1
IN THE UNITED STATES DISTRICT COURT
2
FOR THE DISTRICT OF RHODE ISLAND
3

4

5 * * * * * * * * * * * * * * * *
* C.A. NO. 01-47
6 IN RE: *
*
7 * MARCH 16, 2004
SPECIAL PROCEEDING * 10:00 A.M.
8 *
* PROVIDENCE, RI
9 * * * * * * * * * * * * * * * *

10
BEFORE THE HONORABLE ERNEST C. TORRES
11
CHIEF DISTRICT JUDGE
12
(SHOW CAUSE HEARING)
13

14 APPEARANCES:

15
SPECIAL PROSECUTOR: DESISTO LAW OFFICES
16 BY: MARC DESISTO, ESQUIRE
211 ANGELL STREET
17 PROVIDENCE, RI 02903

18
FOR MR. TARICANI: EDWARDS & ANGELL
19 BY: WILLIAM ROBINSON, ESQUIRE
ONE FINANCIAL CENTER
20 PROVIDENCE, RI 02903
-AND-
21 SUSAN WEINER, ESQUIRE
NBC
22

23 COURT REPORTER: ANGELA M. GALLOGLY, RPR
ONE EXCHANGE TERRACE
24 PROVIDENCE, RI 02903

25 PROCEEDING REPORTED AND PRODUCED BY COMPUTER-AIDED
STENOGRAPHY

1 MARCH 16, 2004 - 10:00 A.M.

2 THE COURT: GOOD MORNING.

3 THE CLERK: THIS IS MISCELLANEOUS CASE 01-47,

4 SPECIAL PROCEEDING.

5 THE COURT: THE PURPOSE OF THIS HEARING, AS I

6 THINK EVERYONE KNOWS, IS TO DETERMINE WHETHER

7 MR. TARICANI OUGHT TO BE HELD IN CONTEMPT FOR ALLEGEDLY

8 REFUSING TO COMPLY WITH THIS COURT'S ORDER OF OCTOBER

9 2, 2003.

10 THAT ORDER DIRECTED HIM TO ANSWER THE SPECIAL

11 PROSECUTOR'S QUESTIONS REGARDING THE IDENTITY OF THE

12 INDIVIDUAL OR INDIVIDUALS WHO PROVIDED MR. TARICANI

13 WITH THE SO-CALLED CORRENTE TAPE IN APPARENT VIOLATION

14 OF THE PROTECTIVE ORDER THAT WAS ENTERED BY JUDGE

15 LAGUEUX IN THE SO-CALLED PLUNDER DOME CASE, AND IN AN

16 APPARENT EFFORT TO PREJUDICE POTENTIAL JURORS OR DELAY

17 THE TRIAL OR HAVE THE TRIAL MOVED OR WHO KNOWS WHAT

18 OTHER ULTERIOR PURPOSE THAT INDIVIDUAL MAY HAVE HAD.

19 I'LL NOTE AT THE OUTSET THAT I FIND CONDUCTING

20 THIS HEARING TO BE A VERY UNPLEASANT TASK, BECAUSE I

21 HAVE A GREAT RESPECT FOR MR. TARICANI AS A REPORTER.

22 I'VE, LIKE MANY RHODE ISLANDERS, HAVE WATCHED HIS WORK

23 OVER THE YEARS, AND I HAVE, BASED ON MY VERY LIMITED

24 ACQUAINTANCESHIP WITH HIM, I HAVE GREAT RESPECT FOR

25 MR. TARICANI AS A PERSON. BUT THIS IS A TASK THAT I'M

1 REQUIRED TO PERFORM HERE. MR. TARICANI'S STATUS AS A
2 REPORTER OR THE RESPECT THAT I HAVE FOR HIM DOES NOT
3 PLACE HIM ABOVE THE LAW. AND, THEREFORE, IF HE HAS
4 VIOLATED AN ORDER OF THIS COURT, I AM DUTY BOUND TO
5 TAKE APPROPRIATE ACTION.
6 THIS MATTER RAISES THREE ISSUES, TWO OF WHICH
7 ARE NOT RELEVANT TO THIS MORNING'S HEARING. THE FIRST
8 ISSUE IS WHETHER A REPORTER WHO IS A MATERIAL WITNESS,
9 AND APPARENTLY THE ONLY WITNESS TO A CRIMINAL ACT, HAS
10 A PRIVILEGE THAT IS NOT ACCORDED TO OTHER CITIZENS TO
11 REFUSE TO ANSWER QUESTIONS REGARDING THE IDENTITY OF
12 THE PERPETRATOR ON THE GROUND THAT THE PERPETRATOR WAS
13 A SOURCE OF INFORMATION TO WHOM THE REPORTER HAD
14 PROMISED CONFIDENTIALITY.
15 THE SECOND ISSUE IS IF NO SUCH PRIVILEGE EXISTS,
16 WHETHER MR. TARICANI SHOULD BE HELD IN CONTEMPT FOR
17 VIOLATING THIS COURT'S ORDER THAT REQUIRED HIM TO
18 ANSWER THE SPECIAL PROSECUTOR'S QUESTIONS REGARDING THE
19 IDENTITY OF THE INDIVIDUAL OR INDIVIDUALS WHO PROVIDED
20 HIM WITH THE CORRENTE VIDEOTAPE.
21 AND THE THIRD ISSUE IS IF MR. TARICANI IS IN
22 CONTEMPT, WHAT ACTION SHOULD THIS COURT TAKE.
23 NOW, I SAY THAT ONLY TWO OF THOSE ISSUES ARE
24 RELEVANT TO THIS HEARING, BECAUSE THE FIRST ISSUE HAS
25 ALREADY BEEN DECIDED, THE COURT PREVIOUSLY DECIDED THAT

1 QUESTION, THE QUESTION AS TO WHETHER MR. TARICANI HAS A
2 PRIVILEGE, IN A WRITTEN DECISION THAT WAS ISSUED ON
3 OCTOBER 2, 2003. THAT'S THE DECISION DIRECTING
4 MR. TARICANI TO ANSWER THE QUESTIONS. THIS COURT
5 GRANTED THE SPECIAL PROSECUTOR'S MOTION TO COMPEL HIM
6 TO ANSWER THOSE QUESTIONS, AND AT THAT TIME THIS COURT
7 EXPLAINED IN SOME DEPTH WHY IT WAS OF THE VIEW THAT
8 MR. TARICANI HAS NO PRIVILEGE TO REFUSE TO ANSWER THOSE
9 QUESTIONS. AND THAT OPINION HAS BEEN PUBLISHED, IT'S
10 BEEN PLACED ON THE COURT'S WEBSITE, IT'S A MATTER OF
11 RECORD. THE CLERK'S OFFICE HAS A SUPPLY OF HARD COPIES
12 THAT WOULD BE AVAILABLE TO ANYONE WHO IS INTERESTED IN
13 READING THAT DECISION AND UNDERSTANDING THE ISSUES AND
14 THE REASONS FOR THE COURT'S DECISION. THERE'S NO NEED
15 TO REPEAT WHAT'S IN THAT DECISION, NO NEED TO REPEAT
16 WHAT THE COURT SAID THERE, WHAT THIS COURT SAID, OR
17 WHAT THE SUPREME COURT SAID IN BRANZBURG WHEN IT
18 SPECIFICALLY HELD THAT A REPORTER HAS NO FIRST
19 AMENDMENT PRIVILEGE TO REFUSE TO DISCLOSE THE IDENTITY
20 OF A CONFIDENTIAL SOURCE WHERE IT IS RELEVANT TO A
21 LEGITIMATE CRIMINAL INVESTIGATION CONDUCTED BY A DULY
22 CONSTITUTED BODY. BRANZBURG ALSO SPECIFICALLY SAID
23 THAT A REPORTER HAS THE SAME OBLIGATION AS EVERY OTHER
24 CITIZEN TO DISCLOSE INFORMATION THAT THE REPORTER
25 POSSESSES REGARDING THE COMMISSION OF A CRIME. AND

1 THAT'S ESPECIALLY TRUE IN A CASE LIKE THIS WHERE IT WAS
2 UNLAWFUL FOR THIS PRESENTLY UNKNOWN INDIVIDUAL TO HAVE
3 PROVIDED THE INFORMATION IN THE FIRST PLACE. THIS IS
4 NOT A CASE WHERE THE SOURCE ACTED LAWFULLY AND OUT OF
5 SOME CIVIC-MINDED DESIRE TO EXPOSE WRONGDOING THAT
6 OTHERWISE MIGHT GO UNDETECTED. HERE, THE LAW
7 ENFORCEMENT AUTHORITIES HAD THE TAPE, IN FACT, THEY
8 MADE IT DURING THE COURSE OF THEIR INVESTIGATION, AND
9 THEY WERE IN THE PROCESS OF PROSECUTING THE REPUTED
10 WRONGDOERS. SO THE MANIFEST PURPOSE OF THE INDIVIDUAL
11 OR INDIVIDUALS WHO PROVIDED THIS TAPE TO MR. TARICANI
12 WAS TO INFLUENCE THE OUTCOME OF THAT TRIAL, TO SUBVERT
13 THE ADMINISTRATION OF CRIMINAL JUSTICE.
14 LIKE BRANZBURG, THIS IS NOT A CASE WHERE ANY
15 RESTRICTION WAS PURPORTEDLY PLACED ON MR. TARICANI, ON
16 WHAT MR. TARICANI COULD SAY OR BROADCAST. THE ORDER
17 WAS NOT DIRECTED AT HIM. IT'S NOT EVEN A CASE WHERE
18 ANYONE IS SEEKING TO PENALIZE MR. TARICANI FOR AIRING
19 THAT TAPE, EVEN THOUGH IT SEEMS TO ME IT WAS OBVIOUS
20 THAT DOING SO COULD HAVE TAINTED THE JURY POOL, THEREBY
21 PREJUDICING THE PARTIES' RIGHT TO A FAIR TRIAL OR
22 CAUSING A POSTPONEMENT OR OTHERWISE INTERFERING WITH
23 THAT CASE.
24 THE ONLY REASON THAT MR. TARICANI IS HERE IS
25 THAT HE REFUSED TO COMPLY WITH A COURT ORDER DIRECTING

1 HIM TO ANSWER THE SPECIAL PROSECUTOR'S QUESTIONS
2 REGARDING THE IDENTITY OF THE INDIVIDUAL OR INDIVIDUALS
3 WHO PROVIDED HIM WITH THE VIDEOTAPE IN VIOLATION OF THE
4 PROTECTIVE ORDER ENTERED BY JUDGE LAGUEUX. AND THE
5 REASON THAT MR. TARICANI HAS GIVEN IS THAT HE CLAIMS
6 THAT HE HAS A REPORTER'S PRIVILEGE TO REFUSE TO ANSWER.
7 AND, AGAIN, WITHOUT BELABORING THE POINT, I THINK, AS
8 INDICATED IN THE COURT'S PRIOR DECISION, RECOGNITION OF
9 SUCH A PRIVILEGE WOULD HAVE SOME VERY SOBERING
10 IMPLICATIONS. FOR EXAMPLE, WHAT HAPPENS IF A TERRORIST
11 TELLS A REPORTER ON THE CONDITION OF CONFIDENTIALITY
12 THAT HIS ORGANIZATION INTENDS TO PLANT NUMEROUS BOMBS
13 IN PUBLIC PLACES, WOULD THE REPORTER HAVE A PRIVILEGE
14 NOT TO IDENTIFY THAT SOURCE, AND THEREBY PREVENT LAW
15 ENFORCEMENT AUTHORITIES FROM APPREHENDING THAT PERSON
16 AND PREVENTING THAT KIND OF INJURY TO OTHERS. OR
17 PERHAPS MORE ANALOGOUS TO THIS SITUATION, IF A
18 TERRORIST PROVIDES A JOURNALIST WITH A VIDEOTAPE OF AN
19 INCIDENT LIKE THE SLITTING OF DANIEL PEARL'S THROAT,
20 THE REPORTER WHOSE THROAT WAS SLIT BY TERRORISTS IN
21 PAKISTAN, ON THE CONDITION THAT THE TERRORIST'S
22 IDENTITY WOULD BE HELD CONFIDENTIAL, DOES THE REPORTER
23 THEN HAVE THE PRIVILEGE NOT TO IDENTIFY THAT PERSON SO
24 THAT LAW ENFORCEMENT AUTHORITIES COULD APPREHEND HIM
25 AND PUNISH THAT PERSON.

1 SO THE TWO QUESTIONS -- AS I SAID, THAT QUESTION
2 HAS BEEN ANSWERED AND MR. TARICANI CERTAINLY HAS A
3 RIGHT TO APPEAL THE COURT'S DECISION -- BUT THE TWO
4 QUESTIONS THAT ARE GERMANE TO THIS HEARING ARE WHETHER
5 MR. TARICANI HAS VIOLATED THE COURT'S ORDER, AND IF SO,
6 WHAT ACTION THE COURT OUGHT TO TAKE.
7 NOW, AS TO THE VIOLATION, MR. DESISTO, THIS WAS
8 PRECIPITATED BY YOUR MOTION TO ADJUDGE MR. TARICANI IN
9 CONTEMPT. IS THERE ANY EVIDENCE YOU HAVE TO PRESENT OR
10 ANY DISPUTE ABOUT THE FACT OF THE VIOLATION?
11 MR. DESISTO: YOUR HONOR, I DON'T THINK THERE IS
12 ANY DISPUTE ABOUT THE VIOLATION. I WILL REITERATE THAT
13 ON FEBRUARY 13, 2004, I HAD MR. TARICANI IN MY OFFICE,
14 FOR AN UNDER OATH DEPOSITION. AT THAT DEPOSITION, HE
15 REFUSED TO ANSWER ANY QUESTIONS RELATED TO THE SOURCE
16 OF THE TAPE. AT THAT DEPOSITION, I ASKED HIM IF HE
17 UNDERSTOOD YOUR ORDER, I READ THE CONCLUDING REMARKS OF
18 YOUR ORDER WHICH ORDERED HIM TO TESTIFY; HE SAID HE DID
19 UNDERSTAND IT. I ASKED HIM IF HE HAD GONE BACK TO HIS
20 SOURCE TO REEXAMINE THE PROMISE, IN VIEW OF YOUR ORDER
21 THAT HE ANSWER THE QUESTIONS, AND HE REFUSED TO ANSWER
22 THAT QUESTION.
23 I'VE PROVIDED THAT TRANSCRIPT TO YOUR HONOR, AND
24 IN THE PAPERS FILED BY MR. TARICANI'S ATTORNEYS, THERE
25 IS AN ADMISSION THAT HE HAS REFUSED TO COMPLY WITH THE

1 ORDER AND WILL CONTINUE TO REFUSE TO COMPLY WITH IT.
2 SO BASED UPON THAT, I WOULD ASK THAT HE BE ADJUDGED IN
3 CONTEMPT.
4 THE COURT: MR. ROBINSON, IS THERE ANY DISPUTE
5 ABOUT WHETHER MR. TARICANI HAS REFUSED TO ANSWER THE
6 QUESTIONS IN ACCORDANCE WITH THE COURT'S ORDER?
7 MR. ROBINSON: YOUR HONOR, THERE IS NO DISPUTE
8 AS TO THE REPRESENTATIONS MADE BY MR. DESISTO.
9 FOR THE RECORD, MY UNDERSTANDING IS THAT THE
10 DEPOSITION OF THE FEBRUARY 13 -- THE TRANSCRIPT OF THE
11 FEBRUARY 13 DEPOSITION HAS BEEN SUBMITTED TO THE COURT.
12 AS YOUR HONOR KNOWS, IT HAS NOT BEEN PROVIDED TO
13 COUNSEL, BUT I WAS PRESENT AT THE DEPOSITION, AND
14 MR. DESISTO'S REPRESENTATIONS AS TO WHAT HAPPENED ARE
15 MATERIALLY CORRECT.
16 THE COURT: WELL, SINCE THERE IS NO DISPUTE THAT
17 MR. TARICANI WAS AWARE OF THE ORDER, AND THAT HE HAS
18 PERSISTED IN HIS REFUSAL TO COMPLY WITH THE ORDER, IT'S
19 CLEAR THAT MR. TARICANI IS IN CONTEMPT. SO THE
20 QUESTION THEN BECOMES WHAT ACTION DOES THE COURT TAKE.
21 THIS IS A CIVIL CONTEMPT PROCEEDING, I SHOULD
22 NOTE AT THE OUTSET. WHETHER IT DEVELOPS INTO A
23 CRIMINAL CONTEMPT PROCEEDING, I GUESS DEPENDS ON WHAT
24 HAPPENS IN THE FUTURE. IN CIVIL CONTEMPT, AS COUNSEL
25 KNOW, THE OBJECTIVE IS TO PERSUADE OR INDUCE THE PARTY

1 VIOLATING THE ORDER TO COMPLY WITH THE ORDER.
2 GENERALLY, THAT IS DONE BY IMPRISONMENT OR BY REQUIRING
3 A PARTY TO PAY A SPECIFIED DOLLAR AMOUNT UNTIL THE
4 PARTY AGREES TO COMPLY. IN A CASE OF CIVIL CONTEMPT, A
5 PARTY CAN CHOOSE TO AVOID OR CALL A HALT TO THE
6 CONSEQUENCES BY COMPLYING WITH THE ORDER, AND FOR THAT
7 REASON, IT IS SOMETIMES SAID THAT AN INDIVIDUAL HELD IN
8 CIVIL CONTEMPT CARRIES THE KEYS TO THE JAILHOUSE IN HIS
9 POCKET. MEANING THAT AT ANY TIME THE PARTY AGREES TO
10 COMPLY, HE CAN OBTAIN HIS RELEASE.
11 BY CONTRAST, IN CRIMINAL CONTEMPT, A PARTY IS
12 PUNISHED FOR NONCOMPLIANCE. AND UNLIKE THE CASE OF
13 CIVIL CONTEMPT, ONCE THE PUNISHMENT IS IMPOSED FOR
14 CRIMINAL CONTEMPT, THE PARTY HELD IN CONTEMPT NO LONGER
15 HAS THE OPTION OF AVOIDING THE CONSEQUENCES BY AGREEING
16 TO COMPLY; IT'S TOO LATE. AND LIKE ANY OTHER CRIMINAL
17 PROCEEDING, THE ONLY RECOURSE THAT PARTY HAS IS
18 APPEALING THE SENTENCE THAT WAS IMPOSED.
19 ORDINARILY IN A CASE LIKE THIS WHERE THE DELAY
20 IN COMPLYING THREATENS TO PREJUDICE OTHERS AS WELL AS
21 THE JUDICIAL PROCESS ITSELF, A RECALCITRANT WITNESS
22 WOULD BE INCARCERATED UNTIL HE AGREED TO ANSWER. I
23 HAVE SERIOUSLY CONSIDERED THAT OPTION. IN FACT, THAT
24 WAS MY INITIAL INCLINATION, TO PLACE MR. TARICANI IN
25 PRISON UNTIL HE AGREED TO COMPLY WITH THE ORDER. BUT

1 AT LEAST AT THIS TIME I REJECT THAT OPTION FOR TWO
2 PRINCIPAL REASONS: FIRST OF ALL, IT APPEARS THAT
3 INCARCERATION COULD ENDANGER MR. TARICANI'S HEALTH.
4 THIS ISSUE HAS NOT BEEN FULLY EXPLORED, BUT THE COURT
5 IS AWARE THAT MR. TARICANI HAS HAD A HEART TRANSPLANT,
6 AND HE HAS SUBMITTED A LETTER FROM HIS ATTENDING
7 PHYSICIAN THAT HE IS TAKING MEDICATIONS TO PREVENT THE
8 REJECTION THAT RENDERED HIM PARTICULARLY SUSCEPTIBLE TO
9 INFECTION IF HE IS EXPOSED IN AN ENVIRONMENT WHERE
10 THERE ARE COMMUNICABLE DISEASES, AND PRISON MAY BE THAT
11 TYPE OF ENVIRONMENT.
12 ON THE OTHER HAND, AS I SAY THIS HASN'T BEEN
13 FULLY EXPLORED, I'M ALSO AWARE THAT MR. TARICANI LEADS
14 AN EXTREMELY ACTIVE LIFE, HE HASN'T SEEMED TO HAVE
15 MISSED A BEAT IN PERFORMING HIS ARDUOUS DUTIES, AND, IN
16 FACT, THIS HEARING WAS RESCHEDULED TO TODAY INSTEAD OF
17 FRIDAY, WHEN THE COURT ORIGINALLY INTENDED TO HAVE IT,
18 BECAUSE OF A REQUEST THAT IT BE SCHEDULED NOW DUE TO
19 THE FACT THAT MR. TARICANI HAS A PLANNED VACATION TO
20 FRANCE, I BELIEVE. SO I'M SURE IT'S A DEBATABLE
21 QUESTION AS TO HOW MUCH MR. TARICANI'S HEALTH MIGHT BE
22 ENDANGERED IF HE WERE IMPRISONED, BUT THERE IS ENOUGH
23 OF A QUESTION IN MY MIND AT THIS POINT TO REJECT THAT
24 OPTION, PARTLY FOR THAT REASON.
25 THE OTHER REASON THAT I REJECT THAT OPTION IS

1 THAT I BELIEVE THAT MR. TARICANI'S MOTIVE IS, AT LEAST
2 IN HIS MIND, A PROPER MOTIVE. I BELIEVE THAT HE
3 GENUINELY FEELS THAT HE HAS SOME BASIS FOR CLAIMING
4 THIS PRIVILEGE, AND THAT HE'S TRYING TO HONOR WHAT, IN
5 MY JUDGMENT, IS APPARENTLY AN ILL-ADVISED PROMISE THAT
6 HE APPARENTLY MADE TO HIS SOURCE. WHY HE REFUSED TO
7 ANSWER MR. DESISTO'S QUESTION AS TO WHETHER OR NOT HE
8 HAD GONE BACK TO THE SOURCE TO SEE IF THE SOURCE WOULD
9 RELEASE HIM FROM THIS OBLIGATION, PARTICULARLY, SINCE I
10 WOULD ASSUME THE SOURCE NEGLECTED TO TELL HIM THAT THE
11 TAPE WAS BEING PROVIDED IN DIRECT CONTRAVENTION OF THE
12 COURT ORDER, I DON'T KNOW. BUT I'D LIKE TO THINK AT
13 LEAST, AND I DO THINK AT THE PRESENT TIME, THAT
14 MR. TARICANI DID NOT KNOW WHEN HE AIRED THAT TAPE OR
15 PROMISED CONFIDENTIALITY, THAT THERE WAS A PROTECTIVE
16 ORDER PROHIBITING THE DISSEMINATION OF THAT TAPE.
17 AGAIN, I SUPPOSE THAT'S A DEBATABLE ISSUE, I DON'T
18 KNOW, IT'S NOT REALLY -- IT DOESN'T REALLY CHANGE MY
19 VIEW AT THIS POINT AS TO WHAT SANCTION OUGHT TO BE
20 IMPOSED.
21 SO FOR THOSE TWO REASONS PRIMARILY, INSTEAD OF
22 INCARCERATING MR. TARICANI, I'M GOING TO IMPOSE A
23 MONETARY SANCTION FOR EACH DAY THAT THE VIOLATION
24 CONTINUES. AND AMONG THE FACTORS THAT I HAVE
25 CONSIDERED IN DETERMINING THE AMOUNT OF THE MONETARY

1 SANCTION ARE, FIRST OF ALL, WHETHER THE SANCTION WOULD
2 BE SUFFICIENT TO PROVIDE A MEANINGFUL INDUCEMENT FOR
3 MR. TARICANI TO COMPLY WITH THAT ORDER, AS THE PURPOSE
4 OF CIVIL CONTEMPT OR SANCTIONS IMPOSED IN CIVIL
5 CONTEMPT IS TO INDUCE COMPLIANCE. AND THE SECOND
6 CONSIDERATION HERE IS WHETHER THE SANCTION IS
7 PROPORTIONAL TO THE HARM CAUSED BY CONTINUING VIOLATION
8 OF THAT ORDER, AND I'LL GIVE COUNSEL AN OPPORTUNITY TO
9 BE HEARD ON THOSE TWO QUESTIONS, IF YOU WISH.
10 DO YOU HAVE ANYTHING TO SAY ON THOSE POINTS ON
11 THE ISSUE OF SANCTIONS IN GENERAL, MR. DESISTO?
12 MR. DESISTO: I DO NOT, YOUR HONOR.
13 THE COURT: MR. ROBINSON?
14 MR. ROBINSON: IF I MAY, YOUR HONOR. I WILL BE
15 BRIEF.
16 I ASSUME YOUR HONOR HAS READ OUR SUBMISSIONS. I
17 WOULD, IN THE FIRST INSTANCE REQUEST AT LEAST, IF I
18 MAY, THAT YOUR HONOR SIMPLY ISSUE A CONTEMPT CITATION
19 WITHOUT SANCTION. THERE IS SOME PRECEDENT IN THE FIRST
20 CIRCUIT FOR THAT. FROM YOUR REMARKS OF A MOMENT AGO, I
21 INFER, PERHAPS INCORRECTLY, THAT YOU HAVE CROSSED THAT
22 BRIDGE, IN WHICH CASE I WOULD EMPHASIZE THE IMMEDIACY
23 OF AN APPEAL AS TO TODAY'S PROCEEDINGS AND WOULD
24 RESPECTFULLY REQUEST A STAY OF ANY SANCTION.
25 IN OUR PAPERS WE SUBMITTED A GREAT DEAL OF

1 AUTHORITY TO STAYING ACTIVITY FOR AN APPEAL TO BE HEARD
2 BY THE FIRST CIRCUIT. AS YOUR HONOR KNOWS, AND AS THE
3 RECORD INDICATES, WE DID, ON MR. TARICANI'S BEHALF,
4 ATTEMPT AN INTERLOCUTORY APPEAL FROM THIS COURT'S
5 EARLIER ORDER. THAT WAS REJECTED BY THE FIRST CIRCUIT,
6 AND THE REASON THAT WE ARE HERE TODAY, UNDERLYING
7 REASON, IT HAS NOTHING TO DO WITH A LACK OF RESPECT ON
8 MR. TARICANI'S PART FOR THE COURT OR FOR THE JUDICIAL
9 PROCESS IN GENERAL, BUT SIMPLY BECAUSE THE FIRST
10 CIRCUIT HAS TOLD US IN NO UNCERTAIN TERMS, THAT THE
11 ONLY WAY MR. TARICANI'S ASSERTED CONSTITUTIONAL COMMON
12 LAW PRIVILEGE CAN BE -- HIS ASSERTION OF SAME CAN BE
13 REVIEWED IS BY A FINDING OF CONTEMPT, AND, THEREFORE,
14 WE ARE IN AN ANOMALOUS POSITION OF HAVING GREAT RESPECT
15 FOR THE COURT, AND I DO SPEAK FOR MR. TARICANI, YET
16 HAVING TO BE IN CONTEMPT, BECAUSE THAT IS WHAT THE
17 PROCEDURE REQUIRES.
18 SO GIVEN THE NONFRIVOLOUS NATURE, I THINK,
19 FRANKLY, PERSUASIVE NATURE, BUT I'M AN ADVOCATE OF THE
20 ASSERTED PRIVILEGE IN THIS CASE AND ITS CONSTITUTIONAL,
21 NOT TO MENTION COMMON LAW UNDERPINNING, I WOULD
22 RESPECTFULLY SUGGEST, A, THAT THE SANCTION SHOULD BE
23 MODERATE, AND, MORE IMPORTANTLY, PERHAPS, THAT IT BE
24 STAYED PENDING PROMPT APPEAL TO THE FIRST CIRCUIT AND
25 DISPOSITION BY THAT COURT AND PERHAPS ANOTHER COURT.

1 I WOULD ALSO, YOUR HONOR, WITH GREAT RESPECT AND
2 WITH SINCERE RESPECT FOR THE COURT AND FOR MY GOOD
3 FRIEND AND COLLEAGUE, MR. DESISTO, SIMPLY FOR THE
4 RECORD STATE THAT ONE OF THE ARGUMENTS THAT WE HAVE
5 ASSERTED IN OUR PAPERS AND BEFORE THE FIRST CIRCUIT
6 ONCE AND THAT WE WILL ASSERT AGAIN, IS THAT THE
7 AUTHORITY OF THE SPECIAL PROSECUTOR HAS BEEN QUESTIONED
8 BY US, IN PLAIN ENGLISH, THAT HIS APPOINTMENT WAS
9 IMPROPER, BECAUSE IT WAS MADE DIRECTLY BY THE COURT
10 WITHOUT REFERENCE TO THE DEPARTMENT OF JUSTICE. I SAY
11 THAT, AGAIN, WITH RESPECT. BUT FOR ALL OF THESE
12 REASONS, AND MOST ESPECIALLY, I THINK, THE SUBSTANTIAL
13 AND NOVEL ISSUE THAT'S PRESENTED IN THIS CASE OF A
14 NEWSMAN'S PRIVILEGE AND ITS CONSTITUTIONAL
15 UNDERPINNINGS AND THE FACT THAT THE FIRST CIRCUIT
16 CLEARLY SEEMS DESIROUS, IT WILL HAVE NO CHOICE ONCE A
17 FINAL ORDER ISSUES HERE TO ADDRESS THIS ISSUE
18 DEFINITIVELY, I WOULD ASK FOR A STAY OF ANY SANCTION.
19 I THANK YOU FOR YOUR ATTENTION.
20 MR. DESISTO: MAY I BE HEARD, YOUR HONOR?
21 THE COURT: YES.
22 MR. DESISTO: IN VIEW OF MR. ROBINSON'S REQUEST
23 FOR A STAY, I JUST WANT TO NOTE MY OBJECTION TO A STAY
24 AT THIS TIME.
25 THE COURT: DO YOU HAVE ANY REASONS YOU WOULD

1 LIKE TO GIVE FOR THAT, MR. DESISTO?

2 MR. DESISTO: WELL, IN VIEW OF YOUR HONOR'S

3 DETERMINATION THAT INCARCERATION IS NOT APPROPRIATE AT

4 THIS TIME, A MONETARY FINE IS NOT THE HARSHEST OF

5 INDUCEMENTS, AND I WOULD ASK THAT IN VIEW OF THAT, IN

6 ORDER TO INDUCE COMPLIANCE AT THE EARLIEST TIME, THAT A

7 STAY NOT BE GRANTED.

8 THE COURT: MR. ROBINSON, ONE QUESTION THAT IS

9 RAISED BY THE MATTER OF THE SANCTION, I DON'T KNOW IF

10 YOU KNOW THE ANSWER TO THIS, BUT IN DETERMINING THE

11 AMOUNT OF THE SANCTION, OBVIOUSLY, ONE OF THE THINGS

12 THE COURT LOOKS AT IS THE FINANCIAL RESOURCES OF THE

13 PERSON. I NOTE THAT BOTH CHANNEL 10 AND NBC, THE

14 NETWORK, HAVE BEEN INVOLVED IN THIS CASE, THEY'VE HAD

15 COUNSEL THAT HAVE APPEARED AT VARIOUS STAGES OF THE

16 PROCEEDINGS. DO YOU KNOW WHO WOULD BE RESPONSIBLE FOR

17 THE SANCTION? WOULD THIS BE MR. TARICANI'S

18 RESPONSIBILITY OR IS HE SUPPORTED BY EITHER CHANNEL 10

19 OR THE NETWORK?

20 MR. ROBINSON: IN ALL TRUTHFULNESS, YOUR HONOR,

21 I DON'T KNOW THE FACTUAL ANSWER TO THE QUESTION IN THIS

22 CASE. I CERTAINLY COULD INQUIRE, THOUGH I DOUBT IF I

23 COULD DO SO IMMEDIATELY. I THINK AS A MATTER OF

24 TRADITION AND AS A GENERALIZATION, BASED ON MY

25 KNOWLEDGE OF THE CASES AND JUST KNOWLEDGE IN GENERAL,

1 MEDIA ORGANIZATIONS TEND TO STAND BEHIND THEIR
2 EMPLOYEES. BUT I MAKE THAT CLEAR AS A GENERALIZATION
3 AND NOT IN DIRECT ANSWER TO YOUR HONOR'S QUESTION.
4 THE SECOND POINT, IF I MAY MAKE, YOUR HONOR,
5 MOST OF THE CASES CITED IN OUR BRIEF WHERE A STAY HAS
6 BEEN ORDERED AS TO SANCTIONS, DEALT WITH MONETARY
7 SANCTIONS, NOT ALL, BUT SOME DEALT WITH IMPRISONMENT,
8 BUT MANY, AND PROBABLY MOST OF THE CASES WE DID CITE
9 DID UPHOLD OR GRANT A STAY IN THE FACE OF A MONETARY
10 SANCTION.
11 AND I REITERATE, YOUR HONOR, AND I WILL BE
12 BRIEF, I DO THINK IN THIS CASE WHERE CLEARLY NOVEL
13 ISSUES ARE IMPORTANT AND WHERE THE PENDENCY OF THIS
14 LITIGATION IS SOMEWHAT LENGTHY, A BRIEF STAY, AND WE
15 WOULD BE MORE THAN WILLING TO HAVE AN EXPEDITED APPEAL
16 PROCESS BEFORE THE FIRST CIRCUIT, WOULD BE APPROPRIATE.
17 THANK YOU.
18 THE COURT: WELL, TWO POINTS BEFORE I EXAMINE
19 THE FACTORS REGARDING THE MAGNITUDE OF THE FINANCIAL
20 PENALTY. FIRST OF ALL, I DON'T AGREE WITH YOU,
21 MR. ROBINSON, THAT THERE IS ANYTHING PARTICULARLY NOVEL
22 ABOUT THIS CASE. I THINK THIS IS AN ISSUE THAT HAS
23 ARISEN MANY TIMES BEFORE, AND, IN FACT, IS VERY SIMILAR
24 TO THE ISSUE DEALT WITH BY THE SUPREME COURT IN THE
25 BRANZBURG CASE. SECOND, NOT THAT THIS HAS ANY BEARING

1 ON THIS CASE, THIS IS MORE OR LESS WATER UNDER THE
2 BRIDGE, BUT THE REASON THE COURT ORDERED A SPECIAL
3 PROSECUTOR IN THIS CASE RATHER THAN HAVING THE JUSTICE
4 DEPARTMENT HANDLE IT, AS WOULD ORDINARILY BE THE CASE,
5 IS THAT THE U.S. ATTORNEY'S OFFICE WAS A PARTY TO THE
6 UNDERLYING CRIMINAL CASE, AND INDIVIDUALS IN THE U.S.
7 ATTORNEY'S OFFICE HAD ACCESS TO THIS TAPE. SO IT WOULD
8 BE VERY UNSEEMLY TO HAVE THE U.S. ATTORNEY'S OFFICE
9 INVESTIGATING WHO PROVIDED THE TAPE WHEN PEOPLE
10 ASSOCIATED WITH THAT OFFICE WERE ON THE LIST OF
11 POTENTIAL SUSPECTS, AND I DON'T THINK THE U.S. ATTORNEY
12 WOULD HAVE ACCEPTED THE INVESTIGATION EVEN IF THE COURT
13 HAD REFERRED IT.
14 GETTING BACK TO THE QUESTION ON THE AMOUNT OF
15 THE SANCTION TO BE IMPOSED. THE FIRST FACTOR THAT I
16 MENTIONED IS THAT THE SANCTION, IF IT'S A MONETARY
17 SANCTION, HAS TO BE MEANINGFUL ENOUGH TO INDUCE THE
18 PARTY TO COMPLY WITH THE ORDER, AND IN DETERMINING HOW
19 MUCH IS REQUIRED TO ACHIEVE THAT OBJECTIVE, THE
20 FINANCIAL RESOURCES OF THE PARTY PAYING THE SANCTION IS
21 CERTAINLY ONE CONSIDERATION.
22 NOW IN THIS CASE IT'S NOT CLEAR WHO WOULD BEAR
23 THAT BURDEN, LIKE MR. ROBINSON, I WOULD ASSUME THAT
24 EITHER CHANNEL 10 OR THE NETWORK WOULD BEAR IT, AND IF
25 THAT WERE THE CASE, THEN THE AMOUNT NECESSARY TO INDUCE

1 COMPLIANCE WOULD BE MUCH GREATER THAN IF MR. TARICANI
2 IS BEARING THE BURDEN. BUT SINCE I DON'T KNOW, AND NO
3 ONE HERE, MR. ROBINSON DOESN'T KNOW EITHER, WHO IS
4 GOING TO BEAR IT, I'M GOING TO GIVE MR. TARICANI THE
5 BENEFIT OF THE DOUBT OR WHOEVER THE BENEFIT OF THE
6 DOUBT, AND ASSUME THAT IT IS MR. TARICANI WHO IS GOING
7 TO BEAR THE BURDEN, AND I WILL PROCEED ON THAT
8 ASSUMPTION.
9 THE SECOND FACTOR IS THE MAGNITUDE OF THE HARM
10 CAUSED BY CONTINUING VIOLATION OF THE ORDER. AND IT
11 APPEARS THAT MR. TARICANI'S CONTINUING VIOLATION OF
12 THAT OCTOBER 2, 2003 ORDER THREATENS TWO KINDS OF HARM.
13 FIRST OF ALL, IT CLEARLY HARMS THE SPECIAL PROSECUTOR'S
14 INVESTIGATION. SINCE MR. TARICANI APPEARS TO BE THE
15 ONLY WITNESS WHO CAN IDENTIFY THE VIOLATOR OF THE
16 PROTECTIVE ORDER, UNLESS AND UNTIL THAT ANSWER IS
17 FURNISHED, THERE IS NOTHING THE SPECIAL PROSECUTOR
18 APPEARS TO BE ABLE TO DO.
19 AND, SECOND, IT POSES HARM TO THE JUDICIAL
20 PROCESS ITSELF. NOW, AS FAR AS THE HARM TO THE
21 INVESTIGATION IS CONCERNED, I WOULD NOTE THAT THIS
22 INVESTIGATION HAS BEEN ONGOING SINCE MAY 31 OF 2001,
23 THAT'S WHEN THE SPECIAL PROSECUTOR WAS FIRST APPOINTED,
24 AND THE INVESTIGATION COULDN'T REALLY GET ON TRACK
25 UNTIL AFTER THE PLUNDER DOME TRIAL HAD BEEN COMPLETED.

1 THAT SPECIAL PROSECUTOR'S APPOINTMENT OCCURRED, IF I
2 REMEMBER CORRECTLY, EITHER ON THE EAVE OF OR DURING THE
3 SO-CALLED PLUNDER DOME TRIAL. SINCE THAT TIME, THE
4 INVESTIGATION HAS BEEN GREATLY PROLONGED BY THE FACT
5 THAT IN AN ATTEMPT TO AVOID HAVING TO ASK MR. TARICANI
6 TO IDENTIFY HIS SOURCE, THE SPECIAL PROSECUTOR MADE
7 CONSIDERABLE EFFORTS, IN MY VIEW PROPERLY SO, TO OBTAIN
8 THAT INFORMATION FROM OTHERS. OBVIOUSLY, THE SIMPLEST
9 AND MOST DIRECT ROUTE FOR THE SPECIAL PROSECUTOR TO
10 HAVE FOLLOWED IN CONDUCTING HIS INVESTIGATION WOULD
11 HAVE BEEN TO GO DIRECTLY TO THE PERSON WHO CLEARLY
12 POSSESSED THE INFORMATION BEING SOUGHT, AND THAT WAS
13 MR. TARICANI. INSTEAD, ALTHOUGH NOT REQUIRED TO DO SO,
14 THE SPECIAL PROSECUTOR, IN DEFERENCE TO MR. TARICANI'S
15 ANTICIPATED RELUCTANCE TO IDENTIFY HIS SOURCE, SPENT A
16 GREAT DEAL OF TIME AND INCURRED ADDITIONAL EXPENSE IN
17 INTERVIEWING, I BELIEVE IT WAS APPROXIMATELY TEN OTHER
18 INDIVIDUALS, SPECIAL PROSECUTOR HAS INDICATED, WHO THE
19 SPECIAL PROSECUTOR BELIEVED HAD SOME INFORMATION
20 REGARDING THIS MATTER OR MIGHT HAVE SOME INFORMATION
21 REGARDING THIS MATTER. THE SPECIAL PROSECUTOR ALSO
22 DEPOSED ABOUT A HALF-DOZEN INDIVIDUALS, AND NEEDLESS TO
23 SAY, THOSE EFFORTS HAVE BEEN UNSUCCESSFUL.
24 THE INVESTIGATION HAS BEEN FURTHER DELAYED AND
25 THE SPECIAL PROSECUTOR'S TIME AND ENERGIES HAVE BEEN

1 FURTHER DIVERTED, BY THE VARIOUS MOTIONS FILED WITH
2 RESPECT TO THIS MATTER, THE HEARINGS THAT HAVE BEEN
3 HELD, INCLUDING THIS HEARING, THE DECISIONS THAT THE
4 COURT HAS RENDERED AND THE OTHER EFFORTS FOCUSED ON THE
5 REFUSAL TO ANSWER THE SPECIAL PROSECUTOR'S QUESTION.
6 ADDITIONAL DELAY AT THIS POINT IS GOING TO MAKE
7 IT ALL THE MORE DIFFICULT FOR THE SPECIAL PROSECUTOR TO
8 SUCCESSFULLY CONCLUDE THIS INVESTIGATION. DELAY ALWAYS
9 HARMS A CRIMINAL INVESTIGATION. WITNESSES' MEMORIES
10 MAY BECOME DIM, EVIDENCE DISAPPEARS, A LOT OF THINGS
11 HAPPEN AS A RESULT OF DELAY. AND THAT BY DELAYING AND
12 IMPAIRING THIS INVESTIGATION, THE PUBLIC INTEREST IN
13 SEEING THAT THE INDIVIDUAL OR INDIVIDUALS WHO COMMITTED
14 THIS CRIMINAL ACT ARE APPREHENDED AND PUNISHED, WILL
15 ALSO SUFFER.
16 AS FAR AS THE JUDICIAL PROCESS IS CONCERNED, OUR
17 SYSTEM IS BASED ON RULE OF LAW. AND AT THE HEART OF
18 THAT SYSTEM IS THE WELL-ESTABLISHED PRINCIPLE THAT
19 COURT ORDERS MUST BE COMPLIED WITH UNLESS THEY ARE
20 VACATED, EITHER BY THE COURT ENTERING THE ORDER OR BY
21 AN APPELLATE COURT. IF EVERYONE IS FREE TO DISREGARD
22 COURT ORDERS AND DECIDE FOR THEMSELVES WHAT THE LAW
23 REQUIRES, NO MATTER HOW PURE THEIR MOTIVE MAY BE FOR
24 DOING SO, IT BREEDS DISRESPECT FOR THE LAW AND WOULD
25 RESULT IN CHAOS. WE WOULD NOT HAVE A SYSTEM OF RULE OF

1 LAW. WE WOULD NO LONGER BE ABLE TO RESOLVE DISPUTES IN
2 AN ORDERLY WAY BASED ON RULE OF LAW.
3 NOW, MR. TARICANI ARGUES THROUGH HIS COUNSEL
4 THAT ANY SANCTION IMPOSED SHOULD BE MINIMAL, BECAUSE,
5 AMONG OTHER THINGS, THE ASSISTANT UNITED STATES
6 ATTORNEY WHO SHOWED APPARENTLY THIS SAME TAPE TO A
7 FAMILY MEMBER AND A FRIEND, WAS SANCTIONED ONLY $500,
8 PLUS HE WAS GIVEN A 30-DAY SUSPENSION, AND HE WAS
9 SUBJECT TO THE PROTECTIVE ORDER, WHICH MR. TARICANI WAS
10 NOT. I DON'T BELIEVE THAT IS AN APT COMPARISON FOR
11 SEVERAL REASONS.
12 FIRST OF ALL, IN RETROSPECT, I THINK THAT
13 PERHAPS THE SANCTION IMPOSED ON THAT ASSISTANT UNITED
14 STATES ATTORNEY MAY HAVE BEEN TOO LENIENT. AND IT WAS
15 -- ONE OF THE FACTORS THAT ENTERED INTO THE COURT'S
16 DECISION AT THAT TIME, WAS I ANTICIPATED THAT THERE
17 WOULD BE SOME ACTION TAKEN BY THE JUSTICE DEPARTMENT,
18 SOME DISCIPLINARY ACTION, I DON'T KNOW WHETHER THAT'S
19 HAPPENED OR NOT, AND AT THIS POINT IT DOESN'T REALLY
20 MATTER. THE SECOND REASON I DON'T THINK THAT'S AN APT
21 COMPARISON IS THIS COURT HAS NO AUTHORITY TO SUSPEND
22 MR. TARICANI FROM HIS POSITION AS I DID WITH THE
23 ASSISTANT UNITED STATES ATTORNEY.
24 THIRD, AND PERHAPS MOST IMPORTANT, THE MAGNITUDE
25 OF THE HARM INVOLVED IN THE TWO CASES IS RADICALLY

1 DIFFERENT, OR AT LEAST THE MAGNITUDE OF THE POTENTIAL
2 HARM. IN THE CASE OF THE ASSISTANT UNITED STATES
3 ATTORNEY, THE TAPE WAS SHOWN IN THE PRIVACY OF HIS HOME
4 TO ONLY TWO OR THREE PEOPLE WHO WERE RELATIVES OR CLOSE
5 FRIENDS. HERE THE TAPE WAS TELEVISED TO THOUSANDS OR
6 MAYBE EVEN HUNDREDS OF THOUSANDS, I DON'T KNOW WHAT THE
7 CHANNEL 10 VIEWERSHIP IS, AT LEAST THOUSANDS OF
8 VIEWERS, COMPRISING THE POOL FROM WHICH THE JURY IN
9 THIS CASE WAS GOING TO BE SELECTED, AND WHILE
10 MR. TARICANI IS NOT CHARGED WITH CONTEMPT FOR VIOLATING
11 THE PROTECTIVE ORDER, HIS REFUSAL TO COMPLY WITH THE
12 OCTOBER 2, 2003 ORDER IS OBSTRUCTING THE INVESTIGATION
13 TO DETERMINE WHO DID VIOLATE THE PROTECTIVE ORDER AND
14 TO HOLD THAT PERSON ACCOUNTABLE.
15 ANOTHER REASON THAT I DON'T THINK THE COMPARISON
16 IS AN APT ONE IS THAT UNLIKE THE ASSISTANT UNITED
17 STATES ATTORNEY'S VIOLATION OF THE PROTECTIVE ORDER,
18 MR. TARICANI'S VIOLATION OF THE OCTOBER 2, 2003 ORDER
19 DIRECTING HIM TO ANSWER THE SPECIAL PROSECUTOR'S
20 QUESTIONS, IS BOTH CONTINUING AND IT HAS BEEN MADE
21 DELIBERATELY AND AFTER AMPLE OPPORTUNITY FOR
22 REFLECTION. THE ASSISTANT UNITED STATES ATTORNEY
23 OBVIOUSLY EXERCISED VERY POOR JUDGMENT AND SUCCUMBED TO
24 A MOMENT OF TEMPTATION, I SUPPOSE, TO PRESUMABLY SHOW
25 OFF TO HIS RELATIVE AND FRIEND OR FRIENDS.

1 MR. TARICANI HAS BEEN AFFORDED EVERY OPPORTUNITY TO
2 RECONSIDER HIS REFUSAL TO COMPLY WITH THE OCTOBER 2
3 ORDER, AND HE'S BEEN GIVEN A CHANCE TO CHALLENGE THAT
4 ORDER ON APPEAL, BUT AS MR. ROBINSON HAS POINTED OUT,
5 THAT APPEAL HAS BEEN UNSUCCESSFUL, BECAUSE APPARENTLY,
6 THE COURT OF APPEALS SAID IT WAS PREMATURE. BUT IN ANY
7 EVENT, MR. TARICANI HAS, DESPITE HAVING THESE
8 OPPORTUNITIES, HAS PERSISTED IN HIS REFUSAL.
9 SO I FIND THAT MR. TARICANI HAS, AS HE CANDIDLY
10 ACKNOWLEDGES, VIOLATED THE OCTOBER 2, 2003 ORDER, AND I
11 HEREBY ADJUDGE HIM IN CONTEMPT.
12 THE COURT WILL ORDER THAT MR. TARICANI HAS UNTIL
13 NOON TOMORROW TO PURGE HIMSELF OF THE CONTEMPT BY
14 COMPLYING WITH THAT ORDER AND ANSWERING THE QUESTIONS
15 POSED TO HIM BY THE SPECIAL PROSECUTOR REGARDING THE
16 IDENTITY OF THE INDIVIDUAL OR INDIVIDUALS WHO PROVIDED
17 HIM WITH THE VIDEOTAPE. IF HE FAILS TO DO THAT, THEN
18 HE IS ORDERED TO PAY THE SUM OF $1,000 FOR EACH DAY
19 THEREAFTER UNTIL HE DOES COMPLY. AND I WILL SAY RIGHT
20 NOW THAT THAT AMOUNT WILL NOT BE REMITTED OR CANCELLED
21 IF COMPLIANCE OCCURS AT SOME LATER DATE, ASSUMING, OF
22 COURSE, THAT THE COURT OF APPEALS DOES NOT VACATE THE
23 ORDER.
24 SO AS FAR AS THE REQUEST FOR STAY IS CONCERNED,
25 THE COURT PREVIOUSLY DENIED A MOTION TO STAY THE

1 OCTOBER 2 ORDER AND NOT MUCH HAS CHANGED SINCE THAT
2 TIME, EXCEPT THAT MR. TARICANI HAS REFUSED TO COMPLY
3 WITH THAT ORDER. SO MOST OF THE REASONS THAT THE COURT
4 CITED IN PREVIOUSLY DENYING THE STAY OF THE OCTOBER 2
5 ORDER ARE EQUALLY APPLICABLE TO THIS REQUEST FOR A
6 STAY.
7 IN ORDER TO OBTAIN A STAY PENDING APPEAL, AS
8 COUNSEL HAVE RECOGNIZED IN THEIR MEMORANDA, THE PARTY
9 SEEKING THE STAY HAS TO DEMONSTRATE FOUR THINGS.
10 FIRST, THE PARTY MUST DEMONSTRATE A STRONG
11 LIKELIHOOD THAT IT WILL SUCCEED ON APPEAL. SECOND, IT
12 HAS TO SHOW THAT IT WILL SUFFER IRREPARABLE HARM IF THE
13 STAY IS NOT GRANTED. THIRD, IT MUST SHOW THAT THE HARM
14 THAT IT WILL SUFFER, IF A STAY IS NOT GRANTED,
15 OUTWEIGHS THE HARM THAT OTHERS WILL SUFFER IF A STAY IS
16 GRANTED. AND FINALLY, IT MUST SHOW THAT THE PUBLIC
17 INTEREST WOULD BE FURTHERED BY GRANTING A STAY. AND IN
18 THIS CASE, I DON'T BELIEVE THAT MR. TARICANI HAS
19 SATISFIED ANY OF THOSE ELEMENTS.
20 AS FAR AS THE LIKELIHOOD OF SUCCESS ON APPEAL IS
21 CONCERNED, AS I'VE ALREADY SAID, THE REASONS THAT I
22 BELIEVE THAT THAT LIKELIHOOD IS VERY SLIM ARE SET FORTH
23 IN THE OCTOBER 2 ORDER AND THE DECEMBER 15 ORDER
24 DENYING HIS PREVIOUS REQUEST OF STAY OF THE OCTOBER 2
25 ORDER.

1 FURTHERMORE, AS I'VE ALREADY NOTED, MR. TARICANI
2 HAS BEEN AFFORDED EVERY OPPORTUNITY TO CONTEST THE
3 OCTOBER 2 ORDER, AND ALTHOUGH IN MY WRITTEN DECISION OF
4 DECEMBER 15 DENYING THE REQUEST FOR STAY OF THAT ORDER,
5 I DENIED THE MOTION FOR A STAY PENDING RESOLUTION OF
6 HIS APPEAL, I DID STAY THAT ORDER FOR 30 DAYS TO GIVE
7 HIM AN OPPORTUNITY TO SEEK A STAY FROM THE COURT OF
8 APPEALS, AND HE'S ALREADY STATED THAT THAT EFFORT WAS
9 UNSUCCESSFUL.
10 IF WE LOOK AT EACH OF THE THINGS THAT
11 MR. TARICANI HAS TO SHOW, THE SECOND THING THAT HE HAS
12 TO SHOW IS THAT FAILURE TO GRANT A STAY WILL CAUSE HIM
13 SOME IRREPARABLE HARM, AND I THINK THAT CLEARLY IS NOT
14 THE CASE HERE. AS I PREVIOUSLY INDICATED, MR. TARICANI
15 HAS TWO OPTIONS: HE CAN COMPLY WITH THE ORDER, IN
16 WHICH CASE THERE WILL NO SANCTION, HE WILL HAVE PURGED
17 HIMSELF OF CONTEMPT; OR HE CAN PERSIST IN HIS REFUSAL
18 TO ANSWER AND TAKE AN APPEAL, IN WHICH CASE HE MUST
19 FACE THE CONSEQUENCES IF HE'S UNSUCCESSFUL IN THAT
20 APPEAL. THE CHOICE IS HIS. IF HE ELECTS THE SECOND
21 OPTION AND HE SUCCEEDS ON APPEAL, THEN THE SANCTION
22 WILL BE VACATED, AND HE WILL NOT HAVE LOST ANYTHING.
23 IT'S ONLY IF HE IS WRONG IN HIS VIOLATION OF THE ORDER
24 THAT HE WILL SUFFER ANY CONSEQUENCES, AND THAT, IN MY
25 JUDGMENT, IS AS IT SHOULD BE. IF HE CHOOSES TO VIOLATE

1 THE ORDER ON THE GROUND THAT HE BELIEVES HE'S CORRECT
2 AND DOESN'T HAVE TO OBEY THE ORDER, AND IF IT TURNS OUT
3 THAT HE'S INCORRECT, THEN CONSEQUENCES OUGHT TO ATTACH.
4 NOW, IN HIS MEMORANDUM, MR. TARICANI ARGUES THAT
5 EVEN IF THERE IS LITTLE LIKELIHOOD OF SUCCESS, A STAY
6 SHOULD BE GRANTED BECAUSE HE'S FORCED TO DISOBEY THE
7 ORDER IN ORDER TO APPEAL IT. I DON'T FIND THAT
8 ARGUMENT PERSUASIVE FOR TWO REASONS: FIRST OF ALL,
9 IT'S NOT CLEAR TO ME THAT THAT PREMISE IS CORRECT. THE
10 COURT OF APPEALS ON OCCASION WILL REVIEW ORDERS EVEN
11 AFTER THEY HAVE BEEN COMPLIED WITH IF THEY DEEM THE
12 QUESTION TO BE ONE THAT IS LIKELY TO RECUR AND EVADE
13 REVIEW. WHETHER THAT IS THE SITUATION -- THIS CASE
14 FALLS INTO THAT CATEGORY OR NOT, I DON'T PURPORT TO
15 SAY. I'M SIMPLY SAYING THAT I'M NOT ENTIRELY CONVINCED
16 THAT THAT PREMISE IS ACCURATE. BUT MORE TO THE POINT,
17 EVEN IF IT IS CORRECT THAT IN ORDER TO APPEAL
18 MR. TARICANI MUST VIOLATE THE ORDER, THAT DOES NOT
19 ENTITLE HIM TO A STAY. A PARTY CAN'T HAVE IT BOTH
20 WAYS. A PARTY CANNOT CHOOSE TO DISOBEY AN ORDER WITH
21 WHICH IT DISAGREES, BECAUSE THAT PARTY WISHES TO APPEAL
22 THE ORDER, AND AT THE SAME TIME CITE THE NEED TO
23 DISOBEY AN ORDER TO PURSUE HIS OR HER CHOICE AS A
24 REASON FOR BEING FREE FROM THE CONSEQUENCES OF THAT
25 CHOICE IF THE APPEAL IS UNSUCCESSFUL. ACCEPTING THAT

1 ARGUMENT WOULD BASICALLY NEGATE THE WELL-ESTABLISHED
2 PRINCIPLE THAT COURT ORDERS MUST BE OBEYED UNLESS AND
3 UNTIL THEY'RE VACATED. IF THE COURT ACCEPTED THAT
4 ARGUMENT, EVERY ORDER COULD BE DISOBEYED WITHOUT FEAR
5 OF CONSEQUENCES BY THE SIMPLE EXPEDIENT OF TAKING AN
6 APPEAL AND PUTTING MATTERS ON HOLD UNTIL THE APPEAL IS
7 DECIDED. EVERY LITIGANT WOULD HAVE CARTE BLANCHE TO
8 UNILATERALLY DELAY THE ENFORCEMENT OF THE COURT ORDERS
9 EVEN IF THERE WAS NO MERIT TO THEIR POSITION, ALL THEY
10 WOULD HAVE TO DO IS FILE AN APPEAL, WAIT UNTIL THE
11 APPEAL IS DECIDED. IF THE PARTY RISKED CONTEMPT IN
12 ORDER TO OBTAIN APPELLATE REVIEW OF A COURT ORDER WITH
13 WHICH THE PARTY DISAGREES, THAT PARTY MUST FACE THE
14 FACT THAT ITS CONTINUED VIOLATION OF THE ORDER CARRIES
15 WITH IT CERTAIN RISKS. THAT COURSE OF ACTION IS TAKEN
16 AT ONE'S PERIL.
17 IF WE LOOK AT THE THIRD FACT RELEVANT TO THE
18 REQUEST FOR A STAY, THAT'S PRETTY EASY TO DISPOSE OF,
19 BECAUSE SINCE MR. TARICANI, IN MY VIEW, HAS FAILED TO
20 DEMONSTRATE THAT HE WILL SUFFER ANY HARM UNLESS HIS
21 APPEAL IS UNSUCCESSFUL, HE'S ALSO FAILED TO SATISFY THE
22 REQUIREMENT THAT THE HARM THAT HE WOULD SUFFER
23 OUTWEIGHS ANY HARM THAT OTHERS WOULD SUFFER IF THE STAY
24 IS GRANTED. EVEN IF MR. TARICANI COULD SHOW SOME HARM
25 HERE, THE COURT HAS PREVIOUSLY INDICATED THAT WHATEVER

1 HARM THAT MAY BE IS OUTWEIGHED BY THE HARM THAT FURTHER
2 DELAY WOULD CAUSE TO THE SPECIAL PROSECUTOR'S
3 INVESTIGATION. IN FACT, THERE ISN'T EVEN ANY ASSURANCE
4 HERE THAT MR. TARICANI WOULD ANSWER THE QUESTIONS EVEN
5 IF THE COURT OF APPEALS SHOULD AFFIRM THIS COURT'S
6 OCTOBER ORDER, SO THE STAY MIGHT EVEN BE IN VAIN. AND
7 SECONDLY, AS I ALREADY SAID, GRANTING A STAY HERE WOULD
8 HARM THE RULE OF LAW, BECAUSE IT WOULD SEND THE MESSAGE
9 THAT INDIVIDUALS ARE FREE TO DISOBEY COURT ORDERS
10 WITHOUT SUFFERING THE CONSEQUENCES EVEN IF THEIR
11 REASONS FOR DOING SO ARE INVALID.
12 AND THE FINAL FACTOR IN RULING ON THE STAY IS
13 THE PUBLIC INTEREST, AND, AGAIN, AS I PREVIOUSLY
14 INDICATED, I FIND THAT MR. TARICANI HAS FAILED TO
15 ESTABLISH THAT THE PUBLIC INTEREST WOULD BE FURTHERED
16 BY GRANTING A STAY. ON THE CONTRARY, AS PREVIOUSLY
17 NOTED IN THIS COURT'S PRIOR DECISIONS, A STAY WOULD
18 UNDERMINE SEVERAL PUBLIC INTERESTS; THE PUBLIC INTEREST
19 IN PRESERVING RULE OF LAW BY ENSURING THAT COURT ORDERS
20 ARE COMPLIED WITH UNLESS AND UNTIL VACATED ; THE
21 PUBLIC'S STRONG INTEREST IN SEEING THAT PERPETRATORS OF
22 UNLAWFUL ACTS THAT THREATEN TO COMPROMISE GRAND JURY
23 INVESTIGATIONS OR DEPRIVE PARTIES IN CRIMINAL CASES OF
24 THEIR CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, THAT THOSE
25 INDIVIDUALS ARE APPREHENDED AND PUNISHED; AND THE

1 PUBLIC ALSO HAS A VERY STRONG INTEREST IN SEEING THAT
2 CRIMINAL INVESTIGATIONS ARE CONDUCTED AND CONCLUDED IN
3 A REASONABLY EXPEDITIOUS MANNER. YOU HAVE ALREADY
4 STRETCHED THAT INTEREST TO THE BREAKING POINT. THOSE
5 INTERESTS GREATLY OUTWEIGH ANY HYPOTHETICAL HARM THAT
6 WOULD BE PRESENTED IN DENYING A STAY OF THE
7 CIRCUMSTANCES. SO THE MOTION FOR STAY IS DENIED.
8 DO YOU HAVE ANYTHING FURTHER AT THIS TIME,
9 MR. DESISTO?
10 MR. DESISTO: NO, YOUR HONOR.
11 THE COURT: MR. ROBINSON?
12 MR. ROBINSON: YES, YOUR HONOR, VERY BRIEFLY, IF
13 I MAY.
14 YOUR HONOR, WITH RESPECT, EVEN THOUGH I ACCEDE
15 TO YOUR RULING ON OUR OVERALL MOTION FOR A STAY, I
16 RESPECTFULLY REQUEST AND ORALLY MOVE FOR A STAY OF 30
17 DAYS, WITHIN WHICH WE CERTAINLY INTEND TO INVOKE OUR
18 APPELLATE RIGHTS, AND I WOULD RESPECTFULLY REMIND THE
19 COURT THAT THAT WAS THE PROCEDURE THAT WAS FOLLOWED AT
20 OUR FORMER MOTION FOR A STAY.
21 THE COURT: THAT REQUEST IS DENIED,
22 MR. ROBINSON, FOR REASONS THAT I HAVE ALREADY STATED.
23 MR. ROBINSON: THANK YOU.
24 THE COURT: COURT WILL BE IN RECESS.
25 (ADJOURNED 10:49 A.M.)

C E R T I F I C A T I O N

I, ANGELA M. GALLOGLY, RPR, DO HEREBY CERTIFY THAT THE FOREGOING PAGES ARE A TRUE AND ACCURATE TRANSCRIPTION OF MY STENOGRAPHIC NOTES IN THE ABOVE-ENTITLED CASE.

ANGELA M. GALLOGLY, RPR

_____

DATE