04/30/2014. [9078581] [13-50561, 13-50562, 13-50566, 13-50571] (Hoffman, Kyle)
	* * * * *
8/25/15	FILED OPINION (MARY M. SCHROEDER, JACQUELINE H. NGUYEN and JACK ZOUHARY) VACATED; REMANDED. Judge: MMS Authoring, FILED AND ENTERED JUDGMENT. [9659006] [13-50561, 13-50562, 13-50566, 13-50571] (RMM)
	* * * * *
11/23/15	Filed (ECF) Appellee USA in 13-50561, 13-50562, 13-50566, 13-50571 petition for

DATE	PROCEEDINGS
	rehearing en banc (from 08/25/2015 opinion). Date of service: 11/23/2015. [9767667] [13-50561, 13-50562, 13-50566, 13-50571] (Zipp, Daniel)
	* * * * *
8/5/16	Filed Order for PUBLICATION (SIDNEY R. THOMAS) Upon the vote of a majority of non-recused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit. Judge Owens did not participate in the deliberations or vote in this case. [10076928] [13-50561, 13-50562, 13-50566, 13-50571] (MM)
	* * * * *
8/18/16	Filed clerk order (Deputy Clerk: WL): The parties are ordered to file, within 14 days of the filing date of this order, simultaneous briefs not to exceed 10 pages on the following question: whether we lack appellate jurisdiction over these appeals, contrary to our holding in United States v. Howard, 480 F.3d 1005, 1011 (9th Cir. 2007). See, e.g., Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106-14 (2009) (describing the types of collateral rulings that may be appealed as sufficiently "final"); Abney v. United States,

DATE	PROCEEDINGS
	431 U.S. 651, 657 (1977) (describing the application of the collateral- order doctrine to appeals in criminal cases). [10092207] [13-50561, 13-50562, 13-50566, 13-50571] (WL)
	* * * * *
9/1/16	Submitted (ECF) Supplemental Brief for review. Submitted by Appellee USA in 13-50561, 13-50562, 13-50566, 13-50571. Date of service: 09/01/2016. [10110772] [13-50561, 13-50562, 13-50566, 13-50571] (Zipp, Daniel)
9/1/16	Submitted (ECF) Supplemental Brief for review. Submitted by Appellee USA in 13-50561, 13-50562, 13-50566, 13-50571. Date of service: 09/01/2016. [10110864] [13-50561, 13-50562, 13-50566, 13-50571] (Zipp, Daniel)
	* * * * *
5/31/17	FILED OPINION (SIDNEY R. THOMAS, MARY M. SCHROEDER, STEPHEN REINHARDT, ALEX KOZINSKI, DIARMUID F. O'SCANNLAIN, BARRY G. SILVERMAN, SUSAN P. GRABER, RICHARD A. PAEZ, MARSHA S. BERZON, CONSUELO M. CALLAHAN and SANDRA S. IKUTA) DENIED. Opinion by Judge Kozinski; Concurrence by Judge Schroeder; Dissent by Judge Ikuta. FILED AND ENTERED JUDGMENT.

DATE	PROCEEDINGS
	[10453287] [13-50561, 13-50562, 13-50566, 13-50571] (RMM)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Docket No. 3:13-cr-04209-LAB-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

RENE SANCHEZ-GOMEZ, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/24/13	1	COMPLAINT as to Rene Sanchez-Gomez (Attachments: # 1 Info Sheet) (ecs) [3:13-mj-03928-BLM-LAB] (Entered: 10/24/2013)
		* * * * *
10/24/16	3	Minute Entry for proceedings held before Magistrate Judge Barbara Lynn Major: Initial Appearance as to "person charged as" Rene Sanchez-Gomez held on 10/24/2013. Federal Defenders appointed for "person charged as" Rene Sanchez-Gomez. Defense counsels objection to full shackles denied; Defense counsels request for an evidentiary hearing denied. For all reasons stated on the record during criminal duty on 10/21/2013. The court specifically in-

DATE	DOCKET NUMBER	PROCEEDINGS
		corporates the reasoning and findings stated on the record on 10/21/2013 into the Courts denial in this case. Bond set as to "person charged as" Rene Sanchez-Gomez (1) No Bail as Defendant is unwilling to admit ID. Preliminary Hearing set for 11/07/2013 at 9:30 AM before Magistrate Judge Barbara L. Major. Arraignment set for 11/19/2013 at 9:30 AM before Magistrate Judge Barbara L. Major. (Interpreter Deborah Berry). (CD# 10/24/2013 BLM 13:3:28-3:55). (Judge: BLM 13:2:55-2:56; 3:01-3:03); (Fed Def: BLM13:2:56-3:01). (Plaintiff Attorney Alex Markle, AUSA). (Defendant Attorney Craig Smith, FD-S/A). (no document attached) (lao) [3:13-mj-03928-BLM-LAB] (Entered: 10/25/2013)
10/24/13	4	***Spanish Interpreter needed as to Rene Sanchez-Gomez (no document attached) (lao) [3:13-mj-03928-BLM-LAB] (Entered: 10/25/2013)
		* * * * *
10/28/13	7	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to Rene Sanchez-Gomez

DATE	DOCKET NUMBER	PROCEEDINGS
		held on 10/24/2013, before Magistrate Judge Barbara Lynn Major. Court Reporter/Transcriber: Cameron P. Kircher. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 11/18/2013. Redacted Transcript Deadline set for 12/2/2013. Release of Transcript Restriction set for 1/27/2014. (Transcript includes proceedings held in case numbers 07-cr-02309-BTM, 13-mj-03824-BLM, 13-mj-03870-BLM, 13-mj-03892-BLM, 13-mj-03893-BLM, 13-mj-03897-BLM, 13-mj-03905-BLM, 13-mj-03928-BLM, 13-mj-03929-BLM, 13-mj-03930-BLM, 13-mj-03931-BLM, 13-mj-03932-

DATE	DOCKET NUMBER	PROCEEDINGS
		BLM, 13-mj-03933-BLM, 13-mj-03934-BLM, and 13-mj-03935-BLM.) (akr) [3:13-mj-03928-BLM-LAB] (Entered: 10/28/2013)
10/28/13	8	APPEAL OF MAGISTRATE JUDGE DECISION (Other), to District Court by Rene Sanchez-Gomez (Attachments: # 1 Appendix) (Livett, Caroline) (Specialist notified of filing) (dls). [3:13-mj-03928-BLM-LAB] (Entered: 10/28/2013)
		* * * * *
10/31/13	13	MOTION *to Order Mr. Sanchez-Gomez Unshackled* by Rene Sanchez-Gomez. (Attachments: # 1 Exhibit A)(Livett, Caroline) (dls). [3:13-mj-03928-BLM-LAB] (Entered: 10/31/2013)
		* * * * *
11/4/13	15	ORDER Denying 13 Defendant's Motion To Be Unshackled On November 5, 2013 as to Rene Sanchez-Gomez (1), and Referring 8 Defendant's Emergency Motion Regarding Shackling. With regard to defendants emergency motion to revoke the district-wide policy of shackling, thereby pre-

DATE	DOCKET NUMBER	PROCEEDINGS
		cluding the shackling of defendant in the future, this Court refers the motion to the Honorable Larry A. Burns, United States District Judge, who will be hearing related motions of the same or similar character as the low number district judge. Signed by Judge John A. Houston on 11/04/13. (cc: LAB Chambers) (jpp) (Modified on 11/4/2013 to edit text re: Name of Judge who signed the order; NEF resent to all parties.) (jpp) (jrd) [3:13-mj-03928-BLM-LAB] (Entered: 11/04/2013)
		* * * * *
11/7/13	17	Minute Entry for proceedings held before Magistrate Judge Barbara Lynn Major: Preliminary Hearing Continued as to Rene Sanchez-Gomez. Defense oral motion to continue hearing granted. Preliminary Hearing continued to 11/21/2013 at 09:30 AM in Courtroom 1C before Magistrate Judge Barbara Lynn Major. Arraignment set for 11/19/2013 at 9:30 AM is vacated. (Interpreter Deborah Berry). (CD# 11/7/2013 BLM 9:44-9:55). (Plaintiff Attorney Alex Markle, AUSA). (Defen-

DATE	DOCKET NUMBER	PROCEEDINGS
		dant Attorney Sandra Hourani, FD-S/A). (no document attached) (jer) [3:13-mj-03928-BLM-LAB] (Entered: 11/07/2013)
11/7/13	18	RESPONSE in Opposition by USA as to Rene Sanchez-Gomez re 13 MOTION *to Order Mr. Sanchez-Gomez Unshackled* (Attachments: # 1 Exhibit 1-3, # 2 Declaration of Keith Johnson, # 3 Proof of Service) (Cole, William) (sjt). [3:13-mj-03928-BLM-LAB] (Entered: 11/07/2013)
11/7/13	19	ORDER OF TRANSFER PURSUANT TO CRIMINAL LOCAL RULE 57.2. Case reassigned to Judge Larry Alan Burns for all further proceedings. Judge John A. Houston no longer assigned to case. The new case number is 13-mj-03928-BLM-LAB. Signed by Judge John A. Houston on 11/6/2013. Signed by Judge Larry Alan Burns on 11/4/2013. (dls) (jrd) [3:13-mj-03928-BLM-LAB] (Entered: 11/08/2013)
		* * * * *
11/20/13	23	NOTICE OF APPEAL by Rene Sanchez-Gomez re Denial of Defense Request for Removal of Leg Shackles. Fee Waived. (Notice

DATE	DOCKET NUMBER	PROCEEDINGS
		of Appeal electronically transmitted to US Court of Appeals.) (Johnston, Ellis). Modified on 11/20/2013 to add text noting Order being appealed, as stated in the Notice of Appeal. (akr). [3:13-mj-03928-BLM-LAB] (Entered: 11/20/2013)
		* * * * *
11/21/13	29	ORDER Denying Emergency Motion to Revoke District-Wide Policy Regarding Shackling of Pretrial Detained Defendants, and ORDER Denying Appeal of Magistrate Judges' Ruling as to Defendants Morales and Patricio-Guzman as to Rene Sanchez-Gomez. Signed by Judge Larry Alan Burns on 11/21/13. (kaj) [3:13-mj-03928-BLM-LAB] (Entered: 11/21/2013)
		* * * * *
11/21/13	34	INFORMATION as to Rene Sanchez-Gomez (1) count(s) 1. (mnb) (Entered: 11/25/2013)
		* * * * *
11/21/13	36	Minute Entry for proceedings held before Magistrate Judge Barbara Lynn Major: Arraignment

DATE	DOCKET NUMBER	PROCEEDINGS
		on Information as to Rene Sanchez-Gomez (1) Count 1 held on 11/21/2013. Change of Plea Hearing as to Rene Sanchez-Gomez held on 11/21/2013. Plea Tendered by Rene Sanchez-Gomez Guilty on count one(1) of the Information. Excludable(s) started as to Rene Sanchez-Gomez: XT Interest of Justice 11/21/2013-12/16/2013. PSR Waived—CR History Report Ordered. (Sentence With CR History Report set for 12/16/2013 09:30 AM in Courtroom 14A before Judge Larry Alan Burns.) (Interpreter Juan Davila-Santiago). (CD# 11/21/2013 BLM1: 1019-1107). (Plaintiff Attorney Matthew Sutton s/a, AUSA). (Defendant Attorney Caroline Livett, FD). (no document attached) (mnb) (Entered: 11/25/2013)
11/22/13	30	AMENDED NOTICE OF APPEAL by Rene Sanchez-Gomez re Denial of Defense Request for Removal of Leg Shackles, Denial of Motion to Recuse, and Partial Denial of Motion to Grant Discovery. Fee Waived. (Notice of Appeal electronically transmitted to US Court of Appeals.) (Johnston,

DATE	DOCKET NUMBER	PROCEEDINGS
		Ellis). Modified on 11/22/2013 to add text noting that this is an "Amended Notice of Appeal." The USCA Case Number is 13-50561. (akr). (Entered: 11/22/2013)
		* * * * *
12/2/13	38	NOTICE OF FILING OF OFFICIAL TRANSCRIPT (Recusal Motion Hearing) as to Rene Sanchez-Gomez for date of 11/12/2013 before Judge Larry Alan Burns, re 23 Notice of Appeal, 30 Amended Notice of Appeal. Court Reporter/Transcriber: Eva Oemick. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court

DATE	DOCKET NUMBER	PROCEEDINGS
		Reporter/Transcriber 12/23/2013. Redacted Transcript Deadline set for 1/2/2014. Release of Transcript Restriction set for 3/3/2014. (Transcript filed in case numbers 13-cr-04209-LAB (13-mj-03928-BLM-LAB), 13-cr-04126-JLS (13-mj-03858-BLM-LAB), and 13-mj-03882-JMA-LAB.) (akr) (Entered: 12/02/ 2013)
12/2/13	39	NOTICE OF FILING OF OFFICIAL TRANSCRIPT (Motion Hearing Re: Appeal of Magistrate Judge Decision) as to Rene Sanchez-Gomez for date of 11/15/ 2013 before Judge Larry Alan Burns, re 23 Notice of Appeal, 30 Amended Notice of Appeal. Court Reporter/Transcriber: Eva Oemick. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The follow-

DATE	DOCKET NUMBER	PROCEEDINGS
		ing deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 12/23/2013. Redacted Transcript Deadline set for 1/2/2014. Release of Transcript Restriction set for 3/3/2014. (Transcript filed in case numbers 13-cr-04209-LAB (13-mj-03928-BLM-LAB), 13-cr-04126-JLS (13-mj-03858-BLM-LAB), And 13-mj-03882-JMA-LAB.) (akr) (Entered: 12/02/2013)
		* * * * *
12/10/13	44	ORDER ACCEPTING GUILTY PLEA as to count(s) 1 of the Information as to Rene Sanchez-Gomez adopting 37 Findings and Recommendation. Signed by Judge Larry Alan Burns on 12/10/13. (kaj) (Entered: 12/10/2013)
		* * * * *
12/16/13	47	ABSTRACT OF ORDER Releasing Rene Sanchez-Gomez. (kaj) (jrd) (Entered: 12/17/2013)
12/20/13	48	JUDGMENT as to Rene Sanchez-Gomez (1), Count(s) 1, Probation 5 years, no fine, assessment $100.00 —waived. Signed by Judge Larry

DATE	DOCKET NUMBER	PROCEEDINGS
		Alan Burns. (kaj) (jrd) (Entered: 12/20/2013)
		* * * * *
12/18/17	70	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to Rene Sanchez-Gomez held on 11/23/2015, before Judge Larry Alan Burns. Court Reporter/Transcriber: Debra M. Henson. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 1/8/2018. Redacted Transcript Deadline set for 1/18/2018. Release of Transcript Restriction set for 3/19/2018. (Transcript filed in case numbers 13-cr-04209-LAB and 15-cr-01999-

DATE	DOCKET NUMBER	PROCEEDINGS
		LAB.) (akr) (Entered: 12/18/2017)
12/19/17	71	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to Rene Sanchez-Gomez held on 11/12/2015, before Magistrate Judge Peter C. Lewis. Court Reporter/Transcriber: Ellen L. Simone. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 1/9/2018. Redacted Transcript Deadline set for 1/19/2018. Release of Transcript Restriction set for 3/19/2018. (akr) (Entered: 12/19/2017)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(SAN DIEGO)

Docket No. 3:13-mj-03882-JMA-LAB-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

MOISES PATRICIO-GUZMAN, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/21/13	1	COMPLAINT as to Moises Patricio-Guzman. (Attachments: # 1 Info Sheet) (ecs) (jcj). (Entered: 10/21/2013)
		* * * * *
10/21/16	3	Minute Entry for proceedings held before Magistrate Judge Barbara Lynn Major: Initial Appearance as to Moises Patricio-Guzman held on 10/21/2013. Federal Defenders appointed for Moises Patricio-Guzman. Bond set as to Moises Patricio-Guzman (1) $10,000 C/CS. Preliminary Hearing set for 10/31/13 at 2:00 PM before Magistrate Judge Jan M. Adler. Arraignment set for 11/14/13 at 9:30 AM before Magis-

DATE	DOCKET NUMBER	PROCEEDINGS
		trate Judge Barbara L. Major. Defense counsels objection to full shackles and evidentiary hearing is Denied. (Interpreter Daniel Novoa). (CD# 10/21/2013 BLM 3:13-3:20). (Plaintiff Attorney Alex Markle, AUSA). (Defendant Attorney Kimberly Trimble, FD-S/A). (no document attached) (ecs) (Entered: 10/22/2013)
		* * * * *
10/21/13	5	ORDER Setting Conditions of Release. Bond set for Moises Patricio-Guzman (1) $10,000 C/CS. Signed by Magistrate Judge Barbara Lynn Major on 10/21/2013. (mtb) (Entered: 10/22/2013)
		* * * * *
10/24/13	8	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to Moises Patricio-Guzman held on 10/21/2013, before Magistrate Judge Barbara Lynn Major. Court Reporter/Transcriber: Cameron P. Kircher. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of

DATE	DOCKET NUMBER	PROCEEDINGS
		Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/ Transcriber 11/14/2013. Redacted Transcript Deadline set for 11/25/2013. Release of Transcript Restriction set for 1/22/ 2014. (Transcript includes proceedings held in case numbers 98-cr-01733-BTM, 09-cr-01070-BEN, 09-cr-07026-AJB, 11-cr-00361-H, 12-cr-00693-MMA, 12-cr-00818-DMS, 12-cr-01283-JM, 12-cr-01583-BTM, 13-cr-00789-CAB, 13-cr-03670-BTM, 13-mj-03216-BLM, 13-mj-03804-RBB, 13-mj-03834-BLM, 13-mj-03858-BLM, 13-mj-03860-RBB, 13-mj-03867-BLM, 13-mj-03868-BLM, 13-mj-03869-BLM, 13-mj-03870-BLM, 13-mj-03871-BLM, 13-mj-03872-BLM, 13-mj-03873-BLM, 13-mj-03874-BLM, 13-mj-03875-BLM,

DATE	DOCKET NUMBER	PROCEEDINGS
		13-mj-03876-BLM, 13-mj-03877-BLM, 13-mj-03880-BLM, 13-mj-03881-BLM, 13-mj-03882-BLM, 13-mj-03883-BLM, 13-mj-03884-BLM, 13-mj-03885-BLM, 13-mj-03886-BLM, 13-mj-03887-BLM, and 13-mj-03888-BLM.) (akr) (Entered: 10/24/2013)
10/28/13	9	APPEAL OF MAGISTRATE JUDGE DECISION (Other), to District Court by Moises Patricio-Guzman (Attachments: # 1 Appendix) (Miller, Judith) (Specialist notified of filing) (dls). (Entered: 10/28/2013)
10/29/13	10	MINUTE ORDER in case as to Moises Patricio-Guzman. Case assigned to Judge Gonzalo P. Curiel for Appeal proceedings. The new case number is 13mj 3882-BLM-GPC. (no document attached) (dlg) (Entered: 10/29/2013)
		* * * * *
10/31/13	12	Minute Entry for proceedings held before Magistrate Judge Jan M. Adler: Change of Plea Hearing as to Moises Patricio-Guzman held on 10/31/2013. Plea entered by Moises Patricio-Guzman (1) Guilty Count 2. PSR Waived,

DATE	DOCKET NUMBER	PROCEEDINGS
		Sentence Without PSR Hearing held on 10/31/2013 for Moises Patricio-Guzman (1), Count(s) 2, defendant sentenced to BOP for 30 days; No fine; $10 special assessment waived.. Count 1 dismissed. Objection to shackling granted in part and denied in part. Wrists shackles removed for the change of plea and sentencing. (Interpreter Matias Pizarro). (CD#10/31/2013 JMA13-1-3:03-3:25). (Plaintiff Attorney Matt Sutton, AUSA). (Defendant Attorney Karen Lehmman, FD-S/A). (no document attached) (rla) (Entered: 11/01/2013)
		* * * * *
11/6/13	15	JUDGMENT as to Moises Patricio-Guzman (1), Count(s) 2, defendant sentenced to BOP for 30 days; No fine; $10 special assessment waived. Signed by Magistrate Judge Jan M. Adler. Signed by Magistrate Judge Jan M. Adler on 10/31/2013. (dls) (cap). (Entered: 11/06/2013)
		* * * * *
11/6/13	17	ORDER OF TRANSFER PURSUANT TO CRIMINAL LOCAL

DATE	DOCKET NUMBER	PROCEEDINGS
		RULE 57.2. Case reassigned to Judge Larry Alan Burns for all further Appeal proceedings. Judge Gonzalo P. Curiel no longer assigned to case. The new case number is 13mj3882-JMA-LAB. Signed by Judge Gonzalo P. Curiel on 11/5/13. Signed by Judge Larry Alan Burns on 11/4/13. (dlg) (Entered: 11/07/2013)
		* * * * *
11/19/13	20	ORDER denying Motion to Recuse; and Order granting in part Motion for Discovery as to Moises Patricio-Guzman. Because Defendants have not pointed to any adequate basis for recusal, and because the Court itself can find none, the motion to recuse is Denied. The Court determined that Defendants would have adequate information to make and support their arguments concerning the constitutionality of the shackling policy. To this extent, the discovery motion is Granted. In other respects, the Court finds the requests too broad and the information sought unnecessary. The motion is therefore granted in part and denied in part. Signed

DATE	DOCKET NUMBER	PROCEEDINGS
		by Judge Larry Alan Burns on 11/19/13.. Signed by Judge Larry Alan Burns on 11/19/13. (lao) (Entered: 11/19/2013)
		* * * * *
11/20/13	22	NOTICE OF APPEAL by Moises Patricio-Guzman re Denial of Defense Request for Removal of Leg Shackles. Fee Waived. (Notice of Appeal electronically transmitted to US Court of Appeals.) (Johnston, Ellis). Modified on 11/20/2013 to add text noting Order being appealed, as stated in the Notice of Appeal. (akr). (Entered: 11/20/2013)
		* * * * *
11/21/13	26	ORDER Amending Order Denying Motion to Recuse and Granting in Part Discovery Motion as to Moises Patricio-Guzman. Signed by Judge Larry Alan Burns on 11/20/13. (kaj) (Entered: 11/21/2013)
11/21/13	27	ORDER Denying Emergency Motion to Revoke District-Wide Policy Regarding Shackling of Pretrial Detained Defendants, and ORDER Denying Appeal of Magistrate Judges' Ruling as to De-

DATE	DOCKET NUMBER	PROCEEDINGS
		fendants Morales and Patricio-Guzman as to Moises Patricio-Guzman. Signed by Judge Larry Alan Burns on 11/21/13. (kaj) (Entered: 11/21/2013)
11/22/13	28	AMENDED NOTICE OF APPEAL by Moises Patricio-Guzman re Denial of Defense Request for Removal of Leg Shackles, Denial of Motion to Recuse, and Partial Denial of Motion to Grant Discovery. Fee Waived. (Notice of Appeal electronically transmitted to US Court of Appeals.) (Johnston, Ellis). Modified on 11/22/2013 to add text noting that this is an "Amended Notice of Appeal." The USCA Case Number is 13-50562. (akr). (Entered: 11/22/2013)
		* * * * *
12/2/13	30	NOTICE OF FILING OF OFFICIAL TRANSCRIPT (Recusal Motion Hearing) as to Moises Patricio-Guzman for date of 11/12/2013 before Judge Larry Alan Burns, re 28 Amended Notice of Appeal, 22 Notice of Appeal. Court Reporter/Transcriber: Eva Oemick. Transcript may be viewed at the court public terminal

DATE	DOCKET NUMBER	PROCEEDINGS
		or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 12/23/2013. Redacted Transcript Deadline set for 1/2/2014. Release of Transcript Restriction set for 3/3/2014. (Transcript filed in case numbers 13-cr-04209-LAB (13-mj-03928-BLM-LAB), 13-cr-04126-JLS (13-mj-03858-BLM-LAB), and 13-mj-03882-JMA-LAB.) (akr) (Entered: 12/02/2013)
12/2/13	31	NOTICE OF FILING OF OFFICIAL TRANSCRIPT (Motion Hearing Re: Appeal of Magistrate Judge Decision) as to Moises Patricio-Guzman for date of 11/15/2013 before Judge Larry Alan Burns, re 28 Amended Notice of Appeal, 22 Notice of Appeal.

DATE	DOCKET NUMBER	PROCEEDINGS
		Court Reporter/Transcriber: Eva Oemick. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 12/23/2013. Redacted Transcript Deadline set for 1/2/2014. Release of Transcript Restriction set for 3/3/2014. (Transcript filed in case numbers 13-cr-04209-LAB (13-mj-03928-BLM-LAB), 13-cr-04126-JLS (13-mj-03858-BLM-LAB), and 13-mj-03882-JMA-LAB.) (akr) (Entered: 12/02/2013)
		* * * * *
12/18/17	42	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to Moises Patricio-Guzman

DATE	DOCKET NUMBER	PROCEEDINGS
		held on 10/31/2013, before Magistrate Judge Jan M. Adler. Court Reporter/Transcriber: Amanda M. LeGore. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 1/8/2018. Redacted Transcript Deadline set for 1/18/2018. Release of Transcript Restriction set for 3/19/2018. (akr) (Entered: 12/18/2017)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(SAN DIEGO)

Docket No. 3:13-cr-04126-JLS-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASMIN ISABEL MORALES, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/18/13	1	COMPLAINT as to Jasmin Morales. (Attachments: # 1 Info Sheet) (mtb)(av1). [3:13-mj-03858-BLM-LAB] (Entered: 10/18/2013)
		* * * * *
10/21/13	5	Minute Entry for proceedings held before Magistrate Judge Barbara Lynn Major: Initial Appearance as to Jasmin Morales held on 10/21/2013. Attorney Federal Defenders appointed for Jasmin Morales. Bond set as to Jasmin Morales (1) No Bail-Govts oral motion to detain (flight). Detention Hearing set for 10/24/2013 09:30 AM before Magistrate Judge Barbara Lynn Major.

DATE	DOCKET NUMBER	PROCEEDINGS
		Preliminary Hearing set for 10/31/2013 at 9:00 AM Before Judge William M. McCurine Jr. Arraignment set for 11/14/2013 at 9:30 AM Before Judge Barbara L Major. Judge update in case as to Jasmin Morales. Magistrate Judge Barbara Lynn Major added to the case. Magistrate Judge Ruben B. Brooks is no longer assigned to case and Magistrate Judge Barbara Lynn Major is now assigned to the case. The new case number is 13mj3858 BLM. Defense counsel objection to full shackles—Denied; Evidentiary hearing—Denied. (Interpreter Daniel Novoa). (CD# 10/21/2013 BLM13 2:57-3:13). (Plaintiff Attorney Alex Markle, AUSA). (Defendant Attorney Kimberly Trimbel, FD-S/A). (no document attached) (mtb) [3:13-mj-03858-BLM-LAB] (Entered: 10/22/2013)
		* * * * *
10/23/13	9	NOTICE OF ATTORNEY APPEARANCE: Judith Miller appearing for Jasmin Morales (Miller, Judith) Attorney Judith Miller added to party Jasmin Morales

DATE	DOCKET NUMBER	PROCEEDINGS
		(pty:dft) (kcm). [3:13-mj-03858-BLM-LAB] (Entered: 10/23/2013)
		* * * * *
10/24/13	11	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to Jasmin Morales held on 10/21/2013, before Magistrate Judge Barbara Lynn Major. Court Reporter/Transcriber: Cameron P. Kircher. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 11/14/2013. Redacted Transcript Deadline set for 11/25/2013. Release of Transcript Restriction set for 1/22/2014. (Transcript includes pro-

DATE	DOCKET NUMBER	PROCEEDINGS
		ceedings held in case numbers 98-cr-01733-BTM, 09-cr-01070-BEN, 09-cr-07026-AJB, 11-cr-00361-H, 12-cr-00693-MMA, 12-cr-00818-DMS, 12-cr-01283-JM, 12-cr-01583-BTM, 13-cr-00789-CAB, 13-cr-03670-BTM, 13-mj-03216-BLM, 13-mj-03804-RBB, 13-mj-03834-BLM, 13-mj-03858-BLM, 13-mj-03860-RBB, 13-mj-03867-BLM, 13-mj-03868-BLM, 13-mj-03869-BLM, 13-mj-03870-BLM, 13-mj-03871-BLM, 13-mj-03872-BLM, 13-mj-03873-BLM, 13-mj-03874-BLM, 13-mj-03875-BLM, 13-mj-03876-BLM, 13-mj-03877-BLM, 13-mj-03880-BLM, 13-mj-03881-BLM, 13-mj-03882-BLM, 13-mj-03883-BLM, 13-mj-03884-BLM, 13-mj-03885-BLM, 13-mj-03886-BLM, 13-mj-03887-BLM, and 13-mj-03888-BLM.) (akr) [3:13-mj-03858-BLM-LAB] (Entered: 10/24/2013)
10/24/13	12	Minute Entryfor proceedings held before Magistrate Judge Barbara Lynn Major: Defense counsel's objection to full shackles denied. Detention Hearing as to Jasmin Morales held on 10/24/2013. Denying 7 Motion to Detain as to Jasmin Morales (1); Bond set as to

DATE	DOCKET NUMBER	PROCEEDINGS
		Jasmin Morales (1) $40,000 P/S secured by property. Preliminary Hearing Continued as to Jasmin Morales. Defense oral motion to continue hearing granted. (Preliminary Hearing continued to 11/14/2013 09:30 AM before Magistrate Judge Barbara Lynn Major.); Preliminary hearing set before Magistrate Judge McCurine—vacated. (Interpreter Deborah Berry). (CD# 10/24/2013 BLM1:949-1009; 1028-1037). (Plaintiff Attorney AUSA, Alex Markle). (Defendant Attorney Judith Miller, FD). (no document attached) (tml) [3:13-mj-03858-BLM-LAB] (Entered: 10/25/2013)
10/24/13	13	ORDER Setting Conditions of Release. Bond set for Jasmin Morales (1) $40,000 P/S. Secured by a trust deed to the United States on real estate approved by a Federal Judge; the co-signatures of owners of property. Signed by Magistrate Judge Barbara Lynn Major on 10/24/2013. (cxl) [3:13-mj-03858-BLM-LAB] (Entered: 10/25/2013)
10/28/13	14	APPEAL OF MAGISTRATE JUDGE DECISION (Other), to

DATE	DOCKET NUMBER	PROCEEDINGS
		District Court by Jasmin Morales (Attachments: # 1 Appendix) (Miller, Judith) (Specialist notified of filing) (dls). [3:13-mj-03858-BLM-LAB] (Entered: 10/28/2013)
10/29/13	15	MINUTE ORDER OF JUDGE TRANSFER in case as to Jasmin Morales. Case assigned to Judge Larry Alan Burns for Appeal proceedings. The new case number is 13mj3858-BLM-LAB. (no document attached) (dlg) [3:13-mj-03858-BLM-LAB] (Entered: 10/29/2013)
		* * * * *
11/7/13	25	RESPONSE in Opposition by USA as to Jasmin Morales re 7 MOTION to Detain *all Pre-Trial Defendants in Shackles* (Attachments: # 1 Exhibit 1-3, # 2 Declaration of Keith Johnson, # 3 Proof of Service) (Cole, William) (cxl). [3:13-mj-03858-BLM-LAB] (Entered: 11/07/2013)
11/8/13	26	MOTION for Recusal *of All District Judges from the Southern District of California* by Jasmin Morales. (Attachments: # 1 Memo of Points and Authorities, # 2 Appendix) (Miller, Judith) (cxl).

DATE	DOCKET NUMBER	PROCEEDINGS
		[3:13-mj-03858-BLM-LAB] (Entered: 11/08/2013)
11/8/13	27	MOTION to Compel Discovery by Jasmin Morales. (Attachments: # 1 Memo of Points and Authorities) (Miller, Judith) (cxl). [3:13-mj-03858-BLM-LAB] (Entered: 11/08/2013)
11/8/13	28	MOTION for Order *for the Issuance of Subpoenas Under Rule 17(c)* by Jasmin Morales. (Attachments: # 1 Declaration) (Miller, Judith) [3:13-mj-03858-BLM-LAB] (Entered: 11/08/2013)
11/11/13	29	RESPONSE in Opposition by USA as to Jasmin Morales re 26 MOTION for Recusal *of All District Judges from the Southern District of California*, 28 MOTION for Order *for the Issuance of Subpoenas Under Rule 17(c)*, 27 MOTION to Compel Discovery (Attachments: # 1 Proof of Service) (Cole, William) [3:13-mj-03858-BLM-LAB] (Entered: 11/11/2013)
11/12/13	30	Minute Entryfor proceedings held before Judge Larry Alan Burns: Motion Hearing as to Jasmin Morales held on 11/12/2013. Denying 26 MOTION for Recusal *of All*

DATE	DOCKET NUMBER	PROCEEDINGS
		District Judges from the Southern District of California filed by Jasmin Morales, denying 27 MOTION to Compel Discovery filed by Jasmin Morales. Defense counsel's request to remove ankle shackles—denied. APPEAL OF MAGISTRATE JUDGE DECISION Hearing set for 11/15/2013 10:00 AM in Courtroom 14A before Judge Larry Alan Burns. (Court Reporter Eva Oemick). (Plaintiff Attorney William P. Cole). (Defendant Attorney Judith Miller, FD; Shereen Charlick, FD). (no document attached) [3:13-mj-03858-BLM-LAB] (Entered: 11/13/2013)
		* * * * *
11/14/13	32	SUPPLEMENTAL DOCUMENT by Jasmin Morales re 14 Appeal of Magistrate Judge Decision to District Court (Attachments: # 1 Declaration) (Cahn, Reuben) [3:13-mj-03858-BLM-LAB] (Entered: 11/14/2013)
11/14/13	33	INFORMATION as to Jasmin Isabel Morales (1) count(s) 1. (mnb) (cap). (Entered: 11/15/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
11/14/13	35	Minute Entry for proceedings held before Magistrate Judge Barbara Lynn Major: Defendant Jasmin Morales states her true name as: Jasmin Isabel Morales. Arraignment on Information as to Jasmin Isabel Morales (1) Count 1 held on 11/14/2013. Not Guilty plea entered. Court confirms the Motion Hearing re Shackles as previously set for 11/15/2013 10:00am before Judge Larry A. Burns. Additionally, and in accordance with General Order 607, the case has been randomly assigned to Judge Janis L. Sammartino, instead of Judge Larry A. Burns. Motion Hearing/Trial Setting set for 12/13/2013 01:30 PM in Courtroom 4A before Judge Janis L. Sammartino. (CD# 11/14/2013 BLM1: 940-958). (Plaintiff Attorney Alex Markle s/a, SAUSA). (Defendant Attorney Judith Miller, FD). (no document attached) (mnb) (Entered: 11/15/2013)
11/15/13	36	Minute Entry for proceedings held before Judge Larry Alan Burns: Motion Hearing re:

DATE	DOCKET NUMBER	PROCEEDINGS
		APPEAL OF MAGISTRATE JUDGE DECISION (Other), to District Court as to Jasmin Isabel Morales held on 11/15/2013. Defense counsel's request to remove leg shackles—denied. Court to issue order. (Court Reporter/ ECR Eva Oemick). (Plaintiff Attorney William P. Cole). (Defendant Attorney Judith Miller, FD; Reuben Cahn, FD; Shereen Charlick, FD). (no document attached) (tlw) (Entered: 11/15/ 2013)
		* * * * *
11/19/13	39	ORDER Denying Motion to Recuse; and Order Granting in Part Motion for Discovery as to Jasmin Isabel Morales. Signed by Judge Larry Alan Burns on 11/19/2013. [previously filed in 13mj3858-BLM-LAB as Doc #35]. (jao) (jrl). (Entered: 11/20/2013)
11/20/13	38	NOTICE OF APPEAL by Jasmin Isabel Morales re Denial of Defense Request for Removal of Leg Shackles. Fee Waived. (Notice of Appeal electronically transmitted to US Court of Appeals.) (Johnston, Ellis). Modified on 11/20/2013 to add text noting Or-

DATE	DOCKET NUMBER	PROCEEDINGS
		der being appealed, as stated in the Notice of Appeal. (akr). (Entered: 11/20/2013)
		* * * * *
11/21/13	41	SUPPLEMENTAL DOCUMENT by USA as to Jasmin Isabel Morales re 36 Motion Hearing, (Attachments: # 1 Exhibit 4 and 5) (Cole, William) (jao). (Entered: 11/21/2013)
		* * * * *
11/21/13	45	ORDER Amending Order Denying Motion to Recuse and Granting in Part Discovery Motion as to Jasmin Isabel Morales. Signed by Judge Larry Alan Burns on 11/20/13. (kaj) (Entered: 11/21/2013)
11/21/13	46	ORDER Denying Emergency Motion to Revoke District-Wide Policy Regarding Shackling of Pretrial Detained Defendants, and ORDER Denying Appeal of Magistrate Judges' Ruling as to Defendants Morales and Patricio-Guzman as to Jasmin Isabel Morales. Signed by Judge Larry Alan Burns on 11/21/13. (kaj) (Entered: 11/21/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
11/22/13	47	AMENDED NOTICE OF APPEAL by Jasmin Isabel Morales re Denial of Defense Request for Removal of Leg Shackles, Denial of Motion to Recuse, and Partial Denial of Motion to Grant Discovery. Fee Waived. (Notice of Appeal electronically transmitted to US Court of Appeals.) (Johnston, Ellis). Modified on 11/22/2013 to add text noting that this is an "Amended Notice of Appeal." The USCA Case Number is 13-50566. (akr). (Entered: 11/22/2013)
		* * * * *
11/26/13	51	MODIFIED ORDER Setting Conditions of Release. Bond set for Jasmin Isabel Morales (1) 40,000 P/S. Secured by the cosignatures of two financially responsible adults (1 must be related). Signed by Magistrate Judge Barbara Lynn Major on 11/26/2013. (jao) (Entered: 11/26/2013)
		* * * * *
11/27/13	53	ABSTRACT OF ORDER Releasing Jasmin Isabel Morales (1) (Re: Doc. No. 54). Defendant released on $40,000 P/S bond posted.

DATE	DOCKET NUMBER	PROCEEDINGS
		Defendant to be released to Pretrial Services for transport to C.R.A.S.H. (aef) (jrd) (Entered: 11/27/2013)
11/27/13	54	P/S Bond Filed as to Jasmin Isabel Morales in amount of $40,000. Signed by Magistrate Judge Barbara Lynn Major on 11/27/2013. (dls) (cap). (Entered: 11/27/2013)
12/2/13	55	NOTICE OF FILING OF OFFICIAL TRANSCRIPT (Recusal Motion Hearing) as to Jasmin Isabel Morales for date of 11/12/2013 before Judge Larry Alan Burns, re 47 Amended Notice of Appeal, 38 Notice of Appeal. Court Reporter/Transcriber: Eva Oemick. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The follow-

DATE	DOCKET NUMBER	PROCEEDINGS
		ing deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 12/23/2013. Redacted Transcript Deadline set for 1/2/2014. Release of Transcript Restriction set for 3/3/2014. (Transcript filed in case numbers 13-cr-04209-LAB (13-mj-03928-BLM-LAB), 13-cr-04126-JLS (13-mj-03858-BLM-LAB), and 13-mj-03882-JMA-LAB.) (akr) (Entered: 12/02/2013)
12/2/13	56	NOTICE OF FILING OF OFFICIAL TRANSCRIPT (Motion Hearing Re: Appeal of Magistrate Decision) as to Jasmin Isabel Morales for date of 11/15/2013 before Judge Larry Alan Burns, re 47 Amended Notice of Appeal, 38 Notice of Appeal. Court Reporter/Transcriber: Eva Oemick. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the

DATE	DOCKET NUMBER	PROCEEDINGS
		file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 12/23/2013. Redacted Transcript Deadline set for 1/2/2014. Release of Transcript Restriction set for 3/3/2014. (Transcript filed in case numbers 13-cr-04209-LAB (13-mj-03928-BLM-LAB), 13-cr-04126-JLS (13-mj-03858-BLM-LAB), and 13-mj-03882-JMA-LAB.) (akr) (Entered: 12/02/2013)
		* * * * *
12/31/13	60	Pretrial Services Request for Warrant for Offender under Pretrial Release and Order thereon in case as to Jasmin Isabel Morales. Bond Revocation Hearing set for 1/2/2014 02:00 PM before Magistrate Judge Bernard G. Skomal. Signed by Magistrate Judge Bernard G. Skomal on 12/31/2013. (jao) (jrl). (Entered: 12/31/2013)
		* * * * *
1/2/14	62	Minute Entry for proceedings held before Magistrate Judge Ber-

DATE	DOCKET NUMBER	PROCEEDINGS
		nard G. Skomal: Status Hearing re Initial Appearance—Pretrial Release Violation as to Jasmin Isabel Morales (n/a) not held on 1/2/2014. Defendant not appearing. Court issues a no bail bench warrant. (CD# 1/2/2014 BGS 14:37-14:39). (Plaintiff Attorney Ryan Sausedo, AUSA). (Defendant Attorney Judith Miller, FD). (PTSO Sylvana Patton). (no document attached) (jer) (Entered: 01/02/2014)
1/2/14	63	ARREST WARRANT ISSUED by Magistrate Judge Bernard G. Skomal in case as to Jasmin Isabel Morales. (jer) (Entered: 01/02/2014)
		* * * * *
2/20/14	79	Arrest Warrant Returned Executed on 2/18/2014, in case as to Jasmin Isabel Morales, re 63 Warrant Issued. (jao) (Entered: 02/20/2014)
		* * * * *
2/27/14	81	Minute Entry for proceedings held before Magistrate Judge Barbara Lynn Major: Bond Revocation Hearing as to Jasmin Isabel Morales held on 2/27/2014. Deft

DATE	DOCKET NUMBER	PROCEEDINGS
		is not seeking bail at this time. Bond Revocation Hearing is hereby vacated. Deft is not ready to plead guilty at this time. Change of Plea Hearing is vacated. Court confirms the Motion Hearing/Trial Setting previously set for 3/7/2014 1:30pm before Judge Janis L. Sammartino. (CD# 2/27/2014 BLM1: 940-943). (Plaintiff Attorney Michael Heyman s/a, AUSA). (Defendant Attorney Judith Miller, FD). (no document attached) (mnb) (Entered: 02/28/2014)
		* * * * *
3/11/14	85	Minute Entry for proceedings held before Magistrate Judge Barbara Lynn Major: Change of Plea Hearing as to Jasmin Isabel Morales held on 3/11/2014. Plea Tendered by Jasmin Isabel Morales Guilty on count one(1) of the Information. Excludable(s) started as to Jasmin Isabel Morales: XT Interest of Justice 3/11/2014-6/6/2014. PSR Ordered. Pending Status Hearing is hereby vacated. Sentence With PSR set for 6/6/2014 09:00 AM in Courtroom 4A before Judge Janis L.

DATE	DOCKET NUMBER	PROCEEDINGS
		Sammartino. (CD# 3/11/2014 BLM1: 936-949). (Plaintiff Attorney Julia Cline s/a, AUSA). (Defendant Attorney Richard Deke Falls, FD). (no document attached) (mnb) (Entered: 03/12/2014)
		* * * * *
4/9/14	89	ORDER ACCEPTING GUILTY PLEA as to count(s) 1 of the Information, as to Jasmin Isabel Morales, adopting 88 Findings and Recommendation. Signed by Judge Janis L. Sammartino on 4/9/2014. (jao) (jrd) (Entered: 04/09/2014)
		* * * * *
5/29/14	91	SENTENCING MEMORANDUM by Jasmin Isabel Morales (Falls, Richard) (jao). (Entered: 05/29/2014)
		* * * * *
6/9/14	95	JUDGMENT as to Jasmin Isabel Morales (1). Count(s) 1, Custody of Bureau of Prisons for a term of 18 months. Supervised Release for a term of 3 years. Assessment $100.00. No fine. Signed

DATE	DOCKET NUMBER	PROCEEDINGS
		by Judge Janis L. Sammartino. (jao) (jrd) (Entered: 06/19/2014)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(SAN DIEGO)

Docket No. 3:13-cr-03876-MMA-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK WILLIAM RING, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/7/13	1	COMPLAINT (t/w Warrant) as to Mark William Ring (1). (lao) (av1). [3:13-mj-03713-JMA] (Entered: 10/07/2013)
10/7/13	2	ARREST WARRANT ISSUED by Magistrate Judge Jan M. Adler in case as to Mark William Ring. (lao) [3:13-mj-03713-JMA] (Entered: 10/07/2013)
		* * * * *
10/11/13	5	Minute Entry for proceedings held before Magistrate Judge Jan M. Adler: Initial Appearance as to Mark William Ring held on 10/11/2013. Federal Defenders appointed for Mark William Ring. Bond set as to Mark William Ring

DATE	DOCKET NUMBER	PROCEEDINGS
		(1) No Bail—Govt motion to detain due to flight risk. Detention Hearing set for 10/17/2013 at 2:30 PM before Magistrate Judge Jan M. Adler. Preliminary Hearing set for 10/24/13 at 2:00 PM before Magistrate Judge Jan M. Adler. Arraignment set for 11/7/13 at 2:00 PM before Magistrate Judge Jan M. Adler. (CD# 10/11/2013 JMA 2:42-2:56). (Plaintiff Attorney Matthew Sutton, AUSA). (Defendant Attorney John Ellis, FD-S/A). (no document attached) (ecs) [3:13-mj-03713-JMA] (Entered: 10/15/2013)
		* * * * *
10/17/13	9	Minute Entry for proceedings held before Magistrate Judge Jan M. Adler: Detention Hearing Continued as to Mark William Ring. Defense oral motion to continue hearing granted. Detention Hearing continued to 10/22 /2013 02:15 PM in Courtroom 2B before Magistrate Judge Jan M. Adler. (CD# 10/17/2013 JMA13-1-3:45-4:01). (Plaintiff Attorney Nicholas Pilchak, AUSA). (Defendant Attorney Elizabeth Barros, FD). (Pretrial Services Of-

DATE	DOCKET NUMBER	PROCEEDINGS
		ficer Eric Kosmo) (no document attached) (rla) [3:13-mj-03713-JMA] (Entered: 10/17/2013)
		* * * * *
10/22/13	11	ORDER Setting Conditions of Release. Bond set for Mark William Ring (1) P/S $10,000. Secured by defedant's signature. Signed by Magistrate Judge Jan M. Adler on 10/22/2013. (dls) [3:13-mj-03713-JMA] (Entered: 10/23/2013)
10/22/13	12	P/S Bond Filed as to Mark William Ring in amount of $10,000. Signed by Magistrate Judge Jan M. Adler on 10/22/2013. (dls) [3:13-mj-03713-JMA] (Entered: 10/23/2013)
10/22/13	13	ABSTRACT OF ORDER Releasing Mark William Ring re 12 Bond; Not to be released until 10/24/2013. (dls) [3:13-mj-03713-JMA] (Entered: 10/23/2013)
10/22/13	14	INFORMATION as to Mark William Ring (1) count(s) 1. (rla) (cap). (Entered: 10/23/2013)
		* * * * *
10/22/13	16	Minute Entry for proceedings held before Magistrate Judge Jan M. Adler: withdrawing 6 Motion to Detain as to Mark William Ring

DATE	DOCKET NUMBER	PROCEEDINGS
		(1); Arraignment as to Mark William Ring (1) Count 1 held on 10/22/2013 Not Guilty plea entered (Status Hearing set for 10/23/2014 02:00 PM in Courtroom 2B before Magistrate Judge Jan M. Adler.); Deferred Prosecution Hearing as to Mark William Ring held on 10/22/2013. Excludable started: XI 10/22/13 to 10/23/14.; Detention Hearing as to Mark William Ring held on 10/22/2013. Bond set at $10,000 P/S; Dft to be released on Thursday, October 24, 2013 by 10am to the Agents of Veterans Affair. Objections to the shackling —over ruled. (CD# 10/22/2013 JMA13-1-3:52-4:38) (sidebar 4:19-4:22). (Plaintiff Attorney Nicholas Pilchak, AUSA). (Defendant Attorney Elizabeth Barros, FD). (Pretrial Services Officer Zena Ajou). (no document attached) (rla) (Entered: 10/23/2013)
10/22/13	19	DEFERRAL OF PROSECUTION AGREEMENT entered as to Defendant Mark William Ring. (vam-received on 10/25/2013) (cap). (Entered: 10/28/2013)
10/24/13	17	Corrected version of this transcript was filed at document 20 on

DATE	DOCKET NUMBER	PROCEEDINGS
		10/31/2013: NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to Mark William Ring held on 10/22/2013, before Magistrate Judge Jan M. Adler. Court Reporter/Transcriber: Elizabeth Cesena. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/ Transcriber 11/14/2013. Redacted Transcript Deadline set for 11/25/2013. Release of Transcript Restriction set for 1/22/2014. (akr). Modified on 10/31/2013 to note that a 20 corrected version of this transcript has been filed by the Court Reporter. (akr). (Entered: 10/24/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
10/31/13	20	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings (corrected transcript) as to Mark William Ring held on 10/22/2013, before Magistrate Judge Jan M. Adler. Court Reporter/Transcriber: Elizabeth Cesena. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/ Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 11/21/2013. Redacted Transcript Deadline set for 12/2/2013. Release of Transcript Restriction set for 1/29/2014. (This is a corrected version of the transcript filed at document 17 on 10/24/2013. Corrected version provided by the

DATE	DOCKET NUMBER	PROCEEDINGS
		Court Reporter.) (akr) (Entered: 10/31/2013)
10/31/13	21	Corrected version of this transcript was filed at document 26 on 11/8/2013: NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings (Court's Comments Re: Shackling) as to Mark William Ring held on 10/22/2013, before Magistrate Judge Jan M. Adler. Court Reporter/Transcriber: Debra M. Henson. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 11/21/2013. Redacted Transcript Deadline set for 12/2/2013. Release of Transcript Restriction set for 1/29/

DATE	DOCKET NUMBER	PROCEEDINGS
		2014. (akr). (Main Document 21 replaced on 11/1/2013 with replacement transcript provided by the Court Reporter. The replacement transcript includes portions of the proceedings not included in the original document. NEF regenerated.) (akr). Modified on 11/8/2013 to note that a 26 corrected version of this transcript has been filed by the Court Reporter. (akr). (Entered: 10/31/2013)
10/31/13	22	APPEAL OF MAGISTRATE JUDGE DECISION (Other), to District Court by Mark William Ring (Attachments: # 1 Appendix A-L, # 2 Appendix M-R) (Barros, Elizabeth) (knb). Modified on 11/18/2013 (vam). (Entered: 10/31/2013)
		* * * * *
11/8/13	26	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings (Court's Comments Re: Shackling, corrected transcript) as to Mark William Ring held on 10/22/2013, before Magistrate Judge Jan M. Adler. Court Reporter/Transcriber: Debra M. Henson. Transcript may be

DATE	DOCKET NUMBER	PROCEEDINGS
		viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 11/29/2013. Redacted Transcript Deadline set for 12/9/2013. Release of Transcript Restriction set for 2/6/2014. (This is a corrected version of the transcript filed at document 21 on 10/31/2013. Corrected version provided by the Court Reporter.) (akr) (Entered: 11/08/2013)
11/12/13	27	Government's Response to Opposition re 22 as to Mark William Ring (Attachments: # 1 Exhibit 1, # 2 Declaration, # 3 Proof of Service) (Pilchak, Nicholas) Modified on 11/13/2013—modified text (vam). (Entered: 11/12/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
11/14/13	32	MOTION for Recusal by Mark William Ring. (Attachments: # 1 Memo of Points and Authorities, # 2 Exhibit) (Barros, Elizabeth) (vam). (Entered: 11/14/2013)
		* * * * *
11/15/13	34	RESPONSE in Opposition by USA as to Mark William Ring re 32 MOTION for Recusal (Attachments: # 1 Proof of Service) (Pilchak, Nicholas) (vam). (Entered: 11/15/2013)
11/18/13	35	SUPPLEMENTAL DOCUMENT by Mark William Ring re 22 Appeal of Magistrate Judge Decision to District Court (Attachments: # 1 Exhibit) (Barros, Elizabeth) (vam). (Entered: 11/18/2013)
11/18/13	36	Minute Entry for proceedings held before District Judge Michael M. Anello: Miscellaneous Hearing as to Mark William Ring held on 11/18/2013. Denying 22 Appeal of Magistrate Judge Decision as to Mark William Ring (1); Denying 32 Motion for Recuse All District Judges From The Southern District of California as to Mark William Ring. (Court Re-

DATE	DOCKET NUMBER	PROCEEDINGS
		porter Elizabeth Cesena). (Plaintiff Attorney AUSA Nicholas W. Pilchak). (Defendant Attorney FD Elizabeth M. Barros). (no document attached) (ibf) (Entered: 11/18/2013)
11/25/13	37	NOTICE OF APPEAL by Mark William Ring re Denial of Defense Request to Appear Unshackled and Motion to Revoke District-Wide Policy Requiring Five-Point Shackling of All Pre-Trial Detained Defendants, Denial of Motion to Recuse All District Judges. Fee Waived. (Notice of Appeal electronically transmitted to US Court of Appeals.) (Attachments: # 1 Proof of Service)(Barros, Elizabeth). Modified on 11/25/2013 to add text re Orders being appealed, as stated in the Notice of Appeal. (akr). (Entered: 11/25/2013)
		* * * * *
11/27/13	40	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings (Motion Hearing) as to Mark William Ring held on 11/18/2013, before Judge Michael M. Anello. Court Reporter/Transcriber: Elizabeth Cesena. Transcript may be

DATE	DOCKET NUMBER	PROCEEDINGS
		viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 12/18/2013. Redacted Transcript Deadline set for 12/30/2013. Release of Transcript Restriction set for 2/25/2014. (akr) (Entered: 11/27/2013)
		* * * * *
10/23/14	46	Minute Entry for proceedings held before Magistrate Judge Jan M. Adler: DISMISSAL OF COUNTS on Government Motion as to Mark William Ring. Gov't oral motion to dismiss with prejudice granted. (CD# 10/23/2014 JMA14-1-2:02-2:06). (Plaintiff Attorney Nicholas Pilchak,

DATE	DOCKET NUMBER	PROCEEDINGS
		AUSA). (Defendant Attorney Elizabeth Barros, FD). (no document attached) (rla) (Entered: 10/23/2014)
10/23/14	47	JUDGMENT OF DISMISSAL in Criminal Case as to Mark William Ring (1), Count(s) 1, gov't oral motion to dismiss with prejudice—granted. Signed by Magistrate Judge Jan M. Adler on 10/23/2014. (vam) (jrd) (Entered: 10/24/2014)

* * * * *

[LOGO OMITTED]

United States District Court
Southern District of California
333 W. Broadway, Suite 1580
San Diego, California 92101

Chambers of
Barry Ted Moskowitz
Chief Judge

Phone: (619) 557-5583
Fax: (619) 702-9966

Oct. 11, 2013

United States Marshal Steven C. Stafford
United States Marshals Service, Southern District of California
United States Courthouse Annex
333 W. Broadway, Suite 100 (Plaza)
San Diego, CA 92101

Dear Marshal Stafford,

I am responding on behalf of the Court to your letter of March 12, 2013, and your presentation to the District Judges on July 8, 2013, in which you have requested that the Court consider a district-wide policy of allowing the Marshals Service to produce all in-custody defendants in full restraints for most non-jury proceedings.

Our understanding is that your request is based on several factors, the most important of which is the safety and security of the Court, its personnel, the attorneys, the public and the in-custody defendants themselves. This concern arises from multiple incidents of

discovering prisoner-made weapons in the holdings cells, the stabbing of one prisoner by another prisoner in Judge Irma E. Gonzalez's courtroom, the recent assault by one prisoner on another (both of whom had leg restraints but no other restraints) in the El Centro Magistrate Judge courtroom, the fact that the Marshals produced in-custody prisoners for 44,426 court appearances in FY 2012 (an average of 178 per day), and the fact that the Marshals are understaffed. Furthermore, the outbreak of a violent incident in the small Magistrate Judge courtrooms (as occurred recently in El Centro) would clearly endanger those present and in close proximity to the defendants. Additionally, in the larger District Judge courtrooms, lack of Marshal personnel in multi-defendant cases could result in attempts to flee, including into the back corridors where the judges' chambers are located. You support your request by pointing out that in other comparable districts, the Marshals produce in-custody defendants in restraints. You further point out that the U.S. Marshals Service Policy Directive 9.18.E.3.b ("USMS Policy Directive") directs that your office produce in-custody defendants in full restraints in non-jury matters unless otherwise directed by a District or Magistrate Judge.[1]

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[1] U.S. Marshals Service Policy Directive 9.18.E.3.b provides: "Courtroom: All prisoners produced for court, with the exception of a jury trial, are to be fully restrained unless otherwise directed by a United States District Judge or United States Magistrate Judge. For a trial by jury proceeding, the United States Marshal or his/her designee should follow the direction of the presiding judicial official. In the event that the deputy in charge or district management decides that a higher level of restraint is necessary, the judge will be informed of the need for higher security.

We have carefully considered your request and have solicited and considered any input from the U.S. Attorney's Office, Federal Defenders of San Diego, Inc., and the CJA Panel representative. We have come to the conclusion that it is the province of the U.S. Marshal to provide for appropriate security in the courthouse. See United States v. Zuber, 118 F.3d 101, 104 (2d Cir. 1997) ("It is the primary role and mission of the United States Marshals Service to provide for the security . . . of the United States [Courts]." (citing 28 U.S.C. § 566(a))); see also United States v. Howard, 480 F.3d 1005, 1013 (9th Cir. 2007) (noting that the Second Circuit in Zuber found that district judges regularly consulted with the Marshals Service and "deferred to its judgment regarding 'precautions to be taken at hearings involving persons who are in custody.'"). Since courthouse and courtroom security is best left to the sound discretion of the U.S. Marshal, including the decision as to whether in-custody defendants should appear in restraints, we do not feel that it is our role to make a general policy on whether restraints should be used, and if so, to what extent. We believe this is a matter for the Marshal's decision in how to best protect all those persons participating in court proceedings.

We do note that the USMS Policy Directive provides that a District or magistrate Judge may direct the Marshals to produce an in-custody defendant without restraints. A substantial majority of the District Judges prefer that defendants appearing before them for guilty pleas and sentencing hearings not have their hands and arms restrained. Therefore, the District Judges direct that the Marshals remove arm and hand restraints during guilty pleas and sentencing hearings

before them unless the Marshals are aware of information that the particular defendant needs to be fully restrained. Please consider this the direction of the District Judges as required by the USMS Policy Directive.

We also note that if you decide to implement the USMS Policy Directive on restraints, defendants in individual cases may ask the judge to direct that the restraints be removed in whole or in part. In such cases it will be the duty of the District or Magistrate Judge to weigh all appropriate factors, including all of the concerns you have expressed.

In conclusion, except in the proceedings mentioned above, we leave to the Marshals Service the procedures necessary to ensure safety and security in the courthouse and courtrooms.

Very truly yours,

/s/ BARRY TED MOSKOWITZ
BARRY TED MOSKOWITZ
Chief Judge
U.S. District Court,
Southern District of California

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case Nos. 13MJ3892-BLM, 13MJ3897-BLM, 13MJ3897-BLM, 13MJ3897-BLM, 13MJ3905-BLM, 13MJ3905-BLM, 13MJ3934-BLM, 13MJ3824-RBB, 13MJ3870-BLM, 13MJ3932-BLM, 13MJ3933-BLM, 13MJ3935-BLM, 13MJ3928-BLM, 13MJ3929-BLM, 13MJ3930-BLM, 13MJ3931-BLM, 13MJ3931-BLM, 13MJ3893-BLM, 07CR2309-BTM

UNITED STATES OF AMERICA, PLAINTIFF

v.

BAYRON ALEZANDER HERRERA, DANIEL MARTINEZ, JOSE MARTINEZ-CARDENAS, DANIEL REYES-ZARATE, ALONSO ISMAEL ALCALA-VIDANA, JUAN CARRANZA-VAZQUEZ, CESAR TOVAR-ZEPEDA, JUAN RODRIGUEZ-SIFUENTES, ANGEL NIETO-GARCIA, JONATHAN REYES, ERNESTO BAUTISTA-ESQIVEL, DANIEL HERNANDEZ-RIVERA, RENE SANCHEZ-GOMEZ, JOSE MARIO LOPEZ, KEVIN BLAIR GRATTAN, JAMES MICHAEL DISALVO, THOMAS STEPHEN DISALVO, JORGE PEREZ ZAVALA, GEORGE ELLIOTT POST, DEFENDANTS

San Diego, California
Thurs., Oct. 24, 2013
P.M. Session

ARRAIGNMENT AND PRELIMINARY HEARING

BEFORE THE HONORABLE BARBARA LYNN MAJOR
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

ALEX DOUVAS
ALESSANDRA P. SERANO
Assistant U.S. Attorneys
880 Front Street
San Diego, California 92101

FOR THE DEFENDANT:

Federal Defenders of San Diego
BY: SAMUEL EILER, ESQ.
CASSANDRA LOPEZ, ESQ.
225 Broadway Street
Suite 900
San Diego, California 92101

[3]

SAN DIEGO, CALIFORNIA—THURSDAY,
OCT. 24, 2013
2:04 P.M.

THE COURT: GOOD AFTERNOON, EVERYONE. ALL OF YOU CAN SIT DOWN.

YEAH, HE CAN BRING THAT FORWARD ONCE HE SIGNS IT.

ALL RIGHT. GENTLEMEN, I'M SPEAKING TO ALL OF YOU THAT ARE SITTING OVER HERE. OH, WAIT, WE HAVEN'T CALLED THEM, HAVE WE?

THE CLERK: NO.

THE COURT: GO AHEAD AND CALL THEM.

THE CLERK: FOR THE RECORD, THE MATERIAL WITNESSES ON ITEM NO. 1, 2 AND 3 ON THE LOG, PLEASE.

BEGINNING WITH ITEM NO. 1, 13MJ3892. PLEASE RAISE YOUR HAND WHEN I CALL YOUR NAME. FERNANDO MARTINEZ-ATILANO. THANK YOU. HE'S PRESENT, AND A BUSINESS CARD HAS BEEN GIVEN TO HIM. ATTORNEY MARK LEVINSON APPOINTED.

ITEM NO. 2, 13MJ3897. PLEASE RAISE YOUR HAND WHEN I CALL YOUR NAME. ENRIQUE MUNETON-CUELLAR. ENRIQUE, ARE YOU HERE?

THE COURT: IN THE BACK. ARE YOU ENRIQUE?

UNKNOWN MATERIAL WITNESS: NO.

THE COURT: SAY THE NAME AGAIN. HE'S IN THE BACK. WE DON'T HAVE HIM. BRING HIM OUT NEXT TIME.

THE CLERK: MIGUEL ANGEL MURRILO-MARTINEZ. MIGUEL ANGEL MURRILO-MARTINEZ. OKAY. WILMER MANUEL [4] SAMAYOA-CASTILLO. THAT IS WILMER, AND HE IS HERE, JUDGE. HE HAS BEEN GIVEN A BUSINESS CARD.

ITEM NO. 3, 13MJ3905, MATERIAL WITNESS' NAME IS ORLAY AMPARA-PEREZ. JOSE ARREDONDO-ENRIQUEZ. JULIO CESAR ESTRADA-ANAYA. JORGE FIGUEROA-SALGADO. FERNANDO GARCIA-RAMIREZ. ALVARO MEDINA-MARQUES. ARTURO MONTANA-SILVA.

ANTONIO NUNEZ-RODRIGUEZ. ANTONIO NUNEZ-RODRIGUEZ. THANK YOU. PEDRO RAMIREZ-TORRES. THANK YOU.

IS THERE ANYONE WHOSE NAME I DID NOT CALL?

MATERIAL WITNESS JIMENEZ: YES.

THE COURT: WHAT'S YOUR NAME, SIR?

THE DEFENDANT: FELIX.

THE COURT: FULL NAME.

MATERIAL WITNESS JIMENEZ: JIMENEZ-HERNANDEZ.

THE CLERK: FOR THE RECORD, FROM ITEM NO. 2, FELIX JIMENEZ-HERNANDEZ.

MADAM INTERPRETER, IF YOU CAN PLEASE VERIFY THAT THE MATERIAL WITNESSES ALL HAVE BUSINESS CARDS FOR THEIR ATTORNEYS.

THE INTERPRETER: YES, THEY ALL DO.

THE CLERK: THANK YOU.

THE COURT: ALL RIGHT. I'M SPEAKING TO ALL OF YOU.

NO CRIMINAL CHARGES HAVE BEEN FILED AGAINST ANY OF YOU. EACH OF YOU ARE HERE BECAUSE SOMEBODY ELSE HAS BEEN [5] ARRESTED AND CHARGED WITH A VIOLATION OF UNITED STATES LAWS, AND IT IS BELIEVED THAT YOU HAVE SEEN OR HEARD SOMETHING THAT WOULD BE HELPFUL TO THE CRIMINAL CASE. BECAUSE YOU ARE A

POTENTIAL WITNESS FOR THAT CRIMINAL CASE, YOU ARE GOING TO BE HELD HERE IN THE UNITED STATES PENDING THE RESOLUTION OF THAT CRIMINAL CASE.

AS A MATERIAL WITNESS, YOU HAVE CERTAIN RESPONSIBILITIES AND OBLIGATIONS, SO I HAVE APPOINTED A LAWYER TO REPRESENT YOU AT NO COST TO YOU. EACH OF YOU HAS BEEN GIVEN A BUSINESS CARD FOR YOUR LAWYER. IN ADDITION, WE WILL NOTIFY YOUR LAWYER THAT HE OR SHE HAS BEEN APPOINTED TO REPRESENT YOU AND YOUR LAWYER WILL BE IN CONTACT WITH YOU IN THE NEAR FUTURE AND REPRESENT YOU FROM HERE ON OUT.

BECAUSE YOU ARE A WITNESS TO THE CHARGED CRIME, YOU MUST STAY HERE IN THE UNITED STATES AND BE AVAILABLE TO TESTIFY ABOUT EVERYTHING THAT YOU SAW AND HEARD. CRIMINAL MATTERS CAN BE LENGTHY, SO I'M SETTING BAIL FOR EACH OF YOU.

OKAY. ALL RIGHT. SO HERE ARE THE CONDITIONS THAT I AM SETTING FOR EACH OF YOU. IF YOU ARE ABLE TO SET—SATISFY THE BAIL CONDITIONS THAT I SET, THEN YOU WILL BE RELEASED FROM CUSTODY FOR THE REMAINDER OF THE CRIMINAL MATTER. IF YOU ARE UNABLE TO SATISFY THE BAIL CONDITIONS, THEN YOU MUST REMAIN IN CUSTODY UNTIL THE CRIMINAL CASE IS OVER OR UNTIL ARRANGEMENTS CAN BE MADE TO PRESERVE YOUR TESTIMONY.

[6]

SO HERE ARE THE CONDITIONS WITH WHICH EACH OF YOU MUST COMPLY: YOU MUST NOT COMMIT A FEDERAL, STATE OR LOCAL CRIME DURING THE PERIOD OF RELEASE. YOU MUST MAKE ALL OF YOUR COURT APPEARANCES. YOU MUST TESTIFY HONESTLY AND TRUTHFULLY ABOUT EVERYTHING THAT YOU SAW AND HEARD. YOUR TRAVEL IS RESTRICTED TO THE STATE OF CALIFORNIA AND YOU MAY NOT ENTER MEXICO.

YOU MUST REPORT FOR SUPERVISION TO THE PRETRIAL SERVICES AGENCY AS DIRECTED BY THE ASSIGNED PRETRIAL SERVICES OFFICER AND PAY FOR THE REASONABLE COST OF SUPERVISION IN AN AMOUNT TO BE DETERMINED BY THE PRETRIAL SERVICES AGENCY AND APPROVED BY THE COURT.

YOU MAY NOT POSSESS OR USE ANY NARCOTIC, DRUG OR CONTROLLED SUBSTANCE WITHOUT A LAWFUL MEDICAL PRESCRIPTION. YOU MAY NOT POSSESS ANY FIREARM, DANGEROUS WEAPON OR DESTRUCTIVE DEVICE DURING THE PENDENCY OF THE CASE. YOU MUST READ OR HAVE EXPLAINED TO YOU AND THEN ACKNOWLEDGE UNDERSTANDING OF THE ADVISE OF PENALTIES AND SANCTIONS FORM.

YOU MUST PROVIDE A CURRENT RESIDENCE ADDRESS AND TELEPHONE NUMBER

PRIOR TO YOUR RELEASE FROM CUSTODY AND KEEP IT CURRENT WHILE THE CASE IS PENDING. YOU MUST SATISFY ANY AGENCY CONDITIONS REQUIRED TO LEGALLY REMAIN IN THE UNITED STATES DURING THE PENDENCY OF THE CRIMINAL PROCEEDING.

YOU MUST SURRENDER TO THE UNITED STATES MARSHAL SERVICE OR THE DEPARTMENT OF HOMELAND SECURITY AS DIRECTED BY [7] THE COURT, PRETRIAL SERVICES, AN ATTORNEY OR AGENT FOR THE UNITED STATES OR YOUR LAWYER. AND EACH OF YOU MUST POST A BOND IN A SPECIFIC AMOUNT, AND THAT BOND MUST THEN BE SECURED BY A CASH DEPOSIT. THE AMOUNTS ARE DIFFERENT, SO I'M NOW GOING TO SPEAK WITH YOU IN GROUPS.

FERNANDO MARTINEZ. ALL RIGHT. I'M GOING TO TALK WITH YOU. ORLAY AMPARO. FERNANDO GARCIA. HE'S NOT HERE; OKAY. FERNANDO MARTINEZ. HE'S NOT OUT HERE. JULIO ESTRADA. ALL RIGHT. CRISTINA RAMIREZ. WILMER SAMAYOA.

ALL RIGHT. FOR ALL OF THE INDIVIDUALS WHOSE NAME I JUST CALLED, I AM SETTING YOUR BOND IN THE AMOUNT OF $5,000, AND YOU MUST POST $500 IN CASH.

ALL RIGHT. NOW THE NEXT GROUP. JOSE ARREDONDO. OKAY. AZALIEL HERNANDEZ-ALVARADO. NO. FELIX JIMENEZ. ALL RIGHT. PEDRO RAMIREZ. ALL RIGHT.

FOR YOU THREE INDIVIDUALS, I'M SETTING EACH OF YOUR BONDS IN THE AMOUNT OF $7500, AND YOU MUST POST $750 IN CASH.

UVALDO LARES. ARTURO MONTANA. ALL RIGHT. MIGUEL MURRILO. ALL RIGHT. MR. ARTURO—EXCUSE ME. MR. MONTANA, SPEAKING JUST TO YOU. I'M SETTING YOUR BOND IN THE AMOUNT OF $15,000, AND YOU MUST POST $1500 IN CASH.

ALVARO MEDINA AND ANTONIO NUNEZ. GENTLEMEN, I'M SETTING EACH OF YOUR BONDS IN THE AMOUNT OF $20,000, AND YOU MUST POST $2,000 IN CASH.

IS THERE ANYONE THAT I DIDN'T JUST STATE AN AMOUNT [8] FOR? RAISE YOUR HAND OR NOD YOUR HEAD AT ME. SEEING NOTHING. ALL RIGHT.

SPEAKING TO ALL OF YOU. IF YOU COMPLY WITH ALL OF THE CONDITIONS THAT I—OH, WAIT, NO. SOME OF YOU—SORRY. SOME OF YOU HAVE BEEN ACCEPTED INTO A SPECIAL PROGRAM.

FERNANDO MARTINEZ. YEP.

MATERIAL WITNESS ATILANO: (THROUGH INTERPRETER) NO.

THE COURT: YES. HANG ON A SECOND. LET ME JUST MAKE SURE. YEAH. ALL RIGHT. SO YOU, SIR. AND ORLAY AMPARO. YOU, SIR. AND FERNANDO GARCIA-RAMIREZ. HE'S THE ONE WHO IS NOT OUT.

ALL RIGHT. SO YOU TWO GENTLEMEN. EACH OF YOU HAVE BEEN ACCEPTED INTO A SPECIAL PROGRAM. IT'S THE—YOU'RE ABLE TO RESIDE AT THE—WHERE IS IT? AT THE CALIFORNIA—WHY DON'T I SEE IT ON HERE. IS THAT AT C.A.I.? THERE IT IS ON THE BACK.

ALL RIGHT. EACH OF YOU HAVE BEEN ACCEPTED INTO THE PROGRAM AT THE CORRECTIONAL ALTERNATIVES, INC. SO YOU WILL BE TRANSPORTED FROM WHERE YOU'RE CURRENTLY IN PRISON TO THE CORRECTIONAL ALTERNATIVES, INC. YOU MUST RESIDE THERE AND COMPLY WITH ALL OF THEIR RULES. IF—IF ANOTHER LOCATION IS FOUND WHERE YOU CAN RESIDE, THAT CAN BE CHANGED. BUT FOR RIGHT NOW EACH OF YOU WILL BE RELEASED FROM PRISON TO THE C.A.I. YOU'LL BE TRANSPORTED BY THE—BY PRETRIAL SERVICES.

[9]

ALL RIGHT. SPEAKING TO ALL OF YOU THEN. IF YOU COMPLY WITH ALL OF THESE CONDITIONS, INCLUDING SURRENDERING TO THE IMMIGRATION OFFICIALS AT THE CONCLUSION OF THE CASE, THE CASH DEPOSIT WILL BE RETURNED TO THE PERSON WHO POSTED IT AFTER YOU SURRENDER TO THE IMMIGRATION OFFICIALS.

IF YOU DO NOT COMPLY WITH ALL OF THESE CONDITIONS, THE UNITED STATES MAY PROCEED AGAINST YOU AND THE PERSON WHO SIGNED YOUR BOND FOR THE FULL

AMOUNT OF THE BOND, INCLUDING KEEPING ALL OF THE CASH. SO IT IS EXTREMELY IMPORTANT THAT YOU COMPLY WITH ALL OF THESE CONDITIONS.

MOST OF THE TIME THESE CASES DO NOT GO TO TRIAL. AND IF THAT HAPPENS HERE, YOU WILL BE REQUIRED TO SURRENDER TO IMMIGRATION AUTHORITIES AND YOU WILL BE RETURNED TO YOUR HOME. IF THE CASE DOES GO TO TRIAL, YOU MUST REMEMBER THAT YOU ARE REQUIRED TO APPEAR IN COURT AND TO TESTIFY HONESTLY AND TRUTHFULLY ABOUT EVERYTHING THAT YOU SAW AND HEARD.

I ALSO WANT YOU TO REMEMBER THAT WHEN YOU ARE RELEASED FROM CUSTODY AND RETURNED TO YOUR HOME, THE UNITED STATES GOVERNMENT HAS A RECORD OF YOUR HAVING BEEN HERE ILLEGALLY BECAUSE THEY TOOK YOUR PICTURE AND FINGERPRINTS. THIS IS IMPORTANT BECAUSE IF YOU RETURN TO THE UNITED STATES WITHOUT PERMISSION, YOU COULD BE ARRESTED AND CHARGED WITH A CRIME.

SO I WANT YOU TO SPEAK WITH THE LAWYER THAT I APPOINTED TO REPRESENT YOU, GIVE THAT LAWYER ALL INFORMATION [10] THAT YOU HAVE TO HELP THEM FIND A SURETY AND A PLACE FOR YOU TO STAY.

THAT'S IT FOR TODAY. GOOD LUCK TO ALL OF YOU.

THE CLERK: IF WE CAN HAVE THE REMAINING MATERIAL WITNESSES, PLEASE.

WE HAVE THE REMAINING MATERIAL WITNESSES TO BE ARRAIGNED. ACTUALLY, I'LL CALL THEIR NAMES WHEN THEY COME OUT HERE, JUDGE, JUST TO BE SURE.

THE COURT: OKAY.

THE CLERK: IS THIS EVERYONE, MR. MARSHAL?

FOR THE RECORD, ITEM NO. 2 AS TO MATERIAL WITNESSES. PLEASE RAISE YOUR HAND WHEN I CALL YOUR NAME.

MIGUEL ANGEL MURRILO-MARTINEZ. OKAY.

THE INTERPRETER: I'M SORRY. I HAVE NOT GIVEN OUT THE HEADSETS YET.

THE CLERK: OKAY. THANK YOU.

ALL RIGHT. FOR THE RECORD, PLEASE RAISE YOUR HAND WHEN I CALL YOUR NAME.

MIGUEL ANGEL MURRILO-MARTINEZ. THANK YOU. ATTORNEY TOM GILMORE HAS BEEN APPOINTED AND HE IS GETTING A BUSINESS CARD NOW. THANK YOU.

THE INTERPRETER: OH, HE ALREADY HAD ON.

THE CLERK: OKAY. THERE WAS TWO OF THEM THAT HAD IT. THE REST DIDN'T. THANK YOU.

CRISTINA RAMIREZ-MAGDALENO. ATTORNEY LAURA MARRAN, [11] PLEASE.

JUVENILE WITH THE INITIALS J.A.R.M. ATTORNEY LAURA MARRAN. THANK YOU.

JORGE FIGUEROA-SALGADO. ATTORNEY IS CIRO HERNANDEZ, PLEASE.

AND AZALIEL HERNANDEZ-ALVARADO. ATTORNEY CIRO HERNANDEZ, PLEASE.

FERNANDO GARCIA-RAMIREZ. ATTORNEY GAYLE MAYFIELD, PLEASE. I THINK HE HAS A BUSINESS CARD ALREADY.

UVALDO LARES-FLORES. ATTORNEY GAYLE MAYFIELD.

IS THERE ANYONE WHOSE NAME I DID NOT CALL?

THE COURT: ALL RIGHT. I'M SPEAKING TO ALL OF YOU. NO CRIMINAL CHARGES HAVE BEEN FILED AGAINST ANY OF YOU. EACH OF YOU IS HERE BECAUSE SOMEBODY ELSE HAS BEEN ARRESTED AND CHARGED WITH A VIOLATION OF UNITED STATES LAWS, AND IT IS BELIEVED THAT YOU HAVE SEEN OR HEARD SOMETHING THAT WOULD BE HELPFUL TO THE CRIMINAL CASE.

BECAUSE YOU ARE A POTENTIAL WITNESS FOR THAT CRIMINAL CASE, YOU ARE GOING TO BE HELD HERE IN THE UNITED STATES PENDING THE RESOLUTION OF THAT CRIMINAL CASE. AS A MATERIAL WITNESS, YOU HAVE CERTAIN RESPONSIBILITIES AND OBLIGATIONS. I HAVE APPOINTED AN ATTOR-

NEY AT NO COST TO YOU TO WORK WITH YOU AND REPRESENT YOU IN THIS MATTER. EACH OF YOU HAS BEEN GIVEN A BUSINESS CARD FOR YOUR LAWYER. IN ADDITION, YOUR LAWYER WILL BE NOTIFIED THAT HE OR SHE HAS [12] BEEN APPOINTED TO REPRESENT YOU AND WILL BE IN CONTACT WITH YOU IN THE NEAR FUTURE.

BECAUSE YOU ARE A WITNESS TO THE CHARGED CRIME, YOU MUST STAY HERE IN THE UNITED STATES AND BE AVAILABLE TO TESTIFY ABOUT EVERYTHING THAT YOU SAW AND HEARD. CRIMINAL MATTERS CAN BE LENGTHY, SO I AM SETTING BAIL FOR EACH OF YOU. IF YOU'RE AVAILABLE TO SATISFY THE BAIL CONDITIONS THAT I SET, YOU WILL BE RELEASED FROM CUSTODY FOR THE REMAINDER OF THE CRIMINAL MATTER. IF YOU ARE UNABLE TO SATISFY THE BAIL CONDITIONS, THEN YOU WILL HAVE TO REMAIN IN CUSTODY UNTIL THE CRIMINAL CASE IS OVER OR UNTIL ARRANGEMENTS CAN BE MADE TO PRESERVE YOUR TESTIMONY.

HERE ARE THE CONDITIONS THAT I AM SETTING FOR EACH OF YOU: YOU MUST NOT COMMIT A FEDERAL, STATE OR LOCAL CRIME DURING THE PERIOD OF RELEASE. YOU MUST MAKE ALL OF YOUR COURT APPEARANCES. YOU MUST TESTIFY HONESTLY AND TRUTHFULLY ABOUT EVERYTHING THAT YOU SAW AND HEARD. YOUR TRAVEL IS RE-

STRICTED TO THE STATE OF CALIFORNIA AND YOU MAY NOT ENTER MEXICO.

YOU MUST REPORT FOR SUPERVISION TO THE PRETRIAL SERVICES AGENCY AS DIRECTED BY THE ASSIGNED PRETRIAL SERVICES OFFICER AND PAY FOR THE REASONABLE COST OF SUPERVISION IN AN AMOUNT TO BE DETERMINED BY THE PRETRIAL SERVICES AGENCY AND APPROVED BY THE COURT.

YOU MAY NOT POSSESS OR USE ANY NARCOTIC, DRUG OR [13] CONTROLLED SUBSTANCE WITHOUT A LAWFUL MEDICAL PRESCRIPTION. YOU MAY NOT POSSESS ANY FIREARM, DANGEROUS WEAPON OR DESTRUCTIVE DEVICE DURING THE PENDENCY OF THE CASE. YOU MUST READ OR HAVE EXPLAINED TO YOU AND THEN ACKNOWLEDGE UNDERSTANDING OF THE ADVICE OF PENALTIES AND SANCTIONS FORM.

YOU MUST PROVIDE A CURRENT RESIDENCE ADDRESS AND TELEPHONE NUMBER PRIOR TO YOUR RELEASE FROM CUSTODY AND KEEP IT CURRENT WHILE THE CASE IS PENDING. YOU MUST SATISFY ANY AGENCY CONDITIONS REQUIRED TO LEGALLY REMAIN IN THE UNITED STATES DURING THE PENDENCY OF THE CRIMINAL PROCEEDING.

YOU MUST SURRENDER TO THE U.S. MARSHAL SERVICE OR THE DEPARTMENT OF HOMELAND SECURITY AS DIRECTED BY THE COURT, PRETRIAL SERVICES, AN ATTORNEY

OR AGENT FOR THE UNITED STATES AND YOUR LAWYER. AND EACH OF YOU MUST EXECUTE A PERSONAL APPEARANCE BOND IN A SPECIFIC AMOUNT, AND IT MUST BE SECURED BY CASH.

FIRST, I THINK THE GENTLEMAN IN THE BACK WITH THE RED T-SHIRT ON, HOW OLD ARE YOU, SIR?

MATERIAL WITNESS J.A.R.M.: (THROUGH INTERPRETER) SIXTEEN YEARS OLD.

THE COURT: I AM NOT SETTING A CASH BOND FOR YOU BECAUSE YOU ARE A JUVENILE. INSTEAD, WHAT YOU NEED TO DO IS TALK TO YOUR LAWYER AND PROVIDE YOUR LAWYER WITH INFORMATION ABOUT YOUR PARENTS AND SOMEONE WHO LIVES HERE IN THE UNITED STATES THAT YOU COULD BE RELEASED TO. I WILL RELEASE YOU TO [14] THE CUSTODY OF AN ADULT WHO CAN TAKE RESPONSIBILITY FOR YOU. SO THERE ISN'T A CASH AMOUNT, BUT YOU NEED TO HELP YOUR LAWYER FIND AN ADULT, LIKE A FAMILY MEMBER.

DO YOU UNDERSTAND?

MATERIAL WITNESS J.A.R.M.: YES.

THE COURT: OKAY. FOR EVERYBODY ELSE, I'M NOW GOING TO SET THIS AMOUNT.

FERNANDO GARCIA. ALL RIGHT. JULIO ESTRADA. CRISTINA RAMIREZ. ALL RIGHT. WILMER SAMAYOA. ALL RIGHT.

SPEAKING THEN TO THOSE TWO INDIVIDUALS, NOT THE JUVENILE, BUT THE OTHER TWO INDIVIDUALS. I AM SETTING YOUR BOND IN THE AMOUNT OF $5,000, AND YOU MUST POST $500 IN CASH.

MR. GARCIA, YOU HAVE BEEN ACCEPTED INTO A SPECIAL PROGRAM, SO YOU'RE GOING TO BE RELEASED TO THE CORRECTIONAL ALTERNATIVES, INC. FACILITY. YOU ARE REQUIRED TO RESIDE IN THAT FACILITY AND COMPLY WITH ALL OF THEIR CONDITIONS UNLESS YOU FIND ANOTHER PLACE TO LIVE. BUT FOR RIGHT NOW, YOU'RE GOING TO BE TRANSPORTED BY THE PRETRIAL SERVICES OFFICER OVER TO C.A.I. ONCE THIS BOND IS POSTED.

OKAY. THEN JOSE ARREDONDO.

THE INTERPRETER: IS THAT (UNINTELLIGIBLE)—

THE COURT: YES.

FELIX JIMENEZ. AZALIEL HERNANDEZ; NO. PEDRO RAMIREZ. UVALDO LARES.

MATERIAL WITNESS LARES: LARES.

[15]

THE COURT: YES. ARTURO MONTANA. MIGUEL MURRILO. ALL RIGHT. SPEAKING TO YOU TWO GENTLEMEN. I'M SETTING EACH OF YOUR BONDS IN THE AMOUNT OF $15,000, SECURED BY $1500 IN CASH.

ANTONIO NUNEZ, WE HAD BOTH OF THESE LAST TIME. ALVARO MEDINA. OKAY. FOR THOSE OF YOU HERE IN THE FRONT ROW, IS THERE ANYONE I DIDN'T JUST SET A BAIL AMOUNT FOR? THAT'S WHAT I THOUGHT.

WHAT'S YOUR NAME, SIR?

MATERIAL WITNESS FIGUEROA: JORGE FIGUEROA.

THE COURT: THANK YOU. HANG ON A SECOND.

DOES PRETRIAL SERVICES HAVE HIM?

THE CLERK: I SEE HIM ON ITEM NO. 3, JUDGE.

THE COURT: JORGE FIGUEROA.

MS. RIEDLING: HIS BOND IS FOR $30,000. IT SHOULD BE ON THERE.

THE COURT: MINE ONLY GOES UP TO 20,000. BUT IT'S 30,000.

ALL RIGHT. GENTLEMAN ON THE END, MR. FIGUEROA, I'M SETTING YOUR BOND IN THE AMOUNT OF $30,000, AND YOU MUST POST $3,000 IN CASH.

YOUR NAME.

MATERIAL WITNESS HERNANDEZ: (THROUGH INTERPRETER) AZALIEL.

THE COURT: I CALLED YOU. I JUST PRONOUNCED IT [16] WRONG. YOUR LAST NAME?

MATERIAL WITNESS HERNANDEZ: HERNANDEZ-ALVARADO.

THE COURT: YEAH. HANG ON A SECOND.

I'M SETTING YOUR BOND IN THE AMOUNT OF $7500, AND YOU MUST POST $750 IN CASH.

OKAY. NOW I'M SPEAKING TO ALL OF YOU AGAIN. IF YOU COMPLY WITH ALL OF THE CONDITIONS THAT I HAVE JUST SET, INCLUDING SURRENDERING TO THE IMMIGRATION OFFICIALS, THE CASH DEPOSIT WILL BE RETURNED TO THE PERSON WHO POSTED IT AFTER YOU SURRENDER TO THE IMMIGRATION OFFICIALS.

IF YOU DO NOT COMPLY WITH ALL OF THESE CONDITIONS, THEN THE UNITED STATES MAY PROCEED AGAINST YOU AND THE PERSON WHO SIGNED YOUR BOND FOR THE FULL AMOUNT OF THE BOND, INCLUDING KEEPING ALL THE CASH; SO IT IS EXTREMELY IMPORTANT THAT YOU COMPLY WITH ALL OF THESE CONDITIONS.

MOST OF THE TIME THESE CASES DO NOT GO TO TRIAL, AND IF THAT HAPPENS HERE, YOU WILL BE RETURNED—YOU WILL BE REQUIRED TO SURRENDER TO IMMIGRATION AUTHORITIES, AND YOU WILL BE RETURNED TO YOUR HOME. IF THIS CASE DOES GO TO TRIAL, YOU MUST REMEMBER THAT YOU ARE REQUIRED TO APPEAR IN COURT AS DIRECTED AND TO TESTIFY HONESTLY AND TRUTHFULLY ABOUT EVERYTHING THAT YOU SAW AND HEARD.

I ALSO WANT YOU TO REMEMBER THAT WHEN YOU ARE RELEASED FROM CUSTODY

AND RETURNED TO YOUR HOME, THE UNITED STATES GOVERNMENT HAS A RECORD OF YOUR HAVING BEEN HERE [17] ILLEGALLY BECAUSE THEY TOOK YOUR PICTURE AND FINGERPRINTS. THIS IS IMPORTANT, BECAUSE IF YOU RETURN TO THE UNITED STATES ILLEGALLY IN THE FUTURE, YOU COULD BE ARRESTED AND CHARGED WITH A CRIME. SO I WANT EACH OF YOU TO SPEAK WITH YOUR LAWYER AND GIVE YOUR LAWYER ANY INFORMATION THAT YOU HAVE TO HELP YOU WITH THIS CASE.

THAT'S IT FOR TODAY. GOOD LUCK TO ALL OF YOU. WAIT A SECOND.

MS. RIEDLING: YOUR HONOR, TAMMY RIEDLING WITH PRETRIAL SERVICES. IF YOU CAN ORDER THE TRANSPORT TO C.A.I. BY THE U.S. MARSHALS, NOT PRETRIAL.

THE COURT: SURE. THAT'S WHAT IS ON THE FORM?

MR. RIEDLING: YES.

THE COURT: YEAH. IT WILL BE BY U.S. MARSHALS THEN. THANK YOU. THAT'S IT FOR TODAY.

(PAUSE WHILE THE COURT HEARD OTHER MATTERS.)

THE CLERK: FOR THE RECORD—

THE COURT: WE'RE NOW GOING TO MOVE INTO NEW ARRAIGNMENTS WITH EVERYONE WHO IS IN CUSTODY. FEDERAL DEFENDERS HAS MADE A RECORD AS TO NEW ARRAIGN-

MENTS. I'VE OBJECTED WITH REGARD TO RESTRAINTS. THEY HAVE OBJECTED TO IT. I'VE OVERRULED THAT OBJECTION.

FOR ALL OF THE SAME REASONS, EACH DEFENDANT IN THIS CASE WILL REFLECT THE FACT THAT FEDERAL DEFENDERS IS OBJECTING, WILL ALSO REFLECT THE FACT THAT I AM OVERRULING [18] THE OBJECTION FOR ALL THE REASONS I PREVIOUSLY STATED, THE OBJECTION THAT YOU PREVIOUSLY STATED IS INCORPORATED INTO THE RECORD.

IF YOU HAVE AN INDIVIDUALIZED CONCERN AS TO A SPECIFIC PERSON, FOR EXAMPLE, A MEDICAL ISSUE, RAISE THAT. OTHERWISE, WE DON'T NEED TO GO THROUGH IT AGAIN. THE RECORD IS PRESERVED. ALL RIGHT.

MR. EILER: YOUR HONOR, I'M GOING TO BE MAKING INDIVIDUALIZED OBJECTIONS ON BEHALF OF EACH DEFENDANT IN THEIR PRESENCE.

THE COURT: NO. YOU'RE NOT.

MR. EILER: SO IS IT MY UNDERSTANDING THAT THIS COURT IS DENYING ME ACCESS TO THE RECORD, TO MAKE INDIVIDUALIZED OBJECTIONS AS TO THE SHACKLING ISSUE?

THE COURT: NO. WHAT I SAID IS THAT THE RECORD HAS BEEN MADE. IT'S INCORPORATED PART OF THIS. IF YOU HAVE AN INDIVIDUALIZED RECORD AS TO SOMEONE

WHO HAS A MEDICAL ISSUE, YOU MAY CERTAINLY RAISE THAT.

TO THE EXTENT YOU'RE REPEATING WHAT FEDERAL DEFENDERS HAS PREVIOUSLY STATED, THAT THERE ARE X-NUMBER OF MARSHALS IN HERE AND THESE INDIVIDUALS ARE IN FULL RESTRAINTS AND HAVE BEEN FOR A WHILE, ALL OF THAT IS ON THE RECORD. AT THIS POINT, IT NEEDS TO GO UP AND HAVE A DECISION MADE BY A JUDGE HIGHER THAN THIS ONE.

MR. EILER: SO UNLESS THERE IS A MEDICAL RECORD, [19] THEN THIS COURT IS DENYING US ACCESS TO THE RECORD TO OBJECT TO THE SHACKLING ISSUE ON DUE-PROCESS GROUNDS?

THE COURT: NO. I'M NOT DENYING YOU ACCESS TO A RECORD AT ALL. WHAT I'M SAYING IS IF THERE IS AN INDIVIDUALIZED CONCERN, SUCH AS A MEDICAL ISSUE, YOU CAN MAKE THAT RECORD.

MR. EILER: I'D LIKE TO OBJECT. I UNDERSTAND THE COURT WANTS TO INCORPORATE THE PREVIOUS PROCEEDINGS THAT WE'VE BEEN HAVING THIS WEEK IN THIS COURTROOM.

YOUR HONOR, I WASN'T PRESENT AT THOSE PROCEEDINGS. I WOULD LIKE TO—FOR THE PURPOSES OF APPEAL, TO MAKE SURE THE BASES ARE COVERED, I'D LIKE TO OBJECT ON THIS RECORD AND MAKE THIS

RECORD CLEAN STANDING ON ITS OWN SO THAT THE ISSUE IS PRESERVED FOR APPEAL.

THE COURT: ALL RIGHT.

MR. EILER: IS THE COURT ALLOWING ME TO DO THAT?

THE COURT: GO AHEAD.

MR. EILER: THANK YOU. AS TO ALL THESE DEFENDANTS, WE ARE OBJECTING ON DUE-PROCESS GROUNDS FOR THE USE OF SHACKLES. WE REQUEST THAT THE SHACKLES BE REMOVED IMMEDIATELY. WE REQUEST AN INDIVIDUALIZED DETERMINATION AS TO THE NECESSITY FOR THE SHACKLES AS TO EACH DEFENDANT. TO THAT END, WE'RE REQUESTING AN EVIDENTIARY HEARING AS TO ALL DEFENDANTS WITH RESPECT TO ANY PREDICATE FACTUAL FINDING THAT PURPORTS TO JUSTIFY THE SHACKLING POLICY AS TO ANY DEFENDANT. [20] WE REQUEST THAT DEFENDANTS BE PRESENT IN COURT FOR THOSE INDIVIDUALIZED DETERMINATIONS.

I NOTE FOR THE RECORD THAT NONE OF THE DEFENDANTS ARE IN COURT RIGHT NOW WHILE I'M MAKING THIS PROFFER. TO THE EXTENT THAT I'M NOT ALLOWED TO MAKE AN INDIVIDUALIZED OBJECTION IN THEIR PRESENCE, WE OBJECT ON SIXTH AMENDMENT GROUNDS THAT THEY BE PRESENT FOR THE PROCEEDINGS RELATING TO THE SHACKLING AT ISSUE. WE ALSO OBJECT ON

FIFTH AMENDMENT GROUNDS FOR THAT SAME REASON.

THE EXTENUATING CIRCUMSTANCES THAT WILL APPLY TO EACH OF THESE DEFENDANTS ARE AS FOLLOWS: AT THE ENTRANCE—WE'RE ON THE FIRST FLOOR OF THE COURTHOUSE. AT THE ENTRANCE OF THE COURTHOUSE, THERE ARE FOUR COURT SECURITY OFFICERS WORKING THERE. IN THIS COURTROOM, THERE ARE TWO UNITED STATES MARSHALS. EARLIER IN THE PROCEEDINGS TODAY, THERE WAS AN ADDITIONAL COURT SECURITY OFFICER STANDING AT THE FRONT DOOR. HE MAY REENTER AT SOME POINT. AND IF HE DOES, I WILL NOTE THAT FOR THE RECORD.

EARLIER IN THE PROCEEDINGS TODAY, THERE WERE TEN MATERIAL WITNESSES, ALL STANDING—ALL SITTING IN THE JURY BOX AT THE SAME TIME. NONE OF THOSE INDIVIDUALS WERE SHACKLED. FOR THE MATTERS WHERE THIS COURT SET BOND OF $10,000 OR MORE, I REVIEWED THE PRETRIAL SERVICE REPORTS. ALL OF THOSE INDIVIDUALS HAD CRIMINAL HISTORIES, RANGING FROM DRUG SALES, ALCOHOL-RELATED OFFENSES, IMMIGRATION-TYPE [21] OFFENSES; SOME OF THEM HAD DOMESTIC VIOLENCE-RELATED ASSAULT CONVICTIONS AS WELL. FOLLOWING THAT, THERE WERE AN ADDITIONAL SEVEN OF MATERIAL WITNESSES BROUGHT OUT. NONE OF THOSE INDIVIDUALS WERE IN SHACKLES EITHER.

WITH RESPECT TO THE HISTORY OF THIS COURT IN THE LAST YEAR, THERE HAVE BEEN OVER 44,000 INDIVIDUAL COURT APPEARANCES. THERE HAVE ONLY BEEN TWO SECURITY INCIDENTS, ONE OF THEM INVOLVING A CASE WHERE THE MEXICAN MAFIA WAS INVOLVED; ANOTHER ONE IN EL CENTRO.

ALL OF THESE INDIVIDUALS APPEARING BEFORE THE COURT HAVE GONE THROUGH THE MCC BOOKING PROCESS. THEY HAVE BEEN STRIP SEARCHED. THEY HAVE BEEN SCREENED FOR DRUG—GANG AFFILIATIONS. AND IN THAT RESPECT, IT ALLEVIATES THE SECURITY CONCERNS THAT MAY JUSTIFY SOME SORT OF SHACKLING POLICY.

THE MAJORITY OF THESE DEFENDANTS ARE CHARGED WITH IMMIGRATION OFFENSES. WITH RESPECT TO THEIR HISTORY, I WOULD LIKE TO ADDRESS THEIR CRIMINAL HISTORY. IT MIGHT WORK BETTER FOR THE COURT IF I ADDRESS THEIR CRIMINAL HISTORY AS IT RELATES TO THE SHACKLING ISSUE AT THE SAME TIME THAT WE ARGUE FOR BOND DETERMINATION. IF THAT'S WHAT THE COURT WOULD PREFER, I'M HAPPY TO DO THAT FOR EFFICIENCY PURPOSES.

THE COURT: THEIR INDIVIDUAL CRIMINAL HISTORY IS RELEVANT AT THE BOND TIME, AND I'D BE HAPPY TO HEAR IT THEN.

[22]

MR. EILER: OKAY. BUT AS FAR AS I KNOW, IN MY REVIEW OF THESE RECORDS, THERE IS NO INDICATION THAT ANY OF THESE DEFENDANTS HAVE ANY HISTORY OF ESCAPING FROM FEDERAL CUSTODY OR ANY CUSTODY, AND THAT NONE OF THEM HAVE ANY HISTORY OF PRISON ASSAULTS.

IT IS IMPOSSIBLE FOR ME TO MAKE AN INDIVIDUALIZED DETERMINATION ABOUT THE INDIVIDUALS WITH RESPECT TO WHETHER THE SHACKLES ARE IMPEDING THEIR ABILITY TO EITHER UNDERSTAND THE PROCEEDINGS WITH RESPECT TO PAIN, WHETHER IT'S EXACERBATING MENTAL OR PHYSICAL HEALTH ISSUES.

BUT FOR ALL OF THESE DEFENDANTS, I THINK THAT IT'S DEHUMANIZING TO THEM. I THINK IT UNDERMINES THE DIGNITY AND COMPOSURE OF THE DEFENDANT IN THESE PROCEEDINGS, WHO HAVE YET TO BE CONVICTED OF A CRIME AND STAND BEFORE THE COURT WITH THE PRESUMPTION OF INNOCENCE. I THINK IT UNDERMINES THE DECORUM AND RESPECT FOR THE CRIMINAL JUSTICE SYSTEM.

THERE ARE ALSO LESS RESTRICTIVE ALTERNATES. WE'D ASK THAT THE INDIVIDUALS BE BROUGHT OUT INDIVIDUALLY, AND ONCE AGAIN, REQUEST AN EVIDENTIARY HEARING.

THE COURT: THAT IS ACTUALLY THE SAME ARGUMENT THAT'S BEEN MADE EVERY TIME ON BEHALF OR BY FEDERAL DEFENDERS WITH REGARD TO ARRAIGNMENTS. I FEEL THAT THE RECORD THAT I MADE ON MONDAY IS EQUALLY APPLICABLE TO YOUR ARGUMENTS HERE TODAY. I, THEREFORE, INCORPORATE MY RULING ON MONDAY.

I DENY YOUR MOTIONS IN BOTH RESPECTS. I DISAGREE [23] WITH YOUR ARGUMENT THAT THE DEFENDANTS ARE ENTITLED TO AN INDIVIDUALIZED DETERMINATION OR A HEARING, EACH ONE. THAT DOESN'T MAKE SENSE. THE U.S. MARSHAL SERVICE HAS MADE A DETERMINATION WITH REGARD TO THE POLICY. I DEFER TO THAT.

SO I DENY YOUR MOTION AS TO ALL DEFENDANTS THAT ARE GOING TO APPEAR HERE IN COURT TODAY.

ALL RIGHT. MARSHALS, LET'S BRING THEM ALL OUT.

MR. EILER: AND, YOUR HONOR, I APPRECIATE THE COURT'S PATIENCE.

THE COURT: I KNOW YOU DISAGREE.

MR. EILER: NO, NO.

THE COURT: YOU DON'T HAVE TO MAKE IT AGAIN FOR THE RECORD.

PLEASE CALL THEM, MICHELLE. WE NEED TO GET GOING.

THE CLERK: ITEMS NO. 5, 6, 7, 8, 9 AND 10 ON THE LOG.

ITEM NO. 5, 13MJ3934, CESAR TOVAR-ZEPEDA;

ITEM NO. 6, 13MJ3824, JUAN ANTONIO RODRIGUEZ-SIFUENTES;

ITEM NO. 7, 13MJ3870, ANGEL NIETO-GARICA;

ITEM NO. 8, 13MJ3932, JONATHAN REYES;

ITEM NO. 9, 13MJ3933, ERNESTO BAUTISTA-ESQUIVEL;

ITEM NO. 10, 13MJ3935, DANIEL HERNANDEZ-RIVERA.

THE COURT: SIT DOWN.

MARSHALS, ARE WE WAITING FOR MORE OR IS THAT [24] EVERYONE? IS THAT EVERYONE WE CALLED?

THE MARSHAL: THAT SHOULD BE EVERYONE.

THE COURT: PERFECT. THANK YOU.

ALL RIGHT. I'M SPEAKING TO ALL OF YOU. EACH OF YOU IS HERE BECAUSE THE UNITED STATES HAS FILED A COMPLAINT CHARGING YOU WITH A CRIME. THIS IS YOUR INITIAL APPEARANCE, SO I'M GOING TO GO THROUGH FOUR THINGS WITH YOU TODAY.

FIRST I'M GOING TO TELL YOU WHAT CRIME YOU ARE CHARGED WITH. SECOND, I'M GOING TO DISCUSS WITH YOU YOUR RIGHT TO COUNSEL. THIRD, I'M GOING TO SET A

PRELIMINARY HEARING. AND, FINALLY, I'M GOING TO DISCUSS BAIL. SO, FIRST, THE CRIME THAT YOU ARE CHARGED WITH:

CESAR TOVAR.

DEFENDANT TOVAR: (INDICATING.)

THE COURT: OKAY. SIR, YOU ARE CHARGED WITH THE CRIME OF TRANSPORTATION OF ILLEGAL ALIENS. IT'S ALLEGED THAT ON OCTOBER 23RD, YOU HAD THE INTENTION OF VIOLATING THE IMMIGRATION LAWS OF THE UNITED STATES. YOU KNEW OR WERE IN RECKLESS DISREGARD OF THE FACT THAT ALIENS HAD COME TO, ENTERED AND REMAINED IN THE UNITED STATES, AND YOU DID TRANSPORT AND MOVE THEM WITHIN THE UNITED STATES IN VIOLATION OF LAW.

JUAN RODRIGUEZ.

DEFENDANT RODRIGUEZ: YES, YOUR HONOR.

THE COURT: ALL RIGHT. ANGEL NIETO.

[25]

DEFENDANT NIETO: YES.

THE COURT: IS THAT YOU? OKAY.

GENTLEMEN. SPEAKING TO THE TWO OF YOU. DOWN HERE, MR. NIETO, DO YOU SPEAK ENGLISH?

DEFENDANT NIETO: YES.

THE COURT: FLUENTLY?

DEFENDANT NIETO: YES.

THE COURT: OKAY. YOU WERE SLOWER IN ANSWERING, SO I WANTED TO MAKE SURE YOU UNDERSTOOD EVERYTHING I WAS SAYING.

SPEAKING TO THE TWO OF YOU. EACH OF YOU ARE CHARGED IN A SEPARATE COMPLAINT BY YOURSELF, BUT YOU ARE CHARGED WITH THE SAME CRIME. THAT CRIME IS ATTEMPTED ENTRY AFTER DEPORTATION. FOR EACH OF YOU, IT'S ALLEGED THAT YOU ARE AN ALIEN, WHO PREVIOUSLY HAD BEEN EXCLUDED, DEPORTED AND REMOVED FROM THE UNITED STATES. YOU THEN ATTEMPTED TO ENTER THE UNITED STATES AND YOU DID NOT HAVE THE PERMISSION OF THE U.S. ATTORNEY GENERAL TO APPLY FOR ADMISSION TO THE UNITED STATES.

FOR MR. RODRIGUEZ, IT'S ALLEGED THIS OCCURRED ON OCTOBER 15TH. FOR MR. NIETO, IT'S ALLEGED THIS OCCURRED ON OCTOBER 17TH.

JONATHAN REYES. ALL RIGHT. ERNESTO BAUTISTA. ALL RIGHT. AND DANIEL HERNANDEZ. ALL RIGHT. THAT'S EVERYBODY.

ALL RIGHT. SPEAKING TO YOU THREE GENTLEMEN. EACH OF YOU ARE CHARGED IN A SEPARATE COMPLAINT, BUT EACH OF YOU ARE CHARGED WITH THE SAME CRIME;

AND THAT CRIME IS BEING A [26] DEPORTED ALIEN FOUND IN THE UNITED STATES.

FOR EACH OF YOU, IT'S ALLEGED THAT YOU ARE AN ALIEN, WHO PREVIOUSLY HAD BEEN EXCLUDED, DEPORTED AND REMOVED FROM THE UNITED STATES. YOU WERE SUBSEQUENTLY FOUND IN THE UNITED STATES AND YOU DID NOT HAVE THE PERMISSION OF THE U.S. ATTORNEY GENERAL TO APPLY FOR ADMISSION TO THE UNITED STATES.

FOR MR. REYES AND MR. BAUTISTA, IT'S ALLEGED THIS OCCURRED ON OCTOBER 23RD; FOR MR. HERNANDEZ, IT'S ALLEGED THIS OCCURRED ON OCTOBER 18TH.

SPEAKING TO ALL OF YOU. THAT'S WHY EACH OF YOU IS HERE TODAY. WITH REGARD TO THIS CRIME, EACH OF YOU HAS THE RIGHT TO REMAIN SILENT. THE UNITED STATES IS REQUIRED TO PROVE ITS CASE AGAINST YOU WITHOUT ANY HELP OR TESTIMONY FROM YOU. IF YOU DECIDE TO SPEAK WITH SOMEONE ABOUT THE CHARGE, ANYTHING YOU SAY CAN BE USED AGAINST YOU. IF YOU DO SPEAK WITH SOMEONE ABOUT THE CHARGE, YOU MAY STOP AT ANY TIME.

THE NEXT THING IS EACH OF YOU HAS AN ABSOLUTE RIGHT TO HAVE AN ATTORNEY HELP YOU IN DEFENDING AGAINST THESE CHARGES. IF YOU DO NOT HAVE THE ABIL-

ITY TO HIRE A LAWYER, I WILL APPOINT A LAWYER TO REPRESENT YOU.

DO YOU HAVE A FINANCIAL AFFIDAVIT FOR MR. TOVAR?

MR. EILER: I BELIEVE WE HANDED THAT FORWARD, YOUR HONOR.

THE COURT: MICHELLE, WOULD YOU LOOK AND SEE IF YOU HAVE THAT. YEP. THANK YOU.

[27]

OKAY. MR. TOVA , I HAVE IN FRONT OF ME A ONE-PAGE FINANCIAL AFFIDAVIT. IT'S SIGNED UNDER THE PENALTY OF PERJURY BY YOU. IS EVERYTHING IN THIS DOCUMENT TRUE? WHERE IS TOVAR?

DEFENDANT TOVAR: (THROUGH INTERPRETER) YES.

THE COURT: ALL RIGHT. BASED UPON THAT INFORMATION, I FIND YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, AND I'M APPOINTING ROBERT CARRIEDO TO REPRESENT YOU.

THE NEXT GROUP ARE ALL CHARGED WITH 1326 VIOLATIONS. DOES THE GOVERNMENT HAVE ANY REASON TO BELIEVE THAT ANY OF THESE HAVE THE—INDIVIDUALS HAVE THE ABILITY TO HIRE A LAWYER?

MR. MARKLE: WE DO NOT, YOUR HONOR. THANK YOU.

THE COURT: BASED UPON THAT, I FIND THEY DO NOT HAVE THE ABILITY TO HIRE A LAWYER. SO FOR ALL THE REST OF YOU, I AM APPOINTING A LAWYER TO REPRESENT EACH ONE OF YOU.

JUAN RODRIGUEZ.

DEFENDANT RODRIGUEZ: YES, YOUR HONOR.

THE COURT: I'M APPOINTING CHARLES REES TO REPRESENT YOU. NO, YOU'RE RIGHT.

FEDERAL DEFENDERS WAS PREVIOUSLY APPOINTED TO REPRESENT YOU. I'M GOING TO CONFIRM THE APPOINTMENT OF FEDERAL DEFENDERS.

GENTLEMAN IN THE MIDDLE.

MS. LOPEZ: YOUR HONOR, I BELIEVE VICTOR PIPPINS [28] REPRESENTED HIM BEFORE. I'M NOT SURE—

THE COURT: SOMEBODY ELSE PROVISIONALLY APPOINTED FEDERAL DEFENDERS AND TOMMY VU'S NAME IS ON HERE. HE DOESN'T GET TO CHOOSE HIS LAWYER.

MR. EILER: OKAY.

MS. LOPEZ: YOUR HONOR, I UNDERSTAND. BUT, YOU KNOW, MR. PIPPINS—I SPOKE WITH THIS INDIVIDUAL IN THE TANK, AND I THINK THERE WERE SOME UNIQUE ISSUES IN THE CASE THAT I THINK MR. PIPPINS IS FAMILIAR

WITH; SO I THINK IT MIGHT BE IN EVERYONE'S BEST INTEREST IF MR. PIPPINS—

THE COURT: SOMEBODY ELSE ALREADY APPOINTED FEDERAL DEFENDERS. I'M APPOINTING FEDERAL DEFENDERS ON THIS.

ANGEL NIETO, I'M APPOINTING CHARLES REES. JONATHAN REYES—STEPPING BACK. MR. REES' NUMBER IS (619) 239-9300.

JONATHAN REYES, I'M APPOINTING FEDERAL DEFENDERS.

ERNESTO BAUTISTA, I'M ALSO APPOINTING FEDERAL DEFENDERS.

AND THEN DANIEL HERNANDEZ, I'M ALSO APPOINTING FEDERAL DEFENDERS.

SPEAKING TO ALL OF YOU. EACH OF YOU HAS JUST BEEN GIVEN A BUSINESS CARD FOR THE LAWYER THAT I HAVE APPOINTED TO REPRESENT YOU. IN ADDITION, WE WILL NOTIFY YOUR LAWYER THAT HE OR SHE HAS BEEN APPOINTED TO REPRESENT YOU, AND YOUR LAWYER WILL BE IN CONTACT WITH YOU IN THE NEAR FUTURE AND REPRESENT YOU THROUGHOUT THE REMAINDER OF THIS CASE.

[29]

THE NEXT THING THAT I NEED TO DO IS SET YOUR PRELIMINARY HEARING AND ARRAIGNMENT. EACH OF YOU ARE ORDERED TO APPEAR IN MY COURTROOM ON NOVEMBER 7TH AT 9:30 A.M. FOR A PRELIMINARY

HEARING. YOU ALSO ARE ORDERED TO APPEAR IN MY COURTROOM FOR ARRAIGNMENT.

FOR MR. RODRIGUEZ AND MR. NIETO, YOU MUST APPEAR IN MY COURTROOM ON NOVEMBER 14TH AT 9:30. FOR EVERYBODY ELSE, IT'S NOVEMBER 19TH AT 9:30.

FOR ALL OF YOU WITH REGARD TO THE PRELIMINARY HEARING.

THE INTERPRETER: YOUR HONOR, THERE IS ONE PERSON THAT STARTED WITH THE INTERPRETER, AND I DON'T KNOW IF HE'S HAVING DIFFICULTIES. MAY I ASK? HE DOESN'T HAVE THE HEADSET ON ANYMORE.

THE COURT: SURE. GO AHEAD.

THE INTERPRETER: OKAY. HE UNDERSTANDS ENGLISH.

THE COURT: OKAY. SO I SET EVERYBODY'S ARRAIGNMENT.

THE FINAL THING—OH, WITH REGARD TO THE PRELIMINARY HEARING, EACH OF YOU HAS THE RIGHT FOR A JUDGE TO MAKE A DETERMINATION AS TO WHETHER OR NOT THERE ARE SUFFICIENT FACTS FOR YOUR CASE TO PROCEED FORWARD, THAT IS THE PURPOSE OF A PRELIMINARY HEARING.

THE FINAL THING THAT I NEED TO DISCUSS WITH EACH OF YOU IS BAIL. IS THE UNITED STATES MOVING TO DETAIN ANYBODY?

MR. MARKLE: YES, YOUR HONOR. WE'RE MOVING TO [30] DETAIN EVERYBODY BASED UPON RISK OF FLIGHT.

THE COURT: IS IT BASED JUST ON THE FACT THAT THEY ARE IN THIS COUNTRY ILLEGALLY?

MR. MARKLE: THERE IS THAT, AND THEN FOR FOUR INDIVIDUALS, IT'S A LITTLE BIT MORE SPECIFIC, RELATING TO THEIR PRIOR RECORD AND THE CIRCUMSTANCES REGARDING THEIR ARREST.

THE COURT: WHICH INDIVIDUALS ARE THOSE, AND GIVE ME YOUR FACTUAL BASIS.

MR. MARKLE: REGARDING THE ARREST, IT'S GOING TO BE CESAR TOVAR. HE WAS—HE'S ACCUSED OF SMUGGLING SIX INDIVIDUALS. HE WAS OBSERVED PICKING UP THESE INDIVIDUALS ON INTERSTATE 8, HALF A MILE EAST—

THE COURT: THIS IS A HIGH-SPEED CHASE; RIGHT?

MR. MARKLE: THAT'S CORRECT.

THE COURT: YEP.

MR. MARKLE: AS WELL AS JUMPING OUT OF THE VEHICLE.

THE COURT: WE'LL SET THAT FOR A DETENTION HEARING.

WHAT ABOUT THE OTHERS?

MR. MARKLE: ANGEL NIETO IS—HE HAS THREE FELONY CONVICTIONS DATING BACK TO 2005, AS WELL AS HE'S CURRENTLY ON SUPERVISED RELEASE FOR 8 U.S.C. 1326. CONSEQUENTLY, A 3142(D) HOLD WOULD BE APPROPRIATE.

[31]

THE COURT: I'LL SET A 3142(D) HOLD, BUT I DON'T SEE THE NEED FOR A DETENTION HEARING. I DENY THAT REQUEST.

WHAT'S THE NEXT ONE?

MR. MARKLE: THANK YOU, YOUR HONOR. THE NEXT ONE WOULD BE JUAN ANTONIO RODRIGUEZ. HE ALSO HAS SEVERAL CRIMINAL CONVICTIONS DATING BACK, WHILE PRIMARILY IMMIGRATION RELATED, THEY ARE FELONIES. AND HE HAS A TOTAL OF FIVE FELONIES, WHICH DATE BACK TO 1992.

THE COURT: SAME THING. I DO BELIEVE I CAN SET BAIL ON THAT ONE.

MR. MARKLE: AND THE FINAL WOULD BE JONATHAN REYES, WHO HAS A—JONATHAN REYES, HE HAS A PRETTY SERIOUS CRIMINAL CONVICTION WITHIN THE LAST SIX YEARS FOR WHICH HE SERVED TWO YEARS FOR.

THE COURT: SAME THING, I CAN SET BAIL. SO I DENY YOUR REQUEST AS TO THOSE THREE INDIVIDUALS.

MR. TOVAR, THE UNITED STATES HAS ASKED THAT YOU BE HELD IN CUSTODY WITHOUT BAIL BECAUSE THEY BELIEVE YOU

PRESENT AN UNREASONABLE RISK OF FLIGHT. THEY HAVE THE RIGHT TO DO THAT. YOU HAVE THE RIGHT TO HAVE A HEARING AND FOR ME TO MAKE A DETERMINATION AS TO WHETHER OR NOT THERE ARE ANY CONDITIONS THAT I COULD SET THAT WOULD GUARANTY YOUR APPEARANCE IN COURT AS REQUIRED. YOU WILL, HOWEVER, BE HELD IN CUSTODY WITHOUT BAIL UNTIL THAT HEARING OCCURS.

I'M GOING TO SET THIS FOR A HEARING, YOUR DETENTION [32] HEARING ON TUESDAY, OCTOBER 29TH, AT 9:30 A.M. SO THAT'S IT FOR TODAY FOR YOU, SIR.

FOR EVERYBODY ELSE, THE UNITED STATES—FOR EVERYBODY ELSE, I AM GOING TO BE SETTING BOND, SO I NOW WANT EACH OF YOU TO LISTEN VERY CAREFULLY. THERE ARE SOME CONDITIONS THAT I BELIEVE ARE APPROPRIATE FOR EVERYBODY, AND I CALL THESE THE GENERAL CONDITIONS. IF YOU ARE RELEASED FROM CUSTODY, YOU MUST COMPLY WITH THE GENERAL CONDITIONS AND WITH ALL OF THE CONDITIONS THAT I SET AS TO YOU INDIVIDUALLY.

SO HERE ARE THE GENERAL CONDITIONS WITH WHICH EACH OF YOU MUST COMPLY: YOU MUST NOT COMMIT A FEDERAL, STATE OR LOCAL CRIME DURING THE PERIOD OF RELEASE. YOU MUST MAKE ALL OF YOUR COURT APPEARANCES. YOUR TRAVEL IS RESTRICTED TO THE SOUTHERN DISTRICT OF

CALIFORNIA AND YOU MAY NOT ENTER MEXICO.

YOU MUST REPORT FOR SUPERVISION TO THE PRETRIAL SERVICES AGENCY AS DIRECTED BY THE ASSIGNED PRETRIAL SERVICES OFFICER AND PAY FOR THE REASONABLE COST OF SUPERVISION IN AN AMOUNT TO BE DETERMINED BY THE PRETRIAL SERVICES AGENCY AND APPROVED BY THE COURT. YOU MAY NOT POSSESS OR USE ANY NARCOTIC, DRUG OR CONTROLLED SUBSTANCE WITHOUT A LAWFUL MEDICAL PRESCRIPTION.

YOU MAY NOT POSSESS ANY FIREARM, DANGEROUS WEAPON OR DESTRUCTIVE DEVICE DURING THE PENDENCY OF THE CASE. YOU MUST READ OR HAVE EXPLAINED TO YOU AND THEN ACKNOWLEDGE UNDERSTANDING OF THE ADVISE OF PENALTIES AND SANCTIONS FORM. [33] YOU MUST PROVIDE A CURRENT RESIDENCE ADDRESS AND TELEPHONE NUMBER PRIOR TO YOUR RELEASE FROM CUSTODY AND KEEP IT CURRENT WHILE THE CASE IS PENDING.

YOU MUST COMPLY WITH ALL GOVERNMENT AGENCY CONDITIONS TO BE ABLE TO LEGALLY REMAIN IN THE UNITED STATES DURING THE PENDENCY OF THE PROCEEDINGS. AND YOU MUST ACTIVELY SEEK AND MAINTAIN FULL-TIME EMPLOYMENT, SCHOOLING OR A COMBINATION THEREOF. THOSE ARE THE GENERAL CONDITIONS WITH WHICH EACH OF YOU MUST COMPLY.

I'M NOW GOING TO HEAR FROM THE LAWYERS WITH REGARD TO ADDITIONAL CONDITIONS. DOES THE GOVERNMENT WANT TO BE HEARD ON AMOUNT?

MR. MARKLE: NO. THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT. JUAN RODRIGUEZ, WHAT'S YOUR POSITION ON MR. RODRIGUEZ?

MR. EILER: THANK YOU, YOUR HONOR. WE'RE REQUESTING A $10,000 CASH OR CORPORATE SURETY BOND IN THIS CASE FOR THE FOLLOWING REASONS: FIRST, MR. RODRIGUEZ HAS A UNITED STATES CITIZEN CHILD, WHO IS EIGHT YEARS OLD. HE HAS A SISTER IN WEST LOS ANGELES AND ALSO A FRIEND IN THE AREA, WHICH DEMONSTRATE TIES TO AT LEAST THE CENTRAL DISTRICT OF CALIFORNIA.

HE'S BEEN A STABLE AND PRODUCTIVE MEMBER OF THE COMMUNITY, WORKING IN AUTO BODY FOR THE PAST 20 YEARS, MAKING A VERY SMALL AMOUNT OF MONEY. AND FOR THOSE REASONS, WE'RE [34] REQUESTING A $10,000 CASH OR CORPORATE SURETY BOND.

I ALSO WOULD JUST LIKE TO NOTE FOR THE RECORD AS TO—WELL, I CAN WAIT ON THE FOLLOW-UP FOR THE SHACKLING ISSUE, I THINK.

THE COURT: I'VE GOT THE CRIMINAL HISTORY IN FRONT OF ME.

MR. EILER: RIGHT. IT'S FILED.

THE COURT: IF YOU WANT TO MAKE—IT IS. IF YOU WANT TO MAKE A RECORD, YOU CAN FILE SOMETHING AFTERWARDS.

MR. EILER: WHAT I DO WANT TO NOTE, JUST AS TO ALL OF THESE INDIVIDUALS, IS THAT THEY ARE ALL PRESENT BEFORE THE COURT, THEY ARE ALL IN SHACKLES WITH A BELLY CHAIN AND THE HANDCUFFS AND THE LEG SHACKLES.

THE COURT: YOU HAD A CHANCE TO MAKE THE RECORD. YOU GUYS DID THIS EVERY DAY. YOU KEEP ADDING FACTS AS WE GO ALONG. I CAN'T KEEP GOING BACK AND REFRESHING THE RECORD. I GAVE YOU THAT CHANCE AT THE BEGINNING.

MR. EILER: NONE OF THESE INDIVIDUALS WERE BEFORE THE COURT AT THAT TIME.

THE COURT: AND DID YOU NOT KNOW HOW THEY WERE GOING TO BE BROUGHT OUT?

MR. EILER: THEY ARE BEFORE THE COURT NOW. FACTS HAVE CHANGED, AND I'M BRINGING THAT TO THE COURT'S ATTENTION FOR THE RECORD, YOUR HONOR.

THE COURT: IT DOES NOT CHANGE ANYTHING.

[35]

ALL RIGHT. MR. RODRIGUEZ, I'M SETTING THE FOLLOWING ADDITIONAL CONDITIONS ON YOU. YOU MUST PROVIDE THE COURT WITH A CASH OR CORPORATE SURETY BOND IN THE AMOUNT OF $25,000 THAT COVERS ALL OF THE CONDITIONS OF RELEASE AND NOT JUST YOUR APPEARANCES.

I'M ALSO IMPOSING A HOLD PURSUANT TO 18 USC, SECTION 3142(D). THAT WILL REMAIN IN EFFECT UNTIL NOVEMBER 7TH OF THIS YEAR. IF NO DETAINER IS LODGED BY THAT DATE, THEN THE CONDITIONS THAT I HAVE JUST TOLD YOU ABOUT WILL TAKE EFFECT.

DO YOU UNDERSTAND, SIR, THAT IF YOU ARE RELEASED FROM CUSTODY, YOU MUST COMPLY WITH THE CONDITIONS I HAVE JUST TOLD YOU ABOUT, AS WELL AS ALL OF THE GENERAL CONDITIONS I'VE PREVIOUSLY TOLD YOU ABOUT?

DEFENDANT TOVAR: YES, YOUR HONOR.

THE COURT: TURNING TO MR. NIETO. WHAT'S YOUR POSITION ON HIM?

MR. EILER: YOUR HONOR, WE'RE REQUESTING A $20,000 CASH OR CORPORATE SURETY BOND FOR THIS INDIVIDUAL, WHO HAS A MOTHER, A SISTER AND ANOTHER SISTER ALL IN THE CENTRAL DISTRICT OF CALIFORNIA. MR. NIETO-GARCIA IS A HIGH SCHOOL GRADUATE. HE'S CURRENTLY UNEMPLOYED AND WON'T BE ABLE TO AFFORD ANY SUBSTANTIAL BOND.

FOR THE RECORD, MR. NIETO-GARCIA HAS DIAGNOSED MENTAL HEALTH ISSUES. IT'S UNCLEAR RIGHT NOW WHETHER THE SHACKLES THAT HE IS WEARING ARE EXACERBATING THAT CONDITION. [36] BUT TO THE EXTENT THAT THEY ARE, WE OBJECT AND RENEW OUR OBJECTION ON THE SHACKLING ISSUE.

THE COURT: SIR, YOU MUST COMPLY WITH THE FOLLOWING ADDITIONAL CONDITIONS. BASED ON WHAT YOUR LAWYER JUST SAID, I'M GOING TO REQUIRE YOU TO SUBMIT TO TREATMENT AND/OR TESTING AT THE DISCRETION OF THE PRETRIAL SERVICES OFFICER ASSIGNED TO YOUR CASE FOR PSYCHIATRIC OR PSYCHOLOGICAL COUNSELING. I'M ALSO GOING TO REQUIRE YOU TO PROVIDE THE COURT WITH A CASH OR CORPORATE SURETY BOND IN THE AMOUNT OF $40,000 THAT'S SECURED—OR THAT COVERS ALL OF THE CONDITIONS OF RELEASE AND NOT JUST YOUR APPEARANCES. I BASE THAT UPON YOUR LENGTHY CRIMINAL HISTORY AND PROBATION VIOLATIONS.

I'M ALSO IMPOSING A HOLD PURSUANT TO 18 USC SECTION 3142(D) THAT WILL REMAIN IN EFFECT UNTIL NOVEMBER 7TH OF THIS YEAR. IF NO DETAINER IS LODGED BY THAT DATE, THEN THE CONDITIONS I HAVE JUST TOLD YOU ABOUT WILL TAKE EFFECT.

DO YOU UNDERSTAND, SIR, THAT IF YOU ARE RELEASED FROM CUSTODY, YOU MUST COMPLY WITH THE CONDITION I HAVE JUST

TOLD YOU ABOUT, AS WELL AS ALL OF THE GENERAL CONDITIONS I'VE PREVIOUSLY TOLD YOU ABOUT?

DEFENDANT NIETO: YES.

THE COURT: ALL RIGHT. THANK YOU, SIR.

MR. REYES, JONATHAN REYES. WHAT'S YOUR POSITION ON HIM?

[37]

MR. EILER: YOUR HONOR, WE'RE REQUESTING A $15,000 CASH OR CORPORATE SURETY BOND FOR MR. REYES, WHO HAS A TWO-YEAR-OLD CHILD AND ALSO HAS A MOTHER, THREE SISTERS, TWO OF WHICH ARE U.S. CITIZENS, ALL IN CALIFORNIA. HE'S ALSO A HIGH SCHOOL GRADUATE AND HE'S BEEN A RESTAURANT WORKER FOR THE PAST YEAR MAKING A PRETTY MEAGER SALARY. WE'D ALSO—I NOTED HERE—I TAKE THAT BACK.

SO FOR THOSE REASONS, WE'RE REQUESTING A $15,000 CASH OR CORPORATE SURETY BOND AND NOTE THAT HE'S IN SHACKLES AND INCORPORATE OUR PREVIOUS OBJECTIONS.

THE COURT: MR. REYES, I'M IMPOSING THE FOLLOWING ADDITIONAL CONDITION ON YOU: YOU MUST PROVIDE THE COURT WITH A CASH OR CORPORATE SURETY BOND IN THE AMOUNT OF $25,000 THAT COVERS ALL OF THE

CONDITIONS OF RELEASE AND NOT JUST YOUR APPEARANCES.

DO YOU UNDERSTAND, SIR, THAT IF YOU ARE RELEASED FROM CUSTODY, YOU MUST COMPLY WITH THE CONDITIONS I HAVE JUST TOLD YOU ABOUT, AS WELL AS ALL OF THE GENERAL CONDITIONS I HAVE PREVIOUSLY TOLD YOU ABOUT?

DEFENDANT REYES: YES.

THE COURT: ALL RIGHT. THANK YOU, SIR. THAT'S IT FOR TODAY.

ERNESTO BAUTISTA. THERE WE GO. WHAT'S YOUR POSITION ON MR. BAUTISTA?

MR. EILER: MR. BAUTISTA, WE'RE REQUESTING A $10,000 [38] CASH OR CORPORATE SURETY BOND. MR. BAUTISTA HAS A UNITED STATES CITIZEN CHILD. HE ALSO HAS A—HE'S ENGAGED TO A UNITED STATES CITIZEN. THEY HAVE BEEN TOGETHER FOR EIGHT YEARS. THE CHILD AND FIANCEE LIVE IN ESCONDIDO, CALIFORNIA, DEMONSTRATING HIS STRONG TIES TO THE REGION. HIS SISTER LIVES THERE AS WELL. MR. BAUTISTA HAS INDICATED HE'S GONE THROUGH THE 12TH GRADE. HE'S BEEN UNEMPLOYED FOR THE PAST SIX MONTHS, WAS PREVIOUSLY WORKING IN CONSTRUCTION.

AND, ONCE AGAIN, WE INCORPORATE OUR PREVIOUS ARGUMENTS AS TO THE SHACKLING ISSUES.

THE COURT: GOVERNMENT, I HAVE THAT HE HAS A 1326 CONVICTION IN 2012, BUT IT DOESN'T INDICATE WHETHER THERE WAS SUPERVISED RELEASE.

MR. MARKLE: HE'S NOT CURRENTLY ON SUPERVISED RELEASE.

THE COURT: TERRIFIC.

MR. MARKLE: WE DID CHECK INTO THAT.

THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT. MR. BAUTISTA, I IMPOSE THE FOLLOWING ADDITIONAL CONDITION ON YOU: YOU MUST PROVIDE THE COURT WITH A CASH OR CORPORATE SURETY BOND IN THE AMOUNT OF $25,000. THAT COVERS ALL OF THE CONDITIONS OF RELEASE AND NOT JUST YOUR APPEARANCES.

DO YOU UNDERSTAND, SIR, THAT IF YOU ARE RELEASED FROM CUSTODY, YOU MUST COMPLY WITH THE CONDITION I HAVE JUST [39] TOLD YOU ABOUT, AS WELL AS ALL OF THE GENERAL CONDITIONS I'VE PREVIOUSLY TOLD YOU ABOUT?

DEFENDANT BAUTISTA: YES.

THE COURT: THANK YOU, SIR. THAT'S IT FOR TODAY.

MR. HERNANDEZ. WHAT'S YOUR POSITION ON MR. HERNANDEZ?

MR. EILER: MR. HERNANDEZ, WE'RE REQUESTING A $10,000 CASH OR CORPORATE SURETY BOND, POINTING TO HIS STRONG

FAMILY TIES TO THE REGION, INCLUDING A UNITED STATES CITIZEN CHILD AND A NUMBER OF FAMILY LIVING IN THE CENTRAL DISTRICT OF CALIFORNIA. ALSO, HIS RELATIVELY MINOR CRIMINAL HISTORY. IT LOOKS LIKE IT'S LIMITED TO A FEW MISDEMEANOR CONVICTIONS. AND HE'S BEEN WORKING, DOING FIELD WORK FOR THE PAST FOUR YEARS WITH A PRETTY MEAGER INCOME.

AND FOR THOSE REASONS, WE'RE REQUESTING A $10,000 CASH OR CORPORATE SURETY BOND AND INCORPORATE OUR PREVIOUS ARGUMENTS AS TO THE SHACKLING ISSUE

THE COURT: ALL RIGHT. SIR, I'M IMPOSING THE FOLLOWING ADDITIONAL CONDITION ON YOU: YOU MUST PROVIDE THE COURT WITH A CASH OR CORPORATE SURETY BOND IN THE AMOUNT OF $20,000. THAT COVERS ALL OF THE CONDITIONS OF RELEASE AND NOT JUST YOUR APPEARANCES.

DO YOU UNDERSTAND THAT IF YOU ARE RELEASED FROM CUSTODY, YOU MUST COMPLY WITH THE CONDITIONS I HAVE JUST TOLD YOU ABOUT, AS WELL AS ALL OF THE GENERAL CONDITIONS I'VE [40] PREVIOUSLY TOLD YOU ABOUT?

DEFENDANT HERNANDEZ: YES.

THE COURT: THANK YOU, SIR. THAT'S IT, MARSHALS. THANK YOU.

MR. EILER: YOUR HONOR, I'M SORRY TO INTERRUPT. BECAUSE MR. TOVAR WAS DETAINED, I DIDN'T GET A BRIEF OPPORTUNITY TO ADDRESS THE SPECIFICS FOR THE SHACKLING ISSUE AS TO HIM.

THE COURT: YOU'LL HAVE AN OPPORTUNITY TO DO THAT AT THE DETENTION HEARING.

MR. EILER: SO THE COURT IS DENYING ME ACCESS TO THE RECORD AS TO MR. TOVAR ON THAT ISSUE?

THE COURT: NO. WHAT'S YOUR INDIVIDUAL CONCERN? DO NOT REPEAT YOUR—YOU HAVE REPEATED—

MR. EILER: I'M NOT. THAT'S WHY I'M RAISING IT, BECAUSE THERE IS AN INDIVIDUAL CONCERN HERE. AND I APPRECIATE THE COURT'S PATIENCE.

MR. TOVAR, WE INTERVIEWED HIM DOWN IN THE TANK. HE HAS SUFFERED SOME INJURIES STEMMING FROM HIS ARREST, INCLUDING A LACERATION ON HIS WRIST WHERE THE SHACKLES ARE COVERING HIM AND SOME INJURIES ELSEWHERE ON HIS BODY. THAT'S THE INDIVIDUAL CONCERN, BEYOND WHAT WE'VE TALKED ABOUT BEFORE.

THE COURT: ALL RIGHT. IN THE FUTURE —THAT'S WHY I RAISED INDIVIDUAL CONCERNS. AT THIS POINT, I CAN'T DO [41] ANYTHING FOR HIM BECAUSE THE HEARING IS OVER. IF YOU HAVE AN INDIVIDUALIZED

CONCERN ABOUT A MEDICAL ISSUE THAT SOMEONE IS UNCOMFORTABLE, SAY THAT AT THE BEGINNING. THAT'S WHY I RAISED THAT AT THE BEGINNING. IF YOU HAVE AN INDIVIDUALIZED CONCERN OF A MEDICAL ISSUE, I CAN ADDRESS THAT BEFORE THE HEARING.

AT THIS POINT, THE HEARING IS OVER.

MR. EILER: RIGHT. THE ISSUE I GUESS IS, DOES YOUR HONOR WANT ME TO WALK THROUGH EACH DEFENDANT INDIVIDUALLY BEFORE THEY ARE BROUGHT OUT?

THE COURT: NO. IF THERE IS A MEDICAL ISSUE, TELL ME AT THE BEGINNING OF THE HEARING.

MR. EILER: OKAY.

THE COURT: MEDICAL ISSUE, TELL ME AT THE BEGINNING BEFORE I BRING THEM OUT. ALL RIGHT. THANK YOU, MARSHALS.

DO YOU HAVE A MEDICAL ISSUE AS TO ANYBODY LEFT?

MR. EILER: MEDICAL ISSUE AS TO NO. 13 ON THE LOG.

THE COURT: OKAY. WHAT'S HIS MEDICAL ISSUE?

MR. EILER: CAN I WAIT FOR HIM TO COME OUT?

THE COURT: NO. BECAUSE IF HE HAS A MEDICAL ISSUE, THEN I DON'T WANT HIM BROUGHT OUT IN CHAINS.

WHAT'S HIS MEDICAL ISSUE?

MR. EILER: HE'S CUT ON THE LEG.

THE COURT: WHERE?

MR. EILER: WHERE THE SHACKLES ARE HOLDING HIS [42] ANKLES AND HE'S BLEEDING. THAT'S WHAT OUR RECORDS SHOW FROM THE TANK THIS MORNING.

THE COURT: NO. 13. IS NO. 13 BLEEDING?

THE MARSHAL: I'LL CHECK.

THE COURT: DON'T BRING HIM OUT AND CHECK AND SEE IF HE'S BLEEDING. CALL EVERYONE BUT 13.

THE CLERK: YES, JUDGE.

FOR THE RECORD, ITEMS NO. 11, 12 AND 15. 11, 12 AND 15.

ITEM NO. 11, 13MJ3928, RENE SANCHEZ-GOMEZ;

ITEM NO. 12, 13MJ3929, JOSE MARIO LOPEZ;

ITEM NO. 15, 13MJ3893, JORGE PEREZ-ZAVALA.

THE COURT: ARE WE GOING TO GET THE PERSON WHO HAS THE SKOMAL HEARING? WE'RE NOT GETTING HIM?

MR. MARKLE: I DON'T BELIEVE SO. I BELIEVE MR. WHEAT IS HANDLING THAT AND I THINK HE'S STILL IN TRIAL.

THANK YOU. I WAS LOOKING FOR WHO THAT WAS. THANK YOU.

THE COURT: I'M MISSING A COMPLAINT THEN. I THINK WE JUST CALLED THREE PEOPLE AND I HAVE TWO PEOPLE.

THE CLERK: 11, 12 AND 15.

THE COURT: I HAVE SANCHEZ AND LOPEZ. OH, 15. NO. OH, ZAVALA. SO YOU DID CALL ZAVALA? YOU THINK WE HAVE ZAVALA? DO YOU HAVE 15?

THE CLERK: SORRY, JUDGE. MARSHALS TOLD ME THEY HAD [43] EVERYONE UP. I WAS THINKING WE DID. I'LL DOUBLE-CHECK.

THE COURT: ALL RIGHT. WE'LL SEE. DO YOU HAVE ZAVALA?

THE MARSHAL. MARKLE: NO.

THE CLERK: IT COULD BE JUST 11 AND 12 THEN, JUDGE, AT THIS TIME. WE'RE WAITING FOR A PROSECUTOR ON 14.

THERE IS ALSO NO. 17, WHICH IS AN OSC, JUDGE.

THE COURT: I'M SORRY?

THE CLERK: 17, WHICH IS AN OSC. THAT'S THE ONLY THING PENDING.

THE COURT: ALL RIGHT.

MR. EILER: FOR NO. 11 AND 12, YOUR HONOR, COULD YOU REFER TO THEM AS THE PERSONS CHARGED AS. I THINK THESE ARE ALLEGATIONS OF FALSE DOCUMENTS.

THE COURT: SURE. WHO IS THIS?

THE MARSHAL: NO. 13, YOUR HONOR.

THE COURT: WHAT?

MR. EILER: THAT'S THE INDIVIDUAL—

THE MARSHAL: NO. 13, YOUR HONOR.

THE COURT: NO. THAT'S THE ONE THAT CAN'T BE BROUGHT OUT. YOU WERE GOING TO CHECK TO SEE IF HE WAS BLEEDING FROM HIS LEG. BRING ME THE OTHER THREE INDIVIDUALS.

THE MARSHAL: YES, YOUR HONOR.

THE CLERK: 11 AND 12, PLEASE, JOSH.

[44]

DEFENDANT GRATTAN: I STOPPED BLEEDING, YOUR HONOR. I STOPPED BLEEDING, YOUR HONOR. IT'S NOT BLEEDING.

THE COURT: OKAY. ARE YOU OKAY TO GO FORWARD THEN?

DEFENDANT GRATTAN: YEAH, WE'RE OKAY TO GO FORWARD.

THE COURT: LEAVE HIM HERE THEN. HANG ON. WAIT FOR EVERYBODY TO COME—EVERYONE. THANK YOU. 11, 12 AND 15. AND HE SPEAKS ENGLISH, SO GO AHEAD AND MAKE YOUR RECORD.

MR. EILER: THANK YOU.

EARLIER TODAY, HIS LEG/ANKLE WAS BLEEDING WHERE THE LEG SHACKLES WERE ON IT. THEY WERE HURTING HIM. IT

LOOKS LIKE THE MARSHALS HAVE TAKEN THE LEG SHACKLES OFF, WHICH HAS ALLEVIATED SOME OF THAT PAIN TO HIS ANKLES.

JUST SO THE RECORD IS CLEAR, WE'RE ALSO INCORPORATING OUR PREVIOUSLY-MADE ARGUMENTS OBJECTING TO SHACKLES ON HIS HANDS AND WAIST AND ASK THAT THEY BE REMOVED, AS WE HAVE WITH ALL OTHER DEFENDANTS ON THIS CALENDAR.

THE COURT: ALL RIGHT. MR. GRATTAN, WE WERE CONCERNED ABOUT YOUR LEGS. AND YOU INDICATED THAT THE BLEEDING HAS STOPPED?

DEFENDANT GRATTAN: YES.

THE COURT: YOU OKAY TO GO FORWARD RIGHT NOW?

DEFENDANT GRATTAN: YES, YOUR HONOR.

THE COURT: ALL RIGHT. STAY WHERE YOU ARE WHILE WE WAIT WHILE THE MARSHALS BRING OUT THE NEXT THREE INDIVIDUALS, [45] OKAY. THEN I'LL TALK TO YOU ALSO.

DEFENDANT GRATTAN: YES.

MR. EILER: THESE OTHER TWO DEFENDANTS ARE NOW PRESENT BEFORE THE COURT IN SHACKLES. WE RENEW OUR OBJECTION AT THE OUTSET OF THE HEARING AND INCORPORATED OUR PREVIOUSLY-MADE ARGUMENTS AS TO THESE INDIVIDUALS.

THE COURT: ALL RIGHT. I'D LIKE ALL THREE OF YOU TO LISTEN VERY CAREFULLY.

EACH OF YOU IS HERE BECAUSE THE UNITED STATES HAS FILED A COMPLAINT CHARGING YOU WITH A CRIME. THIS IS YOUR INITIAL APPEARANCE, SO I'M GOING TO GO THROUGH FOUR THINGS WITH YOU TODAY. FIRST, I'M GOING TO TELL YOU WHAT CRIME YOU ARE CHARGED WITH. SECOND, I'M GOING TO DISCUSS WITH YOU YOUR RIGHT TO COUNSEL. THIRD, I'M GOING TO SET A PRELIMINARY HEARING. AND, FINALLY, I'M GOING TO DISCUSS BAIL. SO FIRST THE CRIMES THAT YOU ARE CHARGED WITH.

PERSON CHARGED AS RENE SANCHEZ, YEP. YOU ARE—ACTUALLY, AND THEN THE PERSON CHARGED AS JOSE MARIO LOPEZ. IS THAT YOU? ALL RIGHT.

GENTLEMEN, SPEAKING TO BOTH OF YOU. EACH OF YOU ARE CHARGED IN A SEPARATE COMPLAINT, BUT YOU'RE CHARGED WITH THE SAME CRIME. THAT CRIME IS MISUSE OF A PASSPORT. FOR EACH OF YOU, IT'S ALLEGED THAT ON OR ABOUT OCTOBER 23RD, YOU WILLFULLY AND KNOWINGLY USED A UNITED STATES PASSPORT THAT HAD BEEN ISSUED OR DESIGNED FOR THE USE OF ANOTHER PERSON [46] WITH THE INTENTION OF GAINING ADMISSION TO THE UNITED STATES.

AND THEN KEVIN GRATTAN, THE GENTLEMAN IN THE FRONT. SIR, YOU ARE CHARGED WITH THE CRIME OF BANK ROB-

BERY. IT'S ALLEGED THAT ON OCTOBER 23RD, YOU USED FORCE, VIOLENCE AND INTIMIDATION TO UNLAWFULLY TAKE FROM THE PERSON AND PRESENCE OF AN EMPLOYEE OF CHASE BANK ON BROADWAY IN SAN DIEGO, THE SUM OF APPROXIMATELY $1558, BELONGING TO AND IN THE CARE, CUSTODY, CONTROL, MANAGEMENT AND POSSESSION OF CHASE BANK. THE DEPOSITS OF WHICH WERE INSURED BY THE FDIC.

SPEAKING TO ALL THREE OF YOU. THAT'S WHY EACH OF YOU ARE HERE TODAY. WITH REGARD TO THIS CRIME, EACH OF YOU HAS THE RIGHT TO REMAIN SILENT. THE UNITED STATES IS REQUIRED TO PROVE ITS CASE AGAINST YOU WITHOUT ANY HELP OR TESTIMONY FROM YOU. IF YOU DECIDE TO SPEAK WITH SOMEONE ABOUT THE CHARGE, YOU MAY STOP AT ANY TIME. IF YOU DO SPEAK WITH SOMEONE ABOUT THE CHARGE, ANYTHING YOU SAY CAN BE USED AGAINST YOU.

EACH OF YOU ALSO HAS AN ABSOLUTE RIGHT TO HAVE AN ATTORNEY HELP YOU IN DEFENDING AGAINST THESE CHARGES. IF YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, I WILL APPOINT A LAWYER TO REPRESENT YOU.

DO YOU HAVE A FINANCIAL AFFIDAVIT FOR MR. GRATTAN OR GRATTAN? HOW DO YOU SAY YOUR LAST NAME SIR?

DEFENDANT GRATTAN: "GRATTAN."

THE COURT: GRATTAN, SORRY.

[47]

MR. EILER: YOUR HONOR, WE'RE REQUESTING A PROVISIONAL APPOINTMENT.

THE COURT: YOU'VE GOT TO HAVE A FINANCIAL AFFIDAVIT FOR HIM. THAT'S PRETTY STRAIGHTFORWARD.

MR. EILER: WELL, YOUR HONOR, THERE ARE FIFTH AMENDMENT SELF-INCRIMINATION CONCERNS IN THIS PARTICULAR CASE, WHICH REQUIRING US TO HAND FORWARD A FINANCIAL AFFIDAVIT HITS THAT RIGHT AGAINST SELF-INCRIMINATION AGAINST THE SIXTH AMENDMENT RIGHT TO COUNSEL. WE'D ASK THAT PROVISIONAL APPOINTMENT BE MADE SO HE CAN BE COUNSELED THROUGH THAT FINANCIAL AFFIDAVIT BEFORE IT'S—

THE COURT: I FIND THERE IS NO BASIS FOR IT. I THINK THE ARGUMENT BEING PRESENTED BY FEDERAL DEFENDERS IS INAPPROPRIATE, BUT I WILL PROVISIONALLY APPOINT A LAWYER. I'LL APPOINT DONALD NUNN.

SO MR. GRATTAN, YOU NEED TO SPEAK WITH MR. NUNN AND PREPARE A FINANCIAL AFFIDAVIT AND PROVIDE IT TO ME AT THE NEXT COURT APPEARANCE.

DEFENDANT GRATTAN: OKAY.

THE COURT: HE'LL TALK TO YOU. DON'T WORRY ABOUT IT.

MS. LOPEZ: MAY I HAVE A MOMENT, YOUR HONOR? HE HAS A QUESTION.

THE COURT: NO. I HAVE APPOINTED ANOTHER LAWYER. YOU GUYS DIDN'T FEEL YOU COULD DO THIS.

[48]

DEFENDANT GRATTAN: I WAS GOING TO ASK YOUR HONOR—

MS. LOPEZ: I DON'T WANT HIM TO SAY ANYTHING IN COURT.

DEFENDANT GRATTAN: I WAS GOING TO ASK YOUR HONOR A QUESTION.

THE COURT: WAIT AND TALK TO YOUR LAWYER. IS IT A HEALTH ISSUE?

DEFENDANT GRATTAN: WELL, I TALKED TO DETECTIVES IN HERE AND BEFORE I TALKED TO A LAWYER.

THE COURT: YEP, YEP. I WANT YOU TO WAIT AND TALK TO YOUR LAWYER ABOUT THAT. OKAY.

DEFENDANT GRATTAN: I DON'T HAVE ANY MONEY OR A JOB.

THE COURT: AND THAT'S WHY I'VE APPOINTED A LAWYER TO REPRESENT YOU. SO MR. NUNN IS GOING TO COME TO REPRESENT YOU. YOU'RE GOING TO PREPARE A FINANCIAL AFFIDAVIT WITH HIM. I WILL LOOK AT IT. AND IF YOU DON'T HAVE ANY MONEY, I WILL CONFIRM HIS APPOINTMENT. BUT MR. NUNN IS GOING TO COME AND TALK TO YOU.

DON'T TALK TO ANYBODY ABOUT THIS CRIME UNTIL THAT HAPPENS.

DEFENDANT GRATTAN: I ALREADY HAVE.

THE COURT: I KNOW YOU HAVE. IT'S IN THE COMPLAINT.

DON'T SAY ANYTHING ELSE. DO YOU UNDERSTAND? STOP. ALL RIGHT.

DEFENDANT GRATTAN: WHAT ABOUT THE INMATES?

[49]

THE COURT: ALL RIGHT. MY RECOMMENDATION TO YOU IS NOT TO TALK TO THEM ABOUT THE CRIME THAT YOU MAY OR MAY NOT HAVE COMMITTED, BUT DO NOT TALK WITH THEM ABOUT THE CRIME YOU'RE CHARGED WITH.

FOR THE TWO INDIVIDUALS CHARGED AS RENE SANCHEZ AND JOSE LOPEZ, DOES THE GOVERNMENT HAVE ANY REASON TO BELIEVE THAT THEY HAVE THE ABILITY TO HIRE A LAWYER?

MR. MARKLE: NO, WE DO NOT, YOUR HONOR. THANK YOU.

THE COURT: ALL RIGHT. THEN, GENTLEMEN, I'M GOING TO FIND THAT EACH OF YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, AND I'M APPOINTING FEDERAL DEFENDERS TO REPRESENT EACH OF YOU.

SPEAKING TO ALL THREE OF YOU AGAIN—WAIT AND TALK TO MR. NUNN. THAT'S IN YOUR BEST INTEREST, SIR.

DEFENDANT GRATTAN: I'M JUST CURIOUS WHY THE FEDERAL—I HAVE SOMEBODY ELSE.

THE COURT: BECAUSE THAT'S WHO I APPOINTED. WAIT AND TALK TO YOUR LAWYER.

SPEAKING TO ALL THREE OF YOU. EACH OF YOU HAS BEEN GIVEN A BUSINESS CARD FOR YOUR LAWYER. YOUR LAWYER WILL BE IN CONTACT WITH YOU IN THE NEAR FUTURE AND WILL REPRESENT YOU THROUGHOUT THE REMAINDER OF THIS CASE.

THE NEXT THING THAT I NEED TO DO IS SET EACH OF YOUR PRELIMINARY HEARINGS AND ARRAIGNMENT. EACH OF YOU ARE [50] ORDERED TO APPEAR IN MY COURTROOM ON NOVEMBER 7TH AT 9:30 A.M. FOR A PRELIMINARY HEARING. YOU ALSO ARE ORDERED TO APPEAR IN MY COURTROOM ON NOVEMBER 19TH FOR ARRAIGNMENT.

WITH REGARD TO THE PRELIMINARY HEARING, EACH OF YOU HAVE THE RIGHT TO HAVE A JUDGE MAKE A DETERMINATION AS TO WHETHER OR NOT THERE ARE SUFFICIENT FACTS FOR YOUR CASE TO PROCEED FORWARD, AND THAT IS THE PURPOSE OF A PRELIMINARY HEARING.

THE FINAL THING THAT I NEED TO DISCUSS WITH EACH OF YOU IS BAIL. INITIALLY

FOR THE TWO GENTLEMEN IN THE BACK, YOUR LAWYER HAS ASKED THAT I REFER TO YOU AS THE PERSON CHARGED AS RENE SANCHEZ AND JOSE LOPEZ, AND I'VE DONE THAT. HOWEVER, BECAUSE I DON'T KNOW YOUR IDENTITY, I FIND THERE ARE NO CONDITIONS THAT I COULD SET THAT WOULD GUARANTY YOUR APPEARANCE IN COURT AS REQUIRED. I THEREFORE ORDER THAT EACH OF YOU BE HELD IN CUSTODY WITHOUT BAIL. I ENTER THAT ORDER WITHOUT PREJUDICE.

IS THE UNITED STATES MOVING TO DETAIN MR. GRATTAN? GRATTAN, SORRY.

MR. MARKLE: WE ARE, YOUR HONOR. WE'RE MOVING TO DETAIN BASED UPON RISK OF FLIGHT AND DANGER TO THE COMMUNITY. AND WE WOULD REQUEST THREE DAYS TO PREPARE.

THE COURT: ALL RIGHT. MR. GRATTAN, THE UNITED STATES HAS ASKED THAT YOU BE HELD IN CUSTODY WITHOUT BAIL BECAUSE THEY BELIEVE YOU PRESENT AN UNREASONABLE RISK OF [51] FLIGHT AND A DANGER TO THE COMMUNITY.

THEY HAVE THE RIGHT TO DO THAT. YOU HAVE THE RIGHT TO HAVE A HEARING AND FOR ME TO MAKE A DETERMINATION AS TO WHETHER OR NOT THERE ARE CONDITIONS THAT I COULD SET THAT WOULD GUARANTY YOUR APPEARANCE IN COURT AS REQUIRED AND THE SAFETY OF THE COMMUNITY. YOU

WILL, HOWEVER, BE HELD IN CUSTODY WITHOUT BAIL UNTIL THAT HEARING OCCURS.

I'M SETTING THAT HEARING FOR TUESDAY, NOVEMBER 29TH, AT 9:30 A.M. YOU MUST RETURN TO MY COURTROOM THEN. AT THAT TIME, YOU WILL ALSO PROVIDE ME WITH A FINANCIAL AFFIDAVIT THAT YOU'RE GOING TO PREPARE WITH YOUR LAWYER.

THAT'S IT FOR TODAY FOR ALL THREE OF YOU.

MR. EILER: YOUR HONOR, YOU SAID THE DETENTION HEARING WAS NOVEMBER 29TH? DID YOU MEAN OCTOBER?

THE COURT: I'M SORRY. OCTOBER 29THYES. IF I SAID THAT, ABSOLUTELY. I DO MEAN OCTOBER 29TH. SO NEXT TUESDAY AT 9:30.

DEFENDANT GRATTAN: OCTOBER 29TH?

THE COURT: YES, YES. THANK YOU. THAT'S IT FOR TODAY, MARSHALS.

LET'S DO THE OSC.

THE CLERK: YES, JUDGE.

ITEM NO. 17 ON THE LOG, PLEASE. 07CR2309-BTM, GEORGE ELLIOT POST.

MR. EILER: MR. POST IS PRESENT BEFORE THE COURT IN [52] FIVE-POINT SHACKLES. WE OBJECT TO THE USE OF THE SHACKLES AND INCORPORATE OUR PREVIOUSLY-MADE ARGUMENTS.

THE COURT: SIR, YOU ARE HERE BECAUSE JUDGE MOSKOWITZ ISSUED A WARRANT FOR YOUR ARREST, BECAUSE IT IS ALLEGED THAT YOU VIOLATED YOUR CONDITIONS OF SUPERVISED RELEASE. IT APPEARS THAT IN MAY OF 2012, HE SENTENCED YOU TO FIVE MONTHS IN CUSTODY, TO BE FOLLOWED BY ONE YEAR OF SUPERVISED RELEASE AFTER YOUR CONVICTION FOR BRINGING IN ILLEGAL ALIENS WITHOUT PRESENTATION; AND IT'S NOW ALLEGED THAT YOU HAVE VIOLATED THOSE CONDITIONS.

ONE CONDITION WAS THAT YOU NOTIFY YOUR PROBATION OFFICER WITHIN TEN DAYS PRIOR TO ANY CHANGE OF RESIDENCE OR EMPLOYMENT, AND IT'S ALLEGED THAT YOU VIOLATED THAT BECAUSE YOU FAILED TO NOTIFY YOUR PROBATION OFFICER OF YOUR CHANGE OF RESIDENCE. AND WHEN THIS WARRANT WAS SIGNED IN SEPTEMBER OF THIS YEAR, YOUR WHEREABOUTS WERE UNKNOWN.

A SECOND CONDITION WAS THAT YOU NOT ILLEGALLY POSSESS A CONTROLLED SUBSTANCE, AND IT'S ALLEGED THAT YOU VIOLATED THAT BECAUSE YOU FAILED TO APPEAR FOR DRUG TESTING ON AUGUST 19TH, 22ND AND 28TH OF THIS YEAR AS REQUIRED. THAT'S WHY YOU'RE HERE TODAY.

BASED UPON THE INFORMATION IN FRONT OF ME, AS WELL AS JUDGE MOSKOWITZ' FINDING, I DO FIND PROBABLE CAUSE TO

BELIEVE THAT YOU COMMITTED THESE VIOLATIONS, BUT I ENTER A DENIAL ON YOUR BEHALF.

[53]

DOES HE HAVE THE ABILITY TO HIRE A LAWYER, SIR?

MR. EILER: YOUR HONOR, IF I MAY SPEAK WITH HIM BRIEFLY. I DON'T HAVE AN INTERVIEW SHEET FILLED OUT FOR THIS INDIVIDUAL.

THE COURT: YEP. GO AHEAD.

MR. EILER: WOULD YOU LIKE ME TO DO THAT?

THE COURT: YEAH.

(ATTORNEY/CLIENT DISCUSSION.)

MR. EILER: MR. POST IS UNEMPLOYED AND HAS NO SUBSTANTIAL ASSETS OF WHICH WE ARE AWARE.

THE COURT: IS WHAT YOUR LAWYER JUST SAID TRUE IN ALL RESPECTS?

DEFENDANT POST: YES.

THE COURT: BASED UPON THAT INFORMATION, I FIND YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, AND I'M GOING TO APPOINT A LAWYER TO REPRESENT YOU. FEDERAL DEFENDERS REPRESENTED YOU IN THE UNDERLYING MATTER, SO I'M GOING TO REAPPOINT THEM TO REPRESENT YOU IN THIS MATTER.

I'M GOING TO SET THIS FOR A STATUS HEARING IN FRONT OF ME ON NOVEMBER 5TH AT 9:30 A.M. TO GIVE YOU TIME TO TALK WITH YOUR LAWYER ABOUT HOW YOU WANT TO PROCEED, AND I'M GOING—AND YOU'RE GOING TO BE HELD IN CUSTODY WITHOUT BAIL BECAUSE JUDGE MOSKOWITZ ISSUED A NO-BAIL WARRANT. THAT'S IT FOR TODAY.

THE CLERK: NO. 14 FOR THE RECORD, PLEASE.

[54]

CASE NO. 13MJ3931, JAMES MICHAEL DISALVO AND THOMAS STEPHEN DISALVO.

MS. SERANO: GOOD AFTERNOON, YOUR HONOR. ALESSANDRA SERANO ON BEHALF OF THE UNITED STATES.

THE COURT: THANK YOU.

MR. EILER: BOTH THESE INDIVIDUALS ARE BEFORE THE COURT IN CUSTODY IN SHACKLES. THOMAS DISALVO SUFFERS FROM A HERNIA AND ABDOMINAL PAIN. I'M UNSURE WHETHER THE SHACKLES ARE EXACERBATING THAT CONDITION, BUT WE ASK THAT THEY IMMEDIATELY BE REMOVED AS TO THAT INDIVIDUAL, AS WELL AS JAMES DISALVO.

THE COURT: BASED ON THAT INFORMATION, IT'S NOT AN EXCEPTIONAL CIRCUMSTANCE.

ALL RIGHT. GENTLEMEN, SPEAKING TO BOTH OF YOU. EACH OF YOU ARE HERE BE-

CAUSE THE UNITED STATES HAS FILED A COMPLAINT CHARGING YOU WITH A VIOLATION OF CRIME. THIS IS YOUR INITIAL APPEARANCE, SO I'M GOING TO GO THROUGH FOUR THINGS WITH YOU TODAY. FIRST, I'M GOING TO TELL YOU WHAT CRIME YOU ARE CHARGED WITH. SECOND, I'M GOING TO DISCUSS WITH YOU YOUR RIGHT TO COUNSEL. THIRD, I'M GOING TO SET A PRELIMINARY HEARING. AND, FINALLY, I'M GOING TO DISCUSS BAIL.

SO FIRST, THE CRIME THAT YOU ARE CHARGED WITH. JAMES DISALVO, YOU ARE CHARGED WITH DISTRIBUTION OF IMAGES OF MINORS ENGAGED IN SEXUALLY EXPLICIT CONDUCT. IT'S ALLEGED [55] THAT ON OR ABOUT APRIL 18TH, YOU KNOWINGLY DISTRIBUTED VISUAL DEPICTIONS USING MEANS AND FACILITIES OF INTERSTATE AND FOREIGN COMMERCE THAT HAD BEEN MAILED, SHIPPED AND TRANSPORTED IN AND AFFECTING INTERSTATE AND FOREIGN COMMERCE, AND WHICH MATERIALS HAD BEEN SO SHIPPED, AND THE PRODUCTION OF WHICH INVOLVED THE USE OF A MINOR ENGAGING IN SEXUALLY-EXPLICIT CONDUCT.

THOMAS DISALVO, YOU ARE CHARGED WITH POSSESSION OF IMAGES OF MINORS ENGAGING IN SEXUALLY-EXPLICIT CONDUCT. FOR YOU IT'S ALLEGED THAT ON OR ABOUT OCTOBER 23RD OF THIS YEAR, YOU HAD PREVIOUSLY BEEN CONVICTED OF POSSESSION OF CHILD PORNOGRAPHY IN VIOLATION OF

CALIFORNIA LAW, AND AFTER THAT FACT, ON OCTOBER 23RD, YOU KNOWINGLY POSSESSED ONE OR MORE MATTERS, THAT IS COMPUTER HARD DRIVES OR COMPUTER MEDIA, THAT CONTAINED VISUAL DEPICTIONS THAT HAD BEEN MAILED, SHIPPED AND TRANSPORTED IN INTERSTATE AND FOREIGN COMMERCE, AND WHICH WERE PRODUCED USING MATERIALS WHICH HAD BEEN MAILED SHIPPED AND TRANSPORTED IN INTERSTATE OR IN FOREIGN COMMERCE, BY ANY MEANS, INCLUDING BY COMPUTER, AND THE PRODUCTION OF WHICH INVOLVED THE USE OF A PREPUBESCENT MINOR, AND A MINOR WHO HAD NOT YET ATTAINED THE AGE OF 12 YEARS ENGAGING IN SEXUALLY-EXPLICIT CONDUCT.

THAT'S WHY EACH OF YOU ARE HERE TODAY. WITH REGARD TO THIS CRIME, EACH OF YOU HAS THE RIGHT TO REMAIN SILENT. THE UNITED STATES IS REQUIRED TO PROVE ITS CASE AGAINST YOU [56] WITHOUT ANY HELP OR TESTIMONY FROM YOU. IF YOU DECIDE TO SPEAK WITH SOMEONE ABOUT THE CHARGE, YOU MAY STOP AT ANY TIME. IF DO YOU SPEAK WITH SOMEONE ABOUT THE CHARGE, ANYTHING YOU SAY CAN BE USED AGAINST YOU.

EACH OF YOU ALSO HAS AN ABSOLUTE RIGHT TO HAVE AN ATTORNEY HELP YOU IN DEFENDING AGAINST THESE CHARGES. IF YOU DO NOT HAVE THE ABILITY TO HIRE A

LAWYER, I WILL APPOINT A LAWYER TO REPRESENT YOU.

WHO IS CHARGED FIRST? JAMES. WHICH ONE IS JAMES? ALL RIGHT. JAMES, I HAVE IN FRONT OF ME A ONE-PAGE FINANCIAL AFFIDAVIT SIGNED BY YOU UNDER THE PENALTY OF PERJURY. IS EVERYTHING IN THIS DOCUMENT TRUE?

DEFENDANT JAMES DISALVO: YES.

THE COURT: BASED UPON THAT INFORMATION, I FIND YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, AND I AM APPOINTING BEN LECHMAN TO REPRESENT YOU.

MS. SERANO: YOUR HONOR, MAY I ASK THAT THAT APPOINTMENT BE PROVISIONAL, GIVEN THAT HE MAKES ALMOST $4,000 A MONTH, ACCORDING TO THE PRETRIAL SERVICES REPORT.

THE COURT: NO. GIVEN THE COSTS—UNLESS HE OWNS—I HAVE THAT HE DOESN'T OWN A HOME OR ANYTHING, AND WHILE HE DOES MAKE 4,000—I HAVE APPROXIMATELY 3200, BUT I DON'T—GIVEN THE AMOUNT OF CASH HE HAS, I DON'T HAVE ANY REASON TO BELIEVE THAT HE ACTUALLY HAS THE ABILITY TO HIRE A LAWYER FOR THIS OFFENSE; SO SOMEONE MAKING APPROXIMATELY THAT [57] MONEY FOR THIS TYPE OF CRIME, I'M GOING TO FIND DOESN'T HAVE THE ABILITY.

MS. SERANO: VERY WELL.

THE COURT: AND THEN FOR THOMAS, THOMAS? OH, THERE. ALL RIGHT. SO THERE IS THE BUSINESS CARD.

THOMAS, I HAVE IN FRONT OF ME YOUR FINANCIAL AFFIDAVIT SIGNED UNDER THE PENALTY OF PERJURY. IS EVERYTHING IN THIS DOCUMENT TRUE?

DEFENDANT THOMAS DISALVO: YES, IT IS.

THE COURT: OKAY. NOW I'M GOING TO FIND BASED ON THAT THAT YOU ALSO DO NOT HAVE THE ABILITY TO HIRE A LAWYER, AND I'M APPOINTING MICHAEL BURKE TO REPRESENT YOU. MR. BURKE'S NUMBER IS (619) 234-2503.

GENTLEMEN, EACH OF YOU HAS BEEN GIVEN A BUSINESS CARD FOR YOUR LAWYER. IN ADDITION, YOUR LAWYER WILL BE NOTIFIED THAT HE HAS BEEN APPOINTED TO REPRESENT YOU AND WILL BE IN CONTACT WITH YOU IN THE NEAR FUTURE.

THE NEXT THING THAT I NEED TO DO IS SET YOUR PRELIMINARY HEARING AND ARRAIGNMENT. EACH OF YOU ARE ORDERED TO APPEAR IN MY COURTROOM ON NOVEMBER 7TH AT 9:30 A.M. AND ON NOVEMBER 19TH AT 9:30 A.M.

EACH OF YOU—EXCUSE ME. WITH REGARD TO THE PRELIMINARY HEARING, EACH OF YOU HAVE THE RIGHT TO HAVE A JUDGE MAKE A DETERMINATION AS TO WHETHER OR NOT THERE ARE SUFFICIENT FACTS FOR

YOUR CASE TO PROCEED FORWARD. THAT'S [58] THE PURPOSE OF A PRELIMINARY HEARING.

THE FINAL ISSUE IS BAIL. IS THE UNITED STATES MOVING TO DETAIN?

MS. SERANO: WE ARE, YOUR HONOR. WE'RE MOVING TO DETAIN MR. JAMES DISALVO BASED ON RISK OF FLIGHT AND MR. THOMAS DISALVO, RISK OF FLIGHT AND DANGER TO THE COMMUNITY, GIVEN HIS CRIMINAL HISTORY.

THE COURT: OKAY. ALL RIGHT, GENTLEMEN. SPEAKING TO BOTH OF YOU.

THE UNITED STATES HAS ASKED THAT EACH OF YOU BE HELD IN CUSTODY WITHOUT BAIL BECAUSE THEY BELIEVE YOU PRESENT AN UNREASONABLE RISK OF FLIGHT. IN ADDITION, FOR THOMAS DISALVO, THEY ALSO BELIEVE THAT YOU PRESENT A DANGER TO THE COMMUNITY.

THEY HAVE THE RIGHT, SPEAKING TO BOTH OF YOU AGAIN. THE GOVERNMENT HAS THE RIGHT TO DO THIS. YOU HAVE THE RIGHT TO HAVE A HEARING AND FOR ME TO MAKE A DETERMINATION AS TO WHETHER OR NOT THERE ARE CONDITIONS THAT I COULD SET THAT WOULD GUARANTY YOUR APPEARANCE IN COURT AS REQUIRED, AND FOR MR. DISALVO, ALSO THE SAFETY—THOMAS DISALVO, ALSO THE SAFETY OF THE COMMUNITY. YOU WILL, HOWEVER, BE HELD IN

CUSTODY WITHOUT BAIL UNTIL THAT HEARING OCCURS.

I'M GOING TO SET THAT FOR THIS TUESDAY, OCTOBER 29TH, AT 9:30 A.M.; SO EACH OF YOU ARE ORDERED TO RETURN TO MY COURTROOM AT THAT TIME.

[59]

THAT'S IT FOR TODAY, GENTLEMEN.

MS. SERANO: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

DO WE HAVE ANY NO BODIES?

THE CLERK: NO, JUDGE. ACTUALLY, WE DID LOCATE NO. 15, JUDGE. HE'S BACK THERE BY AN A.K.A., SO IF IT'S OKAY, WE CAN HANDLE THAT ONE.

THE COURT: THAT'S GREAT. BUT I GAVE THAT BACK TO YOU.

THE CLERK: OH, YOU GAVE IT BACK TO ME. IT'S RIGHT HERE.

NO. 15 FOR THE RECORD, 13MJ3893, JORGE PEREZ-ZAVALA, A.K.A. ELISANDRO MARTINEZ-GOMEZ.

MR. EILER: YOUR HONOR, I DON'T HAVE A COMPLAINT. WE DIDN'T HAVE THE OPPORTUNITY TO INTERVIEW THIS INDIVIDUAL.

THE COURT: HE'S REPRESENTED BY ANOTHER LAWYER RIGHT NOW, SO IT'S A CJA APPOINTMENT.

MR. EILER: OKAY.

THE COURT: YOU KNOW, WE LOST OUR INTERPRETER.

DO YOU SPEAK ENGLISH? NO. THAT'S OKAY. HANG ON.

LET ME SEE IF WE CAN GET AN INTERPRETER.

MS. LOPEZ: I SPEAK SPANISH.

THE COURT: GO AHEAD AND TALK TO HIM THEN.

KEEP IN MIND HE IS REPRESENTED. HERE IS THE [60] COMPLAINT.

DO YOU GUYS HAVE THE COMPLAINT?

MS. LOPEZ: I DON'T THINK WE HAVE THAT.

MR. EILER: NO.

THE COURT: HERE IS THE COMPLAINT AND HERE—WHAT MY—WELL, YOU HAVE THE SAME CALENDAR THAT I HAVE, BUT THERE IS THE RELATED CASE WITH JOHN KIRBY. OKAY. SO HE CURRENTLY IS REPRESENTED BY JOHN KIRBY. IT'S A CJA APPOINTMENT IN ANOTHER CASE. I DON'T KNOW THE CRIME FOR THAT ONE.

MR. EILER: IS YOUR HONOR GOING TO BE SETTING BOND?

THE COURT: I ASSUME YOU'RE GOING TO DO—THE FIRST ONE IS 1542. I ASSUME YOU'RE GOING TO DO A PERSON CHARGED AS?

MR. EILER: YES.

THE COURT: THEN, NO.

ARE YOU MOVING TO DETAIN?

MR. MARKLE: WE WILL, YOUR HONOR.

THE COURT: THERE YOU GO.

MR. MARKLE: ON RISK OF FLIGHT.

THE COURT: ALL RIGHT. IT WILL BE JUST A FEW MOMENTS, EVERYBODY. WE'RE WAITING FOR AN INTERPRETER.

(BRIEF PAUSE IN PROCEEDINGS.)

THE COURT: SIR, YOU ARE HERE BECAUSE THE UNITED STATES HAS FILED A COMPLAINT CHARGING YOU WITH THREE CRIMES. THE FIRST ONE IS MAKING A FALSE STATEMENT IN AN APPLICATION [61] FOR U.S. PASSPORT. THE SECOND ONE IS MAKING A FALSE CLAIM TO UNITED STATES CITIZENSHIP. AND THE THIRD ONE IS MAKING FALSE STATEMENTS IN APPLICATION FOR SOCIAL SECURITY BENEFITS.

WITH REGARD TO THE PASSPORT ALLEGATION, IT'S ALLEGED THAT ON MARCH 5TH OF 2007, WITHIN THE SOUTHERN DISTRICT OF CALIFORNIA, YOU WILLFULLY AND KNOWINGLY MADE A FALSE STATEMENT IN AN APPLICATION FOR U.S. PASSPORT WITH AN INTENT TO INDUCE AND SECURE FOR YOUR OWN USE, THE ISSUANCE OF A U.S. PASSPORT, CONTRARY TO THE LAWS GOVERNING THE ISSUANCE OF SUCH PASSPORTS; SPECIFICALLY, YOU USED THE IDENTITY OF ANOTHER PERSON.

WITH REGARD TO THE SECOND CRIME, FALSE CLAIM TO CITIZENSHIP, IT'S ALLEGED THAT ON JULY 30TH OF 2010, YOU WERE AN ALIEN AND YOU WILLFULLY AND FALSELY REPRESENTED TO AN IMMIGRATION OFFICER, A PERSON WHO HAD A GOOD REASON TO INQUIRE, THAT YOU WERE A CITIZEN OF THE UNITED STATES; WHEREAS, IN TRUTH AND IN FACT, AS YOU KNEW, YOU WERE NOT A CITIZEN OF THE UNITED STATES.

WITH REGARD TO COUNT 3, FALSE STATEMENTS IN APPLICATION FOR SOCIAL SECURITY BENEFITS. IT'S ALLEGED THAT ON NOVEMBER 14TH OF 2012, YOU WILLFULLY AND KNOWINGLY MADE FALSE STATEMENTS IN AN APPLICATION FOR SOCIAL SECURITY RETIREMENT INSURANCE BENEFITS, CONTRARY TO THE LAWS USED IN DETERMINING ENTITLEMENT TO SUCH BENEFITS, BECAUSE YOUR APPLICATION WAS MADE IN THE NAME OF ANOTHER PERSON.

[62]

WITH REGARD TO THESE CRIMES, YOU HAVE THE RIGHT TO REMAIN SILENT. THE UNITED STATES IS REQUIRED TO PROVE ITS CASE AGAINST YOU WITHOUT ANY HELP OR TESTIMONY FROM YOU. IF YOU DECIDE TO SPEAK WITH SOMEONE ABOUT THE CHARGES, YOU MAY STOP AT ANY TIME. IF YOU DO SPEAK WITH SOMEONE ABOUT THE CHARGES, ANYTHING YOU SAY CAN BE USED AGAINST YOU.

YOU ALSO HAVE AN ABSOLUTE RIGHT TO HAVE AN ATTORNEY HELP YOU IN DEFENDING AGAINST THESE CHARGES. IF YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, I WILL APPOINT A LAWYER TO REPRESENT YOU. FROM THE DOCUMENTS IN FRONT OF ME, IT APPEARS THAT ANOTHER JUDGE HAS RECENTLY MADE A DETERMINATION THAT YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER; AND I THEREFORE MAKE THE SAME FINDING IN THIS CASE.

JOHN KIRBY IS CURRENTLY REPRESENTING YOU IN ANOTHER CASE PURSUANT TO A CJA APPOINTMENT. SO I AM GOING TO APPOINT HIM TO REPRESENT YOU IN THIS CASE AS WELL. YOU WILL BE GIVEN A BUSINESS CARD FOR MR. KIRBY. IN ADDITION, HE WILL BE NOTIFIED THAT HE HAS BEEN APPOINTED TO REPRESENT YOU IN THIS MATTER, AND HE WILL BE IN CONTACT WITH YOU IN THE NEAR FUTURE.

YOU HAVE THE RIGHT TO HAVE—EXCUSE ME. THE NEXT THING I NEED TO DO IS SET YOUR NEXT HEARINGS. SO YOU ARE ORDERED TO APPEAR IN MY COURTROOM ON NOVEMBER 7TH AT 9:30 A.M. FOR A PRELIMINARY HEARING. YOU ALSO ARE ORDERED TO APPEAR IN MY COURTROOM ON NOVEMBER 19TH AT 9:30 A.M. FOR AN [63] ARRAIGNMENT.

WITH REGARD TO THE PRELIMINARY HEARING, YOU HAVE THE RIGHT TO HAVE A JUDGE MAKE A DETERMINATION AS TO

WHETHER OR NOT THERE ARE SUFFICIENT FACTS FOR YOUR CASE TO PROCEED FORWARD, AND THAT'S THE PURPOSE OF THE PRELIMINARY HEARING.

THE FINAL ISSUE THEN IS BAIL. AND FIRST THERE ARE—FIRST I HAVE AN ISSUE. THAT IS, YOUR LAWYER HAS ASKED THAT I REFER TO YOU AS THE PERSON CHARGED AS JORGE PEREZ ZAVALA, AND I HAVE DONE THAT. THERE IS A LOT OF GOOD REASONS WHY HE HAS ASKED ME TO DO THAT. HOWEVER, BECAUSE HE HAS ASKED ME TO DO THAT, I DO NOT KNOW WHO YOU ARE. AS A RESULT, I FIND THERE ARE NO CONDITIONS THAT I COULD SET THAT WOULD GUARANTY YOUR APPEARANCE IN COURT AS REQUIRED BECAUSE I DON'T KNOW WHO YOU ARE. I, THEREFORE, ORDER THAT YOU BE HELD IN CUSTODY WITHOUT BAIL. I ENTER THAT ORDER WITHOUT PREJUDICE.

IS THE GOVERNMENT MOVING TO DETAIN ON A BASIS OTHER THAN WHAT I JUST STATED?

MR. MARKLE: WE'RE MOVING TO DETAIN BASED UPON RISK OF FLIGHT, YOUR HONOR.

THE COURT: ALL RIGHT. SO BASED—IN ADDITION, THE UNITED STATES HAS ASKED THAT YOU BE HELD IN CUSTODY WITHOUT BAIL BECAUSE THEY BELIEVE YOU PRESENT AN UNREASONABLE RISK OF FLIGHT. THEY HAVE THE RIGHT TO DO THAT. YOU HAVE THE RIGHT TO HAVE A HEARING AND FOR ME

TO MAKE A DETERMINATION AS TO WHETHER OR NOT THERE ARE ANY CONDITIONS THAT I COULD SET THAT [64] WOULD GUARANTY YOUR APPEARANCE IN COURT AS REQUIRED.

BASED UPON THE IDENTITY ISSUE, AT THIS TIME I'M GOING TO SET THE DETENTION HEARING FOR NOVEMBER 7TH, WHICH IS THE SAME TIME AS THE PRELIMINARY HEARING. IF YOUR LAWYER WANTS TO MOVE THIS UP SOONER, BASED UPON AN ADMISSION AS TO IDENTITY, HE CAN CONTACT MY COURTROOM DEPUTY AND WE CAN EASILY DO IT.

ALL RIGHT, SIR. THAT'S IT FOR TODAY.

DID YOU GET A COPY OF THIS?

MR. EILER: YES.

THE CLERK: COURT'S IN RECESS.

(PROCEEDINGS CONCLUDED AT 4:08 P.M.)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No. 13-cr-4209 LAB
OSC/Disposition
15-CR-1999 LAB

UNITED STATES OF AMERICA, PLAINTIFF

v.

RENE SANCHEZ-GOMEZ, DEFENDANT

Monday, Nov. 23, 2015

JUDGMENT & SENTENCE

BEFORE THE HONORABLE LARRY A. BURNS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

LAURA E. DUFFY
United States Attorney
MATTHEW J. SUTTON
Assistant U.S. Attorney
880 Front Street, Suite 6293
San Diego, CA 92101

FOR THE DEFENDANT:

THOMAS P. MATTHEWS, ESQ.
Law Offices of Thomas P. Matthews
110 W. C Street, Suite 1201
San Diego, CA 92101

San Diego, California—Monday, Nov. 23, 2015

(Defendant is being assisted by a Spanish interpreter.)

THE CLERK: Calling number 3 and number 4 on the calendar, 13-CR-4209, United States of America versus Rene Sanchez-Gomez, and calling number 4 on the calendar, 15-CR-1999, United States of America versus Rene Sanchez-Gomez. Counsel could state their appearance.

THE COURT: Good morning, Mr. Matthews.

MR. MATTHEWS: Good morning, your Honor. Tom Matthews on behalf of Mr. Sanchez-Gomez. He's not yet present.

MR. SUTTON: Good morning again, your Honor. Matthew Sutton on behalf of the United States.

THE COURT: Good morning.

MR. MATTHEWS: Mr. Sanchez-Gomez is now present.

THE COURT: All right. Good morning, Mr. Sanchez.

THE DEFENDANT: Good morning.

THE COURT: Mr. Sanchez is here today on two cases. In 15-CR-1999 he's pled guilty to returning to the United States after being deported; the second case is 13-CR-4209, which he was on supervised release—no, actually on probation—for misusing a passport, and there's an allegation that by coming back into the United States and violating our law, he committed a violation of probation.

I'll deal with 15-CR-1999 first. In that case, [3] Mr. Matthews, I have, among other things, read and considered the presentence report. Have you gone over that with Mr. Sanchez?

MR. MATTHEWS: Yes, I have.

THE COURT: The United States and you on behalf of Mr. Sanchez filed sentencing summary charts; I've reviewed both of those. You also filed a sentencing memo on his behalf, which I have read and considered. I think there's also an objection to the presentence report, and I'll take that up in just a second. Was there anything—anything else filed that I have not mentioned?

MR. MATTHEWS: Did the Court mention a departures motion; I think we filed one of those as well.

THE COURT: No, I didn't, but I do have that here, and I have looked at that.

MR. MATTHEWS: Okay. That would be it.

THE COURT: So let me turn to the objections. You mentioned you did go over the probation report with him?

MR. MATTHEWS: Yes. And, your Honor, I'll just—in terms of the objections, I'll submit on the written objections.

THE COURT: Were they responded to? I didn't—

MR. MATTHEWS: Yes, they were.

MR. SUTTON: There's an addendum, your Honor, that's filed on November 16 by probation.

[4]

THE COURT: Okay.

USPO CHALMERS: Your Honor, I have a copy of that if you need it.

THE COURT: Yeah, I do. For whatever reason I don't think I received the addendum. Well, okay. As to the first, the defendant says he doesn't remember it. That's not the same as saying it didn't happen, but it seems to me to be a moot issue anyway. It doesn't register as a conviction, does it, so—

MR. MATTHEWS: No, it doesn't, your Honor—

THE COURT: —I think—

MR. MATTHEWS: —it does not score. However, my client, he was somewhat adamant that he did not recall that, so just to—

THE COURT: Yeah, probation—

MR. MATTHEWS: —his wishes, I file—I objected to that one.

THE COURT: Okay. Probation has, according to the addendum, considered what he said, that he doesn't remember it, and they've looked at the docket I am assuming; the docket shows that he successfully completed diversion so the charge was dismissed. That's what the probation investigation of the objection came up with.

USPO CHALMERS: Yes, your Honor. Victoria Chalmers from probation.

[5]

THE COURT: All right.

USPO CHALMERS: And I have that document available.

THE COURT: You want to see that, Mr. Matthews?

MR. MATTHEWS: Can I take a quick look at it?

USPO CHALMERS: Of course.

THE COURT: Really doesn't count for anything.

MR. MATTHEWS: Right, your Honor. I don't want to—I don't want to waste the Court's time on this, but it appears—my client insists he didn't recall that. He—apparently there was two similar situations, and he only recalled one. And I guess if there's a way to just keep it—remove it from the probation officer's report—and hopefully there's no need for a future one—but I'll submit to the Court on this. It appears that case did exist at some point.

THE COURT: Now, is this—is this the one that was from Fort Bragg office, Mendocino County?

MR. MATTHEWS: Yes.

THE COURT: You know, attached to the paperwork here is a motion to revoke the diversion. Was that ever acted upon, Madam Probation Officer?

USPO CHALMERS: I'm sorry, your Honor. I'm looking. I'm not sure.

THE COURT: Well, look, here's the way I'll resolve it. I'm not going to strike it; I find that there's not a [6] basis for doing so. That he doesn't remember it doesn't mean it didn't occur. The objective evidence I have—

MR. MATTHEWS: That's fine.

THE COURT: —is that it occurred. That said, I don't have any evidence it was a conviction, it's just diversion, and there's some suggestion that at some point, the DA had second thoughts because there's attached to the docket here a motion to revoke the diversion. But I'll accept the final say of the probation department here, which is the diversion was successfully completed, so maybe somebody gave him a second chance.

MR. MATTHEWS: And then, your Honor, my second objection was based—it's paragraph 30 on page 8.

THE COURT: Okay.

MR. MATTHEWS: Apparently there's two—

THE COURT: —warrants?

MR. MATTHEWS: Well, traffic warrants or something like that, and my client was under the—he was under the impression that they were—he claims he was informed by the judge—

THE COURT: I'll resolve that by—

MR. MATTHEWS: —that those would be cleared up.

THE COURT: I'll resolve that this way, Mr. Matthews: They—the traffic warrants will play no part in my consideration of what sentence is appropriate here.

[7]

MR. MATTHEWS: Okay.

THE COURT: Okay. So I'm happy to hear from you generally.

MR. MATTHEWS: Okay. Well, your Honor, briefly, my client has—he relocated to—from Mexico to the United States at age 14. He did manage to—he graduated from high school in Mendocino. He was gainfully employed since high school primarily as a tree trimmer. Now, his difficulty is the fact that he has nine siblings, eight of them reside in the United States, he has two children that reside in the United States, so the combination of those factors alone as well as looking for employment to help in their support is the reason that he came back to the United States. He knows he can't come back. He knows it's going to lead to just additional punishment in the future. It was his criminal history. I point out in my departures motions that we think they may be a bit overrepresented.

Back in 2008 he did have two DUI convictions, but he related to me that was related to the divorce that he was going through at the time and he has remained sober since then. He went into treatment and it was successful and he actually has been involved in almost a leadership role with AA meetings and AA in general. So I think—you know, as the Court can see I think from—after that the only issue is the illegal entry in 2013, so he managed to stay out of [8] trouble once he got sober.

THE COURT: But then the misuse—

MR. MATTHEWS: In other words, my point is the Court has seen—

THE COURT: Misuse of a passport you mean.

MR. MATTHEWS: Right. I'm sorry. Misuse of a passport. I misspoke, your Honor. But in any event, other than that, he's, you know, trying to gain entry into the country to see his family. He's stayed out of trouble for a fairly significant amount of time now, and even this stuff that he did have, he—you know, it's fairly minimal compared to what the Court sees in many cases.

So in any event, your Honor, we're requesting—probation's, your Honor, recommending six months, the United States is recommending the same. We're requesting a time-served sentence. He's been in custody for a fairly significant amount of time at this point.

THE COURT: All right. Mr. Sanchez, what do you have to say in your own behalf this morning?

THE DEFENDANT: Well, first of all, I want to say good morning to everyone.

THE COURT: All right.

THE DEFENDANT: Believe me, your Honor, when I say that I am ashamed to look at you in the eye. Quite frankly, when I was given a sentence, I didn't realize that I would be [9] on probation after that. But I believe, and please believe me, that I have learned my lesson. I want to apologize to the citizens of the country of the United States for having come back illegally again. I have done what is necessary. I am newly married. Me and my wife bought a license for a business.

THE COURT: Where is your wife, in Mexico?

THE DEFENDANT: She's in Mexico.

THE COURT: Yeah. So why did you come back here?

THE DEFENDANT: Because we bought a license for a liquor store, and my intention was to save up a little bit of money, but now that I have been in jail, I was told by my brother that he's going to loan me the money so that I can get the license. And believe me, I have—I have worked in a liquor store in the past, and you can make some good money. I am desperate to just start my business, and believe me when I say that I will not be coming back.

THE COURT: Where is the—where is the store going to be, what city?

THE DEFENDANT: In Guadalajara, Jalisco.

THE COURT: Okay. Anything else?

THE DEFENDANT: Blessings for everyone, and to my attorney, thank you for the time that he dedicated to my case.

THE COURT: All right. Mr. Sutton?

[10]

MR. SUTTON: Thank you. Your Honor, the United States is recommending six months in custody; we're joining with probation's recommendation. This is—defendant has two prior removals from the United States, a voluntary return in 2009 and an expedited removal in 2013, and of course he is on probation from his 2013 passport case. And he apparently remained in Mexico for approximately two years following his December 2013 removal.

THE COURT: Did you have a transcript of the last sentencing? He mentioned something that was surprising to me because I know my habit and custom when I place somebody on probation. I go over with them in very detailed terms what that means; I elicit from them a promise that they're not going to come back anymore, I tell them that there will be a consequence if within five years they do come back. He—well, he's shaking his head as if familiar with what I'm saying now, but he said that he didn't realize he was on probation after the sentence that was imposed in 2013, which would—is kind of a stunner to me because, as I said, I go over that routinely with somebody what it means to be on probation.

MR. SUTTON: I know the Court's practice. I don't have a copy of the transcript in front of me. I know Mr. Sanchez—the 2013 case ultimately went up on appeal on the shackling issue.

[11]

THE COURT: How many—how many points did he get off for fast track in 2013?

MR. SUTTON: Two levels off in 2013, your Honor.

THE COURT: So he's back, and we give him the two levels again?

MR. SUTTON: That is correct.

THE COURT: Okay. Anything else?

MR. SUTTON: No, nothing further from the government unless the Court has any additional questions for me.

THE COURT: The Court finds as follows: The base level here is eight; four points are added for the prior felony conviction for misuse of a passport, which takes this to a 12; he has accepted responsibility, which drops this by two back to a ten.

Mr. Matthews has asked me to consider a—well, I don't know if it's a departure or a variance or just a disagreement with his criminal history category of III. I've looked it over both quantitatively—I mean that—it's clear that the number of points that he has puts him in that range; there's been no arithmetic or mathematical error in the calculation. So the question is qualitatively does he belong there. I think he does. He's got a felony, he has two drunk driving priors, and then he has a number of arrests for domestic violence. As I said, the—some resulted in [12] diversion so there was no conviction, and I give him the benefit of the doubt on those. But I think, if I'm recalling correctly, at least one of those resulted in a conviction for wife-beating. Let's see. Well, the first one is he got a probation term; that—he pled that down to, what, a local ordinance violation; that doesn't look like it had anything to do with so-called domestic violence anyway. The second two look like they were resolved by diversion, so I won't consider those. But when I look at the—forget about the local ordinance violation; it was a long time ago—he's got two fairly recent drunk drivings and then a felony conviction for misusing a passport. He was on supervised release. I find that category III is the right criminal history category for him.

Regarding the fast track, I'm—I don't think it will make a difference on the sentence that I impose, but I'm not inclined to give it again. He—this isn't as

extreme as the last case with 40 apprehensions and seven deportations and four felonies, but he does have a felony immigration offense, he was on supervision for that. He did get it before, and, you know, the effect of this again is to run the guidelines down for this fellow, and I just don't see that as correct, so I decline to depart. I think, again, that successive fast-track incentives would have the perverse effect of incentivizing people to come back thinking it's [13] just an assembly-line process here. The guideline range is ten to 16 months. I agree with—I'll keep that range in mind as I go through the 3553 factors.

I agree with much of what was said about this fellow's background. I read carefully the—his history. He was essentially raised in this country. Makes it more difficult for somebody; they get kind of a shock to the system when they're put out the first time, and then instinct is to come right back, and that may excuse the first time that he came in even though he misused a passport.

Mr. Sutton, I wasn't sure on this detail. Did he have any other apprehensions? I know—I know of the two deportations, but were there any other—

MR. SUTTON: No, that's all—

THE COURT: Yeah.

MR. SUTTON: —that's all the contacts the government has, your Honor. There was the voluntary return in 2009 and the expedited removal after his 2013 conviction.

THE COURT: So when I look at the—when I look at the circumstances of his offense and consider him against the backdrop of other immigration offenders,

it's pretty benign. Like the first fellow this morning, no egregious felony convictions. The two drunk drivings is troublesome because he's not here legally, he's drunk on the roads twice; that's troublesome, but it is somewhat dated at this point.

[14]

What he has going for him is he just doesn't have a horrible immigration record, and he tells me today that it's not likely that he's going to come back again because he's got a plan to stay in Mexico. He's married, he's got a reason to be down there, he's got a liquor license, his brother's going to help him out with that, and he is starting a business. That—that's what you've represented; is that—that's correct, Mr. Sanchez, everything I've just said?

THE DEFENDANT: That's right, your Honor.

THE COURT: Yeah. So with all that said, I think it lessens the need for deterrence. He ended up—how long was he in custody last time, Mr. Matthews, before he was placed on probation; do you know?

MR. MATTHEWS: Your Honor, may I inquire? I don't have that readily—

MR. SUTTON: I think it was about three months, your Honor.

THE COURT: So he got sentenced in December, and—

MR. SUTTON: He was arrested in October.

THE COURT: I can't see the date here. I know he pled guilty in November. I don't know what the date was. I don't have the charging papers.

MR. MATTHEWS: It was—

MR. SUTTON: He was arrested on October 23, 2013, [15] your Honor.

THE COURT: Okay. All right.

MR. SUTTON: He pled guilty in November and then was sentenced in December, time-served.

THE COURT: So about 60 days? He got like a 60-day sentence last time. Anyway, I think the guidelines are appropriate, they have an appropriate range here. The factors that favor him I think predominate, and so I'm inclined to give him a low-end sentence, and I do impose a ten-month sentence. That's to be followed in this case by three years' supervised release. Two conditions: Don't come back anymore, don't come back to the United States, and don't violate any United States law. I think this sentence is within the range that was contemplated even though I didn't agree with the fast-track departure and the—

MR. SUTTON: That's correct, your Honor.

THE COURT: —ten months is less than the 12 months that he faced, so I think that affects the waiver of appeal here; doesn't it trigger a waiver of the right to appeal and collaterally attack the—

MR. MATTHEWS: Yeah, I believe it does, your Honor, as long as it's below the high end, which it appears to be.

THE COURT: Okay. Let's move now to 13-CR-4209. The Court takes judicial notice that he's violated probation by coming back into the United States, being convicted of the [16] new felony.

The advisory guidelines for this offense are six to 12 months. I'm happy to hear from you, Mr. Matthews. Again, I keep in mind that this is—the purpose of this is to sanction him, not to punish him. He says—I get mixed messages from him. He told me in his allocution that he doesn't remember that he was on probation, but as I started to recount with Mr. Sutton my habit and custom, he was affirmatively shaking his head yes as if what I was saying was familiar to him, so maybe you can inquire and find out whether he understood the effect of being placed on probation.

MR. MATTHEWS: Yeah. When I met with him last, you know, I discussed with him the revocation case, and he seemed to understand what that was all about, so he's prepared to admit to the understanding that the reason for it is because he was on probation. So I was a little surprised at that comment myself.

THE COURT: Yeah. Well, what it means is that for five years, if you come back, you can get in more trouble—not just charging the new offense but you have to answer on the old offense where you caught a break the first time; that's what it means. You remember—you remember I went over that with you when you were here in 2013 when I put you on probation and I said you'll be home by Christmas? You [17] remember all that?

THE DEFENDANT: Yeah, now I remember.

THE COURT: Yeah. Do you remember you promised me you wouldn't come back anymore back in 2013; you said, Judge, I get it, I appreciate the break I'm getting, I promise I won't come back. Do you remember saying something like that to me?

THE DEFENDANT: That's—yes, I do, and that's the reason why I say that I am ashamed of looking you in the eye.

THE COURT: Well, okay. People make mistakes.

MR. MATTHEWS: I guess additionally, your Honor, what I'd add is, you know, on the underlying case where he was just sentenced, you know, he was punished for that prior conviction from 2013, and it was adjusted—got four—upward adjustment level of four points plus he was—went into a higher criminal history category, and then just based on the sentence that the Court imposed, which was higher than what all parties were recommending—

THE COURT: There should be some accounting for making an express promise to me that he's not going to come back and then violating that though, don't you think?

MR. MATTHEWS: Yeah, I agree, your Honor, but at the same time, based on the sentence that the Court, you know, imposed on the underlying case, I mean the Court can take that into consideration when sentencing him on the [18] violation.

THE COURT: Here's what I'm inclined to do, and you tell me whether you think this is reasonable. He faces six to 12 months on this. In light of the sentence that I imposed, which was higher than what you rec-

ommended, I think maybe higher than what the government recommended, my inclination here is to impose a sanction of two months on this case, one-third of the bottom end of the indicated advisory guidelines.

MR. MATTHEWS: Well, it's hard to argue that that isn't fair based on the recommendations, your Honor.

THE COURT: Okay. Well, let me hear from Mr. Sanchez then. Anything you want to tell me on this probationary case? This is the old case that we're talking about now, the one where you acknowledge you didn't keep your promise to me.

THE DEFENDANT: That is correct. I acknowledge that I did not.

THE COURT: Okay. But this is your chance to—whatever you want me to know before I impose a sanction on this case, I'm happy to hear from you.

THE DEFENDANT: Well, I am embarrassed. I made a mistake.

THE COURT: Okay. So here's the thing. You have promised me in the other case you're not going to come back [19] anymore, that this is it, and you've told me that you have a reason to stay in Mexico now, you're—are you newly married? This is a new wife?

THE DEFENDANT: I got married in April, yes.

THE COURT: Okay, good, newly married. And then you have plans to acquire a liquor license and start a business down there. Those are positive things. I think those are reasons that you would probably make it and you didn't want to come back to the United

States, so I—I'll accept those things, and as a result of that, I'll wind the sanction down.

You face six to 12 months. I'm not going to give you even the low end. I'm going to go to two months, two months, for violating your promise to me not to come back, but that'll run consecutive to the sentence that I've just imposed, so the total sentence is 12 months.

Probation was violated on the misuse of a passport case. I'm going to impose three years of supervised release now; I'm authorized to do that on 13-CR-4209. No reduction is necessary because the sentence imposed was for a probation violation, not a supervised release violation, so he faces the full 36 months. Two conditions on this older case: Don't come back anymore, don't come into the United States, and don't violate any United States law. The supervised release on 13-CR-4209 will run concurrent with the one that I [20] imposed on 15-CR-1999. Anything else?

MR. MATTHEWS: Nothing further, your Honor. Thank you.

MR. SUTTON: Can I just note, your Honor, that I would concur with the Court's sentence on—

THE COURT: Oh, okay. I'm sorry, Mr. Sutton. I didn't give you a chance to speak on that. Okay. Good luck. Don't come back, please. You stay there, and I hope your business does well.

(The proceedings were concluded.)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No. 3:13-cr-4209-LAB

UNITED STATES OF AMERICA, PLAINTIFF

v.

RENE SANCHEZ-GOMEZ, DEFENDANT

El Centro, California
Thurs., Nov. 12, 2015

TRANSCRIPT OF OFFICIAL ELECTRONIC SOUND RECORDING OF PROCEEDINGS

BEFORE THE HONORABLE PETER C. LEWIS, MAGISTRATE JUDGE

LIBERTY COURT PLAYER 4:34-4:36 P.M.

APPEARANCES:

FOR THE PLAINTIFF:

United States Attorney's Office
880 Front Street, Suite 6293
San Diego, California 92101
BY: KYLE MARTIN
Assistant United States Attorney

FOR THE DEFENDANT:

Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
BY: JAMES JOHNSON
Attorney at Law

[2]

(Proceedings begin at 4:34 p.m.)

THE CLERK: Number 10 on the log. 13cr4209-LAB. U.S.A. versus Rene Sanchez-Gomez.

THE COURT: Okay. So Mr. Sanchez-Gomez, you're—this is very similar to the last case—you're set for sentencing on the underlying case for November 23rd at 9:30 before Judge Burns.

A petition also, very similar to the last case, went before the judge, and the judge, Judge Burns, issued a warrant for your arrest based on the allegation that on July 3rd of this year, that you had previously, being a deported or removed alien, attempted to enter the United States illegally, which is a violation of Title 8, United States Code, Section 1326.

I'm going to appoint Thomas Matthews. He has him on the underlying case, and I'll set this before Judge Burns for status on that date.

Is that right, Erica?

THE CLERK: What date was that?

THE COURT: The same date as his sentencing.

November 23rd. Set it before Judge Burns.

THE CLERK: Hmm.

THE COURT: Does that make sense?

THE CLERK: I guess so.

THE COURT: What else would we do? Set it for status here, see what he wants? I don't think so. Let's set it [3] before Judge Burns for status.

THE CLERK: Okay.

THE COURT: And Thomas Matthews is—we'll call Mr. Matthews, let him know that he's going to be representing you on the petition as well.

These supervised release violations come up, and they just bite you. That's the deal.

Very good. Thank you, sir, and good luck.

THE DEFENDANT: Yes, sir.

THE COURT: Enter a denial to the petition. I'll find probable cause based on the four corners of the document.

(Proceedings adjourned at 4:36 p.m.)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case Nos. 13MJ3858-BLM-LAB, 13MJ3882-JMA-LAB
and 13MJ3928-BLM-LAB

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASMIN MORALES, MOISES PATRICIO-GUZMAN, RENE SANCHEZ-GOMEZ, DEFENDANTS

San Diego, California
Nov. 12, 2013
3:30 p.m.

REPORTER'S TRANSCRIPT
RECUSAL MOTION HEARING

BEFORE THE HONORABLE LARRY ALAN BURNS,
JUDGE PRESIDING

APPEARANCES:

FOR THE PLAINTIFF:

LAURA E. DUFFY
BY: WILLIAM P. COLE, ESQ.
Assistant U.S. Attorney
880 Front Street
San Diego, CA 92101

FOR THE DEFENDANT:

Federal Defenders, Inc.
BY: SHEREEN CHARLICK, ESQ.
JUDITH MILLER, ESQ.
225 Broadway, Ste. 900
San Diego, CA 92101

[2]

SAN DIEGO, CALIFORNIA—TUESDAY, NOV. 12, 2013, 3:30 P.M.

THE CLERK: CALLING NO. 20 ON THE CALENDAR, 13-MJ-03858, UNITED STATES OF AMERICA VERSUS JASMIN MORALES.

COUNSEL, PLEASE STATE YOUR APPEARANCES FOR THE RECORD.

MS. MILLER: JUDITH MILLER WITH MY CO-COUNSEL SHEREEN CHARLICK.

MR. COLE: WILLIAM COLE FOR THE UNITED STATES.

(PAUSE IN PROCEEDINGS)

THE COURT: WILL YOU REMOVE HER HAND CHAINS AT LEAST. THIS IS A MOTION HEARING. AND MY PRACTICE AT MOTION HEARINGS, BECAUSE THE DEFENDANT MAY NEED TO TAKE NOTES OR PASS NOTES TO THE LAWYER, IS NOT TO HAVE THOSE ON.

(PAUSE IN PROCEEDINGS)

MS. MILLER: IF WE CAN HAVE PERMISSION FOR MS. MORALES TO TAKE A SEAT.

THE COURT: YES, NEXT TO YOU.

MS. MORALES, GOOD AFTERNOON.

THE DEFENDANT: GOOD AFTERNOON.

THE COURT: THIS MATTER IS ON FOR RESOLUTION OF TWO MOTIONS. LET ME SAY THAT THE CASE IS CAPTIONED NOW—ACTUALLY, THE LATEST PLEADING JUST SAYS MS. MORALES.

MS. MILLER: YOUR HONOR, WE WERE WAITING ON THE COURT ORDER FOR THE MOTIONS THAT RELATE—THE COURT: HERE'S WHAT I'VE BEEN INFORMED OF, AND I [3] HAVE NOT RECEIVED PAPERWORK YET. ONE OF THESE CASES IS ASSIGNED TO JUDGE CURIEL, CORRECT, ONE OF THE FOUR CAPTIONED CASES? DO YOU KNOW WHICH ONE THAT IS?

I'VE GOT THE NUMBERS—HERE ARE THE NAMES. OBVIOUSLY, MS. MORALES'S CASE IS ASSIGNED TO ME, AND THAT'S 3858; CORRECT?

MS. MILLER: YES.

THE COURT: SO THESE CASES WERE CONSOLIDATED. I THINK—MS. MILLER, FEDERAL DEFENDERS FILED A NOTICE OF RELATED CASE; CORRECT?

MS. MILLER: I BELIEVE THAT'S CORRECT, YES.

THE COURT: SO PURSUANT TO THAT NOTICE, THE CLERK'S OFFICE CONSOLIDATED THESE FOUR CASES. THE ONLY CASE WHERE I'VE ACTUALLY RECEIVED CONFIRMATION FROM ANOTHER JUDGE THAT THAT

JUDGE CONSENTS TO ME HANDLING THE CASE, WHICH IS PART OF THE RELATED CASE PROCESS, IS JUDGE CURIEL'S CASE.

CAN YOU TELL ME OFFHAND WHICH ONE THAT IS?

MS. MILLER: IN THE FOUR CASES, DURAN, PATRICIA GUZMAN, MORALES, AND SANCHEZ-ROMERO, I DON'T ACTUALLY SEE A CURIEL CASE, BUT—MY MEMORY IS AGREEING WITH YOU, BUT—

MR. COLE: YOUR HONOR, MAYBE I CAN—I AM NOT SURE WHICH, BUT THERE IS A CASE IN FRONT OF JUDGE CURIEL THAT WAS NOT ONE OF THE ORIGINAL FOUR WHERE BRIEFING HAS BEEN PREPARED ON THE TOPIC OF THE SHACKLING POLICY. THE CASE IS *CERVANTES-ALVARADO*, 13CR2382. THAT IS SET FOR HEARING BEFORE [4] JUDGE CURIEL ON FRIDAY AS WELL. IT'S ALSO ABOUT SHACKLING, BUT IT WASN'T ONE OF THE FOUR. MY RECOLLECTION IS THAT IT WAS A JUDGE HOUSTON MATTER—

THE COURT: JUDGE SABRAW.

MR. COLE: —REFERRED TO YOU FOR THE ISSUE OF SHACKLING, AS I UNDERSTAND IT.

THE COURT: I HAVEN'T RECEIVED THE PAPERWORK. I DID RECEIVE AN E-MAIL MESSAGE FROM HIM TO THAT EFFECT.

MR. COLE: THERE ARE TWO CASES, TO MY UNDERSTANDING. TWO OF THE FOUR ARE

DONE. THE PERSONS HAVE BEEN SENTENCED.

THE COURT: IS THAT CORRECT, MS. MILLER?

MS. MILLER: AS TO MR. PATRICIA-GUZMAN, I KNOW THAT HE'S BEEN SENTENCED.

THE COURT: IS IT MOOT AS TO THIS PERSON, THEN?

MS. MILLER: IT'S NOT—I BELIEVE, YOUR HONOR, UNDER THE—

THE COURT: IS IT CAPABLE OF REPETITION AND EVADING REVIEW?

MS. MILLER: YES, YOUR HONOR. AND HE'S THE ONLY ONE WITH A MISDEMEANOR.

THE COURT: WHO IS THE JUDGE ASSIGNED NO MR. GUZMAN'S CASE?

MS. MILLER: JUDGE ANELLO.

THE COURT: THAT DOESN'T SOUND LIKE ONE OF THEM.

MS. MILLER: ACTUALLY, I BELIEVE IT'S YOU. IT WAS A [5] MISDEMEANOR CASE. ULTIMATELY, HE JUST PLED GUILTY FOR IMMEDIATE SENTENCING.

THE COURT: IT HAD AN LAB BEHIND THE NUMBER?

MS. CHARLICK: JUDGE ADLER AND LAB.

THE COURT: SO GUZMAN IS MINE.

THERE'S NO QUESTION MS. MORALES'S CASE IS ASSIGNED TO ME; CORRECT?

MS. MILLER: YES.

THE COURT: WHAT ABOUT RENE SANCHEZ GOMEZ?

MR. COLE: THAT WAS THE JUDGE HOUSTON ONE.

THE COURT: OKAY. JUDGE HOUSTON HAS NOTIFIED ME THAT HE WANTS ME TO HANDLE IT. I HAVEN'T RECEIVED THE PAPERWORK YET. BUT FOR TODAY'S PURPOSES, I'LL ASSUME THAT I'M RULING ON THAT FOR HIM. I'LL CLARIFY THAT ON FRIDAY WHEN WE HAVE THE ACTUAL ARGUMENT OVER THE MOTION. I'LL EITHER HAVE THE PAPERWORK BY THEN OR BE ABLE TO GIVE YOU AN UPDATE.

MR. COLE: IT'S IN HIS WRITTEN ORDER, I BELIEVE. THE ORDER THAT I ATTACHED TO MY MOTION RESPONSE FOR THE SUBSTANTIVE MOTION, THE LAST EXHIBIT IS HIS WRITTEN ORDER. HE STATES IN HIS ORDER THAT THE COURT IS REFERRING THE MOTION TO YOU.

THE COURT: IN CASE THERE'S SOME TECHNICAL GLITCH AND HE HAS TO ACTUALLY SIGN THE CONSENT AND THAT HAS TO BE FILED, I'LL MAKE SURE THAT THAT'S DONE.

BUT YOU HAVE A WRITTEN ORDER FROM HIM ON THAT CASE [6] OF REFERENCE?

MR. COLE: YES.

THE COURT: SO I HAVE THOSE THREE CASES.

NOW, WHAT ABOUT CARLOS DURAN?

MS. MILLER: IF YOU'LL EXCUSE ME BEFORE I LOSE TRACK, WORD ZUNIKA (PHONETIC) IS THE JUDGE CURIEL CASE. THE PAPERWORK HAS BEEN FILED TO NOTICE IT AS A RELATED CASE. SO I BELIEVE THAT'S MOST LIKELY A JUDGE CURIEL CASE.

THE COURT: THE LAST CONVERSATION I HAD WITH HIM WAS A WEEK GO MONDAY. NOT YESTERDAY, BUT A WEEK AGO MONDAY. MAYBE A SUBSEQUENT E-MAIL. I THINK IT WAS A SUBSEQUENT E-MAIL SAYING, "I WANT YOU TO HANDLE IT FOR ME." BUT I HAVE NOT RECEIVED ANY PAPERWORK, AND YOU DON'T HAVE AN ORDER OF REFERENCE FROM HIM.

MR. COLE: I'M NOT SURE—I DIDN'T RECEIVE A MOTION ABOUT THAT CASE. SOME PROSECUTOR MAY HAVE, BUT IT WASN'T PART OF THE ORIGINAL FOUR.

THE COURT: LET ME JUST DEAL WHICH WHAT IS IN FRONT OF ME NOW, WHICH ARE THE FOUR ORIGINAL CASES.

WHAT ABOUT CARLOS DURAN?

MR. COLE: I HAVE A BELIEF THAT HE ALSO—HIS CASE IS RESOLVED. BUT—AND THE REASON IS BECAUSE IS I ACTUALLY TRIED TO FILE AND GOT KICKED OUT FROM

THE CLERK BECAUSE SOME OF CASES WERE CLOSED. SO I CAN'T BE CERTAIN FOR HIM, BUT I BELIEVE—

[7]

THE COURT: SHE'S ASKED—MS. MILLER HAS ASKED ME TO IGNORE THE FACT THAT THE CASE MAY BE TECHNICALLY MOOT AS AN INDIVIDUAL DEFENDANT. THAT WAS THE APPROACH IN HOWARD. I THINK IT'S A SOUND APPROACH HERE. THE PRACTICE HAS NOT CHANGED.

AND SO SHE'S RIGHT TO SAY, MR. COLE, THAT, "LOOK, THIS IS ONGOING WITH EACH NEW DEFENDANT. AND SO GO AHEAD AND RESOLVE THE CASE AS TO THESE FIRST FOUR." I'M PREPARED TO DO THAT. SO THAT IS RESOLVED AND DONE. I'LL LEAVE THIS INTACT RATHER THAN HAVING TO BREAK UP THE CAPTION. BUT I DO NEED TO KNOW WHOSE CASE THAT WAS, BECAUSE I'M NOT SURE THAT I HAD A REFERRAL.

MS. MILLER: YOUR HONOR, WE WILL FOLLOW UP ON ALL OF THIS TO MAKE SURE THAT IT'S CORRECT WHEN WE GET BACK TO THE OFFICE IF THAT'S ALL RIGHT WITH THE COURT.

THE COURT: IT KIND OF PUTS ME IN A BIND BECAUSE IF I MAKE A RULING TODAY, I CAN CERTAINLY MAKE A RULING ON THE FIRST THREE THAT WE DISCUSSED. TWO OF THEM ARE MINE. I HAVE AUTHORITY INDEPENDENTLY TO MAKE A RULING ON THOSE.

ONE JUDGE HOUSTON'S GOING TO ORDER A REFERENCE.

WHO'S THE OTHER ONE?

MR. COLE: IT'S JUDGE SABRAW, ACCORDING TO MY RECORDS. THAT DURAN—DURAN WAS A JUDGE SABRAW CASE.

THE COURT: HERE'S MY COMMUNICATION WITH JUDGE SABRAW. HE ALSO SENT ME AN E-MAIL SAYING, "PLEASE HANDLE [8] MINE." THEN WE WERE INFORMED THAT HIS CASE GOT INDICTED.

IS THAT TRUE OF EDWARD DURAN?

MR. COLE: YES.

MS. CHARLICK: I'M INFORMED THAT'S ACCURATE.

THE COURT: AND THEN IT WAS ASSIGNED TO JUDGE BATTAGLIA; CORRECT?

MS. CHARLICK: I'M CHECKING RIGHT NOW, YOUR HONOR.

(PAUSE IN PROCEEDINGS)

MS. CHARLICK: YES, IT WAS ASSIGNED TO JUDGE BATTAGLIA.

THE COURT: SO I WILL NOT ASSUME JURISDICTION IN THAT CASE BECAUSE, LIKE I COMMUNICATED WITH JUDGE HOUSTON, JUDGE SABRAW, JUDGE CURIEL, WHO'S NOT IMPLICATED HERE, JUDGE BATTAGLIA LOOKED AT THE LOCAL RULES. HE THOUGHT HE HAD TO REFER THE WHOLE

CASE TO ANOTHER DISTRICT JUDGE UNDER THE LOCAL RULE RATHER THAN JUST AN ISSUE. THERE'S SOME DISAGREEMENT BETWEEN JUDGE BATTAGLIA AND JUDGE MOSKOWITZ OVER THAT, BUT I'M NOT A PARTY TO THAT. THE POINT IS HE DID NOT REFER THAT TO ME.

SO JUST TO MAKE OUR RECORD CLEAR, MR. DURAN'S CASE HAS NOT BEEN RELATED. TWO OF THESE ARE MINE, AND THE OTHER I FIND HAS BEEN RELATED. SO THE RULINGS THAT I MAKE TODAY WILL RESPECT THOSE CASES: MOISES PATRICIA GUZMAN, JASMINE MORALES, AND RENEE SANCHEZ-GOMEZ. I'LL LEAVE IT TO JUDGE BATTAGLIA TO DEAL WITH THE OTHER CASE. YOU CAN BRING IT BACK IN FRONT OF [9] HIM OR ASK HIM TO SEND THE WHOLE CASE TO ME OR BE BOUND BY THE RULING OR NOT, OKAY?

SO EVERYBODY CLEAR ON THE THREE CASES THAT I'M ASSUMING ARE THE SUBJECT OF THIS MOTION?

MS. CHARLICK: YES.

THE COURT: I'VE READ THE PAPERS. I'M HAPPY TO HEAR ANYTHING ELSE THAT YOU HAVE. I HAVE SOME QUESTIONS ABOUT SOME OF THE AUTHORITIES.

MS. CHARLICK: I DID HEAR YOUR HONOR SAY THAT AT THE HEARING ON FRIDAY, CERTAIN THINGS WOULD OCCUR. I HOPE THAT IS NOT A FORESHADOWING OF THE CONCLUSION. I'M GOING TO HANDLE THE

RECUSAL ISSUE. AND I KNOW THE COURT'S—

THE COURT: IT'S NOT. IT'S JUST THAT BOTH ARE SCHEDULED AT THIS POINT. AND I'M ANTICIPATING, CONSISTENT WITH THAT SCHEDULING ORDER, THAT WE'RE GOING TO GO FORWARD. IF YOU CAN PERSUADE ME THAT NO JUDGE OF THIS COURT SHOULD HEAR IT, THEN, OF COURSE—AND I'VE SAID THIS TO THE OTHERS, BY THE WAY, THOSE THAT MADE REFERRALS TO ME. ASSUMING THAT THE RECUSAL MOTION IS GRANTED, THEN I WOULD REFER THIS TO JUDGE KOZINSKI, CHIEF JUDGE OF THE CIRCUIT, FOR APPOINTMENT OF SOMEBODY OUT OF THE CIRCUIT. SO NO, IT'S NOT A FORE-SHADOWING AT ALL.

MS. CHARLICK: YOUR HONOR, UNLIKE THE SHACKLING POLICY AND ARGUMENTS RELATING TO ITS CONSTITUTIONALITY, WHICH I THINK ARE THORNY ISSUES, THE RECUSAL ISSUE IS ACTUALLY A [10] STRAIGHTFORWARD ONE. AND WE BELIEVE RECUSAL IS WARRANTED FOR THREE REASONS, THE FIRST OF WHICH IS BINDING NINTH CIRCUIT PRECEDENT IN *BRANDAU*. THE SECOND TWO ARE THE STATUTES, ONE OF WHICH *BRANDAU* EXPLICITLY RELIED UPON.

THE COURT: WHAT DO YOU MAKE—HAVE YOU READ—WELL, YOU MUST HAVE READ IT BECAUSE YOU WERE THE LAWYER IN *CLEMENS VS. U.S. DISTRICT COURT*.

MS. CHARLICK: YES, I WAS.

THE COURT: YOU SAY BINDING NINTH CIRCUIT PRECEDENT.

MS. CHARLICK: I DID.

THE COURT: IN *CLEMENS*, THEY SAY THERE'S NO SUCH THING IN THE CONTEXT OF A RECUSAL MOTION. BUT THEY SAY AT PAGE 1178 IS THAT, "WE'RE MINDFUL THAT SECTION 455(A) CLAIMS ARE FACT-DRIVEN. AND AS A RESULT, THE ANALYSIS OF A PARTICULAR SECTION 455 CLAIM MUST BE GLIDED NOT BY COMPARISON TO SIMILAR SITUATIONS ADDRESSED BY PRIOR JURISPRUDENCE, BUT RATHER BY INDEPENDENT EXAMINATION OF UNIQUE FACTS AND CIRCUMSTANCES OF A PARTICULAR CLAIM AT ISSUE." AND THEY CITE A FIFTH CIRCUIT CASE, *BREMER*.

THAT SUGGESTS TO ME THAT THERE'S NO SUCH THING AS BINDING NINTH CIRCUIT PRECEDENT IN A RECUSAL CASE, THAT THEY'RE FACT-DRIVEN AND THAT THE COURT MUST ANALYZE THE FACTS IN EACH CASE.

MS. CHARLICK: YOUR HONOR, THERE ARE ABSOLUTELY FACT-DRIVEN ASPECTS OF RECUSAL. BUT IN *CLEMENS* ITSELF, THE [11] FACTS IN *CLEMENS* WERE INCREDIBLY DISTINCT AND THE GROUNDS ON WHICH I SOUGHT RECUSAL ENTIRELY DIFFERENT THAN HERE. MY CLIENT, MR. CLEMENS, WAS ACCUSED OF THREATENING THREE DIFFERENT JUDGES. AND THEN THE CASE WAS ACTUALLY ASSIGNED TO JUDGE OTERO,

NOT ONE OF THE JUDGES WHO WAS THREATENED AND ONE OF THE JUDGES WHO HAD BEEN ON THE COURT FOR A SHORT PERIOD OF TIME.

THE ACTUAL—WHEN THE MOTION TO RECUSE WAS MADE, THE DECISION AS TO ITS VALIDITY OF WHETHER IT WOULD BE GRANTED OR DENIED WAS ACTUALLY SENT TO A DIFFERENT JUDGE.

THE COURT: JUDGE MAHAN FROM NEVADA.

MS. CHARLICK: I WENT TO NEVADA AND I ARGUED THAT IN FRONT OF JUDGE MAHAN. IT WAS NOT A DECISION THAT JUDGE OTERO BELIEVED THAT HE SHOULD MAKE BECAUSE OF 28 USC 455(A).

THE COURT: THAT CASE IS VERY DIFFERENT, THOUGH. IT KIND OF PROVES THE POINT ABOUT THESE CASES BEING INTENSELY FACTUAL. THERE A FELLOW HAD THREATENED THREE JUDICIAL COLLEAGUES OF THE VERY JUDGE TO WHOM THE CASE WAS ASSIGNED. PRESUMABLY, HE HAD SOME INTEREST AND KNOWLEDGE WITH RESPECT TO THOSE PEOPLE. HE WASN'T A STRANGER TO THEM. IT WASN'T LIKE PRESIDING INDIFFERENTLY OVER A CASE WHERE THE JUDGE HAS NEVER MET THE VICTIM. THESE WERE JUDICIAL COLLEAGUES. HE HAD AN ONGOING AND A FUTURE RELATIONSHIP WITH THEM. SO I UNDERSTAND THAT IN THAT CONTEXT.

IN A SIMILAR CONTEXT HERE, ALTHOUGH I DIDN'T MAKE A [12] DECISION—I WAS GONE. JUDGE MOSKOWITZ DECIDED ALL JUDGES OF THIS COURT WOULD BE RECUSED ON THE BOMBING OF THE COURTHOUSE BECAUSE SOMEONE COULD SAY THAT WE'RE VICTIMS. I PERSONALLY HAPPEN TO DISAGREE WITH THAT. I HAD TRIED AN EARLIER BOMBING OF THE COURTHOUSE CASE WHERE JUDGE BREWSTER PRESIDED, AND NO SUGGESTION WAS MADE THAT HE COULDN'T BE FAIR, THAT HE WAS SOMEHOW A VICTIM.

MY POINT IS, MS. CHARLICK, THAT IT REALLY POINTS UP TO THE INTENSE FACTUAL DIFFERENCES BETWEEN CASES. AND SO THE QUESTION I HAVE FOR YOU IS YOU SAY, "LOOK, BINDING PRECEDENT." I THINK THERE'S A LOT OF DIFFERENCES BETWEEN THE EASTERN DISTRICT CASE AND WHAT'S HAPPENING HERE. THERE WERE—FRANKLY, I'M AT A LITTLE BIT OF A LOSS TO UNDERSTAND WHY JUDGE REINHARDT ORDERED SOMEBODY ELSE TO HEAR THAT CASE. I DON'T GET IT.

I UNDERSTAND THE STANDARD FOR RECUSAL. I'VE APPLIED IT. I'VE WRITTEN ABOUT IT. I HAVE TO CONFESS TO YOU THAT SOMETIMES I THINK IT'S APPLIED A LITTLE WHIMSICALLY. I THINK SOMETIMES IT JUST DEPENDS ON THE PARTICULAR PANEL AND THAT THERE'S NOT A UNIFORM STANDARD. I MEAN, IT IS AS INTENSELY DIFFERENT AS

THE FACTS THAT ANIMATE THESE 455 MOTIONS.

MS. CHARLICK: WELL, YOUR HONOR, I THINK THAT THERE ARE SOME COMMON THEMES THAT GOVERN THE CASES IN TERMS OF RECUSAL. FIRST IS IT'S AN OBJECTIVE STANDARD, WHETHER A REASONABLE, THOUGHTFUL, AS *CLEMENS* SAYS, OUTSIDE OBSERVER [13] WOULD BELIEVE THE COURT COULD BE IMPARTIAL; AND SECOND, WAS THERE ANY TYPE OF EXTRAJUDICIAL INFORMATION.

THE COURT: WASN'T THERE—THERE'S ANOTHER ASPECT OF THAT. IT'S NOT JUST REASONABLY THOUGHTFUL. IT'S SOMEBODY WITH FULL KNOWLEDGE, TOO—

MS. CHARLICK: OH, YES.

THE COURT: —OF ALL THE CIRCUMSTANCES. AND THOSE CIRCUMSTANCES WOULD INCLUDE THE MARSHALS' POLICY ACROSS THE UNITED STATES; RIGHT?

MS. CHARLICK: YES.

THE COURT: THAT'S ONE THING THAT A PERSON WOULD TAKE INTO CONSIDERATION IN SAYING, WELL, THIS JUDGE CAN BE IMPARTIAL OR CAN'T. I WOULD THINK THAT IT WOULD INCLUDE RESTRAINT PRACTICES IN ALL COURTS TO THE EXTENT THAT THEY'RE KNOWN.

FOR EXAMPLE, I GO HOME AT NIGHT EXHAUSTED. I'LL SIT IN FRONT OF THE TV AND

HAVE A BEER. AND BECAUSE WE DON'T ALLOW ANY CAMERAS IN FEDERAL COURT, I NEVER SEE ANY PROCEEDINGS FROM FEDERAL COURT, BUT I SEE A LOT OF STUFF THAT GOES ON IN STATE COURT. BEING A LAWYER AND A JUDGE, I WATCH IT WITH SOME MILD INTEREST.

ACROSS THE STREET, FOR EXAMPLE, THEY HAVE PEOPLE CAGED. I'VE BEEN TO THE SAN DIEGO ZOO AND I SEE THESE PLEXIGLASS CAGES, AND THAT'S WHERE PEOPLE APPEAR IN PRELIMINARY PROCEEDINGS OVER THERE OFTENTIMES IN SHACKLES [14] BEHIND A CAGE. I WOULD ASSUME THAT THE REASONABLE PERSON WITH KNOWLEDGE OF THIS ISSUE, WHAT RESTRAINTS ARE APPROPRIATE, WHAT RESTRAINTS ARE COMMON IN PRETRIAL PROCEEDINGS IN FRONT OF JUDGES WOULD BE AWARE OF SUCH THINGS. THEY'D WATCH THE TV AND SEE THAT, TOO.

MS. CHARLICK: WELL, YOUR HONOR, IT DOES NOT MEAN WHATEVER SOMEONE WATCHES ON TELEVISION THEY BRING INTO THIS TYPE OF DECISION-MAKING. HERE THERE'S NO DOUBT THAT THERE WERE INDEED A GREAT NUMBER OF EXTRAJUDICIAL, EX PARTE, OUTSIDE COMMUNICATIONS.

THE COURT: WHY WOULD YOU SAY THAT? IT'S ALMOST LIKE SAYING THE JUDGES ARE YOUR ADVERSARIES WHEN YOU USE TERMS LIKE "EX PARTE" AND "EXTRAJUDICIAL." THIS IS COMPLETELY DISTINCT FROM AN ON-

GOING CASE. THIS IS A MATTER OF SETTING COURT POLICY. WHO WOULDN'T EXPECT THAT JUDGES WILL NOT CONSULT WITH THE MARSHALS, WHO ARE THE PRIMARY SECURITY FOR THE COURT, OR THE PROBATION DEPARTMENT, FOR THAT MATTER, OR PRETRIAL?

MS. CHARLICK: NO ONE SAYS THAT THE COURT SHOULDN'T OR CANNOT DO THAT, BUT—

THE COURT: I'VE NEVER HEARD THOSE REFERRED TO, THOUGH, AS "EX PARTE" COMMUNICATIONS.

MS. CHARLICK: WHAT I MEAN IS THAT IT WAS NOT IN THE PUBLIC FORUM. THERE ARE NO TRANSCRIPTS. THIS IS NOT PART OF A HEARING. WE WERE NOT PRESENT. THE CASES GOVERNING [15] RECUSAL—I'M NOT IMPLYING THAT THAT SHOULDN'T OR CANNOT OCCUR. BUT WHEN IT COMES TO RULING UPON THE VALIDITY, THE LAWFULNESS OF A POLICY THAT COMES OUT OF THOSE TYPES OF COMMUNICATIONS, THAT IS INFORMED BY THOSE COMMUNICATIONS—AND JUDGE MOSKOWITZ SAYS THAT THESE THINGS OCCURRED IN EXHIBIT A TO THE SHACKLING MOTION.

THE COURT: "THESE THINGS" BEING WHAT, THAT THERE WERE CONVERSATIONS BETWEEN THE JUDGES AND MARSHALS?

MS. CHARLICK: OH, YES. AND A PRESENTATION.

THE COURT: NO QUESTION ABOUT THAT. THERE WAS A PRESENTATION BY MARSHAL STAFFORD. I WAS A WITNESS TO THAT. I PARTICIPATED. I DON'T KNOW WHICH JUDGES WEREN'T THERE. I THINK EVERYBODY WAS THERE. MARSHAL STAFFORD CAME TO THE JUDGES' MEETING TO ASK US, IMPLORE US TO COME IN LINE WITH THE NATIONAL MARSHALS' POLICY WHICH WE HAD NOT BEEN ALIGNED WITH.

MS. CHARLICK: AND THIS COURT ACCEDED TO THE REQUEST ADOPTING THE POLICY AS ITS OWN MAKING CERTAIN CAVEATS BECAUSE THE COURT DIDN'T WANT CERTAIN SHACKLES DURING GUILTY PLEAS AND SENTENCING. THE COURT HAS APPROVED AND ADOPTED THIS POLICY. THIS IS INDEED NOW OUR DISTRICTWIDE POLICY, *BRANDAU* SAYS.

THE COURT: THERE'S SOME DISPUTE ABOUT THAT, MS. CHARLICK. JUDGE MOSKOWITZ, FOR EXAMPLE, IF YOU ASK HIM, HE'LL SAY, "WE DON'T HAVE A POLICY." I TEND TO THINK WE DO HAVE A POLICY, AND THE POLICY IS ONE OF DEFERENCE TO THE MARSHALS. THAT'S MY PERSONAL POSITION. I'M NOT—AGAIN, I'M [16] RULING ONLY ON CASES HERE THAT HAVE BEEN EITHER REFERRED TO ME OR THAT ARE MINE.

I THINK WHEN THE MARSHAL MADE HIS PRESENTATION AND AFTERWARDS WE WENT AROUND AND DISCUSSED THIS AND EACH PERSON EXPRESSED A POINT OF VIEW ABOUT

THIS, THERE WAS SOME TALK ABOUT, "ARE WE GOING TO HAVE EXCEPTIONS?" SUCH AS THE ONE I RECOGNIZED TODAY, WHICH IS A PRACTICAL COMMON SENSE EXCEPTION. A DEFENDANT AT A MOTION HEARING SHOULD HAVE THE FREEDOM OF MOVEMENT, THAT THEY CAN WRITE NOTES. EVERYONE AGREED THAT CERTAIN EXCEPTIONS WOULD BE RECOGNIZED. AND WE DECIDED THAT WE WOULD LEAVE THOSE IN THE DISCRETION OF EACH JUDGE. NO ONE WOULD SPEAK FOR ANYONE ELSE.

ALL THAT TO STAY WE DON'T HAVE A UNIFORM POLICY. IN FACT, YOUR MOTION PAPERS ON THE PRINCIPAL MOTION NOTE THAT. I THINK THEY NOTE THAT JUDGE HUFF INVOKES THE EXCEPTION IN EVERY CASE.

MS. CHARLICK: YES.

THE COURT: THAT KIND OF CUTS AGAINST THE IDEA THAT WE HAVE A COURT POLICY OR ELSE IT SUGGESTS AT LEAST ONE MEMBER OF THE COURT IS NOT FOLLOWING THE COURT POLICY. I THINK THE POLICY IS SIMPLY DEFERENCE TO THE MARSHALS.

MS. CHARLICK: AND THAT MAY BE. AND THEN IT'S A POLICY THAT THE COURT HAS ESSENTIALLY ADOPTED AS ITS OWN TO DEFER TO THE MARSHALS TO IMPLEMENT 9.18.

THE COURT: SUBJECT TO THE EXCEPTIONS. HERE ARE THE [17] DIFFERENCES: WE DON'T HAVE ANY GENERAL ORDER. THERE'S NO QUESTION ABOUT WHAT THE

POLICY IS. YOU AND I AGREE ON IT AND WE AGREE ON THE PARAMETERS OF IT AND WE AGREE ON THE EXCEPTION THAT EXISTS.

THE ONLY BASIS THAT I CAN POSSIBLY GLEAN FOR JUDGE RICHARD'S RULING THAT THERE NEEDED TO BE A RECUSAL IN *BRANDAU* WAS THAT THERE WERE A SERIES OF ORDERS ISSUED RESPECTING A GENERAL ORDER ON SHACKLING. THE FIRST ONE—FIRST JUDGE HEARS AND SAID, "WE DIDN'T GIVE PROPER NOTICE, SO WE'VE GOT TO DO THIS AGAIN." THEN THERE WAS A SECOND. THEN THERE WAS A THIRD. THEN THERE WAS DISCUSSION IN BETWEEN.

EVEN AT THE TIME OF THE ORAL ARGUMENT, BOTH GOVERNMENT COUNSEL AND COUNSEL FOR THE PETITIONER IN THE CASE SAID, "LOOK, WHATEVER THE LAST ITERATION OF THE POLICY IS, WE CAN TELL YOU FROM OUR OWN EXPERIENCE IT'S NOT BEING FOLLOWED," WHICH MAKES IT WEIGH INTO THE OPINION.

AT THAT POINT, I COULD SEE HIM SAYING, WELL, THIS CONJURES UP THE IMAGE THAT MAYBE THE JUDGES AREN'T BEING, WHAT, ENTIRELY CANDID, I SUPPOSE, ABOUT WHAT THE POLICY IS OR WHAT THE REAL EFFECT IS. SO MAYBE WE NEED SOMEBODY INDEPENDENT TO GO IN AND DECIDE IT. FRANKLY, THAT'S THE ONLY BASIS I CAN SEE FOR SAYING SOMEBODY OTHER THAN AN EASTERN DISTRICT JUDGE SHOULD TELL ME WHAT THE POLICY IS.

THAT'S NOT PRESENT HERE. THERE'S NO DISAGREEMENT ABOUT THE CONTOURS OF WHAT YOU AND I AGREE IS A POLICY, BUT [18] WHAT SOME JUDGES WILL SAY IS NOT A COURT POLICY.

MS. CHARLICK: IN *BRANDAU*, ACTUALLY, THE ENTIRE—THE GENERAL ORDER HAD BEEN RESCINDED AT THE TIME OF THE APPEAL. AND THE GOVERNMENT'S POSITION IS THERE IS NO GENERAL ORDER, SO THERE'S NO NEED FOR ANY OF THIS. AND THE COURT ACTUALLY SAID, "WELL, THERE'S A DE FACTO PRACTICE IN EFFECT." AND THE DEFENSE AND THE GOVERNMENT HAD AGREED THAT THE DE FACTO PRACTICE WAS, IN CERTAIN INSTANCES, THE FULL RESTRAINT SHACKLING THAT HAD BEEN OBJECTED TO.

THE COURT: RIGHT, BUT THERE WAS NO EVIDENCE OF THAT. THAT WAS THE OTHER CURIOUS THING ABOUT THIS, IS THAT ORDINARILY APPELLATE COURTS MAKE DECISIONS ON THE BASIS OF A RECORD. AND HERE THE JUDGE IS SAYING, "WELL, THINGS ARE SAID AT ORAL ARGUMENT. REPRESENTATIONS OF FACTS NOT IN THE RECORD ARE BEING MADE NOW," AND THEY CREDITED THOSE. IT'S JUST A VERY DIFFERENT SITUATION.

ON WHAT BASIS DO YOU THINK AN ORDER ASSIGNING AN OUT-OF-DISTRICT JUDGE IS MADE IN *BRANDAU*? WHAT DO YOU THINK THE BASIS OF THAT WAS?

MS. CHARLICK: I THINK THE BASIS WAS THE DISTRICT JUDGES THEMSELVES HAD BLESSED THIS POLICY. THE DISTRICT JUDGES IN *BRANDAU* ABSOLUTELY SAID IN THE ORIGINAL WRITTEN ORDER THAT THE DISTRICT JUDGE ISSUED REFUSING TO RECUSE HIMSELF AT WHICH TIME HE WAS REVERSED SUBSEQUENTLY, HE SAID, "THE JUDGES OF THIS DISTRICT WERE CALLED UPON TO APPROVE A [19] SECURITY RECOMMENDATION OF THE UNITED STATES MARSHAL AS A MATTER OF INTERNAL COURT ADMINISTRATION. IN DOING SO, THEY CAME TO THE CONCLUSION THAT THE POLICY SHOULD BE OTHERWISE APPROVED WITH CERTAIN ADJUSTMENTS." THAT'S EXACTLY WHAT THIS COURT DID.

THE COURT: THAT'S NOT WHAT THE REMAND ORDER SAID IN THE OPINION. THE REMAND ORDER SAYS THAT IT'S TO GO BACK TO THIS OUTSIDER JUDGE TO DETERMINE, TO DETERMINE, THE NATURE AND CURRENT SHACKLING POLICY IN THE VARIOUS DISTRICT COURT IN THE EASTERN DISTRICT. THAT WAS THE ONLY CHARGE THAT THE JUDGE HAD ON REMAND, NOT TO RULE ON CONSTITUTIONALITY OF THE POLICY, NOT TO SET POLICY, JUST TO DETERMINE AND REPORT BACK TO THE COURT BECAUSE OF THE CONFUSION.

MS. CHARLICK: YOUR HONOR, THEY ASSIGNED IT TO AN OUTSIDE JUDGE BECAUSE OF 28 USC 455(A).

THE COURT: I DON'T AGREE WITH THAT. I DON'T SEE THAT HERE. LOOK, THERE'S A SPECTER—I MEAN, MS. CHARLICK, THE REASON THEY GO THROUGH ALL THESE ITERATION OF WHAT THE RULE WAS IS THERE'S A SPECTER THAT, "WE'RE BEING TOLD DIFFERENT THINGS ABOUT THIS POLICY. AND MAYBE THERE'S SOME EFFORT TO THE CIRCLE THE WAGONS HERE." THAT'S SORT OF BETWEEN THE LINES WHAT I GET.

OTHERWISE, WHY WOULD JUDGES NOT BE ABLE TO RULE ON MATTERS THAT THEY HAD PROMULGATED? THAT'S TOTALLY INCONSISTENT WITH THE RULE THAT SAYS THE THAT A JUDGE HAS MADE [20] A DECISION IN A CASE IS NOT A BAR TO THE JUDGE MAKING A SIMILAR DECISION IN ANOTHER CASE EVEN IF THE RULING IS ADVERSE? IT USUALLY HAS TO BE SOMETHING EXTRAJUDICIAL BEFORE —IN A CASE, A CASE IN CONTROVERSY, IF THE JUDGE IS DISQUALIFIED.

MS. CHARLICK: WE DO HAVE THAT. BUT EVEN THAT ASIDE, FIRST OF ALL, I ACTUALLY BELIEVE *BRANDAU* SPECIFIES THAT, "ON REMAND, A CONSOLIDATED CASE WHICH CHALLENGES THE CONSTITUTIONALITY OF A RULE PROMULGATED BY THE JUDGES OF THE EASTERN DISTRICT," PROMULGATED IN THE SAME WAY THAT THIS COURT HAS PROMULGATED THE APPROVAL OF THE MARSHALS' POLICY, "AS WELL AS THEIR VERY AUTHORITY TO PROMULGATE IT SHALL BE ASSIGNED TO AN OUT-OF-DISTRICT JUDGE."

THE COURT: WHERE ARE YOU READING FROM?

MS CHARLICK: I'M READING FROM PAGE 1070. "ALTHOUGH WE DO NOT SUGGEST THAT THERE IS ANY ACTUAL BIAS ON THE PART OF THE JUDGES, OUR ETHICS RULES REQUIRE RECUSAL."

THE COURT: BUT LOOK UP AT THE TOP, THOUGH, THE TOP OF THAT PAGE, AND SEE WHAT THE CHARGE IS OF THE JUDGE WHO IS TO TAKE OVER THE CASE. THE CHARGE IS TO DETERMINE THE NATURE OF THE CURRENT SHACKLING POLICY IN THE EASTERN DISTRICT. THAT'S IT. IT'S NOT TO RULE ON THE THINGS THAT YOU'VE TALKED ABOUT, THE CONSTITUTIONALITY OF THE ROLE.

THE OTHER RULE THAT COMES TO MIND TO ME IS THE RULE OF NECESSITY HERE. WHO WOULD SET POLICY FOR THIS COURT IF NOT [21] THE JUDGES OF THE COURT, SOME CIRCUIT JUDGE OR SOME OUT-OF-CIRCUIT JUDGE? THAT WOULD BE UNUSUAL INDEED, WOULDN'T IT, TO HAVE SOMEBODY COME FROM NEVADA SAYING, "THIS IS GOING TO BE THE POLICY IN THE SOUTHERN DISTRICT"?

MS. CHARLICK: YOUR HONOR, IF A POLICY IMPLICATES CONSTITUTIONAL CONCERNS, THEN I DO THINK THAT IF THE JUDGES GOT TOGETHER AND IMPLEMENTED A POLICY OR APPROVED SOME OTHER AGENCY'S IMPLEMENTATION OF A POLICY AND THE POLICY IS CHALLENGED ON CONSTITUTIONAL GROUNDS,

THE JUDGES INDEED DO HAVE TO RECUSE THEMSELVES UNDER *BRANDAU*.

THE COURT: ONLY IF YOU DON'T HAVE ANY RECOURSE, BUT YOU DO. I MEAN, THIS CASE IS HEADED TO THE NINTH CIRCUIT. YOU'RE GOING TO HAVE NINE SOUTHERN DISTRICT JUDGES DECIDING THIS CASE.

LOOK, IT WOULD BE A DIFFERENT THING IF THERE WAS A SOUTHERN DISTRICT JUDGE ON THE PANEL THAT REVIEWS THIS OR ON THE MOTIONS PANEL, BUT YOU HAVE TO RECOURSE HERE. IT'S NOT LIKE THIS IS A FINAL DECISION. IF YOU DISAGREE WITH THE CONSTITUTIONALITY OF IT, TAKE IT TO THE CIRCUIT AND YOU'LL HAVE THREE CIRCUIT JUDGES WHO ARE NOT ASSOCIATED NECESSARILY WITH THIS DISTRICT THAT CAN LOOK AT THE CONSTITUTIONALITY OF IT.

MS. CHARLICK: WE HAVE RECOURSE IN THE FIRST ORDER. WE HAVE A STATUTE THAT STATES THAT WHENEVER YOUR IMPARTIALITY COULD BE REASONABLY QUESTIONED, YOU HAVE TO RECUSE YOURSELF.

[22]

THE COURT: IT BEGS THE QUESTION THE STATUTE'S ALSO CLEAR, AS YOU KNOW FROM THE *CLEMENS* CASE SINCE YOU LITIGATED IT, THAT 455 DOES NOT INCLUDE THE FOLLOWING THINGS: RUMOR, SPECULATION, BELIEFS, CONCLUSIONS, INNUENDOS, SUSPICION, OPINION, AND NONFACTUAL MATTERS. THERE'S NOT A FACTUAL MATTER

IDENTIFIED IN YOUR BRIEF THAT WOULD SUGGEST ANY OF THE JUDGES OF THIS COURT CANNOT RULE ON THIS.

MS. CHARLICK: THERE ARE. THERE WERE FACTUAL COMMUNICATIONS MADE BY THE MARSHALS SERVICE TO THE COURT THAT INDEED INFORMED THE COURT'S DECISION. JUDGE MOSKOWITZ HIMSELF SAYS SO.

THE COURT: BUT THOSE AREN'T CONTESTED. YOU'RE NOT SAYING, "OH, YOU WEREN'T TOLD THOSE THINGS." NO JUDGE OF THIS COURT IS DENYING THAT WE WERE TOLD THOSE THINGS. THIS HAS BEEN ABOUT AS TRANSPARENT AS CAN BE.

LOOK, I WASN'T PRIVY TO THE CONVERSATION THAT JUDGE MOSKOWITZ HAD WITH YOU OR REUBEN CAHN HE ALLUDES TO. HE CHECKED WITH FEDERAL DEFENDERS AND U.S. ATTORNEYS BEFORE HE WROTE THE LETTER. THAT'S WHAT HE SAYS IN THE PREAMBLE TO THE LETTER.

DID YOU PARTICIPATE IN THOSE DISCUSSIONS?

MS. CHARLICK: THERE WAS A REQUEST FOR OUR POSITION, AND WE PROVIDED OUR POSITION TO JUDGE MOSKOWITZ.

THE COURT: SO I WASN'T EVEN AWARE OF THAT. I DIDN'T SEE THAT. BUT TO SAY YOU HAVEN'T BEEN INVOLVED, YOU'VE [23] BEEN AS INVOLVED, IT SOUNDS LIKE, AS I'VE BEEN IN THIS. I THINK WHAT THIS COMES DOWN

TO, MS. CHARLICK, IS YOU JUST DISAGREE WITH THE DECISION THAT'S BEEN MADE, AND REALLY YOU'RE SEIZING ON THE DISAGREEMENT TO SAY, "OH, JUDGES CAN'T BE FAIR IN RESOLVING THIS." YOU HAVE RECOURSE. GO TO THE NINTH CIRCUIT AND SAY, "HEY, THIS IS UNCONSTITUTIONAL." BUT I DON'T SEE A BASIS FOR RECUSING HERE.

THE OTHER THING THAT RAN THROUGH MY MIND THIS WEEK, I THINK WE'RE ABOUT TO GET A PAY RAISE. HAVE YOU FOLLOWED THAT AT ALL?

MS. CHARLICK: I HAVE NOT. I DON'T THINK I'M GETTING A PAY RAISE.

THE COURT: NO, I THINK THE JUDGES ARE. I'M NOT TRYING TO BE FLIP HERE, BUT I WANT TO—BECAUSE IT MAKES THE POINT. SIX JUDGES SUED OVER THE ETHICS IN GOVERNMENT ACT OF 1989. SIX ARTICLE 3 JUDGES SAID, "YOU KNOW WHAT, WE WERE SUPPOSED TO GET COST OF LIVING RAISES. WE DIDN'T." AND THIS THING HAS MADE ITS WAY THROUGH THE COURT. EVENTUALLY, THE D.C. COURT OF APPEALS EN BANC RULED ON THE CASE.

GUESS WHO'S GOING TO BENEFIT BY A FAVORABLE RULING IF THE JUDGES GET A RAISE? THE JUDGES ON THE D.C. COURT OF APPEALS ARE GOING TO BENEFIT. BUT THEY RECOGNIZE, AS THE SUPREME COURT HAS IN MANY CASES, THIS RULE OF NECES-

SITY AND SAID, "LOOK, WHO ELSE CAN RULE? IF THERE'S NO ONE ELSE THAT CAN RULE, THEN BY NECESSITY WE HAVE TO RULE."

[24]

AND I FIND MYSELF IN THE SAME POSITION HERE. WHO'S GOING TO MAKE THE POLICY IF NOT THE JUDGES OF THIS COURT. YOU'RE SAYING, WHAT, SOME DECISION ON THE POLICY HAS TO GO TO SOMEBODY OTHER THAN THE NINTH CIRCUIT BEFORE IT GOES THERE IF YOU DISAGREE WITH THE POLICY DECISION WE MAKE? I JUST DON'T SEE THAT.

MS. CHARLICK: WELL, I'M SAYING THE NINTH CIRCUIT SAYS SO. AND THE REASON THAT THE REMAND WAS SOMEWHAT LIMITED IS ONLY BECAUSE IT HAD TO DEAL WITH WAS THERE EVEN A LIVE CONTROVERSY? THE MOOTNESS ISSUE WAS IMPLICATED. HERE WE ABSOLUTELY HAVE A LIVE CONTROVERSY. IT IS—I THINK—

THE COURT: WAS THERE A MOTION IN *HOWARD* TO RECUSE—

MS. CHARLICK: THERE WAS NOT, NOR WAS THERE A MOTION IN *ZUBER*. SO THOSE CASES DON'T GOVERN AT ALL.

THE COURT: THEY DON'T, BUT THEY SUGGEST AT LEAST THAT THE CONFLICT ISN'T AS APPARENT AS YOU'RE ARGUING. BECAUSE I WOULD THINK THAT THE COURT WOULD SAY, "HOLD ON A SECOND HERE. WE'RE REVIEWING SOMETHING, AND THE

JUDGES ARE ALL SELF-INTERESTED. AND BEFORE WE GET TO THE PENULTIMATE ISSUE OF CONSTITUTIONALITY, WE WANT SOME INDEPENDENT PERSON TO MAKE A DECISION THAT WE CAN REVIEW." THEY DIDN'T SAY THAT IN *HOWARD*, AND THEY DIDN'T SAY IT IN *ZUBER*.

MS. CHARLICK: *BRANDAU* CAME AFTER BOTH OF THOSE CASES. *BRANDAU* CAME AFTER *CLEMENS*, YOUR HONOR. AND *BRANDAU* [25] IS NINTH CIRCUIT AUTHORITY. AND IT SEEMS ALMOST FOOLHARDY FOR THE GOVERNMENT TO TAKE THE POSITION IT'S TAKING AND FOR THE COURT TO NOT RECUSE BECAUSE WE ARE GOING TO BE BACK HERE. THERE ARE EVIDENTIARY HEARINGS, DISCOVERY RULINGS—

THE COURT: WE'LL SEE. IF I WAS AS CERTAIN ABOUT THIS AS YOU, THEN I GUESS I'D DUCK FOR COVER AND RUN. I'M JUST NOT. FIRST OF ALL, FUNDAMENTALLY I DON'T SEE THAT ANYONE WITH FULL KNOWLEDGE OF THIS AND OBJECTIVELY WOULD SAY THAT JUDGES CAN'T RULE ON A MATTER OF POLICY THAT THEY'VE AGREED TO WHICH IS NOT CONTROVERTED. THERE'S NO DISAGREEMENT ABOUT WHAT THE POLICY IS. YOU AND I AGREE THAT IT'S A POLICY. I THINK IT'S A POLICY OF DEFERENCE. AND WE AGREE ON WHAT THE EXCEPTIONS ARE.

SO UNLIKE *BRANDAU*, THERE'S NOT A NUMBER OF ITERATIONS OR GENERAL ORDERS THAT YOU WOULDN'T GO UP TO THE

NINTH CIRCUIT, FOR EXAMPLE, IF YOU GET AN ADVERSE RULING FROM ME AND SAY, "WE DON'T KNOW WHAT THE POLICY IS." YOU WOULD SAY, "NO, WE KNOW EXACTLY WHAT THE POLICY IS. JUDGE BURNS AND I, WE'RE ON THE SAME LINE OF THINKING. WE WERE TOGETHER ON THIS." NO ONE'S GOING TO SUGGEST THAT. THAT'S A BIG DIFFERENCE HERE.

MS. CHARLICK: WELL, THE GOVERNMENT HAS—THAT WAS THE GOVERNMENT'S DISTINCTION ON *BRANDAU*, IS THERE WASN'T A GENERAL ORDER. THERE'S NO POLICY. THEY CAN SO, "OH, JUDGE, EVEN IF THERE IS A POLICY, YOU DON'T TO RECUSE BECAUSE *BRANDAU* [26] HAD THIS ODD LANGUAGE ABOUT REMAND."

THE COURT: DOESN'T JUDGE MOSKOWITZ'S LETTER SUGGEST THAT THERE'S A POLICY OF DEFERENCE, THAT WE'RE GOING TO DEFER TO THE MARSHALS? DOESN'T THAT SUGGEST THAT?

MS. CHARLICK: WITHOUT A DOUBT.

THE COURT: YEAH. ME, TOO. SO THE GOVERNMENT IS WRONG ON THAT. I DON'T THINK THEY'LL REPEAT THAT IN FRONT OF THE COURT OF APPEAL. I'M HERE TO TELL YOU, MR. COLE, MY UNDERSTANDING IS WE'RE GOING TO DEFER TO THE MARSHALS ON THIS THING SUBJECT TO PRACTICAL COMMON SENSE EXCEPTIONS.

MR. COLE: I AGREE. BUT TO SAY THAT'S A POLICY IS NOT LIKE A GENERAL ORDER.

THE COURT: IT'S NOT LIKE A GENERAL ORDER.

MR. COLE: BECAUSE IF THE MARSHALS COME OUT TOMORROW WITH SOMEONE WITHOUT SHACKLES, YOU'RE NOT GOING TO ORDER THEM TO PUT SHACKLES ON.

THE COURT: NO, I'M NOT.

MR. COLE: SO THAT'S THE DIFFERENCE.

THE COURT: I AGREE. I THINK THAT'S ONE OF THE FUNDAMENTAL DIFFERENCES BETWEEN THIS AND *BRANDAU*. THERE'S NO UNCERTAINTY ABOUT THE INFORMAL POLICY HERE. THERE'S NO GENERAL ORDER THAT'S IN CONFLICT WITH PRACTICE. THERE'S NO FAILURE TO NOTIFY PEOPLE IN ADVANCE. THERE WAS CONSULTATION BY THE CHIEF JUDGE WITH BOTH FEDERAL DEFENDERS AND THE U.S. ATTORNEY'S OFFICE.

[27]

I'M JUST SAYING, MS. CHARLICK, I DON'T SEE WHY WE CAN'T RULE ON THIS. I DON'T SEE SOMEBODY THAT'S SO INVESTED IN THIS THAT THEY COULDN'T BE FAIR AND CONSIDER THE ISSUES FAIRLY. I CERTAINTY DON'T FEEL THAT WAY.

LOOK, LET'S LOOK AT THE HISTORY OF THIS THING. AS YOU POINT OUT, FOR MANY, MANY YEARS, THERE WAS NO SHACKLING,

AND WE'RE ALL ACCUSTOMED TO THAT. I, FOR ONE—I CAN'T SPEAK FOR THE REST OF MY COLLEAGUES, BUT I NEVER CERTAINLY HEARD THIS. THERE WAS NO JUDGE THAT WAS DANCING AROUND A FIRE SAYING, "WE NEED TO HAVE SHACKLING HERE." DIDN'T COME FROM THE JUDGES. SO THE IDEA THAT SOMEHOW WE'RE NOT IMPARTIAL ON THIS ISSUE OR THAT WE'RE SO INVESTED IN THE POLICY THAT'S WHAT, A MONTH OLD NOW? WHAT'S THE DATE OF THE LETTER?

MS. CHARLICK: THE LETTER IS OCTOBER 11. THE POLICY ROLLED OUT OCTOBER 21.

THE COURT: SO IT'S NOT EVEN A MONTH OLD. WE'RE NOT INVESTED IN THAT.

MS. CHARLICK: THIS POLICY WAS SOLD TO THE COURT BY THE MARSHALS. THE COURT IS RIGHT. THE COURT DIDN'T DRIVE THE TRAIN. SOLD TO THE COURT.

THE COURT: YOU MAKE IT SOUND LIKE WE'RE A BUNCH OF DUMMIES, THAT MARSHAL STAFFORD COME UP THERE AND OVERCAME OUR WILL. YOU KNOW, I HAVE TO TELL YOU THERE WAS A LOT OF DISCUSSION. THERE WAS QUESTIONING OF HIM. LET ME TELL YOU WHAT I RECALL. AGAIN, THIS IS JUST MY RECOLLECTION. I THINK [28] IT'S ACCURATE BECAUSE IT WASN'T THAT LONG AGO.

WHAT HE SAID WAS, "WE'RE OUT OF SYNC WITH 93 OTHER DISTRICTS IN THE UNITED STATES. SHACKLING IS GOING ON IN 93 OTH-

ER DISTRICTS, PARTICULARLY IN THE BORDER DISTRICTS. WE'VE BEEN OUT OF SYNC FOR A LONG TIME. WE'RE GETTING PRESSURE FROM THE MARSHALS SERVICE NATIONALLY TO COME INTO COMPLIANCE. AND THERE ARE GOOD REASONS ON THE MERITS THAT WE SHOULD. THIS POLICY IS VERY DANGEROUS TO PEOPLE."

THE POLICY IS USUALLY TWO MARSHALS TO ONE PRISONER IN COURT. OF COURSE, IN BORDER DISTRICTS, WE HAVE SO MANY CASES, WE HAVE PEOPLE THAT ARE BROUGHT OUT EN MASSE; RIGHT? WE HAVE PEOPLE WHOSE PLEAS ARE TAKEN SIX AT A TIME HERE. AND THAT PRESENTS SECURITY CONCERNS. THAT WAS ONE OF THE POINTS THAT HE MADE.

ANOTHER POINT HE MADE THAT I RECALL WAS, "WE CAN'T TELL WHO THE DANGEROUS PEOPLE ARE. WE CAN'T. A LOT OF TIMES, A GUY WHO HAS NO HISTORY OF BEING DANGEROUS AT ALL WILL TURN OUT TO BE DANGEROUS." AND HE GAVE AN ANECDOTE ABOUT SOMEBODY WHO ATTACKED ANOTHER INMATE IN FRONT OF JUDGE LEWIS RECENTLY. I DON'T REMEMBER ALL THE DETAILS, BUT THAT WAS ONE OF THE ANECDOTES. A GUY THAT NO ONE—NOTHING IN HIS RECORD OR HIS RAP SHEET SUGGESTED DANGEROUSNESS ATTACKED.

AND HE WENT ON TO SAY IT WAS BASED ON SOME FAULTY INFORMATION THAT THAT GUY HAD BEEN GIVEN. I THINK—DON'T HOLD ME

TO THIS, BUT I THINK THE CONTEXT WAS THIS WAS LIKE A [29] GANG WANT-TO-BE AND THIS IS HIS ENTREE INTO THE GANG IF HE DID THIS, BUT THEY HAS THE WRONG GUY. SO—AND THAT MAKES PERFECT SENSE TO ME, THAT THE MARSHALS WOULDN'T BE PRESCIENT ENOUGH TO KNOW WHO THE DANGEROUS GUYS ARE ASIDE FROM THE REALLY OBVIOUS CASE WHERE SOMEONE'S GOT A LONG RAP SHEET OR SOMETHING LIKE THAT.

SO THE EFFECT OF THAT WAS THAT WE NEED TO DO THIS TO PROTECT THE OTHER PRISONERS. WE HAVE SOME GUYS OUT OF SHACKLES; SOME GUYS IN. IT COULD BE ONE OF THE DANGEROUS GUYS THAT'S OUT OF SHACKLES. AND IMAGINE TRYING TO DEFEND YOURSELF IF YOU'RE IN SHACKLES.

THE POINT WAS THIS POLICY IS PROMULGATED ON A CONCERN FOR SAFETY OF ALL OF THE PRISONERS, NOT PECULIAR TO GUYS. AND I DON'T DRAW THE INFERENCE—I'VE SAID THAT MANY TIMES—THE GUY WHO COMES IN IN SHACKLES OR IN THIS CASE YOUR CLIENT. SHE LOOKS LIKE DIMINUTIVE YOUNG WOMAN. THE LAST THING I'D THINK IS THAT SHE'S VIOLENT. I WOULD THINK THAT THE SHACKLING IS FOR HER BENEFIT SO THAT BASED ON MISINFORMATION, SHE DOESN'T GET ATTACK BY SOME UNKNOWING BAD PERSON.

THE OTHER THING HE POINTED OUT WAS THAT IT'S GOING TO BE VERY DIFFICULT, GIV-

EN THE BUDGET CONSTRAINTS, THE SEQUESTRATION, THE LACK OF RESOURCES VIS-A-VIS PAST YEARS FOR THE MARSHALS TO TIMELY PRODUCE THE PRISONERS. HE EXPLAINED THAT IT TAKES THREE MARSHALS TO TAKE SHACKLES ON AND OFF, WHICH IS NEWS TO ME. IT'S NOT MY PORTFOLIO. I NEVER HAD TO [30] GUARD OTHER PEOPLE AND NEVER HAD ANY SECURITY TYPE TRAINING.

BUT HERE'S WHAT HE SAID: HE SAID, "YOU'VE GOT TO HAVE A GUY IN FRONT AND A GUY IN BACK WHEN YOU TAKE THE SHACKLES ON AND OFF. AND THEN WE HAVE TO HAVE ONE PERSON ACTUALLY DOING IT. AND THE REASON WE HAVE A GUY IN BACK IS THAT WE'VE HAD INSTANCES WHERE SOMEBODY LIKE MULE-KICKS SOMEBODY. WE DON'T WANT TO HAVE A GUY GET MULE-KICKED IN THE FACE WHILE HE'S TRYING TO GET THE SHACKLES ON. AND WE HAVE INSTANCES WHERE PEOPLE TRYING TO GET WORKING IN FRONT GET WHIPPED. THEY USE THE SHACKLES AS A MACE AND HIT SOMEBODY."

SO LONG AND SHORT, WHETHER THIS IS TOO MUCH OR NOT ENOUGH, WHO KNOWS. BUT THEY SAY IT TAKE THREE GUYS. AND IT TAKES THREE TO FIVE MINUTES IN EACH CASE. OBVIOUSLY, THEY DON'T KNOW IN WHAT ORDER A CALENDAR IS GOING TO BE CALLED. MY CALENDAR TODAY IS A GOOD EXAMPLE. CALL NO. 1. CALL NO. 9. A LOT

OF TIMES IT TURNS ON WHICH LAWYERS ARE HERE.

SO THEY'RE NOT IN A POSITION TO TAKE ALL THE SHACKLES OFF IN ADVANCE, AND THEY CAN'T DO THAT BECAUSE EVERYBODY BACK HERE IS IN A SMALL HOLDING CELL. IF THEY HAD SOME KIND OF VIOLENT OUTBREAK THERE, THEY COULDN'T CONTAIN IT.

AND THE OTHER ASPECT OF THIS THAT HE MENTIONED TO US WAS THAT IT'S AN EFFICIENCY. IT'S MOVING THE COURT'S DOCKET ALONG TO DO THIS. THE JUDGES LISTENED TO THIS PRESENTATION. HE SAID, "WHAT ABOUT AT SENTENCING?" I THINK JUDGE MOSKOWITZ RAISED A CONCERN THAT, "WELL, THIS MIGHT IMPACT VOLUNTARINESS [31] OF A PLEA." THAT'S NOT A CONCERN THAT I SHARE, BY THE WAY, BECAUSE I'M USED TO SEEING GUYS INTERROGATED ON VIDEO WITH HANDCUFFS NO. NO ONE EVER SUGGESTS THE STATEMENT CAN'T COME IN BECAUSE THEY WERE IN HANDCUFFS.

BUT BE THAT AS IT MAY, THERE WERE SOME INDIVIDUAL ISSUES RAISED, AND THAT'S WHAT LED TO THIS IDEA THAT AS A MATTER OF POLICY WE WOULD DEFER TO THE MARSHALS, TO THEIR NATIONAL POLICY, WHICH IS NOT DIFFERENT, NOT BEING DIFFERENTLY ENFORCED, AS I UNDERSTAND IT, IN OTHER COURTS. AND THERE MAY BE SOME VARIATIONS IN WHETHER IT'S FULL SHACKLING OR JUST LEGS, BUT SUBJECT TO THE EXCEPTION AND THAT EACH JUDGE

WOULD HAVE DISCRETION TO SAY, "TAKE THEM OFF IN THIS CASE."

LOOK, THE EXAMPLES OF THE EXCEPTIONS ARE PRETTY OBVIOUS. SOMEBODY IN A PAIN OR PHYSICAL DISTRESS OR WHEN THE SHACKLES ARE TOO TIGHT, I HAVEN'T SEEN THAT, BUT I COULD CONCEIVE SOMEBODY COMING IN AND SAYING, "THE HANDCUFFS ARE TOO TIGHT," SOMEBODY WITH A MEDICAL CONDITION, OR WHERE THERE'S A NEED FOR IT LIKE TODAY. MAYBE SHE WANTS TO WRITE A NOTE DURING THE MOTION HEARING. THAT'S A FAIRLY COMMON THING THAT DEFENDANTS DO. SO THE WISDOM OF EACH JUDGE BEING LEFT WITH THE PREROGATIVE TO SAY, "DON'T SHACKLE IN THIS CASE," WHICH, OF COURSE, WHICH PREROGATIVE I EXERCISED HERE.

SO I'M JUST TELLING YOU ALL OF THAT IS PRETTY WELL KNOWN. AND I DON'T—THE IDEA THAT AN OBJECTIVE PERSON WOULD COME IN AND SAY, "YOU MADE THAT POLICY, SO YOU CAN'T RULE ON [32] THE EFFICACY OF IT," I DISAGREE WITH THAT.

MS. CHARLICK: JUDGE, THE VERY FACT THAT YOU CAN SIT HERE FOR THIS LENGTH OF TIME AND VIVIDLY RECALL ALL OF THE DETAILS OF THESE EVENTS THAT LED TO THE PROMULGATION OF THIS DEFERENCE POLICY UNDERSCORES THE NEED FOR RECUSAL. YOU YOURSELF—I'M NOT BEING FACETIOUS.

THE COURT: TELL ME HOW YOU RECONCILE THAT WITH THE RULE THAT SAYS IF THIS WAS—IF WE'RE TALKING ABOUT A RECUSAL IN A CASE OF YOU VERSUS THE GOVERNMENT, FOR EXAMPLE, THE CASES ARE VERY CLEAR THAT THINGS THAT I LEARN IN THE COURSE OF THE PROCEEDINGS ARE NOT A BASIS FOR RECUSAL. IT HAS TO BE SOMETHING EXTRAJUDICIAL.

HERE THE TROUBLE I'M HAVING IN FOLLOWING YOUR ANALOGY IS THAT SHE DOESN'T HAVE A CASE—MS. MORALES; RIGHT? MS. MORALES DOESN'T HAVE A CASE AGAINST ME. I'M NOT HER ADVERSARY. TO APPLY ADVERSARIAL PRINCIPLES AND SAY, "WELL, YOU LEARNED SOMETHING THAT AFFECTS HER," I DIDN'T LEARN ANYTHING THAT DIRECTLY AFFECTED HER OR HER CASE. NOTHING AT ALL.

MS. CHARLICK: ACTUALLY, WE DO BELIEVE THAT THIS LITIGATION DOES, IN A SENSE, PIT US AGAINST THE COURT. IT IS THE COURT HOW INDEED ORDERED THE IMPLEMENTATION OF THIS POLICY. EVEN JUDGE DEMBIN HAS RECOGNIZED AND EXPRESSED HIS DISCOMFORT AT BEING IN THAT ADVERSARY POSITION.

THE COURT: HOW IS IT DIFFERENT FROM OTHER [33] SUBSTANTIVE THINGS WHERE YOU DISAGREE WITH ME? YOU KNOW, FOR EXAMPLE, ON MINOR ROLE CALCULATIONS, I TAKE A GOOD LOOK AT THE CASE. SOME JUDGES APPARENTLY DON'T. THAT'S WHAT

I'M TOLD. IF THE PARTIES AGREE TO IT, THEY GO ALONG WITH IT. I DON'T. I FEEL LIKE I HAVE AN INDEPENDENT RESPONSIBILITY. NOW, I THINK AT LEAST, YOU DISAGREE WITH THAT, DON'T YOU?

MS. CHARLICK: THERE ARE TIMES WHEN I DO DISAGREE WITH YOU ON THAT.

THE COURT: SO, I MEAN, DOES THAT KIND OF GILD THE LILY GOING FORWARD? DO YOU SAY, "OH, WELL, JUDGE BURNS HAS TO RECUSE FROM THE CASE ON MINOR ROLE BECAUSE I KNOW THAT HE'S GOING TO TAKE A CLOSE LOOK AT THIS, AND I DISAGREE WITH THE WAY THAT HE SCRUTINIZES THAT. AND SO HE SHOULD BE DISQUALIFIED FROM THE CASE"?

MS. CHARLICK: NO, JUDGE. COMPLETELY DISTINCT BECAUSE IF INDEED IN A MINOR ROLE CASE YOU AND MR. COLE WENT OUT FOR COFFEE AND TALKED ABOUT THINGS AND MR. COLE SAID, "YOU KNOW, I DON'T THINK YOU SHOULD GIVE HIM MINOR ROLE BECAUSE XXX," AND YOU SAID, "OH, GOSH, THOSE ARE REALLY IMPORTANT CONSIDERATIONS," AND THEN YOU BROUGHT BACK THOSE CONSIDERATIONS AND THAT OUTSIDE INFORMATION IN MS. MORALES'S CASE AND IT INFORMED YOUR DECISION, THAT IS EXACTLY WHAT WE HAVE HERE, JUDGE.

THE COURT: WE DON'T, BECAUSE THE CAPTION OF THIS CASE DOESN'T MENTION ME OR THE JUDGES AT ALL. IT DOESN'T. IT [34]

MENTIONS THE UNITED STATES. IT'S UNITED STATES AGAINST MS. MORALES. IT'S AGAINST SO-AND-SO. SO THERE'S A TRUE ADVERSARIAL RELATIONSHIP THERE. I HAVE NO ADVERSARIAL RELATIONSHIP WITH MS. MORALES. SHE LOOKS LIKE A VERY SMILING, DIMINUTIVE YOUNG WOMAN OVER THERE. I HAVE NOTHING AGAINST HER.

MS. CHARLICK: WELL, THE JUDGE IN *BRANDAU* WAS NOT DEEMED NOR NEEDED TO BE DEEMED AN ADVERSARY. I WAS ONLY POINTING OUT THE FACT THAT THE COURT, BASED ON OUTSIDE INFORMATION AND THIS LENGTHY PRESENTATION, MADE A DECISION THAT IMPLICATES THE CONSTITUTIONAL RIGHTS OF MS. MORALES. SHE IS ABLE AND CAN, UNDER *HOWARD*, CHALLENGE THAT DECISION IN HER CRIMINAL CASE.

THE COURT: SURE SHE CAN. I AGREE WITH YOU THAT IT'S A COGNIZABLE CLAIM. AND IF I DON'T RECUSE, I'M GOING TO HEAR THE CLAIM ON FRIDAY. THE QUESTION IS WHY DOES IT HAVE TO BE SOMEONE OTHER THAN I THAT HEARS THE CLAIM. I JUST DON'T SEE IT. I DON'T SEE THAT AN OBJECTIVE PERSON COMING IN LISTENING TO THIS DISCOURSE BETWEEN YOU AND ME OVER THE LAST HALF-HOUR AND SAYING, "YEAH, YEAH. I AGREE WITH MS. CHARLICK. I DON'T THINK THIS GUY CAN BE FAIR ON THIS."

I THINK WHAT THEY'D SAY IS UNDER ALL THE CIRCUMSTANCES, THIS IS JUDICIAL

POLICY. AND TO TAKE ADVERSARIAL PRINCIPLES LIKE EX PARTE COMMUNICATIONS AND TRY TO IMPORT THEM INTO THE FORMULATION OF JUDICIAL POLICY DOESN'T [35] WORK. IT'S NOT THE SAME THING.

JUDGES ARE SUPPOSED TO CONSULT WITH ARMS OF THE COURT BEFORE THEY FORMULATE JUDICIAL POLICY. I WOULDN'T THINK ABOUT SETTING A 28-DAY RULE FOR PROBATION REPORTS, FOR EXAMPLE, WITHOUT GOING TO THE PROBATION DEPARTMENT AND SAYING, "WHAT'S A REASONABLE PERIOD OF TIME FOR YOU TO PREPARE A PROBATION REPORT AFTER A GUY PLEADS GUILTY?" I WOULD GO TO THEM AND ASK THEM, AND I WOULDN'T FEEL LIKE I NEED TO CONSULT WITH YOU OR THAT IF YOU THOUGHT THAT THAT WAS TOO LONG OR TOO SHORT, THAT I COULDN'T HEAR YOUR ARGUMENT ABOUT THAT. AND IF I DIDN'T RULE THE WAY YOU WANTED, THAT YOU WOULDN'T HAVE RECOURSE. OF COURSE YOU WOULD.

BUT IN THE FIRST INSTANCE, I'D MAKE THE DECISION ON THAT. THERE'S NOTHING UNTOWARD ABOUT ME CONSULTING WITH SOME ARM OF THE COURT TO REACH A DECISION TO WHAT THE POLICY OF THE COURT OUGHT TO BE.

MS. CHARLICK: YOUR HONOR, WITH A POLICY THAT IMPLICATES THESE TYPES OF FUNDAMENTAL CONSTITUTIONAL RIGHTS AND DUE PROCESS PROTECTIONS, THERE IS A PROBLEM NOT WITH THE COURT CONSULT-

ING WITH THE MARSHALS, NOT WITH THE COURT IMPLEMENTING A POLICY, BUT WITH THE COURT REVIEWING THE LAWFULNESS OF THE POLICY IT'S INVESTED IN. IT IS INVESTED IN THIS POLICY. IT WAS PERSUADED TO ADOPT IT.

THE COURT: THAT'S SAYS TOO MUCH, MS. CHARLICK, THAT WE'RE INVESTED IN IT. I'M HERE TO TELL YOU WE'RE NOT. IF [36] THEY CHANGE THE POLICY TOMORROW, I WOULDN'T HAVE ANY HEARTBURN. I WOULDN'T. I UNDERSTAND IT. THERE ARE RATIONAL REASONS TO SUPPORT IT. I THINK THERE'S GOOD REASONS TO SUPPORT IT. AND, YOU KNOW, I'M A LITTLE RELUCTANT TO BE PRESUMPTUOUS AND TELL THE MARSHAL, "THIS ISN'T GOING TO BE DANGEROUS FOR YOU." THAT'S A LITTLE LIKE ME TELLING THE PRESIDENT, "HERE'S WHAT YOU SHOULD DO WITH ENEMY COMBATANTS DOWN IN GUANTANAMO."

THERE'S NOTHING—I DIDN'T SERVE IN THE ARMED SERVICES. THERE'S NOTHING IN MY BACKGROUND. OTHER PEOPLE MAY SEE IT DIFFERENTLY, BUT I'M NOT OFFENDED AT ALL BY A POLICY OF DEFERENCE. I DON'T THINK BEING DEFERENTIAL TO THE MARSHALS IN THIS CASE SHOWS THAT I HAVE SOME KIND OF BIAS OR THAT THE REASONABLE PERSON WOULD SAY, "THIS JUDGE IS BIASED." A REASONABLE PERSON WOULD SAY, "THAT'S WHAT WE EXPECT. BEFORE YOU WOULD PROMULGATE A POLICY FOR THE

COURT, WE WOULD EXPECT THAT YOU'D TALK WITH THE SECURITY ARM OF THE COURT IF THE POLICY CONCERNS SECURITY."

MS. CHARLICK: OF COURSE, YOUR HONOR. BUT THEN ONCE THE POLICY IS IMPLEMENTED, FOR YOU TO RULE AND TAKE EVIDENCE ON THESE MATTERS THAT YOU'VE ALREADY HEARD ABOUT, THAT YOU'VE ALREADY SAID, "THIS IS A GOOD IDEA. THERE ARE IMPORTANT REASONS FOR THIS. I NEED TO PROTECT PEOPLE," FROM OUTSIDE THE COURTROOM, THE FOUR WALLS OF THIS COURTROOM, OUTSIDE OF SOMEONE ON THAT WITNESS STAND, YOU MADE A DECISION. YOU [37] DECIDED IT WAS GOOD AND WORTHWHILE AND NECESSARY, AND YOU ORDERED IT.

THE COURT: WE DID DO THAT. AGAIN, I JUST DON'T EMBRACE YOUR ANALOGY THAT THIS IS LIKE AN ADVERSARIAL PROCEEDING. I'M NOT ADVERSARIAL. I DON'T FEEL ADVERSARIAL WITH YOU OR MR. CAHN OR WITH MR. COLE, NOR CERTAINLY WITH MS. MORALES. I DON'T FEEL ADVERSARIAL AT ALL.

SO I THINK, AS I SAID, TO USE TERMS LIKE "EX PARTE" AND THESE THINGS GOING ON, WHOEVER SAID THAT WE'VE GOT TO CALL IN ALL HANDS BEFORE WE PROMULGATE A COURT POLICY, THAT WE HAVE TO HOLD COURT, FOR EXAMPLE, OUT IN THE MEZZANINE HERE AND SAY, "OKAY, ANYBODY THAT WANTS TO COME LISTEN TO US, WE'RE GOING

TO FORMULATE A POLICY"? THERE'S NO REQUIREMENT THAT WE DO THAT.

MS. CHARLICK: THE COURT HAS NUMBER OF POLICIES AND LOCAL RULES AND GENERAL ORDERS. HOW MANY TIMES ARE THERE EVER THESE TYPES OF CHALLENGES? MOST OF THEM DO NOT IMPLICATE THE FUNDAMENTAL CONSTITUTIONAL RIGHTS.

THE COURT: THERE'S A LOT OF THEM WITH YOUR OFFICE. IN THE TRANSCRIPT, YOU HAVE ME SAYING, "OH, THE HORROR." AND THE CONTEXT OF THAT WAS THAT IT WAS LIKE THE 25TH CHALLENGE I'D HEARD THAT DAY.

MS. CHARLICK: TO THE SHACKLING.

THE COURT: YEAH.

MS. CHARLICK: I'M TALKING ABOUT THERE'S A HOST OF OTHER LOCAL RULES AND POLICIES THAT THE COURT WANTS MOTIONS [38] TWO WEEKS BEFORE AND ALL SORTS OF THINGS. WE DON'T BRING CHALLENGES.

THE COURT: THIS HAS BEEN A COMMON CHALLENGE, THOUGH.

MS. CHARLICK: AND IT IS AN IMPORTANT CHALLENGE. IT'S A CHALLENGE WE'RE GOING TO PRESS.

THE COURT: I AGREE. BUT IF I WAS THE LAST WORD ON THIS, MS. CHARLICK, THEN I MAY HAVE SOME PAUSE—MAY HAVE SOME PAUSE—ON IT. I'M NOT. YOU'LL GET A RULING

FROM ME. IF YOU DISAGREE WITH THAT, IF I SAY, "OH, THE POLICY IS OKAY," THEN YOU HAVE IMMEDIATE RECOURSE. THIS IS WRIT OF MANDATE STUFF; RIGHT?

MS. CHARLICK: IT CERTAINLY COULD BE.

THE COURT: SO WHETHER I DECIDE THAT THE POLICY IS OKAY OR WE GET ANOTHER DISTRICT JUDGE AND HE SAYS THE POLICY'S OKAY, YOUR OFFICE'S POSITION IS THAT YOU DON'T THINK THIS POLICY IS OKAY. YOU THINK IT VIOLATES THE CONSTITUTION, AND YOU'RE GOING TO CHALLENGE IT TO THE NINTH CIRCUIT; ISN'T THAT TRUE?

MS. CHARLICK: IT'S TRUE. BUT, YOUR HONOR, IF YOU'RE WRONG AND RECUSAL SHOULD HAVE BEEN ORDERED AS *BRANDAU* STRONGLY SUGGESTS, IF NOT HOLDS, WHICH IS MY OPINION, THEN THAT WHOLE EVIDENTIARY HEARING THAT YOU DO, ALL THESE THINGS THAT GO FORWARD WILL ALL HAVE TO BE REDONE.

THE COURT: YOU'RE ASSUMING YOU'LL HAVE AN [39] EVIDENTIARY HEARING. I'M NOT EVEN AT THAT POINT YET. MR. CAHN IS GOING TO COME AND SPEAK AND ARGUE WHY THE POLICY IS UNCONSTITUTIONAL IN FRONT OF SOMEONE, BUT I DON'T KNOW IF THERE'S GOING TO BE AB EVIDENTIARY HEARING. AS I SAID, THERE'S A REMARKABLE DEGREE OF AGREEMENT ABOUT WHAT ANIMATED THIS HOLE THING AND INFORMED

THE DECISION OF THE JUDGES. THERE'S NO DISAGREEMENT ABOUT THAT.

MS. CHARLICK: THE EVIDENTIARY BASIS FOR—WITHOUT GETTING INTO THE MERITS, THE EVIDENTIARY BASIS IS WARRANTED UNDER *HOWARD* AND UNDER *BRANDAU*.

THE COURT: I DISAGREE WITH YOU ON THAT. AGAIN, *BRANDAU*, THERE WAS DISAGREEMENT ABOUT WHAT POLICY WAS IN EFFECT AND WHAT WAS ACTUALLY GOING ON. THIS IS A COMPLETELY DIFFERENT CASE. THERE'S NO DISAGREEMENT HERE. EVERYBODY IS IN AGREEMENT ABOUT WHAT'S GOING ON, INCLUDING THE ANECDOTES ABOUT WHICH JUDGES ARE FOLLOWING IT METICULOUSLY—

MS. CHARLICK: THE POINT IS IF THE POLICY'S UNDERLYING VALIDITY WAS NOT IN QUESTION IN *BRANDAU*, THERE WOULD HAVE BEEN NO NEED FOR A REMAND AT ALL. IF THE COURT HAD SAID, "YOU KNOW, WE DON'T HAVE NEED TO HAVE ANY HEARINGS. WE DON'T NEED TO DO ANYTHING BECAUSE THIS POLICY WAS OKAY BECAUSE OF *HOWARD*," THERE WOULD HAVE BEEN NO NEED.

THE COURT: I DISAGREE WITH YOU ON THAT. FIRST OF ALL, JUST BETWEEN YOU AND ME, I RESPECT WHAT HAPPENED IN THIS CASE, BUT I DON'T THINK THERE WAS A NEED FOR A REMAND TO A [40] DIFFERENT JUDGE THERE. I REALLY DON'T. AND THE INSTRUCTIONS ON THE REMAND WERE, "TELL

US WHAT THE POLICY IS. SOMEBODY FIGURE OUT WHAT THE POLICY IS." THAT WAS THE ONLY COMMISSION THAT WHOEVER THE JUDGE WAS—I THINK IT WAS JUDGE TASHIMA, RIGHT, THAT ULTIMATELY DECIDED IT?

MS. CHARLICK: HE WAS THE JUDGE ON REMAND.

THE COURT: YEAH, OKAY. SO THAT WAS THE ONLY COMMISSION. IT WASN'T A RULE ON THE CONSTITUTIONALITY OF IT. IT WAS TO MAKE A REPORT TO THE NINTH CIRCUIT ON WHAT THE POLICY ACTUALLY IS. "WHAT ARE WE DEALING WITH? BECAUSE WE'RE GETTING MIXED SIGNALS ABOUT WHAT THE POLICY IS. WE KNOW WE'VE GOT THESE ITERATIONS. THE FIRST GENERAL ORDER WAS RESCINDED AND REISSUED AND THEN TWO AMENDMENTS, AND THEN WE HAVE COUNSEL TELLING US AT ORAL ARGUMENT IT'S NOT. THAT'S STILL NOT THE WAY IT IS."

SO I COULD SEE A COURT KIND OF THROWING UP HIS HANDS AND SAYING, "HUH, I DON'T KNOW WHAT THE POLICY IS HERE. AND YOU KNOW WHAT, I'M NOT SURE THE JUDGES ARE IN AGREEMENT. I'D BETTER HAVE SOMEBODY INDEPENDENT COME IN AND TELL US DEFINITIVELY WHAT THE POLICY IS." THAT'S NOT IMPLICATED HERE. THAT'S NOT IMPLICATED. THERE'S NO ISSUE. NO DISAGREEMENT. MR. COLE SAID IT, YOU SAID IT, AND I SAID IT. WE'RE ALL ON THE SAME PAGE AS TO WHAT THE IN-

FORMAL POLICY IS. IT'S NOT A GENERAL ORDER HERE.

MS. CHARLICK: BUT THE REASON THAT THE APPEAL IN [41] *BRANDAU* ULTIMATELY WAS DISMISSED WAS BECAUSE THE PARTIES ACTUALLY AGREED ON A FAR LESS RESTRICTIVE POLICY THAN THE ONE WE HAVE IN EFFECT HERE. THERE WAS AN EXHIBIT LIST. THERE WAS AN EVIDENTIARY HEARING READY TO GO FORWARD.

THE COURT: IF YOU'RE RIGHT AND THIS MATTER ULTIMATELY IS DETERMINED BY THE COURT TO BE A VIOLATION OF DUE PROCESS, THEN I'M SURE THERE WOULD BE A CHANGE. WE WOULD FOLLOW THE ORDERS OF THAT COURT. FRANKLY, I DON'T KNOW IF THAT'S GOING TO HAPPEN. IT DOESN'T HAPPEN IN THE SECOND CIRCUIT.

MS. CHARLICK: NO ONE ASKED FOR IT TO HAPPEN. THE THING—

THE COURT: I THOUGHT THEY DID IN *ZUBER*. THAT WAS THE REQUEST. THAT WAS THE CHALLENGE.

MS. CHARLICK: OH, I'M SORRY, NOT FOR RECUSAL. I'M STILL TALKING ABOUT RECUSAL. PERHAPS MY USE OF "EX PARTE" MADE THE COURT FEEL AS THOUGH THERE'S A NEED FOR AN ADVERSARY—YOU AGAINST MS. MORALES. THAT'S NOT ACCURATE.

I DO THINK, THOUGH, THE COURT IS INDEED INVESTED IN THIS POLICY BECAUSE OF EXTRAJUDICIAL INFORMATION. AND THAT'S

WHAT THE CASES DISCUSSING RECUSAL, INCLUDING *CLEMENS*, ALL OF THEM DISCUSSED THIS.

THE COURT: WHAT WOULD ANOTHER JUDGE DO, THEN? LET'S ASSUME WE BRING JUDGE MAHAN IN, AS HAPPENED IN THE ONE CASE. WHAT WOULD HE DECIDE IN THIS CASE?

[42]

MS. CHARLICK: HE WOULD HEAR THE MATTER—WELL, IT DEPENDS ON IF IT'S AS A PRELIMINARY MATTER FOR RECUSAL. BECAUSE IN *CLEMENS*, THAT'S WHAT HE DID. HE HEARD THE RECUSAL.

THE COURT: LET'S SAY I GRANT THE RECUSAL MOTION AND HE GETS APPOINTED AS THE INDEPENDENT JUDGE. HE A JUDGE OF THE DISTRICT OF NEVADA. WHAT WOULD HE THEN DO?

MS. CHARLICK: HE WOULD HEAR ALL THE EVIDENCE. HE WOULD DECIDE IF DISCOVERY COULD BE ORDERED, BECAUSE THE GOVERNMENT HAS INDEED SUPPLEMENTED WITH THESE MARSHALS' DECLARATIONS THAT DISCUSSES A TON OF INCIDENTS THAT WE DON'T HAVE ANY INFORMATION ABOUT. HE WOULD DECIDE IF WE GET DISCOVERY; REPORTS, MEMOS, INFORMATION ABOUT THESE 93 OTHER DISTRICTS, WHICH WE SUBMIT THE COURT EN BANC WAS MISINFORMED ABOUT THE PRACTICES, AND THEN MADE A DECISION IMPLEMENTING—

THE COURT: YOU SAY EN BANC. YOU MEAN OUR DISTRICT?

MS. CHARLICK: ALL OF YOU. ALL THE DISTRICT COURT JUDGES WERE MISINFORMED ABOUT THE NATURE OF ALL THE PRACTICES ACROSS THE NATION. THAT INFORMED YOUR DECISION TO DEFER TO THE MARSHALS' POLICY.

THE COURT: WHY COULDN'T THAT BE BROUGHT UP IN FRONT OF ONE OF OUR JUDGES? LOOK, IT'S NOT UNCOMMON AT ALL, MS. CHARLICK, FOR SOMEBODY TO SAY, "JUDGE, YOU HAVE A MISCONCEPTION HERE." AND SOMETIME THEY'LL POINT IT OUT AND I'LL SAY, "YES, YOU'RE RIGHT, I DID HAVE A MISCONCEPTION. I READ THAT DIFFERENTLY." THAT'S THE NATURE OF JUDGING. YOU [43] LISTEN AND SOMEBODY POINTS TO SOMETHING AND YOU SAY, "YEAH, THAT'S RIGHT."

SO, I MEAN, IF YOU HAVE EVIDENCE THAT THAT'S NOT CORRECT, THAT THIS ISN'T THE NATIONAL MARSHALS' POLICY OR THAT, YOU KNOW, ALL DISTRICTS ARE NOT SHACKLING PEOPLE, PRESENT THAT EVIDENCE.

MS. CHARLICK: YOUR HONOR, WE PLAN TO. THE PROBLEM THAT THE RECUSAL ISSUE HIGHLIGHTS IS THAT THERE IS INDEED AN APPEARANCE OF IMPROPRIETY BECAUSE YOU GUYS ALREADY HEARD DIFFERENTLY AND YOU ALREADY DECIDED BASED ON THE

DIFFERENT INFORMATION. WHAT IF THERE'S A DISPUTE OF FACT?

THE COURT: WHAT DO YOU DO IN ONE OF YOUR CASES THAT YOU COME INS AND SAY, "JUDGE, THE COPS DIDN'T ADVISE MIRANDA CORRECTLY. THIS GUY'S FULLY CONFESSED. I CONCEDE THAT. BUT YOU SHOULD THROW THE CONFESSION OUT."

"YOU'RE RIGHT. OUT IT GOES."

THEN WE HAVE A JURY TRIAL, AND YOU AND MR. COLE COME IN AND YOU ARGUE IN FRONT OF THE JURY AND YOU SAY, "HE'S NOT GUILTY. HE DIDN'T DO THIS. THE EVIDENCE ISN'T THERE. HE WAS SOMEWHERE ELSE."

NOW, YOU AND I AND MR. COLE ARE THE ONLY ONES THAT KNOW THAT HE'S ACTUALLY CONFESSED TO THIS. BUT IT DON'T SIT UP HERE AND MAKE FACES AND GO (INDICATING). I DON'T DO THAT. JUDGES ARE EXPECTED AND PRESUMED TO BE ABLE TO COMPARTMENTALIZE INFORMATION, TO BE NEUTRAL.

[44]

THAT'S THE PROBLEM I'M HAVING WITH ALL THIS. YOU'RE SAYING ALL OF A SUDDEN I HAVE TO THROW OFF EVERYTHING—ALL THE TRAINING THAT I'VE HAD ABOUT COMPARTMENTALIZING THINGS, LISTENING TO DEBATE HONESTLY. REALLY, I THINK IT'S A HARD SELL TO SAY, "JUDGE, YOU'RE SO IN-

VESTED IN THIS THAT YOU CAN'T GIVE US A FAIR CALL."

NOW, IT MAY BE THAT YOU'RE ANTICIPATING THAT YOU'RE NOT GOING TO LIKE THE CALL THAT I GIVE. THAT MAY BE. BUT THAT'S NOT A BASIS FOR RECUSING ME.

MS. CHARLICK: OH, I UNDERSTAND THAT CLEARLY, JUDGE. THE BASES—CONGRESS GAVE US THE BASES IN 455(A) AND 28 USC 47. THEY SAID THAT—

THE COURT: I'M FAMILIAR WITH THEM.

MS. CHARLICK: —WHEN THE IMPARTIALITY MIGHT—

THE COURT: HERE'S THE PROBLEM: YOU'RE KIND OF BEGGING THE QUESTION HERE BECAUSE THE WHOLE ISSUE ABOUT WHETHER THIS CREATES A SUBCONSCIOUS BIAS—ISN'T THAT REALLY THE BOTTOM LINE HERE, IS THAT SOMEBODY APPEARING IN SHACKLES, THE JUDGE MAY HAVE SOME KIND OF SUBCONSCIOUS BIAS TO TREAT THAT PERSON MORE HARSHLY?

MS. CHARLICK: IT'S WOULD A THOUGHTFUL, REASONABLE OBSERVER LOOK AT IT AND SAY, "GOSH, THE DISTRICT COURT JUDGES ALL GOT TOGETHER AND THEY HEARD A PRESENTATION AND THEY WERE TOLD THAT COURTROOM SECURITY WAS THE FIRST AND FOREMOST CONCERN, AND THEY ADOPTED THIS POLICY. AND NOW SOMEONE [45] CHALLENGED IT, AND THEY'RE GOING TO RULE ON

THE POLICY THAT THEY ADOPTED BECAUSE OF COURTROOM SECURITY?"

THE COURT: I'M ONE STEP BEYOND THAT. I UNDERSTAND YOUR RECUSAL ARGUMENTS. I DO. I'M SAYING THE BOTTOM LINE ON THE MERITS HERE IS YOU'RE CONCERNED—I THINK THE CONCERN OF FEDERAL DEFENDERS IS A GUY APPEARS IN HANDCUFFS AND SHACKLES AND A JUDGE IS GOING TO SAY, "THIS DANGEROUS PERSON" OR "THIS BAD PERSON" AND MAYBE THE OUTLOOK IS NOT GOING TO BE FAVORABLE.

IS THAT WHAT THE BOTTOM LINE IS ON THIS?

MS. CHARLICK: NO. THAT'S GETTING TO THE MERITS.

THE COURT: THAT'S EXACTLY WHAT I'M TRYING TO DO.

MS. CHARLICK: NO, NO. IT GOES FAR BEYOND THAT. I MEAN, WE HAVE A NUMBER OF OTHER DUE PROCESS CONCERNS THAT RELATE TO OUR CLIENT'S PERCEPTION, THE PUBLIC'S PERCEPTION, THE PAIN AND THE INDIGNITY, THE FACT THAT THE POLICY PUNISHES MORE HARSHLY THOSE POOR MAINTAINING THEIR INNOCENCE GOING TO TRIAL. THE PEOPLE ARE PLEADING GUILTY AND GETTING SENTENCED, THEY GET OUT OF THEIR SHACKLES. SO THERE ARE A NUMBER OF VERY SIGNIFICANT DUE PROCESS CONCERNS THAT GO TO THE MERITS THAT I WASN'T GOING—

THE COURT: IS IT THE CASE THAT—I THOUGHT PEOPLE BEING SENTENCED ARE ACTUALLY IN SHACKLES. YOU'RE SAYING THEY'RE NOT?

MS. CHARLICK: I THINK SOME ARE. THERE'S SOME [46] INDICATION IN JUDGE MOSKOWITZ'S LETTER—

THE COURT: THE HANDCUFFS COME OFF FOR PLEAS AND SENTENCINGS.

MS. CHARLICK: PLEAS AND SENTENCINGS, YES.

THE COURT: BUT THEY STILL HAVE LEG CHAINS ON; RIGHT?

MS. CHARLICK: RIGHT. BUT WHAT I'M—

THE COURT: HERE'S ONE OF THE OTHER BACK STORIES ON THIS THAT'S KIND OF AN IRONY. I NEVER SEE THEM. AND I DON'T KNOW IF MY HEARING IS GETTING BAD AT 59, BUT I DON'T HEAR THEM MOST OF THE TIME. YOU HAVE SOME APPRECIATION FOR WHAT MY SPHERE IS OF VIEW HERE?

MS. CHARLICK: YES.

THE COURT: FROM YOUR PERSPECTIVE, CAN YOU SEE IT?

MS. CHARLICK: YES.

THE COURT: I CAN'T SEE PEOPLE'S LEGS AND STUFF. LIKE YOU, I CATCH YOU RIGHT ABOUT HERE, RIGHT BELOW THE BREAST BONE. BUT COMING THROUGH THE DOOR, I CAN'T SEE IT. I'VE TOLD MANY OF YOUR

LAWYERS WHO REJECT IT, "YOU KNOW WHAT, I WOULDN'T HAVE KNOWN THAT IF YOU WOULDN'T HAVE POINTED IT OUT TO ME. I WOULDN'T HAVE KNOWN."

MS. CHARLICK: JUDGE, THAT'S REALLY NOT—IT CERTAINLY MAY BE ONE OF OUR CONCERNS, BUT IT IS NOT THE MOST MAJOR CONCERN WE HAVE. BECAUSE I DO UNDERSTAND THE COURT'S POSITION ON THAT.

[47]

THE COURT: I DIVERTED YOU. I UNDERSTAND THAT THOSE ARE THE MERITS AND NOT TO THE RECUSAL MOTION.

ANYTHING ELSE YOU HAVE ON THIS?

MS. CHARLICK: ONE MOMENT JUST TO MAKE SURE THAT I HAVE NOT MISSED ANYTHING.

(PAUSE IN PROCEEDINGS)

MS. CHARLICK: YOUR HONOR, MS. LOPEZ REMINDED ME OF JUST ONE OTHER POINT. THAT WHEN THE COURT WAS DISCUSSING THE *HOWARD* CASE IN TERMS OF WHETHER OR NOT THERE WAS A NECESSITY FOR RECUSAL, IN *HOWARD*, THE ORIGINAL POLICY ONLY AFFECTED PROCEEDINGS IN MAGISTRATE COURT. AND THE DISTRICT COURT JUDGES THEN RULED ON THE MAGISTRATE JUDGE'S DECISION.

THE COURT: THEY ADOPTED IT.

MS. CHARLICK: YES. SO HERE IT'S A DISTRICTWIDE POLICY. SO THE MAGISTRATE JUDGES, IT'S A RULING ON THEIR OWN POLICY. SO THAT'S WHERE THERE'S A DIFFERENCE. SO I THINK THAT 28 USC 47, NO JUDGE SHALL SIT IN JUDGMENT ON HIS OWN—

THE COURT: TELL ME HOW IT WORKS IN *HOWARD*. I WOULD ASSUME THAT—THERE WAS A CHALLENGE?

MS. CHARLICK: YES, THERE WAS A CHALLENGE BROUGHT EVERY TIME SOMEONE CAME IN FOR THEIR INITIAL APPEARANCE.

THE COURT: IN THE FIRST INSTANCE BEFORE THE NINTH CIRCUIT WEIGHED IN ON *HOWARD*, WHO MADE THE LAST DECISION BEFORE THE NINTH CIRCUIT?

MS. CHARLICK: I BELIEVE A DISTRICT COURT JUDGE [48] DID.

THE COURT: AND THE EFFECT OF THAT DECISION WAS HE OR SHE ADOPTED THE MAGISTRATE'S DECISION, POLICY FOR DISTRICT?

MS. CHARLICK: YES. BUT THEY WERE REVIEWING THE MAGISTRATE JUDGE'S DECISION. HERE THE COURT'S REVIEWING ITS OWN DECISION TO IMPLEMENT THE POLICY. THERE IS A DISTINCTION. AND—

THE COURT: I SUPPOSE YOU COULD THROW THIS BACK TO A MAGISTRATE JUDGE FOR A DECISION. NO MAGISTRATE JUDGE

EXCEPT FOR JUDGE STORMES WAS PRESENT. WOULD THAT SOLVE IT, ASSIGN IT TO A MAGISTRATE JUDGE?

MS. CHARLICK: NO, YOUR HONOR. THE MAGISTRATE JUDGES HAVE UNIFORMLY STATED AND I HAVE—

THE COURT: THEY WEREN'T INVOLVED IN THE POLICY-MAKING DECISION WITH THE EXCEPTION OF JUDGE STORMES, WHO WAS A PRESIDING MAGISTRATE JUDGE. YOU'RE SAYING SOMEHOW *HOWARD* WAS DIFFERENT BECAUSE IT WAS THE MAGISTRATE JUDGES THAT MADE THE DECISION AND A DISTRICT JUDGE REVIEWED IT. WOULD IT BE ACCEPTABLE HERE TO RANDOMLY PICK A MAGISTRATE JUDGE OTHER THAN JUDGE STORMES TO RULE ON THIS?

MS. CHARLICK: ON, NO, YOUR HONOR. THE MAGISTRATE JUDGES HAVE FULLY BOUGHT INTO THE DISTRICTWIDE POLICY AND SAY SO EVEN TO THE EXTENT WHERE THEY SAY, "JUDGE MOSKOWITZ IS MY BOSS, AND THIS IS THE POLICY." SO THERE'S NO REDRESS.

THE COURT: SO IT HAPPENED IN *HOWARD*. I MEAN, BY [49] PUTTING THE DISTRICT COURT'S IMPRIMATUR ON THE MAGISTRATE'S —AS LONG AS IT'S THE DISTRICT COURT AND *HOWARD* FULLY BOUGHT IN, I JUST DON'T SEE THE DISTINCTION THERE.

LOOK, AS A MATTER OF COURSE, THE DISTRICT COURT JUDGES SET POLICY FOR THE

COURT. THAT'S WHAT THEY DO. THAT HAS BEEN THE TRADITION AS LONG AS I'VE BEEN HERE. I WAS A MAGISTRATE JUDGE FOR SIX YEARS. AND I SUPPOSE FROM TIME TO TIME I REFERRED TO EITHER JUDGE KEEP OR JUDGE HUFF AS MY BOSS. IT'S KIND OF A COLLOQUIALISM. BUT IT'S JUST AN ACKNOWLEDGMENT THAT THE MAGISTRATE JUDGES, FOR THE MOST PART, DIDN'T HAVE NY ROLE IN SETTING COURT POLICY OTHER THAN AN ADVISORY ONE. THE POLICY WOULD EMANATE FROM THE DISTRICT JUDGES' CONSENSUS. AND THAT'S WHY, FOR EXAMPLE, THE GENERAL ORDERS ARE ALL SIGNED BY DISTRICT JUDGES. THEY DON'T HAVE MAGISTRATE JUDGES SIGNING ON TO THEM. SO THAT'S NOT PECULIAR.

ANYWAY, I THINK I HAVE YOUR POSITION ON THIS, MS. CHARLICK. I'M NOT SURE I'M IN FULL AGREEMENT WITH IT, BUT I HAVE IT. YOU'VE DONE A GOOD JOB OF ARTICULATING. ANYTHING ELSE?

MS. CHARLICK: NOT ON THE RECUSAL, YOUR HONOR.

THE COURT: MR. COLE, YOU WANT TO SPEAK TO THE RECUSAL?

MR. COLE: I THINK I'LL SUBMIT IT ON THE PAPERS. ALTHOUGH, YOUR HONOR, I JUST WANTED YOU TO KNOW THAT I'M NOT GIVING UP ON THE ISSUE OF THE USE OF THE TERM "POLICY" ONLY [50] BECAUSE UNLESS YOU SAY THAT ALLOWING THE MARSHALS TO

DETERMINE IN THE FIRST INSTANCE, IT IS A POLICY. I GUESS THAT'S WHAT YOU'RE SAYING.

THE COURT: WHAT I'M SAYING IS THAT I THINK THE POLICY IS ONE IN THE FIRST INSTANCE OF DEFERENCE TO THE MARSHALS. AND IT'S A RESPECTFUL POLICY THAT TAKES INTO CONSIDERATION THE TRAINING THAT THE MARSHALS HAVE HAD. I DON'T KNOW THIS FOR SURE, BUT I SUSPECT WHEN THEY GO TO—WHERE DO THEY GO, TO GLYNCO OR QUANTICO, WHEREVER THEY TRAIN, ONE OF THE THINGS THEY PROBABLY HAVE THERE—AND I'VE NEVER BEEN TO THE PLACE, BUT I WOULD ASSUME THAT THIS IS SO FOR PROFESSIONAL LAW ENFORCEMENT OFFICERS CHARGED WITH COURTROOM SECURITY, THAT MAYBE THEY HAVE LIKE A MOCK COURTROOM AND MAYBE PART OF THE TRAINING IS HAVE SOMEBODY ACT UP AND THEN WE'LL SHOW HOW YOU'RE SUPPOSED TO REACT TO THAT. I'M ASSUMING THEY DON'T DO IT ON THE FLY WHERE THE FIRST TIME THEY HAVE TO RESPOND TO IT IS IN AN ACTUAL LIVE COURT. I DON'T KNOW, BUT I THINK THAT THAT'S PROBABLY THE CASE.

SO WHY WOULDN'T JUDGES AS A MATTER OF COURSE DEFER TO THAT? WHATEVER TRAINING THEY'RE GETTING, I'M ASSUMING IT'S BASED ON NATIONAL ANECDOTES. "THIS HAS HAPPENED IN THIS CASE. YOU'VE GOT TO AVOID THIS." HERE'S THE PROBLEM THAT I HAVE WITH IT.

I HAD A GUY ACT UP IN COURT A MONTH AGO, MONTH AND A HALF AGO. HE GOT MAD, THREW HIS GLASSES. AND THEY PUT HIM ON [51] THE GROUND, AND IT TOOK BOTH MARSHALS. ONE GUY HAD LIKE A TASER OR SOMETHING POINTED AT HIM, I THINK. THEN THE OTHER GUY WAS ON TOP OF HIM. THE FIRST THING I THOUGHT—THE COURT SECURITY OFFICER GOT UP, THE GUY IN THE BLUE JACKET, NON-MARSHALS, AND CAME RIGHT TO THE FRONT OF THE DOOR.

I THOUGHT, "YOU KNOW WHAT, THIS IS ORCHESTRATED. THIS LOOKS LIKE IT'S ORCHESTRATED PURSUANT TO SOME KIND OF TRAINING. THIS DOESN'T SEEM LIKE IT JUST IS HAPPENING SPONTANEOUSLY." I THOUGHT LATER AS I REFLECTED ON THE INCIDENT THAT KIND OF MAKES SENSE, BECAUSE IT COULD BE THAT THIS IS A DIVERSION AND MAYBE PEOPLE ARE GOING TO COME FROM THE GALLERY. WE DON'T SCREEN PEOPLE OTHER THAN WITH A MAGNETOMETER. WE DON'T SCREEN PEOPLE COMING IN. SO MAYBE THAT IS PART OF A SOPHISTICATED PLAN TO BREAK A GUY OUT OR DO SOMETHING ELSE OR HARM SOMEONE.

MY POINT IS THAT I DON'T THINK THESE THINGS HAPPEN EXTEMPORANEOUSLY AND THAT THE MARSHALS JUST REACT. I THINK THEY PROBABLY GET SOME KIND OF TRAINING ON IT. I DON'T KNOW THAT, BUT THAT WOULD MAKE SENSE TO ME IN LIGHT OF MY EXPERIENCE. AND SO WHY WOULDN'T WE

HAVE A POLICY OF DEFERENCE TO THEM ON SECURITY ISSUES? THAT WOULD BE THE SENSIBLE THING TO DO, MR. COLE, NOT FOR US TO PRESUME THAT WE KNOW BETTER THAN EVERYBODY ELSE BECAUSE WE'RE JUDGES, SO I'M GOING TO TELL WHAT SECURITY MEASURES OUGHT TO BE DONE. I HAVE NO IDEA. I KNOW HOW TO PROTECT MYSELF. I'VE THOUGHT TO MYSELF IF [52] SOMEBODY GETS UP HERE, THEY'RE GOING TO HAVE TROUBLE.

MR. COLE: I'M IN TOTAL AGREEMENT. I JUST WANTED TO MAKE CLEAR THAT SINCE IT'S AS *BRANDAU* ISSUE, IS WHAT IT EVOLVES TO WITH THE CHAINS—

THE COURT: DO YOU KNOW WHAT THE BASIS IS FOR THE REFERRAL TO A DIFFERENT JUDGE IN *BRANDAU*? CAN YOU ARTICULATE WHAT IT WAS?

MR. COLE: YOUR HONOR, I BELIEVE IT HAD TO DO—FIRST OF ALL, I WANT TO SAY, ALSO—NOT THAT IT'S MY BUSINESS—BUT I ALSO QUESTIONED WHETHER IT WAS NECESSARY IN THE CASE, BUT IT HAPPENED. WHEN I READ THE CASE, IT'S BECAUSE THEY FELT LIKE THE REPUBLICATION OF THE POLICY, EVEN WHILE THE CASE WAS ON APPEAL, LED THEM TO QUESTION WHETHER IT WAS A VOLUNTARY CESSATION, WHETHER THE JUDGES WERE SEEKING REVIEW. I DON'T KNOW IF THEY WERE REALLY ACCUSING THE JUDGES OF THAT, BUT IT SEEMED TO

ME THEY WERE WORRIED THAT AN OUTSIDE OBSERVER MIGHT—

THE COURT: IT SEEMED TO ME THAT WAS THE BETWEEN-THE-LINES IMPLICATION THERE, BECAUSE OTHERWISE THERE'S NOT AN EXPLANATION FOR IT. I DON'T ACCEPT, BECAUSE IT VIOLATES THE BASIC CONVENTION THAT THINGS THAT HAPPEN AND THE JUDGE RULES ON ARE A BASIS FOR RECUSAL. I DON'T SEE HOW THIS IS DIFFERENT FROM AN ADVERSE RULING IN A CASE FOR A JUDGE TO FORMULATE POLICY AND THEN CONSIDER THE CONSTITUTIONALITY OF THAT POLICY, FOR EXAMPLE.

[53]

I'LL GIVE YOU SOME OTHER EXAMPLES, MS. CHARLICK. THIS HAPPENS ALL THE TIME. WHEN WE GET A 2255, A HABEAS CASE, IT COMES BACK TO US. WE'RE BEING ASKED TO LOOK AT OUR OWN CONDUCT, LOOK AT OUR OWN CASE. NO ONE SAYS, "WELL, YOU CAN'T BE FAIR BECAUSE THIS IS REALLY ATTACKING SOME DECISION THAT YOU MADE IN THE CASE." AS A MATTER OF COURSE, 2255'S COME BACK TO THE JUDGE WHO PRESIDED AT THE TRIAL.

THERE ARE PROBABLY A LEGION OF OTHER EXAMPLES I COULD COME UP WITH WHERE JUDGES ARE ENTRUSTED TO PUT ASIDE WHAT'S HAPPENED BEFORE AND RULE ON WHAT'S IN FRONT OF THEM AT THE PRESENT TIME. THUS, THE RULE SAYS ADVERSE

RULINGS OR PRIOR INVOLVEMENT IS NOT A BASIS FOR RECUSAL UNLESS IT'S EXTRAJUDICIAL.

AND I GET YOUR POINT THAT THE COMMUNICATION WITH THE MARSHAL AMOUNTED TO EXTRAJUDICIAL COMMUNICATION. I JUST DON'T AGREE WITH THE ANALOGY. BECAUSE OF THE ABSENCE OF AN ADVERSARIAL RELATIONSHIP, I DON'T SEE THE DANGER OF US DOING THAT. THAT'S WHY I ASKED MR. COLE THE QUESTIONS I HAVE ABOUT THE SENSIBLENESS OF JUDGES CONSULTING WITH MARSHALS ABOUT MATTERS OF SECURITY. THAT WOULD SEEM TO BE INDICATED. COMMON SENSE. REASONABLE. NOT PROHIBITED.

MR. COLE: IN THE *ZUBER* CASE, THE SECOND CIRCUIT MADE THAT VERY POINT. THEY SAID THIS IS A NORMAL WAYS OF THE COURTHOUSE. AND SINCE THAT ALWAYS WILL GO ON, JUDGES WILL ALWAYS HAVE A RELATIONSHIP WITH THE MARSHALS SERVICE TO SOME [54] EXTENT. SO THIS WOULD REQUIRE RECUSAL ANY TIME A JUDGE IS RULING ON USE OF SHACKLES.

THE COURT: YEAH, I AGREE. THE ARGUMENT ON RECUSAL PROVES TOO MUCH.

THE COURT FINDS AS FOLLOWS: FIRST, I HAVE SURVEYED THE LAW ON RECUSAL. I'M FAMILIAR WITH BOTH OF THE STATUTES THAT MS. CHARLICK HAS CITED. I'VE LOOKED AT THEM AND GIVEN A FRESH AND

CLEAN LOOK TO THIS DECISION THAT WAS MADE ON THE MATTER OF COURT POLICY HERE.

I'VE ALSO SURVEYED THE OTHER CASES ON RECUSAL TRYING TO FIND SOMETHING IN ONE OF THEM THAT MIGHT INFORM THIS DECISION. FOR THE REASONS I'VE ASKED ABOUT AND STATED I DON'T AGREE THAT *BRANDAU* IS AN OVERLAY, AN EXACT OVERLAY, I AGREE WITH THE OBSERVATION THAT JUDGE TALLMAN MADE—WELL, I AGREE WITH THE OBSERVATION IN *CLEMENS* THAT THE CLAIMS ARE FACT-DRIVEN AND THAT THE ANALYSIS OF 455 CLAIMS HAVE TO BE GUIDED NOT BY COMPARISON TO PRIOR JURISPRUDENCE, BUT RATHER AN INDEPENDENT EXAMINATION OF THE FACTS AND CIRCUMSTANCES.

WITH THAT IN MIND, I TURN MY ATTENTION TO THE CASES THAT THE NINTH CIRCUIT HAS PUBLISHED ON THE QUESTION OF REMAND. GENERALLY SPEAKING, REMAND TO A NEW JUDGE IS JUSTIFIED ON ONE OF TWO GROUNDS: A JUDGE'S PERSONAL BIAS OR OTHER UNUSUAL CIRCUMSTANCES. HERE I THINK THE CLAIM IS THAT THE JUDGES ARE, AT LEAST IMPLICITLY, BIASED.

YOU'RE NOT SAYING WE'RE—YOU'RE SAYING IT WOULD BE [55] AN INFERENCE OF IMPLICIT BIAS ON THE PART OF AN OBJECTIVE OBSERVER BECAUSE WE PROMULGATED THE POLICY; RIGHT?

MS. CHARLICK: YES, THE IMPROPRIETY AND IMPARTIALITY UNDER 455.

THE COURT: SO JUST TO BE CLEAR, YOU'RE NOT CLAIMING ACTUAL BIAS BY ANY PARTICULAR JUDGE. YOU'RE JUST SAYING THAT SOMEBODY LOOKING AT THIS WOULD SAY, "THIS DOESN'T SMELL RIGHT BECAUSE THE JUDGES ARE RULING ON THEIR OWN POLICY IN THE FACE OF THE CHALLENGE"?

MS. CHARLICK: WELL, YOUR HONOR, WE ALSO ARE RELYING ON 28 USC SECTION 47 THAT SAYS THAT YOU SHALL NOT SIT IN JUDGMENT ON SOMETHING YOU'VE ALREADY DECIDED, A CASE YOU'VE ALREADY DECIDED. IT IS OUR POSITION THAT YOU'VE DECIDED THIS ISSUE AS A MATTER OF POLICY AND YOU ARE NOW GOING TO BE SITTING IN JUDGMENT ON IT.

SO TO THE EXTENT THAT THAT IMPLICATES ACTUAL BIAS OR JUST IMPLICATES THE FACT THAT YOU ARE CALLED TO JUDGE THE VALIDITY OF THE DECISION YOU'VE ALREADY MADE, THAT IS THE GROUNDS WE'RE RAISING.

THE COURT: I COULD NOT FIND IN MY SURVEY ANY CASE WHERE THE NINTH CIRCUIT SPECIFICALLY IDENTIFIED A JUDGE'S PERSONAL BIAS OR ACTUAL BIAS AS THE REASON FOR REMANDING—OR EXCUSE ME—THE REASON FOR DIRECTING A DIFFERENT JUDGE SHOULD HANDLE THE CASE. THE CASE THAT I FOUND THAT CAME THE

CLOSEST WAS *U.S. VS. SEARS & ROEBUCK* AT 785 FED. 2D 777, A NINTH [56] CIRCUIT CASE DECIDED IN 1986.

IN THAT CASE, THE DISTRICT JUDGE HAD DISMISSED THE INDICTMENT THREE DIFFERENT TIMES. EACH TIME HE WAS REVERSED BY THE COURT OF APPEALS. AT ONE POINT DURING THE PROCEEDINGS, THE JUDGE CHASTISED THE PROSECUTOR, CALLED THE CASE EGREGIOUS, EXPRESSED THE VIEW THAT THE PROSECUTOR WHO BROUGHT THE CASE SHOULD BE FIRED.

THE GOVERNMENT APPEALED FOR A FOURTH TIME AFTER THE DEFENDANT PLED GUILTY, AND THE NINTH CIRCUIT FOUND IN THAT CASE THE DISTRICT JUDGE'S STATEMENTS AND CONDUCT EVIDENCED AN APPEARANCE OF UNWILLINGNESS TO PRESIDE IN THE CASE, AND THEY REMANDED IT TO A DIFFERENT JUDGE. THAT'S THE ONLY CASE I COULD FIND THAT CAME CLOSE TO ACTUAL BIAS.

MS. CHARLICK: YOUR HONOR, IF I MIGHT, IN *UNITED STATES VS. HERNANDEZ-MESA*, THE NINTH CIRCUIT DID JUST REMAND AND —REMANDED AWAY FROM JUDGE ANELLO TO JUDGE CURIEL TO DECIDE—

THE COURT: YOU KNOW, I'M FAMILIAR. I JUST SAW THAT CASE, AND THAT'S ANOTHER HEAD-SCRATCHER. THE GROUNDS FOR THAT WERE THAT, WHAT, JUDGE ANELLO MADE LEGAL RULINGS THAT THEY DISAGREED

WITH? JUDGE KOZINSKI USED THE WORD "PERTURBED." SO A PANEL BEING PERTURBED WITH A DISTRICT JUDGE IS ENOUGH TO SAY, "GIVE IT TO SOMEONE ELSE"?

THE IMPLICATIONS OF THAT, JUST AS A DIGRESSION, MS. CHARLICK, ARE KIND OF FRIGHTENING IF YOU'RE ON THE NINTH [57] CIRCUIT BECAUSE MAYBE THEY'LL NEVER GET TO HEAR ANOTHER CASE THE WAY THEY GET REVERSED. SOME OF THEM IN PARTICULAR, YOU KNOW—SO I DON'T KNOW.

MS. CHARLICK: I'M JUST FLAGGING FOR YOUR HONOR THIS WAS NOT JUST JUDGE REINHARDT IN *BRANDAU*—

THE COURT: NO, I SAW THAT. HONESTLY, I'M NOT TRYING TO CIRCLE THE WAGONS AROUND JUDGE ANELLO, BUT I LOOKED AT IT AND—I SAW TWO CASES IN THE LAST SIX MONTHS THAT CAUSED ME TO SCRATCH MY HEAD. ONE WAS THE *SEA SHEPERD* CASE.

DID YOU READ THAT CASE? JUDGE KOZINSKI WROTE THE ORDER CALLING THEM PIRATES, SAID, "YOU DON'T HAVE TO HAVE A PATCH OVER YOUR EYE OR A PEG LEG TO BE A PIRATE THESE DAYS." IT WAS A PUBLISHED OPINION IN USUAL JUDGE KOZINSKI STYLE, VERY ENTERTAINING.

BUT AGAIN, THEY DIRECT THE CASE TO GO TO A DIFFERENT JUDGE. IN BOTH THAT CASE AND JUDGE ANELLO'S CASE, THE ONLY REASON I COULD SEE FOR IT WAS THEY KIND OF DISAGREED ON THE JUDGE'S RULINGS.

IT'S NOT LIKE THE *SEARS* CASE WHERE THE JUDGES, EVERY TIME IT COMES BACK, HE'S SAYING SOMETHING OR THERE'S SERIAL REVERSALS THAT KIND OF GIVE THE IMPRESSION THAT THE JUDGE ISN'T WILLING TO FOLLOW INSTRUCTIONS FROM A HIGHER COURT. SO I DON'T GET IT. THAT CASE *HERNANDEZ MESA* ALONG WITH THE *SEA SHEPERD* CASE, IN MY HUMBLE OPINION, THEY'RE TO BE OUTLIERS THAT DON'T FOLLOW THE STANDARD OF LOOKING TO SAY, "YEAH, A REASONABLE PERSON WOULD IMPLY BIAS HERE OR THERE'S [58] SOME OTHER UNUSUAL CIRCUMSTANCE." BUT I AM—TO ANSWER YOUR QUESTION, I AM FAMILIAR WITH THE CASE. I JUST LOOKED AT IT AGAIN YESTERDAY. LAST NIGHT, IN FACT.

SO AGAIN, I WANT IT TO BE CLEAR THAT I UNDERSTAND THE DISTINCTION HERE. AND I DON'T THINK MS. CHARLICK DISAGREES WITH WHAT I'M SAYING. THE CONCERN HERE FROM THE DEFENSE STANDPOINT IS THAT THERE'S AN IMPLICATION OF BIAS BECAUSE THE COURT'S INVESTED IN THIS POLICY. THE JUDGES LISTENED TO A PRESENTATION BY THE MARSHAL. THEY MADE A DECISION. THEY AGREED TO DEFER TO THE MARSHALS.

I DON'T WANT TO GET TIED UP IN THE NOMENCLATURE. I HAPPEN TO THINK THAT THAT'S A POLICY DECISION. AND AS YOU POINT OUT I THINK CORRECTLY, MS. CHARLICK, THE FACT THAT IT'S COMMITTED TO

WRITING IN A LETTER THAT—THE LETTER WENT TO YOU; RIGHT? IT NOTIFIED YOU AND THE U.S. ATTORNEY AND EVERYBODY ELSE?

MS. CHARLICK: IT WENT TO THE MARSHALS. WE WERE PROVIDED A COPY.

THE COURT: YEAH. THERE WAS NO SECRET ABOUT IT. IT WASN'T SOME KIND OF SECRET COMMUNICATION. IT WAS KIND OF A GENERAL ANNOUNCEMENT. NO ONE'S BACKED AWAY FOR THAT. SO REALLY THE CLAIM IS, "YOU MADE A POLICY, AND WE DISAGREE WITH IT. WE THINK IT'S CONSTITUTIONALLY SUSPECT. AND WE THINK THAT BECAUSE YOU WERE BEHIND THE POLICY AND YOU TOOK INFORMATION THAT INFORMED THE POLICY, YOU CAN'T BE FAIR."

[59]

SO THAT'S REALLY THE ESSENCE OF THIS CLAIM. AND DEFENDANT IN THIS CASE HAS ANALOGIZED ADVERSARIAL SITUATIONS WHERE THE JUDGE GOT INFORMATION OUTSIDE OF A CASE AND BASED HIS DECISION ON OUTSIDE INFORMATION, EXTRAJUDICIAL INFORMATION. THAT WOULD CLEARLY BE THE CASE. I SEE THIS A MUCH DIFFERENT. I DON'T SEE ANY VALID ANALOGY BETWEEN JUDGES MAKING A POLICY DECISION WHICH NECESSARILY RELIES ON EXTRAJUDICIAL SOURCES, IN THIS CASE THE MARSHALS, AND A CASE WHERE THE JUDGE PRESIDING HAS NO STAKE IN THE OUTCOME AND TAKES IN-

FORMATION AND ACTS ON THAT INFORMATION PROBABLY TO THE DETRIMENT OF ONE SIDE OR THE OTHER. I THINK THAT'S A VERY DIFFERENT CASE. THERE'S AN ADVERSARIAL SHARPNESS IN THE LATTER CIRCUMSTANCE THAT DOESN'T EXIST IN THIS CASE, THE FORMER CIRCUMSTANCE.

NOW, GOING ON, THE CASES, AS *CLEMENS* POINTS OUT, THAT HAVE APPLIED THIS STANDARD OF RECUSAL HAVE TENDED TO BE VERY FACT-BOUND. AND IT USUALLY—IT USUALLY HAS COME UP IN CASES WHERE A JUDGE IN AN ADVERSARIAL PROCEEDING HAS EXPRESSED SOME STRONG SENTIMENT IN FAVOR OF A PARTICULAR ISSUE OR SENTENCE OR SOMETHING LIKE THAT.

I MYSELF WAS REMOVED FROM A CASE SIX YEARS AGO OR SOMETHING. IN THAT CASE, I HAVE TO TELL YOU I THINK IT WAS ABSOLUTELY THE RIGHT THING TO DO. I WAS GOING TO RECUSE IF THEY DIDN'T ORDER REASSIGNMENT. I EXPRESSED VERY STRONG FEELINGS. IT WAS SOME LENIENT DEAL WITH AN EIGHT-TIME FELON [60] WHO WAS BREAKING INTO PEOPLE'S HOUSES AND HAD A KNIFE WITH HIM, AND THEY WERE GIVING AWAY THE STORE. I SAID, "I'M NOT DOING THIS. I'M NOT GOING ALONG WITH THIS."

DO YOU REMEMBER THE CASE? I WOULDN'T TAKE THE—THEY TRIED TO SUBSTITUTE IN INFORMATION. I SAID, "NO, I'M NOT DOING THIS. I'M NOT DISMISSING THE INDICTMENT."

MS. CHARLICK: *VASQUEZ*.

THE COURT: YEAH, *VASQUEZ*. NO QUESTION BASED ON THE STATEMENTS THAT I MADE THAT I WAS INVESTED IN THAT. ANY OBJECTIVE OBSERVER WOULD HAVE SAID, "THIS GUY, HE'S PISSED OFF ABOUT THIS. HE CAN'T BE FAIR." NO PROBLEM. I GET THAT.

THAT'S NOT THE SITUATION HERE. THE LANDSCAPE HERE IS COMPLETELY DIFFERENT. I HAVEN'T HEARD ANYBODY WHO SAYS, "COME HELL OR HIGH WATER, WE'RE GOING TO SHACKLE PEOPLE." THAT HAS NEVER BEEN THE POSITION OF ANY JUDGE ON THIS COURT WITH WHOM I'VE HEARD SPEAK ON THE ISSUE. IT'S NOT MY POSITION. IT WAS NOT THE POSITION OF ANY OF THE JUDGES THAT AGREED TO THIS POLICY.

THE IMPETUS CAME FROM THE MARSHAL AND IT CAME IN THE FORM OF A SECURITY CONCERN AND—OH, I FORGOT TO MENTION ONE THING. THE OTHER THING THAT INFORMED THIS POLICY WAS THE DISCOVERY IN THE LAST SIX MONTHS OF FOUR WEAPONS, RAZOR BLADE SHANKS, IN THE COURT HOLDING CELLS. THE OTHER THING MARSHAL STAFFORD SAID—SEE, MY RECOLLECTION WASN'T AS EXACT AS YOU THOUGH, BUT IT'S GETTING BETTER. THE OTHER THING MARSHAL [61] STAFFORD SAID WAS, "IN THE LAST SIX MONTHS, WE FOUND FOUR WEAPONS IN THE HOLDING CELLS." AND HE SAID, "THIS IS SIGNIFICANT BECAUSE THEY GET

SEARCHED BEFORE THEY LEAVE WHATEVER FACILITY THEY'RE IN, AND THEN WE SEARCH THEM AGAIN. SO THEY'RE TWICE SEARCHED BEFORE THEY GET UP HERE. AND SOMEHOW THESE SHANKS AND RAZOR BLADES HAVE MADE THEIR WAY UP HERE."

SO IT WAS, AGAIN, SOME INDICATION THAT THERE'S NOTHING FAIL-PROOF ABOUT PROVIDING THE SECURITY. REAL HARM COULD BE DONE WITH AN OBJECT LIKE THAT. NOT SIX MONTHS AGO, MY LAW SCHOOL CLASSMATE —WELL, I'M SURE YOU KNOW HIM, MR. BURGNER—HE'S ON OUR CJA LIST—HE'S SITTING NEXT TO SOME GUY TRYING TO DEFEND THE GUY ON A MURDER CHARGE, AND THE GUY REACHES OVER WITH A RAZOR BLADE AND SLASHES HIM IN THE FACE. SO THESE CONCERNS ARE REAL. SECURITY CONCERNS ARE REAL. THEY'RE NOT CONTRIVED. THIS ISN'T HYPOTHETICAL.

ANYWAY, CONTINUING ON WITH THIS, THERE ARE CASES I ACKNOWLEDGED LIKE *MIKAELIAN*, M-I-K-A-E-L-I-A-N, AT 168 FED. 3D, WHERE THE JUDGE'S EX PARTE REVIEW OF MATERIAL LED TO A REMAND. AND I THINK THAT'S PROBABLY THE CLOSEST ANALOGY IN A CASE THAT I CAN FIND TO THE POSITION THAT'S BEING ADVOCATED BY THE DEFENSE.

BUT AGAIN, THE DIFFERENCE THERE IS THAT WAS A CASE PENDING IN FRONT OF A JUDGE. THERE WAS AN ADVERSARIAL RELATIONSHIP BETWEEN A PROSECUTOR AND THE DEFENDANT, AND THE [62] JUDGE GOT

EX PARTE MATERIALS NOT FROM EITHER PARTY. AND APPARENTLY, THEY MADE A DIFFERENCE. THE CASES ARE VERY CLEAR THAT THE JUDGE CAN'T DO THAT, CAN'T BE INFORMATION NOT COMING FROM THE PARTIES, NOT VETTED IN OPEN COURT WITH BOTH SIDES KNOWING IT.

THIS IS A VERY DIFFERENT SITUATION. THE PROMULGATION OF COURT POLICY IS NOT ADVERSARIAL. I DON'T FIND IT TO BE. IT'S BEEN MADE TO BE NOW BECAUSE THE FEDERAL DEFENDER'S OFFICE WANTS TO CHALLENGE THIS. BY THE WAY, THIS IS NOT A UNIFORM CHALLENGE. I RARELY HEAR ANY CJA LAWYERS COMPLAINING OR OBJECTING. IN FACT, MOST DON'T. EVEN WHEN PROMPTED KIND IN A JOCULAR WAY, "ARE YOU GOING TO OBJECT ABOUT THIS?" "NO, WE'RE NOT OBJECTING TO THIS."

SO I WANT TO BE CLEAR THAT NOT EVERYONE HAS THE SAME OBJECTIONS THAT THE FEDERAL DEFENDERS DO OR ARE AS INVESTED IN THIS OR HAS THE PERCEPTION THAT THE JUDGES CAN'T BE FAIR. I DON'T THINK SO. BUT AGAIN, I DISTINGUISH *MIKAELIAN* BECAUSE I DO FIND THAT AN ADVERSARIAL SITUATION IS VERY, VERY DIFFERENT FROM THIS ONE.

I AM AWARE OF THE POINT THAT MS. CHARLICK MADE ABOUT THE TWO RECENT CASES, BUT I COME BACK TO THIS, WHICH I THINK REALLY THE MORE ANALOGOUS CASE TO WHAT'S GOING ON HERE IS THE *CLEMENS*

CASE. IN *CLEMENS*, WHICH IS AT 428 FED. 3D 1175, THE COURT SAYS THIS: "IN DETERMINING WHETHER DISQUALIFICATION IS WARRANTED, WE APPLY A GENERAL RULE THAT QUESTIONS ABOUT A [63] JUDGES'S IMPARTIALITY MUST STEM FROM EXTRAJUDICIAL FACTORS."

THIS IS CITED IN *LITEKY VS. THE UNITED STATES*, 510 U.S. 540. AGAIN, THE ENTIRE CONTEXT OF BOTH OF THESE CASES, *LITEKY* AND *CLEMENS*, IS AN ADVERSARIAL PROCEEDING. WE'RE MINDFUL THAT RECUSAL CLAIMS ARE FACT-DRIVE, AS I'VE MENTIONED, NOT TO BE GUIDED BY PRIOR JURISPRUDENCE, BUT RATHER BY AN INDEPENDENT EXAMINATION OF UNIQUE FACTS AND CIRCUMSTANCES, FAVORABLY CITING A FIFTH CIRCUIT CASE, *U.S. VS. BREMERS*, 195 FED. 3D 221, FIFTH CIRCUIT, 1999.

THEN THEY GO ON TO SAY THAT, "THE TENTH CIRCUIT HAS COMPILED A HELPFUL NONEXHAUSTIVE LIST OF VARIOUS FACTORS THAT SHOULD BE CONSIDERED ON THE RECUSAL MOTION. THESE THINGS ARE NOT SUFFICIENT TO JUSTIFY RECUSAL: RUMOR, SPECULATION, BELIEFS, CONCLUSIONS, INNUENDOES, SUSPICIONS, OPINIONS, AND SIMILAR NONFACTUAL MATTERS."

THAT'S WHERE I FIND MOST OF THE IMPETUS COMES IN THIS CASE. THERE'S A LOT OF SPECULATION. I THINK THERE'S OPINIONS. BUT THERE'S NOTHING FACTUAL HERE. THERE'S NO FACTUAL DISAGREEMENT

HERE. AND SO THE DISAGREEMENT REALLY CONCERNS NONFACTUAL MATTERS. "YOU SHOULDN'T HAVE DEFERRED TO THE MARSHALS." WELL, THERE'S NOT A FACTUAL DISPUTE. THERE WAS DEFERENCE GIVEN TO THE PRESENTATION MADE BY THE MARSHALS, AND I'VE KIND OF GIVEN YOU AN OVERVIEW OF WHAT THAT PRESENTATION WAS.

BUT WE'RE TOLD THAT NONE OF THOSE THINGS IS A [64] JUSTIFICATION FOR RECUSAL. "THE MERE FACT THAT A JUDGE HAS PREVIOUSLY EXPRESSED AN OPINION ON A POINT OF LAW," AGAIN KEEPING THIS THING ADVERSARIAL SETTING, "OR HAS EXPRESSED A DEDICATION TO UPHOLDING THE BAR OR A DETERMINATION TO IMPOSE SEVERE PUNISHMENT WITHIN THE LIMITS OF THE LAW" IS NOT A BASIS. PRIOR RULINGS ARE NOT A BASIS SOLELY BECAUSE THEY WERE ADVERSE.

I THINK HONESTLY THAT THE NUB OF THIS THING GETS TO THAT. THE FEDERAL DEFENDERS DISAGREES WITH THE POLICY. I THINK THAT WAS EXPRESSED TO JUDGE MOSKOWITZ BEFORE THE DECISION WAS MADE. THEN THE DECISION WAS MADE, AND THEY CONTINUE TO DISAGREE WITH IT. AND I THINK THAT IS PART OF THE IMPETUS FOR THIS.

THIS DOESN'T HAPPEN, BASELESS PERSONAL ATTACKS AGAINST THE JUDGE. I DON'T FEEL PERSONALLY ATTACKED AT ALL

IN THIS. ALSO, NOTHING LIKE REPORTERS OR SOMETHING. NONE OF THAT'S COME UP. THERE'S BEEN NO MEDIA. THREATS OR ATTEMPTS TO INTIMIDATE THE JUDGE, I DON'T FEEL LIKE ANY OF THAT IS IN PLAY. BUT SUFFICE IT TO SAY THAT THE FIRST FEW CATEGORIES ARE IN PLAY, AND I THINK THEY COVER THE DISPUTE.

NINTH CIRCUIT GOES ON TO SAY, "AS THE TENTH CIRCUIT RIGHTLY OBSERVED, THE JUDGE HAS A STRONG DUTY TO SIT WHEN THERE'S NO LEGITIMATE REASON TO RECUSE, JUST AS STRONG A DUTY AS HE DOES TO RECUSE WHEN THE LAW AND FACTS REQUIRE IT." HERE I HAVE A RESPECTFUL DISAGREEMENT WITH MS. CHARLICK, WHO I LIKE [65] AND WHO I DO RESPECT QUITE A LOT. JUDGES ARE EXPECTED TO COMPARTMENTALIZE INFORMATION, NOT TAKE THINGS PERSONALLY, TO BE PERSUADABLE, TO BE OF A MIND THAT MAYBE THEY MADE AN INITIAL WRONG DECISION.

I CAN TELL YOU—AND I THINK YOU KNOW WITH ME IN YOUR OWN EXPERIENCE WITH ME—THAT THAT HAPPENS WITH ME AND WITH OTHER JUDGES ON A WEEKLY BASIS. I'LL COME IN. I'LL HAVE MADE NOTES ON SENTENCINGS, FOR EXAMPLE. HERE'S WHAT I THINK. AND THEN I'LL LISTEN TO THE PRESENTATION. I'LL LISTEN TO THE DEFENDANT. AND INVARIABLY, I'LL CHANGE MY MIND ON WHAT HAPPENED. AND IT'S USUALLY TO THE DEFENDANT'S BENEFIT.

SO IT'S THE IDEA OF BEING OPEN TO ARGUMENTS OR OPEN TO THE IDEA THAT YOU GOT IT WRONG IN THE FIRST INSTANCE.

I DON'T SEE THAT THAT'S IMPLICATED HERE. I DON'T SEE THAT AN OBJECTIVE PERSON LOOKING AT THE FACTS IN THE BACKGROUND WOULD SAY THAT THAT'S IMPLICATED OR WOULD HAVE ANY INSECURITY ABOUT A JUDGE OF THIS COURT, NOT JUST ME, BUT ANY OF OUR JUDGES, RULING OBJECTIVELY ON THE CONSTITUTIONAL CHALLENGES TO THIS POLICY.

I DID REMEMBER THE OTHER ANALOGY I WANTED TO GIVE YOU. WIRETAP APPLICATIONS. WE SIGN OFF ON THOSE. WE APPROVE THOSE. AND THEN THERE'S LITIGATION THAT FOLLOWS THAT SAYS, "JUDGE, LOOK, YOU WERE ASLEEP AT THE SWITCH HERE. THEY DIDN'T MINIMIZE ENOUGH" OR THEY DIDN'T DO THIS OR THEY DIDN'T DO THAT. SAME THING WITH SEARCH WARRANTS. LOOK AT THOSE.

[66]

IN MANY INSTANCES, WE'RE CALLED UPON TO REVIEW OUR OWN WORK OR PRIOR DECISIONS, AND THE ARGUMENT IS AS IT IS IN THIS CASE. "YOU MADE A WRONG DECISION. THIS DECISION VIOLATED THE CONSTITUTION. RECONSIDER IN LIGHT OF WHAT WE'RE TELLING YOU." JUDGE ROUTINELY DO THAT.

GIVEN THAT BACKDROP, MS. CHARLICK, I JUST HAVE TO TELL YOU, YOUR THUMB ON THE HEARTBEAT OF WHAT AN OBJECTIVE PERSON WOULD THINK AND MINE IS VERY, VERY DIFFERENT. I THINK AN OBJECTIVE PERSON WITH KNOWLEDGE OF ALL OF THESE FACTS WOULD SAY, "NO, THIS IS PROMULGATION OF POLICY. WE TAKE JUDGE BURNS AT HIS WORD. NO ONE IS SO PERSONALLY INVESTED IN THIS THAT THEY'RE NOT GOING TO CONSIDER THAT THERE MIGHT BE SOME CONSTITUTIONAL CHALLENGE TO IT."

I CAN TELL YOU FOR ONE I HAD NO ONE IN THERE—OTHER THAN THE STATEMENT THAT JUDGE MOSKOWITZ MADE ABOUT VOLUNTARINESS DURING A CHANGE OF PLEA, NO ONE WAS IN THERE ADVOCATING THE CONSTITUTIONALITY OR LACK OF CONSTITUTIONALITY OF IT. IT WASN'T AN ISSUE THAT WAS THE SUBJECT OF A DEBATE AT THE TIME. SO THAT WOULD BE FRESH AND BE NEW AND WOULD BE SOMETHING THAT I THINK A JUDGE WOULD BE DUTY-BOUND TO CONSIDER AND WOULD BE EXPECTED TO CONSIDER.

YOU'VE HEARD ME SAY THIS BEFORE. I HAD THE EXPERIENCE OF SITTING ON A JURY ONCE. I WAS CALLED WHEN I WAS A LAWYER, VERY ACTIVE TRIAL LAWYER. I THOUGHT, "THIS IS GOING TO BE EASY. I DO THIS FOR A LIVING." THEN WE GET BACK IN THE [67] JURY ROOM. THERE'S 11 NONLAWYERS AND ME. DURING THE COURSE OF THE

DELIBERATIONS, ALL KINDS OF PERCEPTIONS CAME UP THAT HADN'T EVEN OCCURRED TO ME. AND HERE I THOUGHT I WAS THE SMARTEST GUY IN THE ROOM. AND SOME OF THOSE THINGS ACTUALLY PERSUADED ME.

IT IS THE WAY THAT HONEST, OBJECTIVE PEOPLE PROCESS INFORMATION. THEY'RE PERSUADABLE. I DON'T SEE ANYTHING IN THE BACKGROUND OF THIS CASE THAT SUGGESTS OR WOULD SUGGEST TO AN OBJECTIVE PERSON THAT ONE OF OUR JUDGES CAN'T RULE ON THE DUE PROCESS CHALLENGES THAT THE DEFENSE EXPECTS TO RAISE TO THESE AS I UNDERSTAND THEM.

SO WITH ALL RESPECT, I DENY THE MOTION TO RECUSE. I DON'T FIND THAT THERE'S ANY BASIS FOR IT. I DON'T FIND THAT THIS, AS I SAID SEVERAL TIMES NOW, IS ANALOGOUS TO AN ADVERSARIAL PROCEEDING WHERE A JUDGE HAS RECEIVED INFORMATION THAT SHOULD NOT HAVE BEEN RECEIVED. SO I DON'T FIND AN ANALOGY.

AND I DO THINK THIS IS DISTINGUISHABLE FROM—I KEEP GETTING THE NAME WRONG—*BRANDAU* WHERE THERE WAS CONCERN ABOUT UNDERLYING FACTS, WHICH IS NOT PRESENT HERE. WITH ALL RESPECT, THAT MOTION IS DENIED.

WHO WANTS TO ARGUE ON THE DISCOVERY?

MS. CHARLICK: MS. MILLER IS GOING TO SEE HOW OPEN YOU ARE.

THE COURT: ALWAYS OPEN.

[68]

MS. MILLER: PRELIMINARILY, I JUST WANT TO NOTE IN THE FLURRY OF ACTIVITY AT THE BEGINNING OF THE HEARING, I NEGLECTED TO JUST NOTE FOR THE RECORD THAT WE DO CONTINUE TO MAKE OUR OBJECTIONS TO MS. MORALES BEING SHACKLED. I THINK THAT'S PROBABLY CLEAR IN WHAT WE'RE HERE ON.

THE COURT: HOW ARE YOU FEELING, MS. MORALES?

THE DEFENDANT: (NODS HEAD).

THE COURT: SHE'S SMILING AND SHAKING HER HEAD AFFIRMATIVELY THAT SHE'S FEELING GOOD.

DOES SHE HAVE SHACKLES ON NOW?

MS. MILLER: I ACTUALLY WAS ABOUT TO ASK THAT—YOUR HONOR IS A FRIENDLY PERSON, AND YOU WERE JUST SMILING AT HER. I UNDERSTAND THAT.

THE COURT: SHE'S SMILING BACK.

MS. MILLER: I WOULD JUST NOTE THAT I WAS JUST SPEAKING WITH MS. MORALES. SHE'S WEARING ANKLE SHACKLES, AND WE ARE ASKING THAT THEY BE REMOVED. SHE'S HAD THEM ON FOR—WELL, THIS PROCEEDING HAS BEEN ABOUT AN HOUR AND A

HALF. SHE ACTUALLY HAS HAD TO DO SOME WALKING IN THEM. SO SHE'S DEVELOPED SOME BLISTERS AROUND WHERE THE SHACKLES UP.

THE COURT: ARE YOU IN PHYSICAL DISTRESS NOW?

THE DEFENDANT: MY LEGS AREN'T MOVING AT THE MOMENT.

THE COURT: SO YOU'RE OKAY NOW FOR THE TIME BEING?

THE DEFENDANT: THROUGHOUT THE DAY, IT'S PUTTING [69] BLISTERS. THAT'S IT.

THE COURT: SHE DOESN'T APPEAR TO BE IN ANY DISTRESS. SHE DOESN'T COMPLAIN OF ANY DISTRESS AT THE PRESENT TIME. THE MOTION IS DENIED.

LET'S TALK ABOUT DISCOVERY.

MS. MILLER: WE'RE ASKING FOR DISCOVERY. I THINK THERE'S TWO PARTS: ONE IS DO WE GET ANY DISCOVERY AT ALL, AND TWO IS SO WHAT IS THAT? SO AS TO PART 1, I THINK WE DO GET DISCOVERY—THERE'S THREE BASES FOR THAT. THE FIRST IS THE INHERENT—THIS COURT'S INHERENT SUPERVISORY POWER OVER THESE PROCEEDINGS UNDER ARTICLE 3. THE SECOND IS A DUE PROCESS CLAUSE. THE THIRD IS THE ALL WRITS ACT. AND—

THE COURT: YOU'RE NOT RELYING—THE SUBPOENAS I GOT WERE DENOMINATED AS

BEING AUTHORIZED UNDER RULE 17. YOU'RE NOT RELYING ON THAT, THEN?

MS. MILLER: I THINK THAT ULTIMATELY THIS DOES COME DOWN TO THE COURT'S INHERENT POWERS OR THAT TRIFECTA, WHICH I THINK ARE OFTEN—THEY KIND OF—THEY COME TOGETHER. RULE 17, I THINK, DOES STILL—RULE 17 IS USED AS A REQUEST FOR SUBPOENAS BOTH FOR PRETRIAL MATTERS, FOR TRIAL MATTERS, AND FOR SENTENCING MATTERS. I MYSELF HAVE USED IT FOR ALL OF THOSE MATTERS. I SUPPOSE—WE'RE ASKING FOR IT BOTH UNDER RULE 17 AND UNDER THE TRILOGY, SO TO SPEAK.

I THINK IT WOULD BE APPROPRIATE UNDER BOTH, BUT I DO BELIEVE THE GOVERNMENT'S OBJECTIONS UNDER RULE 16—

[70]

THE COURT: UNDER *ARMSTRONG*?

MS. MILLER: UNDER *ARMSTRONG*. AND I ACTUALLY THINK—I'VE REVIEWED *ARMSTRONG*. I THINK *ARMSTRONG* ACTUALLY SUPPORTS US AND NOT THE GOVERNMENT. AS I READ *ARMSTRONG*, THE ISSUE IN *ARMSTRONG* WAS IN THAT PARTICULAR CASE, THE SELECTIVE PROSECUTION CLAIM, THE COURT SAID THAT YOU—BASICALLY, THERE WAS AN INSUFFICIENT SHOWING TO BRING THE CLAIM, AND SO THERE WAS NO DISCOVERY.

BUT IT SORT OF SEEMED TO IMPLY THAT DISCOVERY WOULD BE AVAILABLE FOR SUCH

A CLAIM IN ANOTHER SET OF CIRCUMSTANCES. AND SO I THINK THAT IN THIS CASE, IT'S TRUE THAT THIS DOES NOT—THIS CASE DOES NOT GO TO MS. MORALES'S GUILT OR INNOCENCE OF THE CRIME FOR WHICH SHE IS CHARGED. BUT NEVERTHELESS, IF WE'RE GOING TO HAVE—IF WE'RE GOING TO HAVE A FACTUAL RECORD, WE NEED TO BE ABLE TO DEVELOP OUR RECORD.

THE COURT: LET'S GET TO POINT 2 BECAUSE I TEND TO AGREE WITH YOU.

MR. COLE, DO YOU—PUT ASIDE THE SOURCE OF THE COURT'S AUTHORITY AT THIS POINT, WHETHER IT'S INHERENT AUTHORITY OR WHETHER IT'S THE ALL WRITS ACT.

THE THIRD SOURCE WAS?

MS. MILLER: THE DUE PROCESS CLAUSE.

THE COURT: DUE PROCESS CLAUSE.

OKAY. DO YOU AGREE THAT IF I THINK IT'S APPROPRIATE, I CAN ORDER DISCOVERY IN THIS CASE? DO YOU THINK [71] THAT WOULD BE AN ILLEGAL ORDER? AND THIS IS DIFFERENT FROM THE APPROPRIATENESS OF EXERCISING THE DISCRETION. BUT DO YOU THINK I HAVE SOME DISCRETION TO SAY TO THE MARSHALS, FOR EXAMPLE, "COUGH UP INFORMATION ABOUT THESE ANECDOTES THAT WERE MENTIONED TO US"? I MENTIONED ONE OF THEM, THE THING IN FRONT OF JUDGE LEWIS. IF THERE WAS A REPORT ON THAT, GIVE IT OVER TO FEDERAL DEFENDERS SO THAT THEY CAN VERIFY.

AGAIN, I'M NOT ASKING YOU WHETHER I SHOULD. I'M JUST ASKING YOU WHETHER YOU THINK I HAVE AUTHORITY AS THE JUDGE PRESIDING OVER THIS MOTION TO MAKE SUCH AN ORDER.

MR. COLE: WELL, YOUR HONOR, I THINK THAT THE RULE 16 GOVERNS DISCOVERY IN CRIMINAL CASES.

THE COURT: NOW FOR CROSS-PURPOSES, THOUGH, BECAUSE I'VE AGREED WITH YOU, BUT THAT'S NOT A NEAT FIT. THE COURT'S NOT AN ADVERSARY TO THE DEFENDANT. SO I'M NOT GOING TO IMPORT RULES LIKE EX PARTE COMMUNICATIONS INTO WHAT'S HAPPENED HERE. I'M ALSO RELUCTANT TO SAY, OKAY, IF THIS WERE A CRIMINAL CASE, I WOULD NOT ORDER THE GOVERNMENT TO DO THIS.

WHAT SHE'S MAKING FUNDAMENTALLY IS A REQUEST TO SAY, "LOOK, WE'D LIKE TO KNOW WHAT YOU KNEW." NOW, WHETHER I SHOULD DO THAT, I DON'T KNOW.

MR. COLE: I GUESS YOUR HONOR'S ONLY PHRASED QUESTION IS WHY I RESPONDED THE WAY I DID. I DON'T WANT TO TAKE THE POSITION HERE, A LEGAL POSITION, THAT MAY COME BACK TO BECAUSE IT IS—PRACTICALLY SPEAKING, WHETHER THE [72] GOVERNMENT WOULD AGREE TO CERTAIN TYPES OF DISCOVERY, THAT'S A DIFFERENT ISSUE.

THE COURT: MAYBE I PUT YOU ON THE SPOT, THEN. I DON'T WANT YOU TO SAY SOMETHING HERE THAT OBVIOUSLY WITH THIS CASE GOING ON APPEAL WOULD BE JAMMED DOWN YOUR THROAT OR SOME KIND OF CONCESSION.

HERE'S WHAT I FIND WITH RESPECT TO THAT: SURE, I THINK I HAVE AUTHORITY AND DISCRETION. INSOFAR AS THIS HAS BEEN—THIS POLICY HAS COME ABOUT IN CONSULTATION WITH THE MARSHALS SERVICE. I DON'T KNOW THAT I'D GIVE THEM AND ORDER, BUT I COULD CERTAINLY ASK MR. JOHNSON OR THE MARSHAL HIMSELF TO SIT DOWN AND TALK TO YOU. OR TO THE EXTENT THINGS ARE MEMORIALIZED, I THINK I CAN DO THAT.

NOW, THE NEXT QUESTION IS WHY SHOULD I? THIS IS A MATTER OF COURT POLICY. AND YOU HAVE NOT PRESENTED ANY FACTUAL DISPUTES. MS. CHARLICK HAS ALLUDED TO ONE. SHE SAYS, "HEY, WE DON'T THINK EVERYBODY IS BEING SHACKLED EVERYWHERE." BUT SHE APPARENTLY ALREADY HAS INFORMATION ON THAT. I THINK THE MARSHALS' POLICY, MS. MILLER, IS PROBABLY—CAN YOU GOOGLE IT AND FIND OUT WHAT THE NATIONAL MARSHALS' POLICY IS?

MS. MILLER: I BELIEVE NOT, YOUR HONOR.

THE COURT: MR. JOHNSON IS HERE. MAYBE YOU KNOW, MR. COLE. THAT MARSHALS' POLICY ON SHACKLING, IS THAT MEMORIALIZED IN SOME DOCUMENT?

MR. COLE: YES. WE QUOTED IT IN THE PAPERS WE [73] FILED.

THE COURT: DO YOU HAVE ANY OBJECTION TO THE COURT MAKING THAT AVAILABLE. I DON'T HAVE A HARD COPY OF IT.

MR. COLE: NOT AT ALL, YOUR HONOR.

THE COURT: SO LET'S ASSUME THAT I'LL GIVE YOU THAT.

BUT TELL ME—LOOK, WE'RE USING A GO-BY HERE, RULE 17. RULE 17 ALLOWS FOR THE DISCOVERY MATERIAL THAT'S NECESSARY. AND THERE'S A JUDICIAL DEFINITION OF WHAT THAT MEANS. IT MEANS RELEVANT MATERIAL, UNDER *U.S. VS. GALLAGHER*, 620 FED. 2D 797. AND THERE HAS TO BE NECESSITY SHOWN. THE DEFENDANT HAS TO DEMONSTRATE WHAT THE COURTS HAVE CALLED PARTICULARIZED NEED. THAT'S FROM *U.S. VS. ROGERS* AT 921 FED. 2D 1089.

IN THE ABSENCE OF A SPECIFIC SHOWING OF MATERIALITY, THE COURT CAN'T ASSESS WHY IT WOULD BE RELEVANT AND USEFUL. ALL OF THAT KIND OF SETS THE STAGE, MS. MILLER, FOR THE QUESTION I HAVE, WHICH IS WHY DO YOU NEED ANY DISCOVERY WHEN EVERYBODY AGREES, I THINK, ON WHAT INFORMATION THE JUDGES HAD AND WHAT

LED TO THE PROMULGATION OF THIS POLICY? IF YOU'RE AWARE OF INFORMATION THAT CONTRADICTS THAT, THEN BRING THAT UP. BUT I'M TELLING YOU STRAIGHT THIS IS WHAT WE WERE TOLD AND THIS IS WHAT WE ALL ACCEPTED. I HAVEN'T SEEN DEPUTY JOHNSON'S DECLARATION.

HAVE YOU READ IT?

MS. MILLER: YES, YOUR HONOR.

THE COURT: IS IT A LONG—

[74]

MS. MILLER: SHALL I HAND IT UP?

MR. COLE: YOUR HONOR, IT WAS FILED NOT WITH RESPECT TO THE PRESENT MOTION, BUT THE MERITS MOTION.

THE COURT: I HAVEN'T SEEN THAT.

MS. MILLER: I THINK IT MIGHT BE USEFUL FOR YOU TO LOOK AT IT.

THE COURT: THE QUESTION, MS. MILLION, IS THERE FACTUAL DISPUTES THAT WOULD BE ASSISTED BY DISCOVERY HERE?

MS. MILLER: YES, YOUR HONOR, THERE ARE. JUST TO BEGIN WITH WHAT THE COURT REFERENCED, IN POINT OF FACT WE DO NOT KNOW—WELL, WE HAVE HEARD SECONDHAND FROM THE JUDGES WHO WERE WITNESSES TO WHAT THE MARSHAL SAID WHAT IT WAS THAT THEY SAID. WE DON'T HAVE A COPY OF ANY—IF A POWERPOINT WAS

USED. WE DON'T HAVE A COPY OF THAT PRESENTATION.

THE COURT: LET ME TELL YOU WHAT IT WAS. IT WAS AN EXTEMPORANEOUS TALK BY THE MARSHAL FOR ABOUT 20 MINUTES. HE OBVIOUSLY THOUGHT ABOUT IT, BUT HE GOT UP. THERE WAS NO POWERPOINT. NO NOTES TAKEN. NOBODY VIDEOED IT. NOBODY AUDIOTAPED IT. WE JUST LISTENED, AS YOU WOULD EXPECT.

MS. MILLER: YOUR HONOR, I WOULD EXPECT THAT THE MARSHAL PREPARED QUITE A BIT FOR THAT PRESENTATION. I'VE TALKED WITH MANY DEPUTY U.S. MARSHALS, AND THEY'RE EDUCATED. THE PREPARE FOR WHAT THEY DO. I WOULDN'T THINK THAT—IT MIGHT HAVE LOOKED EXTEMPORANEOUS, BUT I DOUBT THAT IT WAS—

THE COURT: HE DIDN'T HAVE ANY NOTES. I WAS SITTING [75] TEN FEET FROM HIM. HE WAS WALKING AROUND SPEAKING. HIS ARMS WERE MOVING. HE WASN'T CONSULTING NOTES. IT WAS ALL LIKE, "OKAY, THESE ARE FACTS THAT I KNOW THAT I'M GOING TO RELATE TO YOU. HERE'S WHAT'S BEHIND THIS." SO THERE'S NOTHING DISCOVERABLE FROM THAT MEETING. I CAN TELL YOU STRAIGHT OUT. NOTHING.

MS. MILLER: YOUR HONOR, ULTIMATELY, WE NEED—WHAT WE'RE ASKING FOR I THINK IS COMPARABLE TO THE KIND OF—THERE'S SORT OF TWO CATEGORIES. ONE WOULD BE

THE SORT OF INTERNAL DATA, MEMORANDA, WHATEVER IT WAS THAT THE MARSHALS WERE RELYING ON TO COME TO THAT DECISION THAT THEY NEEDED TO ASK FOR THIS CHANGE.

THE COURT: I'VE GIVEN YOU A COPY OF THE POLICY. WHAT BEYOND THAT? THEY SAY THERE'S A NATIONAL POLICY THAT REQUIRES SHACKLING OF PRISONERS AND SETS FOR THIS RATIO OF TWO MARSHALS TO EACH PRISONER IN COURT AT THE TIME. I'LL GIVE YOU THAT. THAT'S FAIR. YOU SHOULD KNOW WHAT THE POLICY IS THAT THEY TOLD US THEY'RE RELYING ON.

I NEVER LOOKED AT THE POLICY. I DON'T KNOW IF ANY OF THE OTHER JUDGES DID. MARSHAL STAFFORD DIDN'T HAVE IT. HE ALLUDED TO IT, BUT HE DIDN'T SAY, "I WANT EVERYBODY TO HAVE A COPY OF THIS." BUT WE'LL GET YOU A COPY OF THAT.

MS. MILLER: YOUR HONOR, THE POLICY—ACCORDING TO THE MARSHALS, THERE HAS BEEN A NATIONAL POLICY SINCE 2011. THEY DIDN'T ASK FOR IS IT IMPLEMENTED HERE UNTIL 2013. EVEN [76] IN THE DECLARATION THAT I JUST HANDED UP TO YOU AND THE REPRESENTATIONS THAT YOU'VE MADE ABOUT THE MARSHALS SERVICE'S REASONING AS WELL AS THE REPRESENTATIONS THAT OTHER JUDGES HAVE MADE, THERE WERE—THE MARSHALS PROFFERED TO THE COURT THAT THERE WERE ACTUAL INCIDENTS IN THIS DISTRICT AS WELL AS A

CHANGE IN THE POPULATION, A HOLE SORT OF—THERE WERE SOME TRENDS RELATED TO—

THE COURT: GETTING MORE VIOLENT.

MS. MILLER: —BEING MORE VIOLENT, BOTH THE DEFENDANTS THEMSELVES AS WELL AS FINDING MORE ITEMS. ULTIMATELY, ALL OF THOSE ARE FACTUAL CLAIMS WHICH WE HAVE—FOR VARIOUS—ONE OF THEM, WE HAVE SOME REASON—WELL, SOME OF THEM WE ARE SIMPLY UNABLE TO ASSESS ON OUR OWN BECAUSE WE DON'T HAVE ACCESS TO THE DATA. FOR EXAMPLE, HOW MANY SHIMS ARE FOUND IN THE TANK IN 2010, 2011, 2012, 2013?

THE COURT: YOU HAVE EVIDENCE THAT THE ESTIMATE THAT I GAVE OF FOUR IN THE LAST SIX MONTHS IS WRONG?

MS. MILLER: WELL, THERE'S A QUESTION OF WHETHER—OF THE FOUR IN THE LAST SIX MONTHS. BUT THE MORE SPECIFIC CLAIM THE MARSHALS ARE MAKING IS BOTH THAT AND THAT THERE'S AN INCREASE, THAT THERE'S—SOMETHING DIFFERENT IS HAPPENING NOW THAN USED TO HAPPEN IN THE PAST. AND I THINK WE'VE CERTAINLY DISCUSSED THIS IN THE OFFICE AND AMONGST OURSELVES. WE DON'T SEE A CHANGE.

NOW, THERE MIGHT BE SOME INFORMATION THAT THE [77] MARSHAL IS PRIVY THAT WE'RE UNAWARE OF. CERTAINLY, IT SEEMS

LIKE SOMETHING PROMPTED THEM TO ASK THE COURT FOR THIS CHANGE.

THE COURT: YOU DON'T ARGUE WITH THE FACT THAT THIS POLICY, AS YOU UNDERSTAND IT, HAS BEEN IN EFFECT SINCE 2011?

MS. MILLER: ACCORDING TO THE MARSHAL, THE GOVERNMENT IS CORRECT THAT THEY—WELL, THE GOVERNMENT ACCURATELY STATES THAT IT DID QUOTE THE POLICY IN ITS BRIEFING. WE QUOTED THE POLICY IN OUR—NATIONAL POLICY.

THE COURT: IF THAT'S THE CASE, WHY ISN'T THE FACT THAT THEY'VE GOT THIS NATIONAL POLICY OF ITSELF IMPETUS FOR THEM TO FOLLOW IT HERE? WHY WOULD THEY SAY, "WE KNOW WHAT IT IS IN WASHINGTON AND MILWAUKEE AND IN NEW ORLEANS, BUT WE'RE DIFFERENT IN SAN DIEGO"? WHY WOULD THEY STAY THAT?

MS. MILLER: YOUR HONOR, THERE'S THE POLICY IN WRITING AND THEN THERE'S A PRACTICE ON THE GROUND. IT APPEARS THE MARSHALS HAVE ALSO PROFFERED TO YOU THAT THE 93 FEDERAL COURTS IN THIS COUNTRY FOLLOW THIS POLICY.

THE COURT: THEY DID, YES. THEY SAID THAT—WELL, LET ME BE CLEAR ABOUT WHAT I UNDERSTOOD THE MARSHALS TO SAY. HE DIDN'T SAY THAT EVERYBODY'S IN FULL RESTRAINTS IN EVERY COURT. HE SAID EVERY COURT EXCEPT OURS HAS SOME FORM OF SHACKLING FOR PEOPLE APPEARING IN

PRETRIAL PROCEEDINGS IN FRONT OF THE JUDGES.

IF HE SAID SOMETHING ABOUT WHETHER THERE WAS EXCEPTIONS IN SOME COURTS, I DON'T KNOW IF HE SAID THAT OR [78] NOT. BUT THE CLEAR IMPLICATION WAS THAT WE WERE THE OUTLIER COURT. OF 94 DISTRICTS, WE WERE THE ONLY ONE THAT HAD NO SHACKLES. NONE.

MS. MILLER: YOUR HONOR, I BELIEVE—I THINK ULTIMATELY WHAT IT COMES DOWN TO IS WE NEED THE DATA OR WHATEVER IT WAS THAT THEY WERE RELYING ON IN ORDER TO ASK THE COURT FOR THE SHACKLING POLICY TO BE IMPLEMENTED IN ORDER TO TEST THE CLAIMS, IN ORDER TO SUBSTANTIATE THEIR REMARKS. THEY'RE MAKING STATEMENTS WITHOUT A FACTUAL RECORD. AND WHEN—THE CLAIM OF THE 93 OTHER DISTRICTS, FOR EXAMPLE, THAT'S SOMETHING THAT—THE CLAIMS THAT WE CAN TEST, THE CLAIMS THAT WE CAN INVESTIGATE ON OUR OWN—

THE COURT: WAS DISCOVERY ORDERED IN *HOWARD*?

MS. MILLER: I'M NOT SURE THE ANSWER TO THAT, YOUR HONOR, ALTHOUGH IN THE APPELLATE CASE THERE ARE REFERENCES TO THE RECORD.

THE COURT: REALLY VAGUE, THOUGH. AS I LOOK AT THE RECORD IN *HOWARD*, IT LOOKS LIKE THE VICE IN AN AFFIDAVIT, IT'S

ALL CONCLUSORY AND NO FACTS THAT ALLOW PEOPLE TO DRAW THE INFERENCES. WE'RE LIKE FIVE STEPS AHEAD OF WHAT THE COURT HAD IN *HOWARD* BECAUSE EVERYBODY CAN SAY, "FOUR WEAPONS FOUND IN COURT HOLDING CELLS IN THE LAST SIX MONTHS? HMM, I INFER FROM THAT THAT THERE'S DANGER TO PEOPLE IN THE COURTROOM." OR INCREASED INCIDENCE OF PEOPLE ATTACKING OTHER PEOPLE, I INFER FROM THAT THE MARSHALS NEED TO STEP UP THE SECURITY A LITTLE [79] BIT.

SO IT SEEMS TO ME THAT THE RECORD HERE IS MUCH MORE FULLY DEVELOPED AND THE BASIS FOR THE POLICY HERE IS MUCH MORE COMPLETE AND UNDERSTANDABLE THAN SOME OF THE VAGUE ASSERTIONS I READ IN *HOWARD* ABOUT—THEY QUOTED ONE OF THE MAGISTRATE JUDGES SAYING SOME KIND OF CONCLUSORY STATEMENT ABOUT, "WE FEEL LIKE WE NEED THIS." THERE WAS SOME OBJECTIVE FACTS. THEY HAD A BIG COURTROOM, I THINK.

MS. MILLER: THE THIRD FLOOR OF THE ROYABLE (PHONETIC) COURTHOUSE.

THE COURT: YEAH. SO THAT WAS—BUT THE STATEMENT HE SAID HERE, WE HAVE A LOT OF PEOPLE—AND YOUR OWN EXPERIENCE BEARS THIS OUT. THE MAGISTRATES TAKE SIX PLEAS AT A TIME SOMETIMES, RIGHT, SIX DIFFERENT DEFENDANTS AT THE SAME TIME?

MS. MILLER: SOMETIME MORE; SOMETIMES LESS.

THE COURT: THE SOMETIMES MORE IS WHAT WOULD BE OF CONCERN TO ME IF I WERE CHARGED WITH PROVIDING SECURITY.

MS. MILLER: YOUR HONOR, I THINK THAT THIS IS A POINT WHERE *HOWARD* IS AND IS NOT ON POINT. *HOWARD* IS ON POINT INSOFAR AS THE JUDGES ARE NOT MAKING A DECISION IN THE ABSTRACT. THIS ISN'T KIND OF THERE'S A CONCRETE CASE AND CONTROVERSY. THEY LOOK TO THE RECORD, SUCH IT WAS.

THE WAY IN WHICH *HOWARD* IS NOT ON POINT AS TO THE SCOPE OF THE RECORD IS THE RECORD IN *HOWARD*, ACCORDING TO THE [80] NINTH CIRCUIT, WAS SUFFICIENT TO SUPPORT THE SHACKLING POLICY IN *HOWARD*. THE SHACKLING POLICY IN *HOWARD* WAS A FAR CRY FROM THE SHACKLING POLICY IN THIS COURT, AS YOUR HONOR IS ALREADY AWARE FROM HAVING REVIEWED THE CASE.

THE COURT: LEG SHACKLES ONLY; RIGHT?

MS. MILLER: LEG SHACKLES ONLY AND ONLY AT THE INITIAL APPEARANCE. THAT IS VERY DIFFERENT FROM WHAT'S HAPPENING HERE. SO THERE ARE JUST REFERENCES TO THE RECORD IN GENERAL. IT IS NOT QUITE AS DEVELOPED AS I WOULD HAVE HOPED. NEVERTHELESS, THE RECORD IS REALLY ONLY ABOUT SUPPORTING A LIM-

ITED FORM OF SHACKLING. THAT'S ALL THAT THE NINTH CIRCUIT CAN UPHOLD IN THE END IN *HOWARD*.

THE COURT: WHAT DO YOU THINK YOU'LL FIND IN THIS DISCOVERY. RULE 17 IS NOT SUPPOSED TO BE A FISHING EXPEDITION. I'M NOT USING THAT AS A PEJORATIVE DIRECTED AT YOU. THAT'S A PHRASE OR AN ANALOGY FROM THE CASE.

AND IT SEEMS TO ME THAT IN THE ABSENCE OF EVIDENCE THAT SAYS, "IT DIDN'T HAPPEN THIS WAY, AND WE WANT TO DEMONSTRATE THE LACK OF RELIABILITY OF THE INFORMATION THAT YOU RELIED ON AND WE HAVE GOOD REASON TO SUGGEST TO YOU IT'S UNRELIABLE," THEN I'D SAY, "WELL, OKAY, THIS IS KIND OF SHAPING UP AS A DISPUTE THAT MIGHT REQUIRE AN EVIDENTIARY HEARING, AND MAYBE DISCOVERY WOULD BE NECESSARY." I DON'T SEE THAT HERE.

WHAT I SEE YOU SAYING IS, "WELL, WE KNOW THEY SAID [81] THESE THINGS, BUT WE DON'T HAVE ANY REASON WE CAN POINT TO TO SAY THAT WHAT THEY TOLD YOU IS WRONG WITH THE ONE EXCEPTION MS. CHARLICK HAS POINTED OUT ABOUT MAYBE THERE BEING SOME EVIDENCE THAT PEOPLE AREN'T SHACKLED IN SOME OF THE 93 DISTRICTS.

BUT WITH THAT ONE EXCEPTION, WHICH YOU ALREADY HAVE INFORMATION ON AP-

PARENTLY, THERE'S NOTHING IN THE PAPERS THAT I SAW THAT SAID, "THIS IS DEMONSTRABLY WRONG, AND WE CAN PROVE THIS. AND, IN FACT, IT'S GOING TO BE IMPEACHING TO THEM BECAUSE THEIR OWN RECORDS ARE GOING TO SHOW THAT IT'S NOT TRUE AND THAT YOU WERE LIED TO." THEN, OKAY, WE'VE GOT A RIPE LIVE CONTROVERSY, AND I CAN SAY, "DISCOVERY WILL INFORM THE RESOLUTION OF THAT, SO GET DISCOVERY."

INSTEAD WHAT I HEAR YOU SAYING IS, "WE'RE LOOKING FOR SOMETHING THAT MAYBE WILL PROVIDE A BASIS FOR FURTHER SUPPORT FOR OUR ARGUMENT ATTACK ON THIS POLICY." AND IF THAT'S THE CASE, THAT'S NOT A PROPER BASIS FOR ISSUING RULE 17 SUBPOENAS.

MS. MILLER: YOUR HONOR, I THINK THAT IT'S ALSO COMPARABLE TO EXPERT DISCOVERY UNDER RULE 702. THE REASON THE COURT HAS GIVEN IN THE FIRST PLACE FOR DEFERRING TO THE MARSHALS HAS TO DO WITH THEIR EXPERTISE IN THE MATTER OF COURTROOM SECURITY. WELL, WE'RE ASKING FOR WHAT ARE THE BASES ON WHICH THEY RELIED TO REACH THEIR CONCLUSIONS THAT THIS WAS A NECESSARY OR THE BEST SOLUTION TO THE PROBLEMS THAT WE'RE [82] FACING?

THE COURT: HAVE YOU—AND I DON'T MEAN TO BE FLIP ABOUT THIS. THIS IS NOT A FLIP QUESTION. BUT HAVE YOU GONE TO

DEPUTY JOHNSON AND SAID, "I WANT TO TALK TO YOU ABOUT THIS. I KIND OF WANT TO PICK YOUR BRAIN ON THIS. I'VE GONE OVER THE AFFIDAVIT. THESE THINGS HAPPEN. CAN YOU KIND OF FILL ME IN ON WHAT YOU KNOW OF THIS?" HAS ANY EFFORT BEEN MADE TO SPEAK WITH DEPUTY JOHNSON OR THE MARSHAL TO SAY, "WE KNOW YOU TOLD THE JUDGES AND STUFF. CAN YOU KIND OF GIVE US A PRIMER ON THIS, TOO?" HAS ANY EFFORT BEEN MADE TO DO THIS?

MS. CHARLICK: WE JUST GOT THE DECLARATION LAST NIGHT. SO NO, WE HAD NOT. WE WERE THINKING OF MEETING AND CONFERRING WITH MR. COLE, BUT THEN WE GOT THE RESPONSE, AND THE HEARING WAS TODAY.

THE COURT: CAN YOU REASONABLY BELIEVE, MS. CHARLICK, THAT THEY WOULDN'T SPEAK TO YOU? MY SENSE IS JUST AS I DON'T KNOW IT'S ADVERSARIAL, I DON'T THINK THE MARSHALS ARE GOING TO SAY IT'S ADVERSARIAL.

IF I WAS THE MARSHAL, I'D SAY, "WELL, LOOK, THE FEDERAL DEFENDERS HAVE AN IMPORTANT ROLE IN THE COURTHOUSE. AND IT'S INCUMBENT UPON ME AS THE MARSHAL IMPLEMENTING THIS POLICY TO LET THEM KNOW WHAT THE REASONS ARE. I HAVE NOTHING TO HIDE ON THIS. I'LL SIT DOWN WITH MS. MILLER AND MS. CHARLICK AND MR. CAHN AND I'LL TELL THEM. IF

THEY HAVE QUESTIONS, I'LL ANSWER THEIR QUESTIONS." THAT WOULD SEEM TO [83] ME TO BE THE SENSIBLE WAY TO RESOLVE THIS. WE DON'T HAVE TO MAKE A FEDERAL CASE OUT OF IT.

MS. CHARLICK: WELL, IT IS A FEDERAL CASE, BUT—AND WE ABSOLUTELY WILL TAKE THE OPPORTUNITY TO SIT DOWN WITH MR. JOHNSON. I ENJOY SITTING DOWN WITH MR. JOHNSON. I'VE SAT DOWN WITH HIM ON OTHER MATTERS ON OTHER OCCASIONS.

BUT WE DO ALSO WANT THE UNDERLYING REPORTS, THE DOCUMENTATION. TO COURT'S LOCAL RULES PROVIDE THAT WHEN A PARTY SUPPLIES A DECLARATION, THAT PARTY IS GOING TO BE SUBJECT TO CROSS-EXAMINATION. THESE THINGS WOULD BE JENCKS MATERIAL, MATTERS FOR US TO—

THE COURT: AGAIN, I THINK IT'S A SQUARE PEG IN A ROUND HOLE BECAUSE YOU'RE IMPORTING ADVERSARIAL CONCEPTS TO SOMETHING THAT I DON'T THINK IS ADVERSARIAL. AGAIN, I EMPHASIZE THE JUDGE AREN'T AGAINST MS. MORALES. THE JUDGES AREN'T AGAINST FEDERAL DEFENDERS. THERE'S NO ADVERSARIAL RELATIONSHIP HERE.

DEPUTY JOHNSON IS HERE.

ARE YOU WILLING TO SIT DOWN AND HUM A FEW BARS ABOUT WHAT YOUR EXPERIENCE HAS BEEN AND WHAT LED TO THIS AND WHAT

YOUR UNDERSTANDING IS OF THESE INCIDENTS?

DEPUTY JOHNSON: YES. WE ACTUALLY MADE THAT OFFER PRIOR TO THE MARSHAL MEETING WITH THE JUDGES.

THE COURT: WITH THE FEDERAL DEFENDERS, WITH MS. MILLER AND MS. CHARLICK AND MR. CAHN OR WHOEVER THEIR [84] REPRESENTATIVES ARE, YOU'LL SIT DOWN AND LET THEM KIND OF PICK YOUR BRAIN ABOUT WHAT HAS PROMPTED THIS CONCERN?

DEPUTY JOHNSON: I BELIEVE THE MARSHALS WOULD DO THAT.

MS. CHARLICK: AND OPEN THEIR FILES?

THE COURT: THAT'S SOMETHING DIFFERENT, MS. CHARLICK. THEN—AS I SAID, I DON'T THINK THERE'S A NEED FOR THEM TO DO THAT. I WANT TO HEAR MS. MILLER OUT. BUT AS I SAID, THIS IS MORE IN THE NATURE OF A FISHING EXPEDITION, TRYING TO FIND SOMETHING, YOU KNOW, THAT YOU DON'T KNOW IS THERE AND MAY NOT BE THERE RATHER THAN SAYING, "WE HAVE EVIDENCE THAT'S COMPLETELY CONTRARY TO WHAT'S BEEN REPRESENTED TO THE COURT," IF THERE'S A JOINED ISSUE ON THIS.

I DON'T SEE THIS. I JUST SEE YOU SAYING, "WE KNOW THEY'VE SAID THESE THINGS TO YOU. WE WANT TO BE ASSURED. WE WANT VERIFICATION," WHICH ALL RESPECT, I THINK IS A LITTLE PRESUMPTUOUS ON THE PART OF FEDERAL DEFENDERS. AND IF

THE JUDGES ACCEPTED IT, THEN ABSENT SOME EVIDENCE THAT IT WAS JUST PALPABLY WRONG OR FALSE, WHY WOULD WE SECOND-GUESS WHAT THE MARSHALS TOLD US? I DON'T HAVE ANY PERCEPTION THAT THEY WOULD COME IN AND LIE TO THE JUDGES ABOUT THESE THINGS.

MS. CHARLICK: I'M NOT MAKING ANY ACCUSATIONS, BUT I THINK THE COURT—THE FACT THAT THE COURT DIDN'T GET ANY SUBSTANTIATION EITHER ACTUALLY FURTHERS THE RECUSAL ARGUMENT. BECAUSE NOW THE COURT IS DENYING US ANY GROUNDS TO CHALLENGE [85] THE POLICY THAT THE COURT NEVER CHALLENGED.

THE COURT: NO, I'M JUST SADDLING YOU WITH WHAT YOUR RESPONSIBILITY IS. LOOK, THE ANALOG HERE HAS BEEN RULE 17. THE BURDEN IS ON THE PROPONENT OF A RULE 17 SUBPOENA TO COMPLY WITH THE REQUIREMENTS FOR IT. YOU HAVEN'T DONE THAT. YOU HAVEN'T SHOWN MATERIALITY HERE. YOU HAVEN'T SHOWN A JOINED ISSUE. YOU HAVEN'T SHOWN PARTICULARIZED NEED, PARTICULARLY IN LIGHT OF WHAT DEPUTY JOHNSON SAYS TODAY. "I'LL SIT DOWN WITH THEM, AND THEY CAN ASK ME WHATEVER QUESTIONS THEY WANT ABOUT THIS, AND I'LL ANSWER THEM. I'M JUST NOT GOING TO OPEN FILES UP," TO THE EXTENT SUCH FILES EVEN EXIST. I DON'T KNOW THAT THEY EXIST.

CAN I ASK YOU THIS? AND THIS IS JUST MY OWN INFORMATION. IS THERE A REQUIREMENT THAT IF THERE'S AN INCIDENT IN A COURT, THAT MARSHALS HAVE TO DO A REPORT? IS THERE SUCH A REQUIREMENT?

DEPUTY JOHNSON: THERE IS DEPENDING UPON THE STYPE OR INCIDENT.

THE COURT: WELL, LET'S SAY SOMEBODY ATTACKS SOMEBODY ELSE. WOULD THAT ORDINARILY IN OUR TRAINING PROMPT A WRITING OF A REPORT ABOUT THE ATTACK?

DEPUTY JOHNSON: YES.

THE COURT: SO THE MARSHALS IN COURT WOULD BE REQUIRED AFTER THEY'VE FINISHED THEIR—THE SESSION, THE COURT SESSION, TO GO DOWN AND WRITE THAT.

[86]

AND THEN WHERE DOES THAT REPORT GO, TO YOU OR TO THE MARSHAL HIMSELF?

DEPUTY JOHNSON: TO THEIR SUPERVISOR.

THE COURT: AND THEN WHAT HAPPENS? IS A RECORD KEPT OF THOSE THINGS AT SOME POINT OF WHAT THE INCIDENTS ARE?

DEPUTY JOHNSON: THERE IS SUPPOSED TO BE, YES.

THE COURT: WHEN YOU SAY THERE'S SUPPOSED TO BE, DO YOU KNOW? IS THERE A FILE CABINET THAT CHRONICLES ALL

THESE INCIDENTS THAT HAVE BEEN ALLUDED TO?

DEPUTY JOHNSON: THEY'RE HELD BY THE INDIVIDUAL SUPERVISORS. WITHOUT GOING THROUGH A SUPERVISOR'S RECORDS, I WOULDN'T KNOW WHETHER THEY EXIST.

THE COURT: THANK YOU.

MS. MILLER: I MEAN, YOUR HONOR, TO REFER TO *BRANDAU* FOR A MOMENT, THE GOVERNMENT ACTUALLY SUBMITTED AN EXHIBIT LIST IN BRANDAU AS TO AN EVIDENTIARY HEARING THAT WAS GOING TO BE HELD. AND AS PART OF THAT EXHIBIT LIST, THEY REFER TO INCIDENT REPORTS.

I BELIEVE WE DO ASK FOR INCIDENTS. AT THE TIME WE WROTE THIS, I DIDN'T KNOW THAT THERE WAS A WORD—A TERM "INCIDENT REPORT," WHICH PERHAPS IS A TECHNICAL TERM. SO IT'S NOT IN HERE, BUT THERE ARE INCIDENTS—AS MR. JOHNSON JUST SAID, THERE ARE THESE REPORTS. THEY ARE COLLECTED. THERE'S REFERENCE IN MR. JOHNSON'S DECLARATION TO FOUR INCIDENTS IN THE PAST—I BELIEVE IT'S—WELL, THERE'S REFERENCE TO FOUR [87] INCIDENTS.

THE COURT: THE WEAPONS, YOU MEAN. THE DISCOVERY OF WEAPONS.

MS. MILLER: THE DISCOVERY OF THE WEAPONS AND THEN THE INQUIRY INTO THIS.

THE COURT: YOU SAID THERE'S FOUR OF THOSE?

MS. MILLER: I THINK YOU SAID THAT THERE WERE FOUR OF THOSE.

THE COURT: I MISSPOKE IF I DID. THERE WERE FOUR WEAPONS—THIS IS MY RECOLLECTION AGAIN. WE WERE TOLD THERE WERE FOUR WEAPONS DISCOVERED IN COURT HOLDING CELLS IN THE LAST SIX MONTHS. IN TERMS OF NUMBER OF INCIDENTS, I DON'T KNOW HOW MANY. I AGREE WITH WHAT MS. CHARLICK SAID—WHAT SHE'D BEEN TOLD, WHICH WAS—NO, YOU SAID IT, THAT THERE'S BEEN AN UPTICK IN VIOLENCE IN THE POPULATION.

MS. MILLER: THAT'S MY UNDERSTANDING OF WHAT THE COURT—THE MARSHALS MAY HAVE TOLD THE COURT THAT THE COURT IS TELLING BACK TO US.

THE COURT: THAT'S TRUE. BUT I DON'T KNOW THAT THERE WAS ANY CATALOGING HOW MANY INCIDENTS—VIOLENT INCIDENTS. I KNOW ONE, THE ATTACK IN FRONT OF JUDGE LEWIS. AND I TOLD YOU ABOUT ANOTHER THAT INVOLVED MARSHALS ACTING IN A SECURITY CAPACITY WHEN A GUY GOT MAD AND THREW HIS GLASSES AGAINST THE WALL OVER HERE. IT KIND OF SHOCKED ME BECAUSE IT WAS A LOUD NOISE. IT SOUNDED LIKE A SHOT WENT OFF AT FIRST. [88] SO THAT'S MY OWN EXPERIENCE.

IF I DID TELL YOU THAT THERE WERE FOUR INCIDENTS, I TAKE THAT BACK AT THIS POINT. THERE WERE INCIDENTS AND THERE WAS AN ELUSION TO INCIDENTS. BUT THE FOCUS WAS ON THIS GUY GETTING ATTACKED IN JUDGE LEWIS'S COURT BECAUSE A GUY—I THINK THE POINT THE MARSHAL WAS TRYING TO MAKE IS, "WE CAN'T PREDICT WHO THE VIOLENT GUYS ARE GOING TO BE. WE CAN'T."

MS. MILLER: YOUR HONOR, I THINK THAT THE EXAMPLE OF SOMEONE BEING ATTACKED IN JUDGE LEWIS'S COURT, THAT'S A GREAT EXAMPLE RIGHT THERE. I BELIEVE WE SUBMITTED A DECLARATION FROM AN ATTORNEY WHO WITNESSED THAT.

I ASSUME THERE'S ONLY ONE INCIDENT OUT IN EL CENTRO, SO WE MUST BE TALKING ABOUT THE SAME INCIDENT. WE SUBMITTED A DECLARATION, AND THE DECLARATION SAYS THAT THE INDIVIDUAL WAS IN BRIGHTLY COLORED CLOTHING AND IT LOOKED LIKE HE WAS ON OF THE PEOPLE WHO TYPICALLY SEPARATED OUT FROM EVERYONE ELSE, AND YET THAT PERSON WAS BROUGHT OUT WITH EVERYONE ELSE.

THE COURT: YOU THINK HE WAS A SEPARATEE, THEN?

MS. MILLER: THAT'S MY BELIEF, YEAH.

SO THIS IS THE KIND OF THING THAT'S SORT OF A FINE GRAIN FACTUAL ANALYSIS WHICH INCIDENT REPORT, WHICH THE

MEMOS AND THE DATA UNDERLYING THE POLICY WOULD ALLOW US TO ACTUALLY TEST WHAT THEY'RE SAYING. INSOFAR AS WE ARE ABLE TO GATHER DATA AND TO GATHER SORT OF FACTUAL DISPUTES, I THINK WE HAVE—

[89]

THE COURT: WALK ME FORWARD, THEN. HOW DOES ANY OF THIS RELATE ULTIMATELY TO THE ISSUE OF WHETHER THIS SHACKLING VIOLATES DUE PROCESS OR DOESN'T. ARE YOU PREPARED TO CONCEDE THAT IF THE INCIDENTS ARE PROVED TO BE TRUE BY INCIDENT REPORTS, THAT THE MARSHALS HAVE JUSTIFICATION FOR THE SHACKLING POLICY? BECAUSE IF YOU'RE NOT, THEN THERE'S NO POINT IN GOING INTO THE INCIDENTS. IF YOU'RE GOING TO CONTINUE TO ARGUE THAT THIS IS A VIOLATION OF DUE PROCESS REGARDLESS OF THE ANECDOTAL EXPERIENCES OF THE MARSHALS, THEN I DON'T SEE ANY REASON TO GIVE YOU INCIDENT REPORTS.

MS. MILLER: SO I THINK WE ACTUALLY ASKED TO HAVE THIS HEARING BE HELD ON FRIDAY WITH THE UNDERLYING MERITS MOTION. I THINK THERE'S A WAY IN WHICH THESE TWO ARE SOMEWHAT INTERTWINED, AND I'M PREPARED TO ARGUE—

THE COURT: WHO WROTE THE DISCOVERY MOTION, YOU?

MS. MILLER: YES.

THE COURT: ALL RIGHT. I DON'T NEED MR. CAHN IF YOU WROTE IT. YOU'RE A VERY TALENTED, SMART LAWYER.

MS. MILLER: I APPRECIATE THE COMPLIMENT, BUT MR. CAHN IS GOING TO BE ARGUING.

THE COURT: LOOK, THIS THING WAS CAPTIONED AS AN EMERGENCY MOTION. AND PART OF THE REASON THAT I'VE SIDESTEPPED THE ISSUE OF PEOPLE THAT AREN'T HERE AND DON'T SEEM TO BE AFFECTED IS IT'S CAPABLE OF REPETITION. TOMORROW'S ANOTHER COURT DAY. I ASSUME IT'S GOING TO BE REPEATED. SO [90] ALL OF THAT HAS A SENSE OF URGENCY TO IT, THAT THE COURT SHOULD—THIS IS AN UNCONSTITUTIONAL PRACTICE. I SHOULD STOP IT IMMEDIATELY BECAUSE IT IS AN EMERGENCY.

SO AS THINGS GO, I THINK THE DISCOVERY NEEDS TO COME BEFORE THE HEARING IF THERE'S A RIGHT TO DISCOVERY. THAT'S WHY I JOINED THESE TWO ISSUES TODAY. FUNDAMENTALLY, CAN I DECIDE IT AND THEN IS THERE ANY RIGHT TO DISCOVERY? AND THEN LET'S GET TO THE MERITS, BUT LET'S DO SO VERY PROMPTLY BECAUSE YOUR OFFICE AND MR. CAHN HAVE SAID THIS IS AN EMERGENCY.

MS. MILLER: YOUR HONOR, I THINK THE ULTIMATE ISSUE IS IS THE POLICY RELATED TO—REASONABLY RELATED TO A LEGITIMATE LAW ENFORCEMENT INTEREST IN THE

INTEREST OF SECURITY AND SAFETY, BUT IS THE POLICY AS CRAFTED REASONABLY RELATED TO WHAT THAT INTEREST IS? AND THAT'S WHY WE NEED THE INCIDENT REPORTS OVER TIME. NOT JUST THE INCIDENT REPORTS OVER TIME, BUT SORT OF HOW MANY INCIDENTS HAVE THERE BEEN OVER—I WROTE A TEN-YEAR PERIOD, BUT EVEN IF IT'S A FIVE-YEAR PERIOD. THEY COULD ASK THE SUPERVISORS TO SEND THEM THE REPORTS.

THE COURT: IF YOUR UNDERSTANDING IS THAT THIS POLICY WAS PROMULGATED AND FIRST PUT INTO EFFECT NATIONALLY IN 2011, WHY WOULD WE EVEN GO BEYOND THAT? WHY WOULDN'T WE SAY, "SINCE 2011, TELL US WHAT'S HAPPENED," INASMUCH AS OUR COURT DIDN'T SIGN ON IN 2011. THERE WOULD BE A COUPLE YEARS OF ANECDOTAL EXPERIENCE TO SEE HOW THE POLICY'S WORKING IN [92] PRACTICE.

MS. MILLER: THIS IS SORT OF WHERE THERE'S TWO ISSUES. ONE IS THE MARSHALS' NATIONAL POLICY. I UNDERSTAND THAT THE MARSHALS ARE AN AGENCY. THEY HAVE POLICIES. THEY PROMULGATE THEIR POLICIES. SOME OF THOSE POLICIES GET DEFERENCE. SOME OF THOSE POLICIES DON'T GET DEFERENCE.

THIS COURT IS AN ARTICLE 3 COURT. I DON'T NEED TO REMIND YOU, OF ALL PEOPLE. ULTIMATELY, YOUR DECISION—THIS COURT'S DECISION IS BASED ON OUR ARGU-

MENT AND WHAT—I ASSUME THE COURT'S ULTIMATE DECISION IS GOING TO BE BASED ON THE CONSTITUTION, ALTHOUGH TAKING INTO ACCOUNT THAT ONE FACTOR, THE MARSHALS' NATIONAL POLICY AND TO THE EXTENT THAT IT'S REASONABLY RELATED TO THE SITUATION ON THE GROUND HERE.

NOW, INSOFAR AS THERE'S A CLAIM BY THE MARSHALS OR BY THE COURT THAT THERE'S KIND OF A CHANGING DEMOGRAPHIC OR CHANGING—INCREASE IN VIOLENCE OR SOMETHING LIKE THAT, THAT'S A CLAIM THAT WE DISPUTE. SQUARELY, WE DISPUTE IT. AND THAT'S BASED ON OUR INSTITUTIONAL KNOWLEDGE, OUR SORT OF DISCUSSIONS IN OUR OFFICE. WE PAY ATTENTION TO THESE THINGS. I'M SURE THE COURT UNDERSTANDS. WE PAY ATTENTION TO WHO ARE OUR CLIENTS?

THE COURT: YOU HAVEN'T DISCERNED ANY UPTICK IN VIOLENCE OR IN-COURT INCIDENTS? IS THAT WHAT YOU'RE SAYING?

MS. MILLER: WE HAVE NOT DISCERNED THAT. WE REPRESENT ACTUALLY—

[92]

THE COURT: 50 PERCENT OF THE PEOPLE; RIGHT?

MS. MILLER: 50 PERCENT OF THE PEOPLE. AND NOT JUST THAT. WE REPRESENT ALMOST EVERYONE AT INITIAL APPEARANCES. SO AT THE INITIAL STAGE, WE TALK TO, ALBEIT VERY BRIEFLY IN MANY CASES,

EVERY SINGLE—ALMOST EVERY SINGLE DEFENDANT IN THIS DISTRICT, AND THEN WE ARE ASSIGNED ABOUT HALF OF THEM, WHICH SEEMS LIKE A FAIR—HUNDREDS—REALLY, THOUSANDS OF CASES. WE DO HAVE SOME INSTITUTIONAL OBSERVATIONS ABOUT WHAT'S THE DEMOGRAPHIC, WHETHER PEOPLE ARE INCREASINGLY VIOLENT, THE NATURE OF THE CASES THAT ARE BROUGHT IN THIS DISTRICT.

THE COURT: YOU THINK NO?

MS. MILLER: WE THINK NO.

THE COURT: WHAT DO YOU WANT, RECIPROCAL DISCOVERY?

MR. COLE: WHAT I WAS GOING TO SAY, YOUR HONOR, IS YOU'RE NOT GOING TO FIND ANYWHERE IN THE DECLARATION WE SUBMITTED AN ASSERTION ABOUT THE MIXED DEMOGRAPHICS—CHANGED DEMOGRAPHICS OF THE PEOPLE COMING THROUGH. THAT'S NOT SOMETHING WE'RE RELYING ON. THEY MIGHT HAVE BEEN MENTIONED BY MARSHAL STAFFORD TO THE COURT. WE'RE NOT RELYING ON THAT AT THIS STAGE. I THINK IT'S TRUE—I THINK MOST JUDGES WHO HAVE SAT IN THIS COURTROOM LONG ENOUGH WOULD PROBABLY REFLECT THEMSELVES THE PSR'S AS TO THE TYPE OF CRIMINAL HISTORIES THAT COME THROUGH THE COURTROOM AND WHETHER IT'S CHANGED OVER TIME, BUT MAYBE NOT. THE JUDGES WOULD KNOW.

[93]

THE COURT: MY OWN EXPERIENCE IS IT'S DIFFERENT, BUT IT'S DIFFERENT BECAUSE THE CHARGING POLICY OF THE U.S. ATTORNEY HAS CHANGED OVER TIME. THEY FOCUS NOW ON AGGRAVATED FELONS, FOR EXAMPLE, FOR THE 1326 CASES WHERE 25 YEARS AGO ECONOMIC MIGRANTS WERE BEING CHARGED WITH MISDEMEANORS. THOSE GUYS WERE NOT VERY VIOLENT. NOT VIOLENT AT ALL USUALLY.

MR. COLE: WE'RE NOT—WE DON'T RELY ON THAT ONE DECLARATION. WE DO MENTION THAT THERE'S BEEN AN INCREASING NUMBER OF SECURITY INCIDENTS. THEY SHOW LIKE THIS IS A FISHING EXPEDITION, WHAT IF THE SEVEN INCIDENTS—WHAT IF THEY DISCOVERED IT WAS SIX INSTEAD OF SEVEN OR FIVE INSTEAD OF SEVEN?

THE COURT: I DON'T THINK IT WOULD MAKE A DIFFERENCE.

MR. COLE: WHAT IMPACT WOULD THAT HAVE ON ANYTHING?

THE COURT: NONE.

MR. COLE: IT'S NOT—EXACTLY. AND SO THE ISSUE IS SIMPLY—BOILED DOWN TO ITS ESSENCE ON THE MERITS SIMPLY, CAN A COURT ALLOW A MARSHAL TO DECIDE TO PUT THEM IN SHACKLES IN THE FIRST INSTANCE AND THEN TELL THE MARSHAL, "TAKE THE SHACKLES OFF." THAT'S THE ONLY ISSUE. IT'S NOT GOING TO DEPEND ON WHETHER

THERE WERE FOUR OR FIVE OR WHAT HAPPENS IN GUAM OR WHAT HAPPENS IN NEW YORK.

AND SO I THINK THAT THIS IS A CRIMINAL CASE. IT ISN'T A CIVIL ACTION FOR INJUNCTIVE RELIEF TO CHARGE [94] CONDITIONS OF CONFINEMENT OR SOMETHING ELSE. AND THERE IS NO BASIS FOR THE DISCOVERY THAT'S BEING REQUESTED, WHICH WON'T EVEN GET TO THE ISSUE ANYWAY, WHICH IS A VERY SIMPLE ONE.

DOES THE MARSHAL HAVE TO BE TOLD IN EVERY CASE BEFOREHAND WHETHER THE PERSON COME OUT WITH SHACKLES OR NOT OR CAN THE JUDGE TELL THE MARSHAL AFTER THE PERSON COMES OUT WITH SHACKLES? THAT'S REALLY THE ULTIMATE QUESTION. AND NONE OF THIS DISCOVERY REQUESTED GOES TO THAT LEGAL ISSUE. AND SO—

THE COURT: ACTUALLY, THE POLICY PERMITS BOTH OF THOSE THINGS. IF I'M RIGHT OR WHAT I'M BEING TOLD IS CORRECT, JUDGE HUFF HAS MADE THE EXCEPTION THE POLICY IN HER COURT. SO THE MARSHALS ARE TOLD TO BRING EVERYBODY OUT OF SHACKLES IN HER COURT. SO IT'S ACTUALLY A MORE OPEN-ENDED POLICY THAN YOU'VE DESCRIBED.

MR. COLE: WHAT I MEAN, THOUGH, IS THE ONLY REPLACEMENT POLICY THAT COULD POSSIBLY COME OUT OF THIS IS THAT THE

MARSHALS CAN NEVER BRING ANYONE IN SHACKLES. THAT'S THE ONLY REPLACEMENT POLICY. AND THAT ISN'T GOING TO DEPEND ON WHETHER THERE WERE FOUR INCIDENTS OR THREE INCIDENTS.

THE COURT: HERE'S THE THING, MS. MILLER: IF I THOUGHT—

MS. MILLER: MAY I RESPOND?

THE COURT: OF COURSE.

MS. MILLER: YOUR HONOR, WHAT'S HAPPENING IN MAGISTRATE COURT IS EVERY SINGLE DEFENDANT IS BEING BROUGHT [95] OUT IN SHACKLES, FULL RESTRAINTS, FOR EVERY SINGLE HEARING. THIS ISN'T A MATTER OF—AND THE MAGISTRATE JUDGES ARE SAYING THAT THE ONLY TIME THEY WILL REMOVE SHACKLES ARE UNDER WHAT THEY CALL EXTENUATING CIRCUMSTANCES.

THE COURT: LIKE A MEDICAL CONDITION, FOR EXAMPLE, OR—THEY DON'T HAVE CONTESTED HEARINGS DOWN THERE WHERE, FOR EXAMPLE, THE DEFENDANT WOULD NEED TO WRITE A NOTE TO A LAWYER OR SOMETHING LIKE THAT; RIGHT?

MS. MILLER: SOMETIMES THEY DO.

THE COURT: I ASSUME, THEN, THAT THAT MIGHT POSE ONE OF THE EXCEPTIONAL CIRCUMSTANCES, TOO. YOU CAN HARDLY EXPECT SOMEBODY TO WRITE A NOTE—THEY COULD DO IT, BUT IT WOULD BE VERY AWK-

WARD. I WOULDN'T ASK SOMEBODY TO DO THAT.

MS. MILLER: I DON'T THINK IT'S REALLY FAIR TO SAY THAT THE QUESTION IS CAN A COURT TELL THE U.S. MARSHALS SERVICE TO MAKE THE BLANKET RULE THAT THEY HAVE COME TO OUT IN SHACKLES? THERE MAY BE A TIME AND A PLACE WHERE—

THE COURT: THAT'S GOING ON, THOUGH, IF I FOLLOW WHAT YOU'RE SAYING. YOU TELL ME THAT JUDGE HUFF SAYS IN EVERY CASE, NO ONE'S TO BE IN ANY SHACKLES. IS THAT WHAT YOU'RE REPORTING?

MS. MILLER: I CAN ONLY ASSUME, ALTHOUGH THIS IS PURE SPECULATION ON MY PART, THAT IF THERE WERE AN INDIVIDUALIZED DETERMINATION THAT SOMEONE WAS, IN FACT, DANGEROUS, EVEN IN JUDGE HUFF'S COURTROOM, THEY WOULD BE [96] BROUGHT OUT IN SHACKLES.

THE COURT: IS IT THE CASE—ONE OF THE MISCONCEPTIONS IS THAT WE ALL ARE AWARE OF EVERYTHING GOING ON IN THE COURT, BUT THE TRUTH IS QUITE THE OPPOSITE. I DON'T KNOW WHAT'S GOING ON DOWN THE HALL. THE WEEKLY JUDGES' MEETING PROVIDES SOME INFORMATION ON THE HIGHLIGHTS. BUT IT REALLY IS QUITE AUTONOMOUS HERE.

SO IF YOU TELL ME THAT JUDGE HUFF IS IN EVERY CASE SAYING, "TAKE THE SHACKLES OFF," I'LL ACCEPT THAT. BUT I DON'T

KNOW THAT TO BE THE CASE. IS THAT WHAT IS BEING REPORTED TO YOU BY YOUR LAWYERS?

MS. MILLER: THAT'S WHAT'S BEING REPORTED TO US. I HAVE NOT, IN FACT, BEEN IN JUDGE HUFF'S COURTROOM SINCE, BUT THAT'S WHAT'S REPORTED.

AND SO I THINK THAT MR. COLE IS INCORRECT THAT THE ONLY REPLACEMENT POLICY WOULD BE NO SHACKLES UNDER ANY CIRCUMSTANCES. I WOULD REFER THE COURT TO THE *BRANDAU* CASE WHERE I TOOK THE TIME TO READ THROUGH THE DOCKET IN *BRANDAU*, WHICH IS, IN FACT, VERY INTERESTING. I RECOMMEND IT TO YOU IN YOUR COPIOUS FREE TIME.

BUT IN *BRANDAU*, THERE'S A SERIES—WHAT THERE IS THERE ARE A SERIES OF GENERAL ORDERS, BUT THE GENERAL ORDERS MAKE IT INCREASINGLY SPECIFIC HOW THE COURT IS GOING TO HANDLE THE CONSTITUTIONAL OBJECTIONS AND MAINTAIN COURTROOM SECURITY TO THE POINT WHERE ULTIMATELY THEY END UP ISSUING A VERY [97] SPECIFIC METHOD INVOLVING WHAT ARE CALLED PRISON RESTRAINT FORMS, AND THEY LAY IT ALL OUT. THERE'S STATUS REPORTS SIGNED BY BOTH THE FEDERAL DEFENDERS AND THE UNITED STATES ATTORNEY, ULTIMATELY MOVING TO DISMISS THE CASE EVEN THOUGH IT APPEARS THAT THE PARTIES ARE CONTEMPLATING THAT THERE WILL BE SHACKLES IN

CERTAIN CASES, EVEN THOUGHT THEY'RE DISMISSING IT.

THE COURT: ON REMAND?

MS. MILLER: ON REMAND. WE'RE NOT CRAZY. WE'RE ZEALOUS, BUT WE'RE NOT CRAZY. WHAT WE'RE ASKING FOR IS THE—WE'RE ASKING FOR THE DOCUMENTS THAT WOULD ENABLE US TO LAY A RECORD SO THAT WHEN THIS GOES UP ON APPEAL, THIS ISN'T SIMPLY THE SORT OF UNSUBSTANTIATED ASSERTIONS OF PEOPLE WHO PUT THEMSELVES OUT AS EXPERTS.

THE COURT: LIKE THE COURT RELIED ON IN *HOWARD*; RIGHT? DON'T YOU CONCEDED—

MS. MILLER: I HAVEN'T ACTUALLY SEEN THE RECORD IN *HOWARD*.

THE COURT: AND YOU SEE WHAT'S REPORTED THERE. IT WOULD SEEM TO ME IF THIS WAS REALLY AN IMPORTANT POINT IN DECIDING ON THE EFFICACY OF THE POLICY, THE CONSTITUTIONALITY OF THE POLICY, THEY WOULD HAVE MADE AN EFFORT IF THERE WAS MORE INFORMATION IN *HOWARD* TO SAY, "OH, BY THE WAY," TICK, TICK, TICK, TICK, "ALL OF THESE THINGS SUPPORT THE MAGISTRATE JUDGE'S DECISION." THEY DIDN'T. I LOOK AT THAT AND THEN I LOOK AT WHAT'S KNOWN HERE TO YOU, TO ME THAT'S UNDISPUTED, AND [98] IT'S SO MUCH GREATER AND SO MUCH MORE PARTICULAR AND SO MUCH MORE FACTUAL.

CAN I GET BACK TO THE QUESTION I ASKED YOU BEFORE? LET'S ASSUME THAT THERE WERE TWO INCIDENTS—OR NO, NO. THE OPPOSITE. LET'S ASSUME—I DON'T KNOW WHAT NUMBER WE'RE CONTEMPLATING. LET'S SAY I ORDER MR. JOHNSON TO OPEN UP THE FILES AND THERE'S A HUNDRED INCIDENTS.

WOULD YOU SAY, "WELL, A HUNDRED INCIDENTS, THAT SORT OF SUPPORTS THE POLICY. WE'RE GOING TO WITHDRAW OUR DUE PROCESS OBJECTION"? WOULD YOU DO THAT OR WOULD YOU SAY—

MS. MILLER: I'D HAVE TO LOOK AT IT, YOUR HONOR. I'M NOT SURE. THERE COMES A POINT WHERE PERHAPS THE ANSWER WOULD BE YES, BUT I DON'T—I'M NOT GOING TO SAY EXACTLY WHAT THAT POINT IS.

THE COURT: IT'S TOO BAD THAT THAT OFTEN CONDITIONS THE ACCEPTANCE OR AGREEMENT WITH THE POLICY, THAT IT TAKES SOMETHING LIKE A TRAGEDY TO HAVE A CHANGE IN POLICY OR JUSTIFY THE CHANGE IN POLICY. I WOULD HATE TO THINK THAT THAT WOULD BE THE PREREQUISITE TO PROTECT THE PEOPLE IN THE COURT, THAT WE HAVE TO HAVE AN INCIDENT WHERE SOMEBODY GETS KILLED OR SERIOUSLY MAIMED OR EVEN, LIKE I SAID EARLIER, MY LAW SCHOOL CLASSMATE, A CRIMINAL DEFENSE ATTORNEY, GOT SLASHED ACROSS THE FACE BY A GUY. I HATE TO THINK THAT THAT WOULD HAVE TO

HAPPEN BEFORE SOMEBODY WOULD SAY, "WELL, OKAY, NOW THAT THIS HAS HAPPENED, WE'LL DO IT."

[99]

MS. MILLER: AND, YOUR HONOR, GOD FORBID; RIGHT? BUT AT THE SAME TIME, THERE IS A LIBERTY INTEREST. THERE IS SOMETHING THAT IS SACRIFICED.

THE COURT: WHY CAN'T YOU ARGUE THAT NOW?

MS. MILLER: I PERSONALLY AM NOT PREPARED TO ARGUE.

THE COURT: NO, NO, NO. I MEANT THAT IN A GENERIC SENSE. WHY CAN'T MR. CAHN ARGUE THAT ON FRIDAY? HE SEEMS READY TO GO. I'VE READ THE PAPERS ON THAT. IT SEEMS LIKE THAT DISPUTE HAS BEEN—IS FOCUSED AND HE'S READY TO TELL ME THAT THIS CHAIN STUFF VIOLATES DUE PROCESS RIGHT FOR SOME OTHER REASONS THAT MS. CHARLICK ALLUDED TO. I DON'T UNDERSTAND WHY DISCOVERY IS EVEN NECESSARY BECAUSE IT DOESN'T SEEM LIKE IT'S GOING TO CHANGE ANYTHING HERE.

I THINK YOU'RE GOING TO CONTINUE TO OBJECT TO THIS POLICY AND SAY THE SHACKLES ARE TOO MUCH. I NOTE THAT NO ONE HAS TAKEN THE POSITION THAT JAIL CLOTHING IS TOO MUCH, AND YET WHEN IT COMES TO JURIES THE DEFENDANT CAN'T APPEAR IN JAIL CLOTHING EITHER. SHACKLES ARE BEYOND THAT. I ACKNOWLEDGE

THAT. BUT NEITHER OF THOSE THINGS ARE PERMISSIBLE FOR A DEFENDANT IN FRONT OF A JURY, AND YET I HAVEN'T HEARD ANYONE MAKE THE SUGGESTION, "WELL, OUR CLIENTS NEED TO START COMING OUT IN SLACKS AND SPORT SHIRTS OR SUN DRESSES BECAUSE THERE'S REALLY A DUE PROCESS IMPLICATION OF HAVING THEM IN JAIL CLOTHES IN FRONT OF YOU."

[100]

MS. MILLER: YOUR HONOR, THERE'S A MATTER OF DEGREE.

THE COURT: THERE IS.

MS. MILLER: I THINK THAT IT'S PRETTY—TO ME, TO THE UNITED STATES ATTORNEYS HERE IN COURT, I'M SURE EVERYONE—I WOULD IMAGINE EVERYONE WOULD AGREE THAT THERE IS SOMETHING QUITE DIFFERENT ABOUT A DEFENDANT IN FIVE-POINT RESTRAINTS VERSUS A DEFENDANT IN JAIL CLOTHES.

THE COURT: ACTUALLY—AS I SAID, UNTIL SOMEBODY POINTED IT OUT TO ME—LOOK, FOR ONE THING, PEOPLE THAT I HAVE SEEN—I HAVE TO ACKNOWLEDGE I HAVEN'T BEEN DOWN TO MAGISTRATE COURT TO SEE PEOPLE IN FIVE-POINT RESTRAINTS. I'VE SEEN SOME. YOUR CLIENT CAME OUT TODAY—

THAT WAS FIVE-POINT RESTRAINTS; RIGHT?

MS. MILLER: YES.

THE COURT: SO I'M NOT SHOCKED BY SEEING THAT. MOST OF THE PEOPLE THAT I SEE ARE COMING UNDER THE EXCEPTION THAT IS IN THE LETTER THAT MS. CHARLICK ALLUDED TO WHERE THEY'RE NOT IN HANDCUFFS. THEY MAY BE IN LEG CHAINS, WHICH I DON'T SEE. BUT YOUR OFFICE HAS EVEN BEEN OBJECTING TO THE LEG CHAINS AS YOU DID TODAY.

MR. COLE: YOUR HONOR, THE RELIEF SOUGHT IN THEIR MOTION IS THE COURT SHOULD ORDER ALL PRETRIAL DETAINEES TO APPEAR UNSHACKLED ABSENT A DETERMINATION. THAT'S THE POINT I'M MAKING. THAT'S THE RELIEF IN QUESTION. THEY WANT TO [101] REVERSE THE ORDER. THEY WANT EVERY DEFENDANT TO COME UNSHACKLED UNLESS YOU TELL THEM TO PUT SHACKLES ON. THAT LEGAL ISSUE DOESN'T REQUIRE DISCOVERY.

THE COURT: I KIND OF AGREE. LOOK, IT WAS PRE-STAGED IN *HOWARD*. YOU REMEMBER THAT LINE IN *HOWARD*, "THIS MAY GO TOO FAR"? THE ARGUMENT IN *HOWARD* WAS, "YOU'VE GOT TO MAKE AN INDIVIDUALIZED DETERMINATION ON ALL THESE CASES WHERE DUE PROCESS FORBIDS SHACKLING." THEY SAY IN *HOWARD*, "THIS MAY GO TOO FAR." AND THEN THEY POINT OUT THE SECOND CIRCUIT REJECTED THAT EXPRESSLY.

MS. MILLER: YOUR HONOR, *HOWARD* AGAIN WAS REFERRING ONLY TO INITIAL

APPEARANCES WITH LEG CHAINS ONLY. AND I HAVE TO SAY ALTHOUGH I REVIEWED THE DOCKET IN *BRANDAU*, I DID NOT FULLY REVIEW ALL THE PAPERS IN *HOWARD*. I DO NOT KNOW EXACTLY WHAT KIND OF AN INDIVIDUALIZED DETERMINATION THEY WERE REQUESTING. I WOULD POINT OUT THAT IN *BRANDAU*, THEY WERE REQUESTING AN INDIVIDUALIZED DETERMINATION. AND AN INDIVIDUALIZED DETERMINATION WASN'T A FULL-SCALE HEARING WITH WITNESSES AND THE KIND OF—YOU KNOW, THE HEARING THAT TAKES A LONG TIME, BUT SIMPLY A FORM THAT WAS PREPARED—

THE COURT: THEY ASKED FOR AN INDIVIDUALIZED DETERMINATION IN *HOWARD*, TOO. THAT WAS WHAT WAS CONTENDED THERE, WAS A DEVICE. THEY SAID, "LOOK, YOU CAN'T EVEN PUT THE LEG SHACKLES ON."

HERE IT IS. "THEY ARGUED THAT DUE PROCESS REQUIRES [102] THAT THERE BE NO RESTRAINT WHATSOEVER WITHOUT AN INDIVIDUALIZED DETERMINATION." THIS IS AT PAGE 1013. "THIS MAY GO FARTHER THAN DUE PROCESS REQUIRES, BUT WE DO NOT HAVE TO REACH THIS QUESTION." THEN THEY GO ON TO CITE THE SECOND CIRCUIT CASES THAT REJECTED THAT VERY PROPOSITION. THEY SAID NO INDIVIDUALIZED DETERMINATION IS NECESSARY. IT'S SUFFICIENT FOR THE COURT TO RELY ON THE MARSHALS.

IT WAS FRONT AND CENTER IN *HOWARD*. I DON'T KNOW. THIS ISN'T A HOLDING. THAT IS DICTA. I ACKNOWLEDGE THAT. BUT IF I WERE ON YOUR SIDE OF THE ARGUMENT ON THIS, I WOULD SAY IT DOESN'T LOOK LIKE THE NINTH CIRCUIT IS BUYING INTO THAT. THAT'S WHAT *HOWARD* BESPEAKS TO ME.

MS. MILLER: THE NINTH CIRCUIT DIDN'T BUY INTO IT IN *HOWARD* AS TO THE LIMITED CIRCUMSTANCES OF LEG CHAINS AT INITIAL APPEARANCES. AND REGARDLESS OF HOW THOROUGH THE RECORD WAS IN THAT CASE, THERE WAS ENOUGH OF A RECORD FOR THEM TO—SOME OF THE SPECIFIC FACTS THEY CITED TO WERE THE STAFFING SHORTAGES, THE PRISONER MANAGEMENT, THE RISK OF ESCAPING, VIOLENCE IN VARIOUS LOCATIONS, AS WELL AS THE SPECIFICS OF INITIAL APPEARANCES IN A LARGE ROOM ON THE THIRD FLOOR COURTHOUSE—THE THIRD FLOOR OF THE ROYABLE (PHONETIC) COURTHOUSE IN—EXCUSE ME. THEY WERE MAKING DIRECT CITATION TO THE PARTICULAR CIRCUMSTANCES OF THAT CASE. I THINK THAT THAT SHOWS THAT THE RECORD MATTERS. THE RECORD IS IMPORTANT. AND THEN—

[103]

THE COURT: YOU DON'T KNOW THAT THEY HAD DISCOVERY; RIGHT? YOU DON'T KNOW THAT THAT WASN'T JUST ALL ANECDOTAL AND ACCEPTED?

MS. MILLER: I DON'T KNOW, YOUR HONOR. I HAVEN'T LOOKED AT WHAT HAPPENED IN THE LOWER COURT.

THE COURT: I TEND TO THINK IT WAS.

ANYWAY, I THINK I HAVE YOUR POSITION ON THIS, MS. MILLER. ANYTHING ELSE?

MS. MILLER: JUST—I THINK I HAVEN'T QUITE MENTIONED IT BEFORE. WE'RE GOING BACK TO—YOU WERE ASKING ABOUT WHAT ARE THE FACTUAL DISPUTES. I REFERRED TO OUR INSTITUTIONAL EXPERIENCE AND THINGS. I JUST WANTED TO ADD ON TO THAT THAT OUR INSTITUTIONAL EXPERIENCE IS INDEED THAT THE OVERWHELMING MAJORITY OF OUR CLIENTS WHO ARE DETAINED OR WHO REMAIN IN CUSTODY ARE EITHER DETAINED DUE THE RISK OF FLIGHT OR SOMETIMES A RATHER HIGH BOND THAT THEY ARE UNABLE TO MEET OR THAT THEY'RE IN CUSTODY ON IMMIGRATION.

THE COURT: THAT DOESN'T NECESSARILY CREATE A DISPUTE. I CAN ACCEPT THAT AS A PROFFER. IN FACT, IT SEEMS CONSISTENT WITH MY OWN EXPERIENCE, TOO, THAT THAT'S THE REASON THAT A LOT OF PEOPLE ARE IN CUSTODY, MOSTLY BECAUSE THEY HAVE NO LEGAL RIGHT TO BE IN THE UNITED STATES.

MS. MILLER: INSOFAR AS ONE OF THE CLAIMS OF PART OF WHY THIS POLICY IS BEING PUT INTO PLACE IS BECAUSE OF CONCERNS ABOUT VIOLENCE BOTH WITH—

DEFENDANT-ON-DEFENDANT VIOLENCE AS [104] WELL AS CONCERNS ABOUT VIOLENCE AGAINST SOMEONE IN COURT.

THE PEOPLE WHO ARE DETAINED ARE NOT SO DIFFERENT FROM THE PEOPLE WHO ARE OUT ON BAIL. THEY'RE POORER OR THEY'RE NOT FROM THE UNITED STATES. BUT THOSE TWO FACTORS HAVE NOTHING TO DO WITH THEIR PROPENSITY FOR VIOLENCE. THAT'S THE POINT.

THE COURT: I SOMETIMES—YOU KNOW, I'LL TELL YOU ONE OTHER THING THAT WAS SAID. THIS WAS JUST SAID IN PASSING WHEN THE WHOLE SHACKLING ISSUE HAS ARISEN IN FRONT OF ME. ONE OF THE DEPUTY MARSHALS WHO'S HERE WAS ACTUALLY THE VICTIM OF AN ATTACK. SO THIS IS A SETTING THAT I'M PERSONALLY FAMILIAR WITH. HE WAS A VICTIM OF AN ATTACK. HE SAID, "GUESS WHO ATTACKED ME. SOME GUY WHO CAME THROUGH THE BACK DOORS IN A BUSINESS SUIT." HE GOT MAD ABOUT SOMETHING. IT WASN'T IN FRONT OF ME, SO I DON'T KNOW. THIS WAS JUST HIM TELLING ME, RELATING THE INCIDENT. BUT ACTUALLY MAYBE THAT'S AN ARGUMENT FOR MAKING SURE THAT EVERYBODY WHO APPEARS THAT'S A DEFENDANT GETS SHACKLED.

MS. MILLER: YOUR HONOR, I PROPOSE THAT I SHOULD BE APPEARING BEFORE YOU IN SHACKLES.

THE COURT: WHY YOU? WHY WOULD WE DO THAT? YOU HAVEN'T COMMITTED ANY FELONY. THAT'S KIND OF WHAT'S MISSING HERE, IS THAT THE COMMISSION OF A FELONY OR PROBABLE CAUSE TO BELIEVE THAT, I'M GETTING ARGUMENT—THIS IS A LITTLE WEIRD. I HAVE TO TELL YOU. I'M GETTING ARGUMENT IN CASES WHERE [105] PEOPLE HAVE PLED GUILTY TO A FELONY. AND WE'RE JUMPING AHEAD A LITTLE BIT. OR THE ARGUMENT'S EVEN BEING MADE IN SUPERVISED RELEASE VIOLATIONS. AND I WOULD THINK THAT THE PROCESS DUE AFTER ADJUDICATION OF GUILT IS LESS THAN WHAT'S DUE TO SOMEBODY WHO HAS NOT BEEN ADJUDICATED GUILTY.

THE QUESTION THEN ON THE MERITS, MS. MILLER, BECOMES THIS IS A GROSS DEVIATION FROM SOCIETY'S NORM, SOMETHING THAT WE DENOMINATE AS FELONY CONDUCT. AND WE HAVE PEOPLE PLEADING GUILTY TO IT. THE SUGGESTION THAT, "OH, IT'S TERRIBLE TO RESTRAIN SOMEBODY LIKE THAT OR TAKE SOME PRECAUTIONS," I DON'T THINK THAT'S SO TERRIBLE. I HONESTLY DON'T.

NOW, REASONABLE MINDS CAN DIFFER. AND NO ONE, I SUPPOSE, HAS EVER ACCUSED ME OF BEING A CIVIL LIBERTARIAN. BUT I HAVE RESPECT FOR RIGHTS AND LIBERTIES. YOU'VE HEARD ME SAY TO PEOPLE BEFORE, "I DON'T ENJOY SENDING PEOPLE TO JAIL. I KNOW WHAT AN ASSAULT ON LIBERTY THAT

IS." BUT THE REALITY IS AND THE POINT IS THAT THE TWO THINGS KIND OF GO TOGETHER. FELONY CONDUCT AND GOING TO JAIL AND BEING RESTRAINED WHEN YOU'RE ARRESTED, THESE PERP WALKS THAT THEY DO SOMETIMES WITH HIGH-PROFILE PEOPLE, ALL OF THAT KIND OF COMES WITH THE TERRITORY.

AND THE SUGGESTION HERE—THE UNDERLYING SUGGESTION IS THIS IS SO BENEATH THE DIGNITY OF THE COURT, I JUST DON'T SEE THAT. FOR MOST JUDGES, I THINK IT'S LIKE WHITE NOISE. I'M MUCH MORE LIKELY TO NOTICE A NEW DRESS THAT MS. CHARLICK [106] IS WEARING OR YOU'RE WEARING OR, BETTER EXAMPLE, MR. GELLER, THE FASHION PLATE HE IS, I ALWAYS NOTICE LIKE A POCKET SQUARE. I'M MUCH MORE LIKELY TO PAY ATTENTION TO THAT THAN WHO'S IN SHACKLES AND WHO'S NOT. THAT'S JUST THE WAY IT IS FROM MY PERSPECTIVE.

MS. MILLER: IF I MAY?

THE COURT: OF COURSE.

MS. MILLER: TO THE SPECIFIC ISSUE OF THE FACTUAL DISPUTE, YOUR HONOR, I THINK WE WOULD ALSO DISPUTE THAT THE PRESENT SHACKLING POLICY IS THE LEAST-RESTRICTIVE MEANS IN ESTABLISHING SECURITY. AND AGAIN, THIS WOULD BE PART OF WHY WE NEED THE EVIDENCE ON WHICH THE DECLARATION WAS BASED.

THE COURT: ALL THAT PRESUMES THAT THEY HAVE TO USE THE LEAST-RESTRICTIVE MEANS. I'M NOT AWARE OF ANY COURT CASE THAT SAYS THAT THAT'S THE REQUIREMENT IN THIS CONTEXT.

MS. MILLER: I THINK MR. CAHN WILL GO THROUGH—WILL BE ARGUING.

DO YOU MIND?

THE COURT: NO, NO.

MS. MILLER: I'M SO SORRY. I FEEL LIKE I'VE BEEN INTERRUPTING YOU THIS WHOLE TIME. I APOLOGIZE.

THE COURT: ACTUALLY, IT'S THE OTHER WAY AROUND. BUT IT'S A LIVE BENCH HERE, AND I HAVE QUESTIONS AND I WANT TO HAVE THOSE ANSWERED. SO I'VE BEEN INTERRUPTING YOU. PLEASE CONTINUE.

[107]

MS. MILLER: I JUST WANTED TO ALSO NOTE THAT WE ARE ALSO DISPUTING THAT THERE IS AN INSUFFICIENT—THE CLAIM THAT THERE IS AN INSUFFICIENT LEVEL OF SECURITY SCREENING PRIOR TO APPEARANCES IN COURT. THIS IS NOTED IN THE MAIN SET OF BRIEFINGS.

THE COURT: TELL ME WHAT THE CLAIM IS AGAIN. IT'S INSUFFICIENT—

MS. MILLER: I THINK IT'S DOUBLE-NEGATIVE. THAT'S WHY IT SOUNDED CON-

FUSING. THE POINT IS THAT THE—OUR DISTRICT—EXCUSE ME.

THE COURT: DO YOU WANT A COUGH DROP?

MS. MILLER: IT WON'T HELP, YOUR HONOR. I APOLOGIZE FOR COUGHING.

THE REPORTER: IT WILL HELP.

THE COURT: IT ALWAYS HELPS ME.

MS. MILLER: THANK YOU.

YOUR HONOR, BASED ON THE RULE 5 LITIGATION THAT—THE RULE 5 LITIGATION, THAT'S THE *NUMERO ROJAS* CASE—

THE COURT: YEAH. IN FRONT OF MOSKOWITZ, YOU MEAN?

MS. MILLER: THAT'S THE CASE IN FRONT OF JUDGE MOSKOWITZ. WE KNOW FROM THAT CASE THAT THERE IS A VERY DIFFERENT SET OF PROCEEDINGS—OR PROCEDURES THAT TAKE PLACE IN THIS DISTRICT WHEN DEFENDANTS ARE COMING FROM THE MCC'S IN OTHER DISTRICTS.

IN THIS DISTRICT, UNLIKE OTHER DISTRICTS, DEFENDANTS [108] ARE NOT BROUGHT DIRECTLY TO COURT FOR THEIR INITIAL APPEARANCE. THEY'RE FIRST TAKEN TO THE MCC. THEY'RE SEARCHED BEFORE THEY'RE BROUGHT HERE FROM THE MCC. THEY'RE GIVEN VARIOUS EXAMINATIONS. IT HAPPENS ALL THE TIME IN MAGISTRATE COURT THAT SOMEONE IS—THEY'VE BEEN ARRESTED, BUT

THEY'RE NOT YET BROUGHT TO COURT BECAUSE THEY'RE BEING TAKEN TO THE HOSPITAL OR DETOX OR WHATEVER.

THE COURT: DON'T WE HAVE A RULE IN THIS COURT THAT THEY'VE FOR TO GO THROUGH THE MCC BEFORE THEY COME HERE?

MS. MILLER: INDEED.

THE COURT: YOU CAN'T BRING PEOPLE THROUGH THE BACK DOOR?

MS. MILLER: RIGHT. SO THIS IS THE WAY IN WHICH OUR DISTRICT AGAIN—WE'RE DISPUTING THE CLAIM THAT THERE'S SOMEHOW AN INSUFFICIENT LEVEL OF SECURITY SCREENING ALREADY IN PLACE BEFORE—

THE COURT: HOW WOULD DISCOVERY SPEAK TO THAT, INFORM THAT AT ALL? THAT SOUNDS LIKE IT'S JUST AN ORDINARY DISPUTE, AND I CAN—LOOK, I KNOW WHAT YOU SAID TO BE TRUE. SOME TIME AGO BEFORE I WAS EVEN ON THE COURT, A RULE CAME ABOUT THAT SAID, "DON'T BRING PEOPLE DIRECTLY INTO COURT. TAKE THEM THROUGH THE MCC FIRST," AND THAT'S BEEN A CHALLENGE WITH THE RULE 5 REQUIREMENTS. JUDGE MOSKOWITZ HAS NOW RULED ON THAT AND ESTABLISHED PROCEDURES. NONE OF THAT'S IN DISPUTE. YOU CAN SAY, "LOOK, THAT MAKES US DIFFERENT." NO [109] ONE'S GOING TO DISPUTE THAT.

MS. MILLER: WELL, IT'S MY UNDERSTANDING THAT THE MARSHALS ARE MAKING —ARE SAYING TO THE COURT AND THAT THE COURT IS ACCEPTING THAT IN A SENSE IT'S WORKING.

THE COURT: NO, NOT THAT I'M AWARE OF. IF THAT'S IN THE DECLARATION—

MR. COLE: NO.

THE COURT: THAT WAS NOT PART OF THE PRESENTATION.

MS. MILLER: I GUESS IMPLICIT IN THE CLAIM THAT THERE'S BEEN AN INCREASE IN THE NUMBER OF THINGS SMUGGLED INTO THE COURT IS THAT THE SECURITY SCREENING IS INSUFFICIENT. AND SO WE'RE POINTING TO THE SECURITY SCREENING AND SAYING THAT IT APPEARS TO US, BASED ON THE INFORMATION WE HAVE WHICH I ADMIT IS LIMITED—AND THAT'S, AGAIN, WHY WE'RE ASKING FOR THE SUBPOENAS—THAT THE SECURITY SCREENING DOES APPEAR TO BE SUFFICIENT. WE COULD BE WRONG. I THINK WE'RE RIGHT. BUT I ADMIT THE POSSIBILITY THAT WE'RE RELYING ON FACTS THAT ARE INCORRECT. THAT'S WHY WE WANT THE SUBPOENAS.

THE COURT: I WISH YOU WOULD TELL ME THAT IF THE SUBPOENAS PROVE SOMETHING THAT YOU DON'T THINK TO BE TRUE, WHICH IS THERE'S LIKE A HUNDRED INCIDENTS, WAY MORE THAN WE KNOW, YOU'RE GOING TO SAY, "OH, OKAY." FEDERAL DEFENDERS IS

GOING TO SAY, "OH, I GET IT NOW. THIS IS COMPLETELY JUSTIFIED. I WOULDN'T WANT TO BE A MARSHAL WITH ALL THESE INCIDENTS GOING ON. IT WOULD SCARE THE HELL OUT OF ME." I [110] WISH YOU'D SAY THAT, BECAUSE THEN I COULD SAY, "WELL, OKAY, DISCOVERY MIGHT BE USEFUL."

BUT HERE'S THE—AND I'M NOT SUGGESTING YOU'RE INTRANSIGENT ABOUT THIS, BUT I HONESTLY DON'T THINK IT'S GOING TO MAKE A DIFFERENCE. I THINK YOU'RE STILL GOING TO OBJECT, AS MR. COLE POINTS OUT, TO ANY SHACKLING WITHOUT AN INDIVIDUALIZED DETERMINATION IN EACH CASE.

AND I JUST DON'T THINK DISCOVERY—I'LL BRING THIS BACK TO THE FOCUS OF THIS MOTION. NOT THE MERITS MOTION, BUT THIS MOTION. I JUST DON'T THINK DISCOVERY INFORMS THAT.

ANYWAY, I HAVE YOUR POSITION, MS. MILLER. I APPRECIATE IT.

MS. MILLER: MAY I—

THE COURT: SURE, SURE, SURE.

MR. COLE: I JUST WANT TO MENTION THAT THE TYPE OF SCREENING THAT GOES ON IS WELL KNOWN TO EVERYONE BECAUSE OF *NUMERO-ROJAS* LITIGATION. THERE ARE DECLARATIONS ABOUT IT, HEARINGS ABOUT IT. IT'S NOT DISPUTED.

THE QUESTION IS NOT WHETHER THAT SCREENING IS GOOD OR WHETHER IT'S MORE

OF A—THE QUESTION IS SIMPLY RAISED IN THE DECLARATION—OR THE ISSUE RAISED IN THE DECLARATION IS SIMPLY THAT THAT SCREENING IS NOT PERFECT, THAT IT DOESN'T ELIMINATE ALL THE—

THE COURT: RIGHT.

MR. COLE: WE ADMIT IN OUR RECORD—IN OUR [111] DECLARATION—IN OUR MOTION, THE RESPONSE, WE ADMIT THAT THEY ARE STRIP SEARCHED BEFORE THEY COME INTO THIS COURTHOUSE. BUT NEVERTHELESS, RAZOR BLADES, OTHER WEAPONS.

THE COURT: I KNOW. I KNOW.

MR. COLE: AND SO THERE IS NO FACTUAL DISPUTE, I BELIEVE, OVER SCREENING.

THE COURT: HOW'S THE COUGH DROP WORKING?

MS. MILLER: WE'LL SEE. GIVE IT TIME.

YOUR HONOR, I WOULD JUST RAISE—THE FIRST IS THAT I DO ACTUALLY BELIEVE THAT THERE ARE CASES WHICH REFER TO THE LEAST-RESTRICTIVE MEANS. AND I DON'T—I CANNOT TELL YOU WHAT IT IS, BUT MY MEMORY SAYS THAT THERE ARE ACTUALLY CASES WHICH REFER TO THAT.

THE COURT: IN THE CONTEXT OF IN-COURT PROCEEDINGS?

MS. MILLER: YES. I CAN'T GIVE YOU A CITATION. I DON'T RECALL. I SHOULD HAVE BROUGHT IT, BUT I DIDN'T.

THE COURT: HERE'S WHAT I READ IN PREPARATION FOR THIS HEARING: I KNOW THAT WHEN THE STANDARD IS WHETHER YOU'RE GOING TO SHACKLE A DEFENDANT IN FRONT OF A JURY, YOU MUST EXPLORE ALL OTHER ALTERNATIVES. IN THAT RESPECT, THERE IS A REQUIREMENT OF THE LEAST-RESTRICTIVE MEANS IN FRONT OF THE JURY. SO I KNOW THAT THAT IS THE STANDARD THERE.

BUT I'M ALSO AWARE THAT THIS CIRCUIT AND OTHER CIRCUITS HAVE SAID, "WE'RE NOT GOING TO IMPORT DUE PROCESS STANDARDS IN FRONT OF A JURY TO IN-COURT PROCEEDINGS IN FRONT [112] OF A JUDGE. WE SEE A BIG DIFFERENCE."

IN FACT, THE *HOWARD* AND *ZUBER* REFER TO A PRESUMPTION THAT IT'S DIFFERENT, A PRESUMPTION WHICH IS RECOGNIZED THROUGHOUT THE CASE LAW. I'M CHRONICLING UPDATES WITH MR. SCOTT TO THIS BOOK WE PUT OUT, AND I JUST FOUND A CASE JUST THIS YEAR WHICH MAKES THE POINT IN ANOTHER CONTEXT, *U.S. VS. PRESTON* AT 706 FED. 3D 1106, 1120.

THERE WAS AN ARGUMENT IN THIS CASE THAT THE GOVERNMENT ENGAGED IN MISCONDUCT DURING THE TRIAL IN ARGUMENT. BUT IT WAS A COURT TRIAL, NOT A JURY TRIAL. SO THE COURT SAYS THIS: "EVEN IF THE MISCONDUCT OCCURRED, THE DEFENDANT HASN'T SHOWN MORE PROBABLY THAN NOT THAT IT AFFECTED THE FAIRNESS OF

THE TRIAL. THIS, AFTER ALL, IS A BENCH TRIAL IN WHICH THE JUDGE WAS THE TRIER OF FACT. THE RISK OF IMPROPERLY INFLUENCING A JUDGE BY PLACING"—IN THIS CASE, IT'S VOUCHING OR THE PRESTIGE OF THE GOVERNMENT IN FAVOR AGAINST WITNESSES, IS FAR LESS THAN IN AN JURY TRIAL.

AND THEN THEY ALSO CITE FAVORABLY THIS PRESUMPTION FROM AN EARLIER NINTH CIRCUIT CASE *DEDMORE*, D-E-D-M-O-R-E, VS. UNITED STATES, 322 FED. 2D 938, 946, NINTH CIRCUIT, 1963, THIS PARENTHETICAL: "IT'S TO BE PRESUMED THAT DISTRICT JUDGES CONSIDER ONLY MATERIAL AND COMPETENT EVIDENCE IN ARRIVING AT THEIR FINDINGS."

SO MY POINT ABOUT THIS IS NOT THAT IT'S DIRECTLY ON POINT. IT'S NOT. BUT SORT OF RUNNING THROUGH JURISPRUDENCE [113] IS THE IDEA THAT JUDGES ARE NOT THE EQUIVALENT OF LAY JURORS. AS PART OF THE TRAINING THAT GOES INTO BEING A JUDGE IS LEARNING TO COMPARTMENTALIZE, LEARNING WHAT NOT TO TAKE INTO CONSIDERATION.

LOOK AT RULE 32. RULE 32 IS ANOTHER EXPLICATION OF THAT; THAT WHEN THERE'S A DISPUTE AT SENTENCE, YOU SAY, "IT DIDN'T HAPPEN THIS WAY. WE DON'T WANT YOU TO BE INFLUENCED BY THIS," A JUDGE CAN EITHER HOLD A HEARING, RIGHT, OR THE JUDGE CAN SAY, "I'M NOT GOING TO CON-

SIDER IT." AND WE TRUST THAT WHEN THE JUDGE SAYS, "I'M NOT GOING TO CONSIDER THAT," HE'S NOT GOING TO CONSIDER THAT.

NOW, WE WOULDN'T SAY THAT TO A JURY. WE WOULDN'T SAY, "WE'RE GOING TO GIVE YOU ALL THIS CONTAMINATING INFORMATION, BUT WE WANT YOU TO TELL US WHETHER YOU CAN PUT THIS OUT OF YOUR MIND." WE DON'T TRUST THAT BECAUSE THEY'RE NOT TRAINED AT IMPARTIALITY. THEY DON'T PRACTICE THAT ON A DAILY BASIS. THERE'S JUST SOME THINGS THAT WE THINK THAT THEY ARE NOT TO BE EXPOSED TO.

SO MY POINT ABOUT THIS IS—AND AGAIN, THIS GOES TO THE MERITS. IN THE END, YOU KNOW, WHETHER THIS SHACKLING REALLY SUPPORTS AN ACCUSATION OF THERE'S SOME KIND OF IMPLICIT BIAS ON THE PART OF THE COURT THAT SEES SOMEBODY IN SHACKLES OR JAIL GARB, FOR THAT MATTER, I THINK THAT'S A HARD SELL.

AND WHEN I LOOKED AT IT IN THE CONTEXT OF WHAT YOU'RE ASKING ME FOR, DISCOVERY, I REALLY DON'T THINK [114] DISCOVERY INFORMS THAT. THAT'S GOING TO BE KIND OF A VALUE-LADEN JUDGMENT WITH PEOPLE WHO HAVE DIFFERENT IDEAS ABOUT WHAT PROCESS IS DUE WILL BRING TO THE FORE. AND MAYBE MY IDEA IS DIFFERENT FROM THREE JUDGES ON THE NINTH CIRCUIT ABOUT WHAT PROCESS IS DUE AT THIS POINT, BUT THAT'S TO BE DETERMINED WITH THE ERUDITE, MR. CAHN.

ANYWAY, THANK YOU.

WAS THERE SOMETHING ELSE?

MS. MILLER: THERE WAS. I DON'T MEAN TO DRAG IT OUT. BUT, YOUR HONOR, I THINK ULTIMATELY IF WHAT THE COURT IS GOING TO RELY ON IS THE DECLARATION AND THEN TESTIMONY REGARDING—YOU KNOW, MR. JOHNSON GETTING UP ON THE STAND PERHAPS—

THE COURT: I DON'T EVEN CONTEMPLATE THAT. WHAT I CONTEMPLATE IS THAT THE DECLARATION, UNLESS THERE'S SPECIFIC FACTS THAT CONTRADICT WHAT HE SAYS, WILL SPEAK FOR ITSELF.

NOW, YOU'VE MADE A NUMBER OF REPRESENTATIONS TODAY ABOUT YOUR OWN EXPERIENCE AND THE EXPERIENCE OF LAWYERS IN YOUR OFFICE, THE PROCEDURES THAT ARE FOLLOWED HERE WITH RESPECT TO INTAKE OF PEOPLE INTO THE COURT. I EXPECT TO ACCEPT ALL OF THOSE AS WELL. I DON'T EXPECT TO SAY, "WELL, YOU HAVE TO SIT FOR A DEPOSITION. YOU'VE MADE THIS SWEEPING STATEMENT ABOUT THE EXPERIENCE OF PEOPLE IN YOUR OFFICE, AND YOU'RE GOING TO GET PINNED DOWN BY THE GOVERNMENT." I'M NOT GOING TO TURN THIS INTO AN ADVERSARIAL CIRCUMSTANCE WHEN I [115] DON'T THINK THAT THAT IS WHAT IS REALLY AT ISSUE HERE.

MS. MILLER: THE COURT'S REFERENCE TO THAT POSITION IS QUITE ON POINT. WE'RE ASKING, IN A SENSE, FOR REALLY QUITE A LIMITED SET OF DISCOVERY. I KNOW THAT THE GOVERNMENT COMPARED IT TO CIVIL LITIGATION. BUT, YOUR HONOR, I'VE BEEN A CIVIL LITIGATOR. I'VE WRITTEN INTERROGATORIES. I'VE RESPONDED TO THEM. THIS IS NOTHING COMPARED TO WHAT HAPPENS IN CIVIL LITIGATION.

ULTIMATELY, ALL WE'RE ASKING FOR IS ENOUGH SO THAT WE CAN LAY THE PROPER RECORD, CROSS-EXAMINE MR. JOHNSON OR WHOEVER IT IS WHO COMES TO TESTIFY.

THE COURT: ASSUMING THERE'S TESTIMONY.

MS. MILLER: IF THERE'S TESTIMONY. WE HAVE A NUMBER OF FACTUAL DISPUTES WITH THE MARSHALS SERVICE. WE LAID THAT OUT IN OUR MOTION. SO . . .

THE COURT: THANK YOU, MS. MILLER. ALWAYS A PLEASURE TO HAVE YOU HERE.

MR. COLE, ANYTHING ELSE?

MR. COLE: NOT AT THIS TIME. I THINK THE REQUESTS ARE VERY BROAD. I THINK WE'RE PAST THAT NOW, SO I WON'T BELABOR IT. BUT THEY ARE VERY BROAD. THEY GO INTO ALL KINDS OF LAW ENFORCEMENT—"ANY AND ALL DOCUMENTATION" BRINGS ME FLASHBACKS TO MY LITIGATION EXPERIENCE.

SO IF ANYTHING EVEN REMOTELY CLOSE TO THAT IS BEING CONTEMPLATED, I THINK THE GENERAL COUNSEL'S OFFICE WOULD HAVE [116] TO BE INVOLVED. IT'S VERY EXTENSIVE DISCOVERY, BUT I'M NOT GOING TO BELABOR THAT IN FRONT OF YOU BECAUSE I DON'T THINK IT WE SHOULD DO IT AT ALL.

MS. MILLER: CERTAINLY IF THEY—MR. COLE'S RESPONSE TO OR MOTION CAME LATE LAST NIGHT, AND WE WERE TRYING—WE WERE REALIZING, "OH, WE SHOULD ACTUALLY MEET AND CONFER WITH THE GOVERNMENT ABOUT DISCOVERY" THAT TAKES ME BACK TO MY CIVIL LITIGATION DAYS, WE WOULD BE HAPPY TO COME UP WITH A MORE—A NARROW SCOPE OF DISCOVERY THAT WE CAN SIT DOWN WITH THE U.S. ATTORNEY'S OFFICE—PERHAPS THEY—I SUSPECT WHAT WILL HAPPEN IS WHEN WE START ASKING FOR MATERIALS RELATED TO LAW ENFORCEMENT AND NUMBER OF INCIDENTS AND INCIDENT REPORTS, THAT'S THE KIND OF STUFF THAT'S TYPICALLY PROTECTED —THOSE ARE THE MATERIALS WE GO TO COURT OVER ALL THE TIME.

THE COURT: MR. JOHNSON, I WANT TO CLARIFY. AGAIN, I DIDN'T GET THE DECLARATION UNTIL TODAY WHEN IT WAS HANDED UP TO ME. ARE YOU—I KNOW YOU'RE A BOSS OVER THERE. AS ASSISTANT CHIEF DEPUTY U.S. MARSHAL, ARE YOU IN CHARGE OF SECURITY OR DO YOU OVERSEE THAT FOR THE MARSHALS SERVICE?

DEPUTY JOHNSON: THAT IS ONE OF MY FUNCTIONS, YES.

THE COURT: YOU'RE THE POINT GUY ON THIS MOTION; RIGHT? I WOULD ASSUME AGAIN IN CIVIL PARLANCE, YOU'RE THE PERSON MOST KNOWLEDGEABLE WHEN IT COMES TO THE POLICY, THE INCIDENTS THAT GIVE RISE TO THE POLICY, WHETHER THEY'RE [117] CONSISTENT WITH THE POLICY DEMANDS OR NOT, AND YOU'D BE THE GO-TO GUY?

DEPUTY JOHNSON: I WOULD BE.

THE COURT: THANK YOU.

THE COURT FINDS AS FOLLOWS ON THE DISCOVERY ISSUE: FIRST, I AGREE IN PRINCIPLE WITH MS. MILLER THAT I HAVE AUTHORITY AND DISCRETION TO ORDER DISCOVERY. I DON'T KNOW THAT IT'S SUPPORTED BY ANY OF THE SOURCES THAT SHE POINTED TO, THE ALL WRITS ACT. SHE'S DISAVOWED ANY RELIANCE ON CRIMINAL RULES. BUT THE ALL WRITS ACT, THE DUE PROCESS CLAUSE—

WHAT WAS THE THIRD ONE? TELL ME AGAIN. REMIND ME AGAIN.

MS. MILLER: INHERENT POWERS OF THE COURT.

THE COURT: THE INHERENT POWER OF THE COURT.

I SUPPOSE I RELY ON THE LAST OF THOSE, THE FIRST OF THOSE, INHERENT POWERS OF

COURT. I THINK THAT IN FAIRNESS I COULD SAY, IF I THOUGHT IT WAS NECESSARY, TO THE MARSHALS, "GIVE ALL THIS STUFF OVER." I HAVE LOOKED OVER THE REQUEST. I AGREE WITH MR. COLE THAT THEY'RE EXCEEDINGLY BROAD. I ACCEPT WHAT MS. MILLER SAID, THAT SHE PREPARED THOSE WITHOUT THE BENEFIT OF THE GOVERNMENT'S INPUT, WHAT THEY WOULD ACTUALLY SAY.

AND SO NECESSARILY THEY'RE GOING TO BE OVERLY INCLUSIVE ND YOU DON'T KNOW WHAT THEY'RE WILLING TO GIVE. BUT THE ANALOG HERE HAS BEEN RULE 17. I'VE RECITED THE STANDARDS [118] YOU'VE GIVEN AND THE CASES FOR IT. THE MATERIAL HAS TO BE NECESSARY TO THE DEFENSE. THIS IS AN IMPERFECT OVERLAY BECAUSE, AGAIN, THERE'S NO CASE INVOLVING THE COURT'S PROMULGATION OF THIS POLICY THAT'S ADVERSARIAL. THERE'S DISAGREEMENT WITH IT. THERE'S AN ALLEGATION THAT THE POLICY IS NOT CONSTITUTIONAL, BUT THAT DOESN'T PUT THE COURT IN AN ADVERSARIAL POSITION WITH THE DEFENDANT IN THIS CASE, MS. MORALES, WHO AGAIN I'LL SAY SEEMS LIKE A VERY NICE, SWEET DISPOSITIONED PERSON, NOTHING AGAINST HER. IN FACT, THIS IS THE FIRST TIME I'VE LAID EYES ON HER. NOR WITH FEDERAL DEFENDERS. THE COURT'S JUST NOT A PARTY TO ANY DISPUTE. THE DISPUTE'S BEING RAISED BY FEDERAL DEFENDERS WITH THIS POLICY. AND AS I SAID, I DISAVOWED ANY

ENTRENCHMENT OR EMOTIONAL ATTACHMENT TO THE POLICY.

BUT GETTING BACK TO THE ISSUE, "NECESSARY" MEANS RELEVANT MATERIAL AND USEFUL. AGAIN, THE COURT HAS TO GUARD AGAINST FISHING EXPEDITIONS THAT CAN OCCUR IN THE ABSENCE OF PARTICULARIZED NEED. I DON'T FIND ANY PARTICULARIZED NEED FOR THE DISCOVERY THAT'S REQUESTED HERE. IN FACT, I FIND IT'S SUFFICIENT THAT THE REPRESENTATIVE FROM THE MARSHALS SERVICE IS WILLING TO GIVE OVER TO YOU SOMETHING THAT MAY BE PUBLIC RECORD, BUT COULD BE MORE CONVENIENTLY HANDED TO YOU, WHICH IS THE MARSHALS' NATIONAL POLICY ON SECURITY THAT EMANATES FROM THE MARSHALS SERVICE IN WASHINGTON, D.C., PRESUMABLY GOES OUT TO ALL 94 DISTRICTS, AND IS MEANT TO BIND THE UNITED STATES [119] MARSHALS SERVICE AND ALL THE DISTRICTS WHERE THEY PROTECT THE COURTS. SO MR. JOHNSON SAYS HE'LL GIVE THAT OVER.

DO THAT AS QUICKLY AS POSSIBLE. TONIGHT, TOMORROW. IF YOU HAVE IT, GIVE COPY OF THE WRITTEN POLICY OVER.

DEPUTY JOHNSON: CERTAINLY.

THE COURT: SECOND, MR. JOHNSON SAYS, AS THE PERSON MOST KNOWLEDGEABLE ABOUT THIS, THAT HE'S ABSOLUTELY, POSITIVELY WILLING TO SIT DOWN, DISCUSS THIS WITH YOU, GO OVER HIS UNDERSTANDING OF

THE ANECDOTAL EVIDENCE, ANSWER QUESTIONS THAT YOU MAY PUT TO HIM. I FIND THAT THAT SUFFICES SUFFICIENTLY TO FRAME ANY ARGUMENTS THAT THE DEFENSE NEEDS TO MAKE IN THIS CASE.

I HAVE NO REASON TO BELIEVE THAT HE WOULD MISLEAD. I DON'T EVEN THINK HE'S PERSONALLY INVESTED IN THIS. EDICTS THAT COME OUT OF WASHINGTON AND THAT BIND FEDERAL BUREAUCRATS. IT'S LIKE SAYING, YOU KNOW, THAT ATTORNEY GENERAL HOLDER'S POLICY IS NOW IN THE BREAST OF EVERY U.S. ATTORNEY. I DON'T BELIEVE THAT. MY OWN EXPERIENCE IS SOMETIMES ATTORNEYS AGREE WITH POLICIES; SOMETIMES THE DON'T.

WHEN THE—I'LL GIVE YOU AN EXAMPLE. WHEN THE ATTORNEY GENERAL WAS ASHCROFT AND HE WAS OVERRIDING DEATH PENALTY RECOMMENDATIONS, THERE WAS A LOT OF CONSTERNATION AROUND THE COUNTRY AND THE U.S. ATTORNEY'S OFFICE. THEY DIDN'T LIKE IT. IT WASN'T LIKE, "WELL, HE SAID IT, SO WE'RE INVESTED IN THIS." LAWYERS TEND TO BE INDEPENDENT THINKERS, [120] AND I THINK PROBABLY THE SAME IS TRUE WITH DEPUTY MARSHALS. THEY THINK THIS CASE IS STUPID OR IT'S TOO MUCH OR THIS OR THAT.

SO I DON'T FIND ANY—MY POINT ABOUT THAT IS I DON'T FIND ANY INVESTMENT EVEN OR SPECTER OF INVESTMENT ON THE PART OF DEPUTY JOHNSON THAT WOULD

CAUSE HIM TO SHADE THIS TO TRY TO SUPPORT THE POLICY. I MEAN, IT'S A RULE. HE'S A BUREAUCRAT. AND I MEAN THAT IN THE NICEST SENSE. HE HAS TO FOLLOW THE POLICY THAT EMANATES FROM PRESIDENTIAL APPOINTEES, THE HEAD OF THE UNITED STATES MARSHALS SERVICE, AND ITS EXECUTIVES THERE.

SO ALL THAT TO SAY I DON'T FIND ANY ADEQUATE SHOWING OF NECESSITY OR PARTICULARIZED NEED HAS BEEN MET IN THIS CASE, PARTICULARLY AS TO THE INDIVIDUAL DISCOVERY REQUESTS THAT HAVE BEEN MADE. AND I DO FIND THAT THE ALTERNATIVE HERE, WHICH IS READILY AVAILABLE WITHOUT THE NEED OF THE COURT ISSUING DISCOVERY ORDERS, IS ADEQUATE TO FRAME THE LEGAL ISSUES. THE MOTION FOR DISCOVERY IS DENIED.

I'LL SEE YOU BACK—WHAT TIME IS IT?

THE CLERK: 10:00.

THE COURT: 10:00. I HAVE A TRIAL TOMORROW. I HOPE WE FINISH THAT TRIAL IN TIME. I'M BURNING THE MIDNIGHT OIL.

THANK YOU. I APPRECIATE THE LATENESS OF THE HOUR AND THE DEGREE OF PREPARATION THAT WENT IN ON SHORT NOTICE. I APPRECIATE THE PRESENTATIONS BY ALL. THANK YOU.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case Nos. 13MJ3858-BLM-LAB,
13MJ3882-JMA-LAB, 13MJ3928-BLM-LAB

UNITED STATES OF AMERICA, PLAINTIFF

v.

JASMIN MORALES, MOISES PATRICIO-GUZMAN, RENE SANCHEZ-GOMEZ, DEFENDANTS

San Diego, California
Nov. 15, 2013
10:00 A.M.

REPORTER'S TRANSCRIPT
MOTION HEARING RE: APPEAL OF MAGISTRATE JUDGE DECISION (1)

BEFORE THE HONORABLE LARRY ALAN BURNS, JUDGE PRESIDING

APPEARANCES:

FOR THE GOVERNMENT:

LAURA E. DUFFY, U.S. ATTORNEY
BY: WILLIAM P. COLE, ESQ.
Assistant U.S. Attorney
880 Front Street, Suite 6293
San Diego, California 92101

FOR THE DEFENDANT:

Federal Defenders, Inc.
BY: REUBEN CAHN, ESQ.
SHEREEN CHARLICK, ESQ.
JUDITH MILLER, ESQ.
225 Broadway, Ste. 900
San Diego, CA 92101

SAN DIEGO, CALIFORNIA—FRIDAY, NOV. 15, 2013 - 10:00 A.M.

[2]

THE CLERK: NO. 1, 13MJ03858, UNITED STATES OF AMERICA VERSUS JASMIN MORALES.

COUNSEL, PLEASE STATE YOUR APPEARANCES FOR THE RECORD.

MR. COLE: GOOD MORNING, YOUR HONOR.

WILLIAM COLE FOR THE UNITED STATES.

THE COURT: GOOD MORNING, MR. COLE.

MR. CAHN: GOOD MORNING, YOUR HONOR.

REUBEN CAHN, SHEREEN CHARLICK, JUDITH MILLER ON BEHALF OF MS. MORALES WHO IS COMING INTO THE COURTROOM.

THE COURT: SHE IS. GOOD MORNING.

I APOLOGIZE FOR STARTING JUST A LITTLE BIT LATE.

THE COURT: GOOD MORNING AGAIN, MR. CAHN. YOUR CLIENT IS NOW PRESENT.

I HAVE READ AND CONSIDERED THE MATERIALS THAT HAVE BEEN FILED INCLUDING A SUPPLEMENTAL MEMORANDUM THAT WAS FILED LAST NIGHT, LATE YESTERDAY AFTERNOON?

MR. CAHN: THE DECLARATIONS, YOUR HONOR.

THE COURT: THE DECLARATIONS, YES.

MR. CAHN: YES, THAT WAS FILED LATE, EARLY EVENING.

THE COURT: DID YOU SEE THAT, MR. COLE?

MR. COLE: YES, I DID, YOUR HONOR.

MR. CAHN: IF I MAY BEGIN, I WOULD, OF COURSE, FIRST

REQUEST THAT MS. MORALES BE UNSHACKLED. HER LEGS ARE STILL [3] SHACKLED. I'D NOTE THAT THERE ARE TWO MARSHALS IN THE COURTROOM FOR A SINGLE DEFENDANT. IN FACT, THERE ARE ACTUALLY FOUR. OUR CHIEF MARSHAL IS HERE. SO IT WOULD BE CONSISTENT WITH THE NATIONAL POLICY THAT THEY ARE ENFORCING TO UNSHACKLE HER ENTIRELY.

THE COURT: THE MOTION IS DENIED.

MR. CAHN: JUDGE, WE'D, OF COURSE, TO MAKE CLEAR OUR RECORD, I WANT TO PERSIST IN THE POSITIONS WE TOOK PRIOR REGARDING THE RECUSAL, THE NEED FOR AN EVIDENTIARY HEARING, FOR DISCOVERY OR

ISSUANCE OF 17Z SUBPOENAS, AND I WANT TO MAKE CLEAR THAT WE ARE NOT ABANDONING THOSE POSITIONS.

THE COURT: THAT'S UNDERSTOOD.

I HAVE A WRITTEN AN ORDER ON THE FIRST TWO, THE PRELIMINARY MOTIONS THAT I REVIEW ONE MORE TIME AND PROBABLY ISSUE TODAY. BUT TO BE CLEAR, THE COURT HAS DENIED THE MOTION FOR RECUSAL.

FIRST, WE DEALT WITH THAT. I DON'T FEEL THAT AN IMPARTIAL OBSERVER WOULD HAVE ANY QUESTION ABOUT ANY JUDGE OF THIS COURT BEING NEUTRAL ON THE QUESTIONS OF THE CONSTITUTIONALITY OF THE SHACKLING POLICY. AND I HAVE DISTINGUISHED THE *BRANDAU* CASE.

I ALSO DON'T FEEL THAT THE RULES OF CRIMINAL DISCOVERY ARE AN ANALOG OR ANY KIND OF OVERLAY FOR THIS ISSUE. I TRIED TO EMPHASIZE TO MS. MILLER AND MS. CHARLICK ON TUESDAY THAT THE COURT DOESN'T FEEL IT'S ANY ADVERSARIAL POSITION [4] VIS-A-VIS YOUR CLIENT NOR IS THE MARSHAL SERVICE. AND SO TO APPLY ADVERSARIAL RULES AND TALK ABOUT EX PARTE AND THINGS LIKE THAT DOESN'T SEEM FIT.

ANYWAY, I REITERATE THOSE RULINGS.

MR. CAHN: JUDGE, ACTUALLY, LET ME SAY TWO THINGS BEFORE WE GO FURTHER.

FIRST, I MEANT TO START BY THANKING THE COURT FOR ACCOMMODATING MY SCHEDULE.

THE COURT: WHERE WERE YOU?

MR. CAHN: I WAS IN D.C. AND IN CHICAGO, NOT FOR ANYTHING FUN, BUT FOR WORK RELATED TO OUR NATIONAL BUDGET PROBLEMS, UNFORTUNATELY.

THE COURT: I AM SORRY.

MR. CAHN: I DO APPRECIATE THE COURT'S ACCOMMODATION.

THE COURT: SURE.

MR. CAHN: THE OTHER THING I DID WANT TO LET THE COURT KNOW I, OF COURSE, CONSULTED WITH MS. CHARLICK ABOUT THE HEARING THE OTHER DAY. MS. OEMICK WAS KIND ENOUGH TO PREPARE VERY RAPIDLY A TRANSCRIPT WHICH ALLOWED ME TO—AND I WAS ABLE TO READ IT IN TIME. I AM AWARE OF THE COURT'S RULINGS AND VIEWS ON THE ISSUES.

AND SO WHAT I AM GOING TO ATTEMPT TO DO TODAY WITH THE COURT'S PERMISSION IS TO WASTE AS LITTLE OF THE COURT'S TIME AS POSSIBLE. I SEE TWO ISSUES THAT I THINK NEED TO BE ADDRESSED. ONE WOULD, OF COURSE, BE SHARPENING THE [5] EVIDENTIARY ISSUE SO MAKING CLEAR WHAT OUR DISPUTE IS ON THE EVIDENTIARY ISSUE SO THAT THE COURT IS AWARE OF THOSE.

SO I'D LIKE TO GO THROUGH THE DECLARATION THAT WAS FILED BY DEPUTY MARSHAL JOHNSON BECAUSE I THINK THAT'S THE CHIEF EVIDENTIARY SUPPORT IN THIS RECORD, NOTING WHERE WE EITHER DISAGREE OR WHERE THERE IS AN ADDITIONAL EVIDENTIARY MATTER THAT WE THINK SHOULD BE IN THE RECORD.

THE COURT: ALL RIGHT.

MR. CAHN: HAVING DONE THAT, AS I SAID, I AM WELL AWARE OF THE COURT'S CAREFUL CONSIDERATION OF THESE MATTERS EARLIER IN THE WEEK. AND I NOTE FROM OUR PREVIOUS ENCOUNTERS ON OTHER CASES, THE COURT IS INTIMATELY FAMILIAR WITH THE LAW SURROUNDING SUBSTANTIVE DUE PROCESS. AND SO RATHER THAN WASTING A BUNCH OF TIME WITH A SET OF ARGUMENTS, WHAT I PREFER TO DO IS REST ON THE PAPERS AND INSTEAD ANSWER THE COURT'S QUESTIONS AFTER I HAVE GONE THROUGH THE EVIDENTIARY MATTERS THAT I THINK NEED TO BE HIGHLIGHTED.

THE COURT: GOOD, OKAY.

MR. CAHN: THIS WILL TAKE A LITTLE WHILE. I WANT TO BE THOROUGH BUT I'LL TRY AND MOVE AS QUICKLY AS POSSIBLE THROUGH THESE. AND I AM GOING TO DISCUSS THEM IN TERMS OF PARAGRAPHS IN DEPUTY MARSHAL JOHNSON'S DECLARATION THAT WAS FILED WITH THIS COURT BY THE

GOVERNMENT IN CONJUNCTION WITH ITS RESPONSE TO OUR MOTION.

LET ME BEGIN WITH PARAGRAPH 4. WE WOULD DISPUTE [6] THAT THE MARSHAL HAS INSUFFICIENT INFORMATION ABOUT PRE-TRIAL DETAINEES BEFORE INITIAL APPEARANCES TO BE ABLE TO GAUGE NECESSITY FOR SHACKLING. AND IN PARTICULAR, WE DISPUTE THAT THERE HAS BEEN ANY CHANGE IN CIRCUMSTANCE THAT WOULD JUSTIFY A CHANGE IN POLICY.

TO OUR KNOWLEDGE THE PROCEDURES THAT ARE DESCRIBED IN MARSHAL JOHNSON'S AFFIDAVIT IN THE RULE 5 LITIGATION LAYING OUT THE EXAMINATION OR THE INTERVIEWS OF INDIVIDUALS, THE TB TEST, THE METAL DETECTORS, THE OTHER SCREENINGS THEY GO THROUGH BEFORE THEY MAKE THEIR INITIAL APPEARANCE IN COURT, ARE STILL IN EFFECT, AND WE SPOKE TO MARSHAL JOHNSON YESTERDAY WHO WAS KIND ENOUGH TO TAKE AN HOUR AND A HALF, TWO HOURS OF HIS TIME FROM WHAT SHOULD HAVE BEEN A DAY OFF, AND WE APPRECIATE THAT.

AND SO WE DON'T BELIEVE THAT THERE HAS BEEN ANY REAL CHANGE THERE. WE NOTE THAT THERE IS A VERY, VERY SMALL PERCENTAGE OF INDIVIDUALS WHO COME TO COURT IN THE INITIAL APPEARANCE WITHOUT THOSE SAFEGUARDS HAVING BEEN PUT IN PLACE. THOSE ARE CHIEFLY INDIVIDUALS WHO ARE COMING IN ON OSC'S AND

WHERE THERE IS A GOOD AMOUNT OF HISTORY ABOUT THEIR PRIOR BEHAVIOR IN COURT, OF COURSE, BECAUSE THEY HAVE BEEN IN COURT BEFORE, OR INDIVIDUALS WHO THE MARSHALS ARE ARRESTING ON WARRANTS. AND THOSE INDIVIDUALS, OF COURSE, THE MARSHALS HAVE A GREAT DEAL OF KNOWLEDGE BECAUSE THEY RESEARCH THOSE INDIVIDUALS BEFORE THEY SERVE WARRANTS. AND SO THEY RUN THEIR [7] CRIMINAL HISTORY AND HAVE A CERTAIN AMOUNT OF KNOWLEDGE.

SO THAT WOULD BE THE FIRST FACTUAL DISPUTE I WANT TO HIGHLIGHT.

THE COURT: ON THAT SCORE, THERE IS AN ORDER OF REFERRAL FROM JUDGE HOUSTON TO ME ON ONE OF THE CASES. ONLY THREE OF THE CASES ARE IN FRONT OF ME, AS YOU KNOW.

MR. CAHN: YES, I GATHER THAT THERE WAS SOME CONFUSION AT THE LAST HEARING.

THE COURT: I THINK I WAS FORTHRIGHT ABOUT THIS. THERE WAS SOME DISAGREEMENT BETWEEN THE DISTRICT JUDGES ABOUT WHETHER OUR RELATED CASE LAW WOULD ALLOW THE TRANSFER OF AN ISSUE AS OPPOSED TO AN ENTIRE CASE. ONE OF THE CASES I UNDERSTAND IS IN FRONT OF JUDGE BATTAGLIA. HE DOESN'T READ THE RULE AS AUTHORIZING TRANSFER OF AN ISSUE. JUDGE MOSKOWITZ THINKS THAT IT

DOES. BUT I WASN'T CLAMORING FOR MORE CASES, SO THERE WERE THREE BECAUSE JUDGE HOUSTON DID TRANSFER, AND I HAPPEN TO AGREE WITH THE CHIEF JUDGE THAT AN ISSUE CAN BE TRANSFERRED IF IT'S RELATED IN LAW OR FACT.

WITH RESPECT TO THE CASE THAT WAS TRANSFERRED—AND THIS GOES TO YOUR POINT ABOUT BACKGROUND DATA AND CHANGING DEMOGRAPHICS. JUDGE HOUSTON MADE A FINDING INITIALLY BEFORE SENDING IT OVER TO ME FOR THE BALANCE OF THE MOTION WHICH DEALS WITH THE SHACKLING POLICY GENERALLY, AND HE SAID DENIED AS TO THAT DEFENDANT, AND THAT HIS OWN ANECDOTAL EXPERIENCE OVER THE LAST TEN YEARS HAS CONVINCED HIM THAT THERE IS INDEED [8] CHANGING DEMOGRAPHIC. HE SAID HE HAS REVIEWED HUNDREDS OF PROBATION REPORTS, HE HAS NOTED A CHANGE IN THE CHARGING POLICY OF THE U.S. ATTORNEY'S OFFICE, PARTICULARLY WITH RESPECT TO IMMIGRATION OFFENDERS, WHERE NOW THERE IS A RELIANCE ON AGGRAVATED FELONY AS A CHARGING FACTOR WHERE BEFORE MANY ECONOMIC MIGRANTS NO ONE CLAIMED WERE DANGEROUS COMING THROUGH THIS SYSTEM. HE SAYS THAT POPULATION HAS ENTIRELY CHANGED. HE SAYS AS THEY REACH THE PROBATION REPORT—THIS IS IN THE ORDER OF REFERRAL—THAT HE SEES MORE AND MORE VIOLENT OFFENSES AMONG THE POPULATION OF PEOPLE THAT COME IN AND OUT

OF THE COURT. IS THAT PART OF THE RECORD HERE, TOO?

MR. CAHN: I HAVEN'T REALLY THOUGHT ABOUT THAT ISSUE, YOUR HONOR, TO BE CLEAR. BUT IT'S A MATTER THAT WE OUGHT TO ADDRESS BECAUSE IT WAS SOMETHING THAT WAS PRESENTED TO THE JUDGES. AND SO LET ME JUST SPEAK ABOUT IT NOW A LITTLE BIT OUT OF ORDER.

FIRST, WE HAVE DECLARATIONS IN THE RECORD THAT WE DISPUTE THAT OBSERVATION. AND LET ME MAKE A PERSONAL OBSERVATION. I CAME HERE, AS YOU KNOW, ONLY EIGHT AND A HALF YEARS AGO. AT THE TIME CAROL LAM WAS THE UNITED STATES ATTORNEY AND HAD ALREADY ADOPTED A POLICY OF PROSECUTING—IN FACT, IT WAS A FAR MORE LIMITED POLICY PROSECUTING ONLY AGGRAVATED FELONS AND ONLY THOSE WITH THE MOST SERIOUS CRIMINAL RECORDS. THAT'S IN OUR 1326 IMMIGRATION DOCKET.

[9]

AND SO DURING THE YEARS THAT I HAVE BEEN HERE, THAT'S ALWAYS BEEN THE CASE. AND THE EXPERIENCE OF OUR OFFICE IS CERTAINLY, AT LEAST OVER THE LAST 10 YEARS, THERE HAS BEEN NO SIGNIFICANT CHANGE IN THE DEMOGRAPHIC OF THE INDIVIDUALS WHO ARE BROUGHT BEFORE THE COURT, AND I THINK THAT WOULD BE BORNE OUT BY STATISTICS. BUT, OF

COURSE, WE HAVE DISPUTED IT IN THE DECLARATION AS WELL.

SO I THINK, OF COURSE, THE RELEVANT TIME FRAME WHEN WE ARE LOOKING AT THIS WAS THIS CHANGE IN POLICY NECESSITATED. SO WE NEED TO LOOK AT WHEN THIS DEMOGRAPHIC CHANGE, IF IT CHANGES —I'LL ASSUME FOR ARGUMENT THAT IT DID CHANGE. AND IF I DID CHANGE, THE CHANGE CERTAINLY PREDATED MY ARRIVAL IN THE DISTRICT EIGHT AND A HALF YEARS AGO.

SO WHETHER—WE SPOKE WITH DEPUTY MARSHAL JOHNSON ABOUT THIS YESTERDAY. HE WAS QUITE CLEAR THAT HIS PERCEPTION OF THE CHANGE IN DEMOGRAPHIC DATED BACK MUCH FURTHER. HE HAS BEEN WITH THE MARSHAL'S OFFICE 20 YEARS; IS THAT CORRECT? A LITTLE OVER TWENTY YEARS, AND HE IS DATING THAT CHANGE FROM THE BEGINNING OF HIS TENURE WITH THE MARSHAL'S OFFICE RATHER THAN OVER A LAST BRIEF PERIOD OF TIME. AND AGAIN, I THINK THE COURT NEEDS TO BE LOOKING AND LOOKING AT WHETHER OR NOT THIS NEW POLICY, THIS FAR MORE RESTRICTIVE POLICY IS JUSTIFIED AND WHETHER OR NOT THERE HAS BEEN—WHAT FACTORS HAVE CHANGED THAT JUSTIFY A CHANGE IN POLICY.

THE COURT: THIS IS ARGUMENTS ABOUT THE DEMOGRAPHIC [10] AND WHETHER IT CHANGED AND WHETHER PEOPLE ARE MORE VIOLENT. IN ESSENCE, WHETHER THE POL-

ICY IS SUPPORTED BY CURRENT ANECDOTAL EVIDENCE. ARE THEY PREMISED ON THE—YOUR THEORY THAT THERE HAS TO BE INDIVIDUALIZED ASSESSMENT IN EACH CASE? IT SEEMS TO ME IF THAT THEORY IS FAULTY, THEN ALL IT'S DEPENDENT UPON INCLUDING THIS IDEA OF DISCOVERY AND WE HAVE TO LOOK AT EACH PERSON AS THIS GUY MIGHT BE DANGEROUS, THIS GUY MIGHT NOT, AND NONE OF THAT FOLLOWS IF THE INDIVIDUALIZED ASSESSMENT IS NOT REQUIRED.

MR. CAHN: OF COURSE, WE ARE REALLY GETTING INTO THE MERITS AT THIS POINT, BUT LET ME—

THE COURT: PRELIMINARY TO THIS ISSUE.

MR. CAHN: LET ME TRY TO ADDRESS THE ISSUE AT LEAST BRIEFLY.

HERE IS MY VIEW. THERE IS A COUPLE OF DIFFERENT ISSUES AT STAKE. THE FIRST IS, OF COURSE, OUR REQUEST FOR AN INDIVIDUAL DETERMINATION. AND THAT'S A PROCEDURAL DUE PROCESS RIGHT. DO WE HAVE THE RIGHT TO THAT PROCEDURE IN EACH AND EVERY CASE. BUT, OF COURSE, UNDERLYING A PROCEDURAL RIGHT IS ALWAYS A SUBSTANTIVE RIGHT. IF THERE IS NO SUBSTANTIVE RIGHT TO PROTECT, THERE IS NO PROCEDURAL RIGHT TO PROTECT.

I DON'T THINK ANYBODY DISPUTES THIS. I THINK THE GOVERNMENT AGREES THE RIGHT TO BE FREE OF EXCESSIVE AND UN-

NECESSARY SHACKLING IS A PROTECTED LIBERTY INTEREST. AND SO THE QUESTION IS REALLY THEN WHAT'S THE JUSTIFICATION AND [11] WHAT'S THE STANDARD THAT APPLIES TO JUDGING THAT JUSTIFICATION.

NOW, AT THE VERY LEAST—WE CONCEDE THAT THIS IS THE APPROPRIATE STANDARD—AND I'LL TALK ABOUT THIS A LITTLE BIT LATER. AT THE VERY LEAST WE KNOW THAT FROM CASES, PRISON CASES EVEN THEIR RATIONAL BASIS TEST IS APPLIED. YOU RECALL I DISCUSSED THIS ONCE WITH YOU IN THE PAST IN ANOTHER CASE WHICH I WON'T NAME AT THIS TIME. IN THE CONTEXT OF THESE FUNDAMENTAL LIBERTY INTERESTS, OF COURSE, THE RIGHT TO BE FREE OF RESTRAINTS IS AT THE VERY HEART OF OUR LIBERTY.

THE RATIONAL BASIS TEST IS APPLIED WITH GREATER TEETH THAN IT IS IN PURELY ECONOMIC CASES WHERE WE LOOKING AT IF THERE IS SOME SORT OF ECONOMIC DISCRIMINATION. AND SO AT THE VERY LEAST, THE COURT WOULD HAVE TO COME TO A CONCLUSION THAT THE POLICY IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL OBJECTIVE AND IS INTENDED TO ACHIEVE THAT OBJECTIVE.

AND BEYOND THAT IN LIGHT OF WHAT THE SUPREME COURT HELD IN *BELL VERSUS WOLFISH,* THE COURT WOULD HAVE TO EXAMINE WHETHER OR NOT THIS WAS AN UNWARRANTED OR EXCESSIVE RESPONSE TO A

LEGITIMATE NEED, BECAUSE IF IT IS, THAT WOULD BRING UP THE SPECTER THAT THE CASE FALLS WITHIN THE STRICTURES OF *KENNEDY VERSUS MENDOZA* AND THAT RESTRICTIONS ARE IMPOSED IN FACT AS PUNISHMENT RATHER THAN TO ACHIEVE A LEGITIMATE END. AND, OF COURSE, PUNISHMENT IS NOT A LEGITIMATE END IN THE [12] CONTEXT OF PRETRIAL DETAINEES. THAT IS ABSOLUTELY CLEAR FROM *BELL VERSUS WOLFISH*.

THERE IS THOSE TWO SEPARATE ISSUES. NOW, A COURT COULD DECIDE THAT YOU GOT THE SUBSTANTIVE RIGHT. WE DISAGREE WITH YOU ABOUT THE LEVEL OF PROCEDURAL PROTECTION.

THE COURT: I THINK THAT'S WHERE I AM, MR. CAHN. I DON'T DISAGREE WITH ANYTHING YOU HAVE SAID. I AGREE THAT THERE IS A LIBERTY INTEREST TO BE FREE THROUGHOUT THE PROCESS OF EXCESSIVE RESTRAINT, EXCESSIVE FORCE, BUT THAT CHANGES, I THINK, ONCE THERE IS A PROBABLE CAUSE.

WITH RESPECT TO THIS WHOLE CLASS OF PEOPLE, WE ARE TALKING ABOUT PEOPLE FOR WHOM A FINDING HAS BEEN MADE THAT THER*E* IS PROBABLE CAUSE TO BRING THEM IN, OR IN SOME CASES EVEN MORE THAN THAT. MANY OF THE PEOPLE THAT ARE THE SUBJECT OF THIS MOTION HAVE DECIDED TO PLEAD GUILTY AND ARE PLEADING GUILTY. AND LEVEL OF PROOF OF THEIR GUILT OF A

MAJOR DEVIATION FROM SOCIETY'S NORMS WHAT WE DENOMINATE AS A FELONY IS EVEN GREATER, AND PRESUMABLY WOULD JUSTIFY GREATER RESTRAINTS, LOCKING THEM UP IN PRISON.

I MEAN, THE STUMBLING BLOCK FOR ME IS WHEN WE SAY THERE IS PROBABLE CAUSE TO ARREST. PART AND PARCEL OF THAT IS TO SECURE THE PERSON, TO BRING THEM BEFORE THE COURT, AND THERE IS HARDLY ANYBODY THAT ISN'T HANDCUFFED WHO IS ARRESTED, AS FAR AS I AM AWARE, IN A CAGED VEHICLE. I SUPPOSE IT DEPENDS ON THIS SNAPSHOT, WHERE YOU TAKE THIS SNAPSHOT. YOUR [13] SNAPSHOT SEEMS TO BEGIN HERE IN COURT, AND MINE BEGINS BEFORE THEN. THEY ARE TRANSPORTED OVER HERE IN FULL CHAINS. THEY ARE TRANSPORTED BACK TO WHEREVER THEY ARE HELD—WE ARE TALKING ABOUT IN-CUSTODY DEFENDANTS IN FULL CHAINS.

MR. CAHN: LET ME TRY TO ADDRESS WHAT I THINK THE COURT'S QUESTION IS. WE DO LIMIT OUR CLAIMS TO THE APPEARANCE IN COURT, AND THERE IS A COUPLE OF REASONS FOR THAT.

FIRST, IF YOU LOOK AT *BELL VERSUS WOLFISH* WHICH I WOULD SAY MARKS THE HIGH WATER OF DEFERENCE TO PENAL AUTHORITIES CONTROLLING PRETRIAL DETAINEES. AND, OF COURSE, I LOOK AT *TURNER VERSUS SAFLEY* AS A RETREAT FROM THAT POSITION IN SOME WAYS. THERE ARE

ISSUES THAT ARE AT STAKE IN COURT THAT ARE NOT AT STAKE IN THE *BELL VERSUS WOLFISH* CONTEXT THAT ARE NOT AT STAKE EVEN WHEN AN INDIVIDUAL IS IN THE COURTHOUSE BUT NOT IN THE COURTROOM AND HAS TO DO WITH THE STANDARDS THAT WILL ULTIMATELY APPLY, BUT THE SUBJECTIVE AND PROCEDURAL STANDARDS. AND THE REASON THAT I SAY THAT IS, AGAIN, THE PROTECTIONS THAT ARE ALLOWED DEVOLVE IN PART FROM THE ISSUE—IN PART FROM RIGHTS.

NOW, OF COURSE, THE RIGHTS ARE AT ISSUE. OF COURSE, WE GOT THE SUBSTANTIVE RIGHT TO BE FREE OF UNNECESSARY RESTRAINTS. THAT'S ONE RIGHT. BUT IN MY VIEW—AND I THINK THAT IS JUSTIFIED BY THE CASE LAW, PARTICULARLY THE SUPREME COURT CASE LAW—EITHER THE STANDARD OR THE APPLICATION OF THE STANDARD CHANGES AS OTHER RIGHTS GET INVOLVED. OF COURSE, [14] WE KNOW IN CERTAIN RIGHTS ARE IMPINGED UPON EVEN WHEN THE ACTUAL DETRIMENT TO THE INDIVIDUAL IS EXACTLY THE SAME.

THE STANDARD GOES TO THE HIGHEST STANDARDS, THE STANDARDS OF NECESSITY, THE STANDARDS OF LEAST RESTRICTIVE MEANS. AND THE PERFECT EXAMPLE OF THAT IS, OF COURSE, THE SHACKLING BEFORE JURY. BECAUSE YOU HAVE GOT THE CONJUNCTION OF NOT ONLY THE RIGHT TO BE FREE OF UNNECESSARY RESTRAINT, BUT

THE RIGHT TO AN IMPARTIAL JURY. AND SO THOSE TWO RIGHTS TOGETHER LEAD TO A MUCH HIGHER STANDARD BEING APPLIED.

NOW, WE DON'T HAVE THAT SITUATION HERE. WE DON'T HAVE A JURY. WE ARE NOT TALKING ABOUT JURY TRIALS. WE ARE TALKING ABOUT ONLY MATTERS BEFORE THE COURT. BUT THERE ARE OTHER RIGHTS THAT ARE FUNDAMENTAL IN MY VIEW THAT CHANGE THE CALCULUS OF THE STANDARD TO BE APPLIED. AND THOSE ARE THE RIGHT TO ACCORD—AND LET ME BE CLEAR ABOUT THIS.

I KNOW THAT OFTENTIMES WE TALK ABOUT THIS, AND WE TALK ABOUT IT AS A SORT OF ATTRIBUTE OF THE COURT THAT NECESSARY—THE NECESSITY OF DECORUM AND DIGNITY OF THE COURT, BUT IT'S NOT A RIGHT OR AN INTEREST THAT ACCRUES SOLELY TO THE COURT. THE LEGITIMACY OF THE COURT WHICH IS, OF COURSE, CRITICAL TO THE PUBLIC AND TO THE INDIVIDUAL ON WHOM PUNISHMENT MAY BE IMPOSED IS AFFECTED BY THAT DIGNITY AND DECORUM. THERE IS ALSO THE PERCEPTION OF THE INDIVIDUAL WHICH IS IMPORTANT AND THIS GOES TO IN SOME WAYS TO THE SAME FACTOR OF HOW THEY ARE TO BE TREATED AND WHAT IS THE FAIRNESS, BUT [15] THAT MAY IMPINGE UPON THEIR PROCEDURAL RIGHTS, THEIR RIGHTS AND THEIR ABILITY AND WILLINGNESS TO FULLY PURSUE THOSE.

AND WHAT I MEAN BY THAT IS WHEN AN INDIVIDUAL'S PERCEPTION IS THAT IF OUR COURTS, LIKE THE COURTS IN TOO MANY OTHER COUNTRIES, REALLY DON'T ALLOW PROCESS, THAT IT EXISTS IN FORM BUT NOT IN REALITY, THAT THERE IS NO REAL FAIR SHAKE, THEY MAY SEE NO POINT IN EXERCISING THE RIGHTS THAT OUR COURTS AND OUR CONSTITUTION ACCORD THEM. AND SO FOR THAT REASON I THINK THAT WE ARE SOMEWHERE IN BETWEEN THE JURY TRIAL SITUATION AND THE PURE PRE-TRIAL DETENTION SITUATION WHERE YOU ARE JUDGING HOW INDIVIDUALS ARE HOUSED AND TREATED IN THE MCC.

THE COURT: YOU FOCUSED ONLY ON THOSE CHANGES THAT AFFECT THE DEFENDANT AND NOT ON THOSE THAT CHANGE THE SECURITY EQUATION, BECAUSE I THINK THOSE ARE PROFOUND, TOO. TYPICALLY, WHEN THE POLICE ARRESTS A PERSON, IT'S ONE ON ONE OR TWO ON ONE, AND THEY HAVE A CONTROLLED SITUATION. COURTROOMS ARE VERY DIFFERENT.

EVEN TODAY WE HAVE A GALLERY OF, WHAT, 30 PEOPLE HERE. THE COURTS ARE STAFFED WITH TWO MARSHALS, AND IN THE CASE OF THESE PLEAS, MY UNDERSTANDING IS THAT THE MAGISTRATE JUDGES CONDUCT SIX AT A TIME. THE MARSHAL'S NATIONAL AND REQUIRES THEM TO HAVE TWO MARSHALS PER PRISONER IN COURT AT THE TIME, AND THEY CAN'T DO THAT REALISTI-

CALLY. THEY CAN'T HAVE 12 MARSHALS WITH SIX PEOPLE PLEADING, SO THEY NEED TO DO SOMETHING ELSE.

[16]

I THINK THAT DYNAMIC CHANGES, TOO, AND I THINK THAT HAS TO BE TAKEN INTO CONSIDERATION. MAINTAINING SECURITY IN A COURT IS MUCH MORE DIFFICULT, I THINK, THEN MAINTAINING SECURITY IN OTHER CONTROLLED CIRCUMSTANCES LIKE THE JAIL OR THE VAN THAT BRINGS THEM HERE FROM THE JAIL OR EVEN ON THE STREET WHERE AN ARREST IS EFFECTED. I THINK THAT HAS TO BE PART OF THE EQUATION, TOO, NOT JUST THE DEFENDANT'S PERCEPTION AND THE PUBLIC'S PERCEPTION.

MR. CAHN: I DISAGREE WITH YOU IN A COUPLE OF WAYS. THE FIRST WAY I DISAGREES WITH YOU IS—AND THIS IS I HAVE FRIENDS WHO ARE POLICE OFFICERS, AND THEY TOLD ME MANY TIMES THAT NOTHING IS MORE UNCONTROLLED AND RISKY THAN ARRESTING SOMEBODY OUT ON THE STREET. AND SO I DEFER TO THEM IN THAT REGARD.

I WOULD DISAGREE WITH YOU ALSO IN THAT THAT QUESTION AFFECTS THE STANDARD. THAT QUESTION GOES TO THE APPLICATION OF THE STANDARDS. ONCE YOU HAVE DETERMINED THE STANDARD AND ARE GOING TO APPLY IT, THAT'S A CONSIDERATION IS THIS A RATIONAL RESPONSE, IS IT

EXCESSIVE, AND THERE YOU LOOK AT WHAT ARE THE CIRCUMSTANCES THE MARSHALS HAVE TO DEAL WITH, WHAT ALTERNATIVES DO THEY HAVE, WHAT ARE THE NECESSITIES INVOLVED. I DON'T THINK YOU GET TO THAT QUESTION UNTIL YOU HAVE DETERMINED THE APPROPRIATE SENTENCE.

THE COURT: HOW MUCH DEFERENCE DO WE GIVE THOSE JUDGMENTS THAT THEY MAKE THEN? I TOLD MS. CHARLICK AND [17] MS. MILLER THERE IS NOTHING IN MY PORTFOLIO THAT ALLOWS ME TO TRUMP THEM ON EXPERTISE ON THIS. THEY GO TO TRAINING, AND I WAS SPECULATING TO SOME EXTENT BECAUSE I DON'T KNOW THIS FOR SURE.

I AM ASSUMING BASED ON THINGS I HAVE SEEN THAT THEY HAVE TRAINING, AND PART OF THE TRAINING CONCERNS, FOR EXAMPLE, WHAT IF THERE IS A DISRUPTION IN COURT, WHAT IF SOMEBODY MISBEHAVES. I RELATED THIS TO YOUR LAWYERS THE OTHER DAY THAT TWO MONTHS AGO I HAD SOME GUY THAT GOT MAD OVER SOMETHING WHO THREW HIS GLASSES AGAINST THE WALL, AND ONE MARSHAL HAD A TASER LIGHT ON HIM. HE DIDN'T TASE HIM; THE OTHER ONE WAS DOWN ON HIM, AND THEN ALMOST LIKE CLOCKWORK, THE COURT SECURITY OFFICER CAME TO THE FONT HERE TO PREVENT ANYBODY TO COME HERE FROM THE GALLERY. AND MORE THAN WHAT WAS GOING ON IN FRONT WITH THE DEFENDANT, I WAS FAS-

CINATED WITH THIS ORCHESTRATED RESPONSE TO WHAT WAS GOING ON IN THE COURT. I THOUGHT AFTERWARDS THEY MUST PRACTICE THIS. I'LL BET YOU WHEREVER THE MARSHALS TAKE THEIR TRAINING, WHETHER QUANTICO OR GLYNCO OR WHEREVER, THEY HAVE PROBABLY A MOCK COURTROOM AND PROBABLY SOME OF THEM DISRUPT—AND AGAIN, I AM SPECULATING. BUT I ASSUME THAT'S PART OF THEIR TRAINING.

I DON'T HAVE ANY SUCH TRAINING AND MAYBE YOU HAVE SOMETHING BEYOND WHAT I SAID DO. BUT I WOULD THINK THAT THE STANDARD WOULD ALLOW FOR ME TO DEFER TO THEM JUST AS IT DOES IN THE PRISON SETTING. YOU HAVE TALKED ABOUT *BELL VERSUS* [18] *WOLFISH* AND THE APPLICATION OF THAT. AND, OF COURSE, WE KNOW FROM THAT OTHER CASE THAT GREAT DEFERENCE WAS GIVEN TO THE MEDICAL JUDGMENTS OF PRISONS, EVEN INVOLVING A VERY INTRUSIVE ABRIDGMENT OF DEFENDANT'S PRIVACY IN THAT CASE.

THE COURTS SEEM TO SAY WE ARE GOING TO DEFER TO THE PRISON ON MATTERS OF SECURITY AND DANGER.

MR. CAHN: TWO POINTS. FIRST, THE COURTS DO ALLOW SOME DEFERENCE TO PRISONS, AND THAT'S SHOWN IN *BELL VERSUS WOLFISH*. AS I SAID, ONE OF THE POINTS THAT THE SUPREME COURT ITSELF MAKES IN *TURNER VERSUS SAFLEY* IS THAT

DEFERENCE IS NOT ABSOLUTE. THE COURTS PARTICULARLY IF FUNDAMENTAL RIGHTS ARE INVOLVED ARE OBLIGATED TO ENGAGE IN THEIR OWN EXAMINATION OF THE JUSTIFICATIONS UNDERLYING THE PROCESS.

AND I POINT OUT—AND I THINK THIS MAY BE A MATTER YOU AND I HAVE TALKED BEFORE ALSO—THERE IS GOOD REASONS FOR COURTS AS THE INDIVIDUALS WHO ARE—FOR THE COURTS TO BE THE INDIVIDUALS WHO ARE MAKING THAT FINAL EXAMINATION WITHOUT UNDUE DEFERENCE TO THE INDIVIDUAL WHO ARE FOCUSED ON SECURITY, AND THAT'S SIMPLY WHEN AN INDIVIDUAL OR AN ORGANIZATION OR WHATEVER IS FOCUSED ON ONE THING THAT IS THEIR DRIVING MISSION, THEY TEND TO OVERRATE THE IMPORTANCE OF THAT. I MEAN, TO BE COLLOQUIAL, ALL YOU HAVE GOT IS A HAMMER, EVERYTHING LOOKS LIKE A NAIL. AND SO THE MARSHALS ARE RIGHTLY FOCUSED TO SECURITY. THAT IS THEIR JOB, AND THEY SHOULD BE HYPERVIGILANT, BUT IT'S IMPORTANT KNOWING THAT WE HAVE WE GOT [19] AN ORGANIZATION WHOSE JOB IS TO BE HYPERVIGILANT ABOUT SECURITY, THAT SOMEBODY IS THERE TO EXAMINE AND PUSH BACK. AND SO THAT'S WHY THE DEFERENCE OF THE COURT WHILE IT CAN EXIST HAS TO BE LIMITED.

THE COURT: I DON'T EVEN DISAGREE WITH THAT. I AGREE THAT WE ARE THE FINAL CHECK ON THAT, AND THAT BRINGS

ME SORT OF TO THIS POLICY WHICH ALLOWS FOR INDIVIDUAL DISCRETION, THAT ALLOWS FOR THE JUDGE TO APPLY EXPERIENCE. I SHARED WITH MS. CHARLICK THAT WE DON'T ALLOW TV CAMERAS IN FEDERAL COURT, BUT I GO HOME AT NIGHT SOMETIMES AND SIT DOWN IN MY EZ-CHAIR WITH A BEER AND I AM WATCHING THE NEWS, AND HERE COMES PROCEEDINGS FROM THE STATE COURT RIGHT ACROSS THE STREET. AND MOST OF THE PEOPLE WHO COME IN THERE AND ARE BEING ARRAIGNED OR PRELIMINARY PROCEEDINGS ARE IN A CAGE. HAVE YOU SEE THAT, THAT GLASS CAGE?

MR. CAHN: I HAVE NOT WATCHED TV.

THE COURT: THEY GOT A PLEXIGLAS TYPE CASE, BOTH UP IN THE NORTH COUNTY AND ACROSS THE STREET IN DEPARTMENT 9 OF THE SUPERIOR COURT. AND MOST OF THE TIME EVEN THE PEOPLE WITHIN THE CAGE ARE SHACKLED.

MR. CAHN: I FIND THAT OFFENSIVE IF THAT'S WHAT'S GOING ON.

THE COURT: MAY BE. IT MAY OFFEND INDIVIDUAL PEOPLE, BUT YOU ARE ASKING ME TO SAY, LOOK, ACT AS A CHECK ON WHAT THE MARSHALS ARE DOING HERE. AND I THINK THAT'S RIGHT. [20] I THINK THAT THE COURT SHOULD ACT AS A CHECK, AND I AGREE WITH YOU THERE IS A DUE PROCESS COMPONENT TO THIS, AND IT MAY JUST BE A MATTER OF DEGREE. I POINTED OUT THAT

JAIL CLOTHING, FOR EXAMPLE, IS FORBIDDEN IN FRONT OF THE JURY, TOO. WE COULDN'T BRING OUR CLIENT OUT LOOKING LIKE THIS IN FRONT OF THE JURY BECAUSE THE JURY WOULD DRAW THE SAME INSIDIOUS INFERENCES ABOUT HER, THE LOOK OF GUILT BECAUSE OF JAIL CLOTHING. AND YET IN THE 16 YEARS I HAVE BEEN A JUDGE AND THE 35 YEARS I HAVE BEEN IN THIS DISTRICT, I HAVE NEVER HEARD ANYONE CLAIM THAT, JUDGE, THERE IS IMPLICIT BIAS AND ALL THIS. I WANT MY CLIENT TO APPEAR IN FRONT OF YOU NOT IN JAIL CLOTHING.

I GET IT. THERE IS A DIFFERENT BETWEEN SHACKLES AND CERTAINLY IN EXCEPTIONAL CIRCUMSTANCES WHERE THE SHACKLES ARE ON SOMEBODY THAT'S GOT MEDICAL PROBLEMS OR THEY ARE PROHIBITING SOMEBODY FROM WRITING DURING A MOTION HEARING SENDING NOTES, THEN I'D FALL BACK ON THE EXCEPTION THAT'S NOTED IN THE POLICY. BUT THE DIFFERENCE BETWEEN THE ARGUMENT THAT'S BEING MADE TODAY AND ANOTHER ARGUMENT THAT COULD BE MADE ABOUT JAIL CLOTHING IS A MATTER OF DEGREE.

MR. CAHN: YES AND NO. I MEAN, OUR FOCUS—THERE ARE CERTAIN INTERESTS INVOLVED IN THE SHACKLING OF AN INDIVIDUAL. IN THE PARTICULAR INTEREST THAT WE ARE LEAST FOCUSED TO IN THIS SITUATION BECAUSE, AS I SAID AT THE BEGINNING,

WE ARE NOT DEALING WITH JURY TRIAL SITUATIONS. THE INTEREST THAT WE ARE LEAST FOCUSED ON IS THE PREJUDICE TO THE [21] FACT FINDER. AND THAT'S NOT BECAUSE WE DON'T BELIEVE JUDGES CAN BE PREJUDICED BY THE THINGS THEY OBSERVE BUT RATHER WE TRUST THEM TO BE CONSCIOUS OF THE INFLUENCE THESE THINGS HAVE ON THEM AND TO WORK ACTIVELY TO DISCOUNT THOSE.

IT'S NOT WE DON'T BELIEVE JUDGES ARE HUMAN BUT WE BELIEVE THAT THEY ARE TRAINED AND THEY ARE AWARE AND THEY WILL WORK AGAINST THOSE BIASES. SO THAT IS AN ISSUE, AN INTEREST THAT'S REALLY NOT AT STAKE HERE IN A MAJOR WAY IN OUR VIEW. IF WE WERE IN FRONT OF THE JURY IT WOULD BE, AND THEN WE'D BE APPLYING A VERY, VERY DIFFERENT STANDARD.

THE COURT: TELL ME WHAT IT IS, THEN, BECAUSE I THOUGHT UNDERLYING THIS WHOLE THING WAS A FEAR THAT IN SOME JUDGE'S SUBCONSCIOUS SEEING A DEFENDANT IN CHAINS WOULD PREJUDICE THE JUDGE AGAINST THAT DEFENDANT. AND FRANKLY, IN THE SERIAL APPLICATIONS THAT I HAVE HAD, SOME OF THE LAWYERS IN YOUR OFFICE HAVE ADVOCATED THAT, AND I HAVE TRIED TO ASSURE THEM THAT I AM MUCH MORE LIKELY TO PAY ATTENTION TO MARC GELLER'S NEW SUIT THAN A DE-

FENDANT IN CHAINS. IT'S JUST LIKE WHITE NOISE TO ME.

MR. CAHN: ON THE LIST OF INTERESTS THAT I THINK THAT MATTER IN THIS LITIGATION THAT'S VERY LOW DOWN ON THE LIST. I WOULD START THE FIRST INTEREST IS THE PRIMARY INTEREST, THE INTEREST IN BEING FREE FROM UNNECESSARY RESTRAINTS WHICH IS AS JUST THIS MARSHAL SAID, IS AT THE VERY CORE OF THE LIBERTY PROTECTED BY THE DUE PROCESS.

[22]

THE COURT: LET'S TALK ABOUT THAT. I'LL AGREE. THAT FRAMES THE ISSUE. UNNECESSARY RESTRAINTS AND YOU ARE SAYING, LOOK, BE A CHECK ON THE MARSHAL'S DISCRETION. THEY BELIEVE, CONTRARY TO WHAT YOU HAVE TOLD ME, THAT THIS IS ABSOLUTELY NECESSARY, PARTICULARLY IN THE CASE OF MULTIPLE DEFENDANTS IN COURT. WHAT THEY SAY IS JUST LIKE WE ARE DISTRUSTFUL OF PSYCHIATRISTS WHO TRY TO PREDICT FUTURE DANGEROUSNESS, AND THERE HAS BEEN A GREAT DEBATE OVER WHETHER THAT TESTIMONY COULD BE ADMISSIBLE IN CERTAIN KINDS OF CASES. THEY SAY WE HAVE NO ABILITY TO FERRET OUT AND PREDICT WHO THE DANGEROUS ONES ARE BEYOND THE OBVIOUS. A GUY COMES IN LIKE JONATHAN GEORGE, HE HAS GOT A TRACK RECORD A MILE LONG, FIGHTING WITH COPS AND VIOLENT FELONIES, WE ARE ON ALERT.

BUT WHAT I HAVE LEARNED AND I THINK WHAT MARSHAL STAFFORD TOLD US IN THE PRESENTATION THAT ME MADE WAS THAT BEYOND THAT WE ARE VERY INEPT AT PREDICTING WHO IS LIKELY TO BE VIOLENT, AND IT COULD BE THE GUY YOU SUSPECT LEAST. HE ELABORATED A LITTLE BIT AS I RECALL AND SAID THEY ARE SEEING INCREASING NUMBER OF PEOPLE AFFILIATED WITH GANGS AND THAT THERE ARE WANT-TO-BS THAT WANT TO GET IN THE GANGS, SO THEY'LL GET A COMMISSION TO HARM SOMEBODY ELSE, AND SOME GUY WHO HAS NO HISTORY OF VIOLENCE AND MAYBE VERY LITTLE CRIMINAL HISTORY SUDDENLY WILL BE THE AGGRESSOR AND THE ATTACKER OF SOMEONE ELSE, AND THEY CAN'T KNOW THAT IN ADVANCE.

THE ONLY WAY TO PROTECT THIS MASS OF PEOPLE [23] INCLUDING YOUR CLIENT IS TO PUT RESTRAINTS ON ALL TO PREVENT THAT TYPE OF ATTACK. SO WHAT DO YOU DO ABOUT THAT? I MEAN, MY TENDENCY IS TO BE DEFERENTIAL TO THEIR EXPERIENCE AND SAY, OKAY, THAT SOUNDS REASONABLE TO ME, AND THE RESTRAINTS DON'T COME GREATER THAN WHAT IS NECESSARY TO MEET THAT OBJECTIVE OF PROTECTING INMATES.

MR. CAHN: THERE IS TWO PROBLEMS WITH THAT. ONE IS A LEGAL PROBLEM AND ONE IS A FACTUAL PROBLEM. THE LEGAL PROBLEM IS THAT THAT PARTICULAR RA-

TIONALE COULD JUSTIFY ANY LEVEL OF OPPRESSIVE RESTRAINT ON AN INDIVIDUAL ON THE GROUNDS THAT WE CAN'T PREDICT, DON'T KNOW, AND THEREFORE, WE HAVE TO TAKE ALL POSSIBLE PRECAUTIONS. BUT LET ME SAY—

THE COURT: I DON'T AGREE WHAT THAT.

MR. CAHN: *BELL VERSUS WOLFISH* SPECIFICALLY REJECTED THAT LINE OF ARGUMENT.

THE COURT: THEN I DO, TOO. I DON'T THINK IT WOULD ALLOW ANY LEVEL OF RESTRAINT. THEY COULDN'T BRING SOMEBODY OUT HERE LOOKING LIKE A GUY IN SILENCE OF THE LAMBS IN A CHAIR—THAT WOULD CAUSE EVERYBODY TO SIT UP AND TAKE NOTICE AND SAY WHY THIS FOR EVERYBODY.

AGAIN, IT'S A MATTER OF DEGREE. I DON'T THINK THAT THAT ARGUMENT WOULD ALLOW ANY LEVEL OF RESTRAINT. BUT YOU HAVE TOLD ME THAT THIS IS A BALANCE, AND I AM SENSITIVE TO WHAT YOU ARE TALKING ABOUT. I AM SENSITIVE TO THE PERCEPTION I, FOR ONE, DON'T LIKE TO SEE PEOPLE IN CHAINS. I HANDLE [24] THESE CIVIL CASES WHERE PRISONS BROUGHT CIVIL RIGHTS CASES AGAINST THE PRISON GUARDS, AND I AM ALWAYS TOLD IN THOSE CASES ACCOMPANIED BY TWO GUARDS WE HAVE TO LEAVE THE CHAINS ON. IT'S A CIVIL CASE. I DON'T LIKE IT. I DON'T LIKE

A GUY TO APPEAR LIKE A CHAINED ANIMAL, PARTICULARLY WHEN HE IS ADVOCATING HIS CASE. IT'S NOT LIBERTY INTEREST INVOLVED THERE, BUT I DON'T LIKE IT.

I AM SENSITIVE TO WHAT YOU ARE SAYING ON THE ONE HAND, BUT ON THE OTHER HAND HOW DO WE ACCOMMODATE THIS INTEREST THAT THEY HAVE WHERE THEY CAN'T IDENTIFY WHO THE DANGEROUS PEOPLE ARE AND WE ARE RISKED AN ATTACK BY SOME UNSUSPECTING—A PERSON WHO IS NOT SUSPECTED TO BE DANGEROUS AGAINST SOMEBODY THAT IS.

MR. CAHN: LET ME DEAL WITH THE FACTUAL DISPUTE THAT I HAD WITH THAT ARGUMENT, AND I THINK THAT THIS GOES TO WHAT YOU ARE ASKING.

THE DEPUTY MARSHAL JOHNSON IN THIS DECLARATION AND THE GOVERNMENT IN THEIR FILING, NOTES THAT THERE ARE 59,000 PRISONER TRANSFERS THROUGH THE CELLS IN A GIVEN YEAR; THAT IN 2013, THEY RECOUNT FOUR INCIDENTS OF INMATE-ON-INMATE VIOLENCE, TWO OF WHICH OCCURRED IN THE COURT. WE GIVE THEM FOUR FOR THE PURPOSES OF THIS.

ONE—NINE INSTANCES ON INMATE ON STAFF VIOLENCE, ONE OF WHICH OCCURRED IN THE COURT IN AN EXTENDED END OF THE HOLDING CELL. AND AGAIN, WE ARE ONLY DEALING WITH SECURITY [25] WITHIN THE COURTROOM IN REGARD TO THIS MOTION.

AND WHILE THEY DIDN'T GIVE A COUNT, THEY DISCUSSED FOUR INSTANCES OF POTENTIAL WEAPONS FOUND IN THE HOLDING CELL.

NOW, I CONFESS THAT I DO NOT UNDERSTAND THE BAYSIAN PROBABILITY AND PREDICTIVE STATISTICS, BUT WHEN I DO THE SIMPLE MATH ON THAT AT DIVIDING THESE NUMBERS, I COME UP WITH .000067 PERCENT, A NUMBER THAT IN MY VIEW IS VANISHINGLY SMALL, AND THAT'S THE HISTORICAL RECORD.

THE COURT: TELL ME SOMETHING ELSE. ONE THING I DIDN'T UNDERSTAND. OF THE 59,000 WHO ARE TRANSFERRED BACK AND FORTH, ARE THEY SHACKLED DURING THAT TRANSFER PROCESS AND WHILE THEY ARE IN THE HOLDING CELLS?

MR. CAHN: MY UNDERSTANDING FROM THE MARSHAL'S DECLARATION IS THAT THEY REMAIN SHACKLED IN THE HOLDING CELLS IN LEG SHACKLES ONLY; THAT DURING TRANSPORT, THEY ARE FULLY RESTRAINED. THE ONES IN THE HOLDING CELL—MR. JOHNSON, IF I AM RECOLLECTING IT WRONG, PLEASE, WITH THE COURT'S PERMISSION, JUST POP IN AND TELL ME. THEY ARE FULLY RESTRAINED IN TRANSPORT. THEY GET TO THE HOLDING CELLS DOWNSTAIRS; THAT LEG—I MEAN, ARMS AND BELLY CHAINS ARE REMOVED; THEY SIT IN LEG SHACKLES. THIS IS CONSISTENT WITH OUR EXPERIENCE AS WELL. THEY ARE BROUGHT UP TO THE

COURTROOM IN FULL SHACKLES, AND WHEN THEY ANY SHACKLES ARE REMOVED, THEY ARE REMOVED IN THE—

THE COURT: LET ME UNDERSTAND THAT. WHEN PRISONERS ARE AWAITING THEIR APPEARANCE IN COURT IN THE HOLDING CELL [26] OUTSIDE MY COURT, THEY ARE IN WHAT THEY CALL A FIVE-POINT SHACKLE?

MR. CAHN: AS I UNDERSTAND IT UNTIL JUST BEFORE THEY ARE BROUGHT IN. CAN I TURN TO—

THE COURT: YES, OF COURSE. PLEASE, LET'S GET THIS RESOLVED.

DEPUTY MARSHAL JOHNSON: WITH THE EXCEPTION—THE FIVE-POINT SHACKLES IS NOT OUR TERMINOLOGY FOR IT. THEY SIT IN A HOLDING CELL IN FULL RESTRAINT.

THE COURT: THAT MEANS HANDS ARE HANDCUFFED TO THE WASTE, AND THEN THERE IS CHAINS ON THE LEGS.

DEPUTY MARSHAL JOHNSON: THAT'S RIGHT.

THE COURT: AND, MR. CAHN, HIS UNDERSTANDING IS WHEN THEY ARE FIRST BROUGHT, THEY ARE BROUGHT IN THAT MANNER, HANDCUFFED OR SECURED THAT WAY, IS THAT CORRECT, WHEN THEY ARE BROUGHT FROM WHATEVER FACILITY?

DEPUTY MARSHAL JOHNSON: WITH THE EXCEPTION OF MCC. THAT'S CORRECT.

THE COURT: AND ARE THE HANDCUFFS REMOVED AT SOME POINT WHEN THEY GET TO THE MAIN PROCESSING AREA.

DEPUTY MARSHAL JOHNSON: YES.

THE COURT: AND THEN WHEN THEY ARE BROUGHT UP, FOR EXAMPLE, THE ELEVATOR HERE, ARE THEY IN HANDCUFFS OR NOT?

DEPUTY MARSHAL JOHNSON: THEY ARE IN HANDCUFFS. JUST PRIOR TO WHEN THE DEPUTIES REPORT TO OUR CELL BLOCK TO [27] RETRIEVE THE DEFENDANTS.

THE COURT: SO WHY DO THEY TAKE THE HANDCUFFS OFF FOR A PERIOD OF TIME WHEN THEY ARE IN THE CENTRAL PROCESSING CELL?

DEPUTY MARSHAL JOHNSON: BECAUSE SOME OF THOSE DEFENDANTS MAY BE HERE FOR HOURS IN HOLDING CELLS. AND SO TO LIMIT THE EFFECT OF BEING IN RESTRAINTS. TO LIMIT THE LEAST AMOUNT OF TIME TO BE IN FULL RESTRAINTS. WE DON'T PUT THEM BACK ON UNTIL JUST—

THE COURT: HOW DO YOU PREVENT THE KINDS OF ATTACKS THAT ARE DRIVING THIS POLICY UP HERE IF THEY ARE NOT FULLY SHACKLED WHEN THEY ARE AMONG EACH OTHER IN THE CENTRAL PROCESSING CELL?

DEPUTY MARSHAL JOHNSON: WELL, THERE IS NOTHING TO SAY THAT COULDN'T HAPPEN DOWNSTAIRS, BUT THERE ARE ADDITIONAL STAFF, SUBSTANTIALLY MORE

STAFF DOWNSTAIRS THAN WHAT ARE UPSTAIRS.

THE COURT: SO IS THAT, IN YOUR JUDGMENT, WHY THERE IS A DIFFERENCE BETWEEN HAND SHACKLING TO THE WAIST IN THE COURT HOLDING CELLS VERSUS THE CENTRAL PROCESSING CELL, MORE STAFF DOWNSTAIRS?

DEPUTY MARSHAL JOHNSON: THAT'S A PART OF IT. AND I THINK THAT PART OF IT IS THAT US BALANCING THE AMOUNT OF TIME THAT THEY ARE IN FULL RESTRAINT, WE TRY TO LIMIT THAT AS MUCH AS POSSIBLE.

[28]

THE COURT: IS IT—I AM TRYING TO FIGURE OUT WHAT JUSTIFIES PUTTING THEM BACK IN HANDCUFFS ATTACHED TO THEIR WAIST WHEN THEY ARE IN THE COURT HOLDING CELL AREA IF THEY ARE NOT IN FULL RESTRAINT DOWN IN THE CENTRAL PROCESSING CELL.

DEPUTY MARSHAL JOHNSON: SO WHEN THE DEFENDANTS ARE UPSTAIRS—FOR EXAMPLE, IF YOU HAD MULTIPLE MATTERS ON CALENDAR TODAY THAT ADDITIONAL DEFENDANTS, BESIDES THE DEFENDANTS THAT ARE IN COURT, WOULD BE HELD BEHIND THE COURTROOM IN THE HOLDING CELL, THERE ARE NO SECURITY STAFF BACK THERE. THERE ARE CAMERAS, AND THERE ARE STAFF THAT OCCASIONALLY COME IN AND CHECK IN ON THEM, BUT THE DEPUTIES

THAT ARE IN COURT ARE RESPONSIBLE FOR THE DEFENDANTS THAT ARE HELD BEHIND THE COURTROOM.

THE COURT: WALK ME THROUGH THIS. REALLY, I DON'T KNOW. THERE IS TYPICALLY TWO DEPUTIES IN MY COURT WHEN CRIMINAL MATTERS ARE BEING HEARD.

DEPUTY MARSHAL JOHNSON: CORRECT.

THE COURT: AND TAKE A MONDAY CALENDAR, FOR EXAMPLE. I MAY HAVE MULTIPLE DEFENDANTS, 20, 25 DEFENDANTS THAT HAVE TO BE SEEN AND THEIR CASES HAVE TO BE HEARD ON A MONDAY. YOU ARE SAYING THERE IS JUST TWO MARSHALS THAT STAFF THE COURT AND THE COURT HOLDING CELL?

DEPUTY MARSHAL JOHNSON: THERE ARE SOME STAFF THAT WILL OCCASIONALLY COME AND TAKE THE DEFENDANTS THAT ARE FINISHED BACK DOWNSTAIRS TO RETURN TO THE MAIN CELL BLOCK. [29] THEY MAY ASSIST IN BRINGING THEM UP TO THE FLOOR DEPENDING ON HOW MANY THERE ARE.

THE COURT: BUT AT ANY GIVEN TIME THERE MAY BE JUST TWO MARSHALS, THOSE THAT ARE HERE, AND THEN THE PRISONERS ARE LEFT WITHOUT ANY GUARDS OUTSIDE THE CELL WHILE COURT PROCEEDINGS ARE GOING ON WITH A PRISONER OR A DEFENDANT?

DEPUTY MARSHAL JOHNSON: UNLESS THE DEPUTIES THAT ARE IN THE COURTROOM CALL DOWN AND REQUEST SPECIFIC ASSISTANCE FROM SOMEBODY FOR A PARTICULAR REASON.

THE COURT: IS THAT THE EXPLANATION FOR WHY PEOPLE ARE HANDCUFFED JUST OUTSIDE OF COURT, THAT THERE IS NOBODY WATCHING, NOBODY THAT CAN ATTEND EMERGENCIES IF SUCH OCCUR?

DEPUTY MARSHAL JOHNSON: IT IS THAT, AND IT IS ALSO THE NATIONAL POLICY OF THE MARSHAL SERVICE THAT ONCE REMOVE THEM FROM THE CELL BLOCK, THEY ARE TO BE IN FULL RESTRAINT.

THE COURT: THE CELL BLOCK BEING THE CENTRAL PROCESSING AREA?

DEPUTY MARSHAL JOHNSON: YES, YOUR HONOR.

THE COURT: I THINK I UNDERSTAND.

MR. CAHN: JUDGE, I KNOW THE COURT RULED ON THIS ISSUE ALREADY, BUT I WANT TO POINT OUT THAT IN MY VIEW THIS IS THE SORT OF RICH FACTUAL DETAIL THAT IN THE ANGLO AMERICAN TRADITION IS BEST DEVELOPED IN AN EVIDENTIARY HEARING WITH ADVERSARIES.

THE COURT: WELL, YOU DISPUTE ANY OF WHAT HE IS [30] SAYING OR THAT HE'D SAY IT DIFFERENTLY, MR. CAHN, IF WE HAD HIM UNDER OATH?

MR. CAHN: I DON'T DISAGREE WITH THE PARTICULARITIES, BUT IT IS—IN ALL SERIOUSNESS PUTTING ASIDE, IT REALLY IS OUR TRADITION TO ENGAGE IN DIRECT AND CROSS-EXAMINATION FOR A REASON WHICH IS THINGS COME UP. THERE IS A RICHNESS OF DETAILS THAT GETS BROUGHT OUT. AND IN THIS CASE THE IMPORTANT MATTERS ARE BOTH THE EFFECT AND THE JUSTIFICATION OF THE POLICY. AND I THINK THOSE ARE BETTER BROUGHT OUT IN A RICHER RECORD, BOTH FOR THIS COURT AND, OF COURSE, FOR THE NINTH CIRCUIT, IF THAT'S WHERE IT GOES, BY ENGAGING IN THAT PROCESS. SO THAT'S IN ALL SERIOUSNESS PUTTING ASIDE—

THE COURT: I UNDERSTAND THAT. ARE THERE AREAS OF THE RECORD THAT YOU THINK COULD BE CRYSTALLIZED OR CLARIFIED BY YOU EXAMINING SOMEBODY UNDER OATH? I AM JUST HESITANT TO TURN A DETERMINATION ABOUT JUDICIAL POLICY INTO AN ADVERSARY PROCEEDING. THAT'S MY DESISTANCE TO IT.

MR. CAHN: THERE IS A NUMBER—I WAS GOING TO GO THROUGH THE AREAS WE DISPUTE WITH REGARD TO THAT, AND MAYBE YOU CAN HEAR THOSE AND DECIDE WHAT YOUR VIEW IS OF THE USEFULNESS OF AN EVIDENTIARY HEARING IN REGARD TO THOSE.

THE COURT: ALL RIGHT.

MR. CAHN: I WAS JUST TALKING WITH MS. CHARLICK. ONE OF THE THINGS I WANT TO TRY AND DO HERE TODAY IS BE [31] RESPONSIVE TO THE COURT'S NEEDS AND DESIRES. I'D LIKE TO GO THROUGH THESE. THAT'S MY INTENT, BUT IF IT'S THE COURT'S VIEW THAT WE ARE BETTER SPENDING THIS TIME DISCUSSING SUBSTANTIVE MERITS OF THE ISSUE, I AM HAPPY TO DO THAT, AND WE CAN FILE THIS AS A DOCUMENT AFTER THIS TODAY'S HEARING.

THE COURT: NO, I WANT TO KNOW—BECAUSE FRANKLY, SOME OF THE STUFF, THE REQUESTS THAT WERE BROUGHT UNDER THE AUSPICES OF THE RULE 17C, I THOUGHT EVEN IF I WAS INCLINED TO GRANT SOME OF THEM, THEY WERE WAY OVERBROAD. THEY WENT BACK TEN YEARS. MY UNDERSTANDING IS THAT THIS POLICY THAT'S NOW—THAT WE ARE DEFERRING TO, THAT THE JUDGES ARE DEFERRING TO, WAS CHANGED OR PROMULGATED IN 2011.

MR. CAHN: I TALKED TO DEPUTY MARSHAL ABOUT—DEPUTY MARSHAL JOHNSON ABOUT THAT YESTERDAY. MY UNDERSTANDING IS THAT IS WHEN THE POLICY WAS PROMULGATED. THERE MAY HAVE BEEN A POLICY SIMILAR THAT PREDATED THIS. AND, OF COURSE, IN MY VIEW AS YOU HAVE HEARD EARLIER, WHAT'S RELEVANT IS WHAT CHANGES AND CIRCUMSTANCES HAVE LED TO THE CHANGE IN APPLICATION OF A POLICY IN THIS COURT.

AND I HAVE TOLD YOU IN MY VIEW THE EIGHT AND A HALF YEARS OF EXPERIENCE I HAVE IN THIS COURT IS SUFFICIENT TO EXAMINE THAT ISSUE. SO I DON'T KNOW THAT WE WOULD NEED TO GO BACK TEN YEARS. THE REASON THE REQUEST WAS MADE SO BROADLY IS BECAUSE THERE WAS THIS PURPORTED JUSTIFICATION OF THE POLICY OF A CHANGE OF THE DEMOGRAPHIC OF THE POPULATION THAT COMES [32] BEFORE THE COURT. AND THAT'S WHY IT WAS DRAFTED IN THAT REGARD. AND, OF COURSE, SOME OF THESE MAY BE MATTERS THAT IF WE WERE TO HAVE AN EVIDENTIARY HEARING, I ASSUME WE'D SIT DOWN WITH THE GOVERNMENT AND WE'D TALK ABOUT SOME OF THESE FACTS WHICH COULD SIMPLY BE STIPULATED TO.

THE COURT: TELL ME WHERE YOU THINK THE RECORD IS DEFICIENT ON FACTUAL BACKGROUND, OR ALTERNATIVELY, WHERE THERE IS A SHARP DISPUTE, WHERE YOU JUST DISAGREE WITH WHAT'S BEING SAID OR WHAT YOU UNDERSTAND THE JUDGES TO HAVE BEEN TOLD.

MR. CAHN: LET ME TRY AND GO THROUGH THIS AS I HAVE GOT IT WRITTEN OUT. WHERE YOU HAVE GOT QUESTIONS, PLEASE STEP IN AND ASK ME, AND I'LL TRY TO MOVE THROUGH THIS QUICKLY.

WE ARE TALKING BEFORE ABOUT PARAGRAPH 4 AND ABOUT THE LACK OF INFORMATION. AND THE OTHER POINT I WANTED

TO MAKE ABOUT THAT IS WE TALKED TO DEPUTY MARSHAL JOHNSON YESTERDAY, AND IT DOESN'T APPEAR THAT CONCERN WAS BROUGHT UP IN REGARD TO THE INITIAL PROCEEDINGS. HOW MUCH INFORMATION DO WE HAVE ABOUT AN INDIVIDUAL WHEN THEY FIRST COME BEFORE THE COURT. BUT IT DOESN'T APPEAR THAT THERE IS ANY ADDITIONAL WORK DONE TO OBTAIN MORE INFORMATION ABOUT THE INDIVIDUAL OR THEIR TENDENCIES TOWARDS VIOLENCE OR DISRUPTION AFTER THAT INITIAL APPEARANCE. IF INFORMATION IS RECEIVED FROM THE FACILITY AT WHICH THE INDIVIDUAL IS HOUSED, THAT INFORMATION IS TAKEN INTO ACCOUNT, BUT THERE IS NO FURTHER EFFORTS.

IN THAT SENSE I THINK THAT THE WAY IN WHICH THE [33] DECLARATION IS WORDED AND SET OUT IS SOMEWHAT INACCURATE IF NOT INCOMPLETE. NOW, I'D ALSO NOTE THAT WITH REGARD TO THE PHOTOGRAPH 4 OF THE MARSHAL'S NOTE THAT A LARGE NUMBER OF THE INDIVIDUALS TRANSPORTED BY THEM AND BROUGHT INTO COURT BY THEM DON'T RESIDE IN THE U.S. AND SO THERE IS LIMITED INFORMATION ABOUT CRIMINAL HISTORY AND OTHER MATTERS AVAILABLE TO THEM.

THAT'S ONLY RELEVANT AGAIN IN MY VIEW IF THERE HAS BEEN A CHANGE AND BASED ON OUR KNOWLEDGE—AND AGAIN, THIS IS AN OFFICE THAT INTERVIEWS NEAR-

LY 100 PERCENT OF THE INDIVIDUALS WHO COME INTO COURT BEFORE THEY MAKE THEIR INITIAL APPEARANCE—THAT'S NOT SUBSTANTIALLY DIFFERENT FROM WHAT'S HAPPENED IN THE PAST THAT THIS PERCENTAGE OF IMMIGRANTS, INDIVIDUALS WITH EITHER NO STATUS OR WHO HAVE BEEN RESIDENTS OF OTHER COUNTRIES FOR A LONG PERIOD OF TIME IS NO DIFFERENT THAN IT WAS TWO YEARS AGO OR FIVE YEARS AGO OR EIGHT YEARS AGO.

SO THAT'S ANOTHER FACTUAL ELABORATION PERHAPS RATHER THAN A SHARP DISPUTE THAT I THINK THE RECORD WOULD BE BEST BE ENHANCED.

LET ME TURN TO PARAGRAPH 5.

THE COURT: ONE OF THE THINGS THAT OCCURS TO ME IS THE PREMISE OF THAT POINT IN THE ARGUMENT BASED ON THAT POINT IS THAT THE POLICY BEFORE 2011 WAS ADEQUATE AND FINE. I AM NOT NECESSARILY SURE THAT'S SO. MAYBE THEY MADE AN ADJUSTMENT IN THE POLICY BECAUSE IT WASN'T ADEQUATE AND THEY REALIZED [34] THAT.

THE OTHER THING IS I AM NOT SO SURE THAT WE LOOK AT THE MICROCOSM OF THE SOUTHERN DISTRICT OF CALIFORNIA WHEN WE EVALUATE THE MARSHAL'S NATIONAL POLICY. I ASSUME THAT THE DIRECTOR OF THE MARSHAL SERVICE GETS REPORTS FROM THE 94 DISTRICTS AND THAT MAY BE DIS-

TRICTS WHERE DEFENDANTS ARE A LOT MORE VIOLENT AND RATHER THAN HAVE PECULIAR POLICIES PER DISTRICT, THEY SET NATIONAL POLICIES, THE NATIONAL STANDARD.

YOU CAME FROM MIAMI, AND I CAN IMAGINE THAT THOSE THAT CAME OVER IN THE MARIOLITO BOAT LIFT, WE DIDN'T KNOW MUCH ABOUT THEIR BACKGROUNDS, BUT THERE WAS REASON TO BE MUCH MORE CAUTIOUS BECAUSE OF WHAT WE LEARNED LATER THAT CASTRO OPENED THE PRISONS, FILLED THE BOATS WITH THOSE FOLKS, AND I WOULD HAVE BEEN ON GUARD.

NOW, I DON'T HAVE THAT PERCEPTION ABOUT PEOPLE COMING FROM MEXICO AS A GROUP. BUT IT KIND OF POINTS UP AS A CLEARING HOUSE NATIONALLY FOR SETTING POLICY THE MARSHAL DOES HAVE ACCESS TO SUCH INFORMATION.

MR. CAHN: AS A MATTER FOR THE MARSHAL AS A—FOR LACK OF A—AND I DON'T MEAN THIS IN AN UNKIND WAY—AS A BUREAUCRAT, IT'S CERTAINLY RATIONAL FOR WHOEVER IS THE HEAD OF THE MARSHAL SERVICE TO TAKE THOSE MATTERS INTO ACCOUNT AND SETTING NATIONAL POLICY, BUT WE ARE NOT DEALING WITH NATIONAL POLICY. WE ARE DEALING WITH HOW THAT POLICY IS APPLIED IN THIS DISTRICT. AND IT IS APPLIED DIFFERENTLY IN EVERY [35] DISTRICT. I'LL NOTE THAT IN MIAMI WHERE I PRACTICED FOR MANY YEARS AND WHERE,

IN MY VIEW I'LL SAY QUITE FRANKLY, OUR CLIENT POPULATION HAD A MUCH GREATER HISTORY AND PROCLIVITY TOWARDS VIOLENCE, INDIVIDUALS WERE NOT BROUGHT OUT IN FULL SHACKLES, EVEN AT INITIAL APPEARANCE.

THE COURT: WHAT DO YOU KNOW WHAT GOES ON THERE NOW OR SINCE 2011, SINCE THE PROMULGATION OF THIS POLICY?

MR. CAHN: I HAVEN'T ACTUALLY CHECKED. IF YOU'D LIKE, I CAN. I CAN MAKE A CALL TO MICHAEL CARUSO, WHO IS THE FEDERAL DEFENDER THERE NOW, AND I CAN SUPPLY THAT INFORMATION AFTER THE FACT AND INFORMALLY TO MR. COLE.

THE COURT: NO, I JUST WONDERED BECAUSE IN COMPARISON OF WHETHER THEY WERE SHACKLING WHEN YOU WERE THERE WHICH IS EIGHT AND A HALF YEARS AGO VERSUS NOW ISN'T ALL THAT HELPFUL.

WHAT I AM GIVEN TO UNDERSTAND IS THAT THIS NATIONAL POLICY REQUIRES SHACKLING IN ALL OF THE DISTRICTS, AND WE GOT SOME ANECDOTES. I THINK IN SAN FRANCISCO THEY ARE IN LEG SHACKLES BUT THEY ARE NOT IN HAND SHACKLES ON THE WAIST.

MR. CAHN: AT INITIAL APPEARANCE. THEY ARE NOT SHACKLED AFTERWARDS.

MR. COLE: YOUR HONOR, THE REASON I STOOD WAS ONLY TO SAY WHEN WE GO THROUGH THESE SPECIFIC EVIDENTIARY

DISPUTES, SO TO SPEAK, OR LACK OF CLARITY, I CAN EITHER RESPOND AT THE END OR ONE AT A TIME, BECAUSE IT COULD VERY WELL BE THAT [36] REALISTICALLY AT SOME POINT WHERE IT ELIMINATES SOME FACTUAL DISPUTE AS WE GO ALONG FROM THE GOVERNMENT'S PERSPECTIVE.

I JUST WANTED TO GIVE YOU THAT OFFER OR I COULD WAIT UNTIL—

THE COURT: ACTUALLY, I AM MAKING NOTES AS WE GO. SO IF YOU HAVE SOMETHING ON THIS—I MEAN, THE FIRST TWO ARE THESE. FIRST, THAT THE MARSHALS DON'T ATTEMPT TO GET ANY ADDITIONAL INFORMATION AFTER THE FIRST APPEARANCE THAT MIGHT JUSTIFY SHACKLING AT SUBSEQUENT APPEARANCES. THE SECOND IS THAT MARSHALS DON'T HAVE ENOUGH INFORMATION ABOUT NON-U.S. CITIZEN WHO ARE IN THEIR CUSTODY.

MR. COLE: I THINK THAT THE ISSUE OF WHETHER OR NOT THERE IS SUFFICIENT INFORMATION, WHICH IS THE FIRST ONE, AND THEN WE CAN RAISE IT AT PARAGRAPH 4, I DON'T THINK THERE IS ANY DISPUTE ABOUT THE PROCESS WHAT HAPPENS DOWN IN THE CELL BLOCK AND WHAT SCREENING GOES ON.

WE AGREE WITH THE FEDERAL DEFENDERS. THEY ARE VERY FAMILIAR WHAT THAT SCREENING. THEY ARE FAMILIAR WITH RULE 5 LITIGATION. WE ARE NOT CLAIMING

THERE HAS BEEN A CHANGE IN THAT SCREENING OTHER THAN THE FACT THAT THROUGH THE RULE 5 LITIGATION, THERE IS A GENERAL EMPHASIS ON ALL PARTIES INVOLVED IN THE PROCESS TO TRY TO GET PEOPLE TO COURT OR QUICKLY GETTING FOR THE INITIAL APPEARANCE. WE ARE NOT CLAIMING THAT THAT CHANGED WITH THE TIPPING POINT. WE JUST WANTED TO MAKE CLEAR THAT THERE IS A GENERAL INTEREST IN [37] GETTING PEOPLE TO COURT QUICKLY WHICH HAS TO BE TAKEN INTO ACCOUNT GENERALLY.

THE COURT: HIS POINT WAS BROADER THAN THAT. HE SAYS, LOOK, NO FOLLOW-UP IS DONE THEREAFTER. NO ATTEMPT TO CHECK WHERE THEY ARE BEING HOUSED TO SEE IF THERE IS ANY VIOLENT INCIDENTS OR TAKE TEMPERATURE, ANY OF THOSE THINGS THAT MIGHT INFORM FUTURE DECISIONS ABOUT THE NECESSITY OF SHACKLING AS THEY GO THROUGH THE CRIMINAL JUSTICE PROCESS AND MAKE THEIR APPEARANCES.

MR. COLE: I DON'T THINK THERE IS ANY DISPUTE ABOUT THAT EITHER.

THE COURT: I'LL ASSUME THAT THAT'S SO, THEN; THAT THEY DON'T DO ANY FOLLOW-UP AT ALL.

MR. COLE: THEY WILL RECEIVE SOMETIME INFORMATION FROM THE FACILITY, BECAUSE THE FACILITY KNOWS MORE AND

SAYS, HEY, THIS GUY HAS BEEN ACTING UP, BUT THEY DON'T TYPICALLY GO OUT AND DO AN INVESTIGATION.

THE COURT: DOESN'T SOUND THERE IS A DISPUTE ABOUT THAT, THEN.

WHAT ABOUT THE SECOND THING, MR. COLE?

MR. COLE: WHICH WAS?

THE COURT: THE SECOND THING WAS MR. CAHN POINTS TO PARAGRAPH 4, AND PARAGRAPH 4 TALKS ABOUT, LOOK, THESE—A LOT OF THE PEOPLE WE HAVE TO DEAL WITH ARE NOT U.S. CITIZENS. WE DON'T KNOW ANYTHING ABOUT THEIR BACKGROUND IN MEXICO. WE [38] DON'T KNOW ANYTHING ABOUT THEIR CRIMINAL HISTORY. AND ESSENTIALLY IMPLICIT IN THIS IS WE DON'T WANT TO TAKE A RISK WITH WHAT WE DON'T KNOW.

I DON'T SEE THAT AS—THERE MIGHT BE A JUDGMENT CALL AS TO HOW HIGH THE RISK IS, BUT I THINK IT'S COMMON SENSE THAT MANY PEOPLE WHO COME IN THIS CELL BLOCK ARE FROM ANOTHER COUNTRY, AND UNLESS THEY SELF-REPORT OR HAVE A U.S. CRIMINAL HISTORY, PEOPLE DON'T KNOW WHAT HAPPENED IN THAT COUNTRY. I THINK THAT'S PRETTY OBVIOUS, AND IT'S NOT REALLY—

MR. CAHN: WE DON'T DISAGREE WITH THAT, BUT OUR POINT IS THAT THAT HASN'T CHANGED.

MR. COLE: THAT'S AGREED.

MR. CAHN: IT'S THE SAME AS IT IS NOW.

THE COURT: YOU THINK IT IS THE SAME?

MR. COLE: THE ASPECT OF YOU DON'T KNOW HASN'T CHANGED. I AGREE THERE HAS BEEN NO CHANGE IN THE FACT THAT TEN YEARS AGO WE ALSO DIDN'T KNOW MUCH ABOUT PERSONS.

MR. CAHN: BUT THE POINT IS ALSO THAT HAS NOT CHANGED IN TERMS OF THE PERCENTAGE OF INDIVIDUALS WHO HAVE FOREIGN BACKGROUNDS IN THIS DISTRICT. I THINK THAT'S REMAINED CONSISTENT THROUGHOUT THIS TIME.

THE COURT: PERCENTAGES OF PEOPLE THAT ARE NOT U.S. CITIZENS IS PROBABLE ABOUT THE SAME AS IT'S ALWAYS BEEN?

MR. COLE: I THINK WE ARE NOT RELYING ON CHANGING IS THE REASON FOR OUR POSITION.

[39]

THE COURT: NO DISPUTE ON THAT EITHER. I'LL ACCEPT THAT AS TRUE.

WHAT'S NEXT, MR. CAHN?

MR. CAHN: I THINK MR. COLE JUST BRIEFLY MOVED INTO THE RULE 5 LITIGATION AND THE INTEREST THAT WE HAVE IN GETTING PEOPLE QUICKLY TO COURT. I WANT TO AMPLIFY RATHER THAN DISPUTE WHAT'S IN THE AFFIDAVIT. WHAT I WANT TO

MAKE CLEAR IS TO THE EXTENT THERE IS AN IMPLICATION IN THE AFFIDAVIT THAT THAT'S LED TO A SHORT-CIRCUITING OF THE SCREENING THAT WAS BY MCC THAT IS CORRECT.

IN FACT, MCC CONTINUES TO FOLLOW THE SAME SCREENING PROCEDURES IT DID BEFORE, AND RATHER WHAT'S HAPPENED IS THERE HAS BEEN A COMBINATION BY ADDITIONAL PERSONNEL AND ADDITIONAL TIME FOR READING THE TB'S, X-RAYS AND ALL THOSE THINGS TO ALLOW THE SAME SCREENING TO TAKE PLACE PRIOR TO THE INDIVIDUALS'S ARRIVAL IN COURT WITHOUT SIGNIFICANT DELAYS.

THE COURT: ANY DISPUTE ON THAT, MR. COLE, THAT THE SCREENING PROCEDURE THAT PRECEDES APPEARANCE OF A PERSON IN COURT BY THE MCC OR THE OTHER FACILITIES IS ESSENTIALLY THE SAME BEFORE AND AFTER THE CHANGE IN THE MARSHAL POLICY?

MR. COLE: NO DISPUTE.

MR. CAHN: AS TO PARAGRAPH 6, THE STAFFING OF THE U.S. MARSHALS IN TERMS OF THEIR FT—MAKE A COUPLE OF NOTES ABOUT THAT. FIRST, THE STATISTIC THAT WE ARE STAFFED AT 72 PERCENT OF FTE ALLOTTED BY A FORMULA WE BELIEVE IS INCOMPLETE [40] WITHOUT FURTHER INFORMATION, AND THAT FURTHER INFORMATION IS AS FOLLOWS.

72 PERCENT IS THE STATISTIC RIGHT NOW. IT IS NOT A SUBSTANTIAL CHANGE FROM 2012 OR 2011. NOW, THERE WAS SOME POINT IN THE PAST WHERE MARSHAL JOHNSON BELIEVE CAN'T SPECIFY EXACTLY WHEN WE WERE ALL—ALL OF US WERE MAYBE AT A MORE HIGH WATER POINT IN TERMS OF OUR STAFFING RELATIVE TO NEED, BUT THIS ISN'T A SUBSTANTIAL CHANGE. THE SUBSTANTIAL CHANGE THAT THEY HAVE HAD IN THEIR ABILITY TO STAFF IS ONLY IN THE AVAILABILITY OF CONTRACT OFFICERS WHO ARE INVOLVED NOT IN THE COURTROOM BUT RATHER IN THE MANAGEMENT OF INDIVIDUALS DOWN IN THE HOLDING CELLS.

THE COURT: THAT'S NOT YOUR ISSUE AT ALL; RIGHT?

MR. CAHN: NO.

THE COURT: YOU AGREE WITH THAT, MR. COLE, WHAT HE IS SAYING IS THAT THE STAFF CONCERNS REALLY SHOULDN'T BE PART OF THE EQUATION HERE BECAUSE THEY ARE ESSENTIALLY THE SAME INSOFAR AS THE COURTROOM SECURITY. THEY MAY HAVE CHANGED WITH RESPECT TO GRAND CENTRAL STATION DOWNSTAIRS BUT THAT HASN'T CHANGED UP HERE. THERE IS ALWAYS BEEN TWO MARSHALS UP HERE. THEY HAVE ALWAYS ALSO MANAGED THE SAME GROUP, 20 TO 25 PEOPLE ON A MONDAY FOR ME, FRIDAY FOR SOME OF THE OTHER JUDGES.

MR. COLE: I AGREE WITH THEM THAT—I THINK WE ARE ON AGREEMENT THAT THE PERCENTAGE OF STAFFING LEVELS AND THE IMPACT OF THE CONTRACTORS. THERE IS NO DISPUTE ABOUT THAT. [41] WE ARE NO DISPUTING—WE ARE NOT CLAIMING THAT THAT 72 PERCENT VERSUS THEIR WORKING CALCULATION HAS DRAMATICALLY CHANGED IN RECENT YEARS. WE ARE NOT THE CLAIMING THAT.

THE COURT: I'LL ASSUME THAT TO BE SO ALSO, MR. CAHN. TO TELL YOU THE TRUTH, I DON'T EVEN REMEMBER THE MARSHAL MENTIONING LACK OF STAFF AS ONE OF THE JUSTIFICATIONS. AS I RECALL, THE PRIMARY JUSTIFICATION WAS THE INABILITY TO PROTECT DANGEROUSNESS, AND THEREFORE TO PROTECT PEOPLE IN THE COURT. IN HIS VIEW, THE FACT THAT THE DEMOGRAPHIC HAS CHANGED AND WE HAVE MORE DANGEROUS PEOPLE, THE NECESSITY OF HIM AS THE U.S. MARSHAL FOR THIS DISTRICT FALLING IN LINE WITH A NATIONAL POLICY THAT REALLY, I AM NOT EVEN SURE THAT HE HAD ANY INPUT TO, BUT HE IS TAKING HIS MARCHING ORDERS FROM THEIR SERVICE. AND THEN, AS YOU POINT OUT, SOME OF THESE ANECDOTAL INCIDENTS THAT HE THINKS AT LEAST SUPPORT THE POLICY OF SHACKLING. THAT WAS THE PITCH WE GOT.

ONE OTHER THING I RECALL MARSHAL STAFFORD SAYING, AND I MENTIONED THIS

AND YOU SAW IT IN THE TRANSCRIPT, WAS THE TIME IT TAKES TO TAKE THESE SHACKLES ON AND OFF, AND I THINK HE ESTIMATES IT TOOK ABOUT THREE MINUTES AND WOULD REQUIRE THREE PERSONNEL, ONE IN FRONT, ONE BEHIND, AND ONE ACTUALLY TAKING THE SHACKLES OFF.

I WAS AT THE MEETING WHERE THIS WAS ALL DISCUSSED AND A VOTE WAS TAKEN AND WHETHER WE WOULD DEFER GENERALLY OR NOT, MAYBE NOT A FORMAL VOTE BUT VIEWS WERE SOUGHT AND THE [42] CONSENSUS WAS WE WOULD DEFER. THOSE WERE THE MAIN POINTS.

AND SO THIS IDEA, WELL, MARSHALS DON'T HAVE THE STAFF TO CONTROL THIS REALLY WASN'T PART OF OUR JUDGMENT IN PROMULGATING A NEW COURT POLICY.

MR. CAHN: JUDGE, I THINK THIS IS ADEQUATELY—THIS CONTRAST IS ADEQUATELY DRAWN THAT WE DO DISPUTE THE CHANGING NATURE OF THE POPULATION AND THERE WAS AN AFFIDAVIT.

THE OTHER POINT, THOUGH, THAT I WANT TO BRIEFLY DRAW ATTENTION TO IS WE DID INQUIRE ABOUT THIS WITH THE DEPUTY MARSHAL AND HE TOLD US THAT, IN FACT, THIS IS BASED ON THE PERCEPTIONS OF THE INDIVIDUALS SUCH AS MARSHAL STAFFORD OR DEPUTY MARSHAL JOHNSON RATHER THAN ANY ATTEMPTS TO STATISTICALLY EVALUATE THIS INFORMATION; THAT THEY

HAVE NEVER GONE BACK AND TAKEN A LOOK AT DO OUR NUMBERS REALLY BACK UP THIS PERCEPTION.

THE COURT: HOW WOULD WE DO THAT, THOUGH? WHAT WOULD THEY LOOK AT, PROBATION REPORTS? AND SOMETIMES PROBATION REPORTS DON'T CAPTURE THE NATURE OF THE GUY.

FOR EXAMPLE, I TOLD YOU ABOUT THE INCIDENT HERE. I THINK IT WAS IN THE NATURE OF VIOLENCE. THIS GUY GOT MAD AND IRRATIONAL OVER SOMETHING, AND HE WHIPPED HIS GLASSES AGAINST THE WALL OVER THERE, AND IT SOUNDED LIKE A SHOT GOING OFF.

NOW, I PERSONALLY WOULD CONSIDER THAT A VIOLENT INDENT, AND THE MARSHALS RESPONDED IN KIND. ONE TOOK HIM TO THE GROUND AND THE OTHER HAD THE TASER POINTED AT HIM. I AM [43] NOT SURE THAT THERE IS ANY REPORT MADE OF THAT OR THAT WOULD BE CAPTURED IN ANY DATABASE THAT COULD BE EXAMINED AND THEN COMPARED AGAINST THINGS THAT HAPPENED FIVE YEARS AGO.

MR. CAHN: I DON'T KNOW IF THERE IN OR ISN'T A REPORT OF THAT. I THINK MARSHAL JOHNSON INDICATED THERE PROBABLY WASN'T BUT HE COULDN'T BE SURE BECAUSE THERE IS SOME DISCRETION ON THE PART OF THE INDIVIDUAL THAT THE DEPUTY MAR-

SHALS WHEN TO REPORT INCIDENTS AND AT WHAT LEVEL.

BUT THAT WOULD CERTAINLY BE THE VERY FIRST PLACE YOU WOULD LOOK BECAUSE OF WHAT WE ARE OF COURSE MOST CONCERNED ABOUT BECAUSE THAT'S THE ISSUE WE ARE DEALING WITH IS WHAT HAPPENS IN THE COURTROOM.

NOW, THERE ARE OTHER WAYS TO CHECK THAT KIND OF THING, AND ONE WOULD BE BOTH THE SENTENCING COMMISSION AND THE PROBATION DEPARTMENT KEEP LOTS OF INFORMATION, LOTS OF STATISTICS ABOUT POPULATIONS, AND WOULD BE ILLUMINATING AS WELL. WOULD ANY OF THEM BE CONCLUSIVE? MAYBE NOT, BUT CERTAINLY, YOU WOULD WANT AT LEAST LOOK AND SEE ARE MY GUT FEELINGS ABOUT SOMETHING BACKED UP BY THE REALITIES.

THE COURT: IT BE SUCH A DAUNTING TASK, THOUGH, MR. CAHN, BECAUSE I THINK ANY EFFORT TO LOOK AT DOCUMENTATION WOULDN'T SUFFICIENTLY ANSWER THE QUESTION.

I GIVE YOU AN EXAMPLE. WE HAVE THESE ALIEN SMUGGLING CASES, AND FREQUENTLY THEY INVOLVE A HIGH SPEED CHASE. NOW, GENERICALLY, THE CONVICTION GETS REPORTED AS [44] TRANSPORTING ALIENS, BUT IT MAY INVOLVE GREAT DANGER AND GREAT VIOLENCE AND SOMEBODY TRYING TO RUN OVER AN AGENT OR SOME-

THING. A LOT OF TIMES THAT DOESN'T GET CHARGED AS AN ASSAULT. IT BECOMES AN AGGRAVATING CIRCUMSTANCE. HOW WOULD YOU EVER CAPTURE THE DANGEROUSNESS OF A PERSON LIKE THAT, BECAUSE ALL YOU ARE GOING TO SEE IS THE GENERIC CHARGE THAT HE WAS TRANSPORTING ALIENS AND SO YOU'D SET THAT IN THE PILE OF NON-DANGEROUS PEOPLE, AND THAT MAY BE A TOTAL MISCHARACTERIZATION OF THAT.

MR. CAHN: OF COURSE, SINCE WE ARE TALKING ABOUT A STATISTICAL ANALYSIS, THAT'S ONE OF THE PLACES THAT WOULD SHOW UP IN A SENTENCING COMMISSION'S INFORMATION BECAUSE THEY WOULD HAVE THE RISK OF HARM TO OTHERS AS ONE OF THE GUIDELINE FACTORS THAT WOULD HAVE BEEN APPLIED IN THAT SITUATION.

THE COURT: MAYBE OR MAYBE NOT.

MR. CAHN: I HAVE NEVER HAD A CASE WHERE THERE HAS BEEN A HIGH SPEED CHASE WHERE THERE HASN'T BEEN A GUIDELINE FACTOR APPLIED. NOW, ARE THERE ANY CASES WHERE IT'S NOT? YES, CERTAINLY, IT COULD.

THE COURT: LOOK, THERE IS A BUNCH. I HAVE THEM WHERE THE GOVERNMENT SAYS WE UNDERSTAND THERE IS A PLUS TWO, BUT WE ARE GOING TO ARGUE WITHIN THE RANGE RATHER THAN AT THE PLUS TWO. THAT HAPPENS ALL THE TIME, ALL THE TIME. AND JUDGES DO THAT, TOO. I SAID IT

BEFORE. I HAVE GOT SUFFICIENT LEEWAY WITHIN THE SENTENCING RANGE THAT I UNDERSTAND THERE IS [45] A DISPUTE ABOUT THIS AND CASES ARE GOING BOTH WAYS ON WHETHER THIS PARTICULAR CONDUCT QUALIFIES. I AM GOING TO AVOID THAT ISSUE AND ADJUST WITHIN THE RANGE. YOU'D NEVER CAPTURE THAT, AND YET THAT IS VERY POIGNANT PROOF OF VIOLENCE ON THE PART OF THE DEFENDANT.

MR. CAHN: STATISTICAL DATA IS NEVER PERFECT. I CERTAINLY AGREE WITH THE COURT ON THAT.

THE COURT: I AM NOT SURE IT BE HELPFUL.

MR. CAHN: BUT, IN MY VIEW, IT'S BETTER THAN ANECDOTES. THERE IS A REASON THE DATA HAS A HIGHER LEVEL OF INTEGRITY THAN ANECDOTES AND THE PLURAL OF ANECDOTES IS NOT DATA.

THE COURT: LET'S GO BACK TO THE CASE THAT NEITHER YOU OR I WANT TO NAME, BUT NO DATA WAS REQUIRED THERE. IT WAS ALL ANECDOTAL. THE DECLARATIONS WE ARE GETTING ABOUT THE NECESSITY OF SECURITY WAS ALL ANECDOTAL.

MR. CAHN: BUT WE HAVE—NOT SO MUCH ANECDOTAL. THOSE WERE HARD FACTS ABOUT WHAT WAS OCCURRING IN THAT PARTICULAR CASE. AND CERTAINLY, I WOULD NEVER SAY THAT IF THE MARSHALS WERE TO COME IN HERE AND SAY WE HAD AN INDI-

VIDUAL, HE IS HIGHLY DISRUPTIVE, HE HAS BEEN FIGHTING BACK IN THE CELLS, WE FOUND A WEAPON ON HIM, THAT I AM WOULD TURN AND SAY, YOU KNOW, THERE HAS BEEN NO JUSTIFICATION SHOWN FOR ANY ADDITIONAL SHACKLING. I WOULDN'T DO THAT. YOU WOULD LAUGH AT ME IF I DID.

[46]

THE COURT: THAT CASE WAS DECIDED ON A MORE GENERALIZED LEVEL, AS YOU KNOW. IT WAS A POLICY AND IT RESULTED IN A PUBLISHED OPINION THAT NOW GUIDES SIMILARLY SITUATED INDIVIDUALS. IT WASN'T PECULIAR JUST TO HIM. THEY ANNOUNCED IN BROAD STROKES WHAT THE AUTHORITY OF THE PRISON WAS TO INVOLUNTARY MEDICATE A PERSON. THEY REJECTED SOME OF THE SAME ARGUMENTS THAT ARE BEING MADE HERE REGARDING THE DEGREE OF PARTICULARITY AND THE FINDINGS THAT HAD TO BE MADE.

MR. CAHN: BUT THERE WERE FINDINGS MADE, THERE WERE HEARINGS. THERE WAS FAR MORE PROCESS. THERE WASN'T PROCESS WITHIN THE COURT THAN THERE IS HERE. OUR DISPUTE WAS OVER IN LARGE PART OVER WHERE THAT PROCESS SHOULD TAKE PLACE.

THE COURT: THAT'S RIGHT.

MR. CAHN: SO DESPITE THE FACT THAT WE WEREN'T HAPPY WITH THE RESULT, THERE WAS PROCESS.

THE COURT: I AM JUST NOT SURE THAT THE PREMISE OF THIS THAT IF WE DID A STATISTICAL ANALYSIS OR WE REQUIRED THE MARSHALS TO DO THAT, OR REALLY, WE ARE TALKING ABOUT THE JUDGES. BEFORE THE JUDGES CAN RELY ON THIS, THEY HAVE TO HAVE MORE RELIABLE, MORE SCIENTIFIC DATA. I AM NOT SURE THAT, NUMBER ONE, THAT'S POSSIBLE TO CAPTURE THE DATA THAT WOULD INFORM THIS. I THINK THERE BE A LOT OF UNDERREPORTED INCIDENTS OF VIOLENCE FOR THE REASONS THAT I POINTED OUT. THE NATURE OF THE CHARGE ISN'T DISPOSITIVE OF A LEVEL OF VIOLENCE INVOLVED WITH THE CRIME, AND I THINK THAT WOULD BE IMPOSSIBLE [47] AND A DAUNTING TASK TO PUT ON A COURT BEFORE FORMULATING POLICY. IT'S THE PROBLEM I HAVE WITH IT.

MR. CAHN: MY POINT WOULD BE THAT THERE ARE FUNDAMENTAL RIGHTS AT STAKE. AND BEFORE THOSE ARE IMPINGED UPON, THE JUSTIFICATIONS FOR THOSE, FOR THOSE ACTIONS SHOULD BE TESTED. THIS IS ONE OF THE WAYS THAT WOULD BE TESTED.

NOW, I DON'T THINK THE MARSHALS WOULD BRING THAT INFORMATION IF HERE WERE HAVING AN ADVERSARY EVIDENTIARY HEARING. I WOULD THINK THAT THE GOVERNMENT WOULD GO ON THE INFORMATION THEY PUT ON, AND WE WOULD ENGAGE IN A

STATISTICAL ANALYSIS THE INFORMATION THAT WAS OUT THERE AND CONTEST THAT.

THE COURT: ISN'T THAT AVAILABLE TO YOU NOW? I AM GOING THROUGH MAKING REVISIONS TO THIS, AND ONE OF THE REVISIONS THAT I MADE WAS ON SENTENCING STATISTICS. THEY ARE UP TO DATE UP TO 2012. YOU CAN GET THEM ON THE U.S. SENTENCING COMMISSION'S SITE. DISTRICT BY DISTRICT THEY LIST THE NUMBER OF OFFENSES. I DON'T KNOW IF THEY—THERE IS A NUMBER OF TABLES THERE, AND TO TELL YOU THE TRUTH, MY RESEARCH DIDN'T CAUSE ME TO LOOK AT THE TABLES AND SAY, OKAY, HOW OFTEN IS THE SPECIFIC OFFENSE CHARACTERISTIC APPLIED IN EACH DISTRICT. BUT CERTAINLY, THERE IS A LISTING OF THE GENERAL NATURE OF THE CRIME. FIREARM OFFENSES, IMMIGRATION, DRUG OFFENSES, AND THEY ARE DISTRICT BY DISTRICT. THAT WOULD GIVE YOU SOME OF THE INFORMATION WITHOUT THE NECESSITY OF AN EVIDENTIARY HEARING; RIGHT?

[48]

MR. CAHN: BUT THE POINT OF AN EVIDENTIARY HEARING IS THEY ARE GOING TO PUT ON THIS EVIDENTIARY HEARING. IT'S ABOUT WHAT THEY BELIEVE TO BE THE CHANGE IN NATURE, THE INCREASED VIOLENCE, AND WE ARE GOING TO PUT ON CONTRARY EVIDENCE THAT UNDERCUTS THAT.

THAT'S ALWAYS BEEN MY VIEW THAT'S THE WAY WE DO THINGS IN COURT.

THE COURT: WHY CAN'T I JUST ACCEPT THAT NOW? LOOK, YOU ARE A VERY TRUSTWORTHY PERSON. YOU NEVER EVER MISLED ME, AND I ASSUME BASED ON—

MR. CAHN: THE REASON YOU SHOULDN'T DO IT NOW BECAUSE I HAVEN'T YET DONE THAT RESEARCH. I AM READY TO MAKE THAT REPRESENTATION.

THE COURT: WHAT YOU HAVE TOLD ME IS THAT YOU SURVEYED YOUR STAFF, AND YOUR STAFF SAYS NO DISCERNABLE DIFFERENCE IN THE PEOPLE THAT WE ARE DEALING WITH FROM PRE-2011 TO NOW. WHY CAN'T I ACCEPT THAT, TAKE THAT INTO CONSIDERATION AND CONTRAST THAT AND WEIGH IT AGAINST WHAT THE MARSHALS ARE TELLING ME? WHY DOES IT HAVE TO BE ANY MORE DETAILED THAN THAT?

MR. COLE: I JUST WANT TO MAKE CLEAR, TOO, THAT THE IDEA OF THE CHANGING PRISON POPULATION, DEMOGRAPHIC OF THE POPULATION TO MY RECOLLECTION IS NOT—WE DIDN'T PUT THAT AT ISSUE IN THE DECLARATION. I UNDERSTAND IT WAS SENT TO YOU BY THE MARSHAL IN A HEARING.

THE COURT: I THINK IT WAS RELIED ON, MR. COLE. [49] REALLY, WHAT THIS COMES DOWN TO IS THAT THE JUDGES HAVE CHANGED POLICY HERE, AND HE IS NOT ATTACKING THE NATIONAL MARSHALS POLICY.

HE IS JUST ATTACKING THE APPLICATION OF IT HERE WHICH WAS BROUGHT ABOUT BY THE COURT.

THERE IS EVEN DISAGREEMENT, I HAVE GOT TO TELL YOU, MR. CAHN, ABOUT WHETHER WE HAVE A POLICY HERE. I THINK WE DO. WHEN YOU SURVEYED THE JUDGES AND YOU GET A CONSENSUS AND THEN YOU WRITE THE LETTER TO JUDGE MOSKOWITZ, THE OVERWHELMING NUMBER OF JUDGES WANT THIS AND WANT THAT, THAT'S A REFLECTION OF POLICY, NOT A GENERAL ORDER. I THINK IT'S DIFFERENT FROM *BRANDAU* IN THAT RESPECT, AND IT HAS—HERE HAVEN'T BEEN PERMUTATIONS TO IT AS THERE WERE IN THAT CASE IN THE FACES OF THE CHALLENGE. MAYBE THAT'S BECAUSE WE HAVE A BIG, WIDE OPEN LOOPHOLE, AS I UNDERSTAND IT, AND YOUR BRIEFING, AT LEAST I AM TOLD THAT AT LEAST ONE OF THE JUDGES USES THE EXCEPTION AS THE RULE.

MR. CAHN: THAT'S MY UNDERSTANDING.

THE COURT: THAT'S WHY—IT WAS ANOTHER REASON THAT I DIDN'T THINK WE NEEDED TO RECUSE IS WE REALLY DON'T HAVE ANY QUESTION HERE ABOUT WHAT'S AT STAKE. I THINK THERE IS A POLICY.

ANYWAY, THE POINT IS, MR. COLE, HE IS NOT ATTACKING THE MARSHAL'S POLICY. HE IS ATTACKING THE JUDGES'S POLICY OF

DEFERRING TO THE MARSHALS IN THE SOUTHERN DISTRICT OF CALIFORNIA.

[50]

MR. COLE: MY POINT IS THAT WE HAVE NOT—HE SAID IF WE HAD A HEARING, WE COULD BE COMING IN AND PUTTING ON EVIDENCE ABOUT A CHANGING DEMOGRAPHIC. WHAT YOU ARE SAYING IS WE WOULD NOT BE BECAUSE I UNDERSTAND, JUST AS HE DOES, THAT YOU CAN'T GO BEYOND THAT OTHER THAN A PERCEPTION THAT SOMEONE HAS BEEN YEARS IN THE DISTRICT. MR. CAHN AND HIS STAFF HAVE A PERCEPTION, YOUR HONOR HAS A PERCEPTION ABOUT AND SO DOES MARSHAL STAFFORD AND THAT IS NOT STATISTICAL.

THE COURT: MORE SPECIFICALLY, JUDGE HOUSTON HAS A PERCEPTION WHICH HE HAS MEMORIALIZED IN THE ORDER OF REFERRAL TO ME, AND HE SAYS, LOOK, I HAVE BEEN HERE 25 YEARS, 30 YEARS, AND I HAVE SEEN A CHANGE, AND HE SPELLS OUT EXACTLY WHAT THE CHANGE IS. IT COMES FROM REVIEWING THE PROBATION REPORTS.

MR. COLE: RIGHT, BECAUSE I RECOGNIZE THAT, I HAVE NO INTENTION, EVEN IF WE HAD A HEARING, OF PUTTING THAT ON BECAUSE I THINK YOUR PERCEPTION—YOU HAVE BEEN IN THE DISTRICT LONGER THAN MARSHAL STAFFORD. YOU BOTH HAVE PERCEPTIONS AND MR. CAHN HAS PERCEPTION. YOU CANNOT TAKE THAT AWAY IF YOU

WANTED TO. WE WOULDN'T PUT THAT IN ISSUE AT A HEARING.

THE COURT: THEY ARE BACKING AWAY FROM IT. I AM TELLING YOU THAT WAS ONE OF THE FACTORS I THINK THE JUDGES TOOK INTO CONSIDERATION. AND I HAVE TO TELL YOU THIS, MR. CAHN. I SPEAK ONLY FOR MYSELF OR MAYBE I CAN SPEAK FOR JUDGE HOUSTON. WHEN MARSHAL STAFFORD SAID WHAT HE SAID, I [51] SORT OF—MAYBE NOT OVERTLY, BUT IN MY MIND—WAS KIND OF NODDING IN AGREEMENT THAT I THINK I HAVE SEEN UPTICK IN THE TYPE OF VIOLENT PEOPLE, PRIMARILY BECAUSE OF MORE GANG AFFILIATIONS THAN WE EVER USED TO SEE.

MR. CAHN: I ACCEPT THAT THAT'S YOUR PERCEPTION, AND ACCEPT THAT YOU HAVE COME TO THAT THROUGH YOUR APPEARANCE AND JUDGE HOUSTON DOES AS WELL, BUT I THINK IT'S PARTICULARLY IMPORTANT, BECAUSE AGAIN, I COME BACK TO WE ARE DEALING WITH FUNDAMENTAL RIGHTS THAT WE DOUBLE-CHECK OUR PERCEPTIONS BY LOOKING AT DATA, EVEN IF IT'S NOT THE PERFECT DATA SET. THE PERFECT DATA SET NEVER EXISTS.

THE COURT: WHAT WOULD YOU DO HERE, THOUGH? LIKE I SAID, THE PROBLEM IS I JUST DON'T THINK ANY EXAMINATION OF THE DATA WOULD BE DISPOSITIVE, BECAUSE IN MY VIEW, IT WOULD INVARIABLY UNDER-

REPORT INCIDENTS OF VIOLENCE, INVARIABLY.

MR. CAHN: AM I SAYING IT WOULD BE DISPOSITIVE THAT WE SHOULD IGNORE ALL OTHER EVIDENCE TO THE CONTRARY? NO, BUT IT'S ANOTHER PIECE OF EVIDENCE THAT SHOULD BE CONSIDERED IN MAKING A DETERMINATION.

THE COURT: WHY ISN'T IT ENOUGH FOR ME TO SAY, I HAVE SOME PERCEPTION ON THIS THAT LED TO THIS POLICY, THE MARSHAL HAS SOME PERCEPTIONS, BUT THE FEDERAL DEFENDERS HAVE SOME PERCEPTIONS, TOO. AND YOUR LAWYERS AREN'T IMMUNE FROM ATTACK. I DON'T KNOW IF IT'S HAPPENED, BUT YOU ARE NOT IMMUNE FROM IT. MY LAW SCHOOL CLASSMATE SIX MONTHS AGO GOT SLASHED [52] IN THE FACE BY A GUY HE WAS DEFENDING, AND THERE WAS KIND OF A—EVERYBODY LAUGHED ABOUT IT FOR YEARS, NAMED HODGE CRABTREE WAY BEFORE YOU GOT HERE, BUT HE WAS NOTORIOUS FOR BEING PUNCHED OUT BY HIS CLIENTS AFTER GUILTY VERDICTS.

LOOK, WE ALL HAVE ANECDOTAL—WHY ISN'T IT ENOUGH FOR ME TO SAY I AM GOING TO TAKE INTO CONSIDERATION THAT YOUR EXPERIENCE IS VERY DIFFERENT AND THAT YOUR LAWYERS DEAL FIRST HAND AND MUCH MORE PERSONAL CLOSE CONTACT THAN ANYBODY ELSE, AND I WILL WEIGH THAT AGAINST ANYBODY ELSE'S PERCEP-

TIONS INCLUDING MY OWN. WHY ISN'T THAT SUFFICIENT ON THAT POINT?

MR. CAHN: IT'S USEFUL ON THAT POINT. I DON'T THINK IT SUPPLANTS THE NEED FOR LOOKING AT DATA.

IN REAL LIFE WHEN WE ARE MAKING IMPORTANT DECISIONS, WE RELY ON ANECDOTES, BUT WE ALSO ALWAYS TRY AND BACK THAT UP BY SEEING HOW CORRECT OUR PERCEPTIONS ARE. BECAUSE WE RECOGNIZE THAT HUMAN BEINGS'S PERCEPTIONS ARE OFTEN INACCURATE AND ARE OFTEN BETRAYED BY THE DATA WHICH HAS SOMETHING DIFFERENT. THE BETTER COURSE IS TO LOOK AT ALL OF THE INFORMATION.

THE COURT: YOU AND I HAVE A DIFFERENT VIEW ON THE UTILITY OF LOOKING AT THAT DATA. I MEAN, HONESTLY, I DON'T THINK I WOULD TRUST IT. I'D SAY, WELL, OKAY, SO IT SAYS THAT WE HAVE GOT TEN PERCENT UPTAKE IN VIOLENT OFFENSES ON THE FACE OF THE OFFENSES, AND I'D SAY, THAT'S NOT THE TALE OF THE TAPE. IN MY EXPERIENCE, THAT'S NOT THE TALE OF THE TAPE. NOW, WHAT [53] WOULD YOU DO ABOUT THAT? THAT'S NOT GOING TO CHANGE.

MR. CAHN: I MEAN, YOU WOULD MAKE YOUR JUDGMENT BUT, OF COURSE, IT WOULD BE PART OF THE RECORD AND, AS I SAID, WE HAVE IT AVAILABLE WHEN WE GO UP IN FRONT OF THE CIRCUIT.

THE COURT: IT'S STILL UP IN THE AIR WHETHER YOU ARE GOING UP?

MR. CAHN: YOUR HONOR, OF COURSE, I REMAIN HOPEFUL THAT I CAN CONVINCE YOU, BUT I ALSO REMAIN SOMEWHAT SKEPTICAL.

MR. COLE: YOUR HONOR, I JUST WANT TO MENTION WE ARE JUMPING AHEAD TO THE MERITS, BUT I ALSO DON'T THINK THAT THAT KIND OF AREA—TO ME THAT WOULD BE A MICRO MANAGING OF THE MARSHAL'S DISCRETION. THAT ISN'T CALLED FOR BY THE LEGAL STANDARD ANYWAY. I DON'T THINK IT'S ALSO RELEVANT, BECAUSE THAT IS NOT WHAT *BELL V. WOLFISH* OR ANY OF THE STANDARDS CALL FOR THAT LEVEL OF MICRO MANAGEMENT. THAT IS COMING DOWN TO SOME IMPOSSIBLE ANALYSIS ANYWAY.

THE COURT: IT'S REALLY THE FOCUS OUGHT TO BE THE ONUS ON THE COURT'S DECISION AND WHETHER A COURT SHOULD HAVE OR NEEDS TO HAVE THAT KIND OF DATA BEFORE IT MAKES A POLICY DECISION AS WE HAVE MADE, WHETHER THAT'S REQUIRED AS A MATTER OF PROCEDURAL DUE PROCESS.

GO AHEAD, MR. CAHN. I THINK WE ARE MAKING GOOD PROGRESS ON THESE THINGS BECAUSE THEY ARE A LOT OF THEM THAT ARE NOT CONTESTED.

[54]

MR. CAHN: WE WERE TALKING ABOUT STAFFING WHEN WE SORT OF MOVED TO THE SIDE, AND JUST ONE OTHER QUICK POINT ABOUT THAT IS THAT THE MARSHALS HAVE A STAFFING FORMULA, THEY HAVE A CERTAIN NUMBER OF STAFF DEVOTED TO COURTROOM ACTIVITY, THEY ALSO HAVE STAFF AVAILABLE FOR OTHER ACTIVITY. IT'S WITHIN THE PREROGATIVE OF THE MARSHALS, AND I UNDERSTAND THEY HAVE VARYING MISSIONS TO REDIRECT THOSE IF IT'S NECESSARY TO ACCOMPLISH COURTROOM SECURITY CONSISTENT WITH MAINTAINING THE FUNDAMENTAL RIGHTS OF INDIVIDUALS.

THE COURT: I AGREE WITH THAT, TOO. I AM AWARE, FOR EXAMPLE, THAT A CERTAIN NUMBER OF DEPUTY MARSHALS ARE ASSIGNED TO FUGITIVE TASKS FORCE TO GO OUT ON THE STREET AND FIND PEOPLE THAT ARE WANTED AND HAVE WARRANTS OUT FOR THEM. THE MARSHAL MAKES THAT DECISION, BUT SURELY, YOU CAN'T SAY THAT WE SHOULD OVERRIDE THE MARSHAL'S JUDGMENT ON SOMETHING LIKE THAT, THAT THE JUDGES WOULD SAY BEFORE WE ADOPT THIS POLICY, WE WANT YOU TO PULL TEN PEOPLE OFF THE FUGITIVE TASK FORCE AND PUT THEM IN COURTS. WE'D BE WAY OUT ON A LIMB. THAT'D BE LIKE ME TELLING THE PRESIDENT OF THE UNITED STATES WHAT HAS TO GO ON DOWN IN QUANTANAMO.

MR. CAHN: I AM NOT TELLING YOU YOU SHOULD DIRECT THE MARSHALS TO DO ANYTHING. BUT, OF COURSE, FOR INSTANCE, LET'S LOOK BACK TO THE RULE 5 LITIGATION WHEN THE AGENCIES CAME BEFORE TO COURT AND ESSENTIALLY SAID WE CAN'T GET THIS DONE. AND THE ANSWER OF THE COURT WAS, WELL, WE ARE NOT [55] TELLING YOU WHAT TO DO, BUT WE HAVE RIGHTS THAT WE HAVE A LEGAL OBLIGATION TO ENFORCE AND WE'LL HAVE TO PROVIDE REMEDY IF YOU DON'T ABIDE BY—

THE COURT: AND I AGREE WITH YOU THAT WE HAVE THE AUTHORITY TO SAY THAT. WE HAVE THE AUTHORITY TO SAY, CAN'T THIS BE FIXED BY ADDITIONAL STAFFING? I AM NOT SURE THE ANSWER IS YES. I AM NOT SURE THAT HELPS THEM TO BE ANY MORE PRESSING AS TO WHO THE DANGEROUS PEOPLE ARE GOING TO BE AND WHO NEEDS TO BE SHACKLED.

MR. COLE: I JUST WANTED TO MENTION THAT DURING OUR MEETING YESTERDAY WHERE CHIEF JOHNSON SAT DOWN WITH THE DEFENSE, HE PROVIDED THEM THE APPROXIMATE NUMBER OF THEIR EMPLOYEE STAFF CURRENTLY AND AN APPROXIMATE NUMBER OF HOW MANY ARE TYPICALLY DEVOTED TO COURTROOM DUTIES, AND WE DON'T DISPUTE THAT NUMBER. IN FACT, I THINK THAT HE COULD GIVE IT AGAIN IF IT'S NECESSARY.

MR. CAHN: I DON'T HAVE IT WRITTEN DOWN.

THE COURT: YOU WANT TO MAKE IT A MATTER OF RECORD.

MR. COLE: THERE IS NO DISPUTE ABOUT THAT.

MR. CAHN: CAN'T HURT TO HAVE THAT IN THE RECORD.

I SEE MARSHAL STAFFORD IN THE BACKGROUND. I DON'T MEAN TO SLIGHT HIM IF HE WANTS OF OFFER DIRECT INFORMATION. WE ARE FRIENDS AND I DIDN'T WANT HIM TO FEEL THAT—I JUST DIDN'T WANT HIM TO THINK I WAS IGNORING HIM.

[56]

MR. COLE: YOUR HONOR, FROM THE MARSHAL DOWN, THERE ARE ABOUT 110—THERE IS A MARSHAL AND THEN ABOUT 110 DEPUTY MARSHALS, DEPUTY U.S. MARSHALS. AND ALL OF THEM ARE NOT OBVIOUSLY ASSIGNED TO COURTROOM FUNCTION AT ANY ONE TIME.

THE COURT: WHAT'S THE PERCENTAGE ASSIGNED TO COURTROOM FUNCTION VIS-A-VIS FUGITIVE TASK FORCE FOR THE OTHER?

MR. COLE: THAT CONSTANTLY FLUCTUATES ON HOW MANY COURTROOMS ARE GOING AT ANY GIVEN TIME AND ANY DAY.

THE COURT: GIVEN ME A BALLPARK OF WHAT THE AVERAGE IS, BECAUSE OUR CALENDARS ARE PRETTY STATIC. JUDGES HOLD

COURT ON THE SAME DAYS TYPICALLY. I UNDERSTAND JURY TRIALS ARE A WILD CARD, BUT WE ARE TALKING ABOUT CALENDARS; RIGHT? THIS IS NOT—WE COULD ACTUALLY PUT OUT OF THE EQUATION JURY TRIALS BECAUSE NOBODY APPEARS IN SHACKLES AT JURY TRIALS.

MR. COLE: IT IS AN AVERAGE OF ABOUT 75 TO 80 DEVOTED TO COURTROOM FUNCTIONS.

THE COURT: OUT OF 110?

MR. COLE: THE COURTHOUSE FUNCTIONS OF BRINGING PEOPLE TO COURT AND PEOPLE ARE BEING PULLED ON A VERY HEAVY DAY. THE NUMBER COULD GO WAY UP. PEOPLE ARE CONSTANTLY BEING PULLED ON AND OFF THE TASK FORCES. THEY ALSO SERVE PROCESS.

THE COURT: LOOK, IN MY VIEW, MR. CAHN, THIS WAS NOT EVEN AN ISSUE THAT WAS MUCH CONSIDERED WAS THE STAFFING OTHER THAN THE TIME IT TAKES TO GET THE SHACKLES ON AND OFF WHICH [57] WAS THREE MINUTES AND THREE GUYS. BUT THERE IS YOUR NUMBER, ABOUT 75 TO 80 ON ANY GIVEN DAY OF THE 110 RESPONSIBLE FOR COURTROOM SECURITY.

MR. CAHN: AND I JUST WANT TO SAY MARSHAL JOHNSON WAS FORTHCOMING ABOUT THAT INFORMATION YESTERDAY, BUT I DIDN'T KNOW THAT AND IT DIDN'T WANT TO SPEAK FROM MEMORY.

THE COURT: THERE IS NO DISAGREEMENT ON THAT. I DON'T THINK IT—I DIDN'T INFLUENCE ME MUCH. I SPEAK FOR MYSELF. FRANKLY, I DON'T THINK MARSHAL STAFFORD BROUGHT THAT UP WHEN HE MADE THE PRESENTATION THAT LED TO THE JUDGES DECIDING ON THIS POLICY. ANYWAY, GO AHEAD.

MR. CAHN: LET ME TURN TO PARAGRAPH 8 WHICH IS THE PARAGRAPH THAT DISCUSSES THE NEW COURTHOUSE AND THE NEEDS THAT HAVE BEEN GENERATED BY THE NEW COURTHOUSE. THAT'S THE ANNEX THAT HAS BEEN ADDED THIS YEAR—NO, WAS THIS PAST YEAR.

THE COURT: DECEMBER 1ST, WEEK OF DECEMBER 2012.

MR. CAHN: I TRIED A CASE IN FRONT OF YOU.

THE COURT: YOU DID. WERE YOU THE FIRST ONE TO TRY A CASE WITH ME?

MR. CAHN: I THINK I WAS THE SECOND ONE. SOMEBODY CAME IN A WEEK BEFORE. I TRIED TO BE FIRST, BUT YOU COULDN'T SCHEDULE US. I WANTED TO BE THE FIRST ONE TO TRY A CASE IN THIS COURTHOUSE BUT IT JUST DIDN'T WORK.

SO WE WOULD JUST KNOW THAT I DON'T THINK THERE IS ANY DISAGREEMENT ABOUT THIS THAT WHILE THE ADDITIONAL [58] COURTROOMS EXIST OR COURTHOUSE EXISTS, THE NUMBER OF SITTING JUDGES RE-

MAINS CONSTANT AND HAS NOT BEEN AFFECTED BY THAT. WHEN WE ARE DEALING WITH COURTROOMS AND WHAT HAPPENS IN COURTROOM FOR PURPOSES OF THIS MOTION.

THE COURT: RIGHT. NO DISPUTE ABOUT THAT.

MR. CAHN: PARAGRAPH 9—AGAIN, THIS IS JUST ADDITIONAL INFORMATION RATHER THAN A DISPUTE IS IT DISCUSSES THE NEED TO SEPARATE MALES AND FEMALES AND OTHER SEPARATEES BASED ON OTHER FACTORS. AND, OF COURSE, OUR POINT WOULD ONLY BE THAT'S NOT A CHANGE IN CIRCUMSTANCES. THAT CIRCUMSTANCE EXISTS.

THE COURT: I AGREE WITH THAT, TOO.

MR. CAHN: GETTING TO THE PARAGRAPH 10 WHICH I THINK MORE IS THE NUB OF THE MATTER. WE WOULD DISPUTE THE CLAIM THAT THERE ARE NOW SIGNIFICANTLY MORE SECURITY INCIDENTS THAN IN YEARS PAST WHEN NO SHACKLING POLICIES WERE IN PLACE. AND WE NOTE AGAIN THAT WE SEE NO REAL SUPPORT FOR THIS CLAIM.

THE COURT: IS THAT THE BASIS FOR THE DISPUTE OR DO YOU HAVE CONTRARY EVIDENCE?

MR. CAHN: WELL, WE KNOW ABOUT A VERY FEW DISPUTES—VERY FEW INCIDENTS HAVE BEEN LISTED BY THEM. WE DON'T THINK—WE DISAGREE WITH SOME OF THE DESCRIPTIONS OF THOSE BASED UPON OUR CONVERSATIONS WITH INDIVIDUALS WHO

WERE THERE AND INVOLVED, BUT I DON'T THINK THAT'S CRITICAL.

BUT ONE OF THE THINGS I GO BACK TO THE OBSERVATION I [59] MADE EARLIER ABOUT THE NUMBER OF INCIDENTS CITED BY THE GOVERNMENT IN ITS MEMORANDUM IN OPPOSITION IS VANISHINGLY SMALL IN RELATION TO THE TOTAL NUMBER OF TRANSFERS AND APPEARANCES. AND THAT, I AGAIN ARGUE, THAT THERE HASN'T BEEN A SIGNIFICANT INCREASE. THIS IS A PLACE WHERE ACCESS TO ACTUAL DOCUMENTATION, I THINK, WOULD ILLUMINATE THE CIRCUMSTANCES.

THE COURT: LET'S TALK ABOUT THIS FOR JUST A SECOND BECAUSE IT OCCURS TO ME I HAVE THOUGHT ABOUT THIS—IN FACT, I DISCUSSED IT BEFORE WITH ONE OF MY LAW CLERKS. IT WOULD BE A SHAME IF IT TOOK A REALLY SERIOUS INCIDENT TO GET EVERYBODY IN AGREEMENT THAT SOME CHANGE IN POLICY WAS NECESSARY. THAT'S USUALLY THE WAY OUR SOCIETY WORKS. WE REACT ONCE SOME TERRIBLE TRAGEDY OCCURS, SOMEBODY SHOOTS A BUNCH OF PEOPLE AND WE START TALKING ABOUT—

MR. CAHN: WE OVERREACT.

THE COURT: WELL, I DON'T KNOW. MAY WE DON'T, MAYBE WE REACT. I WOULD HATE TO THINK THAT THE NUMBER OF INCIDENTS AS OPPOSED TO PREVENTING SOME REALLY BAD THING WOULD PREDOMINATE

IN THE CONSIDERATION OF WHETHER THIS WAS AN ACCEPTABLE POLICY. I WOULD HATE TO THINK, FOR EXAMPLE, THAT IT WOULD TAKE SOMEBODY BEING KILLED IN ONE OF THESE COURTS OR VERY SERIOUSLY MAIMED BEFORE WE COULD SAY, ALL RIGHT. THAT'S ENOUGH. AND THAT'S THE PROBLEM I HAVE WITH LOOKING JUST AT RAW NUMBERS AND SAYING THE NUMBERS REALLY DON'T JUSTIFY THIS.

[60]

THE POTENTIAL HERE FOR SOMEBODY TO GET A PENCIL JAMMED IS THIS EAR OR SOMETHING LIKE THAT AND SOME VERY SERIOUS INJURY IS ALWAYS PRESENT. THERE IS ALWAYS A POTENTIAL FOR THAT.

MR. CAHN: IT IS ALWAYS PRESENT. IT'S ALWAYS BEEN PRESENT. AND THE QUESTION —AND IF THERE WAS NOTHING ON THE OTHER SIDE OF THE EQUATION YOU WOULD CERTAINLY TAKE ALL AVAILABLE SECURITY MEASURES AT ALL TIMES, BUT THERE IS ALWAYS SOMETHING ON THE OTHER SIDE OF THE EQUATION, AND MAYBE AS MUNDANE AS THE LOGISTICAL DIFFICULTIES OR IT MAY BE AS ELEVATED AS THE FUNDAMENTAL RIGHTS OF INDIVIDUALS AS IT IS HERE.

AND SO I DON'T DISAGREE THAT WE HAVE GOT TO LOOK AT NOT SIMPLY WHAT'S HAPPENED IN THE PAST BUT THE POTENTIAL FOR PROBLEMS, BUT I ALSO THINK THERE IS A STRONG INTEREST ON THE OTHER SIDE

THAT COUNSELS US LOOKING AT THE HISTORICAL DATA AND CONSIDERING WHETHER OUR PERCEPTION OF THE RISK IS ACCURATE AND JUSTIFIES THIS.

THE COURT: OR IS AN OVERREACTION.

I AGREE WITH YOU. THE BALANCE ALWAYS HAS TO KEEP IN MIND THE INTEREST, THE LIBERTY INTEREST THAT YOU TALKED ABOUT, AND I HAVE IN MIND.

MR. COLE.

MR. COLE: I JUST WANTED TO MAKE CLEAR THAT THAT SENTENCE, A SINGLE SENTENCE IN THE DECLARATION SAYS THAT THIS [61] DISTRICT HAS EXPERIENCES AN INCREASE IN SECURITY INCIDENTS, THAT'S BASED ON NO STATISTICAL ANALYSIS. IT'S BASED ON KEITH JOHNSON AND THE MARSHAL'S PERCEPTION FROM YEARS OF EXPERIENCE THAT THAT'S THE CASE, AND IF THE COURT WOULD LIKE TO DISCOUNT THAT OR EVEN STRIKE IT FROM CONSIDERATION, THAT'S FINE, BECAUSE THE WAY THE SECURITY HAS HAPPENED, THEY ARE NOT ALWAYS RECORDED, LIKE THE ONE WITH GLASSES AGAINST THE WALL OR I THINK IT MIGHT HAVE BEEN A HEADSET. BUT WHAT WAS THROWN AGAINST THE WALL MAY NEVER BE WRITTEN UP.

THE COURT: THE PROBLEM IS, MR. COLE, I CAN'T DISCOUNT THAT BECAUSE A SECURITY POLICY NECESSARILY, I THINK, IS DEPENDENT UPON PERCEPTION AND THE EX-

PERIENCE OF PEOPLE AND THAT CAN'T BE QUANTIFIED WITH THE EXACTITUDE THAT MR. CAHN IS TALKING ABOUT. JUDGE HOUSTON'S REFERRALS ORDER TO ME IS PROBABLY THE BEST PROOF OF THAT.

I THINK JUDGES MAY TAKE INTO CONSIDERATION THAT THE MARSHALS HAVE A PERCEPTION. AND, LOOK, A LOT OF QUESTIONS WERE POSED TO MARSHAL STAFFORD DURING THE COURSE OF THE PRESENTATION. JUDGES ASKED HIM QUESTIONS, AND HE RESPONDED TO THOSE QUESTIONS. IT WASN'T LIKE WE SAT THERE LIKE AUTOMATONS AND JUST ACCEPTING ANYTHING.

MR. CAHN: I WOULD NEVER EVER BELIEVE THAT.

THE COURT: AND, AS YOU CAN IMAGINE OR PERHAPS THE WAY THAT THE ADHERENCE TO THIS SO-CALLED POLICY IS PLAYING OUT, THERE WAS SOME DISAGREEMENT. THIS WAS NOT A CAPTIVE [62] AUDIENCE OR NECESSARILY EVEN A WILLING AUDIENCE. I THINK THE EXCEPTIONS KIND OF BESPEAK THAT. THE EXCEPTIONS TO THE POLICY, THEY BESPEAK THAT.

MR. COLE: YOUR HONOR, I AM AGREEING. OBVIOUSLY, FROM THE GOVERNMENT'S PERSPECTIVE, THE MARSHALS KNEW WHAT'S GOING ON IN THE DISTRICT AND HOW THINGS HAVE BEEN CHANGING, CASTING THE ESSENCE OF DISCRETION, THAT'S THE ESSENCE

OF IT, AND THAT GREAT DISCRETION OUGHT TO BE GIVEN TO THE MARSHAL.

MY POINT WAS SIMPLY THAT IF THE DEFENSE FEELS LIKE NO DISCRETION SHOULD BE GIVEN TO THAT AND EVERYTHING HAS TO BECOME A MATTER OF STATISTICAL ANALYSIS, WELL, IT ISN'T WORTH DOING THAT ANALYSIS. IF THE COURT WANTS TO DISCOUNT AND SAY, OKAY, IT'S JUST THE MARSHAL'S DISCRETION, SO I KIND OF CONSIDER THAT A LITTLE LESS, THAT'S THE POINT THAT I ALREADY MADE. I THINK IT'S VERY SIGNIFICANT. IT ISN'T SOMETHING WORTH DISPUTING IN TERM OF STATISTICAL ANALYSIS.

THE COURT: I UNDERSTAND. I MEAN, THE REAL DISAGREEMENT, I THINK, MR. CAHN MAY HAVE IS THAT HE THINKS THIS OUGHT TO BE PREDICATED ON MORE EMPIRICAL DATA RATHER THAN PEOPLE'S EXPERIENCE, PERCEPTIONS AND ANECDOTES.

MR. CAHN: I THINK WE ALWAYS NEED AS HUMAN BEINGS TO CHECK OUR PERCEPTIONS AGAINST THE HARD DATA TO MAKE SURE WE ARE NOT MISPERCEIVING OR OVERREACTING.

THE COURT: NO ONE WOULD DISAGREE WITH THAT AS A GENERAL PRINCIPLE.

[63]

WHAT'S NEXT?

MR. CAHN: ONE LAST POINT ABOUT THAT WAS, OF COURSE, AGAIN BRINGING US BACK TO THE DISPUTED ISSUE WHICH IS SECURITY INCIDENTS WITHIN COURTROOMS THAT ARE RELEVANT TO THE DECISION MADE HERE, NOT SECURITY INCIDENTS GENERALLY WITHIN THE DISTRICT BECAUSE WE ARE ONLY CONCERNED WITH WHAT HAPPENS IN THE COURTROOM.

ACTUALLY, LET ME MODIFY THAT. A GREATER NUMBER OF SECURITY INCIDENTS IN THE DISTRICT AS A WHOLE MAY BE RELEVANT TO EVALUATING THE OVERALL RISK BUT THEY ARE NOT AS CRITICAL TO THE DECISION OF WHETHER OR NOT WE HAD PROBLEMS IN THE COURTROOM UNDER THE PROCEDURES.

THE COURT: MY FOCUS WOULD BE ON INCIDENTS IN THE COURTHOUSE PROPER, NOT NECESSARILY IN THE COURTROOM. SO IT WOULD INCLUDE GRAND CENTRAL STATION DOWN THERE. IF THE MARSHALS RUN INTO SOME PROBLEM WITH A GUY ARRESTING HIM IN THE FUGITIVE TASK FORCE, THAT DOESN'T INFORM THIS AS FAR AS I AM CONCERNED. SO MY CONCENTRATION WOULD SIMPLY BE ON INCIDENTS IN THE COURTHOUSES PROPER HERE.

MR. CAHN: I GOT YOU, YOUR HONOR.

THE COURT: YOU DON'T DISAGREE WITH THAT?

MR. CAHN: NO, I THINK THAT'S RELEVANT CONSIDERATION WHEN YOU LOOK—I MEAN, THE NEED TO HAVE—I DON'T DISAGREE WITH THAT.

AS I SAID, I'D LIKE TO TALK BRIEFLY ABOUT TWO OF THE [64] INCIDENTS THAT WERE DISCUSSED IN THE AFFIDAVIT, AND I DON'T WANT TO MAKE TOO BIG A POINT OF THIS. BUT THERE WERE TWO PARTICULAR INCIDENTS DISCUSSED. ONE WAS THE INCIDENT THAT OCCURRED IN JUDGE GONZALEZ'S COURTROOM, AND THAT INVOLVED A MEXICAN MAFIA CONSPIRACY TRIAL WHERE INDIVIDUALS HAD POTENTIALLY ADVERSE DEFENSES AND WHERE THESE INDIVIDUALS HAD LENGTHY HISTORIES OF VIOLENCE INCLUDING POSSIBLY HOMICIDES AND RENT COLLECTION, COLLECTING RENTS FROM DRUG DEALERS THAT WOULD OPERATE IN THE NEIGHBORHOOD AND THAT SORT OF THING.

AND SO I THINK IT'S WORTH NOTING WHEN WE LOOK AT THAT SORT OF SECURITY INCIDENT THAT IS IN A PLACE WHERE WE WOULD HAVE HAD MORE INFORMATION THAT WE COULD TAKE INTO ACCOUNT AND THAT MIGHT BEAR ON RATHER THAN A POLICY OF SHACKLING BEAR ON THE NEED TO SHACKLE THAT INDIVIDUAL CASE.

AND SO I THINK THAT SPECIFIC INCIDENT BEING CITED UNDERCUTS THE NEED FOR POLICY. I'D SAY THE SAME THING ABOUT ONE OTHER INCIDENT. THAT'S AN INCI-

DENT THAT OCCURRED OUT IN EL CENTRO. YOU HAVE GOT AN INDIVIDUAL WHO—MY UNDERSTANDING IN EL CENTRO THE SEPARATEES APPEAR HERE IN RED RATHER THAN IN ORANGE AS THEY DO HERE. ONE OF THE INDIVIDUALS INVOLVED WAS IN ORANGE. I UNDERSTAND FROM DEPUTY MARSHAL JOHNSON THAT WHEN SOMEBODY APPEARS IN ORANGE, THEY ARE GENERALLY TOLD—THE MARSHALS ARE TOLD—OR RED, RATHER, IN EL CENTRO—WHY THAT INDIVIDUAL IS THERE.

SO AGAIN, THIS IS AN INSTANCE WHERE THEY WOULD [65] LIKELY HAVE ADDITIONAL INFORMATION COULD HAVE BEEN TAKEN INTO ACCOUNT IN A DECISION MADE ABOUT WHETHER OR NOT ANYONE NEEDED TO BE SHACKLED IN THAT INCIDENT. AND APPARENTLY EITHER WAS TAKEN INTO ACCOUNT AND THE DECISION WAS MADE NOT TO SHACKLE OR WASN'T TAKEN INTO ACCOUNT. BUT IN ANY CASE, IT UNDERCUTS THE NEED TO LOOK AT THIS ON A DISTRICT WIDE POLICY BASIS AS OPPOSED TO LOOKING AT THE INDIVIDUAL CIRCUMSTANCES.

THE COURT: WAIT A MINUTE. IF THAT'S SO, YOU SAY, LOOK, THEY WOULD HAVE AUTHORITY, FOR EXAMPLE, IF THERE IS A SEPARATEE IN THE POPULATION ON ANY GIVEN DAY TO SHACKLE EVERYONE. IS THAT WHAT YOU ARE SAYING? BECAUSE MY UNDERSTANDING IS—I DIDN'T UNDERSTAND THAT THE VICTIM OF THE ATTACK WAS SEPA-

RATEE. I'LL TAKE THAT NOW, BUT THE ATTACKER WAS NOT A SEPARATEE, AND THE ONLY WAY THIS COULD HAVE BEEN PREVENTED IS IF THEY'D SHACKLED EVERYONE THAT WAS OUT THERE IN MASS WITH HIM IN THE JURY BOX.

MR. CAHN: THERE IS A COUPLE OF POTENTIAL RESPONSES. YOU WAIT AND BRING OUT THE SEPARATEE LAST. I DON'T KNOW WHAT THEY DID WHEN THE INDIVIDUALS WERE BACK IN THE HOLDING CELL. DID THEY JUST THROW THE SEPARATEE INTO THE HOLDING CELL WITH EVERYBODY WITH NOTHING BUT LEG SHACKLES, I DON'T KNOW.

THE COURT: I THINK WE HAD SOME INSIGHT EARLIER. I THINK THAT'S THE OCCASION WHEN SOME OF THE STAFF DOWNSTAIRS WILL BRING A PERSON UP AND THEN THEY'LL TAKE THEM BACK DOWN. I THINK HERE AT LEAST—AND THEY MAY NOT HAVE THAT OPTION IN [66] EL CENTRO—BUT HERE, AT LEAST, I THINK THEY HOLD THEM SEPARATELY DOWNSTAIRS AND WHEN THAT PERSON'S CASE IS CALLED, THEN THEY COME UP.

I KNOW YOU DON'T LIKE ANECDOTAL EVIDENCE, BUT I JUST HAD A GUY ON CALENDAR ON TUESDAY AND THERE WAS A LONG DELAY. I TURNED TO THE CLERK WE CALLED THIS CASE LIKE THREE MINUTES AGO, WHAT'S THE DEAL? THE EXPLANATION WAS HE WAS IN A RED JUMPSUIT AND HE WAS BEING BROUGHT UP IN THE ELEVATOR FROM DOWNSTAIRS.

MR. CAHN: THAT MAY BE THE APPROPRIATE RESPONSE. IT MAY BE IF THAT RESPONSE IS UNAVAILABLE THAT YOU NEED TO SHACKLE OTHERS WHO ARE IN THE JURY BOX WITH THAT INDIVIDUAL. IT MAY MEAN THAT YOU NEED EXTRA PERSONNEL IN THESE CIRCUMSTANCES.

BUT IN ANY CASE, YOU CAN MAKE AN INDIVIDUALIZED RESPONSE TO THE PARTICULAR RISK PRESENTED THERE RATHER THAN TAKE THE POSITION THAT WE NEED TO SHACKLE EVERYBODY ALL THE TIME. THAT'S THE ONLY POINT I AM MAKING.

THE COURT: I GOT IT.

MR. CAHN: I THINK THAT'S A POINT WHERE YOU REALLY WOULDN'T WANT TO RELY UPON ME AS A DEFENSE ATTORNEY TO SAY THIS IS THE PARTICULAR RESPONSE THAT SHOULD BE MADE. RATHER, WE KNOW THAT THERE IS A RESPONSE THAT NEEDS TO BE MADE.

THE COURT: I WANT TO GO BACK TO THIS PART OF YOUR PRESENTATION. THESE THINGS WERE THINGS THAT YOU BELIEVE [67] JUSTIFY FURTHER DISCOVERY. AS WE GO THROUGH THEM, THERE IS A REMARKABLE DEGREE OF AGREEMENT, AND I AM WILLING TO CONSIDER AND GIVE DEFERENCE —MAYBE NOT COMPLETE DEFERENCE, BUT I AM WILLING TO CONSIDER YOUR POSITION ON THESE AND THE COUNTER-ARGUMENTS YOU ARE MAKING SAYING THAT THIS IS SO.

SO FAR I HAVEN'T HEARD ANYTHING OTHER THAN DISAGREEMENT ABOUT DATA MINING ON THE NATURE OF THE OFFENSES OR THE CHARACTERISTICS OF THE OFFENDER, BUT I HAVEN'T HEARD ANYTHING THAT JUSTIFIES THE NEED FOR AN EVIDENTIARY HEARING.

I CAN ACCEPT ALL OF THIS AND TAKE ALL OF THIS INTO CONSIDERATION AND GIVE YOUR VIEWS AND THE EXPERIENCE OF YOUR CRIMINAL LAWYERS WHO I HAVE TO SAY ARE PROBABLY CLOSER TO THE FUNCTION BEING PERFORMED BY THE MARSHAL SERVICE THAN THE U.S. ATTORNEY'S OFFICE, BECAUSE THEY COME FACE TO FACE WITH THESE PEOPLE. THEY MEET THEM AT THE JAIL FACILITIES, AND THEY MEET THEM DOWN HERE. I HAVE THAT WELL IN MIND. I THINK THAT GIVES YOU MAYBE A BETTER READ ON THEM, ALTHOUGH THERE IS THIS DIFFERENCE THAT YOU ARE THEIR LAWYERS, AND THEY'D BE LESS LIKELY TO ATTACK YOU THAN SOMEBODY ELSE.

MR. CAHN: SOMETIMES.

THE COURT: I JUST WANT TO KEEP US ON TRACK. SO FAR I HAVEN'T HEARD ANYTHING THAT WOULD NECESSITATE—YOUR RECORD IS MADE HERE ABOUT WHAT YOU THINK THE DEFICIENCIES ARE IN THE JUDGMENT THAT LED TO THE POLICY. AN EVIDENTIARY IS NOT GOING TO ASSIST THAT.

[68]

MR. CAHN: I THINK THERE HAS BEEN A REMARKABLE AMOUNT OF AGREEMENT. AND, OF COURSE, SOMETIME THAT OCCURS EVEN IN EVIDENTIARY HEARING. AS I SAID, THERE MIGHT HAVE BEEN MANY MATTERS THAT WE COULD STIPULATE TO IN ADVANCE. BUT I PERSIST IN MY POINT THAT THE RICHNESS OF THE RECORD IS DIMINISHED WHEN WE DON'T HAVE A HEARING SO WE DON'T BRING FORTH WITNESSES.

THE COURT: YOU MAY NOT EVEN BE ABLE TO PARTICIPATE AS AN ADVERSARY IN A HEARING LIKE THAT BECAUSE—

MR. CAHN: I'D BE A WITNESS.

THE COURT: YES, YOUR TESTIMONY MIGHT BE NECESSARY AS THE HEAD OF FEDERAL DEFENDERS.

MR. CAHN: THAT'S A POSSIBILITY.

WE'D HAVE TO EXAMINE THOSE ETHICAL ISSUES AND WHETHER OR NOT—BUT, OF COURSE, THE RULE THAT SOMEBODY CAN'T BE AN ADVOCATE AND A WITNESS GENERALLY DOESN'T APPLY IN FRONT OF A JUDGE AS OPPOSED TO IN FRONT OF A JURY.

THE COURT: I AM WILLING TO ACCEPT A LOT OF THIS ON PROFFER. OTHER THAN OUR DISAGREEMENT ABOUT THE VALUE OF STATISTICAL INFORMATION, AND THAT'S NOT—I AM NOT DOUBTING THAT YOU IN GOOD FAITH BELIEVE THAT THAT WOULD HELP. I

DON'T THINK IT WOULD BE SO HELPFUL. BUT OTHER THAN THAT, I AM WILLING TO ACCEPT EVERYTHING THAT YOU PROFFERED SO FAR AS PART OF THE BACKGROUND OF THIS CASE AND EVALUATE THE POLICY IN LIGHT OF WE'LL CALL THEM COUNTER-PROFFERS.

[69]

MR. CAHN: I APPRECIATE THAT, YOUR HONOR.

I THINK WE ARE COMING PRETTY FAR ALONG. I HAVE GOT A FEW MORE LEFT. I AM SORRY THIS IS TAKING SO LONG.

THE COURT: NO, NO, NO. IT'S YOUR RECORD, AND I DIDN'T HAVE ANY ILLUSIONS. I KNEW THIS WAS GOING TO THE NINTH CIRCUIT ALL ALONG, NOT THAT THEY ARE GOING TO—

MR. CAHN: NOW YOU ARE DOING IT.

I GUESS YOU COULD ASSUME THAT IF YOU RULED IN OUR FAVOR, THE U.S. ATTORNEY WOULD APPEAL. THAT'S PROBABLY A BETTER ASSUMPTION ON YOUR PART THAN ON MINE. BUT IN ANY CASE, WE TALKED ABOUT THAT ISSUE. I AM TRYING TO SKIP ALONG TO MAKE SURE WE ARE NOT REPEATING OURSELVES.

WE HAVE TALKED ABOUT THE ISSUE OF THE CONSISTENCY OF THE APPLICATION OF FULL RESTRAINTS ACROSS, ABOUT THE NINTH CIRCUIT AND THE COUNTRY. WE

MADE CLEAR THAT WE DISPUTE THAT THERE IS A UNIFORM POLICY. AND SO I DON'T NEED TO SPEND ANY TIME ON THAT.

THE COURT: WHAT ABOUT BORDER DISTRICTS? I THINK THAT'S AN INSULAR SUBSET OF NINTH CIRCUIT COURTS, AND I DO THINK—I MEAN, FOR EXAMPLE, I AM UNAWARE OF THEM TAKING MASS PLEAS IN SAN FRANCISCO, FOR EXAMPLE, OR EVEN LOS ANGELES. I KNOW THAT THAT OCCURS FREQUENTLY IN ARIZONA AND IN OTHER BORDER DISTRICTS, THAT JUDGE BRICKHOUSE IN MEXICO DOES THAT AS WELL. YOU KNOW JUDGE FERRARO OUT THERE, AND I STAY IN TOUCH WITH HIM AND I SIT IN TUCSON FROM TIME TO TIME. YOU KNOW WHAT [70] THE REACTION IN TUCSON IS TO SHACKLING? YAWNING.

MR. CAHN: I THINK THAT'S UNFORTUNATE, AND I THINK WE ARE ALL DIMINISHED BY THAT REACTION.

THE COURT: YES, THEY SAY, LOOK, THIS IS LIKE—NO ONE HAS EVER RAISED THIS. NO ONE HAS EVER CONSIDERED THIS. BUT I DO THINK THAT THERE IS AN IMPORTANT DIFFERENCE BETWEEN BORDER DISTRICTS WITH THE VOLUME THAT WE HAVE, THE SIMILARITY TO CHARGES, THE SIMILARITY OF DISPOSITIONS AND THE NECESSITY THAT THE DISTRICT COURT HAS HERE TO RELY ON THE MAGISTRATE JUDGES TO DO THE YOMEN'S WORK AND TAKE THESE PLEAS.

YOU KNOW ANOTHER STATISTIC, MR. CAHN, THAT'S IMPORTANT IN THIS DISPUTE, THIS DISAGREEMENT IS OUR STATISTIC ON THE NUMBER OF CASES THAT RESOLVE BY PLEA IN THIS DISTRICT. 98.6 PERCENT. THAT'S A HUGE NUMBER, AND I THINK IT HAD PROBABLY NATIONAL AVERAGES IN FEDERAL COURT. I KNOW THEY ARE IN THE 90S, BUT 98.6 IS EXTREMELY HIGH. AND IT POINTS UP TO THE VOLUME OF CASES WE GET, THE SIMILAR THE DISPOSITIONS. THE PRESENCE OF FAST TRACK AND I THINK THAT MAKES US A LITTLE DIFFERENT. THERE ARE MANY, MANY COURTS—IT'S THE MINORITY OF BORDER DISTRICT COURTS WHERE PROCEDURES LIKE OPERATION STREAMLINE THAT'S IN EFFECT IN ARIZONA AND OUR PROCEDURE OF DOING UP TO SIX PLEAS AT A TIME TAKE PLACE. MOST COURTS WOULD NEVER THINK OF THAT AND THERE WOULDN'T BE A NECESSITY FOR IT.

I DO THINK THAT THAT'S A DIFFERENCE IN THAT THERE IS A SUBSET EVEN WITHIN THE 90 CIRCUIT OF BORDER DISTRICT COURTS [71] THAT THAT SHOULD BE GIVEN CONSIDERATION.

MR. CAHN: IT'S DIFFERENT, BUT LET ME TELL YOU MY VIEW ON HOW THAT COMES INTO EFFECT. I THINK THAT MOST OF THE ACCOMMODATIONS THAT WE HAVE MADE, MOST OF THE CHANGES WE HAVE MADE IN THE WAY WE PROCEED IN BORDER DISTRICTS ARE ACCOMMODATIONS TO LACK OF RE-

SOURCES. AND I THINK IT'S UNFORTUNATE, AND BEYOND THAT I THINK THAT THERE ARE TIMES WHEN WE SORT OF BLINDLY STUMBLINGLY HAVE WALKED INTO SITUATIONS WE ARE NOT PAYING PROPER ATTENTION TO THE RIGHTS OF INDIVIDUALS.

THERE ARE DIFFERENT EXPERIENCES, BUT CERTAINLY NOBODY COULD BE HAPPY GOING DOWN TO DEL RIO TEXAS AND LOOKING AT THE WAY CASES ARE HANDLED THERE. OF COURSE, THE NINTH CIRCUIT HAS INTERVENED IN SEVERAL OF THE PLEAS IN ARIZONA WHERE THEY FELT THAT THERE HAS BEEN A SUBSTANTIAL DIMINUTION OF INDIVIDUAL RIGHTS BY THE PROCEDURES THAT HAVE BEEN EMPLOYED ON THE BORDERS. OBSERVANCE OF OUR CONSTITUTIONAL RIGHTS, ALL OF OUR CONSTITUTIONAL RIGHTS TAKES TIME, MONEY AND RESOURCES, AND WE SHOULD BE WILLING TO SPEND THOSE. SO I GET YOUR POINT, BUT IT WEIGHS DIFFERENTLY.

THE COURT: YOU AND I ARE IN A VERY SIMILAR SITUATION. I SHOULD SAY JUDGES OF OUR COURT AND YOU ARE IN A VERY SIMILAR SITUATION. I HAVE READ AND I KNOW YOUR VIEW IS THAT YOU CAN'T EFFECTIVELY REPRESENT THE NUMBER OF THE PEOPLE THAT YOU ARE CHARGED WITH REPRESENTING HERE WITH THE STAFF AND THE BUDGET THAT YOU NOW HAVE.

[72]

MR. CAHN: STRAINED.

THE COURT: YES, IT'S VERY STRAINED. BUT, OF COURSE, ALL YOUR EFFORTS AND ALL THE COURT'S EFFORTS CAN'T FORCE THE LEGISLATURE WHO HOLDS THE PURSE TO SAY, OKAY, WE ARE GOING TO ALLOCATE MORE MONEY TO THAT. IT WOULD HAVE TO BE PRETTY CRITICAL, I THINK, BEFORE A COURT SAID, LOOK, THIS POSES A CONSTITUTIONAL PROBLEM AND WE ARE ORDERING THE LEGISLATURE TO FUND THIS TO A GREATER EXTENT. AND IT SEEMS TO ME THAT THIS IS EVEN A SHARPER DISPUTE WITH YOUR STAFF THAN IT IS WITH SUCH THINGS AS THE MARSHAL'S STAFF.

MR. CAHN: I DON'T KNOW THAT BECAUSE THE SEPARATION OF POWERS ISSUE THAT THE COURT SHOULD EVER ISSUE THAT TYPE OF ORDER. I KNOW COURTS HAVE DONE IT, BUT I THINK IT'S PROBLEMATIC. THE COURT CONTROLS ITS OWN UNIVERSE. IT'S AN INDEPENDENT BRANCH, AND I THINK THE PROPER RESPONSE IS WHEN A COURT IS ASKED TO DO THINGS THAT IT DOESN'T HAVE RESOURCES TO DO JUST TO SAY WE CAN'T DO THEM, AND THAT MEANS DISMISSING CASES. I THINK THAT THAT'S A MORE APPROPRIATE REASON UNDER OUR CONSTITUTION THAN ISSUING AN ORDER TO THE LEGISLATURE IN THEIR CONSTITUTIONALLY LIMITED SPHERE. THAT'S A LITTLE BIT OF AN ASIDE. YOU GET MY VIEW ON THAT.

THE COURT: I DO.

MR. CAHN: IT'S 16, 17. NOW, YOU HAVE TALKED ABOUT THIS ISSUE YOURSELF, SO I DON'T THINK I EVEN NEED TO BRING THIS UP THAT THE PART OF THE RATIONALE, AT LEAST, AND WHAT [73] PORTION OF THE RATIONALE IT WAS, WAS LESS ABOUT THE PARTICULAR SECURITY NEEDS OF THIS DISTRICT AND MORE ABOUT COMING INTO LINE WITH NATIONAL POLICY. YOU SPOKE ABOUT THAT AT THE LAST HEARING. I KNOW IT IS A DISTINCTION BUT I THINK IT'S A GIVEN AT THIS POINT IN LIGHT OF YOUR COMMENTS EARLIER.

THE COURT: LOOK, THE IMPRESSION I GOT—I DON'T KNOW IF MARSHAL STAFFORD USED THIS TERMINOLOGY, BUT THE IMPRESSION FROM THE PRESENTATION—AND I THINK THIS IS PART OF THE MARSHALS PITCH EVEN NOW—IS THAT THIS DISTRICT WAS THE OUTLIER. THERE MAY BE SOME VARIATIONS IN SHACKLING POLICY IN THE OTHER DISTRICTS, BUT ALL SHACKLED AND WE DID NOT, NOT AT ALL. AND HE WAS GETTING SOME HEAT FROM THE GENERAL MARSHAL SERVICE. AND WASN'T JUST A ONE-TIME THING. HE WAS TRYING TO HOLD THEM BACK AS THEY SAID, COME INTO LINE, COME INTO LINE. AND YES, THAT INFLUENCED MY THINKING AS ONE OF THE PEOPLE THAT HAD A SAY IN THE PROMULGATION OF OUR POLICY. I UNDERSTOOD THAT THIS WAS A NATIONAL POLICY. I WONDERED, WELL,

ARE THERE GOOD REASONS WHY WE SHOULD BE ONE DISTRICT OUT OF 94 DIFFERENT FROM THE REST OF THEM.

MR. COLE: YOUR HONOR, ON THAT SCORE I JUST WANTED TO MAKE TWO POINTS. IT'S A NATIONAL POLICY, BUT WE ARE NOT CLAIMING—AS YOU KNOW, DISTRICTS VARY GREATLY. THE BORDER DISTRICTS VARY GREATLY FROM US BECAUSE THEY WERE USING FULL RESTRAINTS, AND WE WERE USING NO RESTRAINTS ON OUR DISTRICT.

THE COURT: NONE.

[74]

MR. COLE: RIGHT. BUT ACROSS THE COUNTRY THERE IS GREAT VARIATION. THE MARSHAL SERVICE ENDEAVORED, I THINK, A LARGE PART BECAUSE JUDGE MOSKOWITZ ASKED TO LOOK AT SIMILARLY SITUATED DISTRICTS AND NINTH CIRCUIT DISTRICTS, NOT THE WHOLE COUNTRY. THERE IS A NATIONAL POLICY THAT WE ARE NOT CLAIMING WE SURVEYED EVERY DISTRICT, ALL 94 DISTRICTS. BUT IN THE SURVEY INFORMATION PROVIDED WHICH FEDERAL DEFENDERS ATTACHED TO THEIR PAPERS, THAT WAS WHAT WAS PROVIDED TO THE COURT IS MY UNDERSTANDING. AND AS FAR AS MARSHALS KNOW THAT WAS ACCURATE WHEN IT WAS PROVIDED. OF COURSE, FOR ANY COURTROOM OR ANY COURTHOUSE IT WILL ALWAYS BE THE TYPICAL REPORT BECAUSE AS WE KNOW FROM OUR OWN COURTROOM,

JUDGES DIFFER. AND SO EVEN IF WE SAY, OH, IN THE DISTRICT OF EASTERN WASHINGTON OR WESTERN WASHINGTON THIS IS GENERALLY WHAT HAPPENS ON ANY GIVEN DAY, ANY JUDGE MAY BE DOING SOMETHING VERY DIFFERENT. AND SO WE RECOGNIZE THIS VARIATION AND THAT'S WHY WHEN WE PRESENTED THE DECLARATION, WE FOCUSED ON THE BORDER DISTRICTS, WHICH WE THOUGHT WHERE THE MOST SIMILARLY SITUATED AND WHICH WE FELT SHOWED SUCH A GREAT DISPARITY IN PRACTICE FROM WHERE WE WERE AND WHERE THEY WERE.

BUT, YOUR HONOR, I WANT TO POINT OUT THAT WHILE THE NATIONAL POLICY IS IMPORTANT TO THE MARSHALS AND WHILE IT WAS PART OF THE PRESENTATION TO YOUR HONOR, THE GOVERNMENT DOESN'T WANT TO LEAVE THE IMPRESSION THAT THAT'S WHAT'S DRIVING THE BUS, BECAUSE THE MARSHAL, KEITH JOHNSON AND THE UNITED STATES, [75] WE ALL BELIEVE THAT ALL THE FACTORS ARE IMPORTANT. IT'S THE WHOLE DISTRICT AND LOOKING THAT THE WHOLE PROBLEM, THE WHOLE COMPLEX, EVERYTHING, THAT THE MARSHAL REACHES AN OVERALL CONCLUSION ABOUT. AND SO I HAVE JUST WANT TO MAKE THAT POINT.

THE COURT: I AGREE WITH YOU, AND I THINK MY COMMENTS REFLECT THAT THE CONSIDERATION WAS MULTI-FACETED HERE. BUT TO ME IT WAS IMPORTANT THAT WE WERE REALLY OUT OF LINE WITH THE NA-

TIONAL POLICY. I THINK THE REPRESENTATION WAS THAT WE WERE UNIQUE IN THE NO-SHACKLING WITHIN THE ARRAY OF DISTRICTS. I DON'T KNOW THAT THAT'S NOT TRUE. DO YOU DISPUTE THAT? ARE THERE OTHER DISTRICTS WHERE THERE IS NO SHACKLING?

MR. CAHN: THERE ARE OTHER DISTRICTS WHERE THERE IS NO SHACKLING. I DID A SURVEY WHEN JUDGE MOSKOWITZ FIRST CONTACTED US BACK IN MARCH. THERE ARE OTHER DISTRICTS WHERE THERE IS NO SHACKLING. THERE ARE OTHER DISTRICTS WHERE THERE IS LIMITED SHACKLING, AND USUALLY SHACKLING AT INITIAL APPEARANCE AND NO SHACKLING THEREAFTER. THERE ARE VERY FEW DISTRICTS, ARIZONA BEING ONE OF THEM, WHERE THERE IS FULL SHACKLING ALL THE TIME OTHER THAN IN JURY TRIALS. THERE THEY DON'T EVEN RELEASE YOUR ARM DURING PLEAS AND SENTENCINGS.

THE COURT: WOULD YOU MAYBE—YOU HAVEN'T THOUGHT ABOUT THIS, BUT WOULD YOUR OBJECTION BE THE SAME IF THE POLICY WAS LIMITED TO JUST WHENEVER THERE ARE MULTIPLE DEFENDANTS IN THE COURT AT ONCE, THE MARSHALS WERE GOING TO EMPLOY SHACKLING?

[76]

MR. CAHN: JUDGE, I WOULDN'T—OF COURSE, IT WOULD DEPEND ON THE NATURE

OF THE SHACKLING. THERE IS DIFFERENCES BETWEEN FIVE POINT AND LEG SHACKLING. AND SO IF YOU ARE ASKING COULD WE AND THE MARSHALS COME TO SOME RESOLUTION ON THIS IF WE SAT DOWN AND TALKED, IT'S POSSIBLE. I DON'T WANT TO SPEAK OUT OF TURN. CERTAINLY, I HAVEN'T EVEN TALKED TO THE CLIENT ABOUT SUCH A THING LET ALONE FULLY CONSIDERED IT.

THE COURT: WAS SHE ONE OF MANY BEFORE THE MAGISTRATE JUDGE? WAS MS. MORALES ONE OF MANY WHO APPEARED AT THE SAME TIME?

MR. CAHN: I BELIEVE THERE WERE QUITE —I AM ASKING MS. MILLER BECAUSE SHE WAS THERE. THERE IS MANY GROUPS OF AT LEAST FIVE. I CAN'T SPEAK TO THE EXACT NUMBER. THERE HAVE BEEN GROUPS OF AT LEAST FIVE DURING THOSE CIRCUMSTANCES.

THE COURT: DID YOU READ IN THE TRANSCRIPT MY—AGAIN, I THINK I RELATED TO MS. CHARLICK AN ANECDOTE FROM WHEN I WAS A MAGISTRATE JUDGE—AND REMEMBER CHIEF DIGERA? WAS HE STILL THERE WHEN YOU GOT HERE?

MR. CAHN: NO.

THE COURT: BIG OLD TOUGH GUY. I TALKED TO DEFENSE COUNSEL, I TALKED TO THE PROSECUTORS. THE TIME TO GO OVER MASS ADVISALS OF RIGHTS, FOR EXAMPLE, YOU HAVE A RIGHT TO HAVE YOUR PRELIMINARY HEARING GO FORWARD TODAY. YOUR

LAWYERS HAVE TOLD ME THAT THEY ARE TRYING TO WORK OUT A DEAL FOR YOU. IT MIGHT BE IN YOUR INTEREST TO WAIVE THAT.

[77]

I WOULD BRING IN 25 AT THE TIME, MUCH TO THE CHAGRIN OF CHIEF DIGERA. HE SAID WE CAN'T DO THAT. I SAID, YES, WE HAVE TO DO THAT BECAUSE ALL THESE LAWYERS ARE BILLING, AND IT'S COSTING THE TAXPAYER A LOT OF MONEY, AND THEY DON'T WANT TO SIT AROUND WHILE I GO THROUGH THIS ONE A THE TIME. THEY WOULD PREFER TO HAVE IT ALL DONE, AND I AM GOING TO INDIVIDUALLY ADDRESS EACH GUY AND HAVE HIM THAT HE AGREES TO THIS CONTINUANCE. AND HE SAID, WELL, I AM SHACKLING EVERYBODY, THEN. AND I SAID, SHACKLE AWAY, BIG CHARM BRACELET, BRING EVERYBODY OUT AT ONCE.

YOU KNOW WHAT MY EXPERIENCE WAS, MR. CAHN? DEFENSE ATTORNEYS LIKED IT, THE DEFENDANTS LIKED IT BECAUSE IT REDUCED THEIR TIME SITTING HERE. THEY GOT BACK TO AT LEAST A MORE FAMILIAR ENVIRONMENT, SAVE THE TAXPAYERS A TON OF MONEY, NO ONE'S RIGHTS WERE HARMED BY IT, NO ONE WAS THE WORSE FOR IT. AND I DON'T KNOW, I AM HAVING TROUBLE UNDERSTANDING WHAT'S WRONG WITH THAT, AND I AM TALKING JUST ABOUT GROUP SHACKLING NOW. I PERCEIVE THAT THERE IS A DIFFERENCE BETWEEN AN INDIVIDUAL

BEING BROUGHT OUT BEFORE THE COURT, BUT A BIG GROUP PROCEEDING LIKE THAT THAT IMPROVES THE EFFICIENCY, SERVES EVERYBODY'S INTEREST. WHAT'S THE PROBLEM?

MR. CAHN: WELL, LET ME GIVE YOU AN ALTERNATIVE ANECDOTE, AND YOU CAN TAKE THIS FOR WHAT IT'S WORTH. YOU KNOW THAT BEFORE I CAME TO FEDERAL COURT, I WAS A STATE PUBLIC DEFENDER IN BROWARD COUNTY, FLORIDA. AND WE TYPICALLY HANDLED [78] WHAT YOU MIGHT CALL ARRAIGNMENTS AND MORNING DOCKET OR WHATEVER, AND I'D WALK IN, AND THERE BE 12 GUYS SITTING IN THE BOX IN LEG SHACKLES, AND WE WOULD TALK TO THEM, AND THE PROCEEDINGS THAT ENSUED WERE SORT OF LIKE A BAZAAR. THE PROSECUTOR MAKE AN OFFER, THE JUDGE WOULD MAKE A DIFFERENT OFFER, AND I RESPOND, MY CLIENT WILL TAKE 28 MONTHS BUT NOT 32 MONTHS. AND WHEN I CAME TO FEDERAL COURT AND I CAME TO MY VERY FIRST PROCEEDING, AND I WALKED IN THE COURT AND THERE WAS NOBODY THERE BUT ME AND THE PROSECUTOR AND MY CLIENT WAS BROUGHT OUT, AND THE JUDGE CALLED FOR APPEARANCES, AND I UNDERSTOOD THEN THAT THIS WAS DIFFERENT, THAT THIS WAS BETTER, AND THIS IS THE WAY OUR JUSTICE SYSTEM WAS MEANT TO WORK, NOT LIKE WHAT WAS GOING ON IN BROWARD COUNTY, FLORIDA.

I UNDERSTAND EFFICIENCIES, I UNDERSTAND NECESSITIES, BUT WE NEED TO KEEP IN MIND WHAT WE LOSE. IT'S VERY IMPORTANT, IT'S INTANGIBLE, BUT IT'S VERY IMPORTANT.

THE COURT: I HAVEN'T MEANT TO DEPRECATE THAT IN ABOUT ASKING THOSE THINGS, BUT.

MR. CAHN: YOU AND I BOTH UNDERSTAND THE REALITIES.

THE COURT: HERE IS A POINT, AND THIS KIND OF EVOLVES FROM EVERYTHING WE HAVE BEEN TALKING ABOUT. I AGREE WITH YOU. I CAME FROM STATE PRACTICE OVER TO FEDERAL COURT, TOO, AND THE MAJESTY OF FEDERAL COURT WAS IMMEDIATE APPARENT TO ME. BUT I SAT IN A NUMBER OF OTHER FEDERAL COURTS, NEW YORK, IDAHO, REALLY ALL OVER THE COUNTRY, AND I HAVE TO TELL [79] YOU THERE IS A DIFFERENCE BETWEEN DISTRICT COURTS AND OTHER FEDERAL COURTS, TOO. DO YOU ACKNOWLEDGE THAT?

MR. CAHN: I DO.

THE COURT: WE ARE CLOSER—I HATE TO CALL IT A BAZAAR ATMOSPHERE LIKE IT'S A BAZAAR HERE. IT'S NOT. BUT AT TIMES IT'S MUCH CLOSER TO WHAT YOU WERE DESCRIBING YOUR EXPERIENCE WAS.

WHEN JUDGE SKOMAL WAS A PUBLIC DEFENDER WITH THE FEDERAL DEFENDERS OFFICE, I COME IN AND WE'D HAVE 30 PEO-

PLE. IN THOSE DAYS IT WAS MISDEMEANORS. AND I'D SAY, LOOK, WHY DON'T YOU PICK OUT THREE THAT YOU THINK DESERVE LIKE NO TIME AND I'LL PICK OUT THREE THAT I THINK DESERVE MORE TIME AND WE WILL MAKE A DEAL WITH RESPECT TO ALL THE OTHERS, AND BOOM, IT'D BE DONE. JUDGE GONZALEZ, WHO WAS A MAGISTRATE AT THE TIME, WOULD SENTENCE 24 ALL AT ONCE, AND THEN HE'D MADE HIS PITCH ON THREE AND I'D MAKE MY PITCH ON THREE.

THERE IS SOME WAYS THAT THIS DISTRICT IS DIFFERENT FROM OTHER DISTRICTS AND MUCH CLOSER TO THE EXPERIENCE THAT YOU HAVE RELATED FROM STATE COURT. NOW, THAT DOESN'T—THIS DUE PROCESS STANDARDS IS A CONSTANT, I THINK. SO I AM NOT SAYING IT VARIES, BUT CERTAINLY THE JUSTIFICATION FOR POLICIES CAN TAKE INTO CONSIDERATION DIFFERENCES LIKE THAT, DON'T YOU THINK?

MR. CAHN: I THINK YOU HAVE TO TAKE INTO ACCOUNT THE INDIVIDUAL CIRCUMSTANCES. BUT BEARING THAT IN MIND, WE SHOULD [80] BE STRIVING FOR ONE OBJECTIVE AND NOT THE OTHER.

I AM SORRY, CAN I HAVE ONE MOMENT?

THE COURT: YES, SURE.

MR. CAHN: JUDGE, CAN WE ASK FOR A SHORT BREAK.

MS. MORALES' LEGS ARE FALLING ASLEEP BECAUSE SHE CAN'T MOVE THEM IN THE

SHACKLES, AND I COULD PROBABLY USE A BATHROOM BREAK.

THE COURT: SURE, WE'LL DO THAT. YOU WANT TO COME BACK IN AN HOUR?

MR. CAHN: WHATEVER IS THE COURT'S PLEASURE.

MR. COLE: YOUR HONOR, I HAVE A GRAND JURY APPEARANCE AT 1:30. IT'S ONLY GOING TO LAST FROM 1:30 TO 2:15, 2:30 THE LATEST.

THE COURT: CAN YOU COME BACK AT 2:30, MR. CAHN?

MR. CAHN: I AM AT THE COURT'S PLEASURE. WHENEVER THE COURT WANTS ME, I AM HERE. I DELAYED YOU BEFORE.

THE COURT: NO, NO, THAT'S ALL RIGHT. I AM SUPPOSED TO BE IN THE DENTIST CHAIR RIGHT NOW.

DOES 2:30 WORK FOR YOU?

MR. COLE: YES.

MR. CAHN: THAT'S FINE, YOUR HONOR.

THE COURT: MS. MORALES, 2:30? THAT WAY YOU CAN GET LUNCH.

SHE IS SMILING, SO I DON'T WANT TO LEAVE THE IMPRESSION THAT SHE IS IN GREAT DISTRESS HERE. THAT WOULD NOT

[81]

BE MY OBSERVATION. LEGS ASLEEP, I DON'T KNOW. I AM SITTING AS SHE IS SITTING AND MY LEGS AREN'T ASLEEP.

MR. CAHN: SHE CAN'T MOVE HER LEGS BECAUSE OF THE SHACKLES. THAT'S WHY HER LEGS ARE ASLEEP. SHE HAS A VERY LIMITED ABILITY TO STRETCH OUT.

THE COURT: HOW BIG IS THE CHAIN? WHAT DO YOU MEAN SHE CAN'T—

MR. CAHN: I DON'T KNOW, YOUR HONOR. I DID NOT GET DOWN TO THE FLOOR.

THE COURT: ONE THING, MR. CAHN, IF THEY WERE HANDCUFFED IMMEDIATELY TOGETHER, I HAVE—ONE OF THE PROBLEMS I HAVE HAD WITH THIS IS I DON'T SEE THE CHAINS. WHEN THEY COME IN MY LINE OF VIEW IS SUCH. ISN'T THERE LIKE 18 INCHES OF CHAIN?

MR. CAHN: I AM SURE THERE IS A STANDARD.

DEPUTY MARSHAL JOHNSON: I HAVE NEVER MEASURED IT.

THE COURT: GO TAKE A LOOK, BECAUSE THIS IS AN IMPORTANT POINT. WE WERE KIND OF BUILDING INTO A RECORD HERE A PERCEPTION THAT SHE IS GREAT DISTRESS. SHE IS—SEEMS LIKE A HAPPY YOUNG LADY. SHE HAS A SMILE ON HER FACE, AND I JUST WANT TO SEE WHAT THE LENGTH OF THE CHAIN IS, BECAUSE THE REPRESENTATION IS SHE CAN'T MOVE HER LEGS. I JUST DON'T THINK THAT'S TRUE.

MR. CAHN: I WOULD SAY IT'S SOMEWHERE BETWEEN 12 AND 18 INCHES.

[83]

THE COURT: ALL RIGHT, SO SHE CAN MOVE HERE LEGS BUT SHE JUST HAS SOME WEIGHT ON THERE, LIKE WORK BOOTS.

MR. CAHN: LET ME BE CLEAR, THOUGH. I DIDN'T SAY SHE WAS IN GREAT DISTRESS, BUT I DID SAY HER LEGS WERE ASLEEP. SHE EXPRESSED DISCOMFORT AND I BROUGHT IT TO YOUR ATTENTION.

THE COURT: LIKE I SAID, I DON'T WANT—HERE IS WHAT I DON'T WANT. I DON'T WANT CERTAIN PEOPLE ON THE NINTH CIRCUIT TO SEIZE ON THAT AND SAY EVEN DURING THIS HEARING POOR MS. MORALES WAS IN—BECAUSE SHE DOESN'T APPEAR TO ME TO BE IN ANY DISTRESS. I'LL TAKE IT AT FACE VALUE THAT SHE SAYS HER LEGS ARE ASLEEP. I DON'T KNOW IF THAT HAS ANYTHING TO DO WITH SHACKLING, BECAUSE I HAVE BEEN SITTING DOWN THIS WHOLE TIME AND MY LEGS AREN'T ASLEEP. I CAN DO WHAT SHE CAN DO WHICH IS MOVE MY FEET.

2:30.

MR. COLE: THANK YOU, YOUR HONOR.

—OOO—

SAN DIEGO, CALIFORNIA—TUESDAY, NOV. 15, 2013 - 2:30 P.M.

THE COURT: MS. MORALES IS BACK. HOW ARE YOU FEELING? GOOD, OKAY. YOU LOOK GOOD.

COUNSEL ARE PRESENT.

MR. CAHN, YOU MAY CONTINUE.

MR. CAHN: SO WE LEFT OFF I THINK AT—

THE COURT: 16 OR 18 IN THE DECLARATION.

MR. CAHN: YES, WE WERE TALKING ABOUT PARAGRAPH 16 AND 17. YOUR RECOLLECTION WAS SIMILAR TO WHAT I RELAYED.

SO LET ME START WITH PARAGRAPH 19. WE WOULD SAY THAT OUR EXPERIENCE WITH THE SHACKLING POLICY AS BEING IMPLEMENTED DOES NOT SHOW DISCRETION BEING EXERCISED ON THE PART OF THE MARSHALS. IN PARTICULAR, YOU HAVE SEEN SOME OF THE DECLARATIONS WE HAVE BEEN TALKING ABOUT, AN INDIVIDUAL WHO IS BLIND, AN INDIVIDUAL IN A WHEELCHAIR, NUMEROUS DIMINUTIVE—

THE COURT: I SAW THAT, YES.

MR. CAHN: THAT CONTINUES TO BE OUR EXPERIENCE.

THE COURT: SHOULD THAT BE MY FOCUS OF ATTENTION HERE OR SHOULD MY FOCUS OF ATTENTION SHOULD BE ON THE IMPLE-

MENTATION OF POLICY BY THE COURT, NOT WHAT THE MARSHALS DO. THE LETTER MAKES VERY CLEAR THAT INDIVIDUAL JUDGES CAN DIRECT ACTIONS IN INDIVIDUAL CASES. SO I READ THAT. THAT WAS THE CASE IN FRONT OF JUDGE BENITEZ WHERE THE WOMAN WAS SHACKLED TO THE WHEELCHAIR AND I READ ANOTHER ONE WHERE [84] SOMEBODY COULDN'T ADJUST THEIR HEADPHONES AND ANOTHER ONE WHERE THEY COULDN'T SIGN SOMETHING.

IN EACH THOSE CASES, I WOULD THINK, IF THE DEFENDER, THE LAWYER HAD SAID, JUDGE, CAN WE HAVE DISPENSATION HERE. THIS WOMAN IS IN WHEELCHAIR. SHE IS OBVIOUSLY NOT A SECURITY RISK. OR, JUDGE, MY CLIENT OBVIOUSLY HASN'T BEEN ABLE TO HEAR. CAN WE TAKE ONE HANDCUFF OFF.

I TELL YOU WHAT I'D DO—AND MARSHALS MUST HAVE KNOWN THAT BECAUSE THEY HAVE MS. MORALES WITHOUT HAND SHACKLES. IN MOTION HEARINGS WHICH COMMONLY INVOLVE IN MY EXPERIENCE THE DEFENDANT PAYING ATTENTION, SOMETIMES TAKING NOTES, PASSING NOTES BACK AND FORTH, I HAVE ASKED THE MARSHALS NOT TO HAVE ANYBODY IN HAND SHACKLES.

ANYWAY, BACK TO MY POINT. MY POINT IS NOT WHETHER THE MARSHALS EXERCISE DISCRETION BUT WHETHER—THIS POLICY ALLOWS COURT TO EXERCISE DISCRETION IN

THE VERY CIRCUMSTANCES THAT ARE OUTLINED IN THESE DECLARATIONS.

MR. CAHN: WE WOULDN'T BE TALKING ABOUT THIS IF THE COURTS WERE EXERCISING THIS DISCRETION, BUT THE COURTS HAVE DECIDED TO—SOME OF THE COURTS, UNLIKE THIS COURT AND SOME OF THE OTHERS—TO SIMPLY DEFERRING TO THE MARSHALS JUDGMENT, AND THAT IS UNIVERSALLY TRUE IN THE MAGISTRATES'S COURTS. THESE ISSUES HAVE BEEN BROUGHT TO THE COURT'S ATTENTION AND THEY TURN TO THE MARSHALS AND SAY—AND ASK THE MARSHALS THEIR VIEW, AND THE MARSHAL SAYS THAT WE SHOULD PROCEED [85] FORWARD WITH SHACKLING, THEN THEY PROCEED IN THAT MANNER.

THE COURT: ONE OF YOUR TRANSCRIPTS SHOWS THAT THAT'S NOT SO. ONE OF THE TRANSCRIPTS I READ WAS IN FRONT OF JUDGE STORMES, AND SHE EXPLAINED WHEN SHE WOULD INVOKE THE EXCEPTION. IF THERE IS A MEDICAL NECESSITY OR SOME OTHER GOOD REASON, AND THERE WASN'T IN THAT CASE, OR AT LEAST IT WASN'T ARTICULATED. SOMEBODY JUST OBJECTED BECAUSE THEY THOUGHT THE SHACKLING REDUCED THE DIGNITY OF THE COURT, AND SHE WASN'T GOING TO COUNTENANCE THAT, BUT SHE DID BY WAY OF EXAMPLE CITE A COUPLE OF REASONS THAT SHE WOULD ORDER SHACKLES REMOVED.

MR. CAHN: THAT'S TRUE IN SOME CASES, BUT AS THE DECLARATIONS MAKE CLEAR, THERE ARE CASES WHERE THAT'S SIMPLY NOT OCCURRING DESPITE REALLY OBVIOUS REASON TO UNSHACKLE, LIKE THE PERSON IN A WHEELCHAIR, THE BLIND PERSON WHO IS TRYING TO USE THEIR CANE AS THEY WALK WHILE THEY ARE SHACKLED; AN INDIVIDUAL WHICH A HUGE GASH ON THEIR LEG THAT'S BEING IRRITATED BY THE SHACKLES.

THE PROBLEM IS PARTICULARLY EGREGIOUS IN MAGISTRATE JUDGE COURT, BECAUSE I THINK THE MAGISTRATES THERE MAY FEEL THAT THEY DON'T REALLY—THAT IT'S NOT APPROPRIATE FOR THEM TO EXERCISE THEIR DISCRETION IN LIGHT OF THE DISTRICT COURT'S ANNOUNCED DEFERENCE TO THE MARSHAL POLICY.

THE COURT: WAIT A MINUTE. DOESN'T THE RECORD IN THIS CASE SO FAR ALSO SHOW THAT JUDGE BROOKS HAS PRETTY ROUTINELY INVOKED THE EXCEPTION?

[86]

MR. CAHN: I AM NOT SURE ABOUT JUDGE BROOKS. CAN I HAVE AN OPPORTUNITY TO TALK TO CO-COUNSEL?

THE COURT: I THOUGHT THAT WAS IN THERE THAT JUDGE BROOKS WAS ONE WHO ROUTINELY INVOKED THE EXCEPTION, AND JUDGE BROOKS IS A MAGISTRATE JUDGE ON THIS COURT.

MR. COLE: WHILE THEY ARE CONFERRING, PERHAPS I MENTION ALSO I DO KNOW THE RECORD INCLUDES THE INSTANCE OF ONE OF DEFENDANTS THAT WAS BROUGHT IN THIS CASE, MR. DURAN, WHO HAD A VISUAL IMPAIR PROBLEM AND THAT RECORD SHOWS ALTHOUGH ON THE FIRST DAY HE SHOWED UP IN COURT HE WAS SHACKLED, THE NEXT DAY THEY ASKED JUDGE MAJOR TO REDUCE THE SHACKLING, AND SHE DID. AND SO THAT AT LEAST IS ONE INSTANCE WERE JUDGE MAJOR EXERCISED DISCRETION IN LIGHT OF THE CONCERN LIKE THAT.

THE COURT: THE BASIC POINT IS THIS, MR. CAHN. IT'S NOT SO MUCH THE MARSHAL'S POLICY. YOU ARE OBJECTING TO THE COURT'S POLICY. THAT'S WHAT WE HAVE AUTHORITY TO CONTROL. I CAN'T TELL THE MARSHALS OTHER THAN TO THE EXTENT THEY INTERFACE WITH THE COURT, HOW TO CONTROL THE SHACKLING OF PEOPLE. IT'S NOT MY BUSINESS, FOR EXAMPLE, HOW THEY TAKE THEM TO COURT OR BRING THEM BACK TO THE FACILITIES.

MR. CAHN: NO, AND WE ARE NOT ASKING ANYTHING ABOUT THAT. THIS IS ABOUT TO THE EXTENT ONE IS ALWAYS LOOKING TO THE OVERALL REASONABLENESS OF THE POLICY IN LIGHT OF THE OBJECTIVES TO BE ACHIEVED AND THE INTEREST ON THE OTHER SIDE, AND ONE OF THE THINGS THAT BEARS UPON THE REASONABLENESS OF [87] THE POLICY I WOULD THINK WOULD BE IT'S

FLEXIBILITY AND APPLICATION. AND SO OUR CONTENTION IS SIMPLY THE CONTRARY TO WHAT'S SET OUT IN THE AFFIDAVIT. WE ARE NOT SEEING THAT FLEXIBILITY—I AM SORRY—THE DECLARATION. WE ARE NOT SEEING THE FLEXIBILITY THAT THE DECLARATION ASSERTS EXISTS.

THE COURT: BY THE MARSHALS?

MR. CAHN: BY THE MARSHALS. THAT'S THE ONLY POINT. THIS IS NOT—

THE COURT: AGAIN, I'LL TAKE THAT AS A COUNTER-PROFFER AND ACCEPT THAT THESE SEVERAL EXAMPLES YOU HAVE GIVEN ME ARE EXAMPLES WHERE I CERTAINLY AGREE WITH YOU. I CAN'T IMAGINE THE UTILITY OF HAVING A BLIND PERSON ON A CANE IN SHACKLES. MAYBE THERE IS CONTEXT WHERE THERE ARE A LOT OF OTHER PEOPLE IN COURT AT THE SAME TIME.

MR. CAHN: THERE WAS A NUMBER. THAT WAS IN MAGISTRATE COURT.

THE COURT: IF YOU ARE ASKING HOW I WOULD HAVE EXERCISED MY DISCRETION ON THAT, I PROBABLY WOULD HAVE LET THE BLIND PERSON WITH THE CANE OUT OF THE SHACKLES WHILE MAINTAINING EVERYBODY ELSE IN SHACKLES. YOU ARE GOING TO GET A DIFFERENT SLANT ON THIS FROM EACH DISTRICT JUDGE, I ASSUME, ON WHAT QUALIFIES AS AN EXCEPTION.

MR. CAHN: MY POINT IS THAT TO THE EXTENT TO WHICH THE GOVERNMENT IS RE-

LYING UPON THE CLAIMED FLEXIBILITY OF THE MARSHALS APPROACH.

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THE COURT: YOU DON'T THINK IT IS. YOU DON'T THINK THEIR APPROACH IS FLEXIBLE.

MR. CAHN: AND OBVIOUSLY, IT MAY DIFFER FROM INDIVIDUAL DEPUTY MARSHAL TO THE INDIVIDUAL DEPUTY MARSHAL. MAYBE SOME ARE MORE OR LESS FLEXIBLE, BUT TO ASSERT THAT IT'S FLEXIBLE ACROSS THE BOARD AND THAT FLEXIBILITY IS BEING ENGAGED APPROPRIATELY WE THINK IS WRONG.

THE COURT: I'LL ACCEPT THAT AS A COUNTER-PROFFER AND TAKE IT INTO CONSIDERATION.

MR. CAHN: PARAGRAPH 20, WE WOULD ASSERT THIS IS A CLARIFICATION RATHER THAN A STRICT DISPUTE, BECAUSE I THINK WE ARE IN AGREEMENT ON THIS. YOU HAVE HEARD ABOUT THE CIRCUMSTANCE IN WHICH INDIVIDUALS ARE SHACKLED. THEY ARE FULLY SHACKLED BEING TRANSPORTED FROM FACILITIES, UNSHACKLED HANDS AND BELLY CHAINS WHEN THEY GET TO THE HOLDING CELLS RESHACKLED.

AND SO TO THE EXTENT THIS DEALS WITH THE QUESTION OF HOW LONG INDIVIDUALS WERE SHACKLED, AND WE WOULD AGREE NO INDIVIDUAL WAS IN FULL SHACKLES FOR EXTRAORDINARY LENGTHY PERIODS OF

TIME, BUT THE MARSHALS WOULD CONCEDE THAT AN INDIVIDUAL, PARTICULARLY ONE BROUGHT FROM A REMOTE FACILITY, CAN BE IN LEG SHACKLES FOR A CONSIDERABLE PERIOD OF TIME FROM THE BEGINNING TO THE END OF THE DAY.

THE COURT: BUT NOT BELLY CHAINS AND HANDCUFFS.

MR. CAHN: MY UNDERSTANDING IS THAT THEY WOULD ALSO [89] HAVE THE BELLY CHAINS AND HANDCUFFS REMOVED AT LEAST IN THE HOLDING FACILITY DOWNSTAIRS.

THE COURT: WHAT ABOUT ON THE WAY DOWN? PRISONERS THAT COME FROM CALIFORNIA CITY, ARE THEY SHACKLED ON THE WAY DOWN FROM THAT FACILITY?

MR. CAHN: I WOULD ASSUME SO CONSISTENT WITH WHAT—MR. COLE IS NODDING HIS HEAD. SO, YES, THEY ARE IN FULL SHACKLES.

THE COURT: THAT'S YOUR UNDERSTANDING, MR. COLE?

MR. COLE: YES, DURING TRANSPORT THEY'D BE IN FULL RESTRAINTS UNLESS THERE WAS SOME—

THE COURT: IS THAT RIGHT, MR. JOHNSON? WHEN YOU RECEIVE THEM FROM THE BUS, EVERYBODY IS IN FULL RESTRAINTS?

DEPUTY MARSHAL JOHNSON: THAT'S CORRECT, YOUR HONOR.

THE COURT: I DID SEE DECLARATIONS THAT INDICATED THAT, TOO, IN THE SUPPLEMENTAL DECLARATIONS.

MR. CAHN: PARAGRAPH 21, I THINK, YOU HAVE GOT DECLARATIONS TO THE EFFECT OF RESTRAINT IMPAIRMENTS OF OUR CLIENTS, ABILITY TO ADJUST HEADSETS, TO WAIVE THE ATTENTION OF COUNSEL IN LARGE GROUPS AND THAT SORT OF THING. AND SO WE CONTINUE—WE HAD A DISCUSSION ABOUT THIS WITH DEPUTY MARSHAL JOHNSON YESTERDAY, AND IT'S ONE OF THE PLACES WE DO SIMPLY DISAGREE AS TO THE ABILITY OF CLIENTS TO ADDRESS MATTERS REQUIRING ATTENTION IN COURT, WHETHER IT BE ADJUSTING THE HEAD SET OR WAVING.

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THE COURT: HOW DO THE SHACKLES HONESTLY IN PRACTICE AFFECT THAT, THOUGH?

MR. CAHN: MY UNDERSTANDING IS THAT THE REGULATION IS, LET'S SAY YOU ARE STANDING, YOU SHOULD BE ABLE TO REACH TO JUST BELOW YOUR CHIN BUT NOT UP TO YOUR EAR OR MOUTH OR EYES.

THE COURT: THE HEADSETS WE HAVE, OF COURSE, ARE ADJUSTABLE ON THE BOTTOM, ON THE GROUND PIECE.

MR. CAHN: THEY ARE ADJUSTABLE IN THE BOTTOM IN THE SENSE THAT YOU CAN MOVE THE LENGTH OF THE PIECE, BUT OFTENTIMES IF YOU THINK ABOUT THE WAY

SOMEBODY WEARS THE HEADSET—AND MS. MORALES ISN'T WEARING ONE—BUT VERY OFTEN YOU SEE OR SAW BEFORE WE BEGAN ENGAGING IN SHACKLES INDIVIDUALS NEED TO ADJUST THE SETTING HOW THEY SAT IN THE EAR TO BE COMFORTABLE OR, OF COURSE, WHEN THEY ARE TALKING TO COUNSEL, SOME OF THEM SPEAK SPANISH, THEY OFTEN NEED TO PULL ONE EAR AWAY, AND NONE OF THAT CAN BE DONE. AND THERE IS ALSO THE LIMITED RANGE OF THE MOTION SOME DIFFICULTY IN THE ATTENTION OF COUNSEL WHEN COUNSEL IS AT THE PODIUM AND THE INDIVIDUAL IS BACK FROM THE PODIUM, AND WE CONTINUE TO SEE THAT AS A PROBLEM IN THIS CASE.

THE COURT: LET ME TELL YOU WHAT MY EXPERIENCE IS HERE INVARIABLY. THAT PARAGRAPH CAUSED ME TO THINK ABOUT IT.

MY EXPERIENCE IS MOST OF THE TIME DEFENDANTS WHOSE HEADSETS AREN'T FUNCTIONING INDICATE VERBALLY THAT THE HEADSET IS NOT FUNCTIONING. THEY DON'T ATTEMPT SELF-HELP. AND [91] INVARIABLY, THE INTERPRETER COMES OVER AND MAKES AN ADJUSTMENT AND THEN THE PERSON WILL NOD AFFIRMATIVELY WHEN THEY CAN HEAR.

ALSO VERY UNUSUAL IN MY EXPERIENCE THAT ANY NON-ENGLISH SPEAKING DEFENDANT WILL TAKE THE HEADSET OFF EVEN WHEN THEY SPEAK WITH COUNSEL. INSTEAD, THEY TEND TO HUDDLE, TURN AWAY

FROM THE BENCH, AND THEY'LL BE A QUIET CONVERSATION WITH THE INTERPRETER WHISPERING, COUNSEL WHISPERING, AND THE DEFENDANT WHISPERING.

AND SO, I HONESTLY DON'T SEE TOO MANY TIMES WHERE A PERSON IS TRYING TO TOUCH THE HEADSET THEMSELVES EVEN I THINK THEY DIDN'T GET THEM IN, THEY DIDN'T SET RIGHT IN YOUR EAR, BUT ALMOST —EVEN THAT, MY EXPERIENCE HAS BEEN THAT THE INTERPRETERS ADJUST THOSE.

MR. CAHN: JUDGE, I TELL YOU I WAS IN A TRIAL TWO, THREE WEEKS AGO WITH JUDGE BENITEZ WITH A CLIENT WHO SPOKE SPANISH. CO-COUNSEL SPOKE SPANISH. OF, COURSE, I DON'T AS YOU KNOW, AND THERE ARE TWO OBSERVATIONS. ONE, I REGULARLY SAW HIM ADJUST HIS HEADSET. AND, OF COURSE, WE ARE IN TRIAL SO THERE IS NO RATIO, AND I THINK THAT WAS JUST BEFORE THE SHACKLING POLICY, AND HE WOULD REGULARLY REACH UP AND MOVE IT IN HIS EARS. ALSO HE WOULD ALSO TALK TO SANDRA LOPEZ, CO-COUNSEL WHO IS A SPANISH SPEAKER. HE WOULD SIMPLY REMOVE ONE EAR WHILE HE SPOKE TO HER. WITH ME THAT DIDN'T WORK BECAUSE SPEAKING SPANISH. THAT WAS HIS HABIT IN SPEAKING WITH HER AND SHE WOULD USUALLY RELAY THE CONVERSATION.

[92]

THE COURT: WHAT PERCENTAGE OF YOUR LAWYERS SPEAK SPANISH?

MR. CAHN: I WOULD SAY IT'S ROUGHLY 50 PERCENT BUT IT MIGHT BE LESS. MAYBE 40 PERCENT, AND WE HAVE GOT A BUNCH WHO ARE LEARNING SPANISH. WE ARE ACTUALLY SHARING THE COST OF THAT TRAINING IN AN EFFORT TO USE THE EXPENSE OF INTERPRETERS. I AM NOT ONE WHO IS TRYING TO LEARN SPANISH. I AM TOO OLD AT THIS POINT.

THE LAST IS A POINT THAT IS IN SOME WAYS A—WELL, THERE IS SOME CONCLUSORY ALLEGATIONS, AND LET ME ACTUALLY ADDRESS THOSE. THERE IS ESSENTIALLY THEIR ARGUMENT TO SAY THAT THE SHACKLING IS NECESSARY TO MAINTAIN SAFETY AND SECURITY OF INDIVIDUALS WHO PARTICIPATE IN FEDERAL COURT PROCEEDINGS, AND WE DISAGREE WITH THAT, OBVIOUSLY. WE WOULDN'T BE HERE. WE THOUGHT THIS WAS AN ABSOLUTE NECESSITY. SO I DON'T REALLY KNOW THAT THAT'S A FACTUAL ALLEGATION THAT NEEDS TO BE DISPUTED, BUT I WANT TO MAKE CLEAR SO WE DON'T AGREE WITH THAT.

THE COURT: MY FOCUS WOULD BE ON THE FACTUAL ALLEGATIONS, ALTHOUGH I HAVE TO MENTION TO YOU AS I DID TO MS. CHARLICK AND MS. MILLER TUESDAY AT SOME POINT, THE *HOWARD* CASE IS RIFE

WITH CONCLUSIONS. I DIDN'T SEE ANY FACTS IN THERE. I SAW THE CHIEF MAGISTRATE JUDGE STATING A CONCLUSION AND THAT WAS CREDITED IN *HOWARD*. I DIDN'T SEE ANY FACTS. I MEAN, UNLIKE OUR CASE WHERE THERE IS A FACTUAL RECORD, THERE [93] IS A REMARKABLE DEGREE OF AGREEMENT ABOUT WHO SAYS WHAT, AND WHAT THE REASONS WERE FOR THE ADOPTION OF A POLICY HERE. I COULDN'T GLEAN ANY OF THAT FROM *HOWARD*. IT WAS CONCLUSORY AND THE NINTH CIRCUIT RELIED ON IT.

MR. CAHN: I HAVE NOT HAD A CHANCE TO REVIEW THE DOCKET SHEET IN *HOWARD*. I HAVE TALKED TO THE LAWYERS WHO LITIGATED THAT, AND IT'S NOT CLEAR TO ME WHERE THE FACTUAL BASIS FOR SOME OF THE CONCLUSIONS COME BECAUSE THERE ARE CLEARLY FACT-BASED CONCLUSIONS. YOU HAVE GOT THE STATEMENTS ABOUT THE SECOND FLOOR COURTROOM IN THE ROYBAL COURTHOUSE—ROYBAL IS SPELLED R-O-Y-B-A-L. I THINK THAT'S EDWARD ROYBAL—AND THINGS LIKE THAT, BUT WHERE THOSE CONCLUSIONS CAME FROM WAS THERE AN AGREEMENT ON THOSE FACTS, WERE THEY SIMPLY ASSERTED, I DON'T KNOW. I HAVE TO SAY WITH ALL DUE RESPECT TO JUDGE SCHROEDER WHO IS A FINE JURIST, I DIDN'T FIND THE OPINION A MODEL OF CLARITY IN ADDRESSING THOSE POINTS. IT'S A VERY BRIEF OPINION, SO IT WASN'T HELPFUL IN THAT REGARD.

THE COURT: HERE IS WHAT I AM REFERRING TO. AT 1013, JUSTIFICATION CITED BY THE NINTH CIRCUIT, IS THIS.

FIRST THEY NOTE, "WE PRESUME WHERE THE COURT DEFERS WITHOUT FURTHER INQUIRY TO THE RECOMMENDATION OF MARSHAL SERVICE, A DEFENDANT BE RESTRAINED AT SENTENCING, THE COURT WILL NOT PERMIT THE PRESENCE OF RESTRAINTS TO AFFECT SENTENCING."

[94]

THEN THEY GO ON TO TALK ABOUT THE EVIDENCE SUPPORTING THAT. "SIMILARY HERE, THE MAGISTRATE JUDGES OF THIS COURT DISCUSS THE ISSUE AMONG THEMSELVES AND CONSULTED WITH THE MARSHAL SERVICE ABOUT THE BALANCE TO BE STRUCK IN THE PROCEEDINGS." WHEREAS MAGISTRATE JUDGE CHARLES ECK, E-C-K STATED, QUOTE "SECURITY-RELATED INFORMATION CONCERNING THE DEFENDANTS TYPICALLY IS INCOMPLETE." END QUOTE.

JUDGE ECK EXPLAINED THAT THE COURT MADE A QUOTE, "INSTITUTIONAL DECISION" END QUOTE, IN FAVOR OF THE SHACKLING POLICY AFTER SEVERAL FORMAL AND INFORMAL MEETINGS. WE DON'T KNOW WHAT INFORM THOSE DECISIONS. WE KNOW THEY MET, BUT THE NINTH CIRCUIT SEEMS SATISFIED WITH JUST THAT REPRESENTATION THAT WE MET WITH THE MARSHALS, WE REACHED A DECISION, THAT THIS IS NECES-

SARY, AND NOBODY NEEDS TO KNOW THE DETAILS.

MR. CAHN: WE DON'T KNOW IF TO THE EXTENT TO WHICH THAT WAS CHALLENGED BY THE APPELLANTS IN *HOWARD*. I FRANKLY CAN'T TELL YOU. I DID REVIEW THE APPELLATE BRIEF IN *BRANDAU* BUT NOT THE ONE IN *HOWARD* YET. I JUST DON'T KNOW. MY RECOLLECTION FROM TALKING TO CARLTON GUNNER WAS IT WASN'T AN ELEMENT OF THE CHALLENGE. CARLTON GUNNER WAS ONE OF THE LAWYERS THAT LITIGATED THE CASE. IT WASN'T AN ELEMENT OF THE CHALLENGE. WE KNOW COURTS LOOK AT THINGS AS THEY ARE BROUGHT TO THEM. THEY COUNT ON LITIGANTS TO BRING THE ISSUES THAT MATTER BEFORE THE COURT AND MAYBE THERE IS SUFFICIENT AGREEMENT ON THE RELEVANT FACTS THAT NOBODY FELT THE NEED TO [95] DISPUTE THEM. OBVIOUSLY, THAT'S NOT EXACTLY THE SITUATION WE ARE IN HERE.

THE LAST POINT THAT I WANT TO MAKE AND THIS IS—I THINK THERE IS AGREEMENT. IN FACT, I AM QUITE CERTAIN THERE IS AGREEMENT ON THE FACT THAT MATERIAL WITNESSES ARE NOT SHACKLED BEFORE THE MARSHAL—ARE NOT SHACKLED BEFORE THE MAGISTRATE COURT, AND YET IN OUR CONVERSATION WITH DEPUTY MARSHAL JOHNSON YESTERDAY—I AM SORRY. I AM SURE I AM LEAVING OUT PART OF YOUR TITLE. YOU ARE A SUPERVISOR, AND I APOLO-

GIZE FOR THAT, IF YOU ACCEPT MY APOLOGIES. HE IS ONE OF THE TWO SECOND IN CHARGE BELOW THE MARSHAL, AND I WANT TO MAKE THAT CLEAR.

THE SAME SECURITY CONCERNS THAT EXIST AS TO DEFENDANTS WHO ARE CHARGED IN THE CASE MAY WELL EXIST AS TO MATERIAL WITNESSES. YOU KNOW FROM TRYING CASES IN THIS DISTRICT QUITE OFTEN MATERIAL WITNESSES ARE INDIVIDUALS WHO WOULD BE DEFENDANTS IN 1326 CASES WHO HAVE PRIOR CRIMINAL CONVICTIONS. AGAIN, ABOUT MAYBE NOT A GREAT DEAL IS KNOWN, MAYBE A GREAT DEAL IS KNOWN.

THE COURT: THAT WAS WHAT I WAS THINKING. DON'T THEY GET FERRETED OUT? THEY DON'T END UP AS PEOPLE WITH GENERIC MATERIAL WITNESSES. THE BORDER PATROL RUNS A RECORD CHECK ON THOSE PEOPLE. WHEN THEY FIND A GUY WHO IS BEING TRANSPORTED WHO HAS A HORRIBLE RECORD OR, FOR EXAMPLE, HAS BEEN CONVICTED OF 1326, THEY PLUCK THAT GUY AND CHARGE HIM [96] SEPARATELY. SO VIOLENT PEOPLE—YOU WOULDN'T EXPECT VERY MANY VIOLENT PEOPLE, OR FOR THAT MATTER, REPEAT IMMIGRATION FELONS TO BE IN THE MIX OF MATERIAL WITNESSES THAT APPEAR IN COURT.

MR. CAHN: I WOULD EXPECT INDIVIDUALS WITH MULTIPLE 1326S TO BE LIKELY MATERIAL WITNESSES. BUT WE HAVE SEEN

THAT, AND OF COURSE, WE HAVE SEEN INDIVIDUALS WITH VIOLENT HISTORIES AS MATERIAL WITNESSES. I CROSS-EXAMINED THEM IN ALIEN SMUGGLING CASES THAT I HAVE TRIED IN THIS DISTRICT.

THE COURT: FROM THE MARSHAL'S PERSPECTIVE, WHY ISN'T THAT AN ARGUMENT IN FAVOR OF SHACKLING THE MATERIAL WITNESSES, TOO?

MR. CAHN: IT WOULD BE, BUT THE POINT THAT I WOULD MAKE ABOUT IT—AND I THINK THE MARSHALS DID WANT TO SHACKLE THE MATERIAL WITNESSES, AND THE DIRECTION THEY GOT FROM THE MAGISTRATE JUDGES OF THE COURT WAS THAT THEY SHOULD NOT SHACKLE THE MATERIAL WITNESSES. THEIR UNDERSTANDING OF THE REASON IS SIMPLY THAT THESE ARE WITNESSES RATHER THAN DEFENDANTS. THEREIN LIES THE PROBLEM.

YOU KNOW FROM THE LENGTHY DISCUSSIONS WE HAD ABOUT *BELL VERSUS WOLFISH* AND THAT OTHER CASE THAT SHALL NOT BE NAMED THAT THE ONE HARD AND FAST RESTRICTION OF TIME, THE DISCRETION OF PENAL INSTITUTIONS WHO ARE HOUSING PRE-TRIAL DETAINEES WAS THAT THEY MIGHT NOT PUNISH. THE SPECIFIC LIMITATION INVOKED THERE WAS *KENNEDY VERSUS MENDOZA* AND THE [97] EXAMINATION WAS WHETHER THE RESPONSE WAS SO EXAGGERATED AS TO GIVE RISE TO AN INFERENCE OF PUNISHMENT.

BUT THE PROBLEM WE HAVE HERE IS WHEN YOU EXCLUDE A GROUP OF PEOPLE SIMILARLY SITUATED IN TERMS OF SECURITY CONCERNS FROM THIS POLICY AND EXCLUDE THEM ONLY BECAUSE THEY ARE NOT DEFENDANTS, YOU RAISE THE SPECTER AT LEAST THAT INDIVIDUALS IN FACT ARE BEING PUNISHED BECAUSE THEY HAVE BEEN CHARGED WITH A CRIME WHICH IS COMPLETELY IMPROPER UNDER *BELL*. AND SO WE THINK THAT THAT IS AN AREA THAT SHOWS THE LACK OF RATIONALITY OF THE POLICY AS ADOPTED.

THE COURT: HASN'T THE NINTH CIRCUIT DISTINGUISHED BETWEEN IN CUSTODY MATERIAL WITNESSES AND DEFENDANTS, AND IN ESSENCE, SUGGESTED THAT THEY SHOULD BE TREATED DIFFERENTLY? JUDGE KOZINSKI'S OPINION SAYING THE ORDER OF THE DAY OUGHT TO BE TO DO DEPOSITIONS TO LET THESE PEOPLE GO AS SOON AS POSSIBLE. I MEAN, THAT WAS A HUGE SEE CHANGER BECAUSE WHEN I WAS DOING THESE CASES, TRYING THEM, THOSE MOTIONS WERE NEVER GRANTED. THE MATERIAL WITNESSES WERE ALWAYS HELD FOR THE DURATION OF THE CASE, AND THEN HERE CAME THIS WATERSHED CASE WHERE JUDGE KOZINSKI SAID, HOLD ON A SECOND. THERE IS A DISTINCTION BETWEEN WITNESSES, EVEN THOUGH IT'S HELD IN CUSTODY, AND PEOPLE CHARGED WITH CRIMES. AND WE HAVE A DIFFERENT STANDARD THAT WE APPLY TO WITNESSES. THAT STANDARD FAVORS RE-

LEASE, AND IF THE TRIAL IS GOING TO DRAG ON OR EVEN IF IT'S NOT GOING TO DRAG ON, IT FAVORS DEPOSITIONS RATHER [98] THAN HOLDING THEM AND THAT'S THE PRACTICE THAT SHOULD BE FOLLOWED.

MR. CAHN: BUT THAT PRACTICE STEMS FROM THE PURPOSE OF THE DETENTION WHICH IS THE PURPOSE YOU GOT THEM DETAINED ONLY TO BE WITNESSES. SO IF YOU CAN RESERVE THEIR TESTIMONY FOR USE LATER, THEN THERE IS NO REASON TO DETAIN THEM.

THE COURT: STILL, IT'S A DISTINCTION, THOUGH, BECAUSE THEY ARE NOT SUBJECT TO 312 BAIL FACTORS OR ANY OF THAT. THE BAILS ARE AUTOMATICALLY SET IN THOSE CASES. IT'S $100 PERSONAL SURETY BOND AND MOST CASES WITH A PROMISE TO COME BACK. IN ESSENCE, IT'S A COMPLETELY DIFFERENT WAY OF LOOKING AT SOMEBODY EVEN ACKNOWLEDGING THAT THEY ARE INITIALLY IN CUSTODY.

MR. CAHN: TWO POINTS: ONE IS, OF COURSE, THE BAIL REFORM ACT ALSO FAVORS RELEASE THE SAME WAY. BUT THE SECOND POINT IS THAT IT'S THE RELATIONSHIP OF THE PURPOSE OF THE WHOLE TO THE ACTION TAKEN THE DESIRE TO RELEASE QUICKLY. THAT'S WHY THE DISTINCTION MADE IS RATIONAL AND WHY IT'S APPROPRIATE. BUT HERE YOU HAVE GOT AN INDIVIDUAL WHO IS HELD, MAYBE WON'T BE FOR LONG, BUT THEY ARE HELD.

THE COURT: DOES THE NATIONAL POLICY SPEAK TO THE MATERIAL WITNESS SITUATION?

MR. CAHN: I DIDN'T READ ANYTHING THAT SEPARATED OUT MATERIAL WITNESSES. I THINK THE POLICY IS NOW PART OF THE RECORD, BUT THERE IS—THERE DIDN'T APPEAR TO BE ANYTHING [99] THAT'S SEPARATE.

MR. COLE: THE MARSHAL WOULD CONSIDER THEM FOR RESTRAINTS POLICY THE SAME AS A DEFENDANT. THEY ARE IN THE MARSHAL'S CUSTODY. SO AGAIN, WE AGREE WITH MR. CAHN THAT THE MARSHAL IF THEY WERE LEFT THEIR OWN DISCRETION WOULD BE BRINGING THEM IN. THE COURT, HOWEVER, REQUESTED THEY NOT DO THAT.

THE COURT: WHICH COURT? THAT'S NOT IN JUDGE MOSKOWITZ'S LETTER.

MR. COLE: WE INDICATED IN THE DECLARATION THAT THE MAGISTRATE JUDGE GAVE THAT INSTRUCTION TO THE MARSHALS. BUT THE POLICY HAS TO DO WITH IN MARSHAL'S CUSTODY, NOT JUST BECAUSE YOU ARE A DEFENDANT OR A MATERIAL WITNESS.

THE COURT: RIGHT.

MR. CAHN: NOBODY IS GOING TO BE SHACKLED IF THEY ARE NOT IN CUSTODY, I PRESUME.

BUT IN CUSTODY MATERIAL WITNESSES ARE NOT SHACKLED AND IN CUSTODY DEFENDANTS ARE, EVEN THOUGH THEY MAY

PRESENT THE SAME SECURITY CONCERNS. AND THAT'S WHAT I SAY BRINGS UP THE PROBLEM POINTED OUT IN *BELL* AND IN *KENNEDY VERSUS MENDOZA*.

I THINK THAT'S THE LAST FACTUAL ISSUE THAT WE FEEL THE NEED TO HIGHLIGHT.

THE COURT: LOOK, THERE IS AGREEMENT ON THAT, TOO. IT'S NOT BEEN ISSUED BECAUSE SEEMS ME THAT THERE IS AGREEMENT. MR. COLE AGREES THAT MATERIAL WITNESSES ARE NOT SHACKLED. I [100] AM INFORMED THAT THAT'S DONE AT THE DIRECTION NOT OF JUDGE MOSKOWITZ BUT OF THE PRESIDING MAGISTRATE JUDGE.

DO YOU HAVE AN IDEA HOW MANY APPEAR AT ONCE? WHEN I WAS A MAGISTRATE, I USED TO SEE TWO OR THREE AT ONCE, NOT LARGE GROUPS, BUT TWO OR THREE AT A TIME.

MR. CAHN: JUDGE, I WILL CONFESS THAT I AM NOT IN MAGISTRATE COURT ANYWHERE NEAR AS MUCH AS—

MS. CHARLICK: MS. MILLER ACTUALLY—

THE COURT: MS. MILLER, WHAT'S YOUR EXPERIENCE THERE? HOW MANY MATERIAL WITNESSES ON A GIVEN DAY?

MS. MILLER: IT JUST REALLY VARIES. ON A VERY SMALL DAY IT'LL BE ONE, AND ON A BIG DAY IT CAN BE TEN.

THE COURT: YOU HAVE SEEN THAT MANY?

MS. MILLER: YOU CAN'T REALLY—VARYING ON—

THE COURT: YOU HAVE SEEN AS MANY AS TEN?

MS. MILLER: I DON'T WANT TO BE—YOU KNOW, I BELIEVE I HAVE.

THE COURT: I AM NOT TRYING TO NAIL YOU DOWN, JUST PICK YOUR BRAIN A LITTLE BIT.

MS. CHARLICK: MS. TRIMBLE SAW 12 OCTOBER 21, THE FIRST DAY—

THE COURT: MY EXPERIENCE MAY BE DATED, ISN'T THERE A CASE THAT SAYS THERE IS A GREATER NEED TO RETAIN ALL OF THEM NOW?

MR. CAHN: I THINK, YES. I THINK THERE HAVE BEEN [101] ENOUGH OPINIONS FROM JUDGE KOZINSKI THAT THERE IS PROBABLY A TENDENCY TO HOLD MORE OF THEM AT LEAST UNTIL THE MATTER IS ON ITS WAY TO RESOLUTION.

THE COURT: SO I'LL TAKE ALL OF THAT INTO CONSIDERATION, TOO, THAT NUMBERS CAN VARY, BUT WHAT DOESN'T VARY IS THAT THE MATERIAL WITNESSES ARE NOT SHACKLED.

MAY I BE SEATED, YOUR HONOR?

THE COURT: SURE.

LOOK, THE LAST HOUR AND A HALF OR SO WE HAVE BEEN TALKING ABOUT THE DIS-

COVERY ISSUES, CONVINCES ME ALL THE MORE THAT THE MOTION—THAT THE DENIAL OF THE MOTION FOR DISCOVERY WAS APPROPRIATE. I DON'T THINK WE NEED IT HERE. YOU AND I HAVE A RESPECTFUL DISAGREEMENT ABOUT STATISTICAL EVIDENCE HERE.

FRANKLY, IF WE BROUGHT IN STATISTICIAN, HE WOULD SAY I AM NOT GOING TO HELP YOU MUCH HERE. I THINK THAT'S WHAT A STATISTICIAN WOULD SAY. HE IS GOING TO SAY THERE ARE SO MANY VARIABLES, AND I THOUGHT ABOUT THIS MORE OVER OUR BREAK. THE VARIABLES EVEN PERTAIN TO THE PRIOR RECORD.

AS YOU MAY SEE, A CRIME DENOMINATED AS A NON-VIOLENT CRIME AND THEN YOU READ THE SUMMARY—AND THIS OFTEN HAPPENS WITH ME, AND THE SUMMARY SUGGESTS IT'S VERY VIOLENT. THE OPPOSITE ALSO HAPPENS. I SEE WIFE BEATING, DOMESTIC VIOLENCE, AND IT TURNS OUT IT'S SOME KIND OF ARGUMENT WITH MAYBE JUST A PUSH OR SOMETHING WHICH WOULDN'T SUGGEST TO ME THAT THE GUY IS [102] A VERY VIOLENT GUY THAT NEEDS TO BE SHACKLED.

BUT THAT KIND OF VARIANCE IN THE CRIMINAL HISTORY DATA WOULD RENDER USELESS, I THINK. I JUST DON'T SEE ANY NEED FOR DATA. BEYOND THAT, THE GREATER POINT IS I DON'T THINK THAT A POLICY NEEDS TO BE BASED ON EMPIRICAL EVIDENCE OF THAT TYPE.

IF I COULD BE ASSURED THAT IT WAS VALID AND RELIABLE STATISTICAL EVIDENCE, THEN I AGREE WITH YOU, MR. CAHN, WHY NOT CONSIDER IT IF THAT'S THE CASE. BUT I JUST HAVE—I JUST SEE SO MANY DAUNTING OBSTACLES TO REACHING A CONCLUSION THAT STATISTICAL DATE COULD BE VALIDATED AND COULD BE SAID TO BE RELIABLE. IN THE CONTEXT OF THAT ISSUE I DON'T THINK IT IS HELPFUL.

I SAY THAT AGAIN WITH RESPECT TO THE DISCOVERY ISSUE. I DON'T THINK WE NEED DISCOVERY. I APPRECIATE WHAT YOU SAY ABOUT THE RICHNESS OF A HEARING, BUT WE HAVE ESSENTIALLY AND INFORMALLY GOT THAT. WE HAVE HAD THE MARSHAL SITTING HERE ALL DAY, YOU HAVE THE CHIEF OF HIS SECURITY DIVISION SITTING HERE ANSWERING QUESTIONS WHICH YOU SEEM TO TAKE AT FACE VALUE. I DON'T THINK THE ANSWERS WOULD BE ANY DIFFERENT OR THE EXAMINATION ANY DIFFERENT IF HE WERE ON THE WITNESS STAND.

MR. CAHN: LET ME MAKE THAT CLEAR. I TAKE TESTIFYING THEY SAY AS TRUTHFUL, AT LEAST AS AN ACCURATE DEPICTION OF THEIR PERCEPTION. AND, YOU KNOW, WE DEAL WITH [103] EACH OTHER ALL THE TIME, AND THE MARSHALS KNOW EACH OTHER.

THE COURT: RIGHT, AND THEN LOOK HOW IT COMES, TOO. THE 600 POUND GORILLA IN THE ROOM IS ME, AND I AM SITTING HERE. I CAN'T IMAGINE THAT DEPUTY JOHNSON IS

GOING TO GET UP AND MAKE MISSTATEMENTS IN FRONT OF A DISTRICT JUDGE ON A MATTER OF IMPORTANCE. SUFFICE IT TO SAY I THINK THAT YOU HAVE A RELIABLE FACTUAL RECORD. I HAVE ASSURED YOU THAT I WILL TAKE INTO CONSIDERATION THE DIFFERENCES OF OPINION YOU HAVE, NOT ONLY WITH THE DECLARATION BUT WITH SOME OF THE OTHER REPRESENTATIONS.

I'LL TAKE INTO CONSIDERATION AS WELL THE DIVERSE EXPERIENCE OF YOUR LAWYERS. I DISCOUNT THAT A LITTLE BIT, BECAUSE I THINK IT'S LESS LIKELY THAT ONE OF THE DEFENDANTS IS GOING TO BE VIOLENT AGAINST A LAWYER REPRESENTING HIM OR HER. SO THAT SKEWS IT A LITTLE BUILT. MORE LIKELY THE OBJECT OF VIOLENCE IS GOING TO BE SOMEBODY ELSE IN THE COURT AND PROBABLY ONE OF THE MARSHALS, BUT I'LL STILL TAKE IT INTO CONSIDERATION.

AGAIN, TO MS. MILLER'S DISCONTENT, I REITERATE AND AFFIRM THE RULING THAT I MADE THAT NO DISCOVERY IS REALLY NECESSARY HERE OR WARRANTED. YOU WANT TALK ABOUT THE MERITS ANY MORE?

MR. CAHN: I THINK WE TALKED ABOUT ALMOST ALL OF THE MERITS, AND PROBABLY THE ONE ISSUE I DIDN'T ADDRESS WAS THE FIRST ISSUE THE COURT BROUGHT OUT WHICH IS THE NECESSITY OF [104] INDIVIDUAL DETERMINATION.

AND LET ME JUST MAKE ONE POINT ABOUT THAT. AND I DON'T HAVE A CASE THAT IS GOING TO OFFER YOU A FIRM BASIS FOR REACHING A CONCLUSION. BUT YOU RECALL AGAIN THE LENGTHY DISCUSSION OF PROCEDURAL DUE PROCESS AND, OF COURSE, THE LINCHPIN CASE IS *MATHEWS VERSUS ELDRIDGE*. THE COURT IS TO BALANCE TO INCREASED RELIABILITY CREATING BY PROVIDING ADDITIONAL PROCEDURES, THE WEIGHT OF THE INTEREST, THE BURDEN ON THE ADMINISTRATIVE OFFICER OR COURT TO PROVIDE THESE ADDITIONAL PROCEDURES, AND FINALLY THE PUBLIC INTEREST WHICH IS A FACTOR LYING OUT THERE.

AND THE ONE POINT I WOULD MAKE ABOUT *MATHEWS* IS THAT AS *MATHEWS* IS ASSUMING THAT IN EACH AND EVERY CASE WHEN IT TALKS ABOUT BALANCING THOSE FACTORS, THE INDIVIDUALS ARE GOING TO GET A HEARING; THAT THERE IS SORT OF SOME PROCESS AVAILABLE FOR THEM TO PROTEST THE ACTION THAT THEY DISAGREE WITH. AND THE DENIAL TO AN INDIVIDUAL WHO IS IN COURT OF THE OPPORTUNITY TO MAKE THAT INDIVIDUAL SHOWING, WHATEVER PROCESS IS, WHETHER IT IS BY EVIDENTIARY HEARING, BY A PROFFER OR DISPUTE, WHETHER IT ARGUMENT, THAT THE DENIAL OF THE OPPORTUNITY TO MAKE THAT INDIVIDUAL SHOWING AND GET A DECISION FROM THE JUDGE WHO IS HEARING THEIR CASE VIA MAGISTRATE JUDGE OR DISTRICT COURT JUDGE SEEMS TO ME ENTIRELY IN-

CONSISTENT WITH *MATHEWS* AND OUR NOTIONS OF ANGLO AMERICAN JURISPRUDENCE.

THE COURT: THEY HAVE IT UNDER THE STATING POLICY. [105] IT'S CLEAR THAT THEY HAVE THE OPPORTUNITY FOR THAT BECAUSE THE POLICY ADMITS OF EXCEPTIONS.

NOW, IT'S HAPPENING IN PRACTICE, AS YOU SAY, IS A DIFFERENT THING. IF A JUDGE WILL NOT ENTERTAIN ANY EXCEPTIONS AT ALL, THEN IN PRACTICE MAYBE THEY ARE NOT GETTING THAT OPPORTUNITY FOR AN INDIVIDUALIZED ASSESSMENT. AND I HAVE GIVEN I HAVE TO TELL YOU PURSUANT TO THAT EXCEPTION, I HAVE INDIVIDUALIZED THE JUDGMENTS IN THE CASE, NOT OFTEN AND NOT ROUTINELY EXCEPT, AS I SAID, MOTION HEARINGS. I THINK THE POLICY IN THE DISTRICT COURT CONTEMPLATING THAT IT BE ONE DEFENDANT AT A TIME RATHER THAN MULTIPLE DEFENDANTS ALREADY SAYS—DIRECTS THE MARSHALS TO TAKE THE HANDCUFFS OFF DURING CHANGE OF PLEAS AND SENTENCING.

SO THAT'S NOT AT ISSUE. THAT REALLY IS THE FOCUS OF THIS, THE THRUST OF THIS IS THE POLICY BEFORE THE MAGISTRATE JUDGES; RIGHT?

MR. CAHN: WELL, YOU KNOW, WE CONTINUE TO FEEL THAT EVEN LEG SHACKLES HERE IN DISTRICT COURT ARE UNNECES-

SARY AND SHOULDN'T BE, BUT THE BIGGEST PROBLEM IS IN MAGISTRATE COURT.

WITH REGARD TO THE ISSUE I HAVE JUST RAISED, THE LACK OF INDIVIDUALIZATION, THAT SEEMS TO BE I WOULDN'T SAY CONFINED TO THE MAGISTRATE COURT BUT IS MUCH MORE OF A SEVERE PROBLEM THERE TO THE POINT WHERE WE HAVE HAD MAGISTRATES ORDER OUR LAWYERS NOT TO MAKE PROFFERS TO THE REASON TO EXCEPT THEIR CLIENTS FROM THE POLICY OF SHACKLING. THAT TO ME IS JUST AN [106] ANATHEMA TO TELL A LAWYER THAT THEY CAN'T EVEN PROFFER WHY THEIR CLIENT SHOULD BE RELEASED.

THE COURT: WELL, LISTEN, I AGREE WITH YOU IF THERE ARE NOVEL REASONS, IF THERE ARE PARTICULARIZED REASONS. LET ME TELL YOU WHAT I HAVE RUN INTO. I HAVE RUN INTO IT EVERYBODY IN LOCKSTEP FROM FEDERAL DEFENDERS WANTING TO MAKE A SPEECH, AND IT'S THE SAME SPEECH. I HAVE ENTERTAINED IT.

FRANKLY, THE REASON I HAVE ENTERTAINED IT IS I THINK EVERY RECORD IS DIFFERENT AND I NEED TO STATE SOMETHING ON THE RECORD. BUT IT IS TEDIOUS, AND IT IS NOT HELPFUL AND IT SLOWS DOWN THE PACE OF JUSTICE IN THESE COURTS, BECAUSE YOU SPEND THE FIRST THREE MINUTES HEARING ARGUMENTS THAT YOU HAVE ALREADY HEARD AND THEN SAYING, OKAY, LOOK, IT APPEARS TO ME—USE MS.

MORALES AS AN EXAMPLE. SHE IS IN NO DISTRESS, SHE HAS GOT A NICE COUNTENANCE ON HER FACE, SHE IS SMILING, SHE DOESN'T APPEAR TO HAVE MEDICAL PROBLEMS, SO HERE IS YOUR INDIVIDUALIZED ASSESSMENT.

I THINK THAT THE SHACKLES ARE—AGAIN, USING HER AS AN EXAMPLE, FOR HER BENEFIT. THAT'S TO DO THAT TIMES 25 OR 30, I CAN UNDERSTAND WHY SOME OF THE JUDGES JUST SAY, I HAVE ENOUGH. DON'T RAISE IT ANYMORE. BUT IT'S WRONG IF THERE ARE MERITORIOUS CASES LIKE THE ONE THAT YOU GAVE ME EARLIER WITH THE GUY WITH THE WHITE CANE, BLIND?

MR. CAHN: YES.

THE COURT: MR. JOHNSON IS SHAKING HIS HEAD NO, BUT [107] I HAVE ALREADY ACCEPTED HIS COUNTER-PROFFER THAT THAT HAPPENS.

MR. CAHN: HE HAD ONE HAND UNSHACKLED.

THE COURT: HERE IS WHAT I WOULD SAY, MR. CAHN. I WOULD SAY WHATEVER THE OUTCOME OF THE HEARING TODAY THAT THERE SHOULD BE A CLARIFICATION BY THE CHIEF JUDGE—AND WILL RECOMMEND THIS TO JUDGE MOSKOWITZ—THAT THE MAGISTRATE JUDGES ARE FREE TO USE INDEPENDENT JUDGMENT IN PARTICULAR CASES TO SAY "TAKE THE SHACKLES OFF THIS PERSON."

LOOK, IF SOMETHING IS IN MEDICAL DISTRESS—I READ ONE DECLARATION WHERE SOMEBODY SAID THIS CAUSED BRUISING OR SCRAPES, OBVIOUSLY, AN ADJUSTMENT TO LOOSEN THEM, THAT'S OBVIOUSLY WARRANTED IN EVERY CASE, AND THE MAGISTRATE JUDGES SHOULD FEEL FREE TO DO THAT. I CAN'T—REALLY, I CAN'T IMAGINE THAT ANY JUDICIAL OFFICER OF THIS COURT, A MAGISTRATE JUDGE WOULD THINK, NO, EVEN THOUGH THESE ARE TIGHT, I HAVE BEEN TOLD MY JUDGE MOSKOWITZ LET'S KEEP THE SHACKLES ON. YOU THINK THAT THAT HAPPENS?

MR. CAHN: WE HAVE TRIED TO PROVIDE DECLARATIONS ABOUT WHAT WE HAVE SEEN AND WHAT WE HAVE HEARD, AND WE HAVE NOT FELT EVEN TO ONE WHO—EVEN IF ONE CAN IMAGINE, IF WE WERE TO LOSE THIS AND ALL THE RULINGS WERE GOING TO GO AGAINST US AND THAT POLICY WERE TO PROCEED IN FORCE, WE WOULD EXPECT THAT EVEN PEOPLE WHO AGREED ENTIRELY WITH THAT RULING WOULD EXPECT A CERTAIN AMOUNT OF DISCRETION TO BE EXERCISED, AND WE HAVE NOT FELT THAT THAT DEGREE OF DISCRETION HAS BEEN PROPERLY [108] EXERCISED.

THE COURT: I'LL TAKE THAT INTO CONSIDERATION, TOO.

THANK YOU, MR. CAHN.

MR. COLE.

MR. COLE: THANK YOU, YOUR HONOR.

I THINK I'LL START WITH THE LAST POINT FIRST THAT MR. CAHN MADE, AND THIS IS JUST MY OBSERVATION AND IT'S THAT PERHAPS YOUR HONOR REFERRED TO WHITE NOISE EARLIER. THAT TO YOU THERE IS SO MANY OTHER THINGS GOING ON IN THE COURTROOM THAT ARE MORE IMPORTANT THAT WHETHER OR NOT THERE IS LEG CHAINS ON SOMEONE WOULD BE WHITE NOISE I THINK YOU SAID.

THE COURT: I DON'T SEE THEM AND SECOND, I HAVE TO TELL YOU—LET'S SEE. I STARTED IN '79, HERE I AM IN MY 34TH YEAR LABORING IN THIS VINEYARD, AND NOTHING THAT'S HAPPENING CURRENTLY IS DIFFERENT OR SOMETHING THAT ABOUT THE RESTRAINT OF DEFENDANTS IS DIFFERENT FROM MY EXPERIENCE OVER THAT PERIOD OF TIME. I ACKNOWLEDGE MR. CAHN'S POINTS. IT'S A LITTLE DIFFERENT HERE. I AM USED TO SEEING PEOPLE ANSWERING TO FELONIES, OR PLEADING GUILTY TO FELONIES OR FOR THAT MATTER BEING BROUGHT IN ON WARRANTS IN RESTRAINTS.

MR. COLE: RIGHT, AND THE REASON I BRING THAT UP IS JUST TO BORROW A PHRASE FOR CONTEXT, THE WHITE NOISE PHRASE, WHICH IS THAT A POLICY WAS JUST IMPLEMENTED OF COURSE OCTOBER 21. AND I PERSONALLY, MY PERSPECTIVE IS THERE WAS A LOT OF WHITE NOISE ABOUT THE POLICY, THAT MAGISTRATE JUDGES IN

[109] PARTICULAR WERE CONFRONTED WITH THE CHALLENGE IN EVERY SINGLE CASE, AND THEREFORE, THE CHALLENGE BECAME WHITE NOISE OR HAS A TENDENCY TO BECOME WHITE NOISE. IT'S LIKE LIVING NEAR A WATERFALL. AND IF INSTEAD THE CHALLENGE HAD BEEN RAISED WHEN THERE REALLY WERE EXTENUATING CIRCUMSTANCES AND ONLY THEN, I BELIEVE THEY WOULD HAVE SEEN A LOT MORE DISCRETION EXERCISED. AND I BELIEVE THEY WILL SEE MORE DISCRETION EXERCISED AS WE COME INTO THAT TYPE OF A SETTING. BUT WHEN THE CHALLENGE IS RAISED IN EVERY SINGLE CASE AND IT ALWAYS STARTS OUT WITH JUST SIMPLE DUE PROCESS CLAIMS, LACK OF DIGNITY, OF DECORUM, OF THE HEADSETS, THINGS THAT MAGISTRATE JUDGES HAVE SEEN TOO OFTEN TO KNOW—THEY KNOW THAT THE HEADSETS ARE NOT THAT BIG OF A PROBLEM, THEY CAN'T BE WORKED OUT IN THE ONE-OFF CASE, I BELIEVE THAT'S PART OF THE PROBLEM.

AND IF WE GOT TO A POINT WHERE JUDGES WERE CALLED UPON TO RULE UPON THE OUTLIERS—I MEAN, THE OUTLIERS ARE SELECTED, FOR EXAMPLE, FOR THIS CASE. WE HAD SOMEONE WHO IS VISUALLY IMPAIRED, I BELIEVE SOMEONE IN A WHEELCHAIR, THOSE ARE OUTLIERS. WE ALL KNOW THAT, BUT THEY WERE SELECTED FOR THIS CASE. AND HOWEVER, OUTLIERS ARE DEALT WITH. THE ONE WHO IS VISUALLY IMPAIRED LATER CAME IN UNSHACKLED; THE WHEELCHAIR-

BOUND PERSON, I DON'T RECALL. I PUT IT IN MY PAPERS, BUT CHANGES WERE MADE, NOT ALWAYS.

JUDGE HOUSTON DIDN'T DECIDE TO LESSEN THE SHACKLING IN HIS WRITTEN ORDER TO ONE DEFENDANT, BUT THE POINT IS THAT [110] THE OUTLIERS CAN BE DEALT WITH, AND OUR JUDICIAL OFFICERS ARE CLEARLY GOOD, ENTIRELY CAPABLE DEALING WITH THOSE WITH DISCRETION. AND I THINK IT WOULD BE EASIER TO DEAL WITH THOSE FOR ALL PARTIES IF THE WHITE NOISE DROPPED AWAY AND IF THERE WASN'T A CLAIM MADE IN EVERY CASE ON THE GROUNDS THAT REALLY IN MY POSITION THE LAW REQUIRES REMOVAL OF THE SHACKLES.

MOVING ON TO ANOTHER POINT. THERE IS THE DIGNITY AND THE DECORUM OF THE COURTROOM ARE VERY IMPORTANT TO ALL PARTIES. THE GOVERNMENT CERTAINLY AGREES WITH THAT. BUT I THINK THAT WE ARE ALSO—

THE COURT: I HAVE TO SAY I HAVE A LITTLE BIT OF TROUBLE FASHIONING THAT AS A DUE PROCESS RIGHT OF THE DEFENDANT, A LITTLE BIT OF A PROBLEM.

MR. COLE: THAT'S WHAT I WAS GETTING.

THE COURT: THE SUPREME COURT HAS SUGGESTED TO HAVE STANDING, YOU HAVE TO HAVE SOME FORM OF ACTUAL INJURY. THERE IS NOT A JUDGE I KNOW OF WHO IS NOT CONCERNED WITH DIGNITY AND DECO-

RUM IN THE COURT, BUT THEY ARE THE PRIMARY GUARDIANS OF THAT. THEY SET THE TONE FOR PATTERN OF COURTROOM CONDUCT, THE PRESIDER DOES. AND I COULD SEE A DEFENDANT SAYING I DON'T LIKE THE WAY THIS IS BEING CONDUCTED OR I THINK THIS—MR. CAHN MADE THE POINT ABOUT THE DIFFERENCE BETWEEN THE BIZARRE ATMOSPHERE IN THE STATE COURT AND THE MORE FORMAL STATE ATMOSPHERE IN FEDERAL COURT. I GET THAT, BUT I AM HAVING A TOUGH TIME SEEING THAT INDIVIDUAL DEFENDANT HAS— [111] CAN CLAIM THAT THAT'S AN ACTUAL INJURY FOR WHICH HE HAS STANDING TO CLAIM THIS PROCESS WAS DENIED.

MR. COLE: YOUR HONOR, THAT'S WHERE I WAS HEADED. THE COMMENT WAS—IS AN AGREEMENT BECAUSE MY POINT IS THAT WE, FOR SOME PERIOD OF TIME AND IN SAN DIEGO, HAD A CULTURE REGARDING RESTRAINTS THAT COULD ONLY BE CHARACTERIZED AS VERY LAX, AT LEAST COMPARED WITH OTHER PLACES, STATE AND FEDERAL, WHERE THEY HAVE BEEN USED. AND THEREFORE, BECAUSE NOW THERE IS A CHANGE FROM THE LAX CULTURE TO THE USE OF RESTRAINTS THAT HAVE BEEN USED SINCE BLACKSTONE—

THE COURT: A LITTLE SHOCK TO THE SYSTEM.

MR. COLE: IT'S A SHOCK TO THE SYSTEM, BUT THAT DOESN'T MEAN THAT IT IS A DEP-

RIVATION OF A CONSTITUTIONAL RIGHT OR THE DIGNITY AND DECORUM OF THE COURTROOM IS GONE. THAT'S THE POINT I WANT TO MAKE.

THE COURT: MR. CAHN HAS ARGUED THAT I SHOULD HAVE NOT EVALUATE THIS AS A SUBSTANTIVE DUE PROCESS CONCERN, AND I AM NOT SURE THAT'S CORRECT. IS THAT YOUR POSITION?

MR. COLE: YES. I THINK UNDER *BELL V. WOLFISH* IT WAS MADE PRETTY CLEAR THAT YOU HAVE TO CONNECT TO SOME OTHER CONSTITUTIONAL RIGHT, THAT YOU CAN'T JUST SAY—

THE COURT: I JUST WENT BACK AND REREAD *GRAHAM VERSUS CONNER* AND THEN A NINTH CIRCUIT CASE THAT INTERPRETS *GRAHAM*—I TAKE THAT BACK. IT'S ANOTHER SUPREME COURT CASE, *U.S. VERSUS LANIER*.

[112]

GRAHAM SAYS THIS: TODAY WE MADE EXPLICIT WHAT WAS IMPLICIT IN *GARNERS—TENNESSEE VERSUS GARNERS* ANALYSIS. IN WHOLE—AND THIS IS EMPHASIZED IN THE OPINION—ALL CLAIMS THAT LAW ENFORCEMENT OFFICERS HAD USED EXCESSIVE FORCE DEADLY OR NOT, IN THE COURSE OF AN ARREST AND STOP OR OTHER SEIZURE OF A FREE CITIZEN SHOULD BE ANALYZED UNDER FOURTH AMENDMENT IN ITS REASONABLE STANDARD RATHER UNDER A SUBSTANTIVE DUE PROCESS APPROACH BECAUSE THE

FOURTH AMENDMENT, WHICH *BELL VERSUS WOLFISH* TELLS US APPLIES HERE, PROVIDES AN EXPLICIT TEXTUAL SOURCE OF CONSTITUTIONAL PROTECTION AGAINST THIS SORT OF PHYSICALLY INTRUSIVE GOVERNMENTAL CONDUCT. THAT AMENDMENT, NOT THE MORE GENERALIZED NOTION OF SUBSTANTIVE PROCESS, MUST BE THE GUIDE FOR ANALYZING THESE CLAIMS.

AND THEN IN *LANIER* THEY SAY *GRAHAM* SIMPLY REQUIRES CONSTITUTIONAL CLAIM IS COVERED BY A SPECIFIC CONSTITUTIONAL PROVISION SUCH AS THE FOURTH OR EIGHTH AMENDMENT. THE CLAIM MUST BE ANALYZED UNDER THE STANDARD APPROPRIATE TO THE SPECIFIC PROVISION NOT UNDER THE RUBRIC OF SUBSTANTIVE DUE PROCESS.

MR. COLE: RIGHT, AND SO THAT'S WHY IF THERE WAS A SIXTH STATEMENT ISSUE. FOR EXAMPLE, I NEED TO WRITE A NOTE TO MY LAWYER, OR I CAN'T HEAR WHAT'S GOING ON IN COURT. THAT'S A VERY SIMPLE STANDARD TO APPLY. IF THERE IS A SIXTH AMENDMENT ISSUE, A JUDGE KNOWS HOW TO DEAL WITH. THAT'S WHERE IT NEED TO BE LINKED TO. I AGREE, NOT JUST THIS SUBSTANTIVE DUE [113] PROCESS RIGHT UNLESS I SUPPOSE, IT'S PUNISHMENT BECAUSE THERE STILL IS A LINE OF CASES UNDER *BELL* ABOUT CONDITIONS OF CONFINEMENT. I WOULD CONTEND THERE IS NO ISSUE IN THIS CASE ABOUT THE MARSHAL ENACTING AS THE PUNISHMENT.

THE COURT: THAT IS YOUR POSITION THAT THIS IS REALLY PUNISHMENT, MR. CAHN, OR IS YOUR POSITION JUST, LOOK, THIS IS UNREASONABLE AND THE JUSTIFICATIONS PROFFERED DON'T SUPPORT IT UNDER THE FOURTH AMENDMENT. THIS IS MORE THAN IS NECESSARY.

MR. CAHN: WE ARE MAKING A PUNISHMENT CLAIM, AND THAT WAS THE POINT OF MY MAKING A DISTINCTION BETWEEN THE WAY THE MATERIAL WITNESSES ARE TREATED AND THE WAY THAT OUR CLIENTS ARE TREATED. YOU CAN'T ARTIFICIALLY CUT OUT THIS ONE GROUP AS TO WHOM THE SECURITY CONCERNS APPLY AND STILL CLAIM THAT THE RATIONALE OR THAT THERE IS AN APPROPRIATE RATIONALE FOR SECURITY REASONS, AND THAT LEADS LOGICALLY TO AN INFERENCE THAT THERE IS A PUNITIVE EFFECT.

THE COURT: YOU HEARD WHAT THE EXPLANATION WAS FOR THAT. IF IT WERE UP TO THE MARSHALS, EVERYONE WOULD BE SHACKLED. THE ONLY REASON THEY DON'T SHACKLE MATERIAL WITNESSES IS THAT THE COURT HAS INSTRUCTED AND THE PRESIDING MAGISTRATE JUDGE INSTRUCTED NOT TO DO THAT. SO HOW DO I IMPUNE A PUNISHMENT MOTIVE TO THE MARSHALS FOR THAT DIFFERENCE? THEY'D LIKE EVERYBODY TO BE SHACKLED.

MR. CAHN: WE ARE ATTACKING A POLICY AND THE [114] IMPLEMENTATION OF THE POLICY AS WELL. SO I THINK THAT IT'S—

THE COURT: STAY WITH ME ON THIS POINT, THEN. NONE OF THIS IS PERSONAL, BUT YOUR SUGGESTION IS THAT JUDGE STORMES IS INTENT ON PUNISHING DEFENDANTS BUT NOT MATERIAL WITNESSES AND THAT EXPLAINS THE DIFFERENT DIRECTIVE THAT WHAT GIVEN?

MR. CAHN: I DON'T KNOW THAT JUDGE STORMES, WITH ALL DUE RESPECT, I DON'T KNOW THAT SHE THOUGHT THIS THROUGH, BUT YOU CAN'T SAY THIS GROUP WILL BE SUBJECTED. THE SECURITY CONCERNS EXIST AS TO BOTH THOSE GROUPS, BUT WE ARE GOING TO BE WILLING TO SUBJECT ONLY THIS GROUP TO THESE ADDITIONAL RESTRAINTS WHICH ARE A BURDEN EVERYONE AGREES, BECAUSE THEY HAVE BEEN CHARGED WITH A CRIME.

THE COURT: WHY WOULDN'T I JUST CONSIDER THAT, THOUGH, UNDER THE GENERAL RUBRIC OF REASONABLENESS, PARTICULARLY IS IT AFFECTS DEFENDANTS AS OPPOSED TO MATERIAL WITNESSES? YOU COULD SAY, JUDGE, LOOK THIS ISN'T NECESSARY AND REASONABLE POLICY BECAUSE YOU NOW HAVE INFORMATION FROM MS. TRIMBLE THAT THERE COULD BE 12, 10 WITNESSES. THAT'S A BIG NUMBER. THEY OUTNUMBER THE NUMBER OF MARSHALS IN THE COURTROOM AT ANY TIME, AND YET

THEY ARE NOT SHACKLED. OUT OF THE OTHER SIDE OF THEIR MOUTHS THE MARSHALS AND THE U.S. ATTORNEY'S OFFICE ARE TELLING YOU THAT IT'S REASONABLE TO MAINTAIN THIS POLICY WITH RESPECT TO DEFENDANTS. THAT'S THE WAY I THINK IT OUGHT TO BE ANALYZED. I DON'T DRAW ANY INFERENCE THAT THERE IS A PUNITIVE MOTIVE ON ANYONE'S PART, [115] WHETHER JUDGE STORMES OR THE MARSHALS. I JUST DON'T SEE IT. IF THAT'S THE CASE, THEN THE DUE PROCESS CLAIMS—SUBSTANTIVE DUE PROCESS CLAIM FALLS AWAY.

MR. CAHN: NO, I WOULD DISAGREE WITH THAT FOR TWO REASONS.

FIRST OF ALL, WE DO MAINTAIN THAT CLAIM, BUT WE ALSO MAINTAIN THE CLAIM THAT THERE IS NOT A RATIONAL RELATIONSHIP BETWEEN, AND IT'S NOT AN APPROPRIATE RESPONSE. IT'S AN EXCESSIVE RESPONSE. AND THAT IS—I UNDERSTAND THE CASES THE COURT JUST REFERRED TO, AND THOSE ARE VERY SPECIFIC WITHIN WHAT THEY SAY IS WHEN THE RIGHT IS TIED TO A VERY SPECIFIC CONSTITUTIONAL RIGHT, YOU SHOULD LOOK TO THAT RIGHT FIRST, BECAUSE THE STANDARDS ARE MORE CONCRETE UNLESS AMORPHOUS IN THOSE THAT WE HAVE ARTICULATED UNDER THE SUBSTANTIVE DUE PROCESS CLAUSE.

THE COURT: SO IT IS HERE, THOUGH; RIGHT? YOU ARE SAYING THAT THESE RESTRAINTS ARE EXCESSIVE. *BELL VERSUS*

WOLFISH SAYS OKAY, PRETRIAL DETAINEES CONDITIONS OF CONFINEMENT, WAYS THAT THEY ARE TREATED. THIS IS ALL BLACK AND WHITE LETTER LAW AT THIS POINT, AT LEAST—I AM NOT SAYING THE OUTCOME HERE OR THE INDIVIDUAL FACTS, BUT I AM SAYING THE SOLUTION OR THE STANDARD FOR EVALUATING HAS ALREADY BEEN SPECIFIED. VERY, VERY CLEAR IT APPLIES IN THIS CIRCUMSTANCE.

MR. CAHN: I AGREE AND I DISAGREE. *BELL VERSUS* [116] *WOLFISH* PROVIDES THE FRAMEWORK FOR THE ANALYSIS. BUT AS I DESCRIBED AT THE BEGINNING OF OUR DISCUSSION HERE EARLIER TODAY, I THINK THE APPLICATION AND THE STANDARD VARIES AS OTHER RIGHTS BECOME IMPLICATED. AND SO WE TALK ABOUT ONE EXTREME SHACKLING IN FRONT OF THE JURY BECAUSE OF THE DIRECT IMPINGEMENT UPON A RIGHT TO FAIR TRIAL AND IMPARTIAL JURY.

AT THE OPPOSITE EXTREME, THE INDIVIDUAL WHO LOSES SOME LIBERTY IN THE CONTEXT OF HIS CONFINEMENT IN THE FACILITY OF WHICH HE IS BEING HELD. AN INDIVIDUAL IN COURT STANDS SOMEWHERE IN BETWEEN THOSE TWO EXTREMES, IN COURT IN FRONT OF THE JUDGE FOR THE REASON THAT I ARTICULATED EARLIER.

THE COURT: I HAVE YOUR POSITION ON THAT.

GO AHEAD, MR. COLE, I AM SORRY. I JUST WANTED TO GET THAT CLARIFIED.

MR. COLE: NO PROBLEM, YOUR HONOR.

SO UNDER THE PRESENT TIME *BELL VERSUS WOLFISH* STANDARD, THE POINT WOULD BE THAT THIS ISN'T PUNISHMENT AND DISCRETION OUGHT TO BE GIVEN TO THE EXECUTIVE THAT MANAGES THE PRISON POPULATION, THE MARSHALS. THAT ISN'T TO SAY THAT DISCRETION HAS TO BE ALWAYS GIVEN IN THE COURTROOM AND THE POLICY OBVIOUSLY ALLOWS THE JUDGES TO CONTROL IT. SO THE JUDGES ALWAYS HAVE CONTROL IN THIS COURT UNDER THIS POLICY. AND THE MARSHALS, A GOOD INDICATION OF THAT IS IN FACT MATERIAL WITNESSES DON'T COME OUT IN SHACKLES. THAT'S A HUGE INDICATION OF THE CONTROL THE COURT HAS OVER THE MARSHAL'S [117] DISCRETION. THE QUESTION JUST BECOMES WHO, AT THE OUTSIDE, HAS A DISCRETION. AND WHO AT THE OUTSET, AND THAT OUGHT TO BE THE MARSHALS. ONCE THEY GET INTO THE COURTROOM IN SHACKLES, THEN IT BECOMES THE JUDGE'S DECISION.

I JUST WANT TO MAKE A COMMENT ABOUT VIOLENT HISTORY. IN ADDITION TO ALL THE POINTS YOUR HONOR HAS MADE IN DISCUSSION WITH MR. CAHN ABOUT THE DIFFICULTY REALLY KNOWING WHETHER SOMEONE HAS A VIOLENT HISTORY BASED ON THINGS LIKE CRIMINAL RECORD, THE POINT THAT UNITED STATES WANTS NO MAKE IS

VIOLENT HISTORY ITSELF IS NOT EVEN A PARTICULARLY GOOD INDICATOR. THE MARSHALS FEEL STRONGLY THAT THERE ARE NOT VERY GOOD INDICATORS OFTEN TO NOTE FOR SURE WHO IS GOING TO ACT UP, AND WHILE VIOLENT HISTORY CERTAINLY HELPS, I AM NOT SUGGESTING IT'S NOT USEFUL AND THEY OUGHT TO KNOW BECAUSE THEY DO, BUT THERE SIMPLY AREN'T ENOUGH GOOD PRECURSORS TO SAY JUST BECAUSE SOMEBODY DOESN'T HAVE A VIOLENT CRIMINAL HISTORY, THEY WON'T CAUSE A PROBLEM, AND THAT'S BORNE OUT IN THE DECLARATION WHERE THE EXAMPLES ARE GIVEN OF SOME OF THE INCIDENTS THAT HAPPENED IN 2013, THE PERSON HAD NO VIOLENT CRIMINAL HISTORY.

WE TALKED ABOUT THE PERCENTAGE OF INCIDENTS VERSUS A HUGE NUMBER OF PRISONS MOVING THROUGH THE CELL BLOCK, AND I WOULD INDICATE THAT YOU COULD SAY THE SAME ABOUT A LOT OF WHETHER THERE WAS AN ISSUE IN *BELL V. WOLFISH*. STRIP SEARCH, FOR EXAMPLE, WAS ONE OF THE ISSUES THERE. I DON'T HAVE THE PERCENTAGE, OF COURSE, BUT I WOULD IMAGINE THAT THE THOUSANDS [118] AND THOUSANDS OF INMATES THAT ARE STRIP SEARCHED, ONLY A VERY SMALL PERCENTAGE HAVE SOMETHING HIDDEN IN SOME CREVICE THAT HAS TO BE REMOVED. AND YET IT'S ACCEPTED THAT STRIP SEARCH IS NECESSARY. AND I WOULD SUBMIT THAT UNDER SIMILAR ANALYSIS WE HAVE TO LOOK

AT WHAT'S TRYING TO BE PREVENTED. ONE OR TWO VIOLATE INCIDENTS IN THE COURTROOM CAN HAVE DEVASTATING CONSEQUENCES. AND SO PERCENTAGES ARE NOT THE BEST MEASURES.

I KNOW THIS IS A COMPLETELY DIFFERENT LEGAL CONTEXT. I AM NOT TRYING TO IMPLODE IT, BUT WE ALL HAVE TO GO THROUGH LINES AT TSA, AND THE PERCENTAGE OF PEOPLE WHO GO THROUGH THOSE LINES WHO ARE CARRYING BOMBS, FOR EXAMPLE, I AM SURE IS INFINITESIMAL.

ON THE ISSUE OF STAFFING, I JUST WANT TO EMPHASIZE THIS, YOUR HONOR. THERE IS NO FACTUAL DISPUTE OVER WHAT THE STAFFING IS. I AGREE WITH THAT ONE HUNDRED PERCENT. THE SIGNIFICANCE OF THE STAFFING IS JUST A MATTER OF JUDGMENT AND ARGUMENT. AND I WOULD SUBMIT TO YOU THAT THE MARSHAL IN TAKING INTO ACCOUNT THIS POLICY DOES CARE ABOUT THE ISSUE OF STAFFING FROM THE STANDPOINT, YOUR HONOR.

THE STAFFING IS WHAT IT IS. WE ARE NOT ARGUING OR DISPUTING WITH THE DEFENSE THAT IT HAS SUDDENLY CHANGED DRAMATICALLY. WE DID LOSE. THE MARSHAL SERVICE DID LOSE THOSE CONTRACT GUARDS DOWN IN THE CELL BLOCK TO A SIGNIFICANT EXTENT, AND THAT MEANT PULLING BACK SOME OF THE DEPUTIES. OTHER THAN THAT, WE ARE CLAIMING THERE HAS BEEN SOME SUDDEN [119] HUGE

DROP OFF IN DEPUTY MARSHAL RESOURCES. HOWEVER, THERE HAS BEEN AN ENTIRE NEW COURTROOM—COURTHOUSE BUILT, AND WHILE THE NUMBER OF SITTING JUDGES HASN'T CHANGED, THE SIZE OF THE COMPLEX HAS.

THE COURT: YOU AGREE WITH MR. CAHN'S BASIC POINT IT'S CONSTITUTIONALLY NECESSARY AND THE MARSHALS ARE GOING TO HAVE TO MAKE ADJUSTMENTS TO ACCOMMODATE THE DEMANDS OF THE CONSTITUTION; RIGHT?

MR. COLE: ABSOLUTELY. BUT WHAT IS CONSTITUTIONALLY NECESSARY IS NEVER LOOKED AT IN A VACUUM OF LIMITED RESOURCES. IF THAT IS THE CASE, THEN *BELL V. WOLFISH* ITSELF WOULD BE DIFFERENT. THERE WOULD BE ONE OF THE CONDITIONS THERE THAT WAS CHALLENGED WAS HOW PEOPLE WERE HOUSED IN CELLS. WELL, WE COULD SOLVE THAT CHALLENGE IF IT WAS CONSTITUTIONALLY SIGNIFICANT, WE COULD SOLVE THAT BY PUTTING THEM IN NICE PENTHOUSE APARTMENTS, BUT YOU ALWAYS LOOK AT REASONABLENESS VERSUS RESOURCES TO SOME EXTENT. OF COURSE, RESOURCES CAN'T BE USED AS A REASON TO DEPRIVE CONSTITUTIONAL RIGHTS. WHEN IT COMES TO CONDITIONS OF CONFINEMENT, IT'S ALWAYS THERE. THE ISSUE OF RESOURCES IS ALWAYS THERE. OTHERWISE WE COULD SAY, FOR EXAMPLE, WELL, MAY WE'LL JUST SURROUND EVERY INMATE WITH

TEN MARSHALS AND TAKE OFF ALL THE SHACKLES.

AND SO I WANT TO POINT OUT IN RAISING THE POINT OF THE NEW COURTHOUSE, YOUR HONOR, ONE OF THE ISSUES THAT'S BRIEFLY MENTIONED IN THE DECLARATION IS THE NEED TO RESTORE [120] ORDER. THIS IS A REAL CONCERN TO THE MARSHAL SERVICE. AND IF AN INCIDENT OCCURS SOMEWHERE THAT THEY THEN ARE GOING TO HAVE TO RESTORE ORDER, THE CONCERN IS NOT JUST TO STOP AN INCIDENT FROM HAPPENING, BUT ALSO POTENTIALLY RESTORING ORDER WHEN ONE OCCURS. AND IF AN INCIDENT HAPPENED RIGHT NOW, YOUR HONOR, IN YOUR COURTROOM, SOMEONE IS GOING TO HAVE TO COME FROM 14 FLOORS DOWN UNLESS COURT HAPPENS TO BE GOING ON NEXT DOOR OR A MARSHAL HAPPENS TO BE ON YOUR FLOOR. THEY MAY HAVE TO COME FROM A CELL BLOCK THAT'S AT THE OLD COURTHOUSE. AND SO AS THE MARSHAL LOOKS AT THE WHOLE COMPLEX AND THE STAFFING, THOSE ARE FACTORS. I AM NOT SAYING DETERMINING FACTORS, BUT IT'S ALL THE WHOLE ENTIRE PICTURE TAKEN INTO ACCOUNT BY THE MARSHAL. AND SO THEREFORE, IF YOU HAVE PEOPLE IN RESTRAINTS, RESTORING ORDER ACROSS A FAIRLY SPRAWLING COURTHOUSE COMPLEX BECOMES MUCH EASIER, AND THAT IS IMPORTANT TO THE MARSHAL SERVICE.

I JUST HAVE TWO MORE BRIEF POINTS. ONE, WE CHECKED DURING THE LUNCH BREAK AND MR. CAHN'S ESTIMATE WAS CORRECT ON THE LENGTH OF THE CHAIN. HE SAID BETWEEN 12 AND 18 INCHES, AND THEY ARE ABOUT 15 INCHES. AND SO HE HAD A GOOD ESTIMATE. IT'S RIGHT IN THE MIDDLE OF HIS RANGE WAS OUR APPROXIMATE MEASUREMENT.

THE COURT: WE MIGHT DO WELL FOR THIS RECORD FOR SOMEBODY WANTING TO LOOK AT THIS TO HAVE ONE OF THE MARSHALS PUT ON THE RESTRAINTS THAT ARE TYPICALLY PLACED ON AN INMATE, TAKE A POLAROID OR SOME OTHER PHOTO OF THAT AND PUT IT IN THE [121] RECORD IN THIS CASE.

MR. COLE: YOUR HONOR, WE DID THAT. I HAVE THEM BACK AT THE OFFICE, AND I THINK I MIGHT HAVE LEFT THEM THERE, BUT WE ARE HAPPY TO SHOW THOSE TO THE DEFENSE TO MAKE SURE THEY FEEL COMFORTABLE THEY ARE ACCURATE.

THE COURT: I THINK THAT OUGHT TO BE PART OF THE RECORD IN THE CASE JUST WHAT THE RESTRAINTS ARE. THEY HAVE BEEN DESCRIBED AND THEY ARE SORT OF EASY TO UNDERSTAND, BUT PICTURES ARE WORTH A THOUSAND WORDS IF THERE IS NO DISPUTE BY MR. CAHN THAT THE PHOTOS THAT YOU HAVE ARE ACCURATE DEPICTIONS OF HOW THE RESTRAINTS FIT ON A PERSON,

THEN I'D ASK YOU TO PUT THOSE IN THE RECORD IN THIS CHASE.

MR. COLE: WE WILL SHOW THOSE TO THEM AND IF THERE ANY DISPUTE, WE WILL RESOLVE IT THROUGH PHOTOS OR SOMETHING. WE'LL GET THOSE TO YOU.

I GUESS THE FINAL POINT I WOULD MAKE —WELL, I WANT TO DO BRIEFLY IS SORT OF A PERSONAL PRIVILEGE SINCE YOUR HONOR BROUGHT IT UP. IT'S NOT REALLY THAT RELEVANT, BUT I JUST WANT YOU TO KNOW THAT IN THE FISCAL YEAR 2013 WE TRIED WELL OVER 100 DEFENDANTS IN THIS DISTRICT WHICH, IF NUMBERS HOLD OUT—

THE COURT: JURY TRIALS?

MR. COLE: NO. I CAN'T REMEMBER HOW MANY WERE BENCH, BUT YES, SOME WERE BENCH, 11 OR 12 BENCH TRIALS. BUT IF NUMBERS HOLD OUT AS THEY USUALLY DO ACROSS THE NATION, WE WOULD BE IN THE FIVE OR SIX FOR THE NATION WHILE ALSO MANAGING [122] MULTIPLES OF OTHER CASES.

THE COURT: FIVE OR SIX JURY TRIALS?

MR. COLE: TRIALS.

THE COURT: MY UNDERSTANDING WAS THE PERCENTAGE OF CASES RESOLVED BY PLEA WAS 98.6. IS THAT STILL ACCURATE?

MR. COLE: I DON'T KNOW. I DIDN'T CHECK THAT FOR FISCAL YEAR 2013, BUT BECAUSE WE DO SO MANY CASES, 100 TRIALS IS STILL A VERY LOW PERCENTAGE OF OUR

CASES. AND SO OTHER DISTRICTS THAT HAVE THE SAME NUMBER OF—

THE COURT: HOW MANY TRIAL ELIGIBLE LAWYERS DO YOU HAVE?

MR. COLE: OVER 100.

THE COURT: FEWER THAN ONE CASE PER LAWYER PER YEAR?

MR. COLE: I KNOW THIS IS GETTING FAR AFIELD. I APOLOGIZE, BUT IN BOSTON—AND I DON'T WANT TO PICK ON MY BROTHER IN BOSTON, BUT A SIMILAR SIZE NUMBER OF AUSAS, THEY'LL CHARGE ABOUT 300 CASES A YEAR.

THE COURT: I JUST GOT AN E-MAIL FROM MR. KELLY WHO WAS GIVING PRESS INTERVIEWS ON "HOW I CONVICTED WHITEY BULGER." DID YOU EVER KNOW HIM, MR. CAHN? HE WAS A FORMER ASSISTANT HERE, BRIAN KELLY?

MR. CAHN: NO, I DIDN'T KNOW HIM.

MR. COLE: I AM WASTING THEIR TIME. I APOLOGIZE. I GET TO THE FINAL POINT WHICH IS THIS.

IT ALL BOILS DOWN IN THE UNITED STATES'S MIND TO [123] SIMPLY WHO MAKES THE FIRST CALL, NOT THE ULTIMATE CALL. THE ULTIMATE CALL IT'S NOT UP DISPUTED FOR JUDGES. THAT HAS NEVER BEEN IN DISPUTE. WHO MAKES THE FIRST CALL WHEN THEY COME OUT OF THAT DOOR? ONCE THEY COME OUT OF THE DOOR, IT IS

THE JUDGE'S WORLD TO DECIDE WHAT HAPPENS TO THEM. AND THE JUDGES ARE DECIDING THAT. YOU HAVE DECIDED TODAY BY NOT HAVING HAND RESTRAINTS.

THE COURT: MS. MORALES'S LEG RESTRAINTS WEREN'T REMOVED?

MR. COLE: OTHER JUDGES HAVE DECIDED TO KEEP THEM ON. FOR INSTANCE, I UNDERSTAND THAT SOME—VERY FEW JUDGES, AT LEAST ONE JUDGE, WILL TYPICALLY MORE RESTRAINTS ON THAN JUDGE MOSKOWITZ'S LETTER CALLS FOR. OTHER JUDGES WILL KEEP LESS RESTRAINTS ON, AND IT VARIES. AND I BELIEVE IT WILL DEVELOP OVER TIME AS THE JUDGES THEMSELVES EXERCISE DISCRETION IN WHAT IS A CHANGE IN OUR DISTRICT. AND SO I BELIEVE THAT WHEN THE QUESTION IS BOILED DOWN TO IF THE DISPUTE IS—IF THE DISPUTE REALLY IS THE JUDGES AREN'T DOING A GOOD ENOUGH JOB GIVING INDIVIDUALIZED DETERMINATIONS, THEN THOSE JUDGES BE CHALLENGED, BUT THE POLICY IS NOT CONSTITUTIONALLY DEFECTIVE.

THE COURT: ARE YOU CONCEDING THAT AN INDIVIDUALIZED DETERMINATION IS REQUIRED?

MR. COLE: I AM ONLY CONCEDING THAT—I AM ONLY CONCEDING THAT—NO, THERE IS NO INDIVIDUALIZED DETERMINATION REQUIRED BEFORE SOMEONE IS PLACED IN RESTRAINTS IN COURT. [124] WHAT *HOWARD*

SUGGESTS IS THAT IF A DEFENDANT ASKED TO HAVE THEM REMOVED AND HAS SOME EXTENUATING CIRCUMSTANCES THAT A JUDGE CERTAINLY OUGHT TO HEAR THAT AND LISTEN TO IT.

JUDGE MOSKOWITZ'S LETTER INDICATES THAT WOULD HAPPEN. ONE COULD QUESTION WHETHER THAT WAS EVEN A NECESSARY HOLDING IN *HOWARD*, BECAUSE IN *HOWARD* THEY WERE—I RECALL THEM REFERRING TO THE FACT THAT THAT'S WHAT THE POLICY ITSELF ALREADY PROVIDED FOR.

THE COURT: THEY SPECIFICALLY ESCHEW DECIDING THE ISSUE. PAGE 1013, DEFENDANT ARGUES THAT "DUE PROCESS REQUIRES THAT THERE BE NO RESTRAINTS WHATSOEVER WITHOUT AN INDIVIDUALIZED DETERMINATION. THIS MAY GO FARTHER THAN DUE PROCESS REQUIRES, BUT WE DO NOT HAVE TO REACH THIS QUESTION."

MR. COLE: RIGHT, AND WHEN THEY LATER TALK ABOUT EXTENUATING CIRCUMSTANCES, MY RECOLLECTION, YOUR HONOR, IS THAT'S IN THE CONTEXT OF SAYING WE KNOW THAT THE CENTRAL DISTRICT POLICY PROVIDES FOR THAT. I DON'T REMEMBER THEM SAYING IT HAS TO PROVIDE FOR THAT BUT THEY NOTED THAT IT DID, AND I THINK THAT GAVE THEM COMFORT THAT ALL IS WELL. AND SO THAT'S WHAT THE POLICY PROVIDES FOR HERE. AND I DO NOT KNOW OF ANY CASE THAT YET REQUIRES MORE

THAN THAT. I DO KNOW *ZUBER* THAT REQUIRES LESS. AND SO THE GOVERNMENT BELIEVES THAT THE POLICY IS APPROPRIATE AND NO CONSTITUTIONAL VIOLATION.

THE COURT: THANK YOU, MR. COLE.

MR. CAHN, I HAVE ONE MORE POINT OF CLARIFICATION. I [125] WANT TO MAKE THAT I HAVE YOUR POSITION ON THIS.

I MENTIONED TO YOU WHAT I BELIEVE THE MARSHAL SAID TO THE JUDGES, AND THIS WAS ONE OF THE STICKING POINTS WITH ME THAT IT WAS APPROXIMATELY UP TO THREE MINUTE PROCESS TO TAKE THE SHACKLES OFF. AND THE EXPLANATION, AS I HAVE MENTIONED TO YOU, WAS NEED A PERSON IN FRONT AND A PERSON BEHIND. HE SAID WE HAVE HAD INSTANCES WHERE SOMEBODY HAS MULE-KICKED THE GUY TRYING TO GET THE SHACKLES OFF. WE HAD OTHER INSTANCES WHERE THEY HAVE USED THEM AS A MACE AND THEY STRUCK SOMEBODY IN THE HEAD. SO WE HAVE A GUY STANDING IN FRONT AND BEHIND. WE HOPE TO PREVENT THAT, AND SOMEBODY ELSE LABORS TRYING TO GET THOSE OFF. TAKES ABOUT THREE MINUTES ON AVERAGE. DO YOU DISPUTE THOSE ESTIMATES OR THAT AMOUNT OF RESOURCES GO INTO THE TASK OF TAKING THEM ON AND OFF EACH TIME?

MR. CAHN: YES. IT'S NOT SOMETHING WE DISCUSSED WITH THE MARSHAL. I DON'T HAVE ANY EVIDENCE TO DISPUTE IT. IT'S

SOMETHING WE'D LIKE TO KNOW MORE ABOUT. I NOTE THAT IF IT TAKES THREE MINUTES TO TAKE THEM OFF UP HERE, IT TAKES THREE MINUTES TO PUT THEM ON DOWN THERE.

THE COURT: YES, EXACTLY RIGHT. BUT THAT'S BEFORE CALENDAR IS CALLED; RIGHT? THAT'S THE CONCERN I HAVE, BECAUSE I'LL HAVE A CASE ON MONDAY. THIS IS WHY THAT RESONATES WITH ME. I'LL HAVE CALENDAR ON MONDAY AND THERE BE 25 OR 30 MATTERS ON CALENDAR. AND AS YOU KNOW FROM BEING IN HERE, THEY DON'T CALL THEM IN ORDER. A LOT OF TIMES IT TURNS ON WHO IS [126] HERE, WHO IS READY TO GO. SO MAYBE NUMBER ONE AND THEN WE'LL GO TO NUMBER 11 AND SO ON.

THE MARSHALS HAVE NO WAY OF KNOWING IN WHICH THE CALENDAR IS GOING TO BE CALLED AND THE DEFENDANTS ARE GOING TO BE SUMMONED IN HERE. SO NECESSARILY, IF WE HAD A POLICY OF TAKING THE SHACKLES OFF EACH TIME, EACH—THE MARSHALS WOULD HAVE TO FIRST LISTEN TO HEAR WHICH CASE IT IS, GO THROUGH THIS THREE-MINUTE PROCESS AND THERE WOULD INVARIABLY BE A THREE-MINUTE DELAY IN BRINGING SOMEBODY UP, ASSUMING THAT ESTIMATE IS RIGHT, AND MULTIPLY THAT TIMES 25. THEN WE HAVE GOT AN HOUR 15 OF COURT TIME THAT IS DELAYED IN A VERY BUSY BORDER DISTRICT WHERE THE DAY

THAT STRETCHES TO FREQUENTLY PAST 5 O'CLOCK.

THE MOTION, IN FACT, MS. MILLER AND MS. CHARLICK ARGUED, I THINK WE WENT PAST 6 O'CLOCK THAT NIGHT BECAUSE WE ARE SO BUSY HERE. I HAD A JURY TRIAL GOING AND THAT TO ME THAT'S A CONCERN. I THINK THAT IMPACTS ON THE REASONABLENESS OF A JUDICIAL POLICY. DOESN'T SPEAK TO THE MARSHAL'S POLICY, BUT THE REASONABLENESS OF A JUDICIAL POLICY THAT IS, YEAH, OKAY, WE UNDERSTAND. MAYBE THERE IS SOME GOOD REASON TO LEAVE THEM ON.

MR. CAHN: I UNDERSTAND AS A PRACTICAL CONCERN BUT NOW WE ARE TALKING PURELY ABOUT ALLOWING ALLOCATION OF RESOURCES TO CONTROL RIGHTS. I'D NOTE THAT THE MARSHAL'S POLICY DOESN'T IN CIRCUMSTANCES WHERE AN INDIVIDUAL APPEARS IN [127] COURT INDIVIDUALLY WITH TWO MARSHALS REQUIRE THESE RESTRAINTS AND YET IN ALL CASES IT APPEARS UNLESS THE JUDGE ORDERS OTHERWISE, THAT THEY ARE STILL BEING RESTRAINED TO SOME DEGREE AS MS. MORALES NOW HAS LEG RESTRAINTS ON, EVEN THOUGH WE HAVE TWO PEOPLE HERE, TWO MARSHALS WHO ARE ASSIGNED TO THE COURTROOM FOR PURPOSES OF SECURITY AS OPPOSED TO THOSE WHO ARE HERE AS OBSERVERS.

THE COURT: WHATEVER THAT POLICY IS, YOU WOULD ACKNOWLEDGE IT NEEDS TO BE

UNIFORM AS TO ALL DEFENDANTS SUBJECT TO A JUDGE MAKING EXCEPTIONS MAKING ON APPLICATION FROM THE DEFENDANT OR THE LAWYER; RIGHT?

I WOULDN'T WANT A POLICY WHERE I'D SAY, YES, MS. MORALES SEEMS OKAY TO ME, SO TAKE THEM OFF. I MEAN, THAT'S KIND OF A WHIMSICAL POLICY. I WOULD THINK AS A MATTER OF PROCESS, WHETHER WE CALL IT DUE PROCESS OR JUST COMMON SENSE THAT WE HAVE SOME SET RULES AND THAT THEY WOULD APPLY AND THAT EVERYBODY WOULD HAVE NOTICE OF THOSE AND THERE BE SOME PREDICTABILITY. AND AGAIN, SUBJECT TO THE EXCEPTIONS IN CASES. YOU DON'T ADVOCATE A SYSTEM WHERE IT'S UP—

MR. CAHN: I AM NOT ADVOCATING CHAOS. MY BELIEF IS THAT A DEFAULT SHOULD BE NO RESTRAINTS, AND IF THERE IS REASON TO BELIEVE THAT AN INDIVIDUAL PRESENTS A RISK, THEN THEY SHOULD BE RESTRAINED AND WHEN THEY COME BEFORE THE COURT IF THE DEFENSE ATTORNEY DISAGREES WITH THAT, THEY SHOULD BE ABLE TO RAISE THE ISSUE.

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THE COURT: THAT'S UNDERSTANDABLE, AND THAT'S A BRIGHT LINE RULE, TOO. NO RESTRAINTS UNLESS NECESSITY IS SHOWN.

MR. CAHN: UNLESS THE MARSHALS HAVE SOME EVIDENCE OF NECESSITY. I WOULD-

N'T SAY THAT THEY NEED TO COME OUT AND FIRST PRESENT IT TO THE COURT BEFORE THEY PUT THE SHACKLES ON THE PERSON, BUT THERE SHOULD BE AN OPPORTUNITY AFTER THE FACT TO RAISE IT WHEN THE INDIVIDUAL COMES OUT SHACKLED AND DEFENSE ATTORNEY SHOULD BE ABLE TO RAISE IT.

THE COURT: GOT YOU.

MR. COLE.

MR. COLE: YOUR HONOR, I JUST WANTED TO MENTION ON THE ISSUE OF HOW LONG IT TAKES TO REMOVE THE SHACKLES. WE WANT TO MAKE SURE THAT—I JUST CONFERRED WITH MR. JOHNSON, AND HE TELLS ME—IF YOU WANT TO INQUIRE SOME MORE, THAT'S FINE—THAT THREE IS A PREFERENCE. THEY DON'T ALWAYS HAVE THAT LUXURY AND IT'S OFTEN DOWN BY TWO AND THAT IT COULD TAKE AS MUCH AS THREE, SOMETIMES LONGER, SOMETIMES LESS. I DON'T WANT TO LEAVE THE IMPRESSION THAT'S ALWAYS AT LEAST THREE MINUTES.

THE COURT: MR. JOHNSON, AS A RULE, IS THREE MINUTES A REASONABLE ESTIMATE IN MOST CASES FOR GETTING THE SHACKLES OFF?

DEPUTY MARSHAL JOHNSON: I THINK THAT'S REASONABLE. CERTAINLY IT CAN HAPPEN FASTER AND SOMETIMES IT TAKES [129] LONGER.

THE COURT: BUT IF YOU HAD TO GIVE ME AN AVERAGE OF BALLPARK, WOULD THREE MINUTES BE IT?

DEPUTY MARSHAL JOHNSON: TWO AND A HALF TO THREE MINUTES.

THE COURT: I'LL TAKE THAT INTO ACCOUNT, THEN. THAT WILL BE THE STANDARD I HAVE IN MIND.

AS I UNDERSTOOD MARSHAL STAFFORD, YOUR PREFERENCE IS TO HAVE THREE PEOPLE: ONE STANDING BEHIND, ONE STANDING IN FRONT, AND THEN ONE ACTUALLY REMOVING THE SHACKLES.

DEPUTY MARSHAL JOHNSON: CORRECT.

THE COURT: THAT'S WHAT'S CALLED FOR ASSUMING RESOURCES ARE AVAILABLE, BUT AT A MINIMUM, WHAT, TWO?

DEPUTY MARSHAL JOHNSON: CORRECT. FOR EXAMPLE, TODAY IN COURT THERE ARE ONLY TWO DEPUTIES HERE.

THE COURT: BUT I AM TALKING ABOUT STRICTLY THE REMOVAL OF SHACKLES. IS THAT EVER DONE BY A SINGLE MARSHAL OR IS IT ALWAYS DONE BY AT LEAST TWO?

DEPUTY MARSHAL JOHNSON: IT ALWAYS BE AT LEAST TWO.

THE COURT: IS THE PREFERERNCE OR THE DEFAULT THREE IF RESOURCES ARE AVAILABLE?

DEPUTY MARSHAL JOHNSON: PREFERENCE IS TO HAVE A THIRD PERSON.

THE COURT: I HAVE IT.

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MR. CAHN: JUDGE, JUST FOR THE RECORD. THAT WAS DEPUTY MARSHAL JOHNSON SPEAKING, NOT MARSHAL STAFFORD.

THE COURT: I AM SORRY. YES, IT WAS KEITH JOHNSON.

ANYTHING ELSE FROM ANY SIDE?

MR. COLE: NO, YOUR HONOR, THANK YOU.

MR. CAHN: NO, YOUR HONOR.

THE COURT: LET ME SAY PRELIMINARILY THAT I UNDERSTAND THAT THIS IS A SINCERE APPLICATION ON THE PART OF FEDERAL DEFENDERS. THEY FEEL VERY STRONGLY ABOUT THIS, VERY PASSIONATELY ABOUT THIS. I DON'T THINK THESE ARE MAKEWEIGHT ARGUMENTS. THE PRESENCE OF MR. CAHN HERE, WHO IS THE HEAD OF FEDERAL DEFENDERS, INDICATES HOW SERIOUSLY THEY TAKE THE ISSUE AND SHOULD AS AN OFFICE. SO I DON'T—NONE OF WHAT I AM ABOUT TO SAY SHOULD BE INTERPRETED AS UNDERCUTTING THE BONA FIDES OF THEIR BELIEF THAT THIS REALLY IS A CONSTITUTIONAL LAW VIOLATION.

PRELIMINARILY, THE COURT WOULD APPLY A FOURTH AMENDMENT STANDARD. FOR THE REASONS THAT I SPOKE ABOUT

WHEN I QUESTIONS MR. COLE, I DON'T THINK THE FREE FLOATING SUBSTANTIVE PROCESS STANDARD APPLIES HERE. I UNDERSTAND THE ARGUMENTS. I UNDERSTAND THE LIBERTY INTEREST INVOLVED, BUT I ALSO THINK THAT *GRAHAM VERSUS CONNER* AND OTHER CASES SUGGEST THAT WHEN A CASE CAN BE DECIDED ON A NARROWER BASIS WHEN THERE IS IN PARTICULAR A CONSTITUTIONAL PROVISION THAT APPLIES, THAT THAT SHOULD BE THE STANDARD FOR ASSESSING THE ALLEGED [131] VIOLATION NOT A MORE AMORPHOUS CONCEPT SUCH AS SUBSTANTIVE DUE PROCESS.

HERE IT'S CONCEDED THAT *BELL VERSUS WOLFISH* DEALS WITH WHETHER CERTAIN CONDITIONS OF CONFINEMENT INCLUDING THE SEIZURE OF A PERSON VIOLATE THE FOURTH AMENDMENT, AND *BELL* IS VERY CLEAR THAT THE ANALYSIS OUGHT TO BE UNDER THE RUBRIC OF REASONABLENESS UNDER THE FOURTH AMENDMENT. IS IT REASONABLE GIVEN ALL OF THE CIRCUMSTANCES AND THE NEED. IS THE DEGREE OF FORCE, THE DEGREE OF RESTRAINT IN THIS CASE, REASONABLE.

THE NINTH CIRCUIT HAS FOLLOWED THAT, I THINK, RELIGIOUSLY. IN *BULL VERSUS CITY AND COUNTY OF SAN FRANCISCO,* 595 FD. 3RD 964. THE COURT LAYS OUT THE ANALYSIS FOR AGAIN EVALUATING CONDITIONS OF CONFINEMENT AND RESTRAINT IN THE PRETRIAL CONTEXT.

THE COURT NOTES AT PAGE 973 THAT THE TEST OF REASONABLES REQUIRES A BALANCING OF THE NEED FOR THE PARTICULAR, IN THIS CASE, SEARCH AGAINST THE INVASION OF THE PERSONAL RIGHTS THAT THE SEARCH ENTAILS, COURTS MUST CONSIDER THE SCOPE OF THAT PARTICULAR INTRUSION, THE MANNER IN WHICH IT'S CONDUCTED, THE JUSTIFICATION FOR INITIATING IT AND THE PLACE IN WHICH IT'S CONDUCTED.

THEY GO ON IN THAT CASE TO RELY ON *BELL* AND SAY THAT THE TEST AND PRETRIAL CONFINEMENT STANDARD IS ONE OF REASONABLENESS.

NOW, THEY ARE ALSO QUICK TO POINT OUT, AS MR. CAHN [132] ARGUES, THAT THE PUNISHMENT IN AN IMPERMISSIBLE FACTOR AND IF THERE IS EVIDENCE OR INFERENCES THAT SUGGEST THAT THE MEASURES ARE BEING TAKEN AS PUNISHMENT, THAT WOULD VIOLATE THE CONSTITUTION.

LET ME START WITH THAT. I FIND NO EVIDENCE THAT THIS POLICY IS PREDICATED ON A DESIRE TO PUNISH.

I FIND NO TESTIFY THAT THAT REALLY HAS BEEN AN OVERLOOKED CONSIDERATION. FRANKLY, EVEN THINK IT'S ON THE RADAR SCREEN. TO ME—AND JUDGE STORMES WAS HERE EARLIER. SHE IS NOT PRESENT NOW. I DON'T KNOW WHAT HER ACTUAL MOTIVATIONS WERE. BUT I THINK THERE IS A DIF-

FERENCE BETWEEN THE MATERIAL WITNESS POPULATION AND THE DEFENDANT POPULATION. I DO. I ACKNOWLEDGE, AS MR. CAHN POINTS OUT, OCCASIONALLY PEOPLE GET THROUGH THAT MIGHT BE VIOLENT AS MATERIAL WITNESSES, BUT THAT'S VERY UNLIKELY. THE SAME CAN'T BE SAID OF THE DEFENDANT POPULATION. IT CAN'T.

ONE FUNDAMENTAL DIFFERENCE BETWEEN THOSE TWO POPULATIONS IS AS TO THE LATTER, THE DEFENDANTS, THERE IS PROBABLE CAUSE TO BELIEVE THEY COMMITTED A FELONY OR THEY ARE BACK ON A WARRANT OR THEY ADMITTED TO COMMITTING A FELONY WHILE THE OTHERS ARE WITNESSES.

AS I MENTIONED WITH RESPECT TO THE RULES THAT APPLY TO DEPOSING MATERIAL WITNESSES IN GETTING THEM OUT OF THE SYSTEM AS QUICKLY AS CAN BE AND GETTING THEM HOME, IN JUST ABOUT EVERY ASPECT OF DEALING WITH MATERIAL WITNESSES IN [133] CRIMINAL JUSTICE THEY ARE DISTINGUISHED AND TREATED DIFFERENTLY, AND THE DISTINCTION BETWEEN MATERIAL WITNESSES AND DEFENDANTS IS ACKNOWLEDGED AND ACTED UPON.

I ALSO THINK THAT ANYTIME I HAVE SEEN A MATERIAL WITNESSES THAT'S HAD A RECORD, HE HAS USUALLY BEEN CALLED OUT FOR PROSECUTION HIMSELF. HE IS NOT RETAINED. THOSE MAY BE SOME OF THE REASONS THAT JUDGE STORMES THOUGHT IT

WAS REASONABLE TO DISTINGUISH BETWEEN THE MATERIAL WITNESS POPULATION AND THE DEFENDANT POPULATION. I WON'T SPECULATE ON THOSE. BECAUSE THE RULING THAT I MAKE WOULD AUTHORIZE FRANKLY THE SHACKLING OF MATERIAL WITNESSES IF THE MARSHALS DEEM THAT NECESSARY.

SO FOR ME THE STANDARD IS REASONABLENESS. I BALANCE THE THINGS THAT I RECITED FROM THE *BULL* CASE AGAINST THE INFRINGEMENT ON INDIVIDUAL LIBERTY. I AGREE WITH WHAT MR. COLE SAID. I THINK THAT THE CHANGE OF POLICY CAME AS A LITTLE BIT OF A SHOCK TO THE SYSTEM HERE BECAUSE WE HAVE BEEN—WHETHER YOU WANT TO CALL IT LAX OR NOT IN COMPLIANCE, BUT THE CULTURE HERE HAS BEEN NO SHACKLES FOR A LONG PERIOD OF TIME, AND IT'S CLEAR TO ME THAT THAT'S VERY DIFFERENT FROM MANY OTHER COURTS AND DISTINCTLY DIFFERENT FROM MOST BORDER COURTS.

I SEE A NEED FOR SHACKLING, FRANKLY, FOR THE REASONS GIVEN BY DEPUTY JOHNSON AND THE MARSHAL. I AGREE WITH THE CONCERN THAT IT IS DIFFICULT IF NOT IMPOSSIBLE EXCEPT IN THE [134] MOST OBVIOUS CASES TO IDENTIFY PRISONERS WHO ARE LIKELY TO POSE A DANGER TO OTHERS, WHETHER IT BE COUNSEL OR THE COURT OR BYSTANDERS IN THE GALLERY OR ONE ANOTHER. I THINK IT'S IMPOSSIBLE. I JUST

DON'T THINK WE CAN PUT THE BURDEN ON THE MARSHALS TO MAKE THOSE CALLS AND SAY THIS GUY SHOULD BE SHACKLED BECAUSE WE HAVE REASON TO BELIEVE HE IS VIOLENT.

IF ANYTHING, THE ONE ANECDOTAL EXPERIENCE IN FRONT OF JUDGE LEWIS WHERE THE PERSON, THE ATTACKER IN THAT CASE, HAD NO HISTORY OF VIOLENCE AT ALL MAKES THE POINT. I DON'T THINK THE MARSHALS NEED TO WAIT UNTIL THERE HAS BEEN AN ATTACK TO ADJUST THE POLICY. I THINK THEY CAN DO IT PREVENTIVELY AS THEY HAVE IN THIS CASE.

I ALSO THINK THE QUESTION, THE ASSESSMENT OF REASONABLENESS, WHILE IT IS PECULIAR TO THIS COURT, MUST TAKE INTO CONSIDERATION THAT AS A NATIONAL POLICY THE MARSHAL SERVICE BELIEVES THAT THIS OUGHT TO BE THE POLICY IN ALL COURTS. IT'S NOT PECULIAR TO BORDER DISTRICTS, NOT PECULIAR TO THE SOUTHERN DISTRICT OF CALIFORNIA. IT APPLIES ACROSS THE NATION NOW. I ACCEPT THE COUNTER-PROFFER OF MR. CAHN THAT IT DOESN'T APPLY WITH THE SAME FORCE IN ALL COURTS; THAT IN ARIZONA, FOR EXAMPLE, IT'S CONCEDED THAT IT'S FULL SHACKLES, BUT MANY OTHER PLACES—HE TELL ME SAN FRANCISCO, AFTER INITIAL APPEARANCE NOT EVEN LEG SHACKLES. SO I ACKNOWLEDGE THE VARIATION DO EXIST.

BUT I DON'T THINK THAT THOSE DIFFERENCES ARE [135] DISPOSITIVE OF WHETHER THE POLICY OF SHACKLING PEOPLE AS A MATTER OF COURSE IS A REASONABLE POLICY.

THE RECORD IN THIS CASE IS THAT WE HAVE A VERY HIGH VOLUME AS FEDERAL COURTS GO, PEOPLE COMING THROUGH. WE ALSO HAVE INSUFFICIENT STAFF TO COMPLY WITH THE DIRECTIVE THAT THE MARSHALS HAVE TO HAVE TWO DEPUTY MARSHALS PER DEFENDANT WHILE IN COURT. SO SOMETHING HAS TO GIVE IN THAT SITUATION, PARTICULARLY IN THE CASE WHERE YOU HAVE SIX DEFENDANTS WHICH IS FAIRLY COMMON IN THIS DISTRICT OFFERING IT A PLEA OF GUILTY AT THE SAME TIME. THE MARSHALS CAN'T BE EXPECTED TO HAVE 12 PEOPLE IN THERE. AND SO WHAT'S THE EQUALIZER TO THE LACK OF STAFF? WELL, THE EQUALIZER IS WELL WE HAVE TO HAVE PEOPLE RESTRAINED. THAT GIVES US THE CONTROL WHICH IS NECESSARY TO MAINTAIN ORDER IN THE COURT AND TO PREVENT ATTACKS OR VIOLENCE FROM OCCURRING.

HONESTLY, MR. CAHN, I THINK THE ASSESSMENT THAT THE COURT MAKES IS WITH DEFERENCE TO THE MARSHAL SERVICE WHICH I GIVE IN THIS CASE. AS I MENTIONED TO YOU, THEY HAVE TRAINING AND EXPERIENCE WHICH IS BEYOND ANYTHING I HAVE EVER HAD. AND I CREDIT THAT, AND I CREDIT THEIR ASSESSMENTS OF THE NEED

IN THIS CASE. BUT I THINK IT'S REASONABLE FOR COURT IN FORMULATING POLICY TO RELY ON THE SECURITY ARM OF THE COURT, IN THIS CASE THE UNITED STATES MARSHAL SERVICE, TO RELY ON THEIR ANECDOTES AND THEIR EXPERIENCE WHICH THIS COURT DID.

THE SAFETY VALVE OR THE STOP GAP I THINK FOR [136] DEFENDANTS IS THAT OUR POLICY PERMITS EXCEPTIONS. YOU ACKNOWLEDGE THAT SOME JUDGES WITH GREAT COMMON SENSE APPLY THOSE EXCEPTIONS. I CAN'T IMAGINE IN THE CASE IN FRONT OF ME KEEPING A BLIND PERSON IN RESTRAINTS OR SOMEBODY WITH A MEDICAL CONDITION FOR THAT MATTER, SOMEBODY WHO WAS CONFINED TO A WHEELCHAIR.

I JUST—I THINK I WOULD INVOKE THE EXCEPTION TO STOP THAT, AND I THINK THAT'S THE PROTECTION AGAINST UNREASONABLENESS IN PARTICULAR SITUATIONS.

IT'S INCUMBENT UPON THE LAWYER FOR THE DEFENDANT TO RAISE THAT IF THE JUDGE DOESN'T DO IT SUA SPONTE, BUT NONETHELESS, THE POINT IS THE EXCEPTION EXISTS AND IT CAN BE INVOKED, AND I DON'T KNOW OF ANY JUDGE IN THIS COURT THAT WOULD NOT CONSIDER THAT. AGAIN, I TELL YOU THAT MY RECOMMENDATION TO THE CHIEF JUDGE IS GOING TO BE TO EITHER CALL MAGISTRATE JUDGES OR SEND OUT A CLARIFYING MEMO SAYING, LOOK, WE WANT TO EMPHASIZE THAT EACH JUDGE HAS DIS-

CRETION IN INDIVIDUAL CASES TO VARY FROM THE POLICY OF DEFERENCE TO THE MARSHALS AS FAR AS RESTRAINTS ON PEOPLE IN COURT. TO THE EXTENT THAT'S NOT UNDERSTOOD, THAT NEEDS TO BE CLARIFIED.

BUT I LOOK AT THIS STRICTLY UNDER REASONABLENESS ANALYSIS HAVING DISCOUNTED THAT THERE WAS ANY POTENTIAL FOR PUNISHMENT HERE, AND I FIND THE POLICY TO BE A REASONABLE ONE.

OUR WORLD VIEWS MAY DIFFER, OUR ANECDOTAL EXPERIENCE MAY DIFFER. IT STRIKES ME WHEN THERE IS PROBABLE CAUSE TO [137] BELIEVE SOMEONE HAS COMMITTED A FELONY, IT'S NOT UNREASONABLE TO EXPECT TO SEE THAT THAT PERSON IS GOING TO BE RESTRAINED IN SOME FORM STARTING WITH THE ARREST, MOVING THROUGH THE PROCESS OF TRANSPORTATION. AND AS I POINTED OUT TO YOU WITH MY EXPERIENCE IN LOOKING AT THE TV AND WATCHING PROCEEDINGS IN OTHER COURTS, EVEN IN COURTS IT'S VERY, VERY COMMON—STATE AND FEDERAL COURTS—TO SEE PEOPLE IN RESTRAINTS, SOMETIMES BEHIND PLEXIGLAS CAGES IN RESTRAINTS WHICH IS SOMETHING VERY DIFFERENT FROM HERE.

YOU HAVE KIND OF BACKED AWAY—WELL, YOU HAVEN'T BACKED AWAY. YOU HAVEN'T MADE A POINT AS HAS BEEN MADE BY SOME OF THE LAWYERS THAT APPEARED IN FRONT OF ME TO RAISE THE OBJECTION BEFORE

THAT THERE IS THIS SPECTER OF IMPLICIT BIAS IN ALL THIS THAT A JUDGE MAY ACTUALLY TREAT A DEFENDANT DIFFERENTLY WHO APPEARS IN CHAINS FROM ONE WHO DOES NOT. I REALLY, AS I SAID, PROFOUNDLY DISAGREE WITH THAT BECAUSE I AM EITHER MAYBE IN THEIR VIEW JADED NOT AS SENSITIVE TO THE INTEREST OF THE DEFENDANT.

IT REALLY DOESN'T EVEN—IT'S NOT A FACTOR THAT I EVEN NOTICE UNLESS IT'S POINTED OUT TO ME. ONE OF THE GREAT IRONIES HERE IS A NUMBER OF TIMES I HAD DEFENDANTS APPEAR AND THEY ARE NOT IN BELLY CHAINS FOR WHATEVER REASON. MAYBE THEY ARE WITHIN THAT EXCEPTION THAT'S ADMITTED IN THE RULE APPEARING FOR SENTENCING, FOR EXAMPLE. AND YOUR LAWYERS HAD TO SAY, JUDGE, I WANT TO NOTE FOR THE RECORD THAT HE IS IN LEG [138] CHAINS. OF COURSE, GIVEN MY PERSPECTIVE HERE, I DON'T SEE THE LEG CHAINS, AND IN MOST INSTANCES I HAVEN'T HEARD THEM AT ALL, HEARD THEM RATTLE, AND IT HAS TO BE POINTED OUT TO ME THAT THEY ARE IN LEG CHAINS. MAYBE THEIR PURPOSE IS BROADER THAN JUST A CONCERN ABOUT THE COURT BEING KIND OF SUBCONSCIOUSLY BIASED AND TO FLAG THAT. MAYBE THE CONCERN IS ALL THE OTHER THINGS YOU HAVE RAISED.

TO THE EXTENT THAT'S PART OF THE CONCERN, I DISCOUNT IT ENTIRELY. THROUGH-

OUT THE CRIMINAL JUSTICE SYSTEM, JUDGES ARE EXPECTED AND PRESUMED TO BE ABLE TO PUT OUT OF THEIR MINDS THOSE THINGS THAT OUGHT NOT TO BE CONSIDERED IN FORMING JUDGMENTS. THERE IS A LEGION OF EXAMPLES. I POINTED OUT TO YOU THAT MS. MILLER OR MS. CHARLICK IN THE EARLIER MOTIONS THERE HAVE BEEN CASES WHERE I SUPPRESSED A CONFESSION AND YET THE DEFENDANT HAS GONE TO TRIAL, AND THE LAWYERS ARGUED THAT THE EVIDENCE CAN'T SHOW THAT HE IS GUILTY. IT'S NOT ENOUGH. HE DIDN'T DO THIS. AND I DON'T IT SIT HERE AND MAKE FACES THROUGHOUT THAT. I AM TRAINED TO COMPARTMENTALIZE THAT INFORMATION, UNDERSTAND IT CAN'T COME IN FRONT OF A JURY, AND EVEN THOUGH I KNOW THERE IS A CONFESSION TO GIVE THE DEFENDANT THE BENEFIT OF A FAIR TRIAL.

MOST RECENTLY IN *UNITED STATES VERSUS PRESTON* AT 706 FD. 3RD 1106, 1120, THAT'S A CASE THAT I CITED TO MS. MILLER AND MS. CHARLICK IN THE EARLIER ONE. THIS WAS A COURT TRIAL WHERE THE ARGUMENT WAS THAT THE GOVERNMENT WAS VOUCHING AND [139] ENGAGING IN OTHER MISCONDUCT. AND AS RECENTLY AS THIS YEAR, IN JULY *PRESTON* CAME OUT. THE COURT RISK OF IMPROPERLY INFLUENCING A JUDGE IS FAR LESS THAN A SHOWING TO THE CONTRARY. THE JUDGES PRESUME TO CONSIDER ONLY MATERIAL AND COMPETENT EVIDENCE IN ARRIVING AT HIS OR HER FINDINGS.

AS I SAID, THIS IS JUST ONE EXAMPLE OF IT. IT PERMEATES THE CRIMINAL JUSTICE PROCESS. THERE IS A DIFFERENCE RECOGNIZED BY THE COURTS, EVEN WITH RESPECT TO SHACKLING AND JAIL CLOTHING BETWEEN PROCEEDS IN FRONT OF A JUDGE AND PROCEEDINGS IN FRONT OF A JURY. IN THE LATTER CASE STRICTLY FORBIDDEN, IN THE FORMER CASE PRESUMED NOT TO MAKE DIFFERENCE AT ALL.

I KNOW YOU HAVEN'T HIT THAT POINT HARD. THAT HASN'T BEEN ONE OF YOUR CONCERNS, AND I THINK THAT'S A REALISTIC ASSESSMENT. THAT JUST DOESN'T HAPPEN HERE, BUT I WANTED TO SPEAK TO THAT BECAUSE IT SEEMS TO ME THAT WOULD BE A CONCERN. SOMEONE MIGHT WANT TO RAISE IT MIGHT WANT TO AT LEAST HAVE ANSWERED. I THINK I HAVE DONE THAT.

HERE I FIND THAT THE POLICY IS ALSO REASONABLE BECAUSE OF THE NATURE OF THE PRACTICE IN THIS DISTRICT. WE ARE A VERY HIGH VOLUME DISTRICT. I THINK MAYBE FOURTH MOST CASES IN THE UNITED STATES. THE NUMBERS DON'T LIE. THE CALENDARS ARE FULL. THE JUDGES WHO WORK VERY HARD HERE HAVE AN EXCEEDINGLY HIGH CRIMINAL DOCKET, VERY DIFFICULT TO KEEP THAT DOCKET GOING. AND FRANKLY, TO HONOR OTHER RIGHTS OF THE [140] DEFENDANTS UNLESS THERE IS SOME EFFICIENCY IN THE WAY THAT CASES ARE HANDLED. I CAN IMAGINE AT SOME POINT

IF WE HAD THESE RESTRAINTS OFF, OFF AND ON IN EVERY SINGLE CASE THAT WE BE RISKING SOME AT SOME POINT KEEPING PEOPLE IN CUSTODY TOO LONG BEFORE WE ADJUDICATED THEIR MATTERS. EVEN IF I TAKE THE ESTIMATE OF DEPUTY JOHNSON THAT IT'S TWO AND A HALF MINUTES, IF YOU MULTIPLY THAT TIMES A TYPICAL CALENDAR FOR ME, 25 OR 30 CASES, THERE IS AN EXTRA HOUR OF TIME THAT GOES INTO THE SHACKLING AND THE UNSHACKLING. I THINK THAT THE UTILITY OF THE PRACTICE, A STANDARD PRACTICE OF KEEPING PEOPLE, WHICH IS SUPPORTED BY OTHER REASONS. THIS IS AN ANCILLARY REASON BUT I THINK THE UTILITY OF A PRACTICE LIKE THAT MAKES GREAT SENSE WHERE YOU HAVE HIGH VOLUME, AND IN PARTICULAR, WHERE YOU HAVE MULTIPLE DEFENDANTS APPEARING AT THE SAME TIME IN COURT.

THE FOCUS OF THIS MOTION IS REALLY THE PLEAS IN FRONT OF THE MAGISTRATE JUDGES AND PRELIMINARY PROCEEDINGS IN FRONT OF THE MAGISTRATE JUDGES. I HAVE GIVEN MY EXPERIENCE ABOUT OTHER PRELIMINARY PROCEEDINGS IN FRONT OF MAGISTRATE JUDGES BESIDE THE PLEAS. BUT I AM INFORMED THAT THE MAGISTRATE JUDGES HERE SORT OF LIKE THE METHOD USED IN ARIZONA WITH STREAMLINE WILL TAKE AS MANY AS SIX PLEAS AT THE TIME WHICH INVOLVES SIX DEFENDANTS BEING IN COURT PLEADING GUILTY, MIND YOU, TO A

FELONY. AND THAT'S PART OF THE ASSESSMENT HERE.

YOU ASKED WHAT DO WE KNOW ABOUT THESE PEOPLE. ALL [141] WE KNOW IN MANY INSTANCES THAT THEY ARE WILLING TO ADMIT A FELONY CONDUCT. THAT'S THE WHOLE GENESIS FOR BEING IN FRONT OF THE MAGISTRATE JUDGE IN MASS LIKE THAT. I THINK THAT'S A VALID FACTOR THAT THE COURT CAN TAKE INTO CONSIDERATION IN BALANCING THE LEVEL OF RESTRAINT HERE.

SO I AM GOING TO DO A WRITTEN ORDER THAT MORE SUCCINCTLY SUMS UP MY FINDINGS. BUT I FIND THAT THIS PRACTICE OF SHACKLING DOES NOT VIOLATE THE FOURTH AMENDMENT. IT DOES NOT VIOLATE IN PARTICULAR THE REASONABLENESS STANDARD THERE. I FIND THAT IT IS, IN FACT, REASONABLE GIVEN THE JUSTIFICATIONS FOR IT, GIVEN THE ANECDOTAL EVIDENCE, GIVEN THE UTILITY THAT IT SERVES IN A BUSY BORDER DISTRICT. WHILE I APPRECIATE THAT SOME OF THE DEFENDANTS DON'T LIKE IT AND IT IS EMBARRASSING TO SOME, ON THAT POINT, AGAIN, I DON'T WANT TO SEEM INSENSITIVE, BUT THE SPECTER OF FAMILY MEMBERS COMING IN AND SEEING THEM IN CHAINS HAS BEEN RAISED. I CAN WELL IMAGINE THAT'S EMBARRASSING BUT IS IT REALLY THAT MUCH MORE EMBARRASSING THAN SEEING THEM IN A JUMPSUIT IN A COURTROOM ANSWERING TO A CRIMI-

NAL CHARGE OR PLEADING GUILTY TO A CRIMINAL CHARGE? YOU ACKNOWLEDGED AT ONE POINT THAT THESE THINGS ARE MATTERS OF DEGREE, AND I THINK THERE ARE. I THINK IT'S THE REASON NOT INCLUDED IN YOUR CHALLENGES ANY CHALLENGE TO THE FACT THAT DEFENDANTS APPEAR IN JUMPSUITS IN FRONT OF THE JUDGES OR IN FRONT OF THE GALLERY. SO THEY ARE MATTERS OF DEGREE.

[142]

I COME TO A DIFFERENT CONCLUSION ABOUT THE PRESENCE OF THOSE SHACKLES ON DEFENDANTS AND THE DEGREE TO WHICH THAT'S DIGNITY-STRIPPING OR SHAPES THEIR PERCEPTION OR SOMEHOW HAS ANY INFLUENCE WHATSOEVER ON THE OUTCOMES COMES IN THE CRIMINAL SYSTEM OR IN OUR COURT AND THE DECISIONS BEING MADE BY JUDGES.

AS I SAID, I WILL HAVE A MORE SUCCINCT WRITTEN ORDER THAT MEMORIALIZES ALL THOSE FINDINGS.

BUT I APPRECIATE THE ARGUMENTS THAT WERE MADE. WITH ALL RESPECT, THE EMERGENCY MOTIONS IN THE THREE CASES THAT ARE BEFORE ME ARE DENIED FOR THOSE REASONS.

MR. COLE, MAKE SURE YOU FOLLOW UP AND AUGMENT THE RECORD WITH THE PHOTOS THAT I HAVE ASKED FOR OF THE RESTRAINTS IN PLACE ON SOMEBODY.

MR. COLE: YES, YOUR HONOR.

THE COURT: DEPUTY JOHNSON, FOR EXAMPLE.

MR. COLE: YES.

MR. CAHN: ONE LAST POINT WHICH IS—AND I HAVE NEVER BEEN COMPLETELY CLEAR ON THAT, COMPLETELY CLEAR HOW THAT RULE WORKS, BUT I AM REQUIRED AT THIS POINT TO ASK THE COURT TO STAY IMPLEMENTATION OF THE ORDER PENDING APPEAL.

THE COURT: OKAY.

MR. CAHN: YOU ARE FAMILIAR WITH THE STANDARDS. I AM GOING TO WASTE TIME.

THE COURT: THIS IS AN ONGOING PRACTICE, THOUGH, RIGHT?

[143]

MR. CAHN: YES.

THE COURT: I WOULD DENY THAT AND LET YOU ASK FOR YOUR EMERGENCY RELIEF. YOU CAN FILE AN EMERGENCY MOTION WITH THE NINTH CIRCUIT; RIGHT?

MR. CAHN: I AM AWARE, BUT THE NINTH CIRCUIT DOES REQUIRE ME TO ASK YOU FIRST.

THE COURT: AS A PROCEDURAL PREREQUISITE?

MR. CAHN: YES. I WANT TO MAKE SURE I—

THE COURT: THE MOTION IS DENIED. THE POLICY—OCTOBER 21ST, IS THAT WHEN IT STARTED?

MR. COLE: YES.

THE COURT: SO IT'S NOT ABOUT TO BE HATCHED. IT'S BEEN IN EFFECT. I FIND IT WOULD BE DISRUPTIVE AT THIS POINT TO FORBID THE MARSHALS FROM DOING IT, PARTICULARLY, BECAUSE I DON'T FIND ANY CONSTITUTIONAL VIOLATION HERE.

THANK YOU, MR. CAHN.

MR. COLE, THANK YOU BOTH.

MR. COLE: THANK YOU, YOUR HONOR.

—OOO—

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 3:13-MJ-3882-JMA-LAB

UNITED STATES OF AMERICA, PLAINTIFF

v.

MOISES PATRICIO-GUZMAN, DEFENDANT

Oct. 31, 2013
3:03 P.M.
San Diego, California

TRANSCRIPT OF DIGITALLY RECORDED PROCEEDINGS
(CHANGE OF PLEA)

BEFORE THE HONORABLE JAN M. ADLER, MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

MATTHEW SUTTON
U.S. Attorneys Office
Southern District of California
880 Front Street, Room 6293
San Diego, California 92101-8893
(619) 557-5610

FOR THE DEFENDANT:

KAREN LEHMANN
Assistant Federal Defender
Federal Defenders of San Diego
225 Broadway, Suite 900
San Diego, CA 92101
(619) 234-8467

[2]

P R O C E E D I N G S

THE CLERK: Calling matter No. 12 from the calender. 13-MJ-3282, United States of America versus Moises Patricio-Guzman. On calendar for a preliminary hearing.

MS. LEHMANN: I'm Karen Lehmann of Federal Defenders, for Ms. Miller from my office, for Mr. Patricio.

(Indiscernible.)

(Pause.)

MS. LEHMANN: Your Honor, before we begin with this change of plea, I would just note that he is in restraints. This is very likely his last court appearance, so my objection will be brief. But since it is the sentencing and, therefore, an extremely important hearing for Mr. Patricio, I would ask if the Court would at least consider removing his wrist shackles for today's hearing.

THE COURT: What is the Government's position, please?

MR. SUTTON: Your Honor, no objection to removing the shackling, as we would be requesting immediate sentencing in this case right after the change of plea.

THE COURT: All right. I will order the marshals to remove the wrist shackles. Leave the leg shackles only, [3] please.

MS. LEHMANN: Thank you.

(Pause.)

THE COURT: Thank you.

(Pause.)

THE COURT: Good afternoon, sir.

Your attorney has informed me you are prepared to plead guilty today to the misdemeanor charge in your complaint, which is Count 2. Is that correct?

THE DEFENDANT THROUGH THE INTERPRETER: Yes, that's correct.

THE COURT: Do you feel like you've had a sufficient opportunity to speak with your attorney about the charges against you and your options, prior to coming to court?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: Are you satisfied with the advice you've received?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: And it's my understanding that you want to plead guilty to the misdemeanor in Count 2

in exchange for the Government's promise to move to dismiss the felony charges in Count 1. Is that correct?

THE DEFENDANT THROUGH THE INTERPRETER: Yes, that's correct.

THE COURT: It is also my understanding that you have [4] agreed to be sentenced immediately and to waive any right to appeal or otherwise attack your conviction. Is that right?

THE DEFENDANT THROUGH THE INTERPRETER: Yes, that's correct.

THE COURT: Sir, have you taken any medication, drugs, or any other such substance within the past 72 hours?

THE DEFENDANT THROUGH THE INTERPRETER: No.

THE COURT: Has anyone made any promises or representations to you or forced you in any way to get you to plead guilty?

THE DEFENDANT THROUGH THE INTERPRETER: No.

THE COURT: You should be aware you have the following constitutional rights. You have the right to plead not guilty and to persist in that plea. You have the right to a public trial. You have the right to be—I'm sorry. You have the right to the assistance of counsel throughout all proceedings, including a trial.

You have the right to confront and cross-examine witnesses against you. You have the right to present a defense and a right to have witnesses subpoenaed to

court to testify on your behalf. And you have the right against compelled self-incrimination, which means you cannot be forced to testify at any hearing or trial, and the Government may not comment upon your silence.

Do you understand you have all of those rights?

[5]

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: If you plead guilty, there will be no trial. You'll be giving up your right to a trial and the other constitutional rights I've just gone over with you.

Do you understand that?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: And do you agree to give up those rights?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: Sir, you are charged in Count 2 with illegally entering the United States.

Do you understand that by pleading guilty to this offense, you will be admitting that you were not a citizen of the United States at the time of the offense, and you unlawfully entered or attempted to enter the United States at a time and place other than as designated by immigration officers; or eluded examination and inspection by immigration officers; or attempted to enter or entered the United States by a willfully false

representation or the willful concealment of a material fact? Do you understand that?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: Do you understand the maximum penalties for this offense are up to six months in custody, a fine of $5,000, and a special assessment of $10?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: Do you also understand that as a result [6] of your conviction for this offense, you may be removed from the United States, denied citizenship, or denied admission to the United States in the future?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: You understand that once you're sentenced, you cannot withdraw the guilty plea you're making here today?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: And do you understand that as part of your agreement with the Government, you are giving up the right you may have to appeal or otherwise attack this conviction and sentence?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: Before I can accept your guilty plea, I have to make sure there's a factual basis for the plea.

I'm going to ask Ms. Lehmann to set forth the factual basis for the plea.

MS. LEHMAN: Your Honor, I'm going to defer to the Government.

MR. SUTTON: Thank you, your Honor.

THE COURT: The Government's (indiscernible).

MR. SUTTON: Your Honor, the defendant was an alien and not a citizen of the United States at the time of the offense. And on or about October 19th, 2013, the defendant attempt—entered the United States at a time and place other [7] than as designated by immigration officers, in that he was found in the United States approximately seven miles west of the Tecate/California port of entry and two miles north of the United States/Mexico international border.

THE COURT: All right. Sir, are each of the facts that were stated by the prosecutor, true?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: And is the Government satisfied with the factual basis for the plea?

MR. SUTTON: Yes, your Honor.

THE COURT: Ms. Lehmann, (indiscernible) voluntarily and with your (indiscernible)?

MS. LEHMANN: It is, your Honor.

THE COURT: I find the defendant's plea of guilty is made knowingly and voluntarily and with a full understanding of the nature of the charge, the rights and consequences of the plea, and that there is a factual

basis for the plea. I will therefore accept the defendant's plea.

I'll now proceed with immediate sentencing.

MR. SUTTON: Thank you, your Honor.

THE COURT: Ms. Lehmann?

MS. LEHMANN: Thank you, your Honor.

Under the terms of the agreement with the Government, we are requesting a sentence of 30 days. I anticipate the Government will be requesting a sentence of 60 days on this [8] misdemeanor.

The terms of the agreement were that Mr. Patricio plead guilty at the first possible court hearing. He has done so. Waiving, of course, all of his rights to make any sort of motions or arguments or a trial. And I think his exceptionally speedy resolution of this case merits a 30-day sentence.

In addition, he has no pretrial criminal history. He is a family man. He comes to the United States—or came to the United States to look for work. And he has been married for ten years. His wife and their three children live in Mexico. He needed money particularly to send the children to school, to pay their school fees.

As soon as he is removed from the United States, he will be going back to Sinaloa. He will be working as a fieldworker, supporting his family. He's also needed by his parents, who are elderly and don't have anybody else to rely on in Mexico.

I think he understands, now, that there are serious consequences for coming here without permission, and

I think that this case has impressed upon him the importance of remaining in Mexico. And for all of these reasons, I think 30 days is sufficient, and we won't see him again after this.

THE COURT: All right. And just to confirm, there is no criminal history? Is that—

MS. LEHMANN: That is my understanding.

[9]

MR. SUTTON: That is correct, your Honor.

THE COURT: Okay. Would the Government like to be heard?

MR. SUTTON: Yes, very briefly, your Honor.

The United States would recommend a sentence of 60 days in custody. As defense counsel noted, this defendant does not have any criminal history. Would note that he has one prior removal from the United States, and he's also been arrested approximately 18 times by border patrol since 2005. And it appears that the incident in question—from this most recent event—that he admitted he was acting as a foot guide for three other individuals. And that perhaps some of those other occasions, when he was encountered by border patrol, he had been acting as a foot guide as well.

THE COURT: All right. Thank you. Any—(indiscernible).

MS. LEHMANN: Your Honor, I have a hard time rebutting what's—what's, you know, been provided to the Government in confidence or without witnesses here. I don't know if that's true or not, but I do know

that the decision was made to give him a misdemeanor offer to illegal entry.

My suspicion is that when he was arrested, he was forthcoming with agents. And in light of his unique acceptance of responsibility and his very, very quick decision to plead guilty, I still think 30 days would be sufficient.

[10]

THE COURT: Thank you.

All right. I'm now going to impose the sentence in this matter. But before I do, I would like to give the defendant the opportunity to say anything you would like to. You don't have to say anything, but if you would like to address the Court, you're welcome to.

THE DEFENDANT THROUGH THE INTERPRETER: I did violate the laws here of the United States, and I wish to apologize. That's it.

THE COURT: All right. Thank you, sir.

All right. In imposing the sentence in this matter, I have gone and applied the factors set forth in Title 18 United States Code Section 3553(a).

I must consider the nature and the circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense; to promote respect for the law; and to provide just punishment for the offense; to afford adequate deterrence to any future criminal conduct the defendant might commit; to protect the public from any further crimes the defendant might commit; and to provide the defendant with any needed educational or vocational training, medical care, or oth-

er correctional treatment in the most effective manner. I must also consider the kinds of sentences available. Because this is a plea to a class B misdemeanor, the sentencing [11] guidelines are not applicable.

I have heard from Ms. Lehmann as to the nature and care—and the circumstances of the offense and the history of the defendant. And I have also heard from the Government in that regard. Here the defendant has no prior criminal history. He does have some prior contacts with law enforcement but no prior criminal history.

He appears to recognize the seriousness of the offense he has committed. He has shown a willingness to recognize this at the earliest moment. And for all of those reasons, given the lack of any prior criminal history, I do believe that a 30-day sentence is appropriate in this matter. That is the sentence I will impose.

What is the Government's position as to the fine and special assessment?

MR. SUTTON: Your Honor, we move to remit, and I do not believe a fine is appropriate.

THE COURT: All right. The Government's motion is made, and I will not impose a fine or a special assessment. Thank you.

MS. LEHMANN: And, your Honor, under the terms of our oral agreement, the appeal has been waived.

THE COURT: Thank you so much.

MR. SUTTON: Thank you, your Honor.

(Conclusion of proceedings.)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case Nos. 13MJ3860-RBB, 13CR3670-BTM, 13CR0789-CAB, 98CR1733-BTM, 09CR1070-BEN, 09CR7026-IEG, 11CR0361-H, 12CR0693-MMA, 12CR0818-DMS, 12CR1283-JM, 12CR1583-BTM, 13MJ3867-RBB, 13MJ-3834-RBB, 13MJ3858-RBB, 13MJ3872-BLM, 13MJ3873-BLM, 13MJ3874-BLM, 13MJ3875-BLM, 13MJ3875-BLM, 13MJ3876-BLM, 13JM3877-BLM, 13MJ3871-BLM, 13MJ3880-BLM, 13MJ3881-BLM, 13MJ3882-BLM, 13MJ3884-BLM, 13MJ3885-BLM, 13MJ3886-BLM, 13MJ3216-WMC, 13MJ3868-BLM, 13MJ3869-BLM, 13MJ3883-BLM, 13MJ3887-BLM, 13MJ3804-RBB, 13MJ3870-BLM, 13MJ3888-BLM

UNITED STATES OF AMERICA, PLAINTIFF

v.

KARINA SALGADO, PEDRO LUIS FABELA-ACOSTA, JULIO RODRIGUEZ-ZARATE, DAVID PEREZ, VERONICA ISABEL THING, MARIO PEREZ-RIVAS, JORGE MARTINEZ-HERNANDEZ, LORENA VASQUEZ, TYRONE MITCHELL PICKARD, LONNIE HEATH INGRAM, ADRIAN SAUZ-TORRES, MERVIN BARCLAY DAVIS, ANA LUCIA RUIZ DEL TORO, JASMIN MORALES, BEATRIZ PLASENCIA SAEZ, MICHELLE YAZBETH PINA, FERMIN CHAVEZ CRUZ, ISIS CARDENAS-REYES, YRENNE MANRIQUEZ-LEON, ALBERTO COTA, CARLOS EDWARD DURAN, ANIBAL CHAVEZ-DAMIAN, FEDERICO MORALES, CARLOS CLEMENTE-LOPEZ, MOISES PATRICIO-GUZMAN, DOLORES ARGAMANEZ-OROZCO, BLAS SABINAS-HERNANDEZ, AGUSTIN RODRIGUEZ-PERALTA, JOSEPH MORENO, KEVIN MURILLO, MARCELA PALACIO RODRIGUEZ, ILDIKO CLARA NEMETH, SAM KHOLI, ANGELA REBECCA

JONES, ANGEL NIETO-GARCIA, RODRIGO ARELLANO, III, DEFENDANTS

San Diego, California
Mon., Oct. 21, 2013
P.M. Session

TRANSCRIPT OF CRIMINAL DUTY LOG

BEFORE THE HONORABLE BARBARA LYNN MAJOR
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

WILLIAM COLE
ALEX MARKLE
Assistant U.S. Attorneys
880 Front Street
San Diego, California 92101

FOR THE DEFENDANT NO. 1:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 2:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 3:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 4:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 5:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 6:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 7:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 8:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 9:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 10:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 11:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 12:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 13:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 14:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 15:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 16:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 17:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 18:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 19:

RICHARD BITTERS
Attorney at Law

FOR THE DEFENDANT NO. 20:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 21:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 22:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 23:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 24:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 25:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 26:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 27:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 28:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 29:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 30:

Federal Defenders of San Diego
BY: KIMBERLY TRIMBLE, ESQ.

FOR THE DEFENDANT NO. 31:

NANCEE S. SCHWARTZ
Attorney at law

FOR THE DEFENDANT NO. 32:

Not present

FOR THE DEFENDANT NO. 33:

Not present

FOR THE DEFENDANT NO. 34:

Not present

FOR THE DEFENDANT NO. 35:

Not present

[5]

SAN DIEGO, CALIFORNIA—
MONDAY, OCT. 21, 2013
1:13 P.M.

THE COURT: GOOD AFTERNOON, EVERYONE.

I WANT TO THANK FEDERAL DEFENDERS. I UNDERSTAND WE STILL HAVE DEFENDANTS, BUT YOU HAVE OTHER PEOPLE OVER THERE PROCESSING THEM, AND I APPRECIATE THAT. THAT WAY WE CAN GET STARTED.

THE CLERK: FOR THE RECORD, IF WE CAN BEGIN WITH THE MATERIAL WITNESSES FROM ITEM NO. 1. CASE NO. 13MJ3860. MATERIAL WITNESSES ARE JOSE CERVANTES-LOPEZ—PLEASE RAISE YOUR HAND—AND VALENTE SANCHEZ-MAGANA. BOTH OF WHICH HAVE ATTORNEY REZA KERAMATI ASSIGNED, JUDGE. AND THEY HAVE BUSINESS CARDS.

THE COURT: PERFECT.

ALL RIGHT. GENTLEMEN, I'M SPEAKING TO BOTH OF YOU. NO CRIMINAL CHARGES HAVE BEEN FILED AGAINST ANY—EITHER OF YOU. EACH OF YOU IS HERE BECAUSE SOMEBODY ELSE HAS BEEN ARRESTED AND CHARGED WITH A VIOLATION OF UNITED STATES LAWS, AND IT IS BELIEVED THAT YOU HAVE SEEN OR HEARD SOMETHING THAT WOULD BE HELPFUL TO THE CRIMINAL CASE. BECAUSE YOU ARE A POTENTIAL WITNESS FOR THAT CRIMINAL CASE, YOU ARE GOING TO BE HELD HERE IN THE UNITED STATES PENDING THE RESOLUTION OF THAT CRIMINAL CASE.

AS A MATERIAL WITNESS, YOU HAVE CERTAIN RESPONSIBILITIES AND OBLIGATIONS, SO I HAVE APPOINTED A [6] LAWYER AT NO

COST TO YOU TO REPRESENT EACH OF YOU IN THIS MATTER. EACH OF YOU HAS BEEN GIVEN A BUSINESS CARD FOR YOUR LAWYER. IN ADDITION, WE WILL NOTIFY EACH OF YOUR LAWYERS THAT HE OR SHE HAS BEEN APPOINTED TO REPRESENT YOU, AND THAT LAWYER WILL BE IN CONTACT WITH YOU IN THE NEAR FUTURE AND REPRESENT YOU THROUGHOUT THE REMAINING CASE.

BECAUSE YOU ARE A WITNESS TO THE CHARGED CRIME, YOU MUST STAY HERE IN THE UNITED STATES AND BE AVAILABLE TO TESTIFY ABOUT EVERYTHING THAT YOU SAW AND HEARD. CRIMINAL MATTERS CAN BE LENGTHY, SO I AM SETTING BAIL FOR EACH OF YOU. IF YOU ARE ABLE TO SATISFY THE BAIL CONDITIONS THAT I SET, YOU WILL BE RELEASED FROM CUSTODY FOR THE REMAINDER OF THE CRIMINAL MATTER. IF YOU ARE UNABLE TO SATISFY THE BAIL CONDITIONS, THEN YOU WILL HAVE TO REMAIN IN CUSTODY UNTIL THE CRIMINAL CASE IS OVER OR UNTIL ARRANGEMENTS CAN BE MADE TO PRESERVE YOUR TESTIMONY.

HERE ARE THE BAIL CONDITIONS THAT I AM SETTING FOR EACH OF YOU, AND YOU MUST COMPLY WITH ALL OF THESE: YOU MUST NOT COMMIT A FEDERAL, STATE OR LOCAL CRIME DURING THE PERIOD OF RELEASE. YOU MUST MAKE ALL OF YOUR COURT APPEARANCES. YOU MUST TESTIFY

HONESTLY AND TRUTHFULLY ABOUT EVERYTHING THAT YOU SAW AND HEARD.

YOUR TRAVEL IS RESTRICTED TO THE STATE OF CALIFORNIA AND YOU MAY NOT ENTER MEXICO. YOU MUST REPORT FOR SUPERVISION TO THE PRETRIAL SERVICES AGENCY AS DIRECTED BY [7] THE ASSIGNED PRETRIAL SERVICES OFFICER AND PAY FOR THE REASONABLE COSTS OF SUPERVISION IN AN AMOUNT TO BE DETERMINED BY THE PRETRIAL SERVICES AGENCY AND APPROVED BY THE COURT.

YOU MAY NOT POSSESS OR USE ANY NARCOTIC, DRUG OR CONTROLLED SUBSTANCE WITHOUT A LAWFUL MEDICAL PRESCRIPTION. YOU MAY NOT POSSESS ANY FIREARM, DANGEROUS WEAPON OR DESTRUCTIVE DEVICE DURING THE PENDENCY OF THE CASE. YOU MUST READ OR HAVE EXPLAINED TO YOU AND THEN ACKNOWLEDGE UNDERSTANDING OF THE ADVICE OF PENALTIES AND SANCTIONS FORM.

YOU MUST PROVIDE A CURRENT RESIDENCE ADDRESS AND TELEPHONE NUMBER PRIOR TO YOUR RELEASE FROM CUSTODY AND KEEP IT CURRENT WHILE THE CASE IS PENDING. YOU MUST SATISFY ANY AGENCY CONDITIONS REQUIRED TO LEGALLY REMAIN IN THE UNITED STATES DURING THE PENDENCY OF THE CRIMINAL PROCEEDING.

AT THE CONCLUSION OF THE CASE, YOU MUST SURRENDER TO THE UNITED STATES

MARSHAL SERVICE OR THE DEPARTMENT OF HOMELAND SECURITY AS DIRECTED BY THE COURT, PRETRIAL SERVICES, AN ATTORNEY OR AGENT FOR THE UNITED STATES OR YOUR LAWYER. AND EACH OF YOU MUST EXECUTE A PERSONAL APPEARANCE BOND IN A SPECIFIC AMOUNT AND IT MUST BE SECURED BY A CASH DEPOSIT.

JOSE CERVANTES, WHO IS THAT? I'M SETTING YOUR BOND IN THE AMOUNT OF $7500; AND YOU MUST POST A CASH DEPOSIT OF $750.

AND VALENTE SANCHEZ. SIR, I'M SETTING YOUR BOND IN [8] THE AMOUNT OF $5,000; AND YOU MUST POST $500 CASH.

TALKING TO BOTH OF YOU AGAIN. IF YOU COMPLY WITH ALL OF THE CONDITIONS THAT I HAVE JUST TOLD YOU, INCLUDING SURRENDERING TO IMMIGRATION OFFICIALS AS DIRECTED, THE CASH DEPOSIT WILL BE RETURNED TO THE PERSON WHO POSTED IT AFTER YOU SURRENDER TO THE IMMIGRATION OFFICIALS.

IF YOU DO NOT COMPLY WITH ALL OF THESE CONDITIONS, THE UNITED STATES MAY PROCEED AGAINST YOU AND THE PERSON WHO POSTED THE BOND FOR THE FULL AMOUNT OF BOND, INCLUDING KEEPING ALL OF THE CASH; SO IT IS EXTREMELY IMPORTANT THAT YOU COMPLY WITH ALL OF THESE CONDITIONS.

MOST OF THE TIME THESE CASES DO NOT GO TO TRIAL, AND IF THAT HAPPENS HERE, YOU WILL BE REQUIRED TO SURRENDER TO IMMIGRATION OFFICIALS AND YOU WILL BE RETURNED TO YOUR HOME. IF THE CASE DOES GO TO TRIAL, YOU MUST REMEMBER THAT YOU ARE REQUIRED TO APPEAR IN COURT AS DIRECTED AND TO TESTIFY HONESTLY AND TRUTHFULLY ABOUT EVERYTHING THAT YOU SAW AND HEARD.

PLEASE REMEMBER THAT WHEN YOU ARE RELEASED FROM CUSTODY AND RETURNED TO YOUR HOME, THE UNITED STATES GOVERNMENT HAS A RECORD OF YOUR HAVING BEEN HERE ILLEGALLY BECAUSE THEY TOOK YOUR PICTURE AND FINGERPRINTS. THIS IS IMPORTANT, BECAUSE IF YOU RETURN TO THE UNITED STATES WITHOUT PERMISSION, YOU COULD BE ARRESTED AND CHARGED WITH A CRIME.

SO I WANT YOU TO SPEAK WITH THE LAWYER THAT I [9] APPOINTED TO REPRESENT YOU, ASK YOUR LAWYER ANY QUESTIONS THAT YOU HAVE, AND GIVE YOUR LAWYER ANY INFORMATION THAT YOU HAVE TO HELP YOUR LAWYER FIND A SURETY AND A PLACE FOR YOU TO STAY.

THAT'S IT FOR TODAY. GOOD LUCK TO BOTH OF YOU.

THE CLERK: FOR THE RECORD, DEFENDANT NOT IN CUSTODY, ITEM NO. 31 ON THE LOG, 13MJ3883, ILDIKO CLARA NEMETH.

MS. SCHWARTZ: GOOD AFTERNOON, YOUR HONOR. NANCEE SCHWARTZ ON BEHALF OF MS. NEMETH, WHO IS PRESENT BEFORE THE COURT ON A NOTICE TO APPEAR FOR APPOINTMENT OF COUNSEL, BOND AND RELEASE OF MATERIAL WITNESS.

THE COURT: ALL RIGHT. MA'AM, THIS IS YOUR INITIAL APPEARANCE, SO I HAVE TO GO THROUGH FOUR THINGS WITH YOU TODAY.

FIRST I'M GOING TO TELL YOU WHAT CRIME YOU'RE CHARGED WITH. SECOND, I'M GOING TO DISCUSS WITH YOU YOUR RIGHT TO COUNSEL. THIRD, I'M GOING TO SET A PRELIMINARY HEARING. AND, FINALLY, I'M GOING TO DISCUSS BAIL.

SO, FIRST, THE CRIME THAT YOU ARE CHARGED WITH. YOU ARE CHARGED WITH TRANSPORTATION OF ILLEGAL ALIENS. IT'S ALLEGED THAT ON OCTOBER 17TH, YOU HAD THE INTENTION OF VIOLATING THE IMMIGRATION LAWS OF THE UNITED STATES. YOU KNEW AND WERE IN RECKLESS DISREGARD OF THE FACT THAT AN ALIEN HAD COME TO, ENTERED AND REMAINED IN THE UNITED STATES, AND [10] YOU DID TRANSPORT OR MOVE THAT PERSON IN VIOLATION OF FEDERAL LAW.

DO YOU UNDERSTAND THAT THAT'S WHY YOU ARE HERE TODAY?

DEFENDANT NEMETH: YES.

THE COURT: WITH REGARD TO THAT CRIME, YOU HAVE THE RIGHT TO REMAIN

SILENT. THE UNITED STATES IS REQUIRED TO PROVE ITS CASE AGAINST YOU WITHOUT ANY HELP OR TESTIMONY FROM YOU. IF YOU DECIDE TO SPEAK WITH SOMEONE ABOUT THE CHARGE, YOU MAY STOP AT ANY TIME. IF YOU SPEAK WITH SOMEBODY ABOUT THE CHARGE, ANYTHING YOU SAY MAY BE USED AGAINST YOU.

YOU ALSO HAVE AN ABSOLUTE RIGHT TO HAVE AN ATTORNEY HELP YOU IN DEFENDING AGAINST THIS CHARGE.

DO YOU HAVE THE ABILITY TO HIRE A LAWYER, MA'AM?

DEFENDANT NEMETH: NO.

THE COURT: I HAVE IN FRONT OF ME A ONE-PAGE FINANCIAL AFFIDAVIT SIGNED BY YOU AT THE BOTTOM. IS EVERYTHING IN THIS DOCUMENT TRUE?

DEFENDANT NEMETH: THAT'S CORRECT.

THE COURT: DO YOU OWN YOUR HOUSE?

DEFENDANT NEMETH: NO, I DON'T. I'M PAYING—

MS. SCHWARTZ: SHE HAS ABOUT $25,000 IN EQUITY. DID I NOT MAKE THAT—I THINK I PUT IT ON THE SURETY AFFIDAVIT.

THE COURT: IT JUST SAYS THAT THERE IS A—

[11]

MS. SCHWARTZ: I BELIEVE IF YOU LOOK—

THE COURT: AT THIS POINT WHAT I'M GOING TO DO IS BASED ON THE INFORMATION IN HERE, I'M GOING TO PROVISIONALLY APPOINT—

MS. SCHWARTZ: OH, I'M SORRY. I SEE WHAT I DID. I PUT EQUITY IN THE PROPERTY OF 175,000. THAT'S—IF YOU LOOK ON THE FIRST PAGE OF THE SURETY ADDENDUM, SHE ACTUALLY HAS 25,000. THAT SHOULD SAY MORTGAGE OF.

THE COURT: ALL RIGHT. I DON'T HAVE THAT IN FRONT OF ME RIGHT NOW. I JUST WAS LOOKING AT THE FINANCIAL AFFIDAVIT.

MS. SCHWARTZ: OKAY. I APOLOGIZE.

THE COURT: SO, MA'AM, WHAT I'M GOING TO DO IS I'M GOING TO PROVISIONALLY APPOINT COUNSEL TO REPRESENT YOU, AND THEN I'M GOING TO MAKE A SUBSEQUENT DETERMINATION, GIVEN THAT YOU OWN A HOUSE, AS TO WHETHER YOU HAVE AN ABILITY TO PAY A PART OR ALL OF YOUR LAWYER —LAWYER'S COST.

DO YOU UNDERSTAND THAT?

DEFENDANT NEMETH: YES.

THE COURT: OKAY. SO WE'RE GOING TO ADDRESS THAT AT THE NEXT HEARING.

FOR RIGHT NOW, IT'S ALSO MY UNDERSTANDING THAT YOU'VE BEEN GIVEN THE OPPORTUNITY TO ENTER INTO THE PRETRIAL DIVERSION PROGRAM; IS THAT CORRECT?

DEFENDANT NEMETH: THAT'S RIGHT.

[12]

THE COURT: ALL RIGHT. AND IS THAT WHAT YOU INTEND TO DO AT THIS POINT?

DEFENDANT NEMETH: YES.

THE COURT: ALL RIGHT. BASED UPON THAT, I'M GOING TO APPOINT MS. SCHWARTZ TO REPRESENT YOU. I'M DOING THAT PURSUANT TO 3006(A).

MS. SCHWARTZ: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT. THE NEXT THING THEN THAT I NEED TO ADDRESS WITH YOU IS BOND. I WANT YOU TO LISTEN CAREFULLY. YOU MUST COMPLY WITH ALL OF THE CONDITIONS I'M ABOUT TO TELL YOU.

YOU MUST NOT COMMIT A FEDERAL, STATE OR LOCAL CRIME DURING THE PERIOD OF RELEASE. YOU MUST MAKE ALL OF YOUR COURT APPEARANCES.

WHY IS PRETRIAL SERVICES RECOMMENDING THE ENTIRE UNITED STATES?

MS. AJOU: YOUR HONOR, IF I MAY HAVE A MOMENT TO LOOK AT THE REPORT.

THE COURT: SURE.

MS. SCHWARTZ, WHY DOES THE DEFENDANT NEED TO TRAVEL WITHIN THE UNITED STATES?

MS. SCHWARTZ: YOUR HONOR, SHE—IT COULD BE CALIFORNIA, I THINK, AND NEVADA. SHE LIVES PART OF THE TIME IN NEVADA. HER FIANCE HAS A HOUSE THERE, AND THEY TRAVEL BETWEEN BOTH LOCATIONS. SHE WORKS, SHE'S SELF-EMPLOYED AS AN [13] INTERPRETER.

THE COURT: WHERE?

MS. SCHWARTZ: IN CALIFORNIA. SO I'M NOT SURE WHY PRETRIAL PUT THAT, EXCEPT IN THE PAST WE HAVE HAD CIRCUMSTANCES WHERE SOMEONE WANTS TO TRAVEL, AND WE'VE MODIFIED IT AT THE DISCRETION OF PRETRIAL SERVICES. BUT IF YOUR HONOR WOULD LIKE TO MAKE IT AT THIS POINT CALIFORNIA AND NEVADA IS FINE.

MS. AJOU: YOUR HONOR, ZENA AJOU ON BEHALF OF PRETRIAL SERVICES. IT APPEARS THAT MS. ORNELAS, WHO COMPLETED THE REPORT, IT LOOKS LIKE MS. NEMETH HAS FAMILY IN UTAH AS WELL AS IN NORTH CAROLINA, WHO SHE VISITS AND WHO IS IN SUPPORT OF HER; AND THAT'S THE REASON WHY MS. ORNELAS, I'M INFERRING, IS REQUESTING THAT TRAVEL.

MS. SCHWARTZ: THAT'S CORRECT, YOUR HONOR.

THE COURT: I MAY ALLOW THAT AT SOME POINT. AT THIS POINT, I DON'T KNOW ENOUGH ABOUT THE DEFENDANT. I WANT YOU RESIDING HERE IN THE SOUTHERN DISTRICT OF CALIFORNIA.

MS. SCHWARTZ: CENTRAL DISTRICT.

THE COURT: IS THAT WHERE YOU'RE AT? I WANT YOU THEN RESIDING IN THE CENTRAL DISTRICT OF CALIFORNIA. I ACTUALLY DON'T WANT YOU TRAVELING TO NEVADA UNTIL I FIND OUT MORE INFORMATION ABOUT YOU AND WHY YOU'RE TRAVELING THERE, WHETHER YOUR BOYFRIEND—I'M SORRY, FIANCE, MY MISTAKE. WHETHER YOUR FIANCE HAS ANY RELATIONSHIP TO THIS CASE.

[14]

AT THIS POINT, I'M JUST CONCERNED ABOUT YOU. AND SO AT THIS POINT I'M LIMITING YOUR TRAVEL TO THE STATE OF CALIFORNIA. SO YOU CAN TRAVEL WITHIN CALIFORNIA, BUT NOT OUTSIDE. YOU MAY NOT GO TO MEXICO. YOU MAY NOT TRAVEL TO NEVADA.

DO YOU UNDERSTAND ALL OF THAT?

DEFENDANT NEMETH: YES, I DO.

THE COURT: OKAY. CONTINUING ON.

YOU MUST REPORT FOR SUPERVISION TO THE PRETRIAL SERVICES AGENCY AS DIRECTED BY THE ASSIGNED PRETRIAL SERVICES OFFICER AND PAY FOR THE REASONABLE COST OF SUPERVISION IN AN AMOUNT TO BE DETERMINED BY THE PRETRIAL SERVICES AGENCY AND APPROVED BY THE COURT.

YOU MAY NOT POSSESS OR USE ANY NARCOTIC, DRUG OR CONTROLLED SUBSTANCE WITHOUT A LAWFUL MEDICAL PRESCRIPTION. YOU MAY NOT POSSESS ANY FIREARM, DANGEROUS WEAPON OR DESTRUCTIVE DEVICE DURING THE PENDENCY OF THE CASE. YOU MUST READ OR HAVE EXPLAINED TO YOU AND THEN ACKNOWLEDGE UNDERSTANDING OF THE ADVICE OF PENALTIES AND SANCTIONS FORM.

YOU MUST PROVIDE A CURRENT RESIDENCE ADDRESS AND TELEPHONE NUMBER PRIOR TO YOUR RELEASE FROM CUSTODY AND KEEP IT CURRENT WHILE THE CASE IS PENDING. YOU MUST ACTIVELY SEEK AND MAINTAIN FULL-TIME EMPLOYMENT, SCHOOLING OR A COMBINATION THEREOF. AND YOU MUST EXECUTE A PERSONAL APPEARANCE BOND IN THE AMOUNT OF $10,000 THAT'S SECURED BY YOUR SIGNATURE.

[15]

I SEE THAT YOU OWN A WEAPON. YOU HAVE TO GET RID OF THAT WEAPON.

DEFENDANT NEMETH: YES. I KNOW.

THE COURT: HAVE YOU DISCUSSED IT WITH PRETRIAL SERVICES?

DEFENDANT NEMETH: YES. YES, I HAVE.

THE COURT: ALL RIGHT. DO YOU UNDERSTAND, MA'AM, THAT YOU MUST COMPLY WITH ALL OF THE CONDITIONS THAT I HAVE JUST TOLD YOU ABOUT?

DEFENDANT NEMETH: YES.

THE COURT: ALL RIGHT. OKAY. THE FINAL THING THAT WE NEED TO DO—NO, NOT THE FINAL THING. TWO THINGS.

FIRST, I HAVE IN FRONT OF ME A STIPULATION OF FACT AND JOINT MOTION FOR RELEASE OF MATERIAL WITNESSES. IT'S FIVE PAGES LONG. ON THE FOURTH PAGE, THERE ARE THREE SIGNATURES. IS THE BOTTOM ONE YOURS?

DEFENDANT NEMETH: YES, MA'AM.

THE COURT: BEFORE YOU SIGNED THIS DOCUMENT, DID YOU READ THE ENTIRE DOCUMENT?

DEFENDANT NEMETH: YES.

THE COURT: ARE YOU FLUENT IN ENGLISH?

DEFENDANT NEMETH: YES.

THE COURT: DID YOU HAVE ENOUGH TIME TO DISCUSS THIS DOCUMENT WITH YOUR LAWYER?

DEFENDANT NEMETH: YES.

[16]

THE COURT: DID SHE EXPLAIN IT TO YOU AND ANSWER ALL OF YOUR QUESTIONS?

DEFENDANT NEMETH: YES, SHE HAS.

THE COURT: COUNSEL, ANY OBJECTION TO MY SIGNING THIS ORDER?

MS. SCHWARTZ: NO, YOUR HONOR.

THE COURT: GOVERNMENT?

MR. MARKLE: NO, YOUR HONOR.

THE COURT: ALL RIGHT. I'M GOING TO GO AHEAD AND SIGN THAT.

THE FINAL THING THEN IS WE NEED TO SET YOUR NEXT COURT APPEARANCE. THAT'S GOING TO BE THE TIME WHEN YOU WILL ENTER THE GUILTY PLEA AND ENTER INTO THIS PROGRAM IF THAT'S WHAT YOU DECIDE TO DO. AT THAT TIME, I WILL ALSO DISCUSS WITH YOU YOUR NEED, IF THERE IS ONE, TO TRAVEL TO NEVADA OR ANYWHERE ELSE, AS WELL AS THE ISSUES REGARDING WHETHER YOU HAVE THE ABILITY TO HIRE A LAWYER OR PAY PART OF MS. SCHWARTZ' FEES.

DO YOU UNDERSTAND ALL OF THAT?

DEFENDANT NEMETH: YES, I DO.

THE COURT: OKAY. LET'S SEE. I THINK I—

MS. SCHWARTZ: I BELIEVE IT'S OCTOBER 30TH, YOUR HONOR, IN FRONT OF—

THE COURT: NO. REMEMBER, WE MOVED THOSE—I'M OUT OF TOWN ON THE 30TH, SO WE MOVED THE 30TH TO THE 23RD. [17] THAT'S TOO SOON, BECAUSE IT'S WEDNESDAY. SO I WAS THINKING I CAN DO IT ON MY CRIMINAL CALENDAR. I CAN DO IT ON MY CRIMINAL CALENDAR ON THE 29TH. I

ALSO COULD DO IT ON MY CRIMINAL CALENDAR ON THE 5TH OR THE 7TH.

MS. SCHWARTZ: 29TH IS FINE, YOUR HONOR.

THE COURT: ALL RIGHT. THEN, MA'AM, YOU ARE ORDERED TO RETURN TO MY COURTROOM ON OCTOBER 29TH AT 10:30 A.M.

DO YOU UNDERSTAND YOU MUST BE HERE ON OCTOBER 29TH AT 10:30 A.M.?

DEFENDANT NEMETH: YES, I DO.

THE COURT: ALL RIGHT. YOU HAVE TO GO DOWNSTAIRS AND BE BOOKED AND FINGERPRINTED. MS. SCHWARTZ WILL TAKE YOU.

MS. SCHWARTZ: THANK YOU, YOUR HONOR.

THE COURT: CERTAINLY. GOOD LUCK TO YOU, MA'AM.

DEFENDANT NEMETH: THANK YOU.

THE CLERK: ITEMS NO. 2 AND 3 ON THE LOG, PLEASE. ITEMS NO. 2 AND 3.

FOR THE RECORD, ITEM NO. 2, 13CR3670-BTM, PEDRO LUIS FABELA-ACOSTA;

ITEM NO. 3, 13CR0789-CAB, JULIO CESAR RODRIGUEZ-ZARATE.

MS. TRIMBLE: GOOD AFTERNOON, YOUR HONOR. KIMBERLY TRIMBLE, FEDERAL DEFENDERS, ON ALL LOG MATTERS, UNLESS OTHERWISE NOTED.

[18]

THE COURT: ALL RIGHT. THANK YOU.

MR. MARKLE: GOOD AFTERNOON, YOUR HONOR. ALEX MARKLE FOR THE UNITED STATES ON ALL LOG MATTERS.

THE COURT: GREAT. THANK YOU.

MS. TRIMBLE: YOUR HONOR, I WOULD NOTE—

THE COURT: HANG ON. THEY DON'T HAVE THEIR HEADSETS ON YET.

GENTLEMEN, GO AHEAD AND HAVE A SEAT. ALL RIGHT. GO AHEAD AND HAVE A SEAT, GENTLEMEN.

MA'AM.

MS. TRIMBLE: YOUR HONOR, I WOULD NOTE THAT THESE INDIVIDUALS HAVE BEEN TAKEN IN WITH SHACKLES. THEY APPEAR TO HAVE SHACKLES ON THEIR HANDS TO THEIR WAIST AS WELL AS THEIR FEET. THE MATERIAL WITNESSES WHO WERE BROUGHT IN JUST PRIOR TO THESE INDIVIDUALS DID NOT HAVE ANY SHACKLES OF ANY KIND. THE OFFENSES AND CHARGES IN THIS CASE DON'T SHOW ANY FORM OF VIOLENCE, SO AT THIS TIME, WE'D ASK THAT THE SHACKLES BE IMMEDIATELY REMOVED.

THE COURT: ALL RIGHT. GOVERNMENT, WHAT'S YOUR POSITION ON THAT REQUEST?

MR. COLE: YOUR HONOR, WILLIAM COLE FOR THE UNITED STATES ON THIS MATTER.

THE COURT: SURE.

MR. COLE: THE GOVERNMENT WOULD OPPOSE THE REQUEST. THE MARSHALS ARE GIVEN THE RESPONSIBILITY OF PROTECTING THE [19] COURTROOM AND SECURING THE SAFETY OF THE PERSONNEL IN THE COURTHOUSE AND THE PUBLIC IN THE COURTHOUSE, AND THEY HAVE APPARENTLY DETERMINED THAT SHACKLING IS APPROPRIATE.

THE COURT: WAIT. STOP FOR A SECOND. ONE OF THE DEFENDANTS CAN'T HEAR ME.

MS. TRIMBLE: AND I WOULD NOTE THAT THE DEFENDANT CAN'T ADJUST HIS HEADSET ON HIS OWN WITH THE SHACKLES ON HIS ARMS.

THE COURT: AND LUCKILY THE INTERPRETER IS OVER THERE PROVIDING THE ASSISTANCE THAT'S NECESSARY.

CAN YOU HEAR ME NOW, SIR?

DEFENDANT FABELA: (THROUGH INTERPRETER) YES.

DEFENDANT RODRIGUEZ: (THROUGH INTERPRETER) YES.

THE COURT: FOR THE RECORD, BOTH OF THEM SAID YES.

SORRY, MR. COLE. GO AHEAD.

MR. COLE: YES, YOUR HONOR. THANK YOU.

I WAS JUST SAYING THAT THE MARSHALS HAVE APPARENTLY MADE A DETERMINATION THAT THESE DEFENDANTS SHOULD BE BROUGHT IN RESTRAINTS. AND UNDER NINTH CIRCUIT LAW, THE MARSHALS ARE GIVEN THE PRIMARY RESPONSIBILITY OF DETERMINING COURTROOM SECURITY MATTERS. UNLESS THERE IS AN EXTENUATING CIRCUMSTANCE PARTICULAR TO ONE OF THESE TWO DEFENDANTS, THE GOVERNMENT WOULD ASK THE COURT TO DEFER TO THE MARSHALS' DISCRETION IN THIS REGARD.

THE COURT: ALL RIGHT. FOR THE RECORD, I WILL STATE [20] THAT EARLIER THIS YEAR, THE UNITED STATES MARSHAL SERVICE APPROACHED THE DISTRICT COURT WITH ITS CONCERN THAT THE SYSTEM FOR HANDLING DEFENDANTS IN PLACE AT THE TIME WAS CREATING SIGNIFICANT SAFETY AND SECURITY CONCERNS AND DANGERS. THE UNITED STATES MARSHAL SERVICE ALSO ADVISED THAT THE EXISTING POLICY WAS OUT OF COMPLIANCE WITH THE NATIONAL UNITED STATES MARSHAL SERVICE POLICIES AND THAT THE—AND THE POLICIES UTILIZED BY OTHER SIMILARLY-SITUATED DISTRICTS.

SINCE THEN, THE DISTRICT JUDGES AND MAGISTRATE JUDGES HAVE HAD NUMEROUS DISCUSSIONS, FORMAL AND INFORMAL, WITH THE UNITED STATES MARSHAL SERVICE REGARDING THE SERVICES' REQUEST TO UTI-

LIZE FULL RESTRAINTS FOR IN-CUSTODY DEFENDANTS FOR NONJURY PROCEEDINGS.

I WILL NOTE FOR THE RECORD THAT THE NINTH CIRCUIT HAS APPROVED POLICY—OR HAS APPROVED A POLICY REQUIRING RESTRAINTS AT THE REQUEST OF THE UNITED STATES MARSHAL SERVICE IN NONJURY SITUATIONS, SUCH AS ARRAIGNMENT. THE NINTH CIRCUIT NOTED WITH APPROVAL THAT IT IS THE RESPONSIBILITY OF THE UNITED STATES MARSHAL SERVICE TO ENSURE COURT SECURITY AND SAFETY AND THAT IT IS PROPER TO DEFER TO THE JUDGMENT OF THE UNITED STATES MARSHAL FOR THE DISTRICT REGARDING APPROPRIATE PRECAUTIONS.

THE UNITED STATES SUPREME COURT HAS NOT DIRECTLY ADDRESSED THIS ISSUE BUT HAS NOTED THAT THE RULE AGAINST VISIBLE SHACKLING DID NOT APPLY, AND THAT'S A QUOTE, QUOTE, [21] DID NOT APPLY AT THE TIME OF ARRAIGNMENT OR LIKE PROCEEDINGS BEFORE THE JUDGE, CLOSED QUOTES.

FOR THE FOLLOWING REASONS, I FIND THAT THERE ARE VALID FACTS AND CIRCUMSTANCES SUPPORTING THE UNITED STATES MARSHAL'S REQUEST. INCLUDED ARE THE FOLLOWING: INITIALLY, THERE IS A UNITED STATES MARSHAL SERVICE POLICY IN PLACE THAT WAS IMPLEMENTED TO ENSURE THE SAFETY AND SECURITY OF THE DEFENDANTS, THE SERVICE EMPLOYEES AND EVERYBODY IN THIS COURTROOM. I AC-

CEPT THE UNITED STATES MARSHAL'S REPRESENTATION THAT THIS DISTRICT IS CURRENTLY OUT OF COMPLIANCE WITH THE APPLICABLE POLICIES.

THIS IS SIGNIFICANT BECAUSE AN INJURY OR DEATH COULD RESULT, AND IF SOMETHING WERE TO HAPPEN, THE LIABILITY FOR THE DECISION TO HANDLE SECURITY IN THE WAY THAT IT WAS HANDLED WOULD BE ON THE UNITED STATES MARSHAL SERVICE. THAT IS ONE OF THE REASONS THAT THE DISCRETION IS GIVEN TO THE UNITED STATES MARSHAL SERVICE AND ONE OF THE REASONS THAT IT IS APPROPRIATE FOR THE COURT TO DEFER TO THE DECISION MAKING DISCRETION OF THE UNITED STATES MARSHAL SERVICE.

IN ADDITION, I AM AWARE OF THE FACT THAT PRISON-MADE WEAPONS HAVE BEEN FOUND IN THE COURT HOLDING CELLS AND CELL BLOCK AREAS AND THERE HAVE BEEN SEVERAL INCIDENTS OF ASSAULTS BY PRISONERS IN COURT AND HOLDING CELL AREAS. OBVIOUSLY THESE CREATE A SIGNIFICANT DANGER.

THIS DISTRICT HAS TO DEAL WITH AN EXTREMELY LARGE [22] NUMBER OF PRISONERS WHO ARE TRANSPORTED ON A DAILY BASIS TO AND FROM COURT. THE TRANSPORTATION PROCESS IS ONE OF THE MOST DANGEROUS TIMES, BOTH FOR PHYSICAL DANGER AS WELL AS ESCAPE. AND GIVEN THE LARGE

NUMBER OF PEOPLE THAT ARE TRANSPORTED, THAT IS A SIGNIFICANT CONCERN.

THE SPECIFIC COURTROOM THAT WE ARE IN TODAY CREATES AN ADDITIONAL CONCERN. MAGISTRATE JUDGE COURTROOMS ARE SMALLER THAN DISTRICT JUDGE COURTROOMS. AS A RESULT, THE DEFENDANTS ARE IN VERY CLOSE PROXIMITY TO EVERYBODY ELSE IN THE COURTROOM. THE INTERPRETER, WHO IS RIGHT IN FRONT OF THEM, COUNSEL WHO IS DIRECTLY NEXT TO THEM, AND THEN THE PUBLIC, WHO IS LESS THAN ABOUT SIX FEET AWAY.

IN ADDITION, THE MAJORITY OF THE MAGISTRATE JUDGE COURTROOMS, AS WELL AS THE ONE THAT I CURRENTLY ARE USING, ARE LOCATED ON THE FIRST FLOOR, WHICH CREATE AN ADDITIONAL CONCERN. THE CLOSE PROXIMITY OF ALL OF THE INDIVIDUALS CREATES ANOTHER SAFETY CONCERN THAT I FIND TO BE VALID.

IN ADDITION, IN MAGISTRATE JUDGE COURTROOMS, THERE IS A VERY SMALL HOLDING CELL WHICH MUST ACCOMMODATE THE PRISONERS FOR TWO DIFFERENT COURTROOMS. THE NUMBER OF INDIVIDUALS WHO MUST BE HELD AND TRANSPORTED TO AND FROM THIS SMALL AREA ADDS ADDITIONAL CONCERNS TO THE SAFETY AND SECURITY FOR THE DEFENDANTS AND THE MARSHALS.

COMPLICATING THIS VERY CONGESTED AREA IS THE FACT THAT THE UNITED STATES MARSHAL SERVICE IS DRAMATICALLY [23] UNDERSTAFFED DUE TO SEQUESTRATION, BUDGET CUTS AND A HIRING FREEZE. DESPITE THEIR UNDERSTAFFING, THEY STILL MUST COVER TWO COURTHOUSES AND NUMEROUS COURTROOMS. THE LIMITED NUMBER OF U.S. MARSHALS CREATES A POTENTIAL IMPEDIMENT TO EFFECTIVELY RESPONDING TO A DANGER IN A CROWDED MAGISTRATE JUDGE COURTROOM OR HOLDING CELL AREA, AND THERE HAVE BEEN NUMEROUS EXAMPLES OF THAT PRECISE CONCERN HAPPENING.

IN ADDITION, MOST MAGISTRATE JUDGES, INCLUDING THIS COURT, HAVE LIMITED ACCESS TO COURTROOMS AND ARE LIMITED IN THE TIME THAT IS AVAILABLE IN COURT TO HANDLE CRIMINAL MATTERS DUE TO STAFFING AND BUDGETARY CONCERNS. AS A RESULT, AND BECAUSE WE MUST PROCESS A LARGE NUMBER OF CRIMINAL DEFENDANTS IN CRIMINAL MATTERS DURING THAT ALLOTTED TIME PERIOD, ALL OF THE MAGISTRATE JUDGES, INCLUDING MYSELF, ARE REQUIRED TO HANDLE MANY MATTERS AT THE SAME TIME DURING A JOINT PROCEEDING RATHER THAN EACH OF THEM INDIVIDUALLY. AND THE NUMBER OF DEFENDANTS IN THE COURTROOM ADD TO THE SAFETY ISSUES.

IN ADDITION, THIS IS ARRAIGNMENT, AND SECURITY INFORMATION REGARDING EACH DEFENDANT, INCLUDING GANG AFFILIATION AND HIS OR HER RELATIONSHIP WITH OTHER DEFENDANTS AND/OR GANGS IS OFTEN UNKNOWN OR INCOMPLETE AT THESE PRETRIAL PROCEEDINGS.

IN ADDITION, FOR SECURITY REASONS, RESTRAINED AND UNRESTRAINED DEFENDANTS CANNOT BE HELD IN THE SAME CELL OR [24] LOCATION. GIVEN THE SMALL MAGISTRATE JUDGE HOLDING CELL AREAS AND THE LARGE NUMBER OF DEFENDANTS HELD IN THEM, THE DEFENDANTS CANNOT BE RESTRAINED AND UNRESTRAINED IN THE HOLDING CELL AREA WITHOUT SIGNIFICANTLY ENDANGERING THE SECURITY AND SAFETY OF THE DEFENDANTS, UNITED STATES MARSHALS AND DEPUTY MARSHALS AND THE COURT PERSONNEL.

WHILE I DON'T FIND IT CONTROLLING, I THINK IT IS RELEVANT THAT THE—THAT OTHER DISTRICTS OF SIMILAR SIZE, NUMBER OF CRIMINAL DEFENDANTS AND MULTIPLE COURTHOUSES IN THE DISTRICT, ALMOST ALL OF THEM UTILIZE RESTRAINTS OF VARIOUS TYPES.

FINALLY, THIS IS A NONJURY PROCEEDING, AND THE FACT THAT THE DEFENDANTS ARE WEARING RESTRAINTS HAVE ABSOLUTELY NO BEARING ON ANY DECISION THAT I WILL MAKE.

FOR ALL OF THOSE REASONS, I FIND THAT IT IS APPROPRIATE THAT THE MARSHALS' REQUEST WAS APPROPRIATE, AND I DEFER TO THEIR REQUEST AND I DENY YOUR MOTION.

MS. TRIMBLE: YOUR HONOR, A FURTHER MOTION—AND FIRST, FOR THE OBSERVATION OF THE RECORD, THERE ARE TWO UNITED STATES MARSHALS PRESENT IN THIS COURTROOM, AS WELL AS THE COURTROOM SECURITY OFFICER AT THE ENTRANCE. THERE ARE ONLY TWO DEFENDANTS WHO ARE PRESENT IN THE JURY BOX AT THIS MOMENT.

THE NINTH CIRCUIT CASE THAT I BELIEVE YOUR HONOR IS REFERRING TO, HOWARD, COMES OUT OF THE EASTERN DISTRICT OF [25] CALIFORNIA—

THE COURT: CENTRAL.

MS. TRIMBLE: CENTRAL DISTRICT, I APOLOGIZE. AND IN THAT DISTRICT, ONLY LEG RESTRAINTS WERE USED. IT WAS ALSO DONE ON AN INDIVIDUALIZED BASIS, WHICH HAS NOT BEEN DONE WITH THESE INDIVIDUALS.

ALSO, IN THAT DISTRICT, THERE IS NO PRE-SECURITY CLEARING THE WAY THAT THERE IS IN THE SOUTHERN DISTRICT OF CALIFORNIA, PARTICULARLY FOR MR. FABELA-ACOSTA, WHO IS AT THE METROPOLITAN CORRECTIONAL CENTER. HE HAS ALREADY UNDERGONE SECURITY SCREENING FROM THE METROPOLITAN CORRECTIONAL

CENTER. THAT EXTRA SCREENING PROCESS IS WELL DOCUMENTED IN THE CASE OF UNITED STATES VS. MINERO-ROJAS, 11CR3253-BTM, WHICH IS OUT OF THIS DISTRICT.

THAT INDICATES IN THE SOUTHERN DISTRICT OF CALIFORNIA, BEFORE INDIVIDUALS ARE TAKEN FROM THE METROPOLITAN CORRECTIONAL CENTER TO MAKE THEIR INITIAL APPEARANCE, THERE IS ALREADY SCREENING DONE TO DISCOVER THINGS SUCH AS GANG AFFILIATIONS. AND THAT EXTRA SECURITY SCREENING IS NOT DONE IN OTHER DISTRICTS WHERE RESTRAINTS ARE USED. AND THE RESTRAINTS IN THOSE OTHER DISTRICTS THAT WERE UPHELD, AS I MENTIONED, WERE ONLY LEG RESTRAINTS; WHEREAS, THESE INDIVIDUALS ARE BEING HELD IN FULL RESTRAINTS.

SO BASED ON ALL OF THOSE ADDITIONAL FACTUAL FINDINGS, I WOULD RENEW MY REQUEST TO TAKE OFF THE SHACKLES. [26] AND IF THAT IS DENIED, THEN WE ASK THE INDIVIDUALS TO BE TAKEN OUT INDIVIDUALLY, BECAUSE THAT IS THE LEAST RESTRICTIVE MEANS THAT COULD ACCOMPLISH THE SAME SECURITY OBJECTIVES.

THE COURT: ALL RIGHT. ANYTHING THE GOVERNMENT WANTED TO ADD?

MR. COLE: WELL, YES, YOUR HONOR. I WOULD MENTION I THINK THE CHARACTERIZATION OF THE HOWARD CASE IS INCORRECT. THE HOWARD CASE DID NOT RE-

QUIRE INDIVIDUAL DETERMINATIONS. IT REQUIRED THE OPPORTUNITY FOR AN INDIVIDUALIZED DETERMINATION, BUT THE POLICY ITSELF WAS UPHELD.

AND WHEN INDIVIDUALIZED DETERMINATION IS MADE UNDER HOWARD, IT WAS CLEAR THAT THE DETERMINATION WAS WHETHER EXTENUATING CIRCUMSTANCES WARRANTED REMOVAL, NOT JUSTIFIED PLACEMENT OF THE SHACKLES. IT WAS WHETHER IT WOULD WARRANT REMOVAL. AND THE GOVERNMENT BELIEVES THAT NO FACTOR HAS YET BEEN BROUGHT FORWARD FOR THIS DEFENDANT, FOR EITHER ONE OF THESE DEFENDANTS, THAT WOULD JUSTIFY REMOVING THE RESTRAINTS.

THE COURT: ALL RIGHT. I AGREE WITH THE GOVERNMENT ON THE INTERPRETATION OF THE HOWARD DECISION. IT WAS MY UNDERSTANDING FROM READING THE DECISION THAT IT APPROVED OF THE POLICY, BUT THERE WAS AN OPPORTUNITY FOR THE LAWYER TO REQUEST THAT IT BE REMOVED AS TO SPECIFIC INDIVIDUALS BASED UPON ADDITIONAL FACTORS.

AND WHILE I ACCEPT YOUR REPRESENTATION THAT THERE IS SCREENING DONE ON THE INDIVIDUALS THAT ARE CURRENTLY BEING [27] HELD AT THE MCC, THERE STILL IS NO SCREENING AS TO ALL OF THE OTHER INDIVIDUALS BEING HELD WITH THESE DEFENDANTS. AS I INDICATED, THERE ARE A NUMBER OF DEFENDANTS WHO HAVE TO BE

BROUGHT OVER TO THIS COURTROOM FOR NEW COMPLAINTS. WE HAVE TO ACCOMMODATE BACK IN THE HOLDING CELL AREA A LARGE NUMBER OF DEFENDANTS, AND WE DON'T KNOW THEIR BACKGROUND, SO WE CAN'T POSSIBLY KNOW THIS DEFENDANT'S RELATIONSHIP TO ANY OF THOSE INDIVIDUALS.

IN ADDITION, AS I INDICATED, THE FACT THAT THEY ARE BEING—BEING SHACKLED HAS NO BEARING WHATSOEVER ON ANY DECISIONS THAT I'M GOING TO MAKE. ALL OF THE CASES THAT I HAVE REVIEWED WITH REGARD TO SHACKLING WERE VERY CONCERNED ABOUT THE PREJUDICE AGAINST THE DEFENDANT IF A JURY WERE TO KNOW, BECAUSE OF CONSIDERATIONS THAT WOULD BE INAPPROPRIATE, THAT THEY MIGHT ATTRIBUTE TO THE FACT THAT THE INDIVIDUAL IS SHACKLED. NONE OF THAT IS RELEVANT HERE.

AS A RESULT, I AGAIN AM GOING TO DENY YOUR REQUEST, AND AT THIS TIME, WE'RE GOING TO GO FORWARD WITH ARRAIGNMENT.

MS. TRIMBLE: YOUR HONOR, I WOULD JUST ASK AN EVIDENTIARY HEARING AS TO EACH OF THESE INDIVIDUALS FOR ALL OF THE FACTS THAT HAVE BEEN FOUND BY THE COURT AND AN INDIVIDUALIZED DETERMINATION AS TO WHETHER SHACKLING IS NECESSARY FOR EACH DEFENDANT.

THE COURT: I FIND THAT AN INDIVIDUAL DETERMINATION OF SHACKLING AS TO EACH OF THESE INDIVIDUALS IS NOT [28] WARRANTED, AGAIN, FOR ALL OF THE REASONS THAT I JUST STATED.

MS. TRIMBLE: AND THE REQUEST FOR THE EVIDENTIARY HEARING?

THE COURT: THAT'S WHAT I SAID, THERE IS NO NEED FOR AN EVIDENTIARY HEARING. I DENY THAT REQUEST.

ALL RIGHT. GENTLEMEN, I WANT BOTH OF YOU TO LISTEN VERY CAREFULLY. A FEDERAL GRAND JURY HAS RETURNED AN INDICTMENT CHARGING EACH OF YOU WITH A CRIME. YOU'RE GOING TO BE ARRAIGNED ON THE INDICTMENT.

THE CLERK: PEDRO LUIS FABELA-ACOSTA, IS THAT YOUR TRUE NAME?

DEFENDANT FABELA: (THROUGH INTERPRETER) YES, IT IS.

THE CLERK: YOU ARE HEREBY INFORMED THAT AN INDICTMENT HAS BEEN FILED CHARGING YOU WITH CONSPIRACY TO DISTRIBUTE HEROIN, POSSESSION OF HEROIN WITH INTENT TO DISTRIBUTE AND AIDING AND ABETTING.

COUNSEL, HAVE YOU RECEIVED A COPY AND DO YOU WAIVE FURTHER READING?

MS. TRIMBLE: YES. AND SO WAIVED.

THE CLERK: THANK YOU.

JULIO CESAR RODRIGUEZ-ZARATE, IS THAT YOUR TRUE NAME, SIR?

DEFENDANT RODRIGUEZ: (THROUGH INTERPRETER) YES.

[29]

THE CLERK: YOU ARE HEREBY INFORMED THAT AN INDICTMENT HAS BEEN FILED CHARGING YOU WITH CONSPIRACY TO DISTRIBUTE METHAMPHETAMINE AND COCAINE AND DISTRIBUTION OF METHAMPHETAMINE.

COUNSEL, HAVE YOU RECEIVED A COPY AND DO YOU WAIVE FURTHER READING?

MS. TRIMBLE: YES. AND SO WAIVED.

THE CLERK: EACH OF YOU ARE FURTHER INFORMED THAT YOU ARE ENTITLED TO A TRIAL BY JURY, TO BE REPRESENTED BY COUNSEL AT ALL STAGES OF THE PROCEEDINGS BEFORE THIS COURT, AND TO HAVE WITNESSES SUBPOENAED TO TESTIFY ON YOUR OWN BEHALF.

HOW DO YOU PLEAD TO THE CHARGES AGAINST YOU, GUILTY OR NOT GUILTY?

MS. TRIMBLE: PLEASE ENTER A NOT-GUILTY PLEA FOR EACH DEFENDANT.

THE COURT: A NOT-GUILTY PLEA WILL BE ENTERED ON BEHALF OF EACH DEFENDANT.

IS THIS INITIAL APPEARANCE FOR BOTH OF THEM, OR ARE THEY—IS IT A FAILED DISPO? INITIAL APPEARANCE.

ALL RIGHT. GENTLEMEN, SPEAKING TO BOTH OF YOU. THIS IS YOUR INITIAL APPEARANCE, SO I HAVE TO GO THROUGH FOUR THINGS WITH YOU TODAY. FIRST, YOU WERE JUST TOLD WHAT CRIME EACH OF YOU ARE CHARGED WITH. THE SECOND THING I'M GOING TO DISCUSS IS YOUR RIGHT TO COUNSEL. THIRD, I'M GOING TO SET [30] YOUR NEXT COURT APPEARANCE. AND FINALLY WE'RE GOING TO DISCUSS BAIL.

SO FIRST—DO YOU HAVE FINANCIAL AFFIDAVITS FOR THESE INDIVIDUALS?

MICHELLE, DO YOU HAVE THOSE?

MS. TRIMBLE: YOUR HONOR, I DO NOT. BUT I CAN PROFFER AS TO EACH OF THEM.

THE COURT: ALL RIGHT. IN THE FUTURE, YOU NEED TO GET FINANCIAL AFFIDAVITS.

MS. TRIMBLE: MY APOLOGIES, YOUR HONOR.

THE COURT: MR. FABELA.

MS. TRIMBLE: MR. FABELA IS APPARENTLY UNEMPLOYED AND HAS NO OTHER MEANS BY WHICH TO PAY FOR AN ATTORNEY AT THIS TIME.

THE COURT: IS WHAT YOUR LAWYER JUST SAID TRUE IN ALL RESPECTS, MR. FABELA?

DEFENDANT FABELA: YES, YOUR HONOR.

THE COURT: HOW LONG HAVE YOU BEEN UNEMPLOYED?

DEFENDANT FABELA: DECEMBER OF LAST YEAR.

THE COURT: ALL RIGHT. DO YOU OWN A HOME OR ANY OTHER REAL PROPERTY?

DEFENDANT FABELA: NO.

THE COURT: BASED UPON THE PROFFER, AS WELL AS THE STATEMENTS BY THE DEFENDANT, I FIND THAT HE DOES NOT HAVE THE ABILITY TO HIRE A LAWYER, AND I AM GOING TO APPOINT A LAWYER [31] TO REPRESENT HIM. I'M GOING TO DO THAT PROVISIONALLY, AND I'M GOING TO REQUIRE HIM TO PROVIDE A FINANCIAL AFFIDAVIT.

SO, SIR, YOU NEED TO TALK TO YOUR LAWYER AND THEN PREPARE A FINANCIAL AFFIDAVIT WHICH YOU WILL SUBMIT TO ME AT THE NEXT COURT APPEARANCE.

I'M APPOINTING FEDERAL DEFENDERS. DO THEY HAVE A CONFLICT? NO. IT LOOKS LIKE THERE IS A WARRANT ON THE OTHER ONE.

JULIO RODRIGUEZ, DOES HE HAVE THE ABILITY TO HIRE A LAWYER?

MS. TRIMBLE: NO, YOUR HONOR. MR. RODRIGUEZ IS SELF-EMPLOYED AS A LANDSCAPER, BUT MAKES—BUT SUPPORTS FOUR INDIVIDUALS, MAKES ONLY APPROXIMATELY $4,000 A MONTH. HE HAS NO OTHER MEANS BY WHICH TO PAY FOR AN ATTORNEY.

THE COURT: I'M SORRY. HE SUPPORTS HOW MANY PEOPLE?

MS. TRIMBLE: FOUR INDIVIDUALS.

THE COURT: HIS WIFE AND TWO KIDS?

MS. TRIMBLE: YES. HE HAS THREE CHILDREN, ACTUALLY; SO IT'S THE THREE CHILDREN I WAS REFERRING TO.

THE COURT: ALL RIGHT. SIR, IS WHAT YOUR LAWYER JUST SAID TRUE IN ALL RESPECTS?

DEFENDANT RODRIGUEZ: YES.

THE COURT: DO YOU OWN A HOME OR ANY REAL PROPERTY?

DEFENDANT RODRIGUEZ: NO.

THE COURT: BASED UPON THAT INFORMATION, I FIND YOU [32] DO NOT HAVE THE ABILITY TO HIRE A LAWYER, AND I'M GOING TO APPOINT A LAWYER TO REPRESENT YOU.

UNLESS I READ OVER, BARBARA DONOVAN IS NEXT. AND IT LOOKS TO ME LIKE SHE DOESN'T HAVE A CONFLICT.

GOVERNMENT, DO YOU HAVE THAT SHE HAS A CONFLICT?

MR. MARKLE: YOUR HONOR, WE DO NOT SHOW THAT SHE HAS A CONFLICT.

THE COURT: OKAY. THEN I'M APPOINTING BARBARA DONOVAN TO REPRESENT YOU. HER NUMBER IS (619) 696-8989. AND I'M ALSO GOING TO REQUIRE YOU TO PREPARE A FINANCIAL AFFIDAVIT WITH YOUR LAWYER AND PROVIDE IT TO ME.

SPEAKING TO BOTH OF YOU. EACH OF YOU HAS BEEN GIVEN A BUSINESS CARD FOR YOUR LAWYER. IN ADDITION, YOUR LAWYER WILL BE NOTIFIED THAT HE OR SHE HAS BEEN APPOINTED TO REPRESENT YOU, AND YOUR LAWYER WILL BE IN CONTACT WITH YOU IN THE NEAR FUTURE, AND REPRESENT YOU THROUGHOUT THE REMAINDER OF THIS CASE.

THE NEXT THING THAT I'M GOING TO DO IS SET A MOTION HEARING FOR EACH OF YOU IN FRONT OF THE DISTRICT JUDGE TO WHOM YOUR CASE IS ASSIGNED.

MR. FABELA, YOU ARE ORDERED TO APPEAR IN JUDGE MOSKOWITZ'S COURTROOM ON DECEMBER 13TH AT 2:00 P.M.

AND, MR. RODRIGUEZ, YOU ARE ORDERED TO APPEAR IN JUDGE BENCIVENGO'S COURTROOM ON NOVEMBER 8TH AT 1:30 P.M. AND THAT'S FOR A STATUS HEARING.

[33]

THE FINAL ISSUE THEN IS BAIL. IS THE UNITED STATES MOVING TO DETAIN?

MR. MARKLE: WE ARE, YOUR HONOR. WE WOULD REQUEST THREE DAYS.

THE COURT: ON WHAT BASIS?

MR. MARKLE: IN ORDER TO PREPARE.

THE COURT: ON WHAT BASIS?

MR. MARKLE: RISK OF FLIGHT. I'M SORRY, YOUR HONOR.

THE COURT: JUST FLIGHT?

MR. MARKLE: JUST FLIGHT.

THE COURT: AS TO BOTH OF THEM?

MR. MARKLE: JUST FLIGHT, YOUR HONOR.

THE COURT: ALL RIGHT. GENTLEMEN, SPEAKING TO BOTH OF YOU.

THE UNITED STATES HAS ASKED THAT EACH OF YOU BE HELD IN CUSTODY WITHOUT BAIL BECAUSE THEY BELIEVE YOU PRESENT AN UNREASONABLE RISK OF FLIGHT. THEY HAVE THE RIGHT TO DO THAT.

YOU HAVE THE RIGHT TO HAVE A HEARING AND FOR ME TO MAKE A DETERMINATION AS TO WHETHER OR NOT THERE ARE ANY CONDITIONS THAT I COULD SET THAT WOULD GUARANTY YOUR APPEARANCE IN COURT AS REQUIRED. YOU WILL HOWEVER BE HELD IN CUSTODY WITHOUT BAIL UNTIL THAT HEARING OCCURS.

I'M GOING TO SET THAT FOR HEARING ON THURSDAY, OCTOBER 24TH, AT 9:30 A.M. SO EACH OF YOU WILL RETURN TO MY [34] COURTROOM ON OCTOBER 24TH AT 9:30 A.M. THAT WILL BE FOR A DETENTION HEARING. IN ADDITION, EACH OF YOU WILL HAVE TO PROVIDE ME WITH A FINANCIAL AFFIDAVIT WE PREVIOUSLY DISCUSSED.

COUNSEL, ANYTHING ELSE AS TO THESE TWO INDIVIDUALS?

MS. TRIMBLE: NO, YOUR HONOR.

THE COURT: THAT'S IT FOR TODAY, GENTLEMEN.

THE CLERK: ITEMS NO. 5, 6, 7, 8, 9, 10 AND 11 ON THE LOG, PLEASE.

FOR THE RECORD, ITEM NO. 5, 09CR1070-BEN, VERONICA ISABEL THING;

ITEM NO. 6, 09CR7026-IEG, MARIO PEREZ-RIVAS;

ITEM NO. 7, 11CR0361-H, JORGE ALBERTO MARTINEZ-HERNANDEZ;

ITEM NO. 8, 12CR0693-MMA, LORENA VASQUEZ;

ITEM NO. 9, 12CR0818-DMS, TYRONE MITCHELL PICKARD;

ITEM NO. 10, 12CR1283-JM, LONNIE HEATH INGRAM;

ITEM NO. 11, 12CR1583-BTM, ADRIAN SAUZ-TORREZ.

THE COURT: GO AHEAD AND HAVE A SEAT, GENTLEMEN AND LADIES.

FOR THE RECORD, THE INTERPRETER HAS VERIFIED THAT THE INDIVIDUALS WHO ARE LISTENING TO ME IN SPANISH CAN HEAR ME.

ALL RIGHT. SPEAKING TO ALL OF YOU. EACH OF YOU IS HERE BECAUSE A FEDERAL JUDGE HAS ISSUED A WARRANT FOR YOUR [35] ARREST BECAUSE IT IS BELIEVED THAT YOU HAVE VIOLATED THE CONDITIONS OF YOUR

SUPERVISED RELEASE. I'M NOW GOING TO SPEAK WITH EACH OF YOU INDIVIDUALLY.

VERONICA THING. YOU DON'T HAVE TO STAND UP. I JUST WANT TO MAKE SURE YOU'RE HERE.

ALL RIGHT. MA'AM, YOU ARE HERE BECAUSE JUDGE BENITEZ ISSUED A WARRANT FOR YOUR ARREST. IT APPEARS THAT IN MARCH OF 2013, HE SENTENCED YOU TO TIME SERVED, TO BE FOLLOWED BY 26 MONTHS OF SUPERVISED RELEASE AFTER WHAT LOOKS LIKE A PRIOR SUPERVISED RELEASE VIOLATION, WHICH CAME OUT OF A CONVICTION FOR IMPORTATION OF MARIJUANA. AND IT'S NOW ALLEGED THAT YOU HAVE VIOLATED THOSE CONDITIONS. ONE CONDITION WAS THAT YOU NOT ILLEGALLY POSSESS A CONTROLLED SUBSTANCE.

AND IT'S ALLEGED THAT YOU VIOLATED THAT BECAUSE ON APRIL 10TH, 17TH AND 25TH OF THIS YEAR, YOU SUBMITTED URINE SAMPLES THAT CONFIRMED POSITIVE FOR METHAMPHETAMINE. SECOND, ON MAY 4TH, YOU USED METHAMPHETAMINE AS EVIDENCED BY YOUR ADMISSION TO THE PROBATION OFFICER. AND, FINALLY, YOU SUBMITTED A URINE SAMPLE ON MAY 8TH—OR YOU FAILED TO SUBMIT A URINE SAMPLE ON MAY 8TH.

DO YOU UNDERSTAND THAT THAT'S WHY YOU'RE HERE TODAY?

DEFENDANT THING: YES, MA'AM.

THE COURT: ANYTHING TO ADD TO PROBABLE CAUSE, MA'AM?

[36]

MS. TRIMBLE: NO, YOUR HONOR. HOWEVER, AT THIS TIME I'D LIKE TO OBJECT TO THE SHACKLING OF MS. THING AND ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY.

THE COURT: ALL RIGHT. I MAKE—FOR THE SAME REASONS YOU'VE PREVIOUSLY STATED?

MS. TRIMBLE: YOUR HONOR, I'D LIKE TO MAKE AN INDIVIDUALIZED ARGUMENT AS TO MS. THING.

MS. THING IS CURRENTLY SHACKLED IN BOTH LEG RESTRAINTS AND WAIST RESTRAINTS. HER ARMS ARE SHACKLED TO THE WAIST RESTRAINTS, SO SHE'S UNABLE TO SIGNAL IF SHE DOESN'T UNDERSTAND, UNABLE TO MOVE HER ARMS IN A WAY THAT MIGHT BE NECESSARY TO COMMUNICATE WITH THE COURT.

I WOULD FURTHER NOTE THAT THERE ARE TWO UNITED STATES MARSHALS IN THE COURT NOW, THERE IS A COURTROOM SECURITY OFFICER AT THE DOOR ENTRANCE TO THIS COURT. THERE IS NO INDICATION THAT MS. THING HAS ANY VIOLENT HISTORY. HER UNDERLYING OFFENSE IN THIS CASE WAS NOT VIOLENT, AND THE ALLEGATIONS OF HOW SHE HAS VIOLATED SUPERVISED RELEASE ARE NOT VIOLATED.

THE U.S. MARSHALS NEW PRACTICE IN THIS DISTRICT OF SHACKLING ALL DEFENDANTS WITHOUT INDIVIDUALIZED DETERMINATIONS AS TO THE NECESSITY OF SHACKLING VIOLATES THE FIFTH AMENDMENT DUE-PROCESS GUARANTY AND IMPOSES AN ADDITIONAL AND UNNECESSARY RESTRAINT ON MS. THING'S LIBERTY AND DETRACTS FROM THE DIGNITY AND DECORUM OF A CRIMINAL [37] PROSECUTION. THERE ARE NO SECURITY CONCERNS IN THIS PARTICULAR CASE. SHE DOES NOT NEED TO BE SHACKLED.

IF THE GOVERNMENT OR THE MARSHALS BELIEVE THERE IS A SECURITY CONCERN IN THIS CASE, I REQUEST AN EVIDENTIARY HEARING. TO THE EXTENT THERE ARE ANY SECURITY CONCERNS, THERE ARE LESS RESTRICTIVE ALTERNATIVES TO SHACKLES. FOR EXAMPLE, MS. THING COULD BE BROUGHT OUT INDIVIDUALLY.

THE COURT: ANYTHING ELSE? I DON'T WANT TO GO THROUGH IT A BUNCH OF TIMES LIKE WE DID ON THE FIRST ONE, WHERE I DENY AND THEN YOU RAISE A NEW ISSUE.

IS THERE ANYTHING ELSE YOU WANT TO RAISE AS TO HER?

MS. TRIMBLE: YOUR HONOR, I BELIEVE THAT THE NINTH CIRCUIT DOES REQUIRE INDIVIDUALIZED DETERMINATION FOR EVERY INDIVIDUAL HERE.

THE COURT: ALL RIGHT. AS TO HER.

MS. TRIMBLE: AS TO HER.

MR. COLE: YOUR HONOR, THE GOVERNMENT WOULD MENTION IN THIS CASE THAT ALL—THERE IS NO EVIDENCE OF A POLICY OF THE MARSHALS THAT ALL DEFENDANTS SHOULD BE SHACKLED. HOWEVER, THE MARSHALS HAVE BROUGHT THIS DEFENDANT OUT SHACKLED, WHICH MEANS THE MARSHALS HAVE DETERMINED, IN THEIR EXPERTISE, THIS IS APPROPRIATE.

THE DEFENSE HAS NOT PUT FORTH ANY INDIVIDUALIZED FACTOR THAT WOULD WARRANT REMOVAL OF THE SHACKLES OTHER THAN BESIDE THE FACT THAT MS. THING APPARENTLY DOES NOT HAVE A [38] VIOLENT CRIMINAL HISTORY, AT LEAST KNOWN TO THE DEFENSE AT THIS TIME.

THE UNITED STATES WOULD ALSO NOTE THAT THERE WAS A REFERENCE MADE TO THE SHACKLES PERHAPS INTERFERING WITH THE ABILITY OF MRS. THING TO COMMUNICATE WITH COUNSEL. BUT I WOULD NOTE FOR THE RECORD THAT BECAUSE OF THE CONFIGURATION OF THE COURTROOM, MS. THING IS VERY CLOSE TO COUNSEL, THE COURT AND THE INTERPRETER, ALTHOUGH SHE IS NOT USING THE INTERPRETER, AND COULD SIGNAL A NEED VERBALLY TO COMMUNICATE WITH COUNSEL ANY TIME. AND AS IS OFTEN THE CASE IN MAGISTRATE COURT, COUNSEL WILL CONFER PRIVATELY WITH THEIR CLIENTS IN ANY EVENT BY APPROACHING THEM IN THE BOX.

THE COURT: ALL RIGHT. FOR THE RECORD, I WOULD NOTE THAT THERE ARE SEVEN PEOPLE OUT HERE, ALL ADDRESSING THE SAME ISSUES; AND SO I HAVE CHOSEN TO HANDLE THEM TOGETHER. THE UNITED STATES MARSHAL SERVICE HAS MADE A DETERMINATION THAT IT'S APPROPRIATE TO BRING EVERYBODY OUT IN SHACKLES. I DEFER TO THAT.

I DISAGREE WITH DEFENSE COUNSEL'S POSITION THAT THE DEFENDANT IS UNABLE TO SIGNAL. IF THERE IS A CONCERN, FIRST OFF, SHE CAN MOVE HER ARMS. I WATCH VERY CAREFULLY AS COURTROOM PROCEEDINGS ARE OCCURRING. I CAN EASILY SEE IF SHE MOVES AROUND IN ANY WAY. IF THERE IS ANY INDICATION THAT SHE DOESN'T UNDERSTAND WHAT IS GOING ON, OR SHE NEEDS TO TALK TO COUNSEL, I WILL, IN FACT, NOTICE THAT.

[39]

IN ADDITION, SHE HAS THE ABILITY TO COMMUNICATE VERBALLY. CERTAINLY IF THERE IS ANYTHING SHE DOESN'T UNDERSTAND, SHE WILL STATE THAT, AND I'LL THEN MAKE IT CLEAR TO HER SO THERE WON'T BE ANY VIOLATIONS. SHE'LL HAVE A COMPLETE UNDERSTANDING.

GIVEN ALL OF THE FACTS OF THIS CASE, AS WELL AS EVERYTHING I'VE PREVIOUSLY STATED, I DENY YOUR REQUEST TO HAVE THE

SHACKLES REMOVED. I DENY YOUR REQUEST FOR AN EVIDENTIARY HEARING.

YOU SAID YOU HAD NO—ANYTHING ELSE TO ADD TO THE PROBABLE CAUSE DETERMINATION. BASED UPON THE INFORMATION IN FRONT OF ME, AS WELL AS JUDGE BENITEZ'S FINDING, I DO FIND PROBABLE CAUSE TO BELIEVE THAT THERE IS A VIOLATION. AS I STATED, AND I ENTER A DENIAL OTHER HER BEHALF.

DOES SHE HAVE THE ABILITY TO HIRE A LAWYER?

MS. TRIMBLE: NO, YOUR HONOR. HER LAST EMPLOYMENT WAS IN 2011, AND SHE IS CURRENTLY ON WELFARE.

THE COURT: IS WHAT YOUR LAWYER JUST SAID TRUE IN ALL RESPECTS, MA'AM.

DEFENDANT THING: YES.

THE COURT: BASED UPON THAT, I FIND THAT SHE DOES NOT HAVE THE ABILITY TO HIRE A LAWYER. FEDERAL DEFENDERS REPRESENTED HER IN THE UNDERLYING MATTER, SO I'M GOING TO REAPPOINT FEDERAL DEFENDERS. I'M SORRY. I WAS LOOKING AT THE WRONG ONE.

[40]

JAMI FERRARA REPRESENTED HER IN THE UNDERLYING MATTER, SO I'M GOING TO REAPPOINT JAMI TO REPRESENT HER IN THIS CASE.

I'M GOING TO SET THIS FOR A STATUS HEARING IN FRONT OF ME TO GIVE YOU TIME TO TALK WITH MS. FERRARA ABOUT HOW YOU WANT TO PROCEED.

WERE YOU GOING TO SAY SOMETHING, MA'AM?

I'M GOING TO SET THIS FOR OCTOBER 29TH AT 9:30 A.M. SO YOU'RE ORDERED TO RETURN TO MY COURTROOM ON THAT DAY. AND JUDGE BENITEZ ISSUED A NO-BAIL WARRANT, SO YOU WILL BE HELD IN CUSTODY WITHOUT BAIL. THAT'S IT FOR TODAY, MA'AM.

MARIO PEREZ, WHO IS THAT?

DEFENDANT PEREZ: THAT'S ME.

THE COURT: ALL RIGHT. SIR, YOU ARE HERE BECAUSE—WAIT A SECOND. THIS IS AN OUT-OF-DISTRICT COMPLAINT. THIS SHOULD HAVE COME IN—UNLESS SUPERVISED RELEASE GOT TRANSFERRED. OH, IT'S A SUPERVISED RELEASE VIOLATION. IT LOOKS LIKE HE WAS RELEASED. WHY IS KEITH ELLISON—GOVERNMENT, WHAT DO YOU HAVE ON THIS?

IT SAYS IN THE BOTTOM THAT IN FEBRUARY OF 2009, A CRIMINAL CASE, BUT THERE IS A CASE PENDING HERE, RESULTING IN INDICTMENT ALTHOUGH THE NUMBER WOULD BE WRONG FOR THE INDICTMENT. AND MAYBE THEN HE HAS—IT'S A SUPERVISED RELEASE VIOLATION IN TEXAS, IN WHICH

CASE THIS SHOULD COME IN ON AN OUT-OF-DISTRICT WARRANT.

[41]

MR. COLE: YOUR HONOR, WILLIAM COLE FOR THE UNITED STATES.

IT APPEARS THAT THE UNDERLYING CASE THAT RESULTED IN A SUPERVISED RELEASE VIOLATION WAS TRANSFERRED TO THE SOUTHERN DISTRICT OF CALIFORNIA AND WAS ASSIGNED A CASE NUMBER, 09CR7026, IN FRONT OF JUDGE GONZALEZ. I HAVE A TRANSFER OF JURISDICTION DATED JUNE 23RD, 2009.

WHAT I CANNOT IMMEDIATELY TELL YOU IS—OH, YES. AND THE VIOLATION PETITION WAS—IT LOOKS LIKE IT WAS FILED IN 2009.

THE COURT: DO YOU HAVE—IS THE PETITION THAT YOU HAVE SIGNED BY KEITH—JUDGE ELLISON?

MR. COLE: THE PETITION THAT I'M—

THE COURT: OR ACTUALLY JUDGE ALVAREZ.

MR. COLE: THE NAME OF THE—ONE SECOND.

THE COURT: SURE.

MR. COLE: YES. JUDGE ALVAREZ, YOUR HONOR. AND THAT WAS DATED MARCH 5TH. AND THEN DATED MARCH—EXCUSE ME, DATED JUNE 23RD IS THE TRANSFER OF JURISDICTION TO THE SOUTHERN DISTRICT OF

CALIFORNIA. AND IT WAS ACCEPTED BY JUDGE GONZALEZ ON JUNE 2009; JUNE 19TH, 2009.

THE COURT: SO, ALL RIGHT, IT'S JUDGE GONZALEZ NOW THEN. ALL RIGHT.

OKAY. MR. PEREZ, RETURNING TO YOU, SIR. IT APPEARS THAT IN JUNE OF 2003, JUDGE ELLISON IN THE SOUTHERN DISTRICT [42] OF CALIFORNIA SENTENCED YOU TO 60 MONTHS IN CUSTODY TO BE FOLLOWED BY THREE YEARS OF SUPERVISED RELEASE AFTER YOUR CONVICTION FOR REENTRY OF A DEPORTED ALIEN.

AND THEN IN 2009, JUDGE ELLISON OR JUDGE ALVAREZ ISSUED A WARRANT ALLEGING THAT YOU VIOLATED YOUR CONDITIONS OF SUPERVISED RELEASE. ONE CONDITION BEING THAT YOU NOT COMMIT ANOTHER CRIME. AND IT'S ALLEGED THAT YOU VIOLATED THAT BECAUSE ON FEBRUARY 17TH OF 2009, YOU ENTERED THE UNITED STATES AFTER BEING DEPORTED, AS EVIDENCED BY EITHER AN INFORMATION OR AN INDICTMENT IN THIS DISTRICT.

A SECOND CONDITION WAS THAT YOU NOT RETURN TO THE UNITED STATES ILLEGALLY. AND IT'S ALLEGED THAT YOU VIOLATED THE CONDITIONS FOR THE SAME REASON THAT I JUST STATED.

THEN IN JUNE OF 2009, THIS CASE WAS TRANSFERRED TO THIS DISTRICT. THAT'S WHY YOU'RE HERE TODAY, SIR.

DO YOU HAVE ANYTHING TO ADD TO PROBABLE CAUSE, MA'AM?

MS. TRIMBLE: NO, YOUR HONOR. I'M NOT SURE I ACTUALLY HAVE EVERYTHING IN FRONT OF ME WITH THESE ALLEGATIONS.

THE COURT: NEITHER DO I. SO AT THIS POINT, I AM ACCEPTING THAT IT'S BEEN ASSIGNED TO JUDGE GONZALEZ BASED ON THE REPRESENTATION MADE BY THE GOVERNMENT. THAT DOCUMENT I DON'T HAVE. IF THAT TURNS OUT TO BE INCORRECT, MR. LANDON, OR HIS LAWYER CAN CERTAINLY CORRECT THAT.

[43]

MS. TRIMBLE: YOUR HONOR, SO WE WOULD JUST OBJECT THAT I DON'T HAVE A WARRANT THAT SETS OUT THE FACTS FOR PROBABLE CAUSE, SO WE WOULD OBJECT THAT THERE IS NO PROBABLE CAUSE AT THIS POINT.

THE COURT: DO YOU HAVE THE BOTTOM OF THE FIRST PAGE? THERE IS THE FACTS.

MS. TRIMBLE: YES. THIS—

THE COURT: IT'S ON THE BOTTOM.

MS. TRIMBLE: AND I SUPPOSE THIS WOULD BE SIGNED BY THE PROBATION OFFICER ON THE NEXT PAGE, SO THIS WASN'T SIGNED BY AN OFFICER OF THE COURT.

THE COURT: IT WAS SIGNED BY THE OFFICER UNDER PENALTY OF PERJURY, AND

THEN ON THE LAST PAGE, A JUDGE MADE THE DETERMINATION TO ISSUE A WARRANT WITH NO BOND.

MS. TRIMBLE: OKAY. NOTHING.

THE COURT: OKAY. SO AT THIS TIME, SIR, BASED UPON MY REVIEW OF THE DOCUMENTS IN FRONT OF ME, AS WELL AS JUDGE ALVAREZ, CASTILLO AND GONZALEZ'S FINDINGS, I DO FIND PROBABLE CAUSE TO BELIEVE THAT YOU COMMITTED THESE VIOLATIONS, BUT I ENTER A DENIAL ON YOUR BEHALF.

DOES HE HAVE THE ABILITY TO HIRE A LAWYER?

MS. TRIMBLE: NO, YOUR HONOR. HE WORKS—HIS LAST JOB WAS AS A HOUSE PAINTER, MAKING INSUFFICIENT MONEY IN ORDER TO PAY FOR AN ATTORNEY ON HIS OWN BEHALF.

THE COURT: IS WHAT YOUR LAWYER JUST SAID TRUE IN [44] ALL RESPECTS? YOU HAVE TO ANSWER OUT LOUD.

DEFENDANT PEREZ: (THROUGH INTERPRETER) YES.

THE COURT: OKAY. BASED UPON THAT INFORMATION, I FIND YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, AND I'M GOING TO APPOINT A LAWYER TO REPRESENT YOU. ALEX LANDON REPRESENTED YOU IN THE UNDERLYING MATTER, SO I'M GOING TO REAPPOINT HIM TO REPRESENT YOU IN THIS

MATTER. I'M GOING TO SET THIS FOR A STATUS HEARING IN FRONT OF ME TO GIVE YOU TIME TO TALK WITH YOUR LAWYER.

SO YOU'RE ORDERED TO APPEAR IN MY COURTROOM ON OCTOBER 29TH AT 9:30 A.M. AND JUDGE ALVAREZ ISSUED A NO-BAIL WARRANT, WHICH DOES NOT APPEAR TO HAVE BEEN CHANGED BY JUDGE GONZALEZ. YOU THEREFORE WILL BE HELD IN CUSTODY WITHOUT BAIL.

MS. TRIMBLE: YOUR HONOR, I DON'T BELIEVE I ASKED IN MR. PEREZ-RIVAS' CASE IN PARTICULAR THAT HE BE UNSHACKLED AT THIS MOMENT. NONE OF THE ALLEGATIONS AGAINST HIM ARE VIOLENT IN ANY MANNER. WE HAVE TWO U.S. MARSHALS AND A SECURITY OFFICER IN THE COURTROOM NOW. HE'S SHACKLED IN HIS LEGS AND HIS ARMS TO HIS WAIST.

THERE IS NO—THERE IS NOTHING IN HIS HISTORY THAT INDICATES HE HAS A PARTICULAR VIOLENT BACKGROUND OR THAT THERE IS ANY REASON IN PARTICULAR TO BELIEVE THAT HE WOULD BE VIOLENT. IN FACT, IT APPEARS THAT AT HIS PRIOR COURT HEARINGS, THERE IS NO INDICATION THAT HE'S EVER ACTED IN A [45] WAY THAT WOULD RAISE PARTICULAR SECURITY CONCERNS. SO WE WOULD ASK FOR HIM TO BE IMMEDIATELY UNSHACKLED.

AND IF THE GOVERNMENT AND MARSHALS BELIEVE THERE IS A SECURITY CONCERN IN

THIS CASE, I REQUEST AN EVIDENTIARY HEARING. I WOULD NOTE THAT THE GOVERNMENT EARLIER NOTED THAT THERE IS NOT A POLICY OF SHACKLING ALL INDIVIDUALS WHO ARE BROUGHT BEFORE THE COURT. IN FACT, THE U.S. MARSHAL SERVICE INDICATES, AND I'M QUOTING, ALL PRISONERS PRODUCED FOR COURT, WITH THE EXCEPTION OF A JURY TRIAL, ARE TO BE FULLY RESTRAINED UNLESS OTHERWISE DIRECTED BY A UNITED STATES DISTRICT JUDGE OR UNITED STATES MAGISTRATE JUDGE.

AND SO I BELIEVE THIS IS AN ACROSS-THE-BOARD POLICY, WITHOUT AN INDIVIDUALIZED DETERMINATION FOR ANY OF THESE INDIVIDUALS AS TO WHETHER SHACKLING IS NECESSARY. AND LESS RESTRICTIVE MEANS HAVE NOT BEEN CONSIDERED WITH THESE INDIVIDUALS.

SO WE'D ASK FOR THE SHACKLES TO BE IMMEDIATELY REMOVED. IN THE ALTERNATIVE, FOR HIM TO BE BROUGHT OUT INDIVIDUALLY WITHOUT SHACKLES; AND AT THE VERY LEAST, HAVE AN EVIDENTIARY HEARING AS TO THE NECESSITY OF SHACKLES IN THIS CASE.

THE COURT: INITIALLY WITH REGARD TO THIS INDIVIDUAL, I DISAGREE WITH YOUR STATEMENT THAT THERE IS NO EVIDENCE IN THE RECORD THAT HE HAS A CRIMINAL OR VIOLENT PAST. WE ACTUALLY HAVE NO EVIDENCE WHATSOEVER IN FRONT OF [46]

THE COURT REGARDING HIS PAST AT THIS POINT.

WITH REGARD TO ALL OF THE OTHER CONCERNS, I DENY YOUR REQUEST FOR THE SAME REASONS THAT I HAVE STATED BEFORE. REQUEST FOR BOTH—TO HAVE THE SHACKLING REMOVED AND FOR AN EVIDENTIARY HEARING.

THAT'S IT FOR TODAY, SIR.

JORGE MARTINEZ, WHO IS THAT?

DEFENDANT MARTINEZ: HERE, YOUR HONOR.

THE COURT: IS THAT YOU? ALL RIGHT. YOU SPEAK ENGLISH?

DEFENDANT MARTINEZ: YES.

THE COURT: OKAY. SIR, YOU ARE HERE BECAUSE JUDGE HUFF ISSUED A WARRANT FOR YOUR ARREST. IT APPEARS THAT IN MAY OF 2011, JUDGE HUFF SENTENCED YOU TO FOUR MONTHS IN CUSTODY TO BE FOLLOWED BY THREE YEARS OF SUPERVISED RELEASE AFTER YOUR CONVICTION FOR FRAUD AND MISUSE OF VISAS, PERMITS AND OTHER ENTRY DOCUMENTS. AND IT'S NOW ALLEGED THAT YOU HAVE VIOLATED THOSE CONDITIONS OF SUPERVISED RELEASE.

SPECIFICALLY, ONE CONDITION WAS THAT YOU NOT COMMIT ANOTHER CRIME, AND THE SECOND CONDITION WAS THAT YOU NOTIFY THE PROBATION OFFICER WITHIN 72 HOURS OF BEING ARRESTED OR QUESTIONED. AND

IT'S ALLEGED THAT YOU VIOLATED THOSE CONDITIONS BECAUSE ON AUGUST 9TH, YOU WERE FOUND IN THE UNITED STATES IN VIOLATION OF FEDERAL LAW, AS EVIDENCED BY A COMPLAINT AND INFORMATION FILED IN THIS DISTRICT.

[47]

A SECOND CONDITION WAS THAT IF DEPORTED, EXCLUDED OR RETURNED TO MEXICO, THAT YOU NOTIFY YOUR PROBATION OFFICER WITHIN 24 HOURS OF ANY REENTRY. AND IT'S ALLEGED THAT YOU VIOLATED THAT BECAUSE FOR THE SAME REASON, ON AUGUST 9TH, YOU ENTERED THE UNITED STATES ILLEGALLY. IN ADDITION, YOU FAILED TO REPORT TO YOUR PROBATION OFFICER WITHIN 24 HOURS OF THAT REENTRY.

DO YOU UNDERSTAND THAT THAT'S WHY YOU ARE HERE TODAY?

DEFENDANT MARTINEZ: YES, YOUR HONOR.

THE COURT: ANYTHING TO ADD TO PROBABLE CAUSE, MA'AM?

MS. TRIMBLE: NO, YOUR HONOR. BUT AT THIS TIME, I OBJECT TO THE SHACKLING OF MR. MARTINEZ AND ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY.

FOR THE RECORD, MR. MARTINEZ IS IN FULL RESTRAINTS, HIS LEGS ARE RESTRAINED, HIS ARMS—

THE COURT: OKAY. FOR THE RECORD, THAT'S—EVERY DEFENDANT THAT HAS COME OUT IS IN THAT EXACT SAME SHACKLING; SO YOU DON'T HAVE TO REPEAT THAT EVERY TIME

MS. TRIMBLE: YES, YOUR HONOR. THE POLICY OF SHACKLING ALL DEFENDANTS WITHOUT INDIVIDUALIZED DETERMINATION AS TO THE NECESSITY OF SHACKLING VIOLATES THE FIFTH AMENDMENT DUE-PROCESS GUARANTY AND IT IMPOSES ADDITIONAL AND UNNECESSARY RESTRAINT ON MR. MARTINEZ.

[48]

THE ALLEGATIONS AGAINST MR. MARTINEZ DO NOT SHOW THAT HE'S A VIOLENT INDIVIDUAL. IT'S AN ALLEGATION OF ILLEGAL REENTRY AND FAILING TO REPORT WITH PROBATION OFFICER, SO THIS DOES NOT SHOW THAT HE POSES A PARTICULAR SECURITY CONCERN IN THIS CASE. HE HAS BEEN SCREENED PRIOR TO COMING TO COURT. THERE ARE TWO UNITED STATES MARSHALS IN THE COURTROOM AND A COURTROOM SECURITY OFFICER.

SO WE WOULD ASK FOR THE IMMEDIATELY—IMMEDIATE REMOVAL OF THE SHACKLES. IF THE GOVERNMENT OR THE MARSHALS BELIEVE THERE IS A SECURITY CONCERN IN THIS CASE, I REQUEST AN EVIDENTIARY HEARING.

THE COURT: FOR THE REASONS PREVIOUSLY STATED, YOUR MOTIONS ARE STILL DENIED.

SIR, BASED UPON THE INFORMATION IN FRONT OF ME, AS WELL AS JUDGE HUFF'S FINDING, I DO FIND PROBABLE CAUSE TO BELIEVE THAT YOU COMMITTED THESE VIOLATIONS, BUT I ENTER A DENIAL ON YOUR BEHALF.

ANOTHER JUDGE RECENTLY MADE A DETERMINATION THAT YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, SO I'M GOING TO MAKE THE SAME FINDING IN THIS CASE. FEDERAL DEFENDERS IS REPRESENTING YOU IN THE UNDERLYING MATTER, SO I'M GOING TO APPOINT THEM TO REPRESENT YOU IN THIS MATTER.

I'M GOING TO SET THIS FOR A STATUS HEARING IN FRONT OF ME ON NOVEMBER 5TH AT 11—EXCUSE ME, AT 9:30 A.M. TO GIVE YOU TIME TO TALK WITH YOUR LAWYER. AND JUDGE HUFF [49] ISSUED A NO-BAIL WARRANT, SO YOU, TOO, WILL BE HELD IN CUSTODY WITHOUT BAIL.

THAT'S IT FOR TODAY, SIR.

LORENA VASQUEZ, IS THAT YOU, MA'AM?

DEFENDANT VASQUEZ: YES, MA'AM.

THE COURT: DO YOU SPEAK ENGLISH?

DEFENDANT VASQUEZ: YES.

THE COURT: TERRIFIC.

YOU ARE HERE BECAUSE JUDGE ANELLO ISSUED A WARRANT FOR YOUR ARREST. IT APPEARS THAT IN DECEMBER OF 2012, HE SENTENCED YOU TO TWO MONTHS IN CUSTODY, WITH CREDIT FOR TIME SERVED, TO BE FOLLOWED BY 24 MONTHS OF SUPERVISED RELEASE. AND IN JANUARY OF 2013, HE MODIFIED THE CONDITIONS.

IT'S NOW ALLEGED THAT YOU HAVE VIOLATED THOSE CONDITIONS. ONE CONDITION WAS THAT YOU NOT ILLEGALLY POSSESS A CONTROLLED SUBSTANCE, AND IT'S ALLEGED THAT YOU VIOLATED THAT BECAUSE ON JANUARY 28TH, YOU USED METHAMPHETAMINE; ON FEBRUARY 2ND, YOU ALSO USED METHAMPHETAMINE. BOTH OF THOSE ARE EVIDENCED BY YOUR ADMISSION. ON FEBRUARY 26TH, YOU GAVE A URINE SAMPLE THAT TESTED POSITIVE FOR AMPHETAMINE AND METHAMPHETAMINE, AND THEN YOU FAILED TO SUBMIT URINE SAMPLES AS REQUIRED ON JANUARY 12TH, FEBRUARY 20, MARCH 14TH AS REQUIRED.

A SECOND CONDITION WAS THAT YOU PARTICIPATE IN A PROGRAM OF DRUG OR ALCOHOL ABUSE TREATMENT, AND IT'S ALLEGED [50] THAT YOU VIOLATED THOSE CONDITIONS BECAUSE YOU FAILED TO ATTEND COUNSELING AS REQUIRED ON NUMEROUS DAYS IN FEBRUARY AND MARCH OF THIS YEAR.

A FINAL CONDITION WAS THAT YOU REPORT TO THE PROBATION OFFICER AND SUB-

MIT A TRUTHFUL REPORT EVERY MONTH. AND IT'S ALLEGED THAT YOU VIOLATED THAT BECAUSE YOU FAILED TO SUBMIT ON MARCH —EXCUSE ME, YOU FAILED TO APPEAR ON MARCH 1ST AS DIRECTED.

DO YOU UNDERSTAND THAT THAT'S WHY YOU ARE HERE TODAY?

DEFENDANT VASQUEZ: YES, YOUR HONOR.

THE COURT: BASED UPON THE INFORMATION IN FRONT OF ME, AS WELL AS JUDGE ANELLO'S FINDING, I DO FIND PROBABLE CAUSE TO BELIEVE THAT YOU COMMITTED THESE VIOLATIONS, BUT I ENTER A DENIAL ON YOUR BEHALF.

DOES SHE HAVE THE ABILITY TO HIRE A LAWYER?

MS. TRIMBLE: NO, YOUR HONOR. SHE HAS BEEN UNEMPLOYED FOR A FEW YEARS.

THE COURT: IS WHAT YOUR LAWYER JUST SAID TRUE IN ALL RESPECTS, MA'AM?

DEFENDANT VASQUEZ: YES, MA'AM.

THE COURT: BASED UPON THAT, I FIND THAT YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER. MR. SCHNEIDEWIND REPRESENTED YOU IN THE UNDERLYING MATTER, AND I'M GOING TO REAPPOINT HIM TO REPRESENT YOU IN THIS MATTER.

[51]

I'M GOING TO SET THIS FOR A STATUS HEARING IN FRONT OF ME ON NOVEMBER 5TH AT 9:00 A.M. SORRY, 9:30 A.M., TO GIVE YOU TIME TO TALK WITH HIM ABOUT HOW YOU WANT TO PROCEED. AND JUDGE ANELLO ISSUED A NO-BAIL WARRANT SO YOU, TOO, WILL BE HELD IN CUSTODY WITHOUT BAIL.

MS. TRIMBLE: YOUR HONOR, I OBJECT TO THE SHACKLING OF MS. VASQUEZ. MS. VASQUEZ HAS A FRACTURED WRIST. SHE IS CURRENTLY IN ARM RESTRAINTS, AS WELL AS THE LEG RESTRAINTS. SO FOR THE RECORD, THIS—SHE'S HOLDING HER WRIST AT THIS TIME. SHE APPEARS TO BE UNCOMFORTABLE WITH SHACKLES IN PART DUE TO HER INJURY. SHE SHOWS NO PARTICULAR NEED FOR EXTRA SECURITY. WE DO HAVE TWO UNITED STATES MARSHALS IN THE COURT, AS WELL AS A COURTROOM SECURITY OFFICER.

THE PRACTICE OF SHACKLING ALL DEFENDANTS WITHOUT INDIVIDUALIZED DETERMINATION AS TO THE NECESSITY OF SHACKLING VIOLATES THE FIFTH AMENDMENT DUE-PROCESS GUARANTY AND IMPOSES ADDITIONAL AND UNNECESSARY RESTRAINT ON MS. VASQUEZ. SHE COULD BE BROUGHT OUT INDIVIDUALLY. THAT WOULD BE A LESS RESTRICTIVE ALTERNATIVE THAN BRINGING HER OUT IN FULL SHACKLES. SINCE THERE ARE NO PARTICULAR SECURI-

TY CONCERNS IN THIS CASE, SHE DOES NOT NEED TO BE SHACKLED.

IF THE GOVERNMENT OR THE MARSHALS BELIEVE THERE IS A SECURITY CONCERN IN THIS CASE, I REQUEST AN EVIDENTIARY HEARING. TO THE EXTENT THAT THERE ARE CONCERNS, LIKE I SAID, THERE ARE LESS RESTRICTIVE ALTERNATIVES.

[52]

THE COURT: MOTIONS ARE DENIED FOR ALL OF THE REASONS PREVIOUSLY STATED.

MA'AM, IF YOUR WRIST IS FRACTURED, YOU NEED TO TELL A DOCTOR AT YOUR PRISON ABOUT IT. OKAY.

MS. TRIMBLE: YOUR HONOR—

THE COURT: WAIT. OKAY?

DEFENDANT VASQUEZ: YES, YOUR HONOR.

MS. TRIMBLE: SHE IS IN CUSTODY AT CCA IN OTAY MESA AND HAS BEEN IN SHACKLES SINCE LEAVING THAT FACILITY.

THE COURT: I THINK THERE ARE DIFFERENT CONCERNS THAT GOVERN WHEN AN INDIVIDUAL IS BEING TRANSPORTED, AND THOSE ISSUES HAVE NOT BEEN RAISED AT THIS TIME. BUT I DO BELIEVE THERE ARE DIFFERENT ISSUES THAT ARE RELEVANT OUTSIDE OF THE COURTROOM.

ALL RIGHT. THAT'S IT FOR TODAY, MA'AM.

TYRONE PICKARD. WHO IS THAT?

DEFENDANT PICKARD: "PICKARD."

THE COURT: WHAT DID YOU SAY?

DEFENDANT PICKARD: "PICKARD."

THE COURT: PICKARD. ALL RIGHT. SIR, YOU ARE HERE BECAUSE JUDGE SABRAW ISSUED A WARRANT FOR YOUR ARREST IN JUNE OF 2013. HE SENTENCED YOU TO FIVE MONTHS IN CUSTODY, TO BE FOLLOWED BY TWO YEARS OF SUPERVISED RELEASE AFTER YOUR CONVICTION FOR TRANSPORTATION OF ILLEGAL ALIENS AND AIDING AND ABETTING.

[53]

AND IT IS NOW ALLEGED THAT YOU HAVE VIOLATED THOSE CONDITIONS OF SUPERVISED RELEASE. SPECIFICALLY ONE CONDITION WAS THAT YOU REPORT TO THE PROBATION OFFICER WITHIN 72 HOURS OF YOUR RELEASE FROM CUSTODY. AND IT'S ALLEGED THAT YOU VIOLATED THAT BECAUSE YOU WERE RELEASED FROM CUSTODY ON SEPTEMBER 11TH, AND YOU DID NOT REPORT WITHIN 72 HOURS.

DO YOU UNDERSTAND THAT THAT'S WHY YOU ARE HERE TODAY?

DEFENDANT PICKARD: I DO, YOUR HONOR.

THE COURT: BASED UPON THE INFORMATION IN FRONT OF ME, AS WELL AS JUDGE SABRAW'S FINDING, I FIND PROBABLE CAUSE

TO BELIEVE THAT YOU COMMITTED THAT VIOLATION, BUT I ENTER A DENIAL ON YOUR BEHALF.

GIVEN THAT HE JUST GOT OUT OF CUSTODY AND HE HAD APPOINTED COUNSEL PREVIOUSLY, I FIND HE DOES NOT HAVE THE ABILITY TO HIRE A LAWYER. ROBERT SWAIN REPRESENTED HIM IN THE UNDERLYING MATTER, SO I'M GOING TO REAPPOINT MR. SWAIN TO REPRESENT HIM IN THIS MATTER.

I'M GOING TO SET THIS FOR A STATUS HEARING IN FRONT OF ME ON NOVEMBER 5TH AT 9:30 A.M. TO GIVE YOU TIME TO TALK WITH YOUR LAWYER ABOUT HOW YOU WANT TO PROCEED. AND JUDGE SABRAW ISSUED A NO-BAIL WARRANT, SO YOU, TOO, WILL BE HELD IN CUSTODY WITHOUT BAIL.

MS. TRIMBLE: AT THIS TIME, I OBJECT TO THE SHACKLING OF MR. PICKARD AND ASK THAT THE SHACKLES BE REMOVED [54] IMMEDIATELY. HE'S SHACKLED BY HIS ARMS AND HIS LEGS. THERE ARE TWO—

THE COURT: YOU DON'T HAVE TO KEEP SAYING THAT PART. I'VE TOLD YOU THAT. IT'S ON THE RECORD. THAT'S WHAT THEY ARE ALL SHACKLED IN. AND THERE ARE TWO MARSHALS. THEY WILL BE HERE ALL DAY.

MS. TRIMBLE: YES, YOUR HONOR. I BELIEVE UNDER THE NINTH CIRCUIT CASE LAW, WE'RE ENTITLED TO INDIVIDUAL HEARINGS FOR ALL OF THESE INDIVIDUALS.

THE COURT: NO. I'M LETTING YOU DO IT EVERY SINGLE TIME. I'M JUST ASKING YOU NOT TO REPEAT THE FACTS THAT I'VE SAID ARE APPLICABLE TO EVERYONE.

MS. TRIMBLE: YES, YOUR HONOR.

MR. PICKARD—AS YOUR HONOR MENTIONED, THE ACCUSATIONS AGAINST MR. PICKARD ARE SIMPLY THAT HE FAILED TO REPORT TO THE PROBATION OFFICER WITHIN 72 HOURS OF RELEASE. THIS IS NOT A PARTICULAR SECURITY CONCERN. THERE IS NO VIOLENCE RELATED TO THIS PARTICULAR ALLEGATION AGAINST MR. PICKARD.

TO THE EXTENT THERE ARE ANY PARTICULAR SECURITY CONCERNS FOR MR. PICKARD, WE WOULD REQUEST AN EVIDENTIARY HEARING AND THEN A DETERMINATION OF WHETHER THERE ARE LESS RESTRICTIVE ALTERNATIVES TO SHACKLES; FOR EXAMPLE, THE MARSHALS CAN BRING THE DEFENDANTS OUT INDIVIDUALLY WITHOUT SHACKLING.

[55]

THE COURT: FOR THE REASONS I PREVIOUSLY STATED, YOUR MOTIONS ARE DENIED. I WOULD NOTE THAT AS TO ALL OF THESE INDIVIDUALS, ALL WE KNOW IS WHAT THE MOST RECENT ALLEGATION OF VIOLATION IS. WE HAVE NO IDEA AT THIS POINT WHAT THEIR UNDERLYING CRIMINAL HISTORY WAS AND/OR WHETHER THERE WAS ANY VIOLENCE INVOLVED.

LONNIE INGRAM. WHO IS THAT?

DEFENDANT INGRAM: HERE.

THE COURT: ALL RIGHT. SIR, YOU ARE HERE BECAUSE JUDGE MILLER ISSUED A WARRANT FOR YOUR ARREST. IT APPEARS THAT IN MAY OF THIS YEAR, HE SENTENCED YOU TO SIX MONTHS IN CUSTODY, TO BE FOLLOWED BY 18 MONTHS OF SUPERVISED RELEASE AFTER YOUR CONVICTION FOR BRINGING IN ILLEGAL ALIENS WITHOUT PRESENTATION. AND IT'S ALLEGED THAT YOU HAVE NOW VIOLATED THOSE CONDITIONS.

ONE CONDITION WAS THAT YOU REPORT TO THE PROBATION OFFICER WITHIN 72 HOURS OF YOUR RELEASE, AND IT'S ALLEGED THAT YOU VIOLATED THAT BECAUSE YOU WERE RELEASED ON SEPTEMBER 17TH OF THIS YEAR, AND YOU DID NOT REPORT WITHIN 72 HOURS.

SECOND, YOU WERE REQUIRED TO RESIDE IN A RESIDENTIAL REENTRY PROGRAM AND YOU FAILED TO RESIDE AT THAT PROGRAM AS DIRECTED, AND YOU WERE UNSUCCESSFULLY TERMINATED ON SEPTEMBER 20TH.

FINALLY, YOU WERE REQUIRED TO NOTIFY THE PROBATION [56] OFFICER TEN DAYS PRIOR TO ANY CHANGE OF RESIDENCE OR EMPLOYEE—EMPLOYMENT, AND IT'S ALLEGED THAT YOU VIOLATED THAT BECAUSE ON SEPTEMBER 20TH, YOU FAILED TO NOTIFY THE PROBATION OFFICER PRIOR TO YOUR

CHANGE IN RESIDENCE. THAT'S WHY YOU'RE HERE TODAY, SIR.

BASED UPON THE INFORMATION IN FRONT OF ME, AS WELL AS JUDGE MILLER'S FINDING, I DO FIND PROBABLE CAUSE TO BELIEVE THAT YOU COMMITTED THESE VIOLATIONS, BUT I ENTER A DENIAL ON YOUR BEHALF.

AGAIN, IT APPEARS THAT YOU HAVE JUST BEEN RELEASED FROM FEDERAL CUSTODY, AND YOU HAD APPOINTED COUNSEL IN THE UNDERLYING MATTER. I THEREFORE AM GOING TO FIND THAT YOU DO NOT HAVE THE ABILITY TO HIRE COUNSEL IN THIS MATTER. FEDERAL DEFENDERS REPRESENTED YOU IN THE UNDERLYING MATTER, SO I'M GOING TO REAPPOINT FEDERAL DEFENDERS TO REPRESENT YOU IN THIS MATTER.

I'M GOING TO SET THIS FOR A STATUS HEARING IN FRONT OF ME ON NOVEMBER 5TH AT 9:30 A.M. TO GIVE YOU TIME TO TALK WITH YOUR LAWYER ABOUT HOW YOU WANT TO PROCEED. AND JUDGE MILLER ISSUED A NO-BAIL WARRANT, SO YOU, TOO, WILL BE HELD IN CUSTODY WITHOUT BAIL.

MA'AM.

MS. TRIMBLE: I OBJECT TO THE SHACKLING —USE OF FULL RESTRAINT SHACKLES ON MR. INGRAM AND ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY. THE NEW PRACTICE OF [57] SHACKLING ALL DEFENDANTS WITHOUT INDIVIDUALIZED DETERMINATION VIOLATES THE FIFTH AMENDMENT DUE-

PROCESS GUARANTY AND IT IMPOSES ADDITIONAL AND UNNECESSARY RESTRAINT ON MR. INGRAM.

THE ALLEGATIONS AGAINST MR. INGRAM ARE NOT VIOLENT IN NATURE, AND THE SENTENCE THAT WAS IMPOSED FOR THE UNDERLYING OFFENSE ALSO SEEMS TO INDICATE THERE WAS NO AGGRAVATED CIRCUMSTANCES TO THAT EFFECT. SO FAILURE TO REPORT AND A NONVIOLENT OFFENSE ARE THE ONLY THINGS THAT WE HAVE IN FRONT OF US, WHICH DO NOT SHOW THAT ADDITIONAL SECURITY MEASURES ARE NECESSARY FOR MR. INGRAM.

IF THE GOVERNMENT AND THE MARSHALS BELIEVE THAT THERE IS A SECURITY CONCERN IN THIS CASE, I REQUEST AN EVIDENTIARY HEARING TO DETERMINE WHETHER THERE ARE LESS RESTRICTIVE ALTERNATIVES TO SHACKLES OR WHETHER THE SHACKLES ARE NECESSARY IN THIS CASE.

THE COURT: FOR ALL THE REASONS PREVIOUSLY STATED, YOUR MOTIONS ARE DENIED.

ADRIAN SAUZ?

SIR, YOU ARE HERE BECAUSE JUDGE MOSKOWITZ ISSUED A WARRANT FOR YOUR ARREST. IT APPEARS THAT IN JULY OF 2012, HE SENTENCED YOU TO 120 DAYS IN CUSTODY, TO BE FOLLOWED BY TWO YEARS OF SUPERVISED RELEASE AFTER YOUR CONVICTION FOR BEING A REMOVED ALIEN FOUND IN THE

UNITED STATES. AND IT IS ALLEGED THAT YOU HAVE VIOLATED THOSE CONDITIONS.

ONE CONDITION WAS THAT YOU NOT COMMIT ANOTHER CRIME. [58] AND IT'S ALLEGED THAT ON MARCH 29TH, YOU WERE A DEPORTED ALIEN WHO WAS FOUND IN THE UNITED STATES IN VIOLATION OF FEDERAL LAW, AS EVIDENCED BY YOUR CONVICTION IN THIS DISTRICT.

BASED UPON THE INFORMATION IN FRONT OF ME, AS WELL AS JUDGE MOSKOWITZ'S FINDING, I DO FIND PROBABLE CAUSE TO BELIEVE THAT YOU COMMITTED THIS VIOLATION, BUT I ENTER A DENIAL ON YOUR BEHALF.

ANOTHER JUDGE RECENTLY MADE A DETERMINATION THAT YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, SO I'M GOING TO MAKE THAT SAME FINDING IN THIS CASE. MARTHA HALL REPRESENTED YOU IN THE UNDERLYING MATTER, SO I'M GOING TO APPOINT MARTHA HALL TO REPRESENT YOU IN THIS MATTER.

I'M GOING TO SET THIS FOR A STATUS HEARING IN FRONT OF ME ON NOVEMBER 5TH AT 9:30 A.M. AND JUDGE MOSKOWITZ ISSUED A NO-BAIL WARRANT, SO YOU, TOO, WILL BE HELD IN CUSTODY WITHOUT BAIL. THAT'S IT FOR TODAY.

MS. TRIMBLE: YOUR HONOR, I OBJECT TO THE SHACKLING OF MR. SAUZ-TORRES AND

ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY.

FOR THE RECORD, HE'S IN FULL RESTRAINTS. HE HAS NO APPARENT INDICATION OF VIOLENT PRIORS. HIS ONLY PRIOR IS FOR ILLEGAL REENTRY AND IMMIGRATION-BASED OFFENSE. THIS DISTRICT IS DIFFERENT THAN OTHER DISTRICTS IN THAT RESPECT, IN THAT MANY OF OUR DEFENDANTS ARE IMMIGRATION DEFENDANTS, WITH FEW [59] CRIMES OF VIOLENCE OR THAT IS RELATED TO GANG ACTIVITY COMING THROUGH.

THERE ARE NO SECURITY CONCERNS IN THIS PARTICULAR CASE. IF THE GOVERNMENT OR THE MARSHALS BELIEVE THERE ARE PARTICULAR CONCERNS OR SECURITY CONCERNS, I WOULD REQUEST AN EVIDENTIARY HEARING. TO THE EXTENT THERE ARE ANY SECURITY CONCERNS, THERE ARE LESS RESTRICTIVE ALTERNATIVES TO SHACKLES, SUCH AS BRINGING OUT THE DEFENDANT INDIVIDUALLY.

THE COURT: FOR ALL THE REASONS PREVIOUSLY STATED, YOUR MOTIONS ARE DENIED.

THAT'S IT FOR TODAY, EVERYBODY. STAND UP AND FOLLOW THE MARSHALS. WAIT. LET THE INTERPRETER GET THE HEADSETS.

MS. TRIMBLE: AND, YOUR HONOR, THE INTERPRETER NEEDS TO GET THE HEADSET

BECAUSE THE INDIVIDUALS CAN'T REACH THEM WITH THE SHACKLES THEY ARE WEARING.

THE CLERK: FOR THE RECORD, ITEMS NO. 14, 16, 17 AND 19. 14, 16, 17 AND 19.

ITEM NO. 14, 13MJ3858, JASMIN MORALES;

ITEM NO. 16, 13MJ3873, MICHELLE YAZBETH PINA;

ITEM NO. 17, 13MJ3874, FERMIN CHAVEZ CRUZ;

AND ITEM NO. 19, 13MJ3876, ALBERTO COTA.

MR. BITTERS: GOOD AFTERNOON, YOUR HONOR. RICHARD BITTERS FOR MR. COTA.

THE COURT: I'M SORRY. NO. 19, ARE YOU GOING—I'LL ASK YOU AGAIN, BUT ARE YOU MAKING A GENERAL APPEARANCE [60] OR A SPECIAL APPEARANCE?

MR. BITTERS: GENERAL APPEARANCE.

THE COURT: GENERAL. THANK YOU.

I HAVEN'T SEEN YOU HERE BEFORE. ARE YOU ADMITTED HERE IN THIS DISTRICT? I SEE YOU'RE FROM THE CENTRAL DISTRICT. MR. BITTERS?

MR. BITTERS: I'M SORRY?

THE COURT: ARE YOU ADMITTED HERE IN THIS DISTRICT?

MR. BITTERS: YES, I AM, YOUR HONOR.

THE COURT: GREAT. THANK YOU. I ASSUMED THE CENTRAL IS WHAT'S ON YOUR BUSINESS CARD. I JUST DIDN'T REMEMBER SEEING YOU BEFORE, SO I WANTED TO MAKE SURE. THANK YOU.

ALL RIGHT. I'M SPEAKING TO ALL FOUR OF YOU. EACH OF YOU ARE HERE BECAUSE THE UNITED STATES GOVERNMENT HAS FILED A COMPLAINT CHARGING YOU WITH ONE OR MORE CRIMES. THIS IS YOUR INITIAL APPEARANCE, SO I'M GOING TO GO THROUGH FOUR THINGS WITH YOU TODAY.

FIRST, I'M GOING TO TELL YOU WHAT CRIME YOU ARE CHARGED WITH. SECOND, I'M GOING TO DISCUSS WITH YOU YOUR RIGHT TO COUNSEL. THIRD, I'M GOING TO SET A PRELIMINARY HEARING. AND, FINALLY, I'M GOING TO DISCUSS BAIL.

SO, FIRST, THE CRIME THAT YOU ARE CHARGED WITH. JASMIN MORALES? THAT'S YOU. ALL RIGHT. AND MICHELLE PINA? THAT'S YOU. ALL RIGHT. FERMIN CHAVEZ? OKAY. AND ALBERT [61] COTA, IS THAT YOU? ALL RIGHT.

EACH OF YOU ARE CHARGED IN A SEPARATE COMPLAINT BY YOURSELF, BUT EACH OF YOU ARE CHARGED WITH THE SAME CRIME; AND THAT CRIME IS IMPORTATION OF A CONTROLLED SUBSTANCE. FOR EACH OF YOU, IT'S ALLEGED—LET'S SEE. FOR MR. COTA, IT'S ALLEGED THIS OCCURRED ON OCTOBER 20TH. FOR EVERYBODY ELSE, IT'S

ALLEGED IT OCCURRED ON OCTOBER 18TH. AND IT'S ALLEGED THAT EACH OF YOU KNOWINGLY AND INTENTIONALLY IMPORTED AN ILLEGAL DRUG INTO THE UNITED STATES FROM A PLACE OUTSIDE OF THE UNITED STATES.

FOR MS. MORALES, IT'S ALLEGED THAT IS 445 GRAMS OF METHAMPHETAMINE. FOR MS. PINA, IT'S 10.2 KILOGRAMS OF METHAMPHETAMINE. FOR MR. CHAVEZ-CRUZ, IT'S 10.4 KILOGRAMS OF METHAMPHETAMINE. AND FOR MR. COTA, IT'S 16.8 KILOGRAMS OF COCAINE. THAT'S THE CRIME THAT EACH OF YOU ARE CHARGED WITH.

WITH REGARD TO THIS CRIME, EACH OF YOU HAS AN ABSOLUTE RIGHT TO REMAIN SILENT. THE UNITED STATES IS REQUIRED TO PROVE ITS CASE AGAINST YOU WITHOUT ANY HELP OR TESTIMONY FROM YOU. IF YOU DECIDE TO SPEAK WITH SOMEONE ABOUT THE CHARGE, YOU MAY STOP AT ANY TIME. IF YOU DO SPEAK WITH SOMEONE ABOUT THE CHARGE, ANYTHING YOU SAY CAN BE USED AGAINST YOU.

EACH OF YOU ALSO HAS AN ABSOLUTE RIGHT TO HAVE AN ATTORNEY HELP YOU IN DEFENDING AGAINST THESE CHARGES. IF YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, I WILL APPOINT A [62] LAWYER TO REPRESENT YOU.

SO FIRST, MS. MORALES, HERE WE GO. MS. MORALES, I HAVE A ONE-PAGE FINANCIAL

AFFIDAVIT IN FRONT OF ME, SIGNED BY YOU UNDER PENALTY OF PERJURY. IS EVERYTHING IN THIS DOCUMENT TRUE?

DEFENDANT MORALES: YES.

THE COURT: I'M SORRY?

DEFENDANT MORALES: YES.

THE COURT: ALL RIGHT. BASED UPON THAT INFORMATION, I FIND YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, AND I'M GOING TO APPOINT A LAWYER TO REPRESENT YOU. I'M APPOINTING FEDERAL DEFENDERS.

MS. PINA, MA'AM, I HAVE IN FRONT OF ME A ONE-PAGE FINANCIAL AFFIDAVIT SIGNED UNDER PENALTY OF PERJURY BY YOU. IS EVERYTHING IN THIS DOCUMENT TRUE?

DEFENDANT PINA: YES.

THE COURT: BASED UPON THAT INFORMATION, I FIND YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, AND I AM APPOINTING MICHAEL MESSINA TO REPRESENT YOU. HIS NUMBER IS (619) 232-1914.

MR. CHAVEZ, SIR, I HAVE IN FRONT OF ME A ONE-PAGE FINANCIAL AFFIDAVIT SIGNED BY YOU UNDER THE PENALTY OF PERJURY. IS EVERYTHING IN THIS DOCUMENT TRUE?

DEFENDANT CHAVEZ: (THROUGH INTERPRETER) YES.

THE COURT: BASED UPON THAT INFORMATION, I FIND YOU [63] DO NOT HAVE THE

ABILITY TO HIRE A LAWYER, AND I'M APPOINTING FEDERAL DEFENDERS TO REPRESENT YOU.

AND THEN MR. COTA, IT'S MY UNDERSTANDING THAT YOU HAVE HIRED MR. BITTERS TO REPRESENT YOU; IS THAT CORRECT, SIR?

THE DEFENDANT: YES, MA'AM.

THE COURT: AND AT THIS TIME, SIR, ARE YOU ENTERING A GENERAL APPEARANCE ON HIS BEHALF?

MR. BITTERS: I AM, YOUR HONOR.

THE COURT: ALL RIGHT. I'M GOING TO GIVE THIS BACK TO YOU. I HAVE A FINANCIAL AFFIDAVIT—I HAVEN'T REVIEWED IT, AND IT IS NOT GOING TO GO INTO THE RECORD.

MR. BITTERS: THANK YOU.

THE COURT: YOU'RE WELCOME.

ALL RIGHT. SPEAKING TO ALL OF YOU. MR. COTA HAS RETAINED A LAWYER. FOR THE OTHER THREE OF YOU. I HAVE APPOINTED A LAWYER TO REPRESENT EACH OF YOU. EACH OF YOU HAS BEEN GIVEN A BUSINESS CARD FOR YOUR LAWYER. IN ADDITION, YOUR LAWYER WILL BE NOTIFIED THAT HE OR SHE HAS BEEN APPOINTED TO REPRESENT YOU, AND YOUR LAWYER WILL BE IN CONTACT WITH YOU IN THE NEAR FUTURE AND REPRESENT YOU THROUGHOUT THE REMAINDER OF THIS CASE.

THE NEXT THING THAT I NEED TO DO—THIS IS FOR ALL FOUR OF YOU—IS TO SET YOUR PRELIMINARY HEARING. ACTUALLY, PRELIMINARY HEARING AND ARRAIGNMENT. WITH REGARD TO THE [64] PRELIMINARY HEARING, EACH OF YOU HAVE THE RIGHT TO HAVE A JUDGE MAKE A DETERMINATION AS TO WHETHER OR NOT THERE ARE SUFFICIENT FACTS FOR YOUR CASE TO PROCEED FORWARD, AND THAT IS ON THE—WILL HAPPEN AT THE PRELIMINARY HEARING.

SO EACH OF YOU IS ORDERED TO APPEAR—LET'S DO ALL OF THESE ON MCCURINE. EACH OF YOU IS ORDERED TO APPEAR IN JUDGE MCCURINE'S COURTROOM ON OCTOBER 31ST AT 9:00 A.M.

AND THEN THE FINAL THING AS TO EACH OF YOU IS BAIL. IS THE UNITED STATES MOVING TO DETAIN?

MR. MARKLE: WE ARE, YOUR HONOR. BASED ON RISK OF FLIGHT.

THE COURT: AS TO EACH INDIVIDUAL?

MR. MARKLE: AS TO EACH INDIVIDUAL.

THE COURT: ALL RIGHT. SPEAKING TO ALL FOUR OF YOU.

THE UNITED STATES HAS ASKED THAT EACH OF YOU BE HELD IN CUSTODY WITHOUT BAIL BECAUSE THEY BELIEVE YOU PRESENT AN UNREASONABLE RISK OF FLIGHT. THEY HAVE THE RIGHT TO DO THAT. YOU HAVE THE RIGHT TO HAVE A HEARING AND FOR ME

TO MAKE A DETERMINATION AS TO WHETHER OR NOT THERE ARE ANY CONDITIONS THAT I COULD SET THAT WOULD GUARANTY YOUR APPEARANCE IN COURT AS REQUIRED. YOU WILL, HOWEVER, BE HELD IN CUSTODY WITHOUT BAIL UNTIL THAT HEARING OCCURS.

MS. TRIMBLE: YOUR HONOR—

THE COURT: I'LL LET YOU DO THAT. BUT MR. BITTERS, I'M INCLINED TO SET THURSDAY THE 24TH. DOES THAT WORK FOR [65] YOU, SIR?

MR. BITTERS: IF WE CAN JUST SET IT ON THE 31ST, IF WE CAN GO AT THE SAME TIME.

THE COURT: NO. I'LL BE OUT OF THE DISTRICT, SO ANOTHER JUDGE WILL BE HANDLING THAT.

MR. BITTERS: ALL RIGHT. THE 24TH?

THE COURT: IF THAT WORKS, YES.

MR. BITTERS: YES. I WOULD BE WILLING TO SUBMIT ON THE PRETRIAL SERVICES RECOMMENDATION, WHICH INDICATES A $40,000 APPEARANCE BOND.

THE COURT: TEN KILOS OF COKE. I'M GOING TO NEED MORE FACTS ON THAT. MY INCLINATION IS NOT TO FOLLOW THAT RECOMMENDATION.

MR. BITTERS: 24TH AT WHAT TIME?

THE COURT: 9:30.

ALL RIGHT. SO I WANT ALL FOUR OF YOU TO LISTEN. I'M SETTING YOUR DETENTION HEARING FOR THURSDAY, OCTOBER 24TH, AT 9:30 A.M. SO EACH OF YOU ARE REQUIRED TO RETURN TO MY COURTROOM ON THAT DATE AND TIME.

MR. BITTERS, ANYTHING ELSE ON BEHALF OF YOUR CLIENT?

MR. BITTERS: I THINK YOU SAID THE 31ST OF OCTOBER FOR—

THE COURT: A PRELIMINARY HEARING. AND THAT'S IN FRONT OF JUDGE MCCURINE.

MR. BITTERS: MCCURINE.

[66]

THE COURT: ALL RIGHT. THAT'S IT FOR YOUR CLIENT THEN?

MA'AM, WHAT DID YOU HAVE AS TO THE OTHER THREE.

MS. TRIMBLE: YOUR HONOR, I WILL BEGIN WITH MS. MORALES. I OBJECT TO THE SHACKLING OF MS. MORALES AND ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY.

FOR THE RECORD, THERE ARE FOUR DEFENDANTS IN THIS GROUP OF DEFENDANTS, ALL ARE WEARING ARM SHACKLES TO SHACKLE THEM TO THEIR WAIST, AS WELL AS LEG SHACKLES TO THEMSELVES. THERE ARE TWO UNITED STATES MARSHALS PRESENT IN THE COURT, AS WELL AS THE

COURTROOM SECURITY OFFICER WHO IS HERE.

THE COURT HAD PREVIOUSLY INDICATED THAT ONE OF THE REASONS TO JUSTIFY THE SHACKLING UNDER THE U.S. MARSHAL'S POLICY WAS THE PARTICULAR EPISODES WHERE COURTROOM SAFETY WAS CONCERNED.

AS FAR AS I AM AWARE, THERE HAVE ONLY BEEN TWO SUCH EPISODE. THEY OCCURRED IN DISTRICT COURT—

THE COURT: OH, NO, NO, NO. THAT'S NOT TRUE AND THAT'S NOT IN THE RECORD. SO I'M GOING TO STATE RIGHT NOW, THAT MAY BE YOUR KNOWLEDGE, BUT THAT IS NOT ACCURATE.

MS. TRIMBLE: YOUR HONOR, THAT IS ONE OF THE REASONS THAT WE REQUEST AN EVIDENTIARY HEARING TO JUSTIFY THE MARSHAL'S POLICY IN THIS CASE, BECAUSE THERE IS NO EVIDENCE IN THE RECORD TO JUSTIFY AN ACROSS-THE-BOARD POLICY AT THIS TIME, PARTICULARLY AN ACROSS-THE-BOARD POLICY FOR [67] FULL-SHACKLE RESTRAINTS ON ALL DEFENDANTS WHO ARE COMING BEFORE THE COURT FOR THEIR FIRST APPEARANCE.

IN PARTICULAR, MS. MORALES IS COMING FROM THE MCC. THERE HAS BEEN A PREVIOUS FINDING IN THE COURT'S—IN THE CASE OF UNITED STATES VS. MINERO-ROJAS, 11CR3253, OUT OF THIS DISTRICT, THAT MED-

ICAL CLASSIFICATION, SEPARATION OF SECURITY SCREENINGS ARE CONDUCTED BY MCC. PRIOR TO DEFENDANTS BEING BROUGHT INTO THE U.S. MARSHALS SPACE, PRISONERS ARE ALSO STRIP SEARCHED PRIOR TO BEING TURNED OVER TO THE MARSHAL.

I'M QUOTING IN THAT CASE FOR A DECLARATION OF THE ASSISTANT CHIEF DEPUTY U.S. MARSHAL KEITH JOHNSON, WHO DESCRIBED THE SECURITY SCREENINGS AT MCC. THOSE SCREENINGS IN THIS DISTRICT ARE DIFFERENT THAN THE SCREENINGS THAT ARE DONE IN OTHER DISTRICTS WHERE SHACKLES ARE USED. AND EVEN THOSE OTHER DISTRICTS, ONLY LEG SHACKLES ARE USED. SO THE FULL SHACKLES IN THIS CASE AREN'T NECESSARY, PARTICULARLY FOR MS. MORALES, WHO HAS NO PRIOR RECORD.

UNLIKE THE PRIOR DEFENDANTS, YOU CAN SEE THE PRETRIAL SERVICES REPORT FOR MS. MORALES. SHE HAS NO PRIOR RECORD. SHE'S BEEN ACCUSED HERE OF IMPORTING METHAMPHETAMINE. THIS IS NOT A VIOLENT OFFENSE. THERE IS NO PARTICULAR SECURITY CONCERNS FOR MS. MORALES.

IF THE GOVERNMENT OR THE MARSHALS BELIEVE THERE ARE PARTICULAR SECURITY CONCERNS, I WOULD ASK—REQUEST AN EVIDENTIARY HEARING SPECIFIC TO MS. MORALES AND ALSO TO [68] DEVELOP THE REC-

ORD AS TO THE GENERAL SECURITY CONCERNS IN THIS DISTRICT, WHICH THERE IS NO FACTUAL BASIS FOR AT THIS TIME. TO THE EXTENT THERE ARE SECURITY CONCERNS, THERE ARE LESS RESTRICTIVE ALTERNATIVES TO SHACKLES. MS. MORALES COULD BE BROUGHT OUT INDIVIDUALLY.

AND FOR THOSE REASONS, I DON'T THINK SHACKLES ARE NECESSARY IN THIS CASE AND I WOULD ASK FOR THEM TO BE IMMEDIATELY REMOVED.

THE COURT: FOR THE SAME REASONS PREVIOUSLY STATED ON THE RECORD, I DENY THE REQUEST.

ALL RIGHT. THANK YOU. THAT'S IT FOR TODAY THEN, MARSHALS.

MS. TRIMBLE: I'M SORRY. THAT WAS JUST FOR MS. MORALES.

THE COURT: THAT'S WHY I LOOKED AT YOU.

MS. TRIMBLE: MY APOLOGIES, YOUR HONOR.

THE COURT: IF YOU WANT TO MAKE A RECORD, YOU'VE GOT TO DO IT.

MS. TRIMBLE: MY APOLOGIES. I THOUGHT YOU WERE ASKING THE GOVERNMENT TO SPEAK AS TO MS. MORALES.

I WOULD ALSO OBJECT TO THE SHACKLING OF MS. YAZBETH PINA AND ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY.

THE POLICY OF SHACKLING HER WITHOUT AN INDIVIDUALIZED DETERMINATION AS TO THE NECESSITY OF SHACKLING VIOLATES THE FIFTH AMENDMENT DUE-PROCESS GUARANTY. AND I THINK THERE IS [69] ALSO AN EVIDENTIARY HEARING REQUIREMENT FOR MS. PINA. THOUGH SHE DOES HAVE ONE PRIOR CONVICTION, THAT CONVICTION IS FOR MARIJUANA. THERE IS NO PARTICULAR SECURITY CONCERN FOR A MARIJUANA OFFENSE AND IT APPEARS TO BE HER ONLY PRIOR.

AGAIN, HERE WE HAVE THE PRETRIAL SERVICES REPORT FOR MS. PINA. MS. PINA ALSO COMES FROM THE METROPOLITAN CORRECTIONAL CENTER, WHERE ADDITIONAL SECURITY SCREENING IS DONE PRIOR TO BEING BROUGHT TO THIS COURT. SHE'S ONLY 22 YEARS OLD. THESE SHACKLES NOT ONLY IMPOSE RESTRAINT ON HER, BUT THEY ALSO DETRACT FROM THE DIGNITY AND DECORUM OF THE CRIMINAL PROSECUTION IN THIS CASE.

TO THE EXTENT THAT THE GOVERNMENT OR THE MARSHALS BELIEVE THERE IS A PARTICULAR SECURITY CONCERN AS TO MS. YAZBETH PINA, I'D ASK FOR AN EVIDENTIARY HEARING AND LESS—THAT LESS RESTRICTIVE ALTERNATIVES TO SHACKLES BE CONSIDERED.

THE COURT: FOR THE REASONS PREVIOUSLY STATED, THE MOTION IS DENIED.

MS. TRIMBLE: I OBJECT TO THE SHACKLING OF MR. CHAVEZ CRUZ AND ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY. MR. CHAVEZ CRUZ IS 33 YEARS OLD AND YET HE HAS NO PRIORS. THERE IS NO INDICATION IN THE PRETRIAL SERVICES REPORT THAT HE POSES A PARTICULAR SECURITY CONCERN.

THE PRACTICE IN THIS DISTRICT OF SHACKLING ALL DEFENDANTS WITHOUT AN INDIVIDUALIZED DETERMINATION AS TO THE [70] NECESSITY OF SHACKLING VIOLATES HIS FIFTH AMENDMENT DUE-PROCESS RIGHTS AND ALSO DETRACTS FROM THE DIGNITY AND DECORUM OF THE CRIMINAL PROSECUTIONS IN THIS DISTRICT.

HE DOES NOT NEED TO BE SHACKLED. IF THE GOVERNMENT OR THE MARSHALS BELIEVE THERE IS A SECURITY CONCERN IN THIS CASE, I REQUEST AN EVIDENTIARY HEARING AS TO MR. CHAVEZ CRUZ IN PARTICULAR, AND ALSO TO DEVELOP THE RECORD AS TO THE SUPPOSED—THE ALLUDED TO SECURITY BREACHES THAT HAVE HAPPENED IN THE PAST THAT HAVE NOT BEEN DEVELOPED ON THE RECORD.

AND SO I WOULD ASK FOR THE SHACKLES TO BE IMMEDIATELY REMOVED. IN THE ALTERNATIVE, FOR MR. CHAVEZ CRUZ TO BE BROUGHT OUT INDIVIDUALLY OR IN THE ALTERNATIVE FOR A LESS RESTRICTIVE MEANS.

THE COURT: THE MOTIONS ARE DENIED. THAT'S IT, MARSHALS. THANK YOU.

THE CLERK: ITEMS NO. 21 THROUGH 30 ON THE LOG.

ITEM NO. 21, 13MJ3871, ANIBAL CHAVEZ-DAMIAN;

ITEM NO. 22, 13MJ3880, FEDERICO MORALES;

ITEM NO. 23, 13MJ3881, CARLOS CLEMENTE-LOPEZ;

ITEM NO. 24, 13MJ3882, MOISES PATRICIO-GUZMAN;

ITEM NO. 25, 13MJ3884, DOLORES ARGAMANEZ-OROZCO;

ITEM NO. 26, 13MJ3885, BLAS SABINAS-HERNANDEZ;

ITEM NO. 27, 13MJ3886, AGUSTIN RODRIGUEZ-PERALTA;

ITEM NO. 28, 13MJ3216, JOSEPH MORENO;

[71]

ITEM NO. 29, 13MJ3868, KEVIN MURILLO;

AND ITEM NO. 30, 13MJ3869, MARCELA PALACIO RODRIGUEZ.

MS. TRIMBLE: AND, YOUR HONOR, WE'D ASK THAT THE INDIVIDUALS IN NO. 29 AND 30 BE REFERRED TO AS "PERSON CHARGED AS."

THE COURT: ALL RIGHT. AS ALWAYS, I WILL TRY TO REMEMBER THAT.

MS. TRIMBLE: THANK YOU, YOUR HONOR.

THE COURT: ALL THE WAY DOWN. THERE YOU GO.

MS. TRIMBLE: YOUR HONOR, THE INTERPRETER IS PLACING HEADPHONES ON THOSE INDIVIDUALS WHO DO NOT SPEAK ENGLISH BECAUSE THE INDIVIDUALS CANNOT USE THEIR HANDS TO PUT THE HEADPHONES ON.

AND THERE IS A GROUP OF TEN INDIVIDUALS WHO HAVE BEEN BROUGHT OUT, ALL ARE WEARING FULL SHACKLES.

THE COURT: ACTUALLY, THEY CAN PUT IT ON WITH THEIR SHACKLES ON. ONE GENTLEMAN JUST DID.

THE MARSHALS ARE DOING IT. EXCUSE ME, THE INTERPRETER IS DOING IT TO BE HELPFUL, BUT THE SHACKLES ACTUALLY ALLOW THE DEFENDANTS TO PUT THEIR HEADSETS ON AND TO ADJUST THEM.

MS. TRIMBLE: YES. IF THE INDIVIDUALS LEAN THEIR HEADS FORWARD, THEY CAN REACH WITH THEIR HANDS. THEIR HANDS CAN'T REACH UP TO THEIR HEADS.

[72]

THE COURT: ALL RIGHT. I'M SPEAKING TO ALL OF YOU. EACH OF YOU IS HERE BECAUSE THE UNITED STATES HAS FILED A COMPLAINT CHARGING YOU WITH A CRIME.

THIS IS YOUR INITIAL APPEARANCE—CAN YOU HEAR ME? GENTLEMAN SECOND FROM THE—MY LEFT. DO YOU WANT TO HEAR ME IN SPANISH? CAN YOU HEAR ME IN SPAN-

ISH? NO, NO, NO. WE CAN FIX IT EASILY. THERE YOU GO. HE'S FIXING THE BUTTON.

A DEFENDANT: SORRY.

THE COURT: NO, NOT A PROBLEM. I WANT YOU TO UNDERSTAND EVERYTHING THAT'S GOING ON.

IS THAT BETTER? ALL RIGHT. SPEAKING —CAN YOU HEAR ME?

A DEFENDANT: YES.

THE COURT: OKAY. ALL RIGHT. I'M SPEAKING TO ALL OF YOU.

EACH OF YOU ARE HERE BECAUSE THE UNITED STATES HAS FILED A COMPLAINT CHARGING YOU WITH A CRIME. THIS IS YOUR INITIAL APPEARANCE, SO I'M GOING TO GO THROUGH FOUR THINGS WITH YOU TODAY.

FIRST, I'M GOING TO TELL YOU WHAT CRIME YOU ARE CHARGED WITH. SECOND, I'M GOING TO DISCUSS WITH YOU YOUR RIGHT TO COUNSEL. THIRD, I'M GOING TO SET A PRELIMINARY HEARING. AND, FINALLY, I'M GOING TO DISCUSS BAIL.

SO FIRST WITH REGARD TO THE CRIME THAT YOU ARE CHARGED WITH. ANIBAL CHAVEZ, IS THAT YOU, MA'AM?

[73]

DEFENDANT CHAVEZ: (THROUGH INTERPRETER) NO.

THE COURT: SORRY, SIR. THAT'S YOU. ALL RIGHT.

ALL RIGHT. SIR, YOU ARE CHARGED WITH THE CRIME OF ATTEMPTED ENTRY AFTER DEPORTATION. IT'S ALLEGED THAT ON OCTOBER 19TH, YOU WERE AN ALIEN WHO PREVIOUSLY HAD BEEN EXCLUDED, DEPORTED AND REMOVED FROM THE UNITED STATES. YOU THEN ATTEMPTED TO ENTER THE UNITED STATES AND YOU DID NOT HAVE THE PERMISSION OF THE U.S. ATTORNEY GENERAL TO APPLY FOR ADMISSION TO THE UNITED STATES.

I JUST SAW—COUNSEL, I JUST SAW IN THE GROUP THAT CAME OUT, THERE ARE SOME SLIPS. ARE WE GOING FORWARD WITH A GUILTY PLEA TODAY?

MS. TRIMBLE: NO, YOUR HONOR.

THE COURT: OKAY.

MR. MARKLE: WE ARE PREPARED TO GO FORWARD.

THE COURT: ALL RIGHT. I DON'T KNOW WHAT HAPPENS WITH THE OFFERS. HAS THERE BEEN A DISCUSSION?

MS. TRIMBLE: I'M SORRY, YOUR HONOR?

THE COURT: I DON'T KNOW WHAT'S HAPPENING WITH THE OFFERS. SO YOU WANT ME JUST TO ARRAIGN HIM ON BOTH OF THEM?

MS. TRIMBLE: YES, YOUR HONOR.

THE COURT: OKAY. ALL RIGHT. FEDERICO MORALES, WHO IS THAT? ALL RIGHT. CARLOS CLEMENTE? ALL RIGHT. DOLORES ARGAMANEZ? BLAS SABINAS-HERNANDEZ?

ALL RIGHT. EACH OF YOU INDIVIDUALS THAT I JUST [74] MENTIONED ARE CHARGED IN A SEPARATE COMPLAINT BY YOURSELF, BUT EACH OF YOU ARE CHARGED WITH THE SAME CRIME; AND THAT CRIME IS BEING A DEPORTED ALIEN FOUND IN THE UNITED STATES.

FOR EACH OF YOU, IT'S ALLEGED THAT YOU ARE AN ALIEN WHO PREVIOUSLY HAD BEEN EXCLUDED, DEPORTED AND REMOVED FROM THE UNITED STATES. YOU WERE THEN FOUND IN THE UNITED STATES AND YOU DID NOT HAVE THE PERMISSION OF THE U.S. ATTORNEY GENERAL TO APPLY FOR ADMISSION TO THE UNITED STATES. FOR EACH OF YOU, IT'S ALLEGED THIS OCCURRED ON EITHER OCTOBER 19TH OR OCTOBER 20TH.

AGUSTIN RODRIGUEZ? ALL RIGHT. AND MOISES PATRICIO? ALL RIGHT. GENTLEMEN, EACH OF YOU ARE CHARGED IN A SEPARATE COMPLAINT, BUT YOU'RE CHARGED WITH THE SAME CRIME. FOR EACH OF YOU—CRIMES. FOR EACH OF YOU, YOU'RE CHARGED WITH TWO CRIMES. FOR EACH OF YOU, YOU ARE CHARGED WITH THE MISDEMEANOR CRIME OF ILLEGAL ENTRY AND THE FELONY CRIME OF BEING A DEPORTED ALIEN FOUND IN THE UNITED STATES.

WITH REGARD TO THE MISDEMEANOR CRIME, IT'S ALLEGED THAT YOU ENTERED THE UNITED STATES ILLEGALLY ON—FOR MR. PATRICIO, IT WAS OCTOBER 19TH; FOR MR. RODRIGUEZ, IT WAS OCTOBER 20TH. AND IT'S ALLEGED THAT YOU ARE NOT A CITIZEN OF THE UNITED STATES AND DID NOT HAVE A LEGAL RIGHT TO ENTER THE UNITED STATES.

WITH REGARD TO THE CRIME OF BEING A DEPORTED ALIEN, IT'S ALLEGED IT OCCURRED ON THE SAME DAYS I JUST TOLD YOU, [75] AND IT'S ALLEGED THAT YOU WERE AN ALIEN WHO PREVIOUSLY HAD BEEN EXCLUDED, DEPORTED AND REMOVED FROM THE UNITED STATES. YOU WERE THEN FOUND IN THE UNITED STATES AND YOU DID NOT HAVE THE PERMISSION OF THE U.S. ATTORNEY GENERAL TO APPLY FOR ADMISSION TO THE UNITED STATES.

JOSEPH MORENO, SIR, YOU ARE CHARGED WITH ESCAPE FROM FEDERAL CUSTODY. IT'S ALLEGED THAT IN—IT'S ALLEGED THAT ON OR ABOUT AUGUST 22ND, YOU FAILED TO RETURN TO THE CORRECTIONAL ALTERNATIVES, INC., AS REQUIRED, AND AT THE TIME THAT THIS WARRANT WAS—COMPLAINT WAS SIGNED IN AUGUST OF 2013, YOUR WHEREABOUTS WERE UNKNOWN. AND YOU WERE IN FEDERAL CUSTODY AT THE CORRECTIONAL ALTERNATIVES, INC., AFTER YOUR CONVICTION FOR CONSPIRACY TO DISTRIBUTE HEROIN.

PERSON CHARGED AS KEVIN MURILLO?

DEFENDANT MURILLO: YES, YOUR HONOR.

THE COURT: ALL RIGHT. AND PERSON CHARGED AS MARCELA PALACIO?

DEFENDANT PALACIO: YES.

THE COURT: ALL RIGHT. SPEAKING TO BOTH OF YOU. OH, NO, I'M SORRY. YOU HAVE DIFFERENT CRIMES.

SO PERSON CHARGED AS MR. MURILLO, IT'S ALLEGED THAT ON OCTOBER 19TH, YOU KNOWINGLY AND WILLFULLY USED A PASSPORT ISSUED OR DESIGNED FOR THE USE OF ANOTHER WITH THE INTENTION OF GAINING ADMISSION TO THE UNITED STATES, KNOWING THAT THE PASSPORT WAS NOT ISSUED OR DESIGNED FOR YOU.

[76]

MS. PALACIO, YOU ARE CHARGED WITH MISUSE OF AN ENTRY DOCUMENT. IT'S ALLEGED THAT ON OCTOBER 18TH, YOU WERE AN ALIEN WHO APPLIED FOR ADMISSION TO THE UNITED STATES AT THE SAN YSIDRO, CALIFORNIA PORT OF ENTRY, AND YOU IMPERSONATED ANOTHER PERSON BY PRESENTING A DOCUMENT OF ENTRY, SPECIFICALLY A BORDER CROSSING CARD BEARING THE NAME OF SOMEONE OTHER THAN YOU.

SPEAKING TO ALL OF YOU. THAT'S WHY EACH OF YOU IS HERE TODAY. WITH REGARD TO THIS CRIME, EACH OF YOU HAS THE

RIGHT TO REMAIN SILENT. THE UNITED STATES IS REQUIRED TO PROVE ITS CASE AGAINST YOU WITHOUT ANY HELP OR TESTIMONY FROM YOU.

IF YOU DECIDE TO SPEAK WITH SOMEONE ABOUT THE CHARGE, YOU MAY STOP AT ANY TIME. IF YOU DO SPEAK WITH SOMEONE ABOUT THE CHARGE, ANYTHING YOU SAY CAN BE USED AGAINST YOU.

EACH OF YOU ALSO HAS AN ABSOLUTE RIGHT TO HAVE AN ATTORNEY HELP YOU IN DEFENDING AGAINST THE CHARGES. IF YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, I WILL APPOINT A LAWYER TO REPRESENT YOU.

BASED UPON THE CHARGES, I DON'T BELIEVE THAT ANY OF THESE INDIVIDUALS HAVE THE ABILITY TO HIRE A LAWYER. DOES THE GOVERNMENT HAVE ANY CONTRARY INFORMATION?

MR. MARKLE: WE DO NOT, YOUR HONOR.

THE COURT: OKAY. BASED UPON THAT THEN, I FIND THAT [77] NONE OF YOU HAVE THE ABILITY TO HIRE A LAWYER. AND I AM GOING TO APPOINT A LAWYER TO REPRESENT EACH ONE OF YOU.

ANIBAL CHAVEZ, GENTLEMAN IN THE BACK, I'M APPOINTING FEDERAL DEFENDERS.

MS. TRIMBLE: YOUR HONOR, AT THIS POINT, I WOULD OBJECT TO THE SHACKLING—

THE COURT: WAIT. LET'S DO THAT AFTER I DO THE CONDITIONS. WE'LL GO ONE BY—I'LL SET BAIL, AND THEN YOU CAN. ALL RIGHT. OKAY.

FEDERICO MORALES. ALL RIGHT. I'M APPOINTING MICHAEL LITTMAN. HIS NUMBER IS (619) 236-1030. MICHAEL LITTMAN, L-I-T-T-M-A-N. READY? (619) 236-1030.

MR. MARKLE: THANK YOU, YOUR HONOR.

THE COURT: CARLOS CLEMENTE, WHO IS THAT? THERE WE GO. THIRD DOWN.

I'M APPOINTING PAUL TURNER. MR. TURNER'S NUMBER, (619) 231-2001.

MOISES PATRICIO, FEDERAL DEFENDERS.

DOLORES ARGAMANEZ, FEDERAL DEFENDERS.

BLAS SABINAS, MERLE SCHNEIDEWIND. MR. SCHNEIDEWIND'S NUMBER IS (619) 668-9555.

AGUSTIN RODRIGUEZ, CHARLES ADAIR. MR. ADAIR'S NUMBER IS (619) 233-3161.

PERSON CHARGED AS KEVIN MURILLO, FEDERAL DEFENDERS.

PERSON CHARGED AS MS. PALACIO RODRIGUEZ, FEDERAL [78] DEFENDERS.

AND MR. MORENO, MARK GELLER. MR. GELLER'S NUMBER—GELLER WITH A G. (619) 239-9456. DO YOU HAVE A CARD? GENTLEMAN IN GREEN.

OKAY. THE FINAL ISSUE THEN THAT I NEED TO DISCUSS WITH EACH OF YOU IS BAIL. INITIALLY FOR THE PEOPLE CHARGED AS KEVIN MURILLO AND MARCELA PALACIO, AS YOU'VE NOTICED WHILE I'VE BEEN TALKING TO YOU, I HAVE REFERRED TO EACH OF YOU AS "THE PERSON CHARGED AS." I DO THAT AT THE REQUEST OF YOUR LAWYER. YOUR ACTUAL IDENTITY IS AT ISSUE IN THE CRIME THAT YOU ARE CHARGED WITH. AS A RESULT, YOUR LAWYER HAS ASKED THAT I REFER TO YOU AS THE PERSON CHARGED AS; AND I HAVE DONE THAT.

HOWEVER, BECAUSE OF THAT, I DON'T KNOW WHO YOU ARE. AS A RESULT, I FIND THERE ARE NO CONDITIONS THAT I COULD SET THAT WOULD GUARANTY YOUR APPEARANCE IN COURT AS REQUIRED, BECAUSE I DON'T KNOW WHO YOU ARE. I THEREFORE ORDER THAT BOTH OF YOU BE HELD IN CUSTODY WITHOUT BAIL. I ENTER THAT ORDER WITHOUT PREJUDICE. THAT'S AN ISSUE YOU CAN DISCUSS WITH YOUR LAWYER. SO THAT'S IT FOR THE TWO OF YOU.

IS THE GOVERNMENT MOVING TO DETAIN ANYBODY?

MS. TRIMBLE: YOUR HONOR, IF I CAN BE HEARD AS TO THOSE TWO DEFENDANTS?

THE COURT: OKAY. SURE.

MS. TRIMBLE: AS TO THE PERSON CHARGED AS [79] MR. MURILLO, I OBJECT TO THE SHACKLING OF THE PERSON CHARGED AS MR. MURILLO AND ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY.

EARLIER TODAY, AT THE BEGINNING OF THIS CALENDAR, THERE WERE MATERIAL WITNESSES WHO WERE BROUGHT INTO THIS COURTROOM. THEY HAD ENTERED THE UNITED STATES ILLEGALLY, THAT'S THE MEANS BY WHICH THEY BECAME MATERIAL WITNESSES. THEY WERE BROUGHT INTO THIS COURTROOM WITH NO SHACKLES WHATSOEVER. THIS INDIVIDUAL IS ACCUSED OF DOING ESSENTIALLY THE SAME THING, ALTHOUGH IT'S A MISUSE OF AN ENTRY DOCUMENT. IT'S A NONVIOLENT OFFENSE.

HOWEVER, IN CONTRAST TO THOSE MATERIAL WITNESSES, HE'S IN FULL SHACKLES AT THIS TIME. THERE HAS BEEN NO SHOWING THAT THERE IS A PARTICULAR SECURITY CONCERN FOR MR. MURILLO, FOR THE PERSON CHARGED AS MR. MURILLO.

THERE—BEING THAT THERE ARE NO SECURITY CONCERNS IN THIS PARTICULAR CASE, AND THAT THERE HAS BEEN NO FACTUAL SHOWING OF SECURITY CONCERNS IN GENERAL IN THIS DISTRICT, I WOULD ASK FOR THE SHACKLES TO BE IMMEDIATELY REMOVED.

IF THAT REQUEST IS DENIED, I REQUEST AN EVIDENTIARY HEARING TO DEVELOP THE RECORD AS TO MR. MURILLO'S SECURITY CONCERNS, AND ALSO THE SECURITY CONCERNS BASED ON THIS DISTRICT IN GENERAL. THERE ARE LESS RESTRICTIVE ALTERNATIVES TO SHACKLES, SO I WOULD ALSO REQUEST THAT MR. MURILLO BE BROUGHT OUT INDIVIDUALLY, AS OPPOSED TO IN FULL RESTRAINTS.

[80]

THE COURT: I DENY YOUR REQUEST FOR THE REASONS PREVIOUSLY STATED.

I WILL NOTE FOR THE RECORD WE HAVE TEN INDIVIDUALS OUT HERE. DUE TO THE LARGE NUMBER OF DEFENDANTS THAT THIS COURT HAS TO HANDLE TODAY, I DO NEED TO HANDLE THEM IN GROUPS, AND THERE ARE NINE OTHER PEOPLE OUT HERE. I THEREFORE DENY YOUR REQUEST.

FOR THE OTHER DEFENDANT.

MS. TRIMBLE: AS TO MR. PALACIO, THE PERSON CHARGED AS MR. PALACIO RODRIGUEZ, I OBJECT TO THE SHACKLING AND ASK THAT THEY BE REMOVED IMMEDIATELY. HE'S ALSO IN FULL RESTRAINTS.

THIS NEW POLICY OF SHACKLING ALL DEFENDANTS WITHOUT AN INDIVIDUALIZED DETERMINATION VIOLATES THE FIFTH AMENDMENT DUE-PROCESS GUARANTY AND IMPOSES ADDITIONAL AND UNNECESSARY RESTRAINTS. MR. PALACIO ALSO IS ACCUSED OF

ENTRY WITH MISUSE OF AN ENTRY DOCUMENT. THIS IS A NONVIOLENT OFFENSE. EVEN IF MR. PALACIO IS THE PERSON THAT HE'S ACCUSED AS BEING, THE PRETRIAL SERVICES INDICATES THAT HE HAS NO PRIORS, SO THERE IS NO PARTICULAR SECURITY CONCERNS AS TO THIS PARTICULAR DEFENDANT.

AS TO THE COURT'S INDICATION THAT THIS COURT NEEDS TO HANDLE A LARGE NUMBER OF CASES, I DON'T THINK THAT THAT OUTWEIGHS THE NEED FOR DECORUM AND DIGNITY IN CRIMINAL PROCEEDINGS. I THINK THE MARSHALS COULD BRING OUT THESE [81] PEOPLE INDIVIDUALLY SO THAT THEY WOULD NOT NEED TO BE IN THE FULL SHACKLE RESTRAINTS.

SO IF THERE IS A PARTICULAR SECURITY CONCERN IN THIS CASE, I REQUEST AN EVIDENTIARY HEARING. OTHERWISE, I REQUEST THAT THE SHACKLES BE REMOVED IMMEDIATELY. AND IF THAT MEANS THAT MR. PALACIO IS BROUGHT IN INDIVIDUALLY, I REQUEST THAT THAT OCCUR.

THE COURT: MS. PALACIO. AND YOUR MOTIONS ARE DENIED IN ALL RESPECTS FOR THE REASONS PREVIOUSLY STATED.

DID I SET PRELIMINARY HEARINGS, MICHELLE? I DON'T THINK I DID FOR ANY OF THESE.

ALL RIGHT. SPEAKING TO ALL OF YOU. I'M NOW—I ALSO NEED TO SET TWO HEARING

DATES FOR EACH OF YOU, A PRELIMINARY HEARING AND AN ARRAIGNMENT. SO WITH REGARD TO THE PRELIMINARY HEARING, EACH OF YOU HAVE THE RIGHT TO REQUIRE THE UNITED STATES PRESENT SUFFICIENT EVIDENCE AND FOR A JUDGE TO MAKE A DETERMINATION THAT THERE IS SUFFICIENT EVIDENCE FOR YOUR CASE TO PROCEED FORWARD.

SO, MR. CHAVEZ, YOU ARE ORDERED TO APPEAR IN JUDGE GALLO'S COURTROOM ON OCTOBER 31ST AT 2:00 P.M. FOR A PRELIMINARY HEARING AND IN MY COURTROOM ON NOVEMBER 14TH AT 9:30 A.M. FOR AN ARRAIGNMENT.

FOR MR. CLEMENTE, YOU ARE ORDERED TO APPEAR IN JUDGE BROOKS' COURTROOM ON OCTOBER 31ST AT 9:00 A.M. FOR A PRELIMINARY HEARING AND IN MY COURTROOM ON NOVEMBER 14TH AT [82] 9:30 A.M. FOR AN ARRAIGNMENT.

FOR MR. PATRICIO, YOU ARE ORDERED TO APPEAR IN JUDGE ADLER'S COURTROOM ON OCTOBER 31ST AT 2:00 P.M. FOR A PRELIMINARY HEARING AND IN MY COURTROOM ON NOVEMBER 14TH AT 9:30 A.M. FOR AN ARRAIGNMENT.

FOR MR. ARGAMANEZ, YOU ARE ORDERED TO APPEAR IN JUDGE CRAWFORD'S COURTROOM ON OCTOBER 31ST AT 9:30 A.M. FOR A PRELIMINARY HEARING AND IN MY COURT-

ROOM ON NOVEMBER 14TH AT 9:30 A.M. FOR AN ARRAIGNMENT.

FOR MR. SABINAS, YOU ARE ORDERED TO APPEAR IN JUDGE CRAWFORD'S COURTROOM ON OCTOBER 31ST AT 9:30 A.M. FOR A PRELIMINARY HEARING AND IN MY COURTROOM ON NOVEMBER 14TH AT 9:30 A.M.

FOR MR. RODRIGUEZ, YOU ARE ORDERED TO APPEAR IN JUDGE DEMBIN'S COURTROOM ON OCTOBER 31ST AT 1:30 P.M. FOR A PRELIMINARY HEARING AND IN MY COURTROOM ON NOVEMBER 14TH AT 9:30 A.M. FOR AN ARRAIGNMENT.

FOR MR. MORENO, YOU ARE ORDERED TO APPEAR IN JUDGE STORMES' COURTROOM ON OCTOBER 31ST AT 9:30 A.M. FOR A PRELIMINARY HEARING AND IN MY COURTROOM ON NOVEMBER 14TH ALSO AT 9:30 A.M. FOR AN ARRAIGNMENT.

FOR THE PERSON CHARGED AS MR. MURILLO, YOU ARE ORDERED TO APPEAR IN JUDGE CRAWFORD'S COURTROOM ON OCTOBER 31ST AT 9:30 A.M. FOR A PRELIMINARY HEARING AND IN MY COURTROOM ON NOVEMBER 14TH AT 9:30 A.M. FOR AN ARRAIGNMENT.

[83]

AND FOR THE PERSON CHARGED AS MS. PALACIO, YOU ARE ORDERED TO APPEAR IN JUDGE GALLO'S COURTROOM ON OCTOBER 31ST AT 9:00 A.M. AND IN MY COURTROOM FOR

AN ARRAIGNMENT ON NOVEMBER 14TH AT 9:30 A.M.

ALL RIGHT. IS THE UNITED STATES MOVING TO DETAIN ANYBODY?

MR. MARKLE: YOUR HONOR, WE ARE MOVING TO DETAIN EVERYBODY BASED ON RISK OF FLIGHT.

THE COURT: ALL RIGHT. WITH REGARD TO MR. MORENO, WHAT'S YOUR BASIS?

MR. MARKLE: OUR BASIS IS THAT THE INDIVIDUAL IS CHARGED WITH ESCAPE, AS HE ESCAPED FROM HIS PLACE HE WAS SERVING HIS SENTENCE AT. HE WALKED AWAY ON AUGUST 22ND, I BELIEVE, AND DID NOT RETURN.

THE COURT: BASED ON THAT, I'M GOING TO SET A HERRING.

SO MR. MORENO, THE UNITED STATES HAS ASKED THAT YOU BE HELD IN CUSTODY WITHOUT BAIL BECAUSE THEY BELIEVE YOU PRESENT AN UNREASONABLE RISK OF FLIGHT. THEY HAVE THE RIGHT TO DO THAT. YOU HAVE THE RIGHT TO HAVE A HEARING AND FOR ME TO MAKE A DETERMINATION AS TO WHETHER OR NOT THERE ARE ANY CONDITIONS THAT I COULD SET THAT WOULD GUARANTY YOUR APPEARANCE IN COURT AS REQUIRED. YOU WILL, HOWEVER, BE HELD IN CUSTODY WITHOUT BAIL UNTIL THAT HEARING OCCURS.

SO YOU ARE ORDERED, SIR, TO APPEAR IN MY COURTROOM [84] ON THURSDAY, OCTOBER 24TH AT 9:30 A.M. THAT'S IT FOR TODAY FOR YOU, SIR.

MS. TRIMBLE: AND, YOUR HONOR, I OBJECT TO THE SHACKLING—

THE COURT: SURE. GO AHEAD.

MS. TRIMBLE: —OF MR. MORENO.

FOR THE RECORD, HE'S IN FULL RESTRAINTS. THERE IS NO INDICATION IN HIS RECORD OF A VIOLENT PAST.

THE COURT: ESCAPE.

MS. TRIMBLE: UNDERSTANDING THE CHARGE OF ESCAPE, THERE IS NO PARTICULAR VIOLENCE OR SECURITY CONCERNS AND THERE IS NO GANG AFFILIATION. WE SEE NO CHARGES OF ANYTHING THAT WOULD INDICATE THAT HE WOULD CAUSE HARM TO HIS CO-DEFENDANT—TO THE OTHER DEFENDANTS THAT ARE PRESENT IN COURT TODAY OR ANYBODY ELSE THAT'S PRESENT IN COURT TODAY.

THE COURT: OR ESCAPE FROM CUSTODY?

MS. TRIMBLE: THE ESCAPE CHARGE I WOULD NOTE IS RELATED TO FAILING TO RETURN TO CORRECTIONAL ALTERNATIVES, SO THIS IS AN ALTERNATIVE CUSTODY DETERMINATION. IT APPEARS THAT HE WAS NOT CONSIDERED A HIGH-SECURITY CONCERN AT THE TIME THAT HE WAS PLACED IN CORRECTIONAL ALTERNATIVES. SO I DON'T

THINK THAT THE RECORD SHOWS A PARTICULAR VIOLENT PAST FOR MR. MORENO.

AND IN ADDITION, IF THERE IS A PARTICULAR SECURITY CONCERN IN THIS CASE, WE WOULD ASK FOR AN EVIDENTIARY HEARING [85] SO THAT THE FACTUAL BASIS FOR THE SHACKLES CAN BE DEVELOPED. AND TO THE EXTENT THERE ARE SECURITY CONCERNS, THERE ARE LESS RESTRICTIVE ALTERNATIVES THAN THE FULL SHACKLING, SIMPLY LEG SHACKLES OR BRINGING MARSHALS OUT—THE MARSHALS BRINGING THE DEFENDANTS OUT INDIVIDUALLY. SO WE WOULD ASK FOR THE SHACKLES TO BE REMOVED, OR IN THE ALTERNATIVE, AN EVIDENTIARY HEARING.

THE COURT: MOTION IS DENIED FOR ALL THE REASONS PREVIOUSLY STATED.

IS THE UNITED STATES MOVING TO DETAIN —WHAT IS THE BASIS FOR THE UNITED STATES MOTION TO DETAIN ALL OF THE INDIVIDUALS; I.E., THOSE CHARGED WITH 8 U.S.C. 1326 VIOLATIONS?

MR. MARKLE: PRIMARILY, YOUR HONOR, IS THE BASIS OF WITH NO LEGAL RIGHT TO ENTER OR REMAIN IN THE UNITED STATES AND THE LEVEL OF CRIMINAL HISTORY IS VARIED BY INDIVIDUALS. AND RATHER THAN LIST IT FOR INDIVIDUALS, IT'S ALSO BASED ON RISK OF FLIGHT.

THE COURT: DOES ANY OF THEM HAVE A CRIMINAL HISTORY THAT PRESENTS AN INDIVIDUALIZED CONCERN?

MR. MARKLE: MR. FEDERICO MORALES HAS NUMEROUS FELONIES. HIS LAST FELONY OCCURRED IN 2010 WHEN HE SERVED 16 MONTHS IN PRISON. PRIOR TO THAT, HE SERVED 16 MONTHS IN PRISON IN 2006.

THE COURT: ALL RIGHT. ANYONE ELSE?

[86]

MR. MARKLE: I BELIEVE THAT'S THE—THAT'S THE ONLY ONE, I BELIEVE.

THE COURT: ALL RIGHT. MR. MORALES, SIR, THE UNITED STATES HAS ASKED THAT YOU BE HELD IN CUSTODY WITHOUT BAIL BECAUSE THEY BELIEVE YOU PRESENT AN UNREASONABLE RISK OF FLIGHT.

MS. TRIMBLE: YOUR HONOR—IF I MAY BE HEARD. I DON'T THINK THAT THE GOVERNMENT HAS REACHED A FACTUAL BASIS.

THE COURT: I DO, THANKS.

BECAUSE THEY HAVE ASKED THAT—THEY BELIEVE THAT YOU PRESENT AN UNREASONABLE RISK OF FLIGHT. THEY HAVE THE RIGHT TO DO THAT. YOU HAVE THE RIGHT TO HAVE A HEARING FOR ME TO MAKE A DETERMINATION AS TO WHETHER OR NOT THERE ARE ANY CONDITIONS THAT I COULD SET THAT WOULD GUARANTY YOUR APPEARANCE IN COURT AS REQUIRED. YOU WILL,

HOWEVER, BE HELD IN CUSTODY WITHOUT BAIL UNTIL THAT HEARING OCCURS.

YOU ARE ORDERED, SIR, TO APPEAR IN MY COURTROOM ON THURSDAY, OCTOBER 24TH AT 9:30 A.M. THAT'S IT FOR TODAY FOR YOU, SIR.

GO AHEAD, MA'AM.

MS. TRIMBLE: I OBJECT TO THE SHACKLING OF MR. MORALES AND ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY. THE PRACTICE OF SHACKLING ALL DEFENDANTS WITHOUT AN INDIVIDUALIZED DETERMINATION VIOLATES THE FIFTH AMENDMENT [87] DUE-PROCESS GUARANTY AND IMPOSES ADDITIONAL AND UNNECESSARY RESTRAINT.

MR. MORALES IS CHARGED WITH ILLEGAL REENTRY. THIS IS A NONVIOLENT OFFENSE. EARLIER TODAY THERE WERE MATERIAL WITNESSES IN THE COURTROOM WHO ALSO HAVE ENTERED THE UNITED STATES ILLEGALLY, THEY ARE ALSO BEING DETAINED AND THEY WERE BROUGHT IN WITHOUT ANY RESTRAINTS WHATSOEVER; SO THE USE OF FULL RESTRAINTS FOR MR. MORALES HAS NOT BEEN JUSTIFIED BY A GENERAL SECURITY NEED IN THIS DISTRICT FOR INDIVIDUALS WHO ARE BEING HELD FOR APPEARANCES IN COURT.

IF THE GOVERNMENT OR THE MARSHALS BELIEVE THERE IS A PARTICULAR SECURITY CONCERN IN THIS CASE, I REQUEST AN EVI-

DENTIARY HEARING. THERE ARE LESS RESTRICTIVE ALTERNATIVES TO SHACKLES; FOR EXAMPLE, MR. MORALES COULD BE BROUGHT OUT INDIVIDUALLY AND ALL OF THESE DEFENDANTS COULD BE BROUGHT OUT INDIVIDUALLY.

THE COURT: MOTION IS DENIED FOR ALL THE REASONS PREVIOUSLY STATED. IN ADDITION, THIS DEFENDANT DOES HAVE A CRIMINAL HISTORY.

ALL RIGHT. I DENY THE GOVERNMENT'S REQUEST FOR DETENTION HEARINGS AS TO ALL OF THE OTHER DEFENDANTS ON THE GROUND THAT THERE ISN'T AN INDIVIDUAL CONCERN, BUT RATHER THERE IS A GENERAL CONCERN THAT INDIVIDUALS WHO ARE IN THIS COUNTRY ILLEGALLY SHOULDN'T GET BAIL APPARENTLY. I DISAGREE WITH THAT. I FIND THAT I HAVE SET BAIL FOR INDIVIDUALS IN [88] SIMILAR SITUATIONS ON NUMEROUS OCCASIONS IN THE PAST, AND NONE OF THOSE DEFENDANTS HAVE FAILED TO APPEAR IN COURT AS REQUIRED TO THE BEST OF MY KNOWLEDGE. IN ADDITION, I DON'T FIND THAT IT'S A PROPER BASIS, SOLELY THAT BASES TO DETAIN SOMEBODY UNDER THE FEDERAL RULES.

DOES THE UNITED STATES WANT TO BE HEARD ON BOND AS TO ANY OF THE REMAINING INDIVIDUALS?

MR. MARKLE: WE WOULD, YOUR HONOR.

THE COURT: ALL RIGHT. STARTING WITH MR. CHAVEZ. MR. CHAVEZ—ACTUALLY, FOR THE INDIVIDUALS WHO ARE LEFT, I WANT ALL OF YOU TO LISTEN VERY CAREFULLY BECAUSE I'M GOING TO SET BAIL CONDITIONS FOR EACH OF YOU.

FOR EACH OF YOU, THERE ARE SOME CONDITIONS THAT I BELIEVE ARE APPROPRIATE FOR EVERYBODY, AND I CALL THESE THE GENERAL CONDITIONS. IF YOU ARE RELEASED FROM CUSTODY, YOU MUST COMPLY WITH ALL OF THE GENERAL CONDITIONS THAT I SET AND WITH ALL OF THE CONDITIONS THAT I SET AS TO YOU INDIVIDUALLY.

SO HERE ARE THE GENERAL CONDITIONS WITH WHICH EACH OF YOU MUST COMPLY: YOU MUST NOT COMMIT A FEDERAL, STATE OR LOCAL CRIME DURING THE PERIOD OF RELEASE. YOU MUST MAKE ALL OF YOUR COURT APPEARANCES. YOUR TRAVEL IS RESTRICTED TO THE SOUTHERN DISTRICT OF CALIFORNIA AND YOU MAY NOT ENTER MEXICO.

YOU MUST REPORT FOR SUPERVISION TO THE PRETRIAL SERVICES AGENCY AS DIRECTED BY THE ASSIGNED PRETRIAL SERVICES OFFICER AND PAY FOR THE REASONABLE COST OF SUPERVISION IN AN [89] AMOUNT TO BE DETERMINED BY THE PRETRIAL SERVICES AGENCY AND APPROVED BY THE COURT.

YOU MAY NOT POSSESS OR USE ANY NARCOTIC, DRUG OR CONTROLLED SUBSTANCE WITHOUT A LAWFUL MEDICAL PRESCRIPTION. YOU MAY NOT POSSESS ANY FIREARM, DANGEROUS WEAPON OR DESTRUCTIVE DEVICE DURING THE PENDENCY OF THE CASE.

YOU MUST READ OR HAVE EXPLAINED TO YOU AND ACKNOWLEDGE UNDERSTANDING OF THE ADVICE OF PENALTIES OF SANCTIONS FORM. YOU MUST PROVIDE A CURRENT RESIDENCE ADDRESS AND TELEPHONE NUMBER PRIOR TO YOUR RELEASE FROM CUSTODY, AND KEEP IT CURRENT WHILE THE CASE IS PENDING.

YOU MUST COMPLY WITH ALL GOVERNMENT AGENCY CONDITIONS TO BE ABLE TO LEGALLY REMAIN IN THE UNITED STATES DURING THE PENDENCY OF THE PROCEEDINGS. AND YOU MUST ACTIVELY SEEK AND MAINTAIN FULL-TIME EMPLOYMENT, SCHOOLING OR A COMBINATION THEREOF.

THOSE ARE THE GENERAL CONDITIONS WITH WHICH EACH OF YOU MUST COMPLY. I'M NOW GOING TO HEAR FROM THE LAWYERS WITH REGARD TO ADDITIONAL CONDITIONS.

MR. MARKLE: REGARDING—

THE COURT: WAIT A SECOND. I JUST HAVE—IT LOOKS LIKE I DON'T HAVE ONE FOR ANIBAL CHAVEZ-DAMIAN, DO YOU?

MS. AJOU: GOOD AFTERNOON, YOUR HONOR. ZENA AJOU ON BEHALF OF PRETRIAL SERVICES. WE DO NOT—OUR OFFICE IS NOT

PROVIDING FULL REPORTS FOR THE 1326 MATTERS. HOWEVER, YOUR [90] HONOR, IF YOU'D LIKE, I CAN ACCESS CRIMINAL RECORDS FROM OUR OFFICE, IF THAT'S SOMETHING YOU WOULD LIKE.

THE COURT: IF THE GOVERNMENT DOESN'T HAVE IT, THEN I WOULD LIKE IT.

ALL RIGHT. WHAT'S THE POSITION OF THE UNITED STATES?

MR. MARKLE: YOUR HONOR, REGARDING ANIBAL CHAVEZ, WE'RE NOT SURE IF HE'S ON SUPERVISED RELEASE AT THE MOMENT AND WHETHER A 3142(D) MOTION WOULD BE APPROPRIATE.

THE COURT: PRETRIAL SERVICES, DO YOU KNOW?

MS. AJOU: YOUR HONOR, I WOULD NEED A MOMENT TO PULL IT UP.

THE COURT: SURE. GO AHEAD AND LOOK AT IT AND I'LL COME BACK TO YOU.

GO AHEAD, SIR.

MR. MARKLE: HOWEVER, INSOFAR AS THAT, THAT'S ALL FOR MR. CHAVEZ.

THE COURT: NO CRIMINAL HISTORY?

MR. MARKLE: HE DOES HAVE CRIMINAL HISTORY, AND I CAN—

THE COURT: OKAY. I DON'T HAVE IT. PRETRIAL SERVICES DIDN'T GIVE ME A REPORT, SO YOU ARE THE ONLY ONE IN THE

ROOM THAT HAS IT. SO IF IT'S RELEVANT, YOU NEED TO TELL ME WHAT IT IS.

MR. MARKLE: I APOLOGIZE. HE HAS A FELONY [91] CONVICTION FOR AN OFFENSE WHICH HE SERVED FIVE DAYS IN JAIL. HE HAS A POSSESSION OF NARCOTICS IN 2007 AND IN 2013, HE HAS A FELONY REENTRY OF REMOVED ALIEN.

THE COURT: GREAT. THANK YOU.

ARE YOU MAKING A RECOMMENDATION?

MR. MARKLE: WE'RE MOVING TO DETAIN BASED ON RISK OF FLIGHT.

THE COURT: RIGHT. AND I DENIED THAT. YOU DON'T WANT TO BE HEARD AFTER THAT?

MR. MARKLE: NO.

THE COURT: SURE.

MA'AM.

MS. TRIMBLE: YOUR HONOR, FIRST, TO SPEAK AS TO CRIMINAL HISTORY, THE POSSESSION OF A CONTROLLED SUBSTANCE, ACCORDING TO THE RAP SHEET IN FRONT OF ME, THE SENTENCE WAS SOLELY FOR THREE YEARS OF PROBATION AND THE SENTENCE WAS SUSPENDED. THERE IS ALSO NO INDICATION, I DON'T KNOW IF PRETRIAL IS GOING TO BE ABLE TO PULL IT UP, BUT THE RAP SHEET DOES NOT SHOW SUPERVISED RELEASE AT THIS TIME FOR THE ILLEGAL REENTRY.

AT THIS TIME, WOULD YOUR HONOR PREFER—

THE COURT: NO. LET ME FINISH. I WANT TO GET EVERYTHING I HAVE TO GET COVERED, AND THEN I'LL LET YOU MAKE YOUR RECORD.

MS. TRIMBLE: WE WOULD RECOMMEND A $20,000 CASH OR [92] CORPORATE SURETY BOND FOR MR. CHAVEZ-DAMIAN.

MR. CHAVEZ-DAMIAN HAS TWO UNITED STATES CITIZEN CHILDREN. THEY ARE 11 YEARS OLD AND 9 YEARS OLD. HE HAS TRIED TO SUPPORT THEM WHEN HE IS ABLE TO, BUT HIS SPOUSE LIVES IN THE LOS ANGELES AREA WITH THESE TWO CHILDREN. SO HE HAS SUBSTANTIAL TIES TO THE AREA, TO THE UNITED STATES AND TO THE DISTRICT, AND I THINK THOSE TIES WOULD BE SUFFICIENT TO KEEP HIM IN THIS DISTRICT FOR THE PENDENCY OF THIS CASE.

THE COURT: ALL RIGHT. THANK YOU.

PRETRIAL SERVICES, WERE YOU ABLE TO—

MS. AJOU: WE HAVE NO INFORMATION, YOUR HONOR.

THE COURT: ALL RIGHT. THEN I'M NOT GOING TO IMPOSE IT. I HAVE NO BASIS FOR IT AT THIS POINT.

ALL RIGHT. SIR, I'M IMPOSING THE FOLLOWING ADDITIONAL CONDITION ON YOU: YOU MUST PROVIDE THE COURT WITH A CASH

OR CORPORATE SURETY BOND IN THE AMOUNT OF $25,000. THAT COVERS ALL OF THE CONDITIONS OF RELEASE AND NOT JUST YOUR APPEARANCES.

DO YOU UNDERSTAND THAT IF YOU ARE RELEASED FROM CUSTODY, YOU MUST COMPLY WITH THE CONDITION I HAVE JUST TOLD YOU ABOUT AS WELL AS ALL OF THE GENERAL CONDITIONS I HAVE PREVIOUSLY TOLD YOU ABOUT?

DEFENDANT CHAVEZ: YES.

THE COURT: THANK YOU, SIR. THAT'S IT FOR TODAY.

MS. TRIMBLE: YOUR HONOR, COULD WE—

[93]

THE COURT: I'M SORRY. GO AHEAD AND MAKE YOUR RECORD.

MS. TRIMBLE: COULD WE EXPAND TRAVEL TO THE CENTRAL DISTRICT FOR—IF HE IS RELEASED ON BOND, THAT'S WHERE HIS WIFE AND CHILDREN LIVE IN LOS ANGELES.

THE COURT: YES.

MS. TRIMBLE: I OBJECT TO THE SHACKLING OF MR. CHAVEZ-DAMIAN. I WOULD NOTE BEFORE WE BEGAN THE BAIL PITCHES, YOUR HONOR INQUIRED AS TO THE GOVERNMENT AS TO WHETHER THERE ARE ANY PARTICULAR CONCERNS ABOUT ANY OF THE INDIVIDUALS WE'RE DISCUSSING HERE WHO ARE CHARGED WITH ILLEGAL REENTRY. NO

PARTICULAR CONCERNS WERE RAISED AS TO MR. CHAVEZ AS TO FLIGHT OR AS TO DANGER; SO THERE APPEARS TO BE NO PARTICULAR SECURITY CONCERN AS TO MR. CHAVEZ.

WE NOTED HIS CRIMINAL HISTORY. ALTHOUGH HE DOES HAVE PRIOR OFFENSES, THE SENTENCES IMPOSED FOR THESE PRIOR OFFENSES ARE FAIRLY SMALL, WE'RE TALKING ABOUT FIVE DAYS IN JAIL AND THREE YEARS OF PROBATION. THE MOST TIME THAT HE'S SPENT IN CUSTODY WAS FOR AN ILLEGAL REENTRY CONVICTION, WHICH IS A NONVIOLENT OFFENSE. THAT'S THE SAME OFFENSE THAT HE'S CHARGED WITH HERE.

MATERIAL WITNESSES WHO ALSO ILLEGALLY ENTERED THIS COUNTRY CAME INTO THE COURT EARLIER WITH NO RESTRAINTS WHATSOEVER, SO THE FULL RESTRAINTS HERE DON'T APPEAR TO BE JUSTIFIED BY ANY GENERAL SECURITY CONCERNS AND NO SPECIFIC [94] CONCERNS HAVE BEEN RAISED AS TO MR. CHAVEZ.

SO I WOULD ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY. AND IN THE EVENT THAT THAT REQUEST IS DENIED, I REQUEST AN EVIDENTIARY HEARING AS TO MR. CHAVEZ IN PARTICULAR AND AS TO THE SECURITY CONCERNS IN THIS DISTRICT IN GENERAL. I THINK THERE ARE LESS RESTRICTIVE ALTERNATIVES TO SHACKLES.

THE COURT: THE MOTION IS DENIED FOR ALL THE REASONS PREVIOUSLY STATED, AS WELL AS HIS CRIMINAL RECORD.

MR. CLEMENTE, WHAT'S THIS INDIVIDUAL'S CRIMINAL HISTORY?

MR. MARKLE: YOUR HONOR, THIS INDIVIDUAL HAS A RATHER LONG CRIMINAL HISTORY AS WELL AS.

THE COURT: HOW MANY FELONIES DOES HE HAVE?

MR. MARKLE: FOUR.

THE COURT: DRUGS? IMMIGRATION? SOMETHING ELSE?

MR. MARKLE: HE'S CURRENTLY ON SUPERVISED RELEASE FOR A 1326 CONVICTION FROM 2010. I HAVE A MISDEMEANOR TAKING VEHICLE WITHOUT OWNER'S CONSENT.

THE COURT: FELONY.

MR. MARKLE: FELONY, TAKING VEHICLE WITHOUT OWNER'S CONSENT, FELONY. THEFT. AND THAT'S—DID I SAY THREE? IF I SAID FOUR, THAT'S THREE. EXCUSE ME.

THE COURT: OKAY. ALL RIGHT.

MA'AM.

MS. TRIMBLE: YOUR HONOR, WE WOULD REQUEST A $20,000 [95] CASH OR CORPORATE SURETY BOND FOR MR. CLEMENTE. HE DOES HAVE TIES TO THIS AREA. IT APPEARS TO BE A FRIEND WHO LIVES IN THIS AREA.

HIS CRIMINAL HISTORY, ALTHOUGH HE DOES HAVE CRIMINAL HISTORY, THERE ARE ONLY THREE FELONIES. THE MOST RECENT FELONY IS FOR THIS ILLEGAL REENTRY, THE SAME OFFENSE THAT HE'S BEING CHARGED WITH HERE. I THINK HIS TIES TO THE AREA, ALONG WITH A $20,000 CASH OR CORPORATE SURETY BOND, WOULD BE SUFFICIENT TO ENSURE HIS APPEARANCE IN THIS CASE.

THE COURT: ALL RIGHT. MR. CLEMENTE, I SET THE FOLLOWING ADDITIONAL CONDITIONS FOR YOU: YOU MUST PROVIDE THE COURT WITH A CASH OR CORPORATE SURETY BOND IN THE AMOUNT OF $25,000. THAT COVERS ALL OF THE CONDITIONS OF RELEASE AND NOT JUST YOUR APPEARANCES.

I'M ALSO IMPOSING A HOLD PURSUANT TO 18 USC SECTION 3142(D). THAT WILL REMAIN IN EFFECT UNTIL OCTOBER 31ST OF THIS YEAR. IF NO DETAINER IS LODGED BY THAT DATE, THEN THE CONDITIONS I HAVE JUST TOLD YOU ABOUT WILL TAKE EFFECT.

DO YOU UNDERSTAND, SIR, THAT IF YOU ARE RELEASED FROM CUSTODY, YOU MUST COMPLY WITH THE CONDITIONS THAT I HAVE JUST TOLD YOU ABOUT, AS WELL AS ALL OF THE GENERAL CONDITIONS I PREVIOUSLY TOLD YOU ABOUT?

DEFENDANT CLEMENTE: YES.

THE COURT: GO AHEAD.

MS. TRIMBLE: I OBJECT TO THE SHACKLING OF MR. CLEMENTE-LOPEZ AND ASK

THAT THE SHACKLES BE REMOVED [96] IMMEDIATELY. HE IS IN FULL RESTRAINTS. THERE IS TWO UNITED STATES MARSHALS IN THE COURT AS WELL AS THE COURTROOM SECURITY OFFICER AT THE DOOR.

THIS COURTHOUSE HAS BEEN USED FOR NEARLY 20 YEARS NOW WITHOUT DEFENDANTS BEING SHACKLED AND WITHOUT ANY MAJOR INCIDENTS OF WHICH I AM AWARE OF DURING INITIAL ARRAIGNMENTS. THE NEW POLICY OF SHACKLING ALL DEFENDANTS WITHOUT AN INDIVIDUALIZED DETERMINATION VIOLATES FIFTH AMENDMENT DUE-PROCESS GUARANTY AND DETRACTS THEM OF DIGNITY AND DECORUM OF THE CRIMINAL STATE OF A CRIMINAL PROSECUTION.

THERE ARE NO SECURITY CONCERNS IN THIS PARTICULAR CASE. THIS IS A NONVIOLENT OFFENSE. HE IS BEING CHARGED WITH ILLEGAL REENTRY. INDIVIDUALS WHO ARE DETAINED AS MATERIAL WITNESSES WHO ALSO ENTERED THIS COUNTRY ILLEGALLY WERE EARLIER BROUGHT INTO THE COURTROOM WITH NO SHACKLES WHATSOEVER, AND SO I WOULD ASK THAT THE SHACKLES BE REMOVED; OR THAT A LESS RESTRICTIVE ALTERNATIVE BE USED, SUCH AS BRINGING MR. CLEMENTE IN INDIVIDUALLY. AND IF THOSE REQUESTS ARE DENIED, I REQUEST AN EVIDENTIARY HEARING.

THE COURT: MOTIONS ARE DENIED FOR ALL THE REASONS PREVIOUSLY STATED.

MR. PATRICIO. ALL RIGHT. LISTEN CLOSELY.

WHAT'S HIS CRIMINAL HISTORY?

MR. MARKLE: I'M SORRY. DID YOU SAY PATRICIO?

THE COURT: YEAH. NO. 24. MOISES.

[97]

MR. MARKLE: OH, I'M SORRY. HE HAS NO CRIMINAL HISTORY, YOUR HONOR.

THE COURT: ALL RIGHT. MA'AM.

MS. TRIMBLE: YOUR HONOR, HE HAS NO CRIMINAL HISTORY AND APPARENTLY HE HAS ONLY ONE PRIOR DEPORTATION. WE'D ASK FOR A $10,000 CASH OR CORPORATE SURETY BOND BE PLACED IN THIS CASE.

HE IS 37 YEARS OLD AND HE HAS THREE CHILDREN THAT HE'S SUPPORTING. THERE ARE TWO CHILDREN WHO ARE AGES NINE AND ONE WHO IS AGE SIX. I THINK THE TIES TO THIS AREA OF HIMSELF AND HIS FAMILY WOULD BE SUFFICIENT TO KEEP HIM HERE WITH A $10,000 BOND.

THE COURT: ALL RIGHT. SIR, YOU'RE REQUIRED TO COMPLY WITH THE FOLLOWING ADDITIONAL CONDITION: YOU MUST PROVIDE THE COURT WITH A CASH OR CORPORATE SURETY BOND IN THE AMOUNT OF $10,000. THAT COVERS ALL OF THE CONDITIONS OF RELEASE AND NOT JUST YOUR APPEARANCES.

DO YOU UNDERSTAND, SIR, THAT IF YOU ARE RELEASED FROM CUSTODY, YOU MUST COMPLY WITH THE CONDITION I HAVE JUST TOLD YOU ABOUT AS WELL AS ALL OF THE GENERAL CONDITIONS I'VE PREVIOUSLY TOLD YOU ABOUT?

THE DEFENDANT: YES.

THE COURT: THANK YOU. THAT'S IT FOR MR.—

MS. TRIMBLE: YOUR HONOR, I OBJECT TO THE SHACKLING OF MR. PATRICIO-GUZMAN AND ASK THAT THE SHACKLES BE REMOVED [98] IMMEDIATELY. HE'S IN FULL RESTRAINTS. IT APPEARS THERE ARE NO PARTICULAR SECURITY CONCERNS AS TO MR. PATRICIO-GUZMAN. IN FACT, HE HAS NO PRIOR RECORD WHATSOEVER, SO THERE IS NO INDICATION THAT THERE IS AN INDIVIDUALIZED DETERMINATION THAT SHACKLES WERE NEEDED IN THIS CASE.

THESE SHACKLES ARE VIOLATING MR. PATRICIO-GUZMAN'S FIFTH AMENDMENT DUE-PROCESS RIGHTS. IT'S ALSO AN UNNECESSARY RESTRAINT ON HIM AND IT DETRACTS FROM THE DIGNITY AND DECORUM OF THIS COURTROOM. THERE ARE NO SECURITY CONCERNS IN PARTICULAR IN THIS CASE, AND HE DOES NOT NEED TO BE SHACKLED GIVEN THE NONVIOLENT NATURE OF THE ALLEGATIONS AGAINST HIM.

IF THE GOVERNMENT BELIEVES THERE IS A PARTICULAR SECURITY CONCERN IN THIS

CASE, I REQUEST AN EVIDENTIARY HEARING. I BELIEVE THERE ARE LESS RESTRICTIVE ALTERNATIVES TO SHACKLES.

THE COURT: ALL RIGHT. FOR ALL THE REASONS PREVIOUSLY STATED, THE MOTION IS DENIED.

MR. ARGAMANEZ. ALL RIGHT. SIR, LISTEN CAREFULLY. WHAT'S HIS CRIMINAL HISTORY?

MR. MARKLE: HIS CRIMINAL HISTORY IS PRETTY SIGNIFICANT AS WELL. HE'S CURRENTLY ON SUPERVISED RELEASE, YOUR HONOR.

THE COURT: SUPERVISED RELEASE. ALL RIGHT. HOW MANY FELONIES?

MR. MARKLE: FOUR FELONIES.

[99]

THE COURT: DRUGS? IMMIGRATION? SOMETHING ELSE?

MR. MARKLE: I HAVE IMMIGRATION. I HAVE BURGLARY, PETTY THEFT, POSSESSION OF A CONTROLLED SUBSTANCE.

THE COURT: PERFECT. THANK YOU.

ALL RIGHT. MA'AM.

MS. TRIMBLE: YOUR HONOR, I WOULD REQUEST A $20,000 CASH OR CORPORATE SURETY BOND. I WOULD NOTE THAT THREE OF THE FOUR FELONIES JUST MENTIONED BY THE GOVERNMENT OCCURRED IN 1991 OR

EARLIER; SO HE HAS ONLY HAD ONE FELONY SINCE THAT TIME. THAT FELONY WAS FOR ILLEGAL REENTRY, WHICH IS A NONVIOLENT OFFENSE. HE GOT TIME SERVED.

THE COURT: I'M SORRY. THE MORE RECENT ONES?

MS. TRIMBLE: YES, THE ONLY ONE THAT HAS OCCURRED—

THE COURT: GOT YOU.

MS. TRIMBLE: —AFTER 1991.

AND IN THAT CASE, HE WAS ACTUALLY SENTENCED TO TIME SERVED WITH NO SUPERVISED RELEASE. SO I THINK ALTHOUGH THERE IS CRIMINAL HISTORY IN THIS CASE, IT'S QUITE DATED, AT LEAST THE SERIOUS OFFENSES, SOME OF THE MORE RECENT OFFENSES ARE DRIVING WITH A LICENSE SUSPENDED AND MISDEMEANOR THEFT.

SO I THINK THAT THE $20,000 CASH OR CORPORATE SURETY BOND WOULD BE SUFFICIENT, PARTICULARLY GIVEN THAT HE HAS A DAUGHTER WHO IS A UNITED STATES CITIZEN, 23 YEARS OLD, WHO GIVES HIM A STRONG INCENTIVE TO REMAIN IN THIS DISTRICT AND THIS AREA.

[100]

THE COURT: ALL RIGHT. SIR, I'M IMPOSING —HAVE YOU BEEN LISTENING TO ME IN ENGLISH?

DEFENDANT ARGAMANEZ: YES, YES.

THE COURT: OKAY. ALL RIGHT. SIR, I'M IMPOSING THE FOLLOWING ADDITIONAL CONDITIONS ON YOU: YOU MUST PROVIDE THE COURT WITH A CASH OR CORPORATE SURETY BOND IN THE AMOUNT OF $25,000. THAT COVERS ALL OF THE CONDITIONS OF RELEASE AND NOT JUST YOUR APPEARANCES.

I'M ALSO IMPOSING A HOLD PURSUANT TO 18 USC SECTION 3142(D). THAT WILL REMAIN IN EFFECT UNTIL OCTOBER 31ST OF THIS YEAR. IF NO DETAINER IS LODGED BY THAT DATE, THEN THE CONDITIONS I HAVE JUST TOLD YOU ABOUT WILL TAKE EFFECT.

DO YOU UNDERSTAND THAT IF YOU ARE RELEASED FROM CUSTODY, YOU MUST COMPLY WITH THE CONDITION I HAVE JUST TOLD YOU ABOUT, AS WELL AS ALL OF THE GENERAL CONDITIONS I PREVIOUSLY TOLD YOU ABOUT?

DEFENDANT ARGAMANEZ: YES, I DO.

THE COURT: ALL RIGHT. THANK YOU.

GO AHEAD, MA'AM.

MS. TRIMBLE: YOUR HONOR, I OBJECT TO THE SHACKLING OF MR. ARGAMANEZ AND ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY. HE'S IN FULL RESTRAINTS, DESPITE THE PRESENCE OF TWO UNITED STATES MARSHALS AND A COURTROOM SECURITY OFFICER.

THE PRACTICE OF SHACKLING ALL DEFENDANTS WITHOUT AN [101] INDIVIDUALIZED DETERMINATION VIOLATES FIFTH AMENDMENT DUE-PROCESS GUARANTY. AS WE NOTED IN DISCUSSING THE APPROPRIATE BOND IN THIS CASE, MR. ARGAMANEZ DOES NOT HAVE SERIOUS OFFENSES OR FELONY OFFENSES AFTER 1991, MANY OF HIS MORE RECENT OFFENSES ARE MISDEMEANORS. SO I DON'T THINK THERE IS ANY INDICATION THAT HE POSES A PARTICULAR SECURITY CONCERN.

IN THE EVENT THAT THE GOVERNMENT OR THE MARSHALS BELIEVE THERE IS A PARTICULAR SECURITY CONCERN, I REQUEST AN EVIDENTIARY HEARING. I THINK THERE ARE LESS RESTRICTIVE ALTERNATIVES TO SHACKLES.

THE COURT: THE MOTIONS IS DENIED FOR ALL THE REASONS PREVIOUSLY STATED.

MR. SABINAS, SIR, LISTEN CAREFULLY. WHAT'S MR. SABINAS' CRIMINAL HISTORY?

MR. MARKLE: HE HAS ONE PRIOR FELONY, YOUR HONOR, AS WELL AS HE'S CURRENTLY ON SUPERVISED RELEASE WE BELIEVE.

THE COURT: IS THE FELONY AN IMMIGRATION FELONY?

MR. MARKLE: YES, IT IS.

THE COURT: ALL RIGHT. MA'AM.

MS. TRIMBLE: YOUR HONOR—

THE COURT: NO. 26.

MS. TRIMBLE: YES, YOUR HONOR. I WOULD REQUEST A $15,000 CASH OR CORPORATE SURETY BOND FOR MR. SABINAS. I AGREE WITH THE GOVERNMENT'S RECOMMENDATION—REPRESENTATION [102] AT LEAST, AS FAR AS I CAN SEE THE RAP SHEET INDICATES ONLY ONE FELONY OFFENSE, WHICH IS AN IMMIGRATION OFFENSE. HE ONLY HAS ONE OTHER IMMIGRATION OFFENSE, WHICH IS A MISDEMEANOR, AND A MINOR OFFENSE PRIOR TO THAT WHICH OCCURRED OVER TEN YEARS AGO.

I THINK HIS TIES TO THIS AREA, WHICH INCLUDES A WIFE AND TWO UNITED STATES CITIZEN CHILDREN, AGES NINE AND FOUR, WHO LIVE IN SANTA ANA, CALIFORNIA, ARE SUFFICIENT TO ENSURE THAT HE WILL REMAIN IN THE AREA FOR THE PENDENCY OF THIS CASE WITH THE ADDITION OF THE $15,000 CASH OR CORPORATE SURETY BOND.

THE COURT: ALL RIGHT. SIR, I'M IMPOSING THE FOLLOWING ADDITIONAL CONDITIONS ON YOU: YOU MUST PROVIDE THE COURT WITH A CASH OR CORPORATE SURETY BOND IN THE AMOUNT OF $25,000. THAT COVERS ALL OF THE CONDITIONS OF RELEASE AND NOT JUST YOUR APPEARANCES.

I'M ALSO IMPOSING A HOLD PURSUANT TO 18 USC SECTION 3142(D). THAT WILL REMAIN IN EFFECT UNTIL OCTOBER 31ST OF THIS

YEAR. IF NO DETAINER IS LODGED BY THAT DATE, THEN THE CONDITIONS I HAVE JUST TOLD YOU ABOUT WILL TAKE EFFECT.

DO YOU UNDERSTAND, SIR, THAT IF YOU ARE RELEASED FROM CUSTODY, YOU MUST COMPLY WITH THE CONDITIONS I HAVE JUST TOLD YOU ABOUT AS WELL AS ALL OF THE GENERAL CONDITIONS I'VE PREVIOUSLY TOLD YOU ABOUT?

DEFENDANT SABINAS: YES.

[103]

THE COURT: ALL RIGHT. GO AHEAD, MA'AM.

MS. TRIMBLE: YOUR HONOR, I OBJECT TO THE SHACKLING OF MR. SABINAS AND ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY. HE'S IN FULL RESTRAINTS. HE'S CHARGED WITH THE NONVIOLENT OFFENSE OF ILLEGAL REENTRY. HIS PRIOR HISTORY SHOWS ONLY NONVIOLENT OFFENSES, IMMIGRATION-RELATED OFFENSES.

THIS HIGHLIGHTS THE DIFFERENCE BETWEEN THIS DISTRICT AND OTHER DISTRICTS WHERE LEG SHACKLES HAVE BEEN USED AND THAT MANY OF THE DEFENDANTS COME BEFORE THIS COURT FOR INITIAL ARRAIGNMENTS ARE BEING CHARGED WITH IMMIGRATION OFFENSES, WHICH DON'T HAVE THE RISK OF VIOLENCE THAT GANG-RELATED CRIMES DO HAVE. SO THAT'S—THAT'S A SIGNIFICANT DIFFERENCE BETWEEN THE ARRAIGNMENTS IN THIS DIS-

TRICT AS OPPOSED TO THOSE IN HOWARD. ADDITIONALLY, THE RESTRAINTS BEING USED HERE ARE MORE EXTREME BECAUSE THEY ARE FULL RESTRAINTS.

THERE ARE NO PARTICULAR SECURITY CONCERNS FOR MR. SABINAS GIVEN HIS LIMITED CRIMINAL HISTORY. HE APPEARS TO BE MORE IN LINE WITH THE MATERIAL WITNESSES WHO CAME IN EARLIER WITH NO SHACKLES WHATSOEVER. SO I'D ASK FOR THE SHACKLES TO BE REMOVED IMMEDIATELY OR FOR AN EVIDENTIARY HEARING.

IF THAT REQUEST IS DENIED, IT WOULD BE LESS RESTRICTIVE ALTERNATIVES TO SHACKLES OR LEG SHACKLES OR BRINGING OUT MR. SABINAS INDIVIDUALLY.

[104]

THE COURT: ALL RIGHT. I DENY YOUR MOTION FOR ALL THE REASONS PREVIOUSLY STATED. IN ADDITION, I DISAGREE WITH YOUR STATEMENT THAT PEOPLE CHARGED WITH IMMIGRATION OFFENSES DON'T HAVE ANY GANG AFFILIATION. I DON'T BELIEVE THAT TO BE TRUE.

THAT'S IT IS FOR TODAY—FOR HIM.

MR. RODRIGUEZ. IS THAT YOU? ALL RIGHT. STAY SITTING, BUT LISTEN CLOSELY.

WHAT'S MR. RODRIGUEZ'S CRIMINAL HISTORY?

MR. MARKLE: HE HAS ONE FELONY FROM 2000 FOR WHICH HE SERVED THREE MONTHS IN JAIL.

THE COURT: WHAT FOR?

MR. MARKLE: VEHICLE ASSAULT.

THE COURT: GREAT. THANK YOU.

MA'AM.

MS. TRIMBLE: YOUR HONOR, I THINK A $15,000 CASH OR CORPORATE SURETY BOND WOULD BE APPROPRIATE FOR MR. PERALTA AND WOULD ENSURE HIS APPEARANCE IN THIS CASE. HE HAS THREE UNITED STATES CITIZEN CHILDREN. THEY ARE AGE 14, 11 AND 8. HIS PARENTS ARE LIVING IN THE UNITED STATES, ALONG WITH HIS WIFE AND HIS CHILDREN, SO HAS VERY STRONG FAMILY TIES TO THIS AREA.

HE, HIMSELF, HAS ALSO LIVED IN THE UNITED STATES FOR A GREAT TIME—PART OF HIS LIFE, SO I THINK THAT THAT BOND WOULD BE SUFFICIENT TO ASSURE HIS APPEARANCE IN THIS CASE.

[105]

THE COURT: ALL RIGHT. AND THERE IS NO SUPERVISED RELEASE?

MR. MARKLE: NO, YOUR HONOR.

THE COURT: ALL RIGHT. SIR, I'M IMPOSING THE FOLLOWING ADDITIONAL CONDITION ON YOU: YOU MUST PROVIDE THE COURT WITH A CASH OR CORPORATE SURETY

BOND IN THE AMOUNT OF $25,000. THAT COVERS ALL OF THE CONDITIONS OF RELEASE AND NOT JUST YOUR APPEARANCES.

DO YOU UNDERSTAND, SIR, THAT IF YOU ARE RELEASED FROM CUSTODY, YOU MUST COMPLY WITH ALL OF THE CONDITIONS—OR WITH THE CONDITION I JUST TOLD YOU ABOUT, AS WELL AS ALL OF THE GENERAL CONDITIONS I'VE PREVIOUSLY TOLD YOU ABOUT?

THE DEFENDANT: YES.

THE COURT: ALL RIGHT. GO AHEAD, MA'AM.

MS. TRIMBLE: I OBJECT TO THE SHACKLING OF MR. PERALTA-RODRIGUEZ AND ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY. HE'S IN FULL RESTRAINTS, DESPITE TWO UNITED STATES MARSHALS AND THE COURTROOM SECURITY OFFICER IN THIS COURTROOM.

THIS COURT HAS BEEN USED FOR NEARLY 20 YEARS WITH NEW ARRAIGNMENTS WITHOUT DEFENDANTS BEING SHACKLED AND WITHOUT ANY MAJOR INCIDENT. THAT'S IN PART BECAUSE OF THE NATURE OF THE CASES THAT COME THROUGH. WHILE THERE MAY BE GANG AFFILIATIONS, THERE IS ADDITIONAL SCREENING DONE AT THE METROPOLITAN CORRECTIONAL CENTER PRIOR TO THEIR INITIAL [106] APPEARANCE FOR ARRAIGNMENTS. SO THERE IS SOCIAL SCREENING AND GANG AFFILIATION SCREEN-

ING SO THAT THESE TYPES OF ISSUES CAN BE ADDRESSED IN THIS DISTRICT IN A WAY THAT THEY ARE NOT ADDRESSED IN OTHER DISTRICTS.

MOREOVER, THIS TYPE OF IMMIGRATION OFFENSE DOESN'T ITSELF INVOLVE GANG AFFILIATION. AND SO THERE IS LESS OF A CONCERN ABOUT VIOLENCE THERE. I THINK THERE ARE NO PARTICULAR SECURITY CONCERNS AS TO MR. PERALTA'S CASE. AND AS THE GOVERNMENT HAS RECOGNIZED, THERE WAS NO PARTICULAR CONCERN AS TO HIM AS TO FLIGHT OR DANGER WHEN DISCUSSING THE NEED FOR A DETENTION HEARING.

HIS CRIMINAL HISTORY INVOLVES DRIVING WITHOUT A LICENSE, A MISDEMEANOR, AND A VEHICLE ASSAULT IS HIS ONLY FELONY. THE MOST TIME HE APPEARS TO HAVE SPENT IN JAIL IS A YEAR, A YEAR SENTENCE, WHICH MAY HAVE ACTUALLY BEEN LESS TIME IN ACTUAL CUSTODY. SO I DON'T THINK THERE ARE SECURITY CONCERNS IN THIS PARTICULAR CASE. HE DOESN'T NEED TO BE SHACKLED.

IF THERE IS A PARTICULAR NEED FOR A SECURITY CONCERN IN THIS CASE, I WOULD REQUEST AN EVIDENTIARY HEARING. THERE ARE LESS RESTRICTIVE ALTERNATIVES, INCLUDING ONLY LEG RESTRAINTS OR BRINGING OUT THE DEFENDANTS INDIVIDUALLY.

THE COURT: THE MOTION IS DENIED FOR ALL THE REASONS PREVIOUSLY STATED. THAT'S IT, MARSHALS. THANK YOU.

THE CLERK: ITEMS NO. 13, 15, 18 AND 20. 13, 15, 18 [107] AND 20.

ITEM NO. 13, 13MJ3834, ANA LUCIA RUIZ DEL TORO;

ITEM NO. 15, 13MJ3872, BEATRIZ PLASENCIA SAEZ;

ITEM NO. 18, 13MJ3875, ISIS CARDENAS-REYES AND YRENNE MANRIQUEZ-LEON;

ITEM NO. 20, 13MJ3877, CARLOS EDWARD DURAN.

THE COURT: DO YOU HAVE MORE FINANCIAL AFFIDAVITS? IT LOOKS LIKE I'M MISSING SOME. I HAVE BEATRIZ, THE MOTION IS OUT. I HAVE NO. 15, BUT NOBODY ELSE.

MS. AJOU: OKAY.

THE COURT: ALL RIGHT. LADIES, ARE WE WAITING FOR MORE? THANK YOU.

GENTLEMAN IN THE FRONT, DO YOU SPEAK ENGLISH? SIR, DO YOU SPEAK ENGLISH?

DEFENDANT DURAN: ARE YOU TALKING TO ME?

THE COURT: YES. OKAY. PERFECT. I CAN HEAR YOU FINE. CAN YOU HEAR ME?

DEFENDANT DURAN: YEAH.

THE COURT: TERRIFIC.

OKAY. I'M SPEAKING TO ALL FIVE OF YOU. EACH OF YOU ARE HERE BECAUSE THE UNITED STATES HAS FILED A COMPLAINT CHARGING YOU WITH A CRIME. THIS IS YOUR INITIAL APPEARANCE, SO I'M GOING TO GO THROUGH FOUR THINGS WITH YOU TODAY.

FIRST, I'M GOING TO TELL YOU WHAT CRIME YOU ARE CHARGED WITH. SECOND, I'M GOING TO DISCUSS WITH YOU YOUR [108] RIGHT TO COUNSEL. THIRD, I'M GOING TO SET YOUR PRELIMINARY HEARING. AND, FINALLY, I'M GOING TO DISCUSS BAIL.

SO, FIRST, THE CRIME THAT YOU ARE CHARGED WITH. LET'S SEE. WHO IS ANA RUIZ? ALL RIGHT, MA'AM. AND BEATRIZ PLASENCIA? GREAT. ISIS CARDENAS? THANK YOU. AND YRENNE MANRIQUEZ? AND THEN ARE YOU CARLOS DURAN?

DEFENDANT DURAN: YES, I AM.

THE COURT: OKAY. SPEAKING TO ALL FIVE OF YOU.

EACH OF YOU ARE CHARGED IN A SEPARATE COMPLAINT, EXCEPT MS. CARDENAS AND MS. MANRIQUEZ ARE CHARGED IN THE SAME COMPLAINT. ALL OF YOU ARE CHARGED WITH THE SAME CRIME, AND THAT CRIME IS THE UNLAWFUL IMPORTATION OF A CONTROLLED SUBSTANCE. FOR EACH OF YOU, IT'S ALLEGED THAT YOU KNOWINGLY AND INTENTIONALLY IMPORTED AN ILLEGAL DRUG FROM MEXICO INTO THE UNITED STATES.

FOR MS. RUIZ, IT'S ALLEGED THIS OCCURRED ON OCTOBER 16TH AND WAS .7 KILOGRAMS OF METHAMPHETAMINE;

FOR MS. PLASENCIO-SAEZ, IT'S OCTOBER 20TH, AND 14.9 KILOGRAMS OF COCAINE;

FOR MS. CARDENAS AND MS. MANRIQUEZ, IT'S ALLEGED THIS OCCURRED ON OCTOBER 18TH, AND IT WAS 2.1 KILOGRAMS OF METHAMPHETAMINE;

AND, MR. DURAN, IT'S ALLEGED OCTOBER 19TH, AND IT WAS 2.8 KILOGRAMS OF METHAMPHETAMINE.

SPEAKING TO ALL OF YOU. THAT'S WHY EACH OF YOU IS [109] HERE TODAY. WITH REGARD TO THIS CRIME, EACH OF YOU HAS THE RIGHT TO REMAIN SILENT. THE UNITED STATES IS REQUIRED TO PROVE ITS CASE AGAINST YOU WITHOUT ANY HELP OR TESTIMONY FROM YOU. IF YOU DECIDE TO SPEAK WITH SOMEONE ABOUT THE CHARGE, YOU MAY STOP AT ANY TIME. IF YOU DO SPEAK WITH SOMEONE ABOUT THE CHARGE, ANYTHING YOU SAY CAN BE USED AGAINST YOU.

EACH OF YOU ALSO HAS AN ABSOLUTE RIGHT TO HAVE AN ATTORNEY HELP YOU IN DEFENDING AGAINST THESE CHARGES. IF YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, I WILL APPOINT A LAWYER TO REPRESENT YOU. SO I'M NOW GOING TO SPEAK WITH EACH OF YOU INDIVIDUALLY TO

VERIFY WHETHER YOU HAVE THE ABILITY TO HIRE A LAWYER.

STARTING WITH MS. RUIZ DOWN ON THIS END. I HAVE A ONE-PAGE FINANCIAL AFFIDAVIT SIGNED BY YOU UNDER THE PENALTY OF PERJURY. IS EVERYTHING IN THIS DOCUMENT TRUE?

DEFENDANT RUIZ: (THROUGH INTERPRETER) I DON'T UNDERSTAND. I SIGNED IT, BUT I DON'T KNOW WHEN.

THE COURT: OKAY. I THINK YOU SIGNED IT THIS MORNING. HERE IS MY QUESTION, THOUGH: DID YOU GIVE TRUTHFUL INFORMATION TO THE LAWYER WHO FILLED THIS FORM OUT FOR YOU?

DEFENDANT RUIZ: YES.

THE COURT: ALL RIGHT. AND THE HOME THAT YOU OWN, IS THAT IN MEXICO?

DEFENDANT RUIZ: YES.

THE COURT: BASED UPON THAT—ACTUALLY, SHE DIDN'T [110] SIGN IT, SO I'LL HAVE—I'M GOING TO REQUIRE YOU TO SIGN THIS WITH YOUR LAWYER BEFORE THE NEXT COURT APPEARANCE. BUT I'M GOING TO ACCEPT YOUR REPRESENTATION THAT IT'S ENTIRELY TRUTHFUL. ACTUALLY, LET'S CIRCUMVENT THIS. I'M GOING TO PUT YOU UNDER OATH.

IS EVERYTHING IN THIS—DO YOU SWEAR UNDER THE PENALTY OF PERJURY THAT

EVERYTHING IN THIS FINANCIAL AFFIDAVIT IS TRUTHFUL?

DEFENDANT RUIZ: YES.

THE COURT: I ACCEPT THAT. AND I FIND THAT SHE DOES NOT HAVE THE ABILITY TO HIRE A LAWYER AND I'M THEREFORE APPOINTING A LAWYER TO REPRESENT YOU.

I'M APPOINTING KEN MCMULLEN—SORRY, THAT'S RIGHT. A LAWYER WAS PREVIOUSLY APPOINTED TO REPRESENT YOU. HIS NAME IS DONALD NUNN, N-U-N-N. SO I'M GOING TO CONFIRM HIS APPOINTMENT TO REPRESENT YOU.

MS. PLASENCIA, DO YOU GO BY PLASENCIA OR SAEZ? WHAT'S YOUR LAST NAME?

DEFENDANT SAEZ: I GO BY SAEZ.

THE COURT: OKAY. SO MS. SAEZ, I HAVE IN FRONT OF ME A FINANCIAL AFFIDAVIT SIGNED BY YOU UNDER THE PENALTY OF PERJURY. IS EVERYTHING IN THIS DOCUMENT TRUE?

DEFENDANT SAEZ: YES, YOUR HONOR.

THE COURT: ALL RIGHT. BASED UPON THAT INFORMATION, I FIND YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, AND I'M [111] APPOINTING KEN MCMULLEN TO REPRESENT YOU. HIS NUMBER IS (619) 231-9664.

MS. CARDENAS, I HAVE IN FRONT OF ME A FINANCIAL AFFIDAVIT SIGNED BY YOU UN-

DER THE PENALTY OF PERJURY. IS EVERYTHING IN THIS DOCUMENT TRUE?

DEFENDANT CARDENAS: (THROUGH INTERPRETER) IS THAT THE ONE WE DID DOWNSTAIRS?

THE COURT: YES.

DEFENDANT CARDENAS: YES.

THE COURT: ALL RIGHT. BASED UPON THAT INFORMATION, I FIND YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER AND I'M GOING TO APPOINT A LAWYER TO REPRESENT YOU.

HOW OLD ARE YOU, MA'AM?

DEFENDANT CARDENAS: TWENTY-ONE YEARS OLD.

THE COURT: ALL RIGHT. I'M APPOINTING FEDERAL DEFENDERS TO REPRESENT YOU.

MS. MANRIQUEZ, I ALSO HAVE A FINANCIAL AFFIDAVIT SIGNED BY YOU UNDER THE PENALTY OF PERJURY. IS EVERYTHING IN THIS DOCUMENT TRUE?

DEFENDANT MANRIQUEZ: (THROUGH INTERPRETER) YES.

THE COURT: BASED UPON THAT, I FIND YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, AND I'M APPOINTING MARC CARLOS TO REPRESENT YOU. SORRY. MR. CARLOS'S NUMBER IS (619) 702-3226.

AND MR. DURAN, I HAVE A FINANCIAL AFFIDAVIT IN FRONT [112] OF ME THAT IS SIGNED BY YOU AS WELL. IS ALL OF THE INFORMATION IN THIS DOCUMENT TRUE?

DEFENDANT DURAN: YEAH.

THE COURT: BASED UPON THE INFORMATION, I FIND YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, AND I'M APPOINTING FEDERAL DEFENDERS TO REPRESENT YOU.

ALL RIGHT. SPEAKING TO ALL OF YOU. EACH OF YOU HAS BEEN—WILL YOU JUST PUT IT IN HIS POCKET, MA'AM. SHE PUT A BUSINESS CARD FOR YOUR LAWYER IN YOUR LEFT POCKET. THERE YOU GO. YOU JUST FOUND IT.

ALL RIGHT. SPEAKING TO ALL OF YOU. EACH OF YOU HAS BEEN GIVEN A BUSINESS CARD FOR YOUR LAWYER. IN ADDITION, WE WILL NOTIFY EACH OF YOUR LAWYERS THAT HE OR SHE HAS BEEN APPOINTED TO REPRESENT YOU, AND YOUR LAWYER WILL BE IN CONTACT WITH YOU IN THE NEAR FUTURE AND REPRESENT YOU FROM HERE ON OUT.

THE NEXT THING THAT I'M GOING TO DO IS SET YOUR PRELIMINARY HEARING AND ARRAIGNMENT. WITH REGARD TO THE PRELIMINARY HEARING, EACH OF YOU HAVE THE RIGHT TO HAVE A JUDGE MAKE A DETERMINATION AS TO WHETHER OR NOT THERE ARE SUFFICIENT FACTS FOR YOUR CASE TO PROCEED FORWARD.

SO, MS. RUIZ, YOU ARE ORDERED TO APPEAR IN JUDGE DEMBIN'S COURTROOM ON OCTOBER 31ST AT 9:00 A.M. AND IN MY COURTROOM FOR AN ARRAIGNMENT ON NOVEMBER 14TH AT 9:30 A.M.

THE CLERK: JUDGE, JUDGE DEMBIN'S APPEARANCE WILL BE [113] 1:30.

THE COURT: THANK YOU. I'M SORRY, MA'AM. THAT WAS INACCURATE.

SO YOU ARE ORDERED TO APPEAR IN JUDGE DEMBIN'S COURTROOM ON OCTOBER 31ST AT 1:30 P.M. AND IN MY COURTROOM ON NOVEMBER 14TH AT 9:30 A.M.

MS. SAEZ, YOU ALSO ARE ORDERED TO APPEAR IN JUDGE DEMBIN'S COURTROOM ON OCTOBER 31ST AT 1:30 P.M. AND IN MY COURTROOM ON NOVEMBER 14TH AT 9:30 A.M.

MS. CARDENAS AND MS. MANRIQUEZ, EACH OF YOU ARE ORDERED TO APPEAR IN JUDGE ADLER'S COURTROOM ON OCTOBER 31ST AT 2:00 P.M. AND IN MY COURTROOM ON NOVEMBER 14TH AT 9:30 A.M.

AND, MR. DURAN, YOU ARE ORDERED TO APPEAR IN JUDGE GALLO'S COURTROOM ON OCTOBER 31ST AT 2:00 P.M. AND IN MY COURTROOM ON NOVEMBER 14TH AT 9:30 A.M.

THE FINAL ISSUE FOR ALL OF YOU IS BAIL. IS THE UNITED STATES MOVING TO DETAIN ANYBODY?

MR. MARKLE: YES, YOUR HONOR. WE'RE MOVING TO DETAIN EVERYBODY BASED UPON RISK OF FLIGHT.

THE COURT: ALL RIGHT. SPEAKING TO ALL FIVE OF YOU. THE UNITED STATES HAS ASKED THAT EACH OF YOU BE HELD IN CUSTODY WITHOUT BAIL BECAUSE THEY BELIEVE YOU PRESENT AN UNREASONABLE RISK OF FLIGHT. THEY HAVE THE RIGHT TO DO THAT. YOU HAVE THE RIGHT TO HAVE A HEARING AND FOR ME TO MAKE A [114] DETERMINATION AS TO WHETHER OR NOT THERE ARE ANY CONDITIONS THAT I COULD SET THAT WOULD GUARANTY YOUR APPEARANCE IN COURT AS REQUIRED. YOU WILL, HOWEVER, BE HELD IN CUSTODY WITHOUT BAIL UNTIL THAT HEARING OCCURS.

SO EACH OF YOU ARE ORDERED TO APPEAR IN MY COURTROOM ON OCTOBER 24TH AT 9:30 A.M.

ALL RIGHT. LISTEN CAREFULLY. GO AHEAD, MA'AM, FOR MS. RUIZ.

MS. TRIMBLE: YOUR HONOR, AS TO MS. RUIZ, I HAVE NO INFORMATION IN FRONT OF ME AS TO WHY SHE WAS ARRESTED ON THE 16TH AND NOT BROUGHT UNTIL TODAY; SO I WOULD JUST MAKE A RULE 5 VIOLATION, DELAY IN PRESENTMENT.

THE COURT: MOTION IS DENIED WITHOUT PREJUDICE, BECAUSE WE JUST DON'T HAVE THOSE FACTS.

MS. TRIMBLE: YOUR HONOR, I ALSO OBJECT TO THE SHACKLING OF MS. RUIZ AND ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY.

FOR THE RECORD, THERE ARE FIVE DEFENDANTS PRESENTLY IN COURT RIGHT NOW. TWO UNITED STATES MARSHALS AND A COURTROOM SECURITY OFFICER ARE ALSO PRESENT IN COURT. ALL OF THE DEFENDANTS ARE WEARING FULL SHACKLES, WHICH INCLUDES LEG SHACKLES, WAIST SHACKLES AND THEIR ARMS ARE SHACKLED—THEIR HANDS ARE SHACKLED TO THE WAIST SHACKLES THEMSELVES.

FOR MS. RUIZ DEL TORO, I THINK THESE SHACKLES HAVE NOT BEEN JUSTIFIED BY AN INDIVIDUAL DETERMINATION AS TO THE [115] NECESSITY OF THAT SHACKLES, WHICH VIOLATES THE FIFTH AMENDMENT DUE-PROCESS GUARANTY AND POSES AN UNNECESSARY RESTRAINT ON HER LIBERTY AND SUBTRACTS FROM THE DIGNITY FROM THIS COURTROOM. SHE HAS NO PRIOR OFFENSES. THERE IS NO INDICATION THAT SHE POSES A PARTICULAR SECURITY CONCERN. THE SECURITY CONCERNS THAT HAVE BEEN DISCUSSED AS TO THIS SPECIFIC DISTRICT HAVE NOT BEEN DEVELOPED IN AN EVIDENTIARY HEARING.

ADDITIONALLY, BEFORE HER ARRAIGNMENT IN THIS COURT, THERE WAS SECURITY PROCESSES THAT ARE SPECIFIC TO THIS DISTRICT THAT OCCUR AT THE METROPOLI-

TAN CORRECTIONAL CENTER. THOSE SECURITY PROCESSES HAVE BEEN OUTLINED IN DECLARATIONS IN THE CASE UNITED STATES VS. MINERO-ROSAS, 11CR3253, OUT OF THIS DISTRICT. THAT INCLUDES MEDICAL CLASSIFICATION, SEPARATION AND SECURITY SCREENING FOR ALL DEFENDANTS BEFORE THEY ARE BROUGHT INTO THE U.S. MARSHAL SPACE.

SO THERE IS EXTRA SECURITY IN THIS DISTRICT THAT DOES NOT OCCUR IN OTHER DISTRICTS WHERE LEG SHACKLES HAVE BEEN UPHELD; AND IN THIS DISTRICT DESPITE THAT EXTRA SECURITY FULL SHACKLES ARE BEING USED. I DON'T THINK THAT THAT'S JUSTIFIED BY THE CIRCUMSTANCES.

IF MY OBJECTION AND REQUEST FOR SHACKLES TO BE REMOVED IS DENIED, I REQUEST AN EVIDENTIARY HEARING. AND I REQUEST A LESS RESTRICTIVE ALTERNATIVE TO BE USED; NAMELY, BRINGING OUT INDIVIDUALS INDIVIDUALLY, OR AT MINIMUM, [116] BRINGING THEM OUT IN ONLY LEG SHACKLES.

THE COURT: MOTION IS DENIED FOR ALL THE REASONS PREVIOUSLY STATED.

MS. SAEZ.

MS. TRIMBLE: MS. SAEZ, I ALSO OBJECT TO THE SHACKLING OF MS. SAEZ AND ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY. SHE POSES NO PARTICULAR SECURITY CONCERN. SHE HAS NO—I'M SORRY.

THE INFORMATION IN FRONT OF ME SHOWS THAT SHE HAS NO PRIOR CONVICTIONS FROM WHAT I CAN TELL. YES, SHE HAS NO CRIMINAL HISTORY, ACCORDING TO HER RAP SHEET. AND SHE'S ACTUALLY AN L.P.R. I DON'T THINK THAT THERE IS ANY PARTICULAR SECURITY CONCERNS THAT HAVE BEEN SHOWN AND THE SECURITY CONCERNS THAT HAVE BEEN ALLEGED IN THIS DISTRICT IN PARTICULAR HAVE NOT BEEN DEVELOPED IN AN EVIDENTIARY HEARING AS APPROPRIATE. SO I WOULD ASK FOR THE SHACKLES TO BE REMOVED IMMEDIATELY.

I WOULD ASK FOR AN EVIDENTIARY HEARING. IN THE EVENT THAT THAT REQUEST IS DENIED, THEN I WOULD ASK THAT LESS RESTRICTIVE ALTERNATIVES BE USED IN ORDER TO RESPECT MS. PLASENCIA-SAEZ' FIFTH AMENDMENT DUE-PROCESS RIGHTS AND RESPECT THE DIGNITY AND DECORUM OF THIS COURTROOM.

THE COURT: MOTION IS DENIED FOR ALL THE REASONS PREVIOUSLY STATED ON THE RECORD.

MS. CARDENAS.

[117]

MS. TRIMBLE: MS. CARDENAS IS ONLY 21 YEARS OLD. SHE HAS NO PRIORS. I OBJECT TO THE SHACKLING OF MS. CARDENAS-REYES AND ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY.

THERE IS NO PARTICULAR INDICATION THAT MS. CARDENAS-REYES POSES A SECURITY CONCERN TO ANYONE IN THIS COURTROOM OR IN THIS DISTRICT IN GENERAL. THERE HAS BEEN NO EVIDENTIARY HEARING TO DEVELOP ANY SECURITY CONCERNS SPECIFIC TO THIS DISTRICT. ADDITIONALLY, MS. CARDENAS HAS BEEN HOUSED IN THE METROPOLITAN CORRECTIONAL CENTER.

THE METROPOLITAN CORRECTIONAL CENTER USES EXTRA SECURITY SCREENING THAT'S CONDUCTED PRIOR TO DEFENDANTS BEING BROUGHT INTO THE U.S. MARSHAL'S SPACE. THEY ARE ALSO STRIPPED SEARCHED PRIOR TO BEING TURNED OVER TO THE U.S. MARSHALS. AND BASED ON THE DECLARATION FILED IN THE CASE UNITED STATES VS. MINERO-ROSAS, 11CR3253, IN THIS DISTRICT.

BECAUSE OF THE EXTRA SECURITY SCREENINGS THAT OCCUR IN THIS DISTRICT, AND THE LACK OF ANY JUSTIFICATION SPECIFIC TO MS. CARDENAS, I ASK THAT THE SHACKLES BE REMOVED. IN THE ALTERNATIVE, I REQUEST AN EVIDENTIARY HEARING. AND I REQUEST THAT LESS RESTRICTIVE ALTERNATIVES BE CONSIDERED, INCLUDING BRINGING HER OUT INDIVIDUALLY.

THE COURT: THE MOTION IS DENIED FOR THE REASONS PREVIOUSLY STATED.

NEXT.

[118]

MS. TRIMBLE: I OBJECT TO THE SHACKLING OF MS. MANRIQUEZ AND I REQUEST THAT THE SHACKLES BE REMOVED IMMEDIATELY.

SHE'S IN FULL RESTRAINTS. THIS COURTHOUSE HAS BEEN USED FOR YEARS FOR NEW ARRAIGNMENTS WITHOUT DEFENDANTS BEING SHACKLED AND WITHOUT ANY MAJOR INCIDENTS OF WHICH I'M AWARE. IF THERE ARE ANY INCIDENTS LIKE THAT, AN EVIDENTIARY HEARING NEEDS TO BE HELD TO DETERMINE THE EXTENT OF THESE SECURITY CONCERNS AND HOW THEY SPECIFICALLY RELATE TO THIS INDIVIDUAL.

MS. MANRIQUEZ HAS NO PRIORS. THERE IS NO INDICATION THAT SHE POSES A PARTICULARLY HIGH SECURITY CONCERN AND THERE ARE OTHER MEANS THAT WE COULD ADDRESS ANY SECURITY CONCERNS FOR MS. MANRIQUEZ.

SO IF THE GOVERNMENT OR THE MARSHALS BELIEVE THERE IS A SECURITY CONCERN IN THIS CASE, I REQUEST AN EVIDENTIARY HEARING. THERE ARE LESS RESTRICTIVE ALTERNATIVES TO SHACKLES. WE ASK THAT MS. MANRIQUEZ BE BROUGHT OUT INDIVIDUALLY SO THAT SHE IS NOT SUBJECTED TO THIS.

THE COURT: MOTION IS DENIED FOR ALL THE REASONS PREVIOUSLY STATED.

MR. DURAN.

MS. TRIMBLE: MR. DURAN I BELIEVE HAS A DIFFERENT SHACKLING SITUATION THAN THE OTHER DEFENDANTS. I BELIEVE HE DOES NOT HAVE ARM SHACKLES ON, AND THAT'S BECAUSE MR. DURAN IS—APPEARS TO BE—HAVE VISION IMPAIRED AND HE ALSO USES [119] A CANE.

HOWEVER, I WOULD—HE IS HOWEVER, DESPITE HIS IMPAIRMENT IN VISION, AND THE NEED FOR THE USE OF THE CANE, HE'S STILL BEING RESTRAINED BY THE USE OF LEG SHACKLES. I DON'T THINK THAT THE SHACKLES ARE JUSTIFIED IN THIS CASE. I THINK IT'S A VIOLATION OF HIS FIFTH AMENDMENT AND DUE-PROCESS RIGHTS. IT IMPOSES ADDITIONAL AND UNNECESSARY RESTRAINTS ON MR. DURAN AND DETRACTS FROM THE DIGNITY AND DECORUM OF THIS COURT.

THERE ARE NO SECURITY CONCERNS SPECIFIC TO MR. DURAN, AND IF THE GOVERNMENT AND THE MARSHALS BELIEVE THERE IS A SECURITY CONCERN IN THIS CASE, I REQUEST AN EVIDENTIARY HEARING. THERE ARE LESS RESTRICTIVE ALTERNATIVES TO SHACKLES. THE MARSHALS COULD BRING OUT THIS DEFENDANT INDIVIDUALLY.

THE COURT: THE MOTION IS DENIED FOR ALL THE REASONS PREVIOUSLY STATED.

THANK YOU, MARSHALS.

THE CLERK: ITEM NO. 12 AND 35 ON THE LOG, PLEASE. 12 AND 35.

ITEM NO. 12, 13MJ3867, MERVIN BARCLAY DAVIS;

ITEM NO. 35 ON THE LOG, PLEASE, 13MJ3888, RODRIGO ARELLANO, III.

MS. TRIMBLE: YOUR HONOR, I'D ASK THAT BOTH OF THESE INDIVIDUALS BE REFERRED TO AS THE PERSON CHARGED AS.

[120]

YOUR HONOR, MR. DURAN APPEARS TO BE HAVING SOME DIFFICULTY WALKING FROM THE COURTROOM WITH HIS CANE.

THE COURT: THE MARSHALS ARE HELPING HIM.

MS. TRIMBLE: THE MARSHALS ARE HELPING HIM. HE DOES NOW HAVE ARM RESTRAINTS ON, WHICH IS CONTRIBUTING TO THE DIFFICULTY OF HIM WALKING.

THE COURT: YOU'RE ASKING PERSON CHARGED AS?

MS. TRIMBLE: YES.

THE COURT: I CAN'T SET BAIL THEN, SO PRETRIAL SERVICES CAN LEAVE AS WELL.

MS. AJOU: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT. GENTLEMEN, EACH OF YOU ARE HERE BECAUSE A CHARGING DOCUMENT OF SOME SORT HAS BEEN FILED IN ANOTHER DISTRICT. YOU WERE ARRESTED HERE IN THIS DISTRICT AND THE LAW REQUIRES THAT YOU BE BROUGHT IN

FRONT OF THE NEAREST JUDGE; THAT'S ME. THAT'S WHY YOU'RE HERE TODAY.

WITH REGARD TO THESE CRIMES, AND I'M GOING TO TELL YOU ABOUT THEM IN A MINUTE, IN THIS DISTRICT, YOU HAVE LIMITED RIGHTS. IN THIS DISTRICT, YOU HAVE THE RIGHT FOR ME TO MAKE A DETERMINATION AS TO WHETHER OR NOT YOU ARE THE PERSON CHARGED IN THE DOCUMENT IN THE OTHER DISTRICT. IF YOU WANT TO ADDRESS GUILT OR INNOCENCE, THAT OCCURS IN THE OTHER DISTRICT.

SO IN THIS DISTRICT, IT'S JUST A DETERMINATION AS TO IDENTITY. BECAUSE IDENTITY IS CRITICAL IN THIS DISTRICT, [121] YOUR LAWYER HAS ASKED THAT I REFER TO YOU AS THE PERSON CHARGED AS AND THEN A NAME. AND I'M GOING TO DO THAT AS TO EACH OF YOU. SO I'M GOING TO ASK BOTH OF YOU NOT TO CONFIRM YOUR IDENTITY.

ALL RIGHT. SO FIRST THERE IS—NO. I GRABBED THE WRONG ONE. PERSON CHARGED AS MERVIN DAVIS, IS THERE SOMEONE—ALL RIGHT.

SIR, YOU ARE HERE BECAUSE YOU ARE CHARGED IN AN INDICTMENT IN THE CENTRAL DISTRICT OF CALIFORNIA. IT APPEARS THAT IN 2010 A FEDERAL GRAND JURY RETURNED AN INDICTMENT IN THAT DISTRICT CHARGING YOU WITH CONSPIRACY TO SELL UNREGISTERED SECURITIES, SELLING UNREGISTERED SECURITIES, CONSPIRACY TO

COMMIT SECURITIES FRAUD, SECURITIES FRAUD, WIRE FRAUD, MONEY LAUNDERING, SUBSCRIPTION TO FALSE TAX RETURNS, TAX EVASION, CONCEALMENT AND FALSE STATEMENT, INFLUENCING AN OFFICER OF THE COURT, AIDING AND ABETTING AND CRIMINAL FORFEITURE.

THAT'S WHY YOU'RE HERE TODAY. DON'T MAKE ANY COMMENT ON THAT CHARGE. AS I INDICATED, GUILT OR INNOCENCE WILL BE ADDRESSED IN THE CENTRAL DISTRICT OF CALIFORNIA. THERE ARE SOME CHARGES—EXCUSE ME, THERE ARE SOME SITUATIONS IN WHICH THE CHARGES IN THE CENTRAL DISTRICT CAN BE TRANSFERRED HERE TO THE SOUTHERN DISTRICT. THAT'S AN ISSUE THAT YOU NEED TO DISCUSS WITH YOUR LAWYER IF THAT'S SOMETHING YOU WANT TO DO. YOUR LAWYER WILL THEN TALK TO THE [122] ATTORNEY FOR THE UNITED STATES IN BOTH THIS DISTRICT AND THE CENTRAL DISTRICT OF CALIFORNIA.

IN ADDITION, IN THIS DISTRICT, YOU DO HAVE THE RIGHT TO HAVE AN ATTORNEY HELP YOU IN DEFENDING AGAINST THESE CHARGES IF YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER. SO I'M NOW GOING TO VERIFY.

DOES HE HAVE THE ABILITY TO HIRE A LAWYER, MA'AM?

MS. TRIMBLE: NO, YOUR HONOR. HE WORKS FOR MINING COMPANIES, BUT HE'S

CURRENTLY UNDERGOING TREATMENT FOR CANCER. HE'S BEEN HAVING TREATMENT FOR CANCER FOR FOUR MONTHS. IT'S MY UNDERSTANDING HE DOES NOT HAVE THE MEANS TO PAY FOR AN ATTORNEY.

THE COURT: DO YOU HAVE A FINANCIAL AFFIDAVIT FOR HIM?

MS. TRIMBLE: NOT AT THIS TIME, YOUR HONOR.

THE COURT: DO YOU OWN A HOME?

DEFENDANT DAVIS: IT WAS FORECLOSED ON.

THE COURT: DO YOU OWN ANY REAL PROPERTY? I'M SORRY. YOU HAVE TO ANSWER OUT LOUD.

DEFENDANT DAVIS: NO, MA'AM.

THE COURT: OKAY. AND ARE YOU WORKING WHILE YOU'RE UNDERGOING YOUR TREATMENT?

DEFENDANT DAVIS: YES.

THE COURT: HOW MUCH DO YOU MAKE A YEAR?

DEFENDANT DAVIS: I THINK THE FIGURE I GAVE THE GIRL [123] WAS $23,700.

THE COURT: OKAY. WHAT I'M GOING TO DO THEN IS I'M GOING TO PROVISIONALLY APPOINT A LAWYER TO REPRESENT YOU. I'M GOING TO REQUIRE YOU TO TALK TO THAT

LAWYER AND PREPARE A FINANCIAL AFFIDAVIT AND THEN SUBMIT THAT TO ME.

IF I FIND THAT YOU HAVE THE ABILITY TO HIRE A LAWYER, OR PAY A PART OF YOUR LAWYER'S FEES, I WILL REQUIRE YOU TO DO THAT; SO I'M MAKING THE REPRESENTATION PURSUANT TO 3006(A).

I'M APPOINTING INGE BRAUER. HER NUMBER IS (619) 238-1031. YOU'LL BE GIVEN A BUSINESS CARD HERE FOR YOUR LAWYER. IN ADDITION, WE WILL NOTIFY YOUR LAWYER THAT SHE HAS BEEN APPOINTED TO REPRESENT YOU AND SHE WILL BE IN CONTACT WITH YOU IN THE NEAR FUTURE.

I'M GOING TO SET THIS FOR A HEARING IN FRONT OF ME, IT'S THE IDENTITY AND REMOVAL HEARING. IT WILL BE THE TIME WHEN I MAKE A DETERMINATION AS TO WHETHER OR NOT YOU ARE THE PERSON CHARGED IN THE CENTRAL DISTRICT OF CALIFORNIA WITH THESE CRIMES. SO YOU ARE ORDERED TO APPEAR IN MY COURTROOM ON NOVEMBER 5TH AT 9:30 A.M.

IS THE UNITED STATES—I'M GOING TO DETAIN BECAUSE I DON'T KNOW WHO HE IS. IS THE UNITED STATES MOVING ON A SEPARATE BASIS?

MR. MARKLE: WE'RE MOVING ON RISK OF FLIGHT.

THE COURT: OKAY. SO TWO ISSUES, SIR.

[124]

THE FINAL ISSUE THAT I NEED TO ADDRESS WITH YOU IS BAIL. THE UNITED STATES HAS ASKED THAT YOU BE HELD IN CUSTODY WITHOUT BAIL BECAUSE THEY BELIEVE YOU PRESENT AN UNREASONABLE RISK OF FLIGHT. THEY HAVE THE RIGHT TO DO THAT. YOU HAVE THE RIGHT TO HAVE A HEARING AND FOR ME TO MAKE A DETERMINATION AS TO WHETHER OR NOT THERE ARE ANY CONDITIONS THAT I COULD SET THAT WOULD GUARANTY YOUR APPEARANCE IN COURT AS REQUIRED. YOU WILL, HOWEVER, BE HELD IN CUSTODY WITHOUT BAIL UNTIL THAT HEARING OCCURS ON THEIR MATTER, WHICH CAN BE EITHER HERE OR THE CENTRAL DISTRICT OF CALIFORNIA.

THE SECOND ISSUE IS MY OWN MOTION. I'M ORDERING YOU DETAINED WITHOUT BAIL, BUT I'M ENTERING THAT ORDER WITHOUT PREJUDICE. AND I MAKE THAT FINDING BECAUSE, AS I INDICATED TO YOU IN THE BEGINNING, YOUR IDENTITY IS A CRITICAL ISSUE, YOUR LAWYER HAS ASKED THAT I REFER TO YOU AS THE PERSON CHARGED AS MERVIN DAVIS. AND I'M DOING THAT. BUT BECAUSE I DON'T KNOW YOUR TRUE IDENTITY, THERE ARE NO CONDITIONS THAT I COULD SET THAT WOULD GUARANTY YOUR APPEARANCE IN COURT AS REQUIRED, BECAUSE I DON'T KNOW WHO YOU ARE.

SO I ORDER THAT YOU BE HELD IN CUSTODY WITHOUT BAIL ON THAT BASIS. I ENTER THAT ORDER WITHOUT PREJUDICE.

I THINK THAT'S EVERYTHING. ANYTHING ELSE THAT I NEED TO GO THROUGH TODAY?

MR. MARKLE: REGARDING MR. DAVIS?

THE COURT: YEAH.

[125]

MR. MARKLE: THE DETENTION HEARING IS HELD THE SAME DATE AS THE REMOVAL HEARING?

THE COURT: THANK YOU. YES. SO THE DETENTION HEARING CURRENTLY IS SET FOR NOVEMBER 5TH, THE SAME DAY AS THE REMOVAL HEARING. DISCUSS THAT WITH YOUR LAWYER. IT COULD BE HELD IN THE CENTRAL DISTRICT OF CALIFORNIA. IF YOU CHANGE YOUR MIND ABOUT ADMITTING IDENTITY, WE CAN MOVE THAT HEARING UP, BUT DISCUSS THAT WITH YOUR LAWYER.

ANYTHING ELSE THEN?

MR. MARKLE: I DON'T BELIEVE SO.

THE COURT: ALL RIGHT. MA'AM, GO AHEAD.

MS. TRIMBLE: YOUR HONOR, I OBJECT TO THE SHACKLING OF THE PERSON CHARGED AS MR. DAVIS AND ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY. HE'S IN FULL RESTRAINTS, WHICH INCLUDES RESTRAINTS ON HIS LEGS AND HIS ARMS. THERE IS ONLY

ONE OTHER DEFENDANT IN COURT AT THIS TIME. HOWEVER, THERE ARE STILL TWO UNITED STATES MARSHALS PRESENT IN COURT, AS WELL AS THE COURTROOM SECURITY OFFICER SITTING NEAR THE ENTRANCE.

AS I MENTIONED WHEN MR. DAVIS FIRST CAME OUT, HE IS CURRENTLY UNDERGOING CANCER TREATMENT. THESE SHACKLES, I DON'T KNOW IF THEY AGGRAVATE HIS HEALTH CONDITION, BUT I CAN TELL YOU THAT WHEN I SPOKE WITH MR. DAVIS EARLIER IN THE TANK, HE WAS EXPRESSING SOME DISCOMFORT.

HIS—THE ALLEGATIONS THAT HAVE BEEN BROUGHT [126] AGAINST HIM ARE NONVIOLENT. THEY ALL APPEAR TO BE WIRE FRAUD, SO THERE IS NO INDICATION THAT HE POSES A PARTICULAR SECURITY RISK. THEREFORE, THE USE OF THE FULL SHACKLES IN THIS CASE VIOLATE HIS FIFTH AMENDMENT DUE-PROCESS RIGHTS. IT'S AN UNCONDITIONAL AND UNNECESSARY RESTRAINT AND IT DETRACTS FROM THE DIGNITY AND DECORUM OF THIS CRIMINAL PROSECUTION.

GIVEN THE LACK OF PARTICULAR SECURITY CONCERNS IN THIS CASE AND THE LACK OF ANY EVIDENTIARY HEARING WHICH SHOWS SECURITY CONCERNS MORE BROADLY IN THIS DISTRICT, AND ESPECIALLY BECAUSE MR. DAVIS I BELIEVE IS BEING HELD AT THE MCC, WHERE HE HAS SUBJECT TO

ADDITIONAL SECURITY SCREENING, I REQUEST THAT THE SHACKLES BE REMOVED. IF THAT'S DENIED, I WOULD REQUEST AN EVIDENTIARY HEARING. AND I REQUEST THAT LESS RESTRICTIVE ALTERNATIVES BE USED, SUCH AS BRINGING HIM OUT INDIVIDUALLY. HE'S ONLY HERE WITH ONE OTHER INDIVIDUAL, SO IT WOULDN'T CAUSE MUCH ADDITIONAL TIME ON THE COURT TO DO THAT; OR AT LEAST TO HAVE LESS RESTRICTIVE SHACKLES.

THE COURT: THE MOTION IS DENIED FOR ALL THE REASONS PREVIOUSLY STATED ON THE RECORD.

ALL RIGHT. THE PERSON CHARGED AS RODRIGO ARELLANO. ALL RIGHT. SIR, YOU ARE HERE, YOU ALSO ARE CHARGED IN THE CENTRAL DISTRICT OF CALIFORNIA AND, AGAIN, IT'S AN INDICTMENT.

IN AUGUST OF THIS YEAR, A FEDERAL GRAND JURY IN THE [127] CENTRAL DISTRICT OF CALIFORNIA RETURNED AN INDICTMENT CHARGING YOU AND A NUMBER OF OTHER INDIVIDUALS WITH CONSPIRACY TO DISTRIBUTE CONTROLLED SUBSTANCES, POSSESSION WITH INTENT TO DISTRIBUTE CONTROLLED SUBSTANCES, AIDING AND ABETTING AND CRIMINAL FORFEITURE. SO THAT'S WHY YOU'RE HERE TODAY.

AGAIN, WITH REGARD TO THOSE CRIMES, YOU HAVE THE RIGHT FOR ME TO MAKE A DETERMINATION AS TO WHETHER OR NOT

YOU ARE THE PERSON CHARGED IN THE CENTRAL DISTRICT OF CALIFORNIA. IF YOU WANT TO HAVE THESE CHARGES TRANSFERRED DOWN TO—DOWN HERE TO THIS DISTRICT, THERE ARE SOME LIMITED SITUATIONS, CIRCUMSTANCES IN WHICH YOU COULD HAVE THAT HAPPEN. YOU NEED TO TALK WITH YOUR LAWYER, YOUR LAWYER WILL THEN TALK WITH THE ATTORNEY FOR THE UNITED STATES IN BOTH DISTRICTS AND MAKE A DETERMINATION.

YOU ALSO HAVE THE RIGHT TO HAVE AN ATTORNEY HELP YOU IN DEFENDING AGAINST THESE CHARGES HERE IN THIS DISTRICT. THE ATTORNEY I'M APPOINTING CANNOT—WON'T BE REPRESENTING YOU IN THE CENTRAL DISTRICT BASED ON MY APPOINTMENT, BUT JUST IN THIS DISTRICT.

I'M APPOINTING DANA GRIMES TO REPRESENT YOU. MS. GRIMES' NUMBER IS (619) 232-9700. SAME THING, I AM GOING TO SET A REMOVAL HEARING OR IDENTITY HEARING HERE IN THIS DISTRICT. IT WILL BE ON NOVEMBER 5TH AT 9:30 A.M. IN MY COURTROOM. AND THE—DURING THAT HEARING, THAT WILL BE THE [128] TIME WHEN WE MAKE A DETERMINATION AS TO WHETHER OR NOT YOU ARE THE PERSON CHARGED IN THE CENTRAL DISTRICT OF CALIFORNIA.

GENTLEMEN, FOR BOTH OF YOU, IF I DO FIND THAT YOU ARE THE PERSON CHARGED IN THIS INDICTMENT, I WOULD THEN ORDER THAT EACH OF YOU BE TRANSFERRED TO

THE CENTRAL DISTRICT OF CALIFORNIA TO ADDRESS THESE CHARGES. IF I FIND THAT YOU ARE NOT THE PERSON CHARGED IN THAT DOCUMENT, THEN I WOULD ORDER THAT YOU BE RELEASED FROM CUSTODY. YOU WILL, HOWEVER, STAY IN CUSTODY UNTIL THAT DETERMINATION OCCURS.

RETURNING TO THE PERSON CHARGED AS MR. ARELLANO, I SET THE HEARING FOR NOVEMBER 5TH. IS THE UNITED STATES MOVING TO DETAIN ON A BASIS OTHER THAN THE NAME?

MR. MARKLE: YES, WE ARE, YOUR HONOR. ON RISK OF FLIGHT.

THE COURT: ALL RIGHT. SO THE PERSON CHARGED AS MR. ARELLANO, THE SAME THING GOES TO YOU—GOES AS TO YOU AS I JUST DISCUSSED WITH THE OTHER DEFENDANT. THAT IS, THE UNITED STATES HAS ASKED THAT YOU BE HELD IN CUSTODY WITHOUT BAIL ON THE GROUNDS THAT THEY BELIEVE YOU PRESENT AN UNREASONABLE RISK OF FLIGHT BASED UPON YOUR CONDUCT RELATED TO THE OTHER CASE OR THE CASE IN THE CENTRAL DISTRICT OF CALIFORNIA.

THEY HAVE THE RIGHT TO DO THAT. YOU HAVE THE RIGHT TO HAVE A HEARING AND FOR A JUDGE TO MAKE A DETERMINATION AS TO WHETHER OR NOT THERE ARE ANY CONDITIONS THAT COULD BE SET [129] THAT WOULD GUARANTY YOUR APPEARANCE IN COURT AS REQUIRED. THAT HEARING COULD

HAPPEN HERE OR IN THE CENTRAL DISTRICT OF CALIFORNIA. YOU WILL, HOWEVER, BE HELD IN CUSTODY WITHOUT BAIL UNTIL THAT HEARING OCCURS.

THE SECOND ISSUE IS MY ISSUE, AND THAT IS WITH REGARD TO THE IDENTITY. AS I PREVIOUSLY EXPLAINED TO YOU, YOUR LAWYER HAS ASKED THAT I REFER TO YOU AS THE PERSON CHARGED AS RODRIGO ARELLANO, III, AND I'M DOING THAT. AND THERE ARE A LOT OF GOOD REASONS FOR THAT. HOWEVER, BECAUSE I DO NOT KNOW YOUR NAME, I FIND THERE ARE NO CONDITIONS THAT I COULD SET THAT WOULD GUARANTY YOUR APPEARANCE IN COURT AS REQUIRED. I, THEREFORE, ORDER THAT YOU BE HELD IN CUSTODY WITHOUT BAIL. I ENTER THAT ORDER WITHOUT PREJUDICE.

ANYTHING ELSE AS TO THIS INDIVIDUAL?

MS. TRIMBLE: YES, YOUR HONOR. I OBJECT TO THE SHACKLING.

THE COURT: I'LL LET YOU DO THAT. ANYTHING ELSE ON THE REMOVAL STUFF?

MR. MARKLE: NO. THANK YOU, YOUR HONOR.

THE COURT: FINE. MA'AM, GO AHEAD AND MAKE YOUR RECORD.

MS. TRIMBLE: I OBJECT TO THE SHACKLING OF THE PERSON CHARGED AS MR. ARELLANO AND ASK THAT THE SHACKLES BE REMOVED IMMEDIATELY. HE'S IN FULL

RESTRAINTS. HE'S HERE WITH ONLY ONE OTHER DEFENDANT. THERE ARE TWO UNITED STATES [130] MARSHALS HERE AND A COURTROOM SECURITY OFFICER. SO THIS TYPE OF FULL RESTRAINTS IS NOT JUSTIFIED BY ANY SHOWING OF SECURITY—ANY NEED FOR SECURITY IN THIS DISTRICT HAS NOT BEEN ESTABLISHED BY AN EVIDENTIARY HEARING. THERE HAVE BEEN SOME ALLEGATIONS, BUT NO ACTUAL HEARING HAS BEEN HELD TO SHOW SPECIFIC NEEDS IN THIS DISTRICT.

MOREOVER, MR. ARELLANO APPEARS TO BE HOUSED IN THE METROPOLITAN CORRECTIONAL CENTER WHERE ADDITIONAL SECURITY SCREENING OCCURS PRIOR TO AN INDIVIDUAL BEING PUT INTO THE CUSTODY OF THE U.S. MARSHALS. SO THE SECURITY CONCERNS IN THIS PARTICULAR CASE DO NOT JUSTIFY FULL SHACKLES.

IF THE GOVERNMENT OR THE MARSHALS BELIEVE THERE IS A PARTICULAR SECURITY CONCERN IN THIS CASE, I REQUEST AN EVIDENTIARY HEARING. THERE ARE LESS RESTRICTIVE ALTERNATIVES TO SHACKLES. THE MARSHALS CAN BRING THE DEFENDANTS OUT INDIVIDUALLY SO THE USE OF FULL RESTRAINTS VIOLATES HIS FIFTH AMENDMENT DUE-PROCESS RIGHTS.

THE COURT: THANK YOU. MOTION IS DENIED FOR ALL THE REASONS PREVIOUSLY STATED ON THE RECORD.

THAT'S IT, MARSHALS. THANK YOU.

THE CLERK: ITEM NO. 4 ON THE LOG, PLEASE. ITEM NO. 4, 98CR1733-BTM, DAVID PEREZ.

THE COURT: ALL RIGHT. SIR, DO YOU SPEAK ENGLISH?

DEFENDANT PEREZ: YES, MA'AM.

THE COURT: TERRIFIC. OKAY. YOU ARE HERE BECAUSE [131] JUDGE MOSKOWITZ ISSUED A WARRANT FOR YOUR ARREST BECAUSE IT IS ALLEGED THAT YOU HAVE VIOLATED YOUR CONDITIONS OF SUPERVISED RELEASE.

SPECIFICALLY, IN MARCH OF 2012, JUDGE MOSKOWITZ FOUND THAT YOU HAD VIOLATED YOUR CONDITIONS OF SUPERVISED RELEASE, HE REVOKED THAT SUPERVISED RELEASE, SENTENCED YOU TO FOUR MONTHS IN CUSTODY, TO BE FOLLOWED BY A TWO-YEAR TERM OF SUPERVISED RELEASE; ALL OF THIS WAS AFTER YOUR ORIGINAL CONVICTION FOR IMPORTATION OF COCAINE.

AND IT IS NOW ALLEGED THAT YOU HAVE VIOLATED YOUR CONDITIONS OF SUPERVISED RELEASE. SPECIFICALLY ONE CONDITION WAS THAT YOU NOT COMMIT—SORRY, THAT YOU NOT ILLEGALLY POSSESS A CONTROLLED SUBSTANCE, AND IT'S ALLEGED THAT YOU VIOLATED THAT BECAUSE YOU USED A CONTROLLED SUBSTANCE AS EVIDENCED BY A URINE SAMPLE THAT YOU SUBMITTED ON JULY 24TH, WHICH CON-

FIRMED POSITIVE FOR AMPHETAMINE, METHAMPHETAMINE AND THC METABOLITE OR MARIJUANA.

SECOND CONDITION WAS THAT YOU PARTICIPATE IN A PROGRAM OF MENTAL HEALTH TREATMENT, AND IT'S ALLEGED THAT YOU VIOLATED THAT BECAUSE YOU FAILED TO ATTEND MENTAL HEALTH COUNSELING AT SHARPER FUTURE ON JULY 25TH OF 2012.

DO YOU UNDERSTAND THAT THAT'S WHY YOU ARE HERE TODAY?

DEFENDANT PEREZ: YES, YOUR HONOR.

THE COURT: BASED UPON THE INFORMATION IN FRONT OF [132] ME AS WELL AS THE—JUDGE MOSKOWITZ ISSUED ANOTHER ORDER TO SHOW CAUSE. DO YOU HAVE THE ORIGINAL? IT LOOKS LIKE HE ISSUED AN ORIGINAL ONE ON JULY 30TH. NO. I HAVE TWO COPIES OF THE—

THE CLERK: OKAY.

MS. TRIMBLE: YOUR HONOR, AT THIS POINT I WOULD JUST ASK—OBJECT TO THE SHACKLING OF MR. PEREZ. HE'S THE ONLY DEFENDANT PRESENT IN COURT RIGHT NOW, AND THERE ARE TWO UNITED STATES MARSHALS STILL HERE. SO THERE IS AN ADDITIONAL MARSHAL PER ONE DEFENDANT HERE. I'D LIKE TO ELABORATE—

THE COURT: GO AHEAD.

MS. TRIMBLE: AS TO MY OBJECTION MORE GIVEN THE OPPORTUNITY, BUT I THINK AT

THIS TIME, IT WOULD BE APPROPRIATE TO REMOVE THE SHACKLES, AT BEAR MINIMUM, THE HAND SHACKLES, GIVEN HE'S THE ONLY DEFENDANT HERE AND THERE IS NO INDICATION OF A PARTICULAR SECURITY CONCERN.

THE COURT: YOUR MOTION IS DENIED. I DO IT BASED ON THE REASONS THAT I PREVIOUSLY STATED. SPECIFICALLY ONE OF THE CONCERNS THAT HAVE BEEN VOICED BY THE UNITED STATES MARSHAL SERVICE AND THE REASON—ONE OF THE REASONS THEY IMPLEMENTED THIS PROGRAM IS THAT IT CREATES AN UNWARRANTED SECURITY CONCERN TO HAVE INDIVIDUALS WHO ARE RESTRAINED AND UNRESTRAINED IN THE SAME HOLDING CELL AREA.

AS SOON AS WE FINISH WITH THIS INDIVIDUAL, HE'S GOING TO BE RETURNED INTO THAT SAME CELL AREA AND HE CANNOT [133] BE, FOR SECURITY REASONS, UNRESTRAINED WHEN OTHERS ARE RESTRAINED. AGAIN, I FIND IT'S INAPPROPRIATE AND CREATES A SECURITY ISSUE BASED UPON THE INFORMATION PROVIDED TO ME BY THE MARSHALS FOR THE MARSHALS TO BE UNRESTRAINING INDIVIDUALS IN COURT AT A TIME WHEN ANYONE COULD WALK INTO THE COURTROOM, THERE COULD BE MOVEMENT AROUND.

FOR ALL OF THOSE REASONS, I DENY YOUR REQUEST. I DEFER TO THE DECISION

THAT'S BEEN MADE BY THE UNITED STATES MARSHAL SERVICE—

MS. TRIMBLE: AND YOUR HONOR—

THE COURT: —ON THAT BASIS.

MS. TRIMBLE: —I WOULD ASK FOR AN EVIDENTIARY HEARING FOR ALL THE FACTUAL FINDINGS THAT YOU JUST MADE TO JUSTIFY SHACKLES FOR THIS PARTICULAR DEFENDANT. PROFFERS MADE BY THE U.S. MARSHALS HAVE NOT BEEN LAID OUT IN AN EVIDENTIARY HEARING SO THEY ARE NOT PROPERLY CONSIDERED BEFORE THE COURT OR USED FOR SECURITY RIGHT NOW.

THE COURT: MOTION IS DENIED ON THAT BASIS ON THE GROUNDS THAT THIS IS A POLICY THAT'S BEEN IMPLEMENTED BY THE UNITED STATES MARSHAL SERVICE. THAT THIS IS ARRAIGNMENT. WE HAVE A LARGE NUMBER OF DEFENDANTS THAT ARE COMING THROUGH THIS COURTROOM, AND SO FOR—SPECIFICALLY FOR NEW ARRAIGNMENTS, I'M RELYING ON THE POLICY IMPLEMENTED BY THE UNITED STATES MARSHAL SERVICE. I'M DEFERRING TO THEIR JUDGMENT FOR ALL OF THE REASONS PREVIOUSLY STATED.

[134]

ALL RIGHT. MR. PEREZ, THERE ARE SOME ADDITIONAL VIOLATIONS THAT WERE FILED AGAINST YOU. IN ADDITION, ONE OF THE CONDITIONS WAS THAT YOU NOT ILLEGALLY POSSESS A CONTROLLED SUBSTANCE. AND IT'S ALLEGED THAT YOU USED A CONTROLLED

SUBSTANCE ON JUNE 23RD OF 2012 AS EVIDENCED BY A URINE SAMPLE, WHICH CONFIRMED POSITIVE FOR AMPHETAMINES AND METHAMPHETAMINES. IN JULY OF 2012, YOU USED METHAMPHETAMINE AS EVIDENCED BY AN ADMISSION. AND IN JULY OF 2012, YOU FAILED TO SUBMIT A URINE SAMPLE AS DIRECTED.

THE SECOND CONDITION WAS THAT YOU RESIDE IN A RESIDENTIAL REENTRY CENTER. IT'S ALLEGED THAT YOU VIOLATED THAT BECAUSE ON JULY 18TH YOU WERE UNSUCCESSFULLY TERMINATED FROM THE RESIDENTIAL REENTRY CENTER DUE TO DRUG USE.

A THIRD CONDITION WAS THAT YOU NOTIFY YOUR PROBATION OFFICER TEN DAYS PRIOR TO ANY CHANGE OF RESIDENCE OR EMPLOYMENT, AND IT'S ALLEGED THAT YOU VIOLATED THAT BECAUSE ON JULY 18TH, YOU CHANGED YOUR PLACE OF RESIDENCE AND FAILED TO NOTIFY YOUR PROBATION OFFICER OF THAT FACT.

ANOTHER CONDITION WAS THAT YOU NOT ENTER THE REPUBLIC OF MEXICO WITHOUT PERMISSION, AND IT'S ALLEGED THAT YOU VIOLATED THAT BECAUSE ON JULY 19TH, YOU ENTERED MEXICO WITHOUT THE PERMISSION OF YOUR OFFICER AS EVIDENCED BY YOUR ADMISSION. SO THOSE ARE ALL OF THE ALLEGATIONS THEN NOW.

WITH REGARD TO ALL OF THOSE ALLEGATIONS, I FIND PROBABLE CAUSE TO BELIEVE THAT YOU COMMITTED THESE VIOLATIONS [135] BASED UPON THE INFORMATION IN FRONT OF ME, AS WELL AS JUDGE MOSKOWITZ'S FINDING. HOWEVER, I ENTER A DENIAL ON YOUR BEHALF.

DOES HE HAVE THE ABILITY TO HIRE A LAWYER?

MS. TRIMBLE: NO, YOUR HONOR.

THE COURT: TELL ME SOMETHING. IS HE WORKING?

MS. TRIMBLE: FROM WHAT IS BEFORE ME, I DON'T BELIEVE THAT HIS FINANCIAL CONDITIONS HAVE CHANGED FROM WHEN HE WAS PREVIOUSLY APPOINTED LEILA MORGAN OF OUR OFFICE.

THE COURT: WERE YOU WORKING PRIOR TO YOUR ARREST?

DEFENDANT PEREZ: YOUR HONOR, NO. I WAS LAID OFF PRIOR TO MY ARREST.

THE COURT: WHEN WERE YOU LAID OFF?

DEFENDANT PEREZ: I WAS LAID OFF SOMEWHERE—FOUR MONTHS AGO, WHICH WOULD BE—

THE COURT: THIS IS OCTOBER. SO ABOUT JUNE-ISH YOU WERE LAID OFF?

DEFENDANT PEREZ: YEAH.

THE COURT: ALL RIGHT. DO YOU OWN ANY REAL PROPERTY?

DEFENDANT PEREZ: NO, YOUR HONOR.

THE COURT: BASED UPON THE INFORMATION IN FRONT OF ME, I FIND YOU DO NOT HAVE THE ABILITY TO HIRE A LAWYER, AND I'M GOING TO APPOINT A LAWYER TO REPRESENT YOU. FEDERAL DEFENDERS REPRESENTED YOU IN THE UNDERLYING MATTER, SO I'M [136] GOING TO REAPPOINT THEM TO REPRESENT YOU IN THIS MATTER.

DEFENDANT PEREZ: THANK YOU, YOUR HONOR.

THE COURT: YOU'RE WELCOME.

I'M GOING TO SET THIS FOR A STATUS HEARING IN FRONT OF ME TO GIVE YOU TIME TO TALK WITH THEM ABOUT HOW YOU WANT TO PROCEED. SO YOU ARE ORDERED TO APPEAR IN MY COURTROOM ON NOVEMBER 5TH AT 9:30 A.M. AND JUDGE MOSKOWITZ ISSUED A NO-BAIL WARRANT, SO YOU WILL BE HELD IN CUSTODY WITHOUT BAIL. THAT'S IT FOR TODAY, SIR.

MS. TRIMBLE: YOUR HONOR, CAN I BRIEFLY BE HEARD AT SIDEBAR AS TO A MEDICAL ISSUE FOR MR. PEREZ?

THE COURT: THAT NEEDS TO GO TO THE PRISON WHERE HE'S BEING HELD. I CAN'T ORDER THEM TO GIVE HIM THE CARE THAT HE NEEDS. IF THE PRISON IS UNABLE TO ACCOMMODATE WHATEVER THAT MEDICAL

ISSUE IS, THEN IT CAN BE RAISED APPROPRIATELY. BUT AT THIS TIME, THE FIRST STEP IS YOU NEED TO TALK TO THE MEDICAL AUTHORITIES AT THE PRISON WHERE YOU'RE BEING HELD.

MS. TRIMBLE: MY UNDERSTANDING IS HE IS NOT RECEIVING THE MEDICATION THAT HE NEEDS AT CCA, BUT DOES RECEIVE IT AT THE METROPOLITAN CORRECTIONAL CENTER.

THE COURT: PERFECT. FOLLOW UP THEN TO MAKE SURE THAT HE GETS THE MEDICAL CARE THAT HE NEEDS.

ALL RIGHT. THANK YOU, SIR. THAT'S IT FOR TODAY.

DEFENDANT PEREZ: COUNSEL, I JUST WANT TO THANK YOU [137] AS WELL.

THE COURT: ALL RIGHT. MICHELLE.

THE CLERK: THAT'S ALL, JUDGE. JUST THE NO BODIES.

THE COURT: ANY BODIES THAT YOU'RE CONCERNED ABOUT?

MS. TRIMBLE: I BELIEVE THE NO BODIES FOR TODAY WERE 31, 32, 33 AND 34.

THE COURT: PERFECT. THANK YOU.

THE CLERK: NO. 31 WAS A PRETRIAL DIVERSION MATTER WHICH WE HANDLED.

MS. TRIMBLE: OH, I'M SORRY. YES.

THE COURT: ALL RIGHT. 32, WHAT'S THE GOVERNMENT'S INFORMATION ON THIS INDIVIDUAL?

MR. MARKLE: I UNDERSTAND THAT HE HAS A MEDICAL ISSUE AND HE—HOWEVER, IT SHOULD BE CLEARED UP TOMORROW.

THE COURT: ALL RIGHT. WE'LL CONTINUE THIS UNTIL TOMORROW.

33, ANGELA JONES.

MR. MARKLE: WE HAD A STATUS TODAY, AND THIS DATE IS APPROXIMATELY THREE TO FIVE MORE DAYS. SHE'S CURRENTLY AT API FOR HEROIN DETOXIFICATION.

THE COURT: WHAT DO YOU MEAN, A STATUS WAS HELD TODAY?

MR. MARKLE: SHE WAS ORIGINALLY GIVEN FIVE TO SEVEN DAYS ON THE 15TH WHEN SHE WAS BOOKED IN. AND THEN HER STATUS [138] WAS REEVALUATED TODAY.

THE COURT: SO YOU WERE GIVEN AN UPDATE. THERE WASN'T A COURT DATE.

MR. MARKLE: WE WERE GIVEN AN UPDATE.

THE COURT: SO THREE TO FIVE DAYS FROM TODAY?

MR. MARKLE: THREE TO FIVE DAYS FROM TODAY.

THE COURT: ALL RIGHT. THEN I'LL CONTINUE THIS MATTER UNTIL FRIDAY ON MY CALENDAR.

AND THEN THE LAST ONE WAS JUST ARRESTED TODAY, SO WE'LL CONTINUE THAT UNTIL TOMORROW, OR IS THAT ONE IN THE HOSPITAL?

MR. MARKLE: IS THAT ANGELO—

THE COURT: IT IS.

MR. MARKLE: EXCUSE ME. HE IS IN API AS WELL FOR AN ALCOHOL DETOX. HIS STAY IS ESTIMATED AT FIVE TO SEVEN DAYS.

THE COURT: ALL RIGHT.

MR. MARKLE: FROM THE 18TH.

THE COURT: GREAT. THEN I WILL CONTINUE HIS MATTER UNTIL FRIDAY ON MY CALENDAR. AGAIN, IF HE APPEARS EARLIER, HE SHOULD BE BROUGHT OVER AS SOON AS HE DOES APPEAR. AND I EXCLUDE TIME FROM TODAY UNTIL THE—FROM THE 18TH TO THE 25TH ON THE GROUNDS THAT THE DEFENDANT IS UNAVAILABLE BECAUSE HE'S HOSPITALIZED.

AND ON MS. JONES, I FORGOT TO DO THAT. I EXCLUDE [139] TIME FROM TODAY THROUGH THE 25TH ON THE GROUNDS THAT SHE IS UNAVAILABLE BECAUSE SHE IS HOSPITALIZED.

ALL RIGHT.

MS. TRIMBLE: THANK YOU.

THE COURT: THANK YOU.

THE CLERK: COURT'S IN RECESS.

(PROCEEDINGS CONCLUDED AT 4:52 P.M.)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No. 13-CR-3876 MMA

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK WILLIAM RING, DEFENDANT

San Diego, California
Tuesday, Oct. 22, 2013
2:21 p.m.

COURT'S COMMENTS RE: SHACKLING
PARTIAL TRANSCRIPT

BEFORE THE HONORABLE JAN M. ADLER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

LAURA E. DUFFY
United States Attorney
BY: JASON M. WANDEL
Assistant U.S. Attorney
880 Front Street, Suite 6293
San Diego, CA 92101

FOR THE DEFENDANT:

ELIZABETH M. BARROS, ESQ.
Federal Defenders of San Diego
225 Broadway, Suite 900
San Diego, CA 92101

[2]

San Diego, California—Tuesday,
Oct. 22, 2013, 2:21 p.m.

(Following is a partial transcript of the proceedings.)

THE COURT: Good afternoon. Before we bring out any of the defendants, I want to address a matter that I think everyone here knows about, but I want to explain how we're going to proceed today and on future criminal calendars.

As all of you know, earlier this year the United States Marshal contacted Chief Judge Moskowitz and explained to him in detail why he felt it was essential that the Court implement a district-wide policy of allowing the Marshal's Service to produce all in-custody defendants in full restraints for nonjury proceedings. The marshals stated several factors in support of this proposed policy because they believed that the system for handling defendants that was in place at the time was creating significant safety and security dangers. The Marshal's Service also advised the Court that the existing policy was out of compliance with the national policies of the United States Marshal's Service and policies utilized by other similarly situated districts, including other districts in this circuit.

Since that time the district judges and the magistrate judges have had numerous discussions with the

Marshal's Service regarding this request, and for the following reasons, I find that there are valid facts and [3] circumstances supporting the marshal's request. Included among those facts and circumstances are the following. The United States Marshal's Service has nationwide policies designed to protect participants in court proceedings. The policies that have been in place in this district are not in compliance with those national policies, and this is highly significant because it could result in injury or death with liability or responsibility placed on the Marshal's Service. Therefore, it's important to defer, in my view, to the Marshal's Service decisions regarding the need for restraints in order to assure safety in the court.

In addition, prison-made weapons have been found in court holding cells and cellblock areas, and there have been several incidents of assaults by prisoners in court and holding cell areas. Notably in those incidents, the incidents were not prevented despite the fact that the inmates were wearing leg restraints.

There's an extremely large number of prisoners transported on a daily basis to and from courts in this district. It's my understanding that approximately 5,000 people go through two cellblocks every single month, and of course transporting the prisoners through these cellblocks is one of the most potentially dangerous times in the sequence of events.

Furthermore, the United States Marshal's Service is [4] dramatically understaffed due to the effects of sequestration, concomitant budget cuts, and a hiring freeze, and yet they still must staff two courthouses and numerous courtrooms. The limited number of marshals creates a potential impediment to effectively

responding to danger in a crowded courtroom or holding cell area, and as I mentioned, there are several examples in this district of incidents demonstrating just that fact.

In many instances, in pretrial proceedings security information regarding each defendant, including gang affiliation and his or her relationship with other defendants and/or gangs, is imperfect or incomplete. For security reasons, restrained and unrestrained defendants cannot be held in the same cell or location. It is the national policy of the United States Marshal's Service to require full restraints for new complaints and these—and similar proceedings, similar pretrial proceedings, and similar restraint procedures are utilized in other districts of similar size, number of criminal defendants, and multiple courthouses and courtrooms.

In addition, the proceedings before me in this court are, for the most part, nonjury proceedings, and restraints will not affect my decision in any way. As the Ninth Circuit said in the case of United States v. Howard, 463 F.3d 999 at page 1005, "Fear of prejudice is not at issue [5] in these proceedings as a judge in a pretrial hearing presumably will not be prejudiced by seeing defendants in shackles," and that certainly will be the case here; there will not be any such prejudice as far as I am concerned. It is prejudice to a defendant that arises from being shackled before a jury that is the concern articulated by the United States Supreme Court, and in the case of Deck v. Missouri, 544 U.S. 622, 626, 2005, the Supreme Court held that the rules applicable to shackling or the lack of shack-

ling before juries do not apply at the time of arraignment or like proceedings before a judge.

For all of these reasons, I believe there are ample facts and circumstances that support the marshal's recommendation that this policy of full shackles be implemented, and I am going to implement it in this court. I will allow counsel for either the government or any defense counsel to make any statement they wish. Does anyone—

MR. WANDEL: Nothing from the government, no, nothing.

MS. BARROS: Your Honor, I do wish to be heard in each case in which I am appearing.

THE COURT: Okay. All right. So we'll do that at the appropriate time. And at this time we can begin to bring in the defendants for our normal calendar. Thank you.

(Unrelated matters omitted from this transcript.)

[6]

THE COURT: Ms. Barros, would you like to be heard?

MS. BARROS: Yes, your Honor. At this time I would note that each of the defendants has been brought out in full restraints, leg shackles, the waist chains, handcuffs, their arms bound to their waist. And I would object to the shackling on due process grounds and ask that the shackles be immediately removed.

With respect to the—I would like to address some of the Court's comments initially regarding the policy.

As I think was stated on the record and we're aware, the marshals this week, yesterday, changed their policy in this district to be bringing out all defendants in full restraint in magistrate court, and this policy or this change in practice is due to a marshal's policy that directs them to bring out all defendants, unless directed otherwise by the district judge or the magistrate judge, in full restraints. This is apparently a national policy that was adopted in 2011 that had not been implemented in this district.

Up until now, up until yesterday, defendants were never brought out—excuse me—I won't say never, but only in exceptional circumstances or based on individual determinations were brought out in shackles. The tradition in this district—and for I believe approximately 40 years—defendants have not been brought out in shackles routinely in either magistrate or—or in district court.

[7]

I have read through the letter from Judge Moskowitz to the United States Marshals, as I'm sure the Court has, and that letter cites to—

THE COURT: That's, just for the record, the letter dated October 11, 2013—

MS. BARROS: Yes, your Honor.

THE COURT: —correct?

MS. BARROS: Correct. And that letter indicates that there had been two altercations in court, one in El Centro and one—the other incident was before Judge Gonzalez, and that was in district court I believe actually during a break in the jury trial proceedings,

and that case was an exceptional case because that case involved the Mexican Mafia prosecution, and so it was a case involving high-security defendants in the—in the first place. That is the only incident/altercation that I'm aware of that has occurred in this courthouse in San Diego. The only other incident was in El Centro.

And I believe that our—the statement that this policy or this practice is going to bring this district into basically compliance or have this district have the same procedures as other districts is incorrect. While there may be a nationwide policy, that policy is not implemented in the same way in every district, and I don't believe that a simple marshal policy can justify the restrictions on each [8] defendant's liberty. These are pretrial detainees. I would note in the Central District, which is the—the—where the Howard case came out of, the policy that was addressed by the Ninth Circuit in that case involved leg shackling only and at initial appearances, and that is one important distinction. And in the districts, other districts where shackling occurs, for the most part, your Honor, it involves leg shackling only.

Our office has, in the short time since we received notice of this policy change, attempted to do our own survey of other districts, and I can tell you we heard back I believe just an hour ago from the Northern District. In the Northern District they also use leg shackles only. In the Eastern District of California, your Honor, full shackles are sometimes used, but there is an individual determination made in every case, and, in fact, they have a form that is presented to the presiding judge before court and before the person is brought out in shackles that indicates—and I've seen

the form, your Honor—it indicates the type of criminal history the individual has, any individual security concerns, gang concerns, crime of violence, if the instant offense involved violence; and the judge makes the determination whether shackles are used and the extent —the degree of shackling that is to take place before the individuals are brought out to court. So it is a [9] misstatement to say that defendants are shackled in every other district. Here in California, the districts that are close to us—the Central District and the Eastern District—there is not a routine—the marshals do not use—routinely use full restraints.

We've communicated with former colleagues that now practice in New York, and they've indicated that they never use shackles in places like New York, where presumably the docket involves far less 1326 cases, which almost never involve violence, and more of the firearms types of offenses and offenses that the—that do sometimes relate to violence. So the docket is different, and actually the type of docket we have here I think weighs against the routine use of shackling. And I think that the practice in this district bears out—is evidence itself that shackling is not necessary. Judge Moskowitz's letter indicates that in 2012, for example, there were 44,426 court appearances. Out of those court appearances, we had one incident in the San Diego courthouse which involved the Mexican Mafia prosecution. I also believe that there had been a motion to sever because there were antagonistic defenses in that case. So respectfully, your Honor, I think that the security issue that occurred in that case was foreseeable and could have been dealt with based on an individual determination that shackles should have been used in that particular case.

[10]

But the—we have never seen an altercation in magistrate court that I am aware of, and I think that that is in part due to the extensive screening that's done here in San Diego at the MCC. All defendants that are arrested and booked here in San Diego are booked through the Metropolitan Correctional Center, and one consequence of what were the unconscionable delays —or one benefit, I should say, of the unconscionable delays that were occurring in this district, the Rule 5 delays, your Honor, is that we actually have somewhat of a record of the type of screening that is done here. And one of the justifications for that delay that was argued by the government in, for example, the Minero-Rojas case that was before Judge Moskowitz was the fact that this district is different from other districts because of the extensive screening that takes place in this district. And, in fact, I have a transcript of the hearing that occurred on November 7th of 2011 where AUSA Butcher indicates that it is different and that in other districts shackling is used because they don't have the same kind of screening procedures.

There is also—there was also a declaration of Assistant Chief Deputy United States Marshal Keith Johnson that was submitted in that case. For the record, the case number is 11-CR-3253. It was a case before Judge Moskowitz, and if I may, your Honor—I apologize—it indicates that [11] medical classification and separation and security screening are conducted by MCC prior to defendants being brought to U.S. Marshal space. Prisoners are also strip-searched prior to being turned over to the United States Marshal.

There was also a declaration filed in the Minero-Rojas case by Gabriel Gutierrez. I believe that he is —he indicates in his declaration that he was a case management coordinator employed by the United States Department of Justice, Federal Bureau of Prisons, at the Metropolitan Correction Center in San Diego, California. That declaration elaborates on basically the screening procedures, and it indicates that—that—on paragraph 4, when an arresting agent is provided a booking window, they're required to fax the prisoner remand form to R and D staff, also referred to as the booking slip. This information is entered into the computer before the inmate arrives, and staff complete a complete background check using the name and information provided by the arresting agency. If the inmate has active warrants or other pending cases, further research may be required. Staff initially process the inmates upon arrival in the basement of the institution, which includes a brief medical screening to determine suitability for incarceration. Staff then perform visual searches on the inmate, inventory and store the inmate's personal property, and have inmates change into the appropriate prison attire. [12] Staff then transfer the inmates to the second floor of the institution, where they are booked. MCC San Diego utilizes the Department of Justice's nationwide Joint Automated Booking System to electronically capture inmate data, including photos and fingerprints. Staff also begin the process of collecting DNA samples of qualifying new commitment.

A member of the unit team—this is paragraph 5—must also interview the inmates as part of the social screening for information concerning—concerning their suitability for placement in general population, separa-

tion concerns, gang affiliation, prior testimony, past victimization, et cetera. If there are other indications, psychological distress, sexual history, further screening is done and they're referred to a psychologist.

This is all part of the screening that takes place before inmates are brought to court for their initial arraignment, and I think that this is significant because this differentiates us from other districts, from other districts like the Central District that uses only leg restraints, your Honor. And that was one of the points made in Howard that in the Central District, security screenings are not complete before they are take—make their initial appearance. Again, Howard also dealt only with the initial appearance, not subsequent appearances such as the first [13] preliminary hearing, detention hearings, waivers of indictment. So this is different. And what is going on in this district is far beyond what the Ninth Circuit authorized in Howard. In fact, subsequent to Howard, in the Eastern District—the marshals tried to do this in the Eastern District without the individualized determinations, and that case was appealed to the Ninth Circuit. That case was United States v. Brandau—B-r-a-n-d-a-u—578 F.3d, 1064. And while that case was on appeal, the district, the judges, I believe either adopted an order or, in conjunction with the marshals, changed their policy to require individualized determinations before routinely using shackles or full shackles. And on appeal—this is the opening statement from the Court, the Ninth Circuit, in Brandau: A criminal defendant's first and sometimes only exposure to a court of law occurs at his initial appearance. The conditions of that appearance establish for him the foundation for his future relationship with the court system and in-

form him of the kind of treatment he may anticipate as well as the level of dignity and fairness he may expect. We have recognized that shackling defendants at such times effectuates some diminution of the liberty of pretrial detainees and detracts to some extent from the dignity and decorum of a critical stage of a criminal prosecution. We have not, however, fully defined the parameters of a pretrial detainee's liberty [14] interest and being free from shackles at his initial appearance or the precise circumstances under which courts may legitimately infringe upon that interest to achieve other aims such as courtroom safety.

So the issue has not been fully decided by the Ninth Circuit, but in Brandau, which is a case subsequent to Howard, the Ninth Circuit remanded to an out-of-district judge for an evidentiary hearing in that case. And the Eastern District now does employ a system where individualized determinations are made and an order is signed by the magistrate judge before all defendants are brought out fully restrained.

So I think that that is the extent of my comments with respect to the general policy. I would note that there is an assertion that the marshals are understaffed. I think all federal employees and federal agencies can say that they're understaffed due to sequestration, but as a result of that, there are also less prosecutions this year than there have been in past years. And there are still I believe four marshals in court; earlier there were—there was a court security officer as well. I—I don't think that we can make a finding that they are any less staffed today in this courtroom than they have been in the past. I think oftentimes—and the Court can take notice that over

the last several years—I've been practicing in this district [15] for ten years now—I routinely see two marshals in court—in fact, there are four in court today—and I have never seen a security incident in—in magistrate court in this district. So I—I do take a little bit of issue with the notion that they are understaffed. Every agency is understaffed, but I don't think if we—we don't have any evidence as to the ratio of marshals to the number of cases that are being brought or any evidence that it is less than in prior years.

With respect to each of the individual clients, none of the defendants that I am appearing for today have charges—that have been called right now have any charges that involved violence or attempts to flee. Each of the defendants has appeared in court before your Honor at least once before—Ms. Narcotes has made two prior court appearances before your Honor without being shackled—and none of them have caused any incidents or attempted to flee. As I noted previously, security checks are done in this district prior to the clients being brought to court. They are also strip-searched, and there are a number of marshals in court today.

I was briefly able to speak with several of the defendants, not all of them, for whom I'm appearing right now, and many of them indicated that they—they do feel discomfort based on—from the shackles, both in their [16] wrists and on their legs.

So, your Honor, I do ask that the shackles be immediately removed for each of the individuals, and if the Court denies that request, I would ask for an evidentiary hearing because I do think that—that there

are some disputed issues regarding the necessity of this policy.

THE COURT: Thank you, Ms. Barros. Would the government like to respond?

MR. WANDEL: Yes, briefly, your Honor. Your Honor set forth the reasons before you sat here today on why you think the new policy's appropriate. The United States is in agreement on every single one of those. We feel the underlying theme here is simply that the U.S. Marshals are the one people in this room who truly have expertise on the safety of the rest of us in this room. And while Ms. Barros points out there's four marshals in here today, all four of those marshals are safer as they transport these individuals back to the MCC because of those restraints. And that's good enough for me, it's good enough for the U.S. Attorney's Office. So I would note that your Honor did not give up your ability on a case-by-case basis to make an exception to this policy. I believe you just set forth what you feel is going to be the general way we're going to operate in your court.

If the defendant can—can provide a specific, articulable medical problem that the restraints are [17] aggravating or—not just discomfort, these don't feel good, but a serious injury or it's prohibiting the defendants from communicating with their counsel, the United States believes your Honor will make appropriate decision on a case-by-case basis. But otherwise, we feel the new policy is appropriate, and we support the request of the marshals.

THE COURT: All right. Thank you. The Court has already stated in detail why it is implementing the

policy requested by the marshals. I do want to state for the record that in the Howard case that has been discussed here today, the Ninth Circuit quoted the United States Supreme Court in a case called Bell, and this is what it said: In determining whether restrictions or conditions are reasonably related to the government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that such conditions are peculiarly within the province and professional expertise of corrections officials. And it went on to say that courts should ordinarily defer to their expert judgment in such matters.

It is the expert judgment of the U.S. Marshal's Service in this district that this policy is necessary for all of the reasons that I summarized and which are stated in detail in Judge Moskowitz's October 11, 2013 letter to the United States Marshal Steven C. Stafford.

I should also note again, as I did earlier, that [18] these are pretrial proceedings, and that the United States Supreme Court in the Deck case noted that the considerations applicable to a jury proceeding, a jury trial, are not applicable not only to initial appearances but to what it called "like proceedings," and I believe the types of proceedings we have here today fall into that category.

I'm going to overrule the objections lodged by Ms. Barros on behalf of her clients. I'm going to deny the request for an evidentiary hearing on these matters for all of the reasons previously stated. Thank you.

MR. MARKS: And, your Honor, I don't mean to talk for talking's sake, but I would like to make an ob-

jection on my case as well. I represent Mr. Fernandez and Mr. Mendoza. With respect to Mr. Mendoza, I did speak to him before the proceedings began. He's indicated to me that his wrist restraints are quite uncomfortable; they're cutting into his wrists and he's in pain. I would request that they be removed or loosened. He said that they're too—they have been put on too tightly.

I think the Court has eloquently described its justifications for why what the marshal's policy—what the marshals are doing now is permissible. I disagree with them respectfully for the—the reasons that Ms. Barros has stated. I would invite the Court to do not just what is permissible but what is right. It strikes me that if someone [19] came to this courtroom from another place and was asked to point out the innocent people, that they wouldn't include this group of nine people.

THE COURT: All right. Thank you, Mr. Marks. I appreciate the comments of counsel. I know they are deeply felt. They were articulately stated. I believe under the law the policy of the marshal, which is a very well-considered, well-thought-out policy that has been under consideration for a substantial period of time in the face of all of the factors that I mentioned, including many incidents, including one in magistrate judge court in El Centro where right in the box there was an attack by one inmate upon another, and they were wearing leg restraints, fully justifies the policy that the marshal has asked the Court to implement.

The Court is mindful that defendants feel discomfort. The Court is sorry for that, but I believe the Court is well within its discretion under the law for the

reasons stated and the authorities I've cited to implement the policy of the marshals.

So that is the Court's ruling. The objections are overruled. I will now proceed with a hearing.

(The partial transcript was concluded.)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No. 13 CR 3876

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK WILLIAM RING, DEFENDANT

Nov. 18, 2013
Monday, 3:00 P.M.

MOTION HEARING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE
MICHAEL M. ANELLO, DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

LAURA E. DUFFY
United States Attorney
BY: NICHOLAS PILCHAK
Assistant US Attorney
880 Front Street
San Diego, CA 92101

FOR THE DEFENDANT:

ELIZABETH BARROS
Attorney at Law
Federal Defenders of SD
225 Broadway
Suite 900
San Diego, CA 92101

[2]

SAN DIEGO, CALIFORNIA, NOV. 18, 2013,
MONDAY, 3:00 PM

—0O0—

THE CLERK: REMAIN SEATED. COME TO ORDER.

THE COURT: GOOD AFTERNOON, FOLKS.

THE CLERK: NUMBER 16 ON OUR CALENDAR, 13 CR 3876, UNITED STATES OF AMERICA VERSUS MARK WILLIAM RING.

MR. PILCHAK: GOOD AFTERNOON, YOUR HONOR. NICHOLAS PILCHAK FOR THE UNITED STATES.

THE COURT: GOOD AFTERNOON.

MS. BARROS: GOOD AFTERNOON, YOUR HONOR.

ELIZABETH BARROS, FEDERAL DEFENDERS FOR MR. RING. MR. RING IS AT AN INPATIENT FACILITY IN HOUSTON, TEXAS. IT IS OUR REQUEST TO WAIVE HIS PRESENCE FOR TODAY.

THE COURT: ALL RIGHT. HIS PRESENCE IS WAIVED. I GUESS HE NEED NOT BE THERE.

FOR THE RECORD, WE ARE HERE ON THE EMERGENCY APPEAL OF THE MAGISTRATE JUDGE'S DENIAL OF THE DEFENDANT'S REQUEST TO APPEAR UNSHACKLED. I THINK THAT WAS THE TITLE OF THE PLEADING.

BUT FIRST, SINCE THEN THE DEFENDANT HAS FILED PURSUANT TO AN ORDER SHORTENING TIME A MOTION TO RECUSE ALL THE DISTRICT JUDGES FROM THE SOUTHERN DISTRICT OF CALIFORNIA; PRESUMABLY INCLUDING ME FROM PRESIDING OVER THIS MOTION, OR I GUESS ANY MOTION LIKE IT CONCERNING THE PROPRIETY OF THE MARSHALS SHACKLING PROCEDURES. SO I GUESS WE SHOULD DEAL [3] WITH THAT FIRST FROM A LOGICAL STANDPOINT, ASSUMING THAT'S STILL ON THE TABLE?

MS. BARROS: YES, YOUR HONOR. I THINK THAT IS APPROPRIATE.

THE COURT: THE COURT'S TENTATIVE RULING HERE WOULD BE TO RESPECTFULLY DENY THAT MOTION. ESSENTIALLY FOR THE REASONS SET FORTH IN THE GOVERNMENT'S OPPOSITION TO THE MOTION. IN THE COURT'S VIEW, IT'S NOT BEING ASKED TO RULE UPON THE COURT'S POLICY, THE COURT DOESN'T HAVE A POLICY. IT'S SIMPLY ELECTED TO DEFER TO THE MARSHALS POLICY.

THERE WAS SOME CONCERN ABOUT EX PARTE CONTACTS. IT DOESN'T APPEAR TO ME THERE WAS ANY IMPROPER EX PARTE CONTACT. OF COURSE COURTROOM STAFF FROM TIME TO TIME ARE IN CONTACT WITH THE MARSHALS OFFICE ON GENERAL SECURITY ISSUES. I DON'T SEE ANYTHING IMPROPER ABOUT THAT.

ALSO THIS COURT IS NOT BEING ASKED TO RULE ON A CASE OR DECISION TRIED BY IT OR BY ME. I'M NOT BEING ASKED TO REVIEW MY OWN DECISION AND BEYOND THAT, THE COURT—I GUESS I JUST DON'T SEE ANY AUTHORITY THAT WOULD REQUIRE OR EVEN SUGGEST THAT THERE OUGHT TO BE A RECUSAL UNDER THESE PARTICULAR CIRCUMSTANCES.

SO THAT'S THE COURT'S TENTATIVE THOUGHT AND THE BASIS FOR IT. DEFENSE CARE TO ARGUE THAT FURTHER?

MS. BARROS: JUST VERY BRIEFLY. I THINK RECUSAL, THAT THIS IS ACTUALLY A PRETTY STRAIGHTFORWARD QUESTION AND [4] I THINK THAT THE CASE THAT IS ON POINT IS ***BRANDAU***. THAT WAS THE LAST CASE THAT CAME OUT OF THE NINTH CIRCUIT ON THE SHACKLING ISSUE. SO THAT WAS A CASE THAT DEALT WITH THE POLICY IN THE EASTERN DISTRICT OF CALIFORNIA, AND THERE HAD BEEN AN APPEAL OF THE SHACKLING POLICY IN THE EASTERN DISTRICT AND WHILE THE CASE WAS ON APPEAL, THE POLICY OR THE ORDER HAD BEEN RE-

SCINDED AND SO THERE WAS A QUESTION OF MOOTNESS IN THAT CASE, WHETHER OR NOT THE CASE WAS MOOT BECAUSE THE GOVERNMENT ALLEGED THAT THE POLICY HAD CEASED AND IT WAS NO LONGER CAPABLE OF REPETITION BECAUSE THIS WAS NO LONGER A POLICY AND ON REMAND, THE NINTH CIRCUIT REMANDED THE CASE TO AN OUT-OF-DISTRICT JUDGE AND STATED ON REMAND, "THE CONSOLIDATED CASE WHICH CHALLENGES THE CONSTITUTIONALITY OF A RULE PROMULGATED BY THE JUDGES ON THE EASTERN DISTRICT AS WELL AS THEIR SUPERIOR AUTHORITY TO PROMULGATE IT SHALL BE ASSIGNED TO AN OUT OF DISTRICT JUDGE; ALTHOUGH WE DO NOT SUGGEST THAT THERE CAN BE ACTUAL BIAS ON THE PART OF THE JUDGES OR AT THIS RULE AS PART OF RECUSAL WHERE A JUDGE'S IMPARTIALITY MAY REASONABLY BE QUESTIONED."

AND SO I DON'T THINK THAT THE QUESTION OF AN IMPROPER CONTACT, FOR EXAMPLE, OR ABSENT PARTY CONTACT WITH THE MARSHALS, I DON'T QUESTION THAT IT WAS PROPER FOR THE JUDGES TO RECEIVE INFORMATION FROM THE MARSHALS. BUT I THINK AS A MATTER OF FACT, THE MARSHALS AND THE COURT HAVE RECEIVED [5] BOTH FORMAL AND INFORMAL DISCUSSION INFORMATION FROM THE MARSHALS SERVICE AND THEREFORE, THE DETERMINATION MADE BY THE COURT OR INFORMATION THAT THE COURT HAS IS IN PART BASED ON EXTRA-

JUDICIAL INFORMATION HAS BEEN RECEIVED OUTSIDE OF THESE PROCEEDINGS.

AND IN ADDITION, BECAUSE IT'S A POLICY —WHETHER IT WAS POLICY INITIALLY ENACTED BY THE COURT, I THINK AS THE COURT MENTIONED AND THAT LAST CASE WAS CALLED, THE COURT HAS A POLICY OF DEFERENCE TO THE MARSHALS POLICY. SO I THINK THAT THAT IS A POLICY AND THAT WAS A POLICY THAT WAS DECIDED UPON BY THE DISTRICT JUDGES AS A WHOLE AND REFLECTED IN JUDGE MOSKOWITZ'S LETTER AND BECAUSE THE DISTRICT JUDGES IN THIS DISTRICT MADE THAT DECISION TO PROCEED IN THAT MANNER, THAT RECUSAL IS WARRANTED.

AND I WOULD JUST CITE TO ACTUALLY, IF YOU REVIEW THE ORAL ARGUMENT FROM THE ***BRANDOFF*** CASE AT ABOUT MINUTE 13. JUDGE MCKEOWN POSES THE QUESTION TO THE GOVERNMENT, "THAT SEEMS A LITTLE ODD TO ME THAT YOU WOULD HAVE A JUDGE IN THE EASTERN DISTRICT RULING ON THE CONSTITUTIONALITY OF A POLICY PROMULGATED BY THE JUDGES, INCLUDING THAT JUDGE IN TERMS OF THE RECUSAL REGARDING THE PLAINTIFF. WHY DON'T WE SEND THIS TO OR ASK THAT A JUDGE OUTSIDE THE DISTRICT, IF THE CASE IS STILL ALIVE AT THE END OF THE COURT OF APPEALS, WHY WOULDN'T ANOTHER JUDGE BE APPROPRIATE?"

AND THEN THE PROSECUTOR RESPONDED THAT HE OR SHE, I [6] DON'T KNOW WHO AR-

GUED THE CASE, THOUGHT IT WAS APPROPRIATE FOR A FRESNO JUDGE WHO WAS FAMILIAR WITH THE CIRCUMSTANCES TO DECIDE THE CASE AND JUDGE REINHARDT ASKED, "YOU ARE ASKING HIM TO RULE ON WHETHER OR NOT HE'S ACTING CONSTITUTIONALLY," AND THE PROSECUTOR RESPONDED, "NO. I THINK THAT A CASE-BY-CASE DETERMINATION—"

COURT REPORTER: MS. BARROS, COULD YOU SLOW DOWN A LITTLE BIT PLEASE? THANK YOU.

MS. BARROS: SORRY. "NO. I THINK THAT A CASE-BY-CASE DETERMINATION OF THE PROPRIETY OF SHACKLING IN ANY GIVEN CASE CAN AND SHOULD BE CONSIDERED BY A JUDGE FAMILIAR WITH A COURTROOM SETTING.

AND JUDGE MCKEOWN RESPONDED, "THAT IS DEFENDANT'S SPECIFIC AS OPPOSED TO A POLICY RELATED. MAYBE I WASN'T COMPLETELY CLEAR IN MY QUESTION, BUT MY QUESTION REALLY GOES WHETHER AN EASTERN DISTRICT JUDGE SHOULD BE MAKING A DETERMINATION ON THE CONSTITUTIONALITY OF THE POLICY OF THE LAW."

SO I THINK IT'S CLEAR FROM THE ***BRANDAU CASE*** THAT THE NINTH CIRCUIT HAS OPINED THAT WHEN THERE IS A SHACKLING POLICY IN A PARTICULAR DISTRICT THAT THE CONSTITUTIONALITY OF THAT POLICY SHOULD

BE DETERMINED BY AN OUT-OF-DISTRICT JUDGE. WITH THAT, YOUR HONOR. I SUBMIT.

THE COURT: WELL MAYBE WE'RE GETTING INTO SEMANTICS AND MAYBE I MISSPOKE. I THINK THAT THE [7] DIFFERENCE, SIGNIFICANT DIFFERENCE BETWEEN WHAT'S GOING ON HERE AND THE CASE YOU'RE DISCUSSING IS THAT THE EASTERN DISTRICT HAD A COURT RULE, RIGHT? PASSED BY THE JUDGES. IT WAS, IT WASN'T THE MARSHALS POLICY. IT WAS THE JUDGES PASSED, AS I RECALL IT, WHAT WAS IT? A GENERAL ORDER?

MR. PILCHAK: THAT'S CORRECT, YOUR HONOR. GENERAL ORDER NUMBER 441.

THE COURT: SO THAT'S A LITTLE DIFFERENT, RIGHT? IF I'M BEING CALLED UPON TO ADJUDICATE THE CONSTITUTIONALITY OF SOMETHING THAT I PROMULGATED, THAT GETS A LITTLE CLOSER TO SOME KIND OF CONFLICT OR RECUSAL ISSUE. THAT'S NOT WHAT WE HAVE HERE. IF I HAVE USED THE WORD "COURT POLICY", I'M SAYING THAT, BUT I DON'T THINK THAT'S CORRECT.

ALL I'VE ELECTED TO DO IS TO DEFER TO THE MARSHALS POLICY AND I, IN MY VIEW, THE MARSHAL HAS THE EXPERTISE, THE JUDGMENT, THE EXPERIENCE IN PROVIDING COURT SECURITY AND SO IN MY VIEW, I SHOULD DEFER TO THAT.

NOW I REALIZE IN AN INDIVIDUAL CASE, I WOULD HAVE THE AUTHORITY; OBVIOUSLY,

IN MY COURTROOM TO DEVIATE FROM THAT. I CAN'T SPECULATE UNDER WHAT CIRCUMSTANCE, IF SOMEBODY CAME IN ON A STRETCHER OR WHEELCHAIR OR WHO KNOWS? THERE MAY BE REASONS WHY OR IF IT WAS AN UNDULY PROLONGED HEARING, WHO KNOWS? I CAN'T SPECULATE NOW BUT I CAN CONCEIVE OF SOME CIRCUMSTANCE UNDER WHICH THE COURT WOULD SAY, "OKAY. I'M [8] GOING TO DEVIATE FROM THE MARSHALS POLICY. MY COURTROOM. I GET TO CALL THAT SHOT."

BUT GENERALLY, IT IS THE MARSHALS POLICY. I THINK THAT'S THE BIG DIFFERENCE BETWEEN THIS SITUATION AND THE ***BRANDAU CASE***.

MR. PILCHAK: YOUR HONOR, THE GOVERNMENT AGREES WITH THAT AND WOULD POINT OUT IN THE ***BRANDAU DECISION***, IT ACTUALLY AMPLIFIES THAT DISTINCTION IN THAT CASE. THE MAGISTRATE JUDGE HAD DENIED THE REQUEST TO QUOTE THE OPINION CONSIDERING HIMSELF BOUND BY THE EASTERN DISTRICT OF CALIFORNIA'S GENERAL ORDER 441 AND THAT'S AT PIN CITE SITE 1065 FROM THE ***BRANDAU*** DECISION. THAT POLICY WHICH IS DESCRIBED LATER IN THE DECISION, DID NOT PROVIDE FOR ANY INDIVIDUALIZED DETERMINATION REGARDING THE APPROPRIATENESS OF SHACKLING.

SO AGAIN, ANOTHER DISTINCTION FROM THE PRACTICE IN THIS DISTRICT WHERE

EVERY JUDGE AS INDICATED, RETAINS DISCRETION AT ALL TIMES.

THE COURT: JUST TO THINK THIS THROUGH, AND I HAVE THOUGHT IT THROUGH, BUT OBVIOUSLY EVERY—I'M THINKING IF THIS COURT WERE RECUSED, WHO IS GOING TO DECIDE THIS ISSUE? EVERY DISTRICT HAS MARSHALS, RIGHT? EVERY ONE BY DEFINITION. AND MOST OF THEM, IF NOT ALL OF THEM, HAVE CHECK-IN POLICIES. SO WHO WOULD YOU WANT TO HEAR THE CASE IF THIS COURT HAD TO RECUSE ITSELF?

[9]

MS. BARROS: YOUR HONOR, I THINK THE PROCEDURE IS GENERALLY TO REFER IT TO THE CHIEF JUDGE OF THE NINTH CIRCUIT TO REFER IT TO A JUDGE, TO ASSIGN A JUDGE TO HEAR IT. SO FOR EXAMPLE, THE ***CLEMMONS CASE*** THAT WAS CITED BY THE GOVERNMENT IN THEIR RESPONSE TO THE RECUSAL, EVEN THE RECUSAL MOTION ITSELF WAS DECIDED BY AN OUT-OF-DISTRICT JUDGE. SO THE QUESTION WHETHER EVEN TO RECUSE WAS REFERRED TO AN OUT-OF-DISTRICT JUDGE TO MAKE THAT DETERMINATION. I THINK THE ONE LINE, I UNDERSTAND A LINE JUST DRAWN BY THE COURT, THAT IN ***BRANDAU***, THIS WAS THE ISSUE, AN ORDER BY THE DISTRICT COURT; HOWEVER BY THE TIME THE CASE WAS ON APPEAL, THE GOVERNMENT ACTUALLY ARGUES THAT THERE WAS NO POLICY AT ALL BECAUSE THAT ORDER HAD BEEN RESCIND-

ED AND THE, THE DEFENDANTS WERE ARGUING THAT THERE WAS STILL THIS PRACTICE THAT AMOUNTED TO A POLICY IN THAT DISTRICT OF SHACKLING EVERYBODY, DESPITE THE FACT THAT THE ORDER HAD BEEN RESCINDED.

SO WHILE I UNDERSTAND THAT THERE HAD INITIALLY BEEN AN ORDER THAT WAS PROMULGATED BY THE JUDGES, I DON'T THINK THAT THAT REALLY SETS THAT CASE APART FROM WHAT'S GOING ON HERE BECAUSE THE JUDGES ARE STILL IN THIS DISTRICT THAT MADE THE DECISION TO DEFER TO THE MARSHALS.

THE COURT: WELL, SOME DO AND SOME DON'T. I GUESS I HAVEN'T POLLED MY COLLEAGUES BUT I'LL BET YOU THAT THEY'RE NOT ALL ON THE SAME PAGE. THIS WHATEVER YOU CALL [10] IT, PRACTICE, ALL I KNOW IS WHAT I DO. I'M GOING TO DEFER TO THE MARSHAL BUT I KNOW I'M NOT A HUNDRED PERCENT, I KNOW I RETAIN THE ULTIMATE AUTHORITY. IT'S MY DISCRETION. IF SOMEBODY COMES IN HERE AND I THINK FOR WHATEVER REASON THEY SHOULD NOT BE SHACKLED, I THINK I WOULD HAVE THE OBVIOUS AUTHORITY DO THAT.

I GUESS WHAT YOU'RE SAYING IS SOME OTHER JUDGE SHOULD DECIDE WHETHER I DO, WHETHER I CAN DO WHAT I DO, OR WHETHER IT'S APPROPRIATE TO DO WHAT I DO, WHICH IS WHAT HAPPENS ALL THE TIME.

I THINK THAT'S WHAT THE NINTH CIRCUIT IS FOR.

MS. BARROS: I THINK THAT'S WHAT ***BRANDAU*** INDICATES AND WITH THAT I SUBMIT.

MR. PILCHAK: A FEW OTHER POINTS ABOUT ***BRANDAU***, IN THAT CASE I THINK IT'S FAIRLY CLEAR FROM THE TONE AND THE LANGUAGE OF THE OPINION, THE THING THAT THE NINTH CIRCUIT WAS MOST CONCERNED ABOUT IN ***BRANDAU*** WAS THE SHIFTING POLICIES THAT MS. BARROS REFERRED TO AND THE PRIME MOTIVATOR FOR THEIR REFERRAL ON REMAND TO A DIFFERENT JUDGE IS QUESTIONABLE, NOT ONLY WHAT IS THE POLICY AT THIS POINT, BECAUSE IT HAD CHANGED, BUT ALSO THE SUGGESTION THAT PERHAPS THE LOWER COURT HAD BEEN TRYING TO OBTAIN A REVIEW POTENTIALLY BY PROMULGATING DIFFERENT POLICIES WHILE THE CASE WAS ON APPEAL IN AN EFFORT TO PRESENT SORT OF A MOVING TARGET WHILE THE APPEAL WAS PENDING.

MS. BARROS QUOTED SOME OF THE ORAL ARGUMENT FROM THE [11] CASE BEING ARGUED IN FRONT OF THE PANEL. OF COURSE MY UNDERSTANDING OF THE APPELLATE LAW IS QUESTIONS TRADED DURING ORAL ARGUMENT ARE NOT PRECEDENTIAL. THEY MAY BE JUDGE'S ATTEMPTS TO TEST THE LITIGANTS' THINKING DURING ARGUMENT, BUT THEY AREN'T THEMSELVES PRECEDENT.

AND THEN ONE FINAL MINOR POINT, MS. BARROS MENTIONED THE ***CLEMMONS*** DECISION THAT THE GOVERNMENT CITED IN ITS PAPERS. IT'S TRUE THAT THE RECUSAL QUESTION AND RECUSAL MOTION IN THAT CASE WAS HEARD BY A DIFFERENT JUDGE OTHER THAN THE TRIAL JUDGE AGAINST WHOM THE MOTION WAS LODGED, BUT THAT WAS BECAUSE IT WAS AT THE REQUEST OF THE TRIAL JUDGE. SO THE JUDGE SITTING IN YOUR POSITION RECEIVING A RECUSAL MOTION IN THAT CASE REQUESTED HE BE REASSIGNED PRESUMABLY BECAUSE HE MADE SOME DETERMINATION IN THAT CASE THAT THE RECUSAL QUESTION SHOULD GO TO ANOTHER JUDGE.

THE COURT: ALL RIGHT. I KNOW THAT THIS IS NOT THE END OF IT AND ANYTHING I SAY HERE TODAY IS NOT THE LAST WORD OR ANYTHING. LET'S MAKE SURE WE HAVE THE RECORD COMPLETE. ANYTHING ELSE EITHER SIDE WANTS TO OFFER ON THE RECUSAL ISSUE THAT WE HAVEN'T ALREADY SAID?

MS. BARROS: NO, YOUR HONOR.

MR. PILCHAK: NO, YOUR HONOR.

THE COURT: AS TO THE UNDERLYING SUBSTANTIVE MATTER, THE APPEAL OF THE MAGISTRATE JUDGE'S DENIAL OF THE DEFENDANT'S REQUEST TO APPEAR UNSHACKLED, THE COURT'S [12] TENTATIVE RULING IS TO RESPECTFULLY DENY THAT APPEAL ALSO.

AGAIN ESSENTIALLY FOR THE REASONS SET FORTH IN THE GOVERNMENT'S RESPONSE AND OPPOSITION, BRIEFLY STATED AND I GUESS WE HAVE ALREADY SAID THIS, THAT THIS COURT FINDS IT PRUDENT TO DEFER TO THE CONSIDERED JUDGMENT OF THE MARSHALS OFFICE WHOSE JOB IT IS TO PROVIDE COURTROOM SECURITY.

IN ADDITION, THE COURT READS CURRENT NINTH CIRCUIT CASE LAW, INCLUDING THE ***HOWARD CASE***, SOME PEOPLE SEEM TO READ IT A LITTLE DIFFERENTLY FROM THE WAY I READ IT, BUT THE WAY I READ IT IS THAT IT AUTHORIZES SHACKLING IN A NON-JURY SETTING WHEN CONDUCTED PURSUANT TO AN APPROVED POLICY OF THE MARSHALS OFFICE, WHICH IS WHAT WE HAVE HERE.

AS COUNSEL KNOW, THE NINTH CIRCUIT IN ***HOWARD*** SEEMS TO BE IN ACCORD WITH OTHER CIRCUITS ON THE SAME ISSUE AND IT CITES APPROVINGLY, AS COUNSEL HERE KNOW, SECOND CIRCUIT IN ***U.S. VERSUS ZUBER,*** Z-U-B-E-R WHICH I'LL QUOTE, "THE RULE THAT COURTS MAY NOT PERMIT A PARTY TO A JURY TRIAL TO APPEAR IN COURT IN PHYSICAL RESTRAINTS WITHOUT FIRST CONDUCTING AN INDEPENDENT EVALUATION OF THE NEED FOR THESE RESTRAINTS DOES NOT APPLY IN THE CONTEXT OF A NON-JURY SENTENCING HEARING." UNQUOTE.

THAT'S WHAT WE'RE DEALING WITH HERE. OBVIOUSLY, IF WE WERE TALKING ABOUT A JURY, IT IS A WHOLE DIFFERENT KETTLE OF

FISH. WE'RE TALKING ABOUT NON-JURY APPEARANCES HERE AND THE USE OF SHACKLES AND PURSUANT TO AN APPROVED POLICY OF THE [13] MARSHALS OFFICE IN A NON-JURY SETTING.

SO ON THAT RECORD, I THINK THE MAGISTRATE JUDGE HERE MADE THE CORRECT RULING AND MY TENTATIVE THOUGHT THERE IS TO DENY THE APPEAL; IN ESSENCE, TO AFFIRM THE RULING. SO THAT'S THE TENTATIVE THOUGHT. I'LL HEAR FROM DEFENSE COUNSEL. ANYTHING ELSE TO ADD ON THAT?

MS. BARROS: YES, YOUR HONOR.

YOUR HONOR, I THINK THAT THE, RESPECTFULLY, I THINK THE COURT IS MISREADING THE ***HOWARD*** CASE. ***HOWARD***, AT THE OUTSET, FOUND THERE WAS AN ADEQUATE JUSTIFICATION OF NECESSITY FOR THE POLICY THAT WAS AT ISSUE IN THAT CASE. IT WAS A LIMITED POLICY THAT WAS AT ISSUE, WHICH DEALT WITH LEG IRONS ONLY, IN COMPARISON TO THE FULL RESTRAINTS THAT ARE BEING UTILIZED IN THIS DISTRICT AND IT WAS A POLICY THAT WAS APPLIED AT INITIAL APPEARANCE AND THERE HAD BEEN A FULL EVIDENTIARY RECORD IN THE ***HOWARD CASE*** BEFORE THE CASE WENT UP ON APPEAL.

THERE HAD BEEN EXHIBIT LISTS AND A LOT OF INFORMATION THAT WAS PRESENTED TO THE COURT ABOUT THE SPECIFICS IN THAT DISTRICT AND IN PARTICULAR, EVEN

THE COURTROOM THAT WAS UTILIZED FOR NEW COMPLAINTS OR FOR INITIAL ARRAIGNMENT IN THE CENTRAL DISTRICT, THEY REFERRED TO "THE ROY BAUER COURTHOUSE," WHICH I UNDERSTAND IS A PARTICULARLY LARGE COURTROOM THAT CAN ACCOMMODATE THE MULTI, MULTI DEFENDANT CASES. SO I BELIEVE IT'S 40 OR PERHAPS MORE DEFENDANTS THAT [14] CAN BE BROUGHT OUT AT ONE TIME IN THAT PARTICULAR COURTROOM AND THAT WAS ONE OF THE CONCERNS, WAS JUST THE MASS NUMBER OF DEFENDANTS THAT WOULD BE BROUGHT OUT IN THAT PARTICULAR COURTROOM.

THERE WAS ALSO A RECORD THAT IS DISTINCT FROM THE RECORD HERE AND WHAT HAPPENS IN THIS DISTRICT WITH RESPECT TO THE TYPE OF SECURITY SCREENING THAT HAPPENS IN THE CENTRAL DISTRICT BEFORE DEFENDANTS ARE INITIALLY BROUGHT TO COURT. SO IN MANY OTHER DISTRICTS, UNLIKE OUR DISTRICT, THE ARRESTING AGENCIES ACTUALLY BRING AND PRESENT THE DEFENDANTS TO COURT.

IN OUR DISTRICT, EVERYONE IS PROCESSED THROUGH THE MCC SO THE MCC SCREENS EVERYONE, THEY DO A SECURITY SCREENING, OTHER TYPE OF CLASSIFICATIONS THAT ARE RECITED IN THE RECORD BELOW IN FRONT OF JUDGE ADLER, AS WELL AS IN DECLARATIONS THAT I SUBMITTED IN CONJUNCTION WITH THE MOTION THAT I FILED. BUT THERE IS SCREENING THAT

OCCURS IN THIS DISTRICT BEFORE DEFENDANTS ARE NEVER BROUGHT TO COURT AND THAT'S DIFFERENT FROM WHAT HAPPENED IN ***HOWARD***. IF ***HOWARD*** WAS INTENDED, IF THE RULE IN ***HOWARD*** WAS THAT PRE-TRIAL SHACKLING OUTSIDE THE PRESENCE OF THE JURY IS ALWAYS, IS ALWAYS CONSTITUTIONAL, WE WOULDN'T HAVE THE DECISION IN ***BRANDAU*** WHICH POSTDATES THE HOWARD DECISION.

IN ***BRANDAU***, THE COURT WOULD HAVE SAID WE DON'T NEED TO REACH ANY OF THIS. WE DON'T NEED TO REMAND THIS FOR AN [15] EVIDENTIARY TO FIGURE OUT WHAT THE ACTUAL POLICY IS BECAUSE IN ***HOWARD***, WE APPROVED PRE-TRIAL SHACKLING OF ALL DEFENDANTS OUTSIDE THE PRESENCE OF THE JURY. THAT'S NOT WHAT ***HOWARD*** SAID. ***HOWARD*** WAS SPECIFIC TO THE DISTRICT AND TO THE RECORD BEFORE IT AND FOUND THAT THERE HAD BEEN ADEQUATE JUSTIFICATION FOR THE LIMITED POLICY IN THAT DISTRICT. SO I DON'T THINK THAT ***HOWARD*** CONTROLS THE SHACKLING.

THE COURT: WELL EVERY CASE IS DIFFERENT AND I APPRECIATE THE FACTS ARE DIFFERENT AND IT MAY NOT ULTIMATELY, A HUNDRED PERCENT CONTROL BUT IT DOESN'T HELP YOUR SIDE OF IT, DOES IT? THE RULING IS CONTRARY TO YOUR POSITION SO I JUST WONDER WHY YOU KEEP CITING IT. I GUESS THAT'S THE ONLY CASE WHERE YOU FIND SOME DICTA THERE, YOU

CAN DISTINGUISH IT IN A WAY THAT YOU THINK SUPPORTS YOUR POSITION HERE, RIGHT?

MS. BARROS: WELL ***HOWARD*** IS OBVIOUSLY A RELEVANT CASE SO I DON'T THINK IT WOULD BE APPROPRIATE FOR ME TO IGNORE ***HOWARD***. THE HOLDING IN ***HOWARD*** WAS BASED ON THE CIRCUMSTANCES OF THE CENTRAL DISTRICT AND I DON'T THINK THAT IT WAS INTENDED TO ESTABLISH A PER SE RULE IN THE NINTH CIRCUIT AND ***BRANDAU*** POST DATES ***HOWARD*** AND ***BRANDAU*** WAS ACTUALLY REMANDED FOR AN EVIDENTIARY HEARING AND FOR A DETERMINATION ULTIMATELY OF THE CONSTITUTIONALITY, IF THERE WAS STILL THIS LINE OF CONTROVERSY.

THE COURT: WHAT'S THE PRECEDENTIAL VALUE OF [16] ***BRANDAU*** UNDER THOSE CIRCUMSTANCES IF THERE ISN'T ANY?

MS. BARROS: ***BRANDAU*** DOESN'T ESTABLISH THE RULE EITHER. SO I THINK WHAT WE'RE LEFT WITH IS THIS UNIQUE SITUATION WHERE THE NINTH CIRCUIT HAS NOT INDICATED IT'S FINAL RECORD WORD ON THIS PARTICULAR ISSUE. THERE ARE NO CASES THAT DEAL, FIRST OF ALL WITH A POLICY THAT DICTATES THE USE OF FULL RESTRAINTS AND AT HEARINGS BEYOND THE INITIAL APPEARANCE, THERE'S NO NINTH CIRCUIT CASE ON POINT IN THAT REGARD.

THE COURT: SO YOU WANT MY NAME TO BE ON THE FIRST NINTH CIRCUIT CASE THAT COMES OUT ON THAT ISSUE?

MS. BARROS: YOUR HONOR, I GAVE YOU AN OUT.

MR. PILCHAK: IT'S A BIT OF A RACE TO PASADENA, YOUR HONOR, THERE ARE SEVERAL OTHER CASES PENDING AS WELL.

MS. BARROS: YOUR HONOR, I THINK THAT HOWARD DOES NOTE THAT THE GENERAL RULE IS THAT THERE SHOULD BE, AND THIS IS THE GENERAL RULE OF IT IN JURY TRIAL PROCEEDINGS. THE GENERAL RULE THAT THERE MUST BE COMPELLING CIRCUMSTANCES THAT THERE IS SOME NEED FOR ADDITIONAL SECURITY MEASURES TO WARRANT THE USE OF PHYSICAL RESTRAINTS. ***HOWARD*** RECOGNIZES THAT'S THE GENERAL RULE IN PARTICULAR, WHERE THERE ARE JURY TRIAL PROCEEDINGS.

IN ***BRANDAU***, THE NINTH CIRCUIT SAID EXPLICITLY, WE HAVE NO YET DETERMINED THE OUTER LIMITS, BASICALLY OF THAT RULE OR HOW MUCH RESTRAINT CAN BE USED ON PRE-TRIAL DETAINEES [17] OUTSIDE THE PRESENCE OF A JURY. SO ***BRANDAU*** ACKNOWLEDGES THAT'S AN OPEN QUESTION IN THE NINTH CIRCUIT.

I THINK THAT IF YOU LOOK AT THE OTHER CIRCUIT CASES HOWEVER ON THIS ISSUE, THERE ARE A NUMBER OF DIFFERENT FACTORS THAT THE NINTH CIRCUIT HAS POINT-

ED TO BEYOND JUST PREJUDICE TO THE JURY, SO THAT'S NOT THE ONLY CONCERN ARTICULATED IN THOSE CASES. FOR EXAMPLE, IN ***SPAIN VERSUS RUSSIA***, THE NINTH CIRCUIT ARTICULATED FIVE DIFFERENT FACTORS FOR THE COURT TO CONSIDER.

THE FIRST FACTOR WAS THE PREJUDICE, THE POTENTIAL PREJUDICE TO THE JURY.

THERE WERE OTHER FACTORS ARTICULATED; FOR EXAMPLE, ANY PHYSICAL PAIN, MENTAL OR PSYCHOLOGICAL ANGUISH TO THE DEFENDANT. THE WAY IN WHICH IT MAY INTERFERE WITH THE DEFENDANT'S ABILITY TO COMMUNICATE WITH COUNSEL. SO THERE, SO THE FACT THAT IT CAN PREJUDICE A JURY IS ONE OF MANY FACTORS FOR THE COURTS TO TAKE INTO CONSIDERATION.

THE COURT: THAT'S THE MAIN BASIS, RIGHT? THAT'S THE REASON FOR THE RULE? THAT'S WHAT ALL THE CASES TALK ABOUT, RIGHT? THAT'S WHY THEY TALK ABOUT "IN THE PRESENCE OF THE JURY", YOU HAVE TO HAVE AN INDIVIDUALIZED DETERMINATION BECAUSE THERE CAN BE GREAT PREJUDICE. YOU BRING SOMEBODY IN CHAINS IN FRONT OF A JURY AND YOU ARE WORRIED ABOUT WHAT THE JURY IS GOING TO THINK ABOUT THAT, RIGHT?

[18]

MS. BARROS: WELL, YOUR HONOR, I THINK THAT'S ONE REASON FOR BASICALLY THE STRICT SCRUTINY THAT IS ARTICULAT-

ED IN ***SPAIN VERSUS RUSSIA*** AND THE ***DEPP CASE*** FROM THE SUPREME COURT. BUT THERE ARE OBVIOUSLY OTHER CONCERNS FOR THE COURT TO TAKE INTO CONSIDERATION AND I DON'T THINK THE COURT CAN CLOSE IT'S EYES TO THE FACT THAT THE RESTRAINTS, AND IN SOME CASES, MAY BE PHYSICALLY PAINFUL TO DEFENDANTS. IN FACT, THAT WAS THE ISSUE, ONE OF THE MAIN ISSUES FOR MR. RING.

THE COURT: I READ THAT BUT LET ME, NOT TO INTERRUPT, BUT JUST TO FOCUS ON A THOUGHT ON THAT FOR A MOMENT. I THINK THAT I'M NOT GOING OUT ON A LIMB TO SUGGEST THAT PRISONERS, WHEN THEY ARE TRANSPORTED TO THIS COURTHOUSE, ARE IN RESTRAINTS.

MS. BARROS: YOUR HONOR, IF THEY ARE TRANSPORTED FROM A PLACE OTHER THAN THE MCC, THEY ARE. WHEN THEY'RE TRANSPORTED FROM THE MCC, MY UNDERSTANDING IS THAT THEY ARE NOT IN RESTRAINTS.

THE COURT: SO WHENEVER, THEY ARE OFTEN—LET ME PUT IT THIS WAY, GENERALLY, THEY ARE OFTEN PLACED IN RESTRAINTS UNDER VARIOUS CIRCUMSTANCES AND THEY MAY ON OCCASION, CAUSE PHYSICAL PAIN OR ANGUISH OR ALL THESE OTHER THINGS THAT YOU ARE CONCERNED ABOUT. BUT THAT'S GOT NOTHING TO DO WITH, THAT'S NOT PARTICULAR TO BEING IN A COURTROOM. THAT JUST HAPPENS. IF THEY HURT, THEY

HURT. [19] IF THEY CAUSE PAIN, THEY CAUSE PAIN. SO I HAVE A LITTLE TROUBLE WITH THAT GENERALIZED ARGUMENT AND DISTINGUISHING NON-JURY PROCEEDINGS FROM JURY PROCEEDINGS.

OBVIOUSLY IN FRONT OF A JURY, YOU DON'T WANT RESTRAINTS BECAUSE THE JURY MAYBE PREJUDICED. BUT IN NON-JURY PROCEEDINGS, I'M NOT SURE THAT I SEE ANY DIFFERENT OR ADDITIONAL PREJUDICE, IF YOU VIEW IT AS PREJUDICE, IN YOUR VIEW, THAT DOESN'T ALREADY OCCUR TO EVERY IN-CUSTODY-DEFENDANT ROUTINELY.

MS. BARROS: WELL YOUR HONOR, FOR EXAMPLE, MR. RING, HE WAS HOUSED AT THE MCC, SO HE WOULDN'T HAVE BEEN IN SHACKLES DURING THE TRANSPORT. I UNDERSTAND THAT THE ISSUE WITH RESPECT TO THE PAIN CAUSED BY THE SHACKLES MAY, MAY IMPLICATE OTHER CASES OUTSIDE OF APPEARANCES IN THE COURTHOUSE.

I THINK THE ISSUE IN THIS CLAIM HOWEVER, IS LIMITED TO A COURTROOM PROCEEDING AND THE CASES FOR EXAMPLE, ***BRANDAU*** AND ***HOWARD***, THEY END. ***SPAIN VERSUS RUSSIAN***, WHICH IS ANOTHER NINTH CIRCUIT CASE I'VE CITED, INDICATES ONE OF THE FACTORS FOR THE COURT TO CONSIDER IS THE FACT THAT SHACKLES CAN BE AN AFFRONT TO THE DIGNITY AND THE DECORUM OF THE JUDICIAL PROCEEDINGS.

I THINK TRADITIONALLY DEFENDANTS ARE NOT BROUGHT TO COURT TO APPEAR IN FRONT OF A JUDGE IN SHACKLES. THE MESSAGE THAT IT SENDS TO BOTH THE DEFENDANT AND TO [20] THE PUBLIC IS THAT THIS IS SOMEONE WHO IS DANGEROUS, THAT HAS BEEN DETERMINED TO BE GUILTY. IN FACT, IN ***BRANDAU***, THE FIRST COUPLE LINES OF THE DECISION SAID, "A CRIMINAL DEFENDANT'S FIRST AND SOMETIMES ONLY EXPOSURE TO A COURT OF LAW OCCURS AT HIS INITIAL APPEARANCE. THE CONDITIONS OF THAT APPEARANCE ESTABLISH FOR HIM THE FOUNDATION FOR HIS FUTURE RELATIONSHIP WITH THE COURT SYSTEM AND INFORMS HIM OF THE KIND OF TREATMENT HE MAY ANTICIPATE, AS WELL AS THE LEVEL OF DIGNITY AND FAIRNESS HE MAY EXPECT."

AND THEN THE COURT GOES ON TO SAY THAT, "WE RECOGNIZE THAT SHACKLING DEFENDANTS AT SUCH TIME EFFECTUATES SOME DIMINUTION OF THE LIBERTY OF TRIAL AND DETRACTS TO SOME EXTENT, FROM THE DIGNITY AND DECORUM OF A CRITICAL STAGE OF A CRIMINAL PROSECUTION."

WITH THAT ISSUE IN ***HOWARD*** AND ***BRANDAU*** THAT WAS ALL JUST ON THE INITIAL APPEARANCE, WHAT WE'RE NOW TALKING ABOUT IN THIS DISTRICT IS ROUTINE SHACKLING OF DEFENDANTS AT ALMOST EVERY APPEARANCE EXCEPT FOR THEIR JURY TRIAL AND I THINK THE MESSAGE IT SENDS TO THE DEFENDANTS ABOUT THE

TYPE OF TREATMENT THAT THEY SHALL EXPECT, AS WELL AS HOW THE COURT PERCEIVES THE DEFENDANT, AND I DON'T MEAN TO SAY THAT THE COURT WOULD BE PREJUDICED BY THE FACT THAT THE COURT SEES THE DEFENDANT IN SHACKLES, BUT IT'S ABOUT THE MESSAGE SENT BOTH TO THE DEFENDANT AND TO THE PUBLIC ABOUT THE TYPE OF TREATMENT THE PERSON WILL RECEIVE AND WHAT TYPE OF PERSON [21] THIS IS THAT'S APPEARING BEFORE THE COURT.

AND I THINK THAT'S WHY TRADITIONALLY, SHACKLES ARE NOT USED.

THE COURT: WHY DO YOU SAY THAT? I MEAN, I DON'T HAVE, SOMEBODY HERE MAY KNOW THE ANSWER, BUT MY UNDERSTANDING IS AT LEAST, CERTAINLY IN THE BORDER COURTS, WE WERE THE OUTLIER, WE WERE THE ONLY ONES WHO DIDN'T SHACKLE DEFENDANTS, ISN'T THAT TRUE?

MS. BARROS: YOUR HONOR, THAT'S NOT TRUE. THAT'S ONE OF THE REASONS WHY I THINK THAT—

THE COURT: THAT'S NOT TRUE?

SO ARIZONA, TEXAS, THEY ALL, NONE OF THEM SHACKLE THE DEFENDANTS?

MS. BARROS: NO. THERE ARE DISTRICTS THAT SHACKLE DEFENDANTS; HOWEVER, ONE OF THE REASONS I GUESS FOR EVEN THE MOTION TO RECUSE IS THAT THE COURT WAS PRESENTED WITH CERTAIN IN-

FORMATION. I BELIEVE SOME OF THE INFORMATION THAT THE COURT HAS BEEN PRESENTED IN SOME OF THESE FORMAL AND INFORMAL MEETINGS WITH THE MARSHALS IS INACCURATE. I HAVE HEARD OTHER JUDGES SAY THAT THEY WERE TOLD THAT 93 OUT OF 94 DISTRICTS SHACKLE AND WE WERE THE ONLY ONES, THE ONLY DISTRICT THAT DOESN'T.

THE COURT: LET ME PUT IT ON A MORE REAL, YOU KNOW, I HAVE SAT IN ARIZONA, WE WENT OVER AND SAT IN JOHN ROLL'S, JUDGE ROLL'S COURT AND I HAVE SAT IN OTHER [22] DISTRICTS AND THEY ARE ALL SHACKLED. SO THAT'S, YOU KNOW, THAT'S JUST THE WAY. NOW I'M NOT HERE TO SAY THAT EVERY DISTRICT IN THE COUNTRY DOES, I DON'T KNOW, BUT I DON'T KNOW THAT THAT MATTERS. I JUST GATHERED FROM YOUR ARGUMENT, IN FACT I THOUGHT YOU JUST SAID THAT THE GENERAL RULE IS THAT YOU DON'T SHACKLE AND I JUST THINK THAT'S NOT BEEN MY EXPERIENCE.

MS. BARROS: I THINK TRADITIONALLY, IF YOU LOOK AT EVEN FOR EXAMPLE GOING BACK EVEN TO ***BELL VERSES WOLFISH***, WHICH IS ONE OF THE CASES THAT THE GOVERNMENT HAS CITED IN ITS RESPONSE IN OPPOSITION. IN ***BELL***, WHICH IS A CASE THAT DEALS WITH THE RIGHTS OF PRE-TRIAL DETAINEES WHEN THEY ARE AT THE FACILITY, THE INSTITUTION WHERE THEY ARE BEING DETAINED PENDING TRIAL. IN ***BELL***, THE

COURT INDICATED, "CONVERSELY LOADING A DETAINEE ROUTINELY IN SHACKLES AND THROWING HIM IN A DUNGEON MAY INSURE HIS PRESENCE AT TRIAL, AND PRESERVE THE SECURITY OF THE INSTITUTION, BUT IT WOULD BE DIFFICULT TO CONCEIVE OF THE SITUATION WHERE CONDITIONS SO HARSH EMPLOYED TO ACHIEVE OBJECTIVES THAT COULD BE ACCOMPLISHED IN SO MANY ALTERNATIVES IN LESS HARSH METHODS, WOULD NOT SUPPORT A CONCLUSION THAT THE PURPOSE FOR WHICH THEY WERE IMPOSED WAS TO PUNISH." JUSTICE MARSHAL, IN HIS DEFENSE CITES TO BLACKSTONE.

I ALSO IN MY RESPONSE CITED TO UNITED NATIONS DOCUMENTS THAT ALSO REFERS TO THE STATEMENT BASICALLY THAT, THAT [23] DEFENDANTS SHOULD NOT BE SHACKLED WHEN APPEARING IN COURT AND THEY NOTE THAT IT MAY BE NECESSARY, EVEN IN THE UNITED NATIONS DOCUMENT THAT I CITED TO NOTE IT MAY BE NECESSARY DURING TRANSPORT.

THERE ARE TIMES WHEN SHACKLING MAY BE NECESSARY. IT'S NOT NECESSARY DURING COURT PROCEEDINGS. I, FOR EXAMPLE, PRACTICE IN THIS DISTRICT, WHERE IT WAS A LITTLE OVER TEN YEARS NOW, AND UNTIL THIS POLICY WAS IMPLEMENTED, I SAW, I THINK ONE PERSON SHACKLED AND THERE WERE NOT ROUTINE SECURITY INCIDENTS OCCURRING IN COURT.

I DON'T THINK THAT THE SHACKLING IS NECESSARY. I ALSO THINK THAT IT'S AN EXAGGERATED RESPONSE BY THE UNITED STATES MARSHALS SERVICE. IT'S NOT BASED ON NEEDS IN OUR DISTRICT BUT A DESIRE BASICALLY TO COMPLY WITH THE MARSHALS NATIONAL POLICY, WHICH IS NOT IMPLEMENTED IN EVERY DISTRICT AND WHERE IT IS IMPLEMENTED, IT'S NOT IMPLEMENTED IN THE SAME WAY IN EVERY DISTRICT.

SO FOR EXAMPLE, IN THE NORTHERN DISTRICT OF CALIFORNIA, THERE ARE CERTAIN COURTHOUSES THAT DON'T SHACKLE AT ALL, AND THERE ARE CERTAIN COURTHOUSES THAT USE JUST LEG RESTRAINTS, BUT THE USE OF FULL RESTRAINTS WHICH HAS NOW BECOME THE NORM IN THIS DISTRICT IS UNUSUAL. AND I BELIEVE WASHINGTON, AND I DON'T HAVE THE DOCUMENTS IN FRONT OF ME, BUT I BELIEVE WASHINGTON, MAYBE OREGON AS WELL, THERE IS NO SHACKLING. NEW YORK, THERE'S NOT ROUTINE SHACKLING IN NEW YORK. THERE [24] ARE MANY DISTRICTS IN EASTERN DISTRICTS WHICH WAS AT ISSUE IN THE ***BRANDAU*** CASE, THAT REQUIRES INDIVIDUALIZED DETERMINATION, THEY REQUIRE INDIVIDUALIZED DETERMINATIONS AND THE FORM WAS ACTUALLY PRESENTED TO THE JUDGE BEFORE THE DEFENDANT IS BROUGHT OUT TO COURT TO MAKE A DETERMINATION BASED ON THAT DEFENDANT'S HISTORY AND CHARACTERISTICS, THE NATURE OF THE CHARGE FOR EX-

AMPLE, WHETHER SHACKLING OF THAT DEFENDANT IS APPROPRIATE.

SO YES THERE IS—THE MARSHALS HAVE AND DO SHACKLE IN SOME DISTRICTS, WE'RE NOT THE ONLY DISTRICT, BUT WE'RE NOT AN OUTLIER EITHER AND SO THAT IS SOMETHING THAT I THINK HAS BEEN PRESENTED TO THE COURT THAT WE DO DISPUTE.

THE COURT: SO ON BEHALF OF THE GOVERNMENT NOW, WE'VE HEARD ABOUT BLACKSTONE AND WE'VE HEARD ABOUT THE UNITED NATIONS.

MR. PILCHAK: THAT'S CORRECT, YOUR HONOR.

THE COURT: WHAT DO YOU HAVE TO SAY ABOUT THAT?

MR. PILCHAK: I SEARCHED FOR AN INTERNATIONAL ORGANIZATION OF COMPETING ESTEEM OF THE UNITED NATIONS AND I WANTED TO ADD SOMETHING LIKE THAT TO MY PAPERS, BUT HAVEN'T NOT YET FOUND ANYTHING. BUT I DO WANT TO RESPOND TO A COUPLE OF POINTS FROM DEFENSE COUNSEL.

FIRST, AND PERHAPS MOST IMPORTANTLY OUR READING OF THE NINTH CIRCUIT PRECEDENT. HOW TO READ ***HOWARD*** AND ***BRANDAU*** TOGETHER. FIRST OF ALL, ***BRANDAU*** ITSELF, AS I THINK THE [25] COURT WAS ALLUDING TO, DIDN'T REALLY DECIDE MUCH. IT REMANDED THE CASE FOR AN EVIDENTIARY HEARING TO CLARIFY THE RECORD.

SO I THINK WHILE THERE ARE THESE DIFFERENT STATEMENT IN ***BRANDAU***, ABOUT LIBERTY INTERESTS AND DEFINING OF PERIMETERS, THOSE MAY ALL SAFELY BE CONSIDERED AS DICTA SINCE THEY WEREN'T RELIED UPON FOR ANY HOLDING IN THE ***BRANDAU*** CASE ITSELF.

READING THE ***HOWARD*** DECISION OF COURSE, NO ONE IS TAKING THE ***HOWARD*** DECISION, CERTAINLY THE GOVERNMENT ISN'T TAKING THE POSITION THAT ***HOWARD*** STANDS FOR THE PROPOSITION THAT ANY SHACKLING, ANY RESTRAINT POLICIES AS LONG AS IT IS OUTSIDE OF THE PRESENCE OF THE JURY IS PER SE CONSTITUTIONAL.

FOR EXAMPLE, IF THERE WERE A POLICY THAT REQUIRED RESTRAINT OUTSIDE THE PRESENCE OF THE JURY WITHOUT ANY INPUT OR OVERSIGHT BY THE JUDGE, THAT MAY NOT BE CONSTITUTIONALLY DEFENSIBLE, WITHOUT CONCEDING THAT POINT BUT IT'S NOT THE POLICY THAT WE'RE DISCUSSING TODAY BECAUSE WHAT WE'RE TALKING ABOUT TODAY IS A PRACTICE THAT, AS YOUR HONOR HAS RECOGNIZED, ALLOWS THIS COURT TO MAKE THE FINAL WORD ON ANY INDIVIDUAL CASE TO CONDUCT AN INDIVIDUAL DETERMINATION IF IT LIKES.

WHAT THE POLICY AND THE PRACTICE THAT WE'RE DISCUSSING TODAY CONCERNS IS WHO HAS THE FIRST WORD, NOT THE LAST WORD, THE FIRST, ABOUT WHETHER INDIVIDUALS ARE GOING TO BE RESTRAINED

WHEN THEY COME OUT INTO THE COURTROOM. AND I [26] BELIEVE THAT AS THE RESULT OF CONSIDERED JUDGMENT WITH INPUT FROM ALL PARTIES INCLUDING, I THINK, THE CHIEF JUDGE SOLICITED INPUT FROM THE FEDERAL DEFENDERS OFFICE AS PART OF THE PROCESS IN CONSIDERING THE POLICY, THE COURT'S IN THIS DISTRICT HAVE LARGELY; ALTHOUGH NOT ENTIRELY, DECIDED TO DEFER TO THE EXPERT JUDGMENT OF THE UNITED STATES MARSHAL AS THE FIRST WORD ON WHAT THE RESTRAINTS SHOULD BE FOR, FOR INDIVIDUALS IN THIS DISTRICT.

DEFENSE COUNSEL REFERRED TO THE COMPELLING CIRCUMSTANCES REQUIREMENT. I THINK FROM ***SPAIN VERSUS RUSSIA***, FOR RESTRAINTS THAT WERE IMPOSED, MY RECOLLECTION OF THE ***SPAIN*** DECISION WAS A JURY TRIAL CONTEXT. I THINK THERE IS NO SUPPORT IN THE CASE LAW WHATSOEVER FOR REQUIRING A REQUIREMENT OF COMPELLING CIRCUMSTANCE OR COMPELLING JUSTIFICATION FOR RESTRAINTS WHEN THE JURY IS NOT PRESENT.

AS I THINK YOUR HONOR POINTED OUT, THAT IS THE ANIMATED CONCERN IN ALL OF THOSE CASES, PREJUDICE TO THE JURY. CASE LAW IS QUITE THE CONTRARY WHEN THE PROCEEDINGS ARE BEFORE A JUDGE AND THERE'S A STRONG LINE OF PRECEDENT WHICH I THINK IS CITED IN ***HOWARD*** TO SUPPORT THAT.

DEFENSE COUNSEL REFERS TO THE DANGER THAT THERE WILL BE AN AFFRONT TO THE DECORUM AND THE DIGNITY OF THE COURT IF INDIVIDUALS ARE SHACKLED AND RESTRAINED DURING NON-JURY-TRIAL PROCEEDINGS. I THINK THE CASE LAW MAKES CLEAR THAT THAT FACTOR, ALTHOUGH IT IS INCLUDED IN CERTAIN [27] DECISIONS, IT IS THE LEAST IMPORTANT FACTOR TO BE CONSIDERED, ALTHOUGH IT DOES MAKE THE LIST.

HER REFERENCE TO DECISIONS DISCUSSING PRISONERS LOADED WITH CHAINS AND THROWN IN DUNGEONS, CERTAINLY ISN'T A REFLEXION OF WHAT THE PRACTICE IS IN THIS DISTRICT, AT THIS DATE AND I WANT TO BE CLEAR THAT ALTHOUGH THE LANGUAGE CITED BY DEFENSE COUNSEL REFERRED TO LOADING FOLKS UP WITH CHAINS AND THROWING THEM IN DUNGEONS IS RAISING THE SPECTER OF PUNISHMENT, I DON'T THINK THIS CASE RAISES ANY CONCERN THAT EITHER THE SUGGESTION OF THE POLICY FROM THE UNITED STATES MARSHALS OR THE DECISION FROM THE DISTRICT COURT TO DEFER TO THE MARSHALS IN THE FIRST INSTANCE, IN ANY WAY SUGGESTS THAT THE MOTIVATION OF ANY OF THE PARTIES OR THE EFFECT OF THE POLICY IS TO PUNISH PEOPLE WHICH I THINK TRIGGERS A DIFFERENT BODY OF CASE LAW, BUT I THINK SAFELY CAN BE CONSIDERED NOT TO BE THE ISSUE IN THIS CASE.

AT SEVERAL POINTS, MS. BARROS INDICATED THAT SHACKLING SIMPLY ISN'T NECESSARY IN THIS DISTRICT. WITH RESPECT, I THINK THAT'S HER JUDGMENT AND HER ASSESSMENT OF THE FACTS. I THINK THAT THE COURT IS ENTITLED TO CONSIDER THE SITUATION, THE CIRCUMSTANCE ITSELF, THE FACT THERE ARE DIFFERENT RESTRAINT POLICIES AND IN THE DIFFERENT DISTRICTS THROUGHOUT THIS COUNTRY I THINK REFLECTS THE FACT THAT DIFFERENT COURTS ARE ENGAGING IN A THOUGHTFUL WAY WITH THE CIRCUMSTANCES IN THEIR DISTRICTS HOPEFUL WITH THE GOOD SENSE [28] TO INCLUDE THE EXPERT JUDGMENT AND THE EXPERT CONSIDERATION FROM THE UNITED STATES MARSHALS SERVICE, BUT IT CERTAINLY IS NOT RIGHT TO SAY THAT SHACKLING IS UNKNOWN OR FULL RESTRAINTS IN NON-JURY PROCEEDINGS ARE UNKNOWN, PARTICULARLY IN THE BORDER DISTRICTS AS YOUR HONOR APPROPRIATELY RAISED EARLIER.

AND THERE IS EVIDENCE IN THE RECORD IN THE FORM OF A DECLARATION SUBMITTED BY THE UNITED STATES ON THIS POINT. I AM NOT SURE WHAT EVIDENCE THERE IS IN THE RECORD BEFORE THE COURT AT THIS POINT TO SUGGEST IT IS A UNKNOWN PRACTICE OR UNUSUAL PRACTICE TO ENGAGE IN RESTRAINTS PARTICULARLY IN THE DISTRICTS THAT ARE MOST RELEVANT TO BE COMPARED TO OURS, THOSE OTHER DISTRICTS THAT DEAL WITH EXTRAORDINARILY

HIGH VOLUMES OF CASES AND WHICH ARE LOCATED ON THE BORDER OF THIS COUNTRY.

THE MOTIVATION POINT, I BELIEVE DEFENSE COUNSEL ALSO IN OPINING ON WHETHER THE RESTRAINT POLICY IS NECESSARY IN THIS DISTRICT, MAY HAVE OPINED THAT THE MARSHAL ENACTED THE POLICY SIMPLY OUT OF A DESIRE TO FOLLOW IN LINE WITH THE NATIONAL POLICY OR SORT OF RATIONAL TO TOW THE LINE FOR THE REST OF THE UNITED STATES MARSHALS SERVICE. AGAIN, I DON'T THINKS THERE IS ANY EVIDENCE IN THE RECORD ABOUT THAT. I THINK THE EVIDENCE IN THE RECORD IS TO THE CONTRARY ABOUT THE REASONS FOR HAVING THE POLICY AND THE FACT THAT REGARDLESS OF THE MOTIVATION, THE UNITED STATES MARSHAL [29] SERVICE IN PROPOSING SUCH A POLICY IN THIS DISTRICT, THE FACT THAT THE DISTRICT COURT RETAINS DISCRETION TO IMPLEMENT IT, TO CONDUCT INDIVIDUALIZED ASSESSMENTS IF IT THINKS IT IS NECESSARY, AND THEN TO REACH A DIFFERENT CONCLUSION IS WITHOUT QUESTION.

SO WITH THAT SAID, YOUR HONOR, I THINK WE SUBMIT ON THE PAPERS UNLESS YOU HAVE FURTHER QUESTIONS.

THE COURT: I DON'T HAVE ANY QUESTIONS. ANYTHING ELSE FROM THE DEFENSE?

MS. BARROS: YES, YOUR HONOR. FIRST OF ALL WITH RESPECT TO MOTIVATION. I THINK IF YOU LOOK AT ***BELL VERSUS WOLFISH***, FOR EXAMPLE, THE COURT DOESN'T NEED TO FIND THAT THE MOTIVATION IS TO PUNISH. IN ***BELL VERSUS WOLFISH*** WHICH DEALT IN RELEVANT PART WITH A DOUBLE BUNK RESTRICTION AT THE MCC, I BELIEVE IN NEW YORK, THE COURT THERE NOTED THAT "WHERE COMMISSION OF RESTRICTION IS THE ONLY DEPRIVATION OF LIBERTY, THE PROPER INQUIRY IS WHETHER THE CONDITION AMOUNTS TO PUNISHMENT," AND THEN SAID THAT "OFTEN EXPRESSED INTENT TO PUNISH, THE DETERMINATION WILL TURN ON WHETHER THE CONDITION MAY RATIONALLY BE CONNECTED TO ENVISION THAT PURPOSE AND WHETHER IT APPEARS EXCESSIVE IN RELATION TO THAT PURPOSE."

SO APART, EVEN WHEN THERE IS NO INTENT TO PUNISH, THE CONDITION, AND THERE WHERE WE WERE DEALING WITH SOMETHING FAR LESS RESTRICTIVE AND IT WASN'T A PHYSICAL [30] RESTRAINT ON THE DEFENDANT, A RESTRAINT THAT REQUIRED DEFENDANT TO BASICALLY SHARE A CELL, NOT THE TYPE OF PHYSICAL RESTRAINTS THAT ARE BEING USED HERE THAT CAN AND ARE SOMETIMES FOR EXAMPLE, IN THE CASE OF MR. RING, EXTREMELY PAINFUL.

AND THE COURT NOTED THAT IT HAS TO BE RATIONALLY CONNECTED TO A LEGITIMATE PURPOSE AND THE COURT MUST LOOK AT

WHETHER IT APPEARS EXCESSIVE IN RELATION TO THAT PURPOSE.

LATER IN ***TURNER VERSUS SAFETY***, ANOTHER PRISON LITIGATION CASE, I DON'T THINK THESE CASES NECESSARILY PRESENT THE RIGHT PARADIGN; HOWEVER, THE GOVERNMENT IS ARGUING IT'S NOT THE COMPELLING CIRCUMSTANCE TEST. I DON'T THINK THAT THESE CASES DEALING WITH PRISONERS RIGHTS AT A DETENTION FACILITY PRESENT THE RIGHT TEST EITHER.

IT IS PROBABLY THE COURT, THE NINTH CIRCUIT HASN'T DETERMINED THIS AND THERE'S NO CASE FROM THE SUPREME COURT EITHER THAT DETERMINES THE STANDARD OF REVIEW FOR SHACKLING PRETRIAL DETAINEES OUTSIDE THE PRESENCE OF THE JURY, BUT IT'S PROBABLY SOMEWHERE IN BETWEEN, YOUR HONOR. TO BE FAIR. IT'S JUST AN ISSUE THAT HASN'T BEEN DECIDED.

BUT FOR EXAMPLE, ***TURNER VERSUS SAFELY***, THERE THE COURT IN ANOTHER PRISON LITIGATION CASE NOTED THAT THE EXISTENCE OF OBVIOUS EASY ALTERNATIVES MAYBE EVIDENCE THAT THE REGULATION IS NOT REASONABLE BUT IS AN EXAGGERATED RESPONSE TO SECURITY CONCERNS.

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SO I THINK THAT THE COURT DOES NEED TO MAKE A DETERMINATION ABOUT WHETHER THE MARSHALS POLICY IS AN EXAGGERATED RESPONSE AND WHETHER OR NOT IT'S

EXCESSIVE IN RELATION TO THE SECURITY CONCERNS THAT HAVE BEEN PRESENTED TO THE COURT. I THINK THAT IT IS EXCESSIVE AND WE DO DISPUTE, I KNOW THE COURT HAS, THE GOVERNMENT, EXCUSE ME, PUT INTO THE RECORD A DECLARATION BY CHIEF DEPUTY MARSHAL KEITH JOHNSON.

AND WE DO DISPUTE NUMEROUS THINGS IN THAT DECLARATION SO I WANTED TO GO THROUGH THAT. FOR EXAMPLE, THERE'S THE SUGGESTION THAT THE MARSHALS HAVE INSUFFICIENT INFORMATION ABOUT PRE-TRIAL DETAINEES BEFORE INITIAL APPEARANCES TO BE ABLE TO GAUGE THE NECESSITY FOR SHACKLING. THE MARSHALS HAVE JUST AS MUCH INFORMATION NOW AS THEY HAVE HAD IN THE PAST WHEN THERE WAS NO SHACKLING POLICY. OUR CHIEF TRIAL ATTORNEY AND OUR, MY BOSS, MR. CAHN BOTH MET WITH MR. JOHNSON AND INTERVIEWED HIM AFTER HE INITIALLY PREPARED AND SUBMITTED THAT DECLARATION IN CONJUNCTION WITH THE CASE THAT WAS BEFORE JUDGE BURNS.

THE MARSHALS HAVE JUST AS MUCH INFORMATION NOW AS THEY'RE HAD IN THE PAST, AT LEAST AFTER INITIAL APPEARANCE, WE BELIEVE THAT THE MARSHALS DO HAVE SUFFICIENT INFORMATION AS INDICATED BY ALL OF THE DECLARATIONS THAT WERE SUBMITTED IN CONJUNCTION WITH THE RULE FIVE LITIGATION FOR EXAMPLE TO MAKE

SECURITY DETERMINATIONS IN THIS DISTRICT.

[32]

AND THIS IS SOMETHING THAT DISTINGUISHES US FROM OTHER DISTRICTS. THE COURT ASKED WHAT ABOUT THE DISTRICTS ALONG THE BORDER, ARIZONA, TEXAS ALL THESE OTHER DISTRICTS. IT WAS SUGGESTED IN RULE FIVE LITIGATION THAT MOST OTHER DISTRICTS HAVE THIS POLICY WHERE PEOPLE ARE BROUGHT TO COURT INITIALLY, AND PART OF THE JUSTIFICATION FOR THE REALLY LONG DELAYS THAT WERE OCCURRING WAS THE FACT THAT WE HAVE ALL OF THE SECURITY THAT TAKES PLACE IN THIS DISTRICT.

WE DO HAVE THAT SCREENING AND WE HAVE SCREENING THAT CONTINUES TO OCCUR, EVEN NOW THAT THE DELAYS HAVE IN LARGE PART BEEN REMEDIED. THAT SCREENING CONTINUES TO TAKE PLACE AND THAT DOES DISTINGUISH US FROM OTHER DISTRICTS.

I THINK THAT TO THE EXTENT THAT THERE IS ANY LACK OF INFORMATION THAT COULD JUSTIFY, IF AT ALL SHACKLING'S POLICY ONLY AT A SHORT APPEARANCE; FOR EXAMPLE, WHAT WAS AT ISSUE IN ***HOWARD***, THE MARSHALS INDICATED OR THE MARSHAL INDICATED IN HIS DECLARATION THAT A LOT OF THE DEFENDANTS IN THIS DISTRICT FOR EXAMPLE, RESIDE OUTSIDE OF

THE UNITED STATES, SO THAT THERE'S A LACK OF INFORMATION OR A POTENTIAL LACK OF INFORMATION ABOUT CRIMINAL HISTORY, ARE THEIR CRIMINAL RECORDS, THIS ISN'T ANYTHING DIFFERENT THAN IN PAST YEARS. I DON'T THINK THAT'S SOMETHING THAT COULD CONSTITUTE A CHANGE THAT NECESSITATES THE SHACKLING POLICY. WE HAVE ALWAYS HAD A LARGE NUMBER OF IMMIGRATION CASES IN THIS DISTRICT.

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WITH RESPECT TO PARAGRAPH NUMBER FIVE OF CHIEF DEPUTY MARSHALS DECLARATION, THE IMPLICATION IS THAT BECAUSE OF THE RULE FIVE LITIGATION, THE MARSHALS, AND THAT REQUIRES THE MARSHALS TO FOLLOW THE LAW AND PROMPTLY PRESENT ARRESTEES IN FEDERAL COURT, THAT THAT SOMEHOW SHORT-CIRCUITED THE NECESSARY SCREENING PROCEDURES. THAT'S INACCURATE. I'M TOLD, I WASN'T PRESENT AT THAT MEETING, YOUR HONOR, BUT I'M TOLD BASED ON THE MEETING WITH MR JOHNSON, IT REVEALED NO SHORT CUTS THAT ARE TAKEN IN THE SCREENING PROCESS SINCE THE RULE FIVE LITIGATION.

THE GOVERNMENT CITES PARAGRAPH SIX OF THE DECLARATION INDICATING THAT STAFFING AT THE US MARSHALS IS AT 72 PERCENT OF WHAT THEY PROJECT THEIR NEEDS TO BE. I BELIEVE THAT THE INTERVIEW REVEALED THAT'S UNCHANGED SINCE AT LEAST 2012, A YEAR WHEN THERE WAS NO

SHACKLING POLICY IN PLACE AND THAT DESPITE SEQUESTRATION. THERE HAVE BEEN NO DEPUTY U.S. MARSHALS THAT WERE FURLOUGHED OR LAID OFF, THAT THE CUTS WERE SOLELY TO CONTRACT EMPLOYEES NOT TO DEPUTY U.S. MARSHALS.

WITH RESPECT FOR EXAMPLE TO PARAGRAPH EIGHT, THE IMPLICATION IS THAT THE NEW COURTHOUSE CAUSED MORE WORK FOR THE MARSHALS. BUT AS THE COURT IS AWARE, THERE ARE NO ADDITIONAL JUDGES OR COURTROOM TO STAFF. THERE ARE NO MORE SITTING COURTS THAN THERE WERE IN THE PAST FOR THE MARSHAL TO TRANSPORT PEOPLE TO, THE MARSHALS OFFICES WERE RELOCATED [34] TO THE NEW COURTHOUSE AND THE PRE-TRIAL DETAINEES ARE INTERVIEWED PRIOR TO INITIAL APPEARANCES EVEN IN THE NEW COURTHOUSE. THAT IS NOW THE PRIMARY TANK FOR THE UNITED STATES MARSHALS.

PARAGRAPH NINE, I BELIEVE DISCUSSES THE ISSUE OF SEPARATION OF MALES FROM FEMALES, THAT'S ALWAYS BEEN DONE. THEY HAVE ALWAYS BEEN SEPARATED IN THE PAST. THERE'S NEVER BEEN A NEED FOR SHACKLING. THAT'S NOT ANYTHING NEW AND THIS MAY BE ONE OF THE IMPORTANT DISPUTES THAT WE HAVE. IT'S WITH RESPECT TO SECURITY INCIDENTS, YOUR HONOR.

I DON'T KNOW IF ITS NECESSARY FOR ME TO GO OVER ALL THIS, IF THE COURT IS BAS-

ING ITS RULING REALLY ON THE READING OF ***HOWARD*** AS A MATTER OF LAW.

BUT JUST TO BE CLEAR, SO THAT OUR RECORD IS COMPLETE, I ASK THE COURT FOR YOUR INDULGENCE.

THE COURT: OKAY.

MS. BARROS: SO WE DO DISPUTE THE CLAIM THAT THERE ARE NOW MORE SECURITY INCIDENTS THAN IN THE PAST YEARS WHEN THERE WAS NO SHACKLING POLICIES IN PLACE. I DON'T BELIEVE THAT THE JUDGES HAVE BEEN PROVIDED WITH DOCUMENTARY SUPPORT, STATISTICS, EVEN ANY NUMBERS OF INCIDENTS THAT WERE IN THE PAST VERSUS THE NUMBER OF CURRENT INCIDENTS THAT HAVE OCCURRED TO SUPPORT THIS CLAIM. AND MY UNDERSTANDING IS THAT BASED ON THE MEETING THAT MS. CHARLICK AND MR. CAHN HAD WITH MR. JOHNSON, THAT THEY [35] DON'T HAVE ANY SUCH STATISTICS. THAT THAT INFORMATION HAS NOT BEEN RETAINED.

THE SECURITY INCIDENTS HAVE PRIMARILY INVOLVED THAT ARE CITED FOR EXAMPLE, IN JUDGE MOSKOWITZ LETTER, INMATE ON INMATE ATTACKS, YET INMATES ARE UNSHACKLED OR AT LEAST THEIR ARMS ARE UNSHACKLED. THEY HAVE ONLY LEG RESTRAINTS WHEN THEY ARE INITIALLY BROUGHT TO THE COURTHOUSE. SO MY UNDERSTANDING IS THAT NOW INMATES BROUGHT FROM MCC ARE NOT SHACKLED

WHILE BEING BROUGHT OVER. INMATES THAT ARE BROUGHT FROM OTHER FACILITIES SUCH AS CCA AND SAN LUIS, THEY ARE SHACKLED, THAT'S IS I THINK UNDERSTANDABLE BECAUSE THEY'RE BEING TRANSPORTED IN PUBLIC WITH A MASS NUMBER OF DEFENDANTS AND VERY LITTLE SECURITY AND TO PREVENT ESCAPE OR SOMEBODY TAKING OVER A BUS, FOR EXAMPLE.

BUT WHEN THEY ARRIVE AT THE COURTHOUSE, THEY'RE UNSHACKLED OR AT LEAST THEIR BELLY RESTRAINTS ARE REMOVED AND THE ARM RESTRAINTS, THE HANDCUFFS ARE ALSO REMOVED. THEY ARE PLACED IN A HOLDING CELL WITH MULTIPLE DEFENDANTS. SO THIS IDEA THAT THE SHACKLING IS NECESSARY TO PREVENT INMATE ON INMATE ATTACKS IS A FLAWED. THE INMATES ARE TOGETHER. THEY'RE TOGETHER ONCE AT THE JAIL UNSHACKLED, BUT MORE IMPORTANTLY, ONCE WHEN THEY GET TO THE COURTHOUSE THEY ONLY HAVE LEG IRONS ON WHEN THEY'RE INITIALLY BROUGHT AND KEPT IN THE MAIN CELL AND THERE ARE MULTIPLE DEFENDANTS TOGETHER. THE SHACKLING POLICY IS ALSO BEING APPLIED TO [36] DEFENDANTS WHO APPEAR INDIVIDUALLY FOR THEIR APPEARANCE.

FOR EXAMPLE, MR. RING, THE LAST APPEARANCE, WHEN HE WAS SHACKLED, HE WASN'T SHACKLED AT THE FIRST APPEARANCE OR SECOND APPEARANCE, SO I THINK THE DETERMINATION TO SHACKLE HIM WAS

NOT BASED ON ANY PERSONAL CHARACTERISTICS OR HISTORY, BUT WAS JUST AS AN IMPLEMENTATION OF THE GENERAL POLICY, WHEN HE WAS SHACKLED AT THE THIRD HEARING AND THE LAST APPEARANCE THAT HE MADE, HE WAS BROUGHT OUT IN FULL RESTRAINTS.

IT WAS A HEARING THAT PERTAINED TO HIM ALONE. THERE WAS NO ONE ELSE PRESENT. IN FACT HE CONVEYED TO ME BECAUSE HE WAS THE LAST MATTER ON THE CALENDAR, HE WAS ACTUALLY, AT SOME POINT ALONE, SHACKLED IN THE BACK. THERE WERE NOT ANY OTHER DEFENDANTS THAT WERE HELD WITH HIM AT THAT POINT BECAUSE HE WAS LAST MATTER ON CALENDAR.

SO THE IDEA THAT IT IS NECESSARY TO PREVENT INMATE ON INMATE ATTACKS, I BELIEVE IT IS FLAWED.

THE TWO INCIDENTS THAT WERE MENTIONED AND THAT ARE MENTIONED IN THE LETTER BY JUDGE MOSKOWITZ, BOTH OF THOSE, I THINK, IT'S SIGNIFICANT THAT BOTH INVOLVED INDIVIDUALS WITH MEXICAN MAFIA OR MEXICAN GANG DROPOUT AFFILIATIONS, SO THESE WERE INDIVIDUALS WHO PROBABLY SHOULD HAVE BEEN SEPARATED AND COULD HAVE BEEN SHACKLED. THERE IS NO NEED TO SHACKLE EVERY OTHER PRE-TRIAL DETAINEE IN THE ENTIRE DISTRICT.

SO THERE CAN BE DETERMINATIONS THAT ARE MADE ON AN [37] INDIVIDUAL BASIS WHEN YOU HAVE INDIVIDUALS THAT HAVE THESE GANG AFFILIATIONS AND OBVIOUS SECURITY CONCERNS, IN PARTICULAR, THE MEXICAN MAFIA CASE. YOUR HONOR, TO SHACKLE IN THOSE CASES SUBJECTING EVERYONE IN THE DISTRICT, THERE IS UNPRECEDENTED SHACKLING, AT LEAST IN THIS DISTRICT. MY UNDERSTANDING AND I MAY BE WRONG BECAUSE AGAIN THIS IS PART OF THE REASON FOR RECUSAL, IS THAT THERE WAS EXTRAJUDICIAL INFORMATION WHERE THESE OUTSIDE COMMUNICATIONS WITH THE JUDGES, WHICH I DON'T THINK IT'S IMPROPER, IT'S ONE OF THE REASONS THAT RECUSAL IS APPROPRIATE, IS THAT THERE MAY HAVE BEEN SOME DISCUSSION ABOUT CHANGING DEMOGRAPHICS. PLEASE CORRECT ME IF I'M WRONG, BUT I BELIEVE THAT THE MARSHALS HAVE ARTICULATED THE BELIEF THAT OR PERCEPTION THAT THERE'S SOME SORT CHANGING DEMOGRAPHIC IN THE DISTRICT AND I DON'T BELIEVE THAT THAT'S BASED ON ANYTHING, ANY EVIDENCE OR STATISTICS AND IT'S CERTAINLY NOT THE PERCEPTION THAT I HAVE.

I, FOR EXAMPLE, HAVE BEEN PRACTICING IN THIS DISTRICT FOR TEN YEARS AND IF ANYTHING, I SEE MORE AND MORE CASES WHERE PEOPLE ARE PROSECUTED, IN PARTICULAR IN THE 1546 AND 1544 CASES, THE DOCUMENT CASES AT THE BORDER, WHERE WE SEE FIRST TIME IMMIGRANTS OR INDI-

VIDUALS WITH LITTLE HISTORY OR NO CRIMINAL HISTORY THAT ARE BEING PROSECUTED, FOR EXAMPLE, FOR DOCUMENT FRAUD CASES.

WHEN I STARTED PRACTICING IN THIS DISTRICT, I DIDN'T [38] SEE ANY OF THOSE CASES. THOSE CASES WERE NEVER BROUGHT. IF ANYTHING, MY PERCEPTION IS THAT THERE ARE MORE AND MORE CASES IN PARTICULAR, IMMIGRATION CASES WHERE PEOPLE ARE PROSECUTED THAT DON'T HAVE A CRIMINAL HISTORY.

AGAIN, I MENTIONED THIS EARLIER, BUT WE DISPUTE THAT WE ARE THE OUTLIER, THAT WE ARE THE ONLY DISTRICT THAT DOESN'T SHACKLE AND THERE'S A NUMBER OF OTHER NINTH CIRCUIT DISTRICTS THAT DO NOT ENGAGE IN THE FULL RESTRAINTS FOR ALL NON-JURY PROCEEDINGS. I THINK NOW, IF YOU, I BELIEVE A CHART WAS SUBMITTED AS ONE OF OUR EXHIBITS TO THE COURT, IF YOU GO THROUGH THE OTHER DISTRICTS IN THE NINTH CIRCUIT, I BELIEVE THAT THE POLICY NOW IN THIS DISTRICT IS MORE RESTRICTIVE THAN THE POLICY IN MOST OTHER NINTH CIRCUIT DISTRICTS.

AGAIN, THIS IS BASED ON THE COMMUNICATION THAT OUR OFFICE RECEIVED FROM THE CHIEF JUDGE BUT IT WAS AND I MENTIONED THIS EARLIER, OUR UNDERSTANDING THAT THE MARSHALS BROUGHT THE RESTRAINT ISSUE TO THE COURT BECAUSE IT WAS CONCERNED WITH IMPLEMENTING THE NATIONAL DIRECTIVE AND IT COULD FACE

SOME LIABILITY TO DO SO UNDER THEIR NATIONAL DIRECTIVE, THEY WERE INSTRUCTED TO FULLY RESTRAIN UNLESS OTHERWISE DIRECTED BY THE COURT. SO PERHAPS THERE WAS SOME HOPE THAT THE COURT WOULD GIVE SPECIFIC DIRECTION. BUT MY UNDERSTANDING IS THE ISSUE WAS BOUGHT TO THE COURT BECAUSE OF THE NATIONAL DIRECTIVE AND POLICY.

[39]

WE DISPUTE THAT THE MARSHALS ARE EXERCISING GOOD JUDGMENT IN IMPLEMENTING THE POLICY. I THINK THERE WAS A REFERENCE MAY BE IN ABOUT SIX CASES, THEY HAVE DECIDED TO UNSHACKLE INDIVIDUALS, I BELIEVE. WE SUPPLY DECLARATIONS THAT SHOW THAT PEOPLE, INCLUDING BLIND AND HANDICAPPED AND INJURED INDIVIDUALS HAVE BEEN SHACKLED AND THAT IN MOST CASES, THE SHACKLES, IF UNSHACKLED AT ALL, THEY'RE REMOVED ONLY WHEN DIRECTED TO DO SO BY A JUDGE, NOT BASED ON THE JUDGMENT OF THE MARSHALS ON THEIR OWN.

YOUR HONOR, I THINK IN SOME CASES, THE RESTRICTIONS DO IMPAIR THE ABILITY OF DEFENDANTS TO PARTICIPATE IN THE PROCEEDINGS AND TO COMMUNICATE WITH US. FOR EXAMPLE, MANY OF THE DEFENDANTS CAN'T PUT ON THEIR OWN HEADPHONES. I HAVE SEEN MANY DEFENDANTS WHO CAN OBTAIN, MAYBE ONE DEFENDANT, WHO I HAVE SEEN WITH A BELLY CHAIN AND

THAT WAS ABLE TO PUT ON HIS OWN HANDCUFFS AND THAT DEPENDS IN PART ON THE SIZE OF THE INDIVIDUAL, BUT IN MANY CASES, DEFENDANTS, THEY CAN'T ADJUST THEIR OWN HEADSETS, THEY DON'T UNDERSTAND ANYTHING.

IT'S REALLY ONLY AFTER THE FACT WHEN THEY'RE ABLE AND IF THEY ARE INCLINED TO SPEAK UP AND INDICATE THEY DON'T UNDERSTAND, THAT THE HEADPHONES CAN BE READJUSTED AND THE COURT, IN SOME CASES, MAY HAVE TO REPEAT WHAT HAD BEEN SAID EARLIER. BUT IT IS ALSO, REALLY DETRACTING FROM AN INDIVIDUALS OWN DIGNITY WHEN YOU CAN'T ADJUST JUST YOUR OWN HEADSETS, FOR THESE REALLY BASIC THINGS YOU HAVE TO SEEK [40] ASSISTANCE, ASSISTANCE FROM THE MARSHALS AND ESPECIALLY IN THESE PUBLIC PROCEEDINGS WHERE I THINK OUR CLIENTS OFTEN FEEL LIKE THEY ARE BEING PUT ON DISPLAY AND THEIR DIGNITY IS ALREADY DIMINISHED.

THE COURT: MR. PILCHAK WANTS TO KNOW IF HE'S GOING TO HAVE AN OPPORTUNITY TO RESPOND OR IF YOU'RE GOING TO KEEP ON TALKING UNTIL MIDNIGHT.

MS. BARROS: I PROMISE I WON'T KEEP ON TALKING UNTIL MIDNIGHT. I THINK I'M BASICALLY ABOUT DONE. I JUST WANTED TO POINT OUT NONE OF THE SECURITY INCIDENTS INVOLVED ATTACKS ON JUDGES. IN MANY OF THE CASES WHERE WE ARE SEEING

SHACKLING, IT'S AN INDIVIDUAL BEFORE THE COURT, THERE ARE NO OTHER INMATES PRESENT AND THERE'S NEVER BEEN TO MY KNOWLEDGE BEEN AN INCIDENT THAT HAS INVOLVED AN ATTACK ON A JUDGE. WHICH I THINK COULD REALLY BE THE ONLY JUSTIFICATION IN COURTS WHERE YOU HAVE SOMEONE THAT IS BROUGHT OUT INDIVIDUALLY WHO HAS BEEN FULLY SHACKLED, THAT OR TO PREVENT ESCAPING. IN ALL OF THOSE CASES, THE MARSHALS HAVE SUFFICIENT PERSONNEL, TWO MARSHALS PER DEFENDANT, ESPECIALLY WHEN YOU HAVE SOMEONE ELSE BROUGHT OUT INDIVIDUALLY, THERE'S ALWAYS TWO MARSHALS, SOMETIMES THERE IS EVEN MORE, SOMETIMES THERE'S MORE COURT SECURITY OFFICERS WHO ARE PRESENT AS WELL.

I REALLY DON'T THINK THERE'S ANY REASON FOR THE FULL SHACKLING SPECIAL WHEN WE HAVE INDIVIDUALS APPEARING [41] INDIVIDUALLY.

ALSO THERE'S THIS IDEA ABOUT THE STAFFING SHORTAGES AND I WANTED TO QUICKLY COMMENT. I'M NOT SURE, AND I DON'T THINK THAT THEY USED TO HAVE ANY, THERE'S THE SUGGESTION THAT THEY WOULD NEED MORE STAFF NOW BECAUSE THERE IS THREE MARSHALS THAT ARE REQUIRED TO REMOVE THE SHACKLES FOR EXAMPLE. I DON'T THINK, AND I MAY BE MISTAKEN, I DON'T THINK THEY WERE SHACKLED AT ALL WHILE IN THE TANK PRI-

OR TO THE NEW POLICY BEING IMPLEMENTED.

SO SINCE THIS POLICY HAS BEEN IMPLEMENTED, THEIR INITIALLY, THEY HAVE ONLY LEG SHACKLES ON IN A HOLDING TANK WITH MULTIPLE INDIVIDUALS AND THEN MY UNDERSTANDING IS WHEN THEY ARE BROUGHT UP TO THE TANK OR THE CELL, RIGHT OUTSIDE OF THE COURTROOM, THAT IS WHEN THEY HAVE THE FULL RESTRAINTS PLACED ON THEM BEFORE THEY'RE BROUGHT UP AND WHEN THEY'RE PLACED IN THE TANK BASICALLY TO BE BROUGHT OUT TO COURT. THAT'S WHEN THEY'RE BEING FULLY SHACKLED. IT'S REALLY FOR THE PURPOSE OF BEING BROUGHT OUT TO COURT THAT THESE SHACKLES ARE BEING PLACED ON.

EXCUSE ME. I'D ALSO NOTE THE MATERIAL WITNESSES ARE NOT SHACKLED AND THE MARSHALS DON'T HAVE ANY MORE OR LESS INFORMATION ABOUT THEM WHETHER THEY PRESENT ANY SECURITY RISK AND THAT MY UNDERSTANDING IS THAT THE MARSHALS HAVE NO POLICY IN PLACE TO PREVENT OR ADDRESS INJURY ASIDE FROM ADVISING THE SUPERVISOR AND INTERVIEWING AN INDIVIDUAL ABOUT [42] THE INJURY.

SO I THINK, YOUR HONOR, WITH THAT, WITH RESPECT TO GENERAL POLICY AND THE JUSTIFICATIONS THAT WERE PROVIDED FOR IT IN THE MARSHALS DECLARATION,

THAT'S REALLY ALL I HAVE TO SAY ABOUT THAT.

IF WE WANT TO TALK ABOUT MR. RING'S CASE, HIM AS AN INDIVIDUAL, I DO HAVE A FEW MORE THINGS TO SAY ABOUT THAT BUT I GUESS I'LL LET MR. PILCHAK RESPOND TO THE GENERAL COMMENTS FIRST.

THE COURT: ALL RIGHT. I NOTE IT'S ALMOST 4:30 OR IT IS 4:30, SO WE HAVE TO BRING THIS TO A CLOSE SOON. GO AHEAD, SIR.

MR. PILCHAK: I'LL ATTEMPT TO MOVE QUICKLY, YOUR HONOR. THANK YOU.

TO START NEAR THE END OF WHERE DEFENSE COUNSEL FINISHED OFF, NOTING THERE'S NEVER BEEN AN ATTACK ON A JUDGE IN THIS DISTRICT, TO THAT I SAY THANK GOODNESS. I THINK IT WOULD BE UNFORTUNATE IF SOMETHING LIKE THAT WOULD BE REQUIRED BEFORE A POLICY OF PRUDENCE LIKE THIS COULD BE JUSTIFIED.

ONE OF THE REASONS THAT DEFENSE COUNSEL NOTES THAT SHE THOUGHT THE OLD POLICY WITH NO FULL RESTRAINTS WAS SUFFICIENT WITH THE U.S. MARSHALS POLICY REQUIRES TWO MARSHALS PER DEFENDANT IN OPEN COURT.

I WOULD OBSERVE THAT THAT POLICY IS OFTEN BREACHED IN THIS DISTRICT, ESPECIALLY IN MAGISTRATE COURT [43] WHERE DEFENDANT ARE BROUGHT EN MASSE FOR INITIAL APPEARANCES OR CHANGES OF

PLEAS WHERE THERE ARE TWO OR PERHAPS THREE U.S. MARSHALS FOR MANY DEFENDANTS. I THINK THAT'S ONE OF THE DISTRICTS SPECIFIC REASONS THAT MAKES IT PARTICULARLY IMPORTANT TO HAVE A PRUDENT RESTRAINT POLICY HERE IN THE SOUTHERN DISTRICT.

AND THEN TO GO BACK TO HER EARLIER COMMENTS, DEFENSE COUNSEL DISPUTED A NUMBER OF THINGS IN DEPUTY UNITED STATES MARSHAL JOHNSON'S DECLARATION. I WON'T ADDRESS ALL OF THEM BUT MANY OF THEM, TO GROUP HER POINTS TOGETHER, FACTS ABOUT THERE IS NOT ENOUGH KNOWN ABOUT THE DEFENDANTS WHO MAY APPEAR IN COURT. THERE MAY BE CHANGING DEMOGRAPHICS OR THAT INTERNATIONAL DEFENDANTS WHOM WE DON'T KNOW THEIR CRIMINAL HISTORIES OR HAVE ENOUGH INFORMATION ABOUT THEIR CRIMINAL HISTORIES TO JUDGE WHETHER THEY MAY BE VIOLENT, ALL OF THESE POINTS ABOUT HOW—PERHAPS THESE FACTORS ARE THE SAME NOW AS THEY WERE A YEAR OR TWO AGO, AND THERE'S NOT BEEN A CHANGE TO JUSTIFY A CHANGING POLICY, I WOULD SAY THAT PERHAPS THE RESTRAINT POLICY WAS INSUFFICIENT BEFORE.

THERE'S NOTHING TO SAY THAT THE POLICY THAT EXISTED ON OCTOBER 20 OF THIS YEAR WITH NO RESTRAINTS FOR NON-JURY PROCEEDINGS WAS ADEQUATE AND MAY BE THAT THE POLICY ITSELF WAS INSUFFI-

CIENT AND WE'VE NOW BROUGHT IT INTO A DIFFERENT PRACTICE THAT IS MORE REFLECTIVE OF THE SECURITY CONCERNS THAT ARE UNIQUE TO THIS DISTRICT.

[44]

MS. BARROS REFERRED TO THE TEST OF ***BELL VERSUS WOLFISH*** FOR DETERMINING WHETHER THERE IS AN IMPOSITION OF PUNISHMENT BY RESTRAINTS WHEN THE RESTRAINT IS RATIONALLY CONNECTED TO A LEGITIMATE PURPOSE AND/OR IT APPEARS EXCESSIVE. I THINK THAT TEST IS CLEARLY SATISFIED HERE. THERE IS A LEGITIMATE PURPOSE. THE RESTRAINTS ARE OBVIOUSLY CONNECTED TO THAT. THE ONLY POTENTIAL FOR ARGUMENT HERE IS WHETHER THEY APPEAR EXCESSIVE BUT I THINK IN LIGHT OF THE STATE OF THE RECORD, I THINK THAT HAS ALSO BEEN CLEARLY ESTABLISHED.

DEFENSE COUNSEL ARGUES THAT THE RESTRAINTS ARE FAR MORE RESTRICTIVE THAN WHAT WAS AT ISSUE IN ***BELL VERSUS WOLFISH***, IT IS A RATHER LENGTHY OPINION BUT IT DEALT WITH A NUMBER OF PRACTICES THAT TOOK PLACE AT THE METRO CORRECTIONAL CENTER, IN THAT CASE, INCLUDING A VERY INTRUSIVE STRIP SEARCH POLICY FOR FULL STRIP SEARCHES IN BODY CAVITIES INSPECTIONS, FOLLOWING CONTACT VISITS.

SO I WOULD HARDLY DISPUTE THE IDEA THAT WE ARE DEALING WITH SOMETHING THAT IS MUCH MORE RESTRICTIVE NOW THAN WHAT WAS AT ISSUE IN ***BELL VERSUS WOLFISH***, THE SUPREME COURT WAS EXTREMELY DEFERENTIAL TO PRISON AUTHORITIES SUGGESTING THAT THE FEDERAL COURTS SHOULDN'T SIMPLY SUPPLANT THEIR JUDGMENTS AND THEIR EXPERTISE WHENEVER THEY HAD A DISAGREEMENT IN HOW THEY IMPLEMENTED THEIR MANDATE.

A FEW OTHER MORE SPECIFIC THINGS AND I'LL BE FINISHED. MS. BARROS REFERRED TO THE STAFFING LEVELS OF THE U.S. [45] MARSHALS SERVICE, DEPUTY JOHNSON'S DECLARATION AND SAID THE ONLY THING THAT THE MARSHALS HAVE LOST IN THE LAST FEW YEARS ARE CONTRACT EMPLOYEES. I WOULD OBSERVE THAT OF COURSE CONTRACT EMPLOYEES, PARTICULARLY WHEN THEY PARTICIPATE INTHE MARSHALS FUNCTIONING ARE IMPORTANT TO THE MARSHALS BEING ABLE TO FULFILL THEIR RESPONSIBILITIES IN SECURING THE COURTROOMS.

SAME THING WITH THE NEXT OBSERVATION FROM DEFENSE COUNSEL THAT ALTHOUGH WE HAVE A NEW 16 STORY COURTHOUSE, WE HAVEN'T ADDED ANY JUDGES OR FUNCTIONING COURTROOMS TO THE DISTRICT. ONE OF THE MARSHALS EXTREMELY IMPORTANT RESPONSIBILITIES, IN ADDITION

TO PREVENTING SECURITY INCIDENTS, IS RESPONDING TO SECURITY INCIDENTS.

CONSIDER YOUR HONOR, THE MARSHALS WOULD HAVE TO RESPOND FROM ONE END OF OUR MUCH LARGER COURTHOUSE COMPLEX TO ANOTHER END IF AN INCIDENT WERE TO ARISE. THERE MAY NOT BE NEW JUDGES OR NEW COURTROOMS, BUT THE FACT THAT YOU MIGHT HAVE TO GET UP TO THE 15TH FLOOR OF THE ANNEX OR OVER TO THIS BUILDING, IF THE MARSHALS THAT ARE GOING TO BE RESPONDING ARE LOCATED NEXT DOOR, IT'S RELEVANT. IT'S RELEVANT TO THE SECURITY SITUATION. IT'S RELEVANT TO THE NEED TO RESTRAIN PEOPLE WHEN THEY APPEAR IN YOUR HONOR'S COURTROOM OR WHEN THEY'RE WAITING JUST OUTSIDE.

OTHERWISE, DEFENSE COUNSEL REFERRED TO THE IDEA OF AN INMATE ON INMATE INCIDENT AND PREVENTING THOSE IS NOT REALLY [46] THE FOCUS OF THE POLICY AND FOR SOME REASON, INMATES WHO ARE UNSHACKLED IN THE TANK MEANS THAT WE'RE NOT CONCERNED ABOUT THEIR ASSAULTING EACH OTHER. THE MARSHALS WILL TELL YOU THAT INMATES IN THE TANKS ARE MUCH MORE CLOSELY SUPERVISED THAN THEY ARE WHEN THEY ARE DISBURSED TO VARIOUS COURTROOMS FOR THEIR COURT APPEARANCES. THAT'S PROBABLY ONE REASON WHY IT'S IMPORTANT TO RESTRAIN THEM WHILE THEY ARE IN TRAN-

SIT AND IN THE COURTHOUSE AND COMING TO THE COURTROOMS LIKE YOUR HONOR'S.

SHE ALSO REFERENCED THE FACT THAT BOTH OF THE VIOLENT INCIDENTS IN THE COURTROOMS THAT ARE REFERENCED IN THE GOVERNMENT'S SUBMISSION HAD SOMETHING TO DO WITH THE MEXICAN MAFIA AND GANG AFFILIATIONS. I'M NOT SURE THAT'S ENTIRELY ACCURATE. OBVIOUSLY, THE INCIDENT IN JUDGE GONZALEZ COURTROOM DID PERTAIN TO THE MEXICAN MAFIA, THE INDIVIDUALS WERE CLEARLY ASSOCIATED WITH THAT. I THINK THE INCIDENT IN EL CENTRO FRANKLY WAS UNCERTAIN OF ULTIMATELY OF WHAT THE MOTIVATION OF THAT INDIVIDUAL WAS. I DON'T THINK IT WAS CLEARLY IDENTIFIED AS A MEXICAN MAFIA GANG MEMBER BEFORE THE INCIDENT OCCURRED.

I THINK THAT COMES UP WITH ONE OF THE CENTRAL JUSTIFICATIONS FOR THE PRACTICE OF RESTRAINING THE COURTROOM, WITH ALL DUE RESPECT TO THE UNITED STATES MARSHALS WHO ARE VERY GOOD AT THEIR JOB AND VERY GOOD AT PROTECTING, THEY'RE NOT PARTICULARLY EXCELLENT IN PREDICTING [47] THE FUTURE. I THINK THAT'S ONE OF THE FACTORS OF THEIR RECOMMENDATION IN THIS DISTRICT, EVEN WITH DEFENDANT'S CRIMINAL HISTORY OR BACKGROUND, EVEN ASSUMING THAT'S AVAILABLE, SOMETIMES IT'S NOT, THEY CAN'T PREDICT WHEN OR WHERE THE NEXT

INCIDENT WILL COME FROM. THAT'S ONE OF THE REASONS THAT RESTRAINT POLICY IS WARRANTED.

FINALLY, THE LAST POINT, DEFENSE COUNSEL WAS REFERRING TO THE SHACKLES IMPAIRING A DEFENDANT'S ABILITY TO PARTICIPATE IN THE PROCEEDINGS AND COMMUNICATE WITH HIS ATTORNEY. I THINK YOUR HONOR, FROM HIS OWN EXPERIENCE, PROBABLY KNOWS THE EXTENT TO WHICH THAT IS TRUE. JUST EARLIER TODAY, A DEFENDANT IN FULL RESTRAINTS WAS ABLE TO WRITE NOTES TO HIS COUNSEL DURING THE PROCEEDINGS, ABLE TO GET HER ATTENTION WHEN HE DISAGREED WITH SOME OF THE FACTS GOVERNMENT COUNSEL WAS GOING THROUGH IN THAT HEARING, AND TO THE EXTENT THAT IS A PROBLEM, OVERARCHING THE ENTIRE PRACTICE, TO THE EXTENT THE COURT IS ABLE TO INTERVENE IN COURT APPROPRIATE RESPONSES. SO WITH THAT, WE SUBMIT.

THE COURT: ALL RIGHT. THANKS. I'M AFRAID TO ASK IS THERE MORE?

MS. BARROS: VERY, VERY BRIEFLY.

WITH RESPECT TO THE EN MASSE, I DON'T THINK THOSE DEFENDANTS, A COUPLE DEFENDANTS BROUGHT OUT SPECIFICALLY IN MAGISTRATE COURT, THAT'S NOT THE CASE WITH DEFENDANTS APPEARING IN DISTRICT COURT. EVEN THEN, WE DON'T HAVE EN [48] MASSE GUILTY PLEAS. IN FACT THE NINTH

CIRCUIT ADDRESSED THAT BECAUSE APPARENTLY THAT HAPPENED IN ARIZONA AND THE NINTH CIRCUIT REVERSED THAT PRACTICE, BUT THAT ISN'T SOMETHING THAT OCCURRED OR SHOULD BE OCCURRING. FOR INITIAL APPEARANCES, THERE ARE MULTIPLE DEFENDANTS AND SOMETIMES APART FROM THOSE TWO TYPES OF APPEARANCES, WE RARELY SEE MULTIPLE DEFENDANTS, UNLESS IT'S A MULTI DEFENDANT CASE, THAT ARE BROUGHT OUGHT OUT TOGETHER FOR COURT.

JUST VERY BRIEFLY, I MEANT, I DIDN'T FINISH MY THOUGHT EARLIER WHEN I WAS TALKING ABOUT THE STAFFING SHORTAGES AND WE HAVE ACTUALLY HAD SOME MARSHALS COMMENT IN COURT THAT THEY COULDN'T SHACKLE BEFORE BECAUSE IT REQUIRED MORE OF THEM TO ACTUALLY SHACKLE. SO WE REALLY DISPUTE THAT THE ISSUE WITH RESPECT TO STAFFING SHORTAGES NECESSITATES SHACKLING. MY UNDERSTANDING IS NOW WITH THE SHACKLING POLICY, WE ACTUALLY NEED TO HAVE MORE MARSHALS PRESENT TO DO THE SHACKLING THAN THEY DID IN THE PAST. SO YOUR HONOR, WITH THAT, I WILL SUBMIT ON THE FACE.

THE COURT: ALL RIGHT. THANKS, COUNSEL. THE MATTER HAS BEEN VERY WELL BRIEFED AND ARGUED TODAY. I THINK WE MADE A GOOD RECORD HERE. I'LL GO AHEAD AND CONFIRM WHAT ORIGI-

NALLY WAS STATED AS THE COURT'S TENTATIVE RULING, THAT IS WITH ALL DUE RESPECT, THE MOTION IS DENIED AND THE MAGISTRATE JUDGE'S DECISION IS CONFIRMED.

ANYTHING ELSE WE SHOULD DO FOR THE RECORD OR OTHERWISE?

[49]

MS. BARROS: YOUR HONOR, I DID WANT TO ADDRESS MR. RING, AS AN INDIVIDUAL?

THE COURT: YOU MEAN WE HAVEN'T TALKED ABOUT HIM YET?

MS. BARROS: WHAT WAS THAT?

THE COURT: THERE'S MORE?

MS. BARROS: VERY BRIEFLY.

THE COURT: ALL RIGHT.

MS. BARROS: YOUR HONOR, I THINK THE SHACKLING AS TO MR. RING WAS INAPPROPRIATE AND SHOULD HE, I HOPE HE DOESN'T MAKE ANOTHER APPEARANCE BEFORE THIS COURT, BUT SHOULD HE BE REQUIRED TO APPEAR IN THE CASE STILL PENDING BEFORE YOUR HONOR, THAT HE NOT BE SHACKLED. I THINK HIS HISTORY, THE COURT HAS SUBSTANTIAL INFORMATION ABOUT HIS HISTORY, BOTH AS A WAR VET AND THE RESULTANT INJURIES THAT HE HAS SUFFERED BECAUSE OF THAT. HE SENT A LOT OF HIS DOCUMENTS, AND I HOPE YOUR HONOR HAS THEM, THEY WERE SUBMITTED

TO THE COURT UNDER SEAL AT THE TIME OF HIS LAST HEARING, HIS MILITARY RECORDS, FOR EXAMPLE, DID THE COURT OBTAIN THOSE RECORDS?

THE COURT: I DON'T HAVE EXTENSIVE MILITARY RECORDS HERE. SHOULD I?

MS. BARROS: IT WAS THE D—

THE COURT: THE DD 214?

MS. BARROS: YES. AS WELL AS A FEW OTHER [50] DOCUMENTS.

THE COURT: I THINK I'M GENERALLY FAMILIAR WITH HIS MILITARY BACKGROUND. YOU ARE NOT TALKING ABOUT MEDICAL RECORDS.

MS. BARROS: NO. THE GOVERNMENT SUBMITTED A COUPLE MEDICAL RECORDS IN THEIR RESPONSE. I HAVE ONE RECORD I SHARED WITH THE GOVERNMENT. I WANTED TO SHARE THAT WITH THE COURT AS WELL. BUT HE DOES SUFFER FROM A NUMBER OF MEDICAL ISSUES. THOSE WERE REFERENCED IN THE DOCUMENTS THAT WERE SUBMITTED UNDER SEAL. THERE WAS AN INDICATION FROM THE VA HE HAS BEEN A 100 PERCENT DISABLED AND RECOUNTED SEVERE INJURY. MR. RING HAS PRETTY SEVERE PTSD, YOUR HONOR.

HE ALSO SUFFERS FROM DEPRESSION. HE HAS A NUMBER OF PHYSICAL INJURIES FROM HIS TIME ABROAD. BEFORE HE WAS DEPLOYED TO IRAQ, UNFORTUNATELY BE-

CAUSE HE WAS EXPOSED TO MULTIPLE IMPROVISED EXPLOSIVE DEVICES, HE HAS A TRAUMATIC BRAIN INJURY BECAUSE OF THAT. HE ALSO HAD SURGERY TO HIS LEFT ANKLE AND HIS KNEES AS WELL. HE HAS A PROBLEM, AS WELL AS I FAILED TO MENTION THIS AT AN INITIAL HEARING, BUT HE ALSO HAS BACK PROBLEMS. I THINK HE HAD A BULGING DISK IDENTIFIED AND SINCE HE'S BEEN AT THE VA, CURRENTLY THEY HAVE FOUND TWO FRACTURES IN HIS BACK AS WELL.

BUT HE HAS MULTIPLE PHYSICAL AILMENTS AND HE EXPRESSED TO ME BEFORE HIS LAST TIME IN THE TANK, HE HAD LEG IRONS ON [51] AND HE EXPRESSED TO ME THAT IT WAS PAINFUL. IT WAS VERY PAINFUL. THEY WERE BASICALLY TOO TIGHT AROUND THE ANKLE WHERE HE HAD THE SURGERY. HE WAS NOT IN FULL RESTRAINTS WHEN I MET WITH HIM IN THE TANK. BY THE TIME HE WAS BROUGHT OUT TO COURT, HE WAS TEARFUL. HE WAS CRYING.

THE GOVERNMENT INDICATED IN THEIR RESPONSE THAT THERE WAS NO EVIDENCE THAT HE WAS IN PAIN, APART FROM MY REPRESENTATIONS TO THE COURT. AND I CAN TELL THE COURT AS AN OFFICER OF THE COURT, I WOULDN'T MISREPRESENT THAT, I CONFIRMED WITH HIM AFTER THE FACT THAT HE WAS IN PAIN. HE DESCRIBED TO

ME HE SAID "EXTREME PAIN". THE SHACKLES WERE VERY PAINFUL TO HIM.

IN ADDITION TO THE PAIN, HE SAID THE SHACKLES MADE HIM FEEL GUILTY AND WORTHLESS. HE WAS CRYING BECAUSE OF HOW THE SHACKLES MADE HIM FEEL, BUT ALSO, PRIMARILY BECAUSE OF THE PAIN, BUT ALSO THE SECONDARY IMPACT THAT IT HAD ON HIS MENTAL STATE.

THE GOVERNMENT'S SUGGESTS THAT PERHAPS THERE HAD BEEN SOME INCIDENT WHERE HE WAS CHARGED WITH DISORDERLY CONDUCT, IT WAS NOT AN ASSAULT. THE CONDUCT HE WAS CHARGED WITH IN CONJUNCTION WITH THE DISCHARGE OF THE VA, WHERE HE DID NOT PHYSICALLY ASSAULT ANYONE, BUT BECAUSE HE HAD BEEN DISCHARGED AND UNDER THOSE CIRCUMSTANCES THAT PERHAPS THAT SOMEHOW WARRANTED A SHACKLING, THAT CLEARLY WAS NOT THE BASIS FOR THE SHACKLING.

[52]

ONE, HE WASN'T SHACKLED ON DAY ONE, WAS NOT SHACKLED ON DAY TWO, HE WAS NOT SHACKLED UNTIL DAY THREE WHEN IT WAS PART OF THE MARSHALLS OVERALL POLICY. THE RECORDS THAT THEY DID SUBMIT I THINK ARE INTERESTING, YOUR HONOR.

THEY ACTUALLY INDICATE THAT PART OF THE ISSUE, HE WAS HE WAS TELLING THE OFFICERS WHEN HE WAS AT THE LA JOLLA

VA WHEN THEY RESPONDED. BY WAY OF BACKGROUND, THERE WAS A BUNCH OF INMATES AND THERE WAS A CODE YELLOW, THERE WAS A FORM ON THE FLOOR AND IT WAS NIGHT TIME, AND THEY WERE BANGING WINDOWS AND THINGS LIKE THAT. THAT'S AT THE HOSPITAL. A NUMBER OF PATIENTS WERE GATHERING AROUND TO WATCH. I THINK THEY WERE PRIMARILY PTSD PATIENTS SO THE STAFF ADMITTED THEY DIDN'T WANT PATIENTS ON THE FLOOR OBSERVING THIS PATIENT BECAUSE IT TENDS TO TRIGGER THE OTHER PATIENTS.

SO MR. RING HAD BEEN AWOKEN IN THIS MANNER AND APPARENTLY, HE SAID TO THE NURSING STAFF, I DON'T REMEMBER THE EXACT WORDS BUT TO GET HER HANDS OUT OF HIS FACE, AS SHE WAS TRYING TO GET HIM AND USHER HIM AND SOME OF THE OTHER PATIENTS OUT OF THE WAY, SO THAT THEY WEREN'T OBSERVING WHAT WAS HAPPENING. THE POLICE WERE CALLED TO THE HOSPITAL.

AS PART OF THE RECORDS THE GOVERNMENT SUBMITTED UNDER SEAL, IT INDICATES HE WAS RESISTING ARREST AND I DON'T BELIEVE IT WAS A LEGAL TERM OF A "CRIMINALLY LIABLE ACT", BUT HE WAS TELLING THE OFFICERS, "YOU CAN'T HANDCUFF ME. [53] I'M INJURED. I NEED TO BE DOUBLE CUFFED." HE CANNOT BE HANDCUFFED BECAUSE HE ALSO HAS A NECK INJURY THAT I CITED HERE, BUT HE WAS

TELLING OFFICERS, "YOU CAN'T HANDCUFF," SO THEY THEN HANDCUFFED HIM IN A SPECIAL MANNER, DOUBLE CUFFED. AND AS SOON AS THEY HAD EVERYONE ON THE FLOOR AND UNDER CONTROL, THEY UNCUFFED HIM, UNCUFFED HIM AND LET HIM GO.

THEY DIDN'T BELIEVE IT WAS NECESSARY TO TAKE HIM INTO CUSTODY AT THE TIME. HE WAS THEN DISCHARGED TO THE STREET AND UNFORTUNATELY HE WAS DISCHARGED WITHOUT ANY MEDICATIONS FROM THE NUMBER OF MEDICATIONS HE WAS RECEIVING AND LATER THE INSTANT CHARGES WERE FILED, BASED ON AN ALLEGATIONS OF SOMETHING THAT OCCURRED AFTER THE DISCHARGE FROM THE HOSPITAL.

BUT WHEN HE WAS ARRESTED, HE WAS BASICALLY LOCATED BECAUSE THEY USED THE GPS ON HIS PHONE TO LOCATE HIM AT A HOTEL. HE WAS COMPLIANT AND HE DIDN'T RESIST ARREST OR REFUSE TO GO INTO CUSTODY WITH THEM. HE WAS TAKEN TO BALBOA NAVAL MEDICAL CENTER. THE MEDICAL RECORDS FROM BALBOA MEDICAL CENTER OR NAVAL MEDICAL CENTER, EXCUSE ME, AT BALBOA, INDICATE SIGNIFICANTLY UNDER HOSPITAL COURSE ONE PSYCHIATRIC, HE DID NOT REQUIRE SECLUSION OR RESTRAINTS. THAT WAS THE MEDICAL DETERMINATION THAT WAS MADE.

THIS IS NOT PRIOR HISTORY. IT ALSO NOTES HE HAD NO EPISODES OF VIOLENCE

OR AGITATION. HE WAS ABLE TO MAINTAIN A CALM DEMEANOR. JUST FOR THE RECORD, I WANTED TO SUBMIT [54] ALTHOUGH WE DISPUTE THE CHARACTERIZATION THAT WHATEVER HAPPENED AT THE LA JOLLA VA, THAT THE CHARACTERIZATION WAS AN ASSAULT. THERE WAS NO PHYSICAL ALTERCATION. TO THE EXTENT THAT THE COURT WANTS TO TAKE THAT INTO CONSIDERATION, I DID WANT TO OFFER IT AS EVIDENCE INTO THE RECORD FROM AFTER HE WAS DISCHARGED IN THE LA JOLLA VA AND THIS WAS WHEN HE WAS TAKEN INTO CUSTODY AND DEPENDING ON THE STANDARD THAT THE COURT APPLIES IN THIS CASE, FOR EXAMPLE, IF YOU LOOK AT ***GONZALEZ VERSUS WHILER***, THERE THE NINTH CIRCUIT IN THAT CASE NOTED WHEN THE COURT CONSIDERED THE FACTORS, THE COURT NEEDS TO LOOK AT THE DEFENDANT'S CONDUCT WHILE IN CUSTODY, WHETHER THERE WERE INCIDENTS WHILE IN CUSTODY AND WHETHER THERE WAS OBSTRUCTION OF A JURY, FOR EXAMPLE, IN COURT PROCEEDINGS.

HE WAS NEVER, HE NEVER CAUSED ANY SORT OF PROBLEM DURING THE COURT PROCEEDINGS. HE WAS NOT DISRUPTIVE ON DAY ONE AND DAY TWO. WHILE IN CUSTODY, THERE IS NO EVIDENCE OF ANY ASSAULTIVE OR DESTRUCTIVE BEHAVIOR, YOUR HONOR.

I REALLY THINK THAT IN THIS CASE IS REALLY AN AFFRONT TO THE DIGNITY AND DECORUM OF THE COURTROOM AND TO SOME-

ONE WHO HAS HONORABLY SERVED THEIR COUNTRY IN VERY DANGEROUS CIRCUMSTANCES FOR MANY, MANY YEARS. AND I THINK THAT IT IS DEGRADING TREATMENT.

YOUR HONOR, MAY I APPROACH?

THE COURT: YES.

[55]

MS. BARROS: I INDICATED THIS WOULD BE UNDER SEAL, THEY ARE MEDICAL RECORDS, IS THAT CORRECT?

THE COURT: ALL RIGHT.

MR. PILCHAK: YOUR HONOR, MR. RING'S CASE IS A VERY UNUSUAL ONE. THAT IS THE REASON WHY HE WAS OFFERED SUCH A VERY FAVORABLE RESOLUTION WHICH HE ULTIMATELY ACCEPTED IN THIS CASE. WHICH WAS THE PARTICULAR DEFERRED PROSECUTION FILED, PURSUANT TO WHICH HE WAS RELEASED FROM CUSTODY. SO HE'S NOT IN CUSTODY ANY LONGER. IT'S CERTAINLY THE HOPE OF THE UNITED STATES HE WON'T BE IN CUSTODY IN THIS CASE AGAIN AS LONG AS HE COMPLIES WITH THE CONDITIONS OF THE DEFERRED PROSECUTION AGREEMENT. HE DOES HAVE AN EXEMPLARY RECORD OF SERVICE TO THIS COUNTRY.

MANY OF THE THINGS MS. BARROS SAID ARE ACCURATE. I'M NOT IN COMPLETE AGREEMENT WITH HER DESCRIPTION OF THE INCIDENT AT THE VA HOSPITAL, WHERE HE WAS BEING TREATED BEFORE HE WAS

DISCHARGED. BUT AFTER HE WAS DISCHARGED, HE'S CHARGED WITH THREATENING TO KILL OTHER INDIVIDUALS. THAT WEIGHED IN THE GOVERNMENT'S MOTION TO DETAIN HIM.

WHEN HE WAS BROUGHT IN FOR HIS INITIAL APPEARANCE AND I THINK LIKELY IT WAS A HIGHLY RELEVANT FACTOR ON THE DECISION FOR MS. BARROS REQUEST TO REMOVE THE RESTRAINTS BEFORE JUDGE ADLER. AND WITH THAT SAID, WE SUBMIT.

MS. BARROS: AND WITHOUT GETTING TO MUCH INTO THE FACT OF THE CHARGES BECAUSE HE ENTERED INTO THE DEFERRED [56] PROSECUTION AGREEMENT. IT WAS AN AGREEMENT THAT DID NOT REQUIRE AN ADMISSION OF GUILT TO ANY PARTICULAR FACTS IN THIS CASE. AND PART OF THAT IS THAT HE DOES INDICATE AND HE CONTINUED TO MAINTAINS HIS INNOCENSE OF THOSE CHARGES, DESPITE THE AGREEMENT THAT WAS REACHED, HE REFUSED TO PLEAD GUILTY TO THOSE CHARGES.

I KNOW IT IS NOT PART OF THE PRIOR RECORD, I PUT IT INTO THE RECORD AT OUR LAST HEARING. ONE OF THE ISSUES IN THE CASE IS WHETHER OR NOT THE DEFENDANT SUBJECTIVELY INTENDED TO THREATEN AND WHETHER THE ALLEGED THREAT WAS A TRUE THREAT, OR WHETHER OR NOT IT IS SOMETHING THAT WOULD BE TAKEN SERIOUSLY FROM A SUBJECTIVE AND AN OBJECTIVE STANDPOINT.

IN THIS CASE, WHAT HE WAS CHARGED WITH IS MAKING A TELEPHONE CALL TO GET HIS CASE MANAGER OR COORDINATOR, CARE COORDINATOR IN OKLAHOMA, WHERE HE ALLEGEDLY MADE STATEMENTS ABOUT HOW UPSET HE WAS WITH THE LA JOLLA VA. THAT WAS WHERE HE WAS DISCHARGED TO THE STREET. HE HAD BEEN BROUGHT HERE FOR THE SOLE PURPOSE OF RECEIVING TREATMENT FROM THE VA AND HE WAS DISCHARGED TO THE STREET WITHOUT ANY MEDICATION AND WITH NOWHERE TO GO. SO THE PHONE CALL THAT HE ALLEGED TO HAVE MADE WAS MADE TO THIS CARE COORDINATOR WHERE THE GOVERNMENT INCLUDED A TRANSCRIPT OF THE CALL, WHERE HE MADE STATEMENTS ABOUT THE PEOPLE HERE IN SAN DIEGO.

I INTERVIEWED THE CARE COORDINATOR AND SPOKE TO HER, [57] SHE DIDN'T TAKE IT SERIOUS. I THINK THIS WAS DESPITE THE NATURE OF THE CHARGE, IT SOUNDS SERIOUS. BUT EVEN THE PERSON WHO RECEIVED THE CALL, SHE DIDN'T THINK HE WAS SERIOUS.

AND THEN WITH RESPECT TO OBJECTIVE INTENT TO THREATEN, WHILE UNDER THE LAW THE THREAT ACTUALLY HAS TO BE RECEIVED BY THE PERSON HE INTENDS TO THREATEN, THE THREAT WAS NEVER EVEN DIRECTED TOWARD THE LA JOLLA VA.

I SAY THOSE TO POINT OUT THAT DESPITE THE WORDING OF THE CHARGE, MR. RING

WAS COMPLETELY INNOCENT AND THERE WERE SIGNIFICANT FACTS IN THE CASE.

THE COURT: WELL OF COURSE THE MAGISTRATE JUDGE ONLY KNEW WHAT THE MAGISTRATE JUDGE KNEW AT THAT TIME. WE'RE HERE TALKING ABOUT THINGS YOU APPARENTLY HAVE UNCOVERED OR DETERMINED OR OPINED.

MS. BARROS: I PROFFERED THAT HISTORY THEN.

THE COURT: ANOTHER UNUSUAL ASPECT OF THIS CASE IS YOU ARE TALKING ABOUT CONDUCT THAT HAS ALREADY OCCURRED. I DON'T KNOW IF THERE'S SOME CIVIL CLAIM OUT THERE THAT YOU CAN BRING OR YOUR CLIENT CAN BRING. YOUR CLIENT IS NOT IN CUSTODY HERE. HE'S NOT HERE. SO ALL I'M BEING ASKED TO DO AS I UNDERSTAND IT, IS TO LOOK AT THE MAGISTRATE JUDGE'S DECISION AT THE TIME, GIVEN THE CIRCUMSTANCES THEN PRESENT, GIVEN THE MARSHALS POLICIES AND AS INDICATED, I THINK THAT THE MAGISTRATE JUDGE MADE THE CORRECT DECISION UNDER THOSE [58] CIRCUMSTANCES ON THAT RECORD, CONSIDERING THE POLICY. HE'S NOT HERE NOW. HE'S NOT SCHEDULED TO BE HERE.

I DON'T KNOW EXACTLY WHAT ELSE YOU EXPECT ME TO RULE ONTODAY OTHER THAN TO SIMPLY RULE ON THE APPEAL OF WHAT THE MAGISTRATE JUDGE DID.

MS. BARROS: YOUR HONOR, I THINK THAT AS FAR AS THIS CASE, I HOPE HE DOESN'T HAVE TO APPEAR, IT IS CERTAINLY NOT A MOOT UNDER HOWARD AND HIS INDIVIDUAL CASE, HE DOES HAVE A COURT APPEARANCE SCHEDULED IF YOU WILL, NEXT OCTOBER.

ALTHOUGH HOPEFULLY, HE WON'T HAVE TO APPEAR FOR THAT HEARING. THAT BEING SAID, I THINK THE COURT SHOULD RULE SHACKLING AS TO MR. RING AS AN INDIVIDUAL WAS NOT WARRANTED AND SHOULD HE BE BROUGHT BEFORE THE COURT AGAIN, HE NOT BE SHACKLED, PARTICULARLY GIVEN HIS PHYSICAL AND MENTAL ISSUES THAT SHACKLING, I CAN TELL THE COURT IN HIS WORDS, IT WAS EXTREMELY PAINFUL.

THE COURT: WELL I CAN'T MAKE ANY PROSPECTIVE RULING. ALL I CAN DO IS DEAL WITH WHAT I HAVE ON MY PLATE TODAY, THAT IS THE APPEAL FROM THE MAGISTRATE JUDGE'S ORDER. I GUESS I'M REPEATING MYSELF, BASED ON THIS RECORD, INCLUDING THE MARSHALS POLICY, IT'S MY DETERMINATION THAT THE MAGISTRATE JUDGE MADE THE CORRECT RULING BASED ON THAT RECORD, SO THE APPEAL WOULD BE RESPECTFULLY DENIED. WHAT'S GOING TO HAPPEN IN THE FUTURE IS ANYBODY'S GUESS.

[59]

MR. PILCHAK: THANK YOU, YOUR HONOR.

THE COURT: ANYTHING ELSE TO ADD FOR THE RECORD OR OTHERWISE?

MS. BARROS: NO YOUR HONOR.

ALL RIGHT. THANKS. THANKS FOR THE ARGUMENT AND WE FINISHED BEFORE 5:00 O'CLOCK. WE'LL BE IN RECESS.

MR. PILCHAK: THANK YOU, YOUR HONOR.

(END OF PROCEEDING)