

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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 In Re: NASSAU COUNTY 99-CV-2844
 STRIP SEARCH CASES : US Courthouse
 : Central Islip, NY
 :
 : December 9, 2009
 - - - - - X 9:30 a.m.

REQUESTED EXCERPT FROM TRIAL
BEFORE THE HONORABLE DENIS R. HURLEY
UNITED STATES DISTRICT JUDGE

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Continued.....

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1 ...that counsel should not be talking to the witness.

2 MS. SULLIVAN: We will not be communicating.

3 THE COURT: That's correct.

4 (There was a pause in the proceedings.)

5 (Witness steps down.)

6 THE COURT: At this point we will address the
7 issue of whether a representative from Newsday should be
8 included in the presently-scheduled visit for me at the
9 Nassau County Correctional Facility. That is scheduled
10 for 10 am Thursday.

11 Basically, what has transpired is that the
12 county asked for me to do a walk-through of the relevant
13 portion of the correctional facility. I asked plaintiffs
14 for their input, and as I recall, and I will be corrected
15 if I'm wrong, they took no position one way or another. I
16 think they said, in essence, if I thought it would help
17 me, fine. They weren't really sure of the necessity for
18 the walk-through.

19 At that point, or at some point, I believe it
20 was Mr. Kessler of Newsday indicated that he would like to
21 be included in that walk-through. I communicated that
22 information to the attorneys, and the defendants indicated
23 that they wanted to check with the correctional facility
24 before they responded to my inquiry.

25 That communication occurred, and as a result of

1 that communication Miss Sullivan advised me that the
2 Nassau County Correctional Facility was opposed to anyone
3 other than the court and the attorneys and, if necessary,
4 any support personnel of the court from being involved in
5 the tour. And my chambers communicated that development
6 to Mr. Kessler.

7 Then the next thing that happened was that we
8 received a letter today, delivered by hand from the
9 attorneys representing Newsday, and that letter goes
10 through the applicable law as Newsday views it to be, and
11 based on that letter indicates that there is no legal
12 justification, or there would appear to be none, to
13 exclude Mr. Kessler as a representative of the Fourth
14 Estate from being involved in the scheduled trip to the
15 correctional facility.

16 Now, in the letter there is a statement on page
17 3 which I think is accurate, and it indicates basically
18 who carries the burden of proof and then what are the
19 elements that must be addressed before some type of
20 closure of a part of a civil trial may occur.

21 Mr. Saffran, have you received a copy of that
22 letter?

23 MR. SAFFRAN: Yes, we have, your Honor.

24 THE COURT: Have you had a chance to review it?

25 MR. SAFFRAN: We have, the last two hours.

1 THE COURT: As far as the factors that are
2 listed in the letter, more particularly on page 3 and it
3 extends onto page 4, do you believe that is an accurate
4 recitation of the standard that governs in this case?

5 MR. SAFFRAN: I believe this is an accurate
6 recitation of the standard for closing a court proceeding.
7 And I also believe that is not the issue here.

8 There is no dispute whatsoever as to the
9 presumptive openness to the press and to the public of
10 court proceedings. That is why this proceeding is open
11 and Newsday has been here throughout this trial.

12 I do not believe that it follows from that that
13 if a federal judge goes outside the courtroom on a site
14 visit, that whatever site the federal judge goes to
15 becomes a courtroom.

16 And I think that is the narrow issue here, which
17 is on the first page of Newsday's letter. They hold out a
18 proffer of evidence, if you will, that they are going to
19 back up with case law that, *"the qualified right of access*
20 *to attend proceedings in civil litigation extends to site*
21 *visits conducted by the finder of fact."*

22 Yet, as you read through the five-page letter,
23 which is an excellent disposition of the general law about
24 the openness of court proceedings, there are only two or
25 three sentences at the top of page 3, citing two cases

1 that actually deal with that narrow issue which is the
2 issue before us, which is, does the jail in this case
3 become an extension of the courtroom merely because of
4 your Honor's presence.

5 They cite the Eleventh Circuit case *Newman v*
6 *Graddick*, and through very clever quotation, very well
7 chosen quotation, they cite as standing for the
8 proposition that the presumption of openness, "applies
9 equally to proceedings other than the trial itself," which
10 one would think refers to such things as site visits.

11 They also cite --

12 THE COURT: Well, a site visit, that is not part
13 of a trial itself?

14 MR. SAFFRAN: I think a site visit is part of
15 the trial, but I do not believe the same rule pertains as
16 in the courtroom. And I think a hypothetical will
17 illustrate that.

18 What if, in the forthcoming World Trade Center
19 trial, the Khalid Sheikh Mohammad trial, if whatever judge
20 is assigned to that case wants to do a visit to the
21 interrogation chambers at Gitmo because that is certain to
22 become a defense in that trial, I assume, does that make
23 the interrogation chambers at Gitmo an extension of the
24 Southern District federal courtroom for purposes of press
25 access?

1 THE COURT: Well, I mean, the question is
2 whether, if the judge visits the facility, does that
3 somehow bring it within the ambit of the trial or venue?

4 MR. SAFFRAN: Exactly. And I would think not.

5 And even if it is, the government that makes the
6 motion, as they might well, to say, as in effect we are
7 doing here, that we would like the judge to see for
8 himself or see for herself that this is rather innocuous,
9 that does not, by the mere presence of the federal judge,
10 open a secure facility to the presence of reporters. And
11 I think exactly the same pertains here.

12 I recognize, of course, the Nassau County jail
13 is not Gitmo, but it is a secure facility. It may not be
14 quite as compelling a security consideration, but
15 nonetheless there are very important security
16 considerations and a long-standing policy of no press
17 access.

18 THE COURT: Let me just step back so I
19 understand what you are telling me.

20 You open with a proposition that basically what
21 is set forth in Newsday's letter is an accurate recitation
22 of the standards that apply to open access of a trial.
23 And then I thought the suggestion would be that this is
24 really not part of the trial. So if it is not part of the
25 trial, then the standards enunciated, for instance, on

1 page 3 extending to page 4 of the December 9 letter do not
2 come into play.

3 But I think it probably is. And you have not
4 said anything to the contrary. I think it is part of the
5 trial.

6 Now, if that is true, then it would seem to me
7 that when we go through these different standards, like
8 compelling interest, that with respect to Guantanamo Bay
9 it may well be that there are some security interests
10 there that are so significant that a court might find that
11 there is a compelling interest in maintaining the
12 security, which in effect overwhelms or more than
13 counter-balances the right of the public, or in this case
14 a member of the Fourth Estate included within the ambit of
15 the public, to be present.

16 So I guess my question is, is it your position
17 that what would transpire at the jail, which would be a
18 view of the site, that is part of the trial? Or that
19 isn't part of the trial for First Amendment purposes?

20 (Continued on the following page.)

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1 MR. SAFFRAN: I phrased it that way, your Honor.
2 And let me, if I may, parse that sentence into two parts.
3 It is obviously part of the trial. I don't see how I
4 could disagree that a proceeding that is part of the
5 trial. It is part of the trial.

6 For First Amendment purposes under the First
7 Amendment law press access to courtroom proceedings, no, I
8 do not believe it is subject to the same consideration.
9 That's why I was pointing out that the only case that the
10 Newsday cites for this specific issue of site visits, do
11 not actually support that proposition.

12 The Newmark -- the Eleventh Circuit case, Newman
13 vs. Graddick, actually concerned pretrial and post-trial
14 courtroom proceedings. It did not have anything to do
15 with a site visit. It did not have anything to do with a
16 proceeding taking place out of the courtroom. It just, as
17 of other cases, extended the basic rule of open trial to
18 openness to pretrial and post-trial proceedings. And I
19 believe also involved here specifically was access to
20 discovery documents. Those were about documents.

21 The quote that they have given from the Newman
22 case, if you look at it in context, the entire quote --
23 and it is at Page 801 of that second -- of 696 F.2d -- the
24 question is whether the right of access extends to
25 post-trial and pretrial proceedings in this case. The

1 reasons for a right of access to the trial in a case of
2 this kind seem to apply equally to proceedings other than
3 the trial itself. So it didn't refer to proceedings
4 outside the courtroom.

5 The other case, the Pennsylvania case did refer
6 to a site visit to a crime scene. But interestingly, it's
7 also addressed somewhat out of context. Because while
8 there is certainly language in that case, and it is the
9 only case that apparently Newsday was able to find and we
10 were able to find in two hours of research that comes even
11 close to the issue at hand -- while the Court there did
12 analogize the crime scene and any place where the Judge
13 and jury goes to being part of the court itself, they did
14 it in the context of limiting press access. Because the
15 issue there was not whether a reporter could go along.
16 This was actually the lawn outside the house of the
17 victim's residence, was where the judge was going to take
18 testimony.

19 So it was, in effect, public. It was the street
20 in front of the house which, of course, is public. There
21 was no question that the reporter could be there. The
22 issue was whether photographs could be taken. It was
23 crystal clear under both the governing Pennsylvania rule
24 and the First Amendment that there was no right to
25 photography in the courtroom. Just as here, doesn't have

1 a photographer with them, there are no cameras in the
2 courtroom, in a federal courtroom, just as there are no
3 cameras apparently in the Pennsylvania courtroom.

4 The press's position there was that because this
5 is outside the courtroom, because the judge is leaving his
6 courtroom to go on a site visit, that the reporter can
7 bring a photographer along. A photographer can take
8 pictures of the jury, take pictures of the crime scene.
9 And in that context the appellate Court ruled, no, you
10 have, the press has to greater right outside of the
11 courtroom than it would have inside. It was also subject
12 to a restriction on photography. And that is a legitimate
13 restriction under the First Amendment, even though we have
14 left the venue of the courtroom.

15 So while some of the language analogizing the
16 courtroom to a site visit would seem relevant, we have to
17 keep in mind that this case actually restricted press
18 access. And to say that press access is going to be no
19 greater outside the courtroom than it is inside, it was
20 not necessarily known from that, that press access must be
21 as great when the judge goes to visit a secure facility as
22 the access would be in the judge's courtroom.

23 And finally, on standards, your Honor, I would
24 point out that the Press-Enterprise case specifically
25 holds that the standard is whether the place and process

1 has historically been opened to the press and the public.
2 And Press-Enterprise is, of course, the US Superior Court
3 case in 1986. It came after the Richmond Newspapers and
4 Globe Newspaper case. And I believe that further honed
5 the general standards of compelling interest that Newsday
6 sets forth in Pages 3 and 4 of its letter.

7 And it is clear here that the jail is simply not
8 a place where historically there has been access to the
9 general public and to the press. By definition there has
10 not. By definition it is a secure facility.

11 So while we don't seem to have any other case
12 that we can find quickly that deals with press access to a
13 jail, I would submit that taking that standard from the
14 Press-Enterprise case, that that is the standard that
15 applies. And I assume the way we mesh the general
16 standard that Newsday sets forth together with the
17 Press-Enterprise standard, is that we have a place that is
18 not historically open to the press and public, and we
19 don't even have to get into the compelling interest
20 balancing test.

21 I think that is the gist of my argument. And I
22 would be happy to answer any other questions.

23 THE COURT: Yes. What I probably ought to do is
24 indicate for the attorneys representing the parties in
25 this First Amendment issue, is what the actual trip to the

1 jail entails. That may or may not have a bearing on their
2 respective positions.

3 What I intend to do on Thursday would be akin to
4 if this was a negligence action and I went out to view, if
5 I was the trier of fact, and I went to the intersection
6 where the accident happened. I would go to that location.
7 Like in this case what I would do is, there is an exhibit,
8 Defendant's RR, which provides a layout not to scale, but
9 of each of the rooms within a certain area which bears on
10 what is relevant to the testimony that has been provided
11 in the case.

12 And what I would do is, I would go to the jail.
13 I would say to whoever was going to conduct the tour in
14 the sense of leading me through to see what I want to see;
15 I have Defendant's RR. I would like to be shown each of
16 the rooms located or reflected on that particular diagram.
17 I would not entertain questions by the attorneys. I
18 wouldn't get any input from the attorneys. But I would
19 view it. Then when we came back to court, to the extent
20 anyone wanted to comment on what I observed, that would be
21 fine.

22 Also, there would be a videotape taken, or a
23 video taken of my trip through the jail. But that
24 basically is the parameters of what would transpire.

25 So what I would like to do is hear from -- the

1 burden of proof, as I understand here, to the extent that
2 the defendants seek what plaintiffs would label as closure
3 of a portion of the trial, that the onus rests on the
4 defendants rather than in this case the members of the
5 class.

6 So against that backdrop, what I would like to
7 do is listen to the Newsday's position. And we may go
8 back and forth a few times. But in any event, Ms. Leith?

9 MS. LEITH: Yes.

10 I would like to address what counsel said first
11 about Press-Enterprise and just clarify what I would
12 believe there to be.

13 It is not so much the location of the jail that
14 is of historical significance or prong. It is not the
15 location, per se, that the historical prong looks to. It
16 is the type of proceeding that that leads to. In this
17 case where they have conceded that the viewing is part of
18 the trial, it's historical access to trial that
19 Press-Enterprise would look at.

20 THE COURT: I haven't had a chance because I
21 have been working on this case during the day. I haven't
22 read Press-Enterprise. But if I look at Press-Enterprise
23 do you feel that would support you position?

24 MS. LEITH: I do feel it will support our
25 position, Judge. But to be perfectly honest and frank, I

1 don't remember the specific proceeding at issue in that
2 case off the top of my head either. But it was going to a
3 lot of these cases like to whether Grand Jury proceedings
4 are historically open to the public. Whether immigration
5 proceedings are open to the public. That is what the
6 historical prong really speaks to.

7 THE COURT: You know what is interesting about
8 Newsday asking this. I have no idea what the answer is,
9 that is why I'm asking the question.

10 Assume that, not only Mr. Kessler would like to
11 go to the jail, but assume 200 members of the public would
12 like to go to the jail, because it is a public trial. And
13 they would like to make sure they monitor the entire
14 process. I know that's not our problem. But it is
15 something that does come to mind. In other words, where
16 is the line drawn, or is there no line to be drawn?

17 MS. LEITH: That would go, your Honor, to the
18 alternative narrowly drawn, or the limitation narrowly
19 drawn if no adequate alternative exists. Just like we
20 have press pools, that would be an alternative. If 200
21 members of the press wanted to come --

22 THE COURT: I'm not thinking of the press.

23 MS. LEITH: Well, if 200 members of the public
24 wanted to come, there would -- that obviously there might
25 be reasons why that is not -- you can't do that in these

1 circumstances.

2 THE COURT: So you would go back to the various
3 items that are set forth in your letter; compelling
4 interest, no alternative, narrowly drawn, et cetera.

5 MS. LEITH: Yes. And I believe that is where
6 counsel's hypothetical on Gitmo would fall as well. That
7 would go to the compelling government interest. Obviously
8 we haven't heard specifically what their interest is in
9 this case. But I think he recognizes that it would be a
10 different interest than we're dealing with at the Gitmo
11 detention center.

12 In terms of whether or not there is precedence
13 for this, I would disagree that David does not support our
14 position. There it was recognizing that members of the
15 press were going to be attending this as part of the
16 evidence being presented in the trial. And yes there were
17 restrictions placed on that. But they were done under the
18 rules of the Court as being part of the trial proceeding.

19 Here again we're not seeking to bring a
20 photographer to the viewing. That goes again to lesser
21 restrictions being placed on versus complete closure of
22 the proceeding.

23 I think that was everything I wanted to add.
24 Again, I do think it is relevant that it is the defendants
25 that want to seek to present this evidence to your Honor

1 as a trier of fact. The Second Circuit has recognized
2 that public access to the fact-finding process is vital
3 and important. And it is also important that to the
4 extent that it can be, that the public and the press is
5 given contemporaneous access.

6 The Second Circuit, *ABC, Inc. vs. Stewart*, talks
7 about the color and the texture of the proceedings. I
8 understand that they haven't objected to the press having
9 access to the photographs. But that is a different --
10 that's like a cold version of the record, as the case puts
11 it, versus being there and getting the information
12 firsthand.

13 THE COURT: Very good. Thank you.

14 MS. LEITH: Thank you, your Honor.

15 THE COURT: Let me ask you, Mr. Saffran;
16 assuming that I conclude that the jail visit is -- and I
17 don't think you dispute this point -- part of the trial,
18 and therefore you -- maybe you do dispute this -- that the
19 compelling interest, no alternative, et cetera standard
20 are applicable. What would be the harm to the jail or the
21 correctional facility, rather than having a host of
22 attorneys and a judge visit the relevant portion of the
23 correctional facility, if one more individual was on hand
24 who can not take any photographs, and there is going to be
25 no dialogue between the Court nor anyone else during the

1 visit? What would, what would be the compelling interest
2 that would come into play?

3 MR. SAFFRAN: It will help, the fact that there
4 are no photographs is one factor that would be helpful.
5 And I would point out that we acknowledge we have turned,
6 over many photographs already. Which I think counts
7 toward the alternative procedures that we stressed in this
8 case.

9 There is a general concern -- you will see
10 tomorrow, one thing that very much surprised me when
11 Mr. Herbst and I did a walk through earlier this summer,
12 that there are inmates out there. Inmates were being
13 processed through. And the issue of course the jail is
14 going to try, to the extent that they can, to not have
15 that happening when you're present tomorrow.

16 But there is a, there is a security risk there
17 potentially to the reporter which raises liability issues.
18 I think there is a major concern that is simply not in any
19 way doing anything in this climate to further compromise
20 security to take on any, any potential risk to the
21 security of the facility. There is also a great concern
22 of setting a precedent that traditionally we have not
23 allowed the press or the public for obvious reasons into
24 the jail.

25 The facility has had requests in connection with

1 major public issues that has led to litigation. But just
2 in connection with issues involving the jail, there have
3 been made regular requests for visit. And the consistent
4 policy I believe under the administration of both parties
5 has been to deny those requests.

6 And we are very concerned about setting a
7 precedent of allowing reporters in.

8 THE COURT: Is there any significance for
9 present purposes that one purpose that put this scenario
10 in motion was a request by defendants, who are obviously
11 representing among others, the Nassau County Correctional
12 Facility, that such an inspection be occurring, in other
13 words, when we talk about such an inspection being
14 conducted.

15 But when we're talking about precedent, absent
16 the request -- and I'm not criticizing defense counsel at
17 all. She has done a wonderful job. But the fact of the
18 matter is, she is the one that set this in motion. So to
19 the extent there was no such request, this discussion
20 would never have been conducted.

21 MR. SAFFRAN: I don't think that's relevant,
22 your Honor.

23 As I said in the Gitmo analogy, I don't think it
24 would be relevant in that hypothetical. The federal
25 government would be the one who made the motion for a

1 judicial site visit. I don't think that by one side
2 proposing that as a trial procedure it would be useful for
3 the finder of fact, whether a judge and jury, to visit the
4 site -- I don't think that if the government, the
5 maintainer of the facility made that motion, I think that
6 it means that they are waiving all of their concerns about
7 security.

8 And again, it is very different to have a
9 federal judge or even a jury, which of course is sworn to
10 the rules of court -- it is very different to have a
11 federal judge walking through a secure facility where you
12 have, you have the gate locations, you have other
13 buildings in the facility -- to open it up to a reporter
14 is much more of a concern.

15 THE COURT: One of the things that I think may
16 be significant. From what I have heard, and I don't think
17 it is contested, that the onsite visit is a part of the
18 trial. And it would seem to me that it flows from that,
19 that this Court is required to look and see if there is a
20 compelling interest that would override the right of the
21 press or the public to be present during a public trial.

22 Now basically what the county has indicated is
23 that there are compelling interests in the sense of
24 security concerns and so forth. But the representations
25 of counsel standing alone are not sufficient to establish

1 that standard, or to meet that test; the compelling
2 interest test.

3 I mean, I'm having -- I'm trying to be very open
4 about this. I mean it seems to me that what has to be
5 done is the Court has to go through the items of
6 compelling interest and no alternative, narrowly drawn.
7 And that has to be the analysis. Both sides should have
8 the right to present such information as they deem as
9 relevant as to that task.

10 Now I have a right to ask for proffers rather
11 than to actually make you march in a bunch of witnesses.
12 If the proffers indicate that there is a factual issue
13 that has to be resolved, then obviously we'll have to have
14 a hearing. But if I heard a proffer and then said, well
15 thank you very much, but based on that proffer, even if
16 you established each and every element of the proffer, I
17 would still find X. Then we would do away with the
18 hearing. And it is meaningless. So that is what why I'm
19 looking for guidance here.

20 MR. SAFFRAN: Your Honor, Lieutenant Mike Golio,
21 who is an attorney and on the legal staff of the Sheriff's
22 Department -- of course this only came up a few hours ago
23 and we haven't had a chance to consult in detail -- do you
24 think I could take two minutes to talk with Mr. Golio?

25 THE COURT: You absolutely can.

1 I'll indicate just to the extent it may be of
2 some assistance. But as I said, I have been on the bench
3 all day. I haven't had a chance to read these materials
4 because they just came in today. And that is
5 understandable. It is probably just likely yesterday.

6 But my general view is, subject to being
7 educated by counsel, which I often am; that what should be
8 done here is Mr. Kessler should go along. Mr. Kessler
9 should be under a direction not to take any photographs.
10 Which he has no intention of doing in any event.

11 And he would be part of the entourage when we
12 march through this place. Nothing is going to be said.
13 Nothing is going to be done except I am going to look.

14 And then I'll come back and I'll hear at the
15 appropriate time any argument counsel wants to make based
16 on the photographs, the videos. There will be another
17 video tomorrow. And what I may have seen on the visit
18 tomorrow.

19 So that is basically it.

20 But let's take five minutes and see where we
21 are.

22 (Whereupon a recess was taken at 5:00 p.m.)

23 (After recess the following occurred.)

24 THE COURT: Yes, sir?

25 MR. HERBST: Before Mr. Saffran speaks, could I

1 be heard very briefly?

2 THE COURT: Yes, sir.

3 MR. HERBST: I wanted to say, your Honor --

4 THE COURT: Do we have everybody present?

5 Go ahead.

6 MR. HERBST: I was going to keep my counsel on
7 this. But after listening to what was said so far, I feel
8 an obligation to express the view that if there is going
9 to be an inspection, that the press be allowed to attend.

10 And I say that for two reasons: One, is that as
11 the lawyer for the plaintiffs, I think it is my obligation
12 to do everything I can to make sure there is an error-free
13 record in case of an appeal in this case. And I think
14 that just in order to prevent any possibility of that
15 happening --

16 THE COURT: I understand what you're saying.

17 MR. HERBST: That I feel the position that I'm
18 taking would be the best part of discretion and
19 reasonable.

20 Secondly, as someone who has been basically a
21 civil rights lawyer since, essentially since leaving
22 government service as a prosecutor, I find it unfortunate
23 to hear that the argument expressed that jails should be
24 closed off from the public.

25 Bad things happen in prisons and in jails. And

1 one of the reasons that they do, and continue to, is that
2 the public and the press have less access to prisons and
3 jails than they should.

4 THE COURT: I'm not sure that is the issue.
5 It's a simple issue. It's not simple, but it is a
6 discrete issue.

7 MR. HERBST: That is all I wanted to say.

8 THE COURT: But basically your position is that
9 you feel that Newsday should be permitted to be present
10 for the walkthrough?

11 MR. HERBST: Yes, your Honor.

12 THE COURT: All right.

13 MS. SULLIVAN: Your Honor, I consulted with our
14 jail liaison. And we want to give your Honor some details
15 about some security concerns that are involved here so
16 your Honor can make your determination.

17 THE COURT: These would be security concerns
18 that are triggered by an additional person being a member
19 of the walkthrough proceeding?

20 MS. SULLIVAN: Yes, your Honor.

21 In other words, we're officers of the Court.
22 Your Honor has, certainly has a fact-finding mission here.
23 But the more number of people, the bigger this crowd, the
24 more security concerns arise.

25 So one specific concern was, was raised by my

1 co-counsel; the presence of inmates. But beyond that,
2 there are, especially in this area, certain types and
3 styles of locks used that we're very concerned about a
4 member of the public seeing; certain staff locations; the
5 numbers of staff in the area where they are posted; gate
6 locations inside the facility; and proximity in this area
7 to other areas in the jail.

8 And just, just to put it in perspective a little
9 bit -- the jail is constantly dealing with the issue of
10 the concern about possible escapees. So any of these
11 details regarding locations of certain checkpoints, gates,
12 locks, styles of security devices, concerns the jail for
13 that very reason.

14 With respect to the actual, the actual style of
15 how this visit should be categorized; in consultation we
16 talked about that further. And one of the things I wanted
17 to broach with your Honor and counsel is, is that this
18 really is very akin to the deliberative process that a
19 jury would go through, and in this case your Honor would
20 go through. And in that regard --

21 THE COURT: How is that true?

22 MS. SULLIVAN: In other words, nobody is making
23 arguments, nobody is pointing out certain things. Your
24 Honor is being presented with this walkthrough, the
25 opportunity to walkthrough in an effort to have you better

1 able to make your ultimate decision after hearing the
2 testimony.

3 THE COURT: Wouldn't that be better
4 characterized as evidence, as distinct from the
5 deliberative process?

6 MS. SULLIVAN: You mean the location itself?
7 The view of the location itself is absolutely evidence.
8 But it is evidence to be used in your Honor's
9 determination and deliberations. And I would say that
10 this is, this is somewhat of a hybrid between the
11 deliberative process and the actual courtroom proceedings,
12 which are open to the public. So that would be, that
13 would be something I would offer for your Honor's
14 consideration.

15 And in light of the security concerns that I
16 have detailed, if your Honor ends up allowing the press
17 personnel to attend this particular jail visit, I ask that
18 we be permitted to be heard on limitations and
19 restrictions pursuant to the standards.

20 THE COURT: Well, you have already mentioned
21 some of the problems. One would be the location of
22 checkpoints and locks, and so forth.

23 So what is Newsday's counsel's position in that
24 regard? Ms. Leith?

25 MS. LEITH: Your Honor, my understanding -- and

1 I absolutely have not been present for the proceedings --
2 but my understanding is that the defendants have placed
3 into evidence, and that has never been sought to be
4 sealed -- diagrams, layouts of the various places you're
5 going to visit.

6 So in terms of her concerns or their concerns
7 about locations of staff, the gate, and proximity to other
8 areas, I believe that is already in the public record.

9 THE COURT: I'm not so sure about locks, though,
10 locks and checkpoints necessarily. The layout in these
11 photographs is an entire physical layout, that is true.
12 And I imagine maybe you could detect the type of lock. I
13 don't know.

14 MS. LEITH: And again, understand, I don't know
15 how many inmates are in this facility. But the inmates
16 are also viewing the locks and the staff locations. And,
17 you know, in terms of who is giving information to
18 potential escapees, which they identify as their primary
19 concern, I don't think that they have a good faith basis
20 to say that allowing a member of the press into these
21 areas is any greater risk than the fact that the inmates
22 themselves are taken around in these facilities.

23 THE COURT: You know, I'll just add one more
24 item as far as the tour tomorrow. That I'm envisioning it
25 will take from the time I get to the area, have to go

1 through security and all that -- but once I get to the
2 area, which I intend to view, that's going to take me at
3 most a few minutes. I'm not saying that so much for your
4 benefit, but maybe for the defendant's benefit.

5 In other words, they can tell us at the jail;
6 look, you're here at, say 10:30. They can say from
7 quarter to 11:00 to 11:00 it is available. I'll go
8 through during that period, which means we'll all go
9 through during that period.

10 So to the extent that they want to hold anything
11 in abeyance, or prevent transfer of inmates during that
12 period of time, none of that would occur.

13 I mean, I can do this in 15 minutes, I'm sure.
14 I don't know if that helps.

15 MS. LEITH: That was my next point I wanted to
16 address, your Honor; is that in terms of the bigger the
17 crowd, the more of the concerns. We're talking about in
18 this case one additional person. And if we had additional
19 people that wanted to come, that would be a limitation to
20 address. But here we're talking about one additional
21 person on the tour.

22 I just, again, don't think that is a good faith
23 basis. And it is not a, they are not compelling reasons
24 for you.

25 And to that end, I just want to say it is not

1 just that they have a compelling interest in the security.
2 The standard is that they have to show they have to
3 demonstrate -- excuse me -- a substantial probability that
4 the public access in this case will harm that compelling
5 interest.

6 All I'm hearing so far are sort of general
7 concerns that they might see a lock; that another, or an
8 inmate or inmates haven't already seen. I just, again, I
9 don't think they're meeting the standard.

10 And I just want to address one last point.
11 Counsel said this is akin to the deliberative process. Or
12 that it is evidence that you're receiving to appreciate in
13 making your decision. That is the fundamental interest
14 that we look to on whether or not the public should have
15 access to this material. Or to repeatedly say that if the
16 material that the public is gaining access to goes to the
17 decision-making process, then, you know, access should be
18 presumed.

19 (Continued on the following page.)
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1 THE COURT: Is there anything further on this?

2 MS. SULLIVAN: Your Honor, I would just ask to
3 be heard.

4 If your Honor is going to make a decision that
5 the press be in attendance, I would ask that we be heard
6 with regard to restrictions on that access.

7 THE COURT: All right. What I could do then is,
8 let me address the first part of what we are doing today,
9 and that is the question of whether a member of the Fourth
10 Estate should be part of the group when I view the jail
11 tomorrow.

12 I start with the proposition that the viewing of
13 this portion of the jail is a part of the trial. The
14 trial is, by its very nature, a public activity and it is
15 available to be seen by the public.

16 It is different than, for instance, a grand
17 jury, which is discussed in Press-Enterprise Company. In
18 the Press-Enterprise case, among other things, they are
19 talking about the type of activity and the type of
20 operation and whether that is typically subject to being
21 open to the public.

22 Now, obviously, a grand jury proceeding, by its
23 very nature, historically and today, is not open to the
24 public. To the extent the argument is made that the
25 correctional facility is not typically open to the public,

1 I think there is a flaw in that argument. I think the
2 proper focal point is on the nature of the proceedings.
3 Here the nature of the proceedings is the trial.

4 So the fact that a part of the trial will occur
5 at a place which typically is not open to the public I
6 don't believe falls within the rationale of the
7 Press-Enterprise case.

8 I do agree with the defense that the nature of
9 the location where the viewing will occur is germane. It
10 is germane because it is one of the factors that has to be
11 considered when I review the various factors that bear on
12 the First Amendment right of access, as contrasted with
13 the need for security within the correctional facility.

14 We have proceeded today by way of proffers, and
15 I have obviously listened very carefully to the proffers,
16 which have been well voiced by counsel. Based on the
17 proffers, I don't believe that the defendants, and I so
18 find, have shown a compelling interest in precluding a
19 member of the Fourth Estate from being present during this
20 walk-through.

21 Now, on the question of no alternative, that
22 being another factor that I must consider. When I first
23 thought about this, it seemed to me that at least an
24 argument could be made that since no dialogue of any
25 significance will occur during the walk-through, and given

1 the fact that the walk-through will be recorded by a video
2 device, that furnishing the videotape or the product of
3 the video device should suffice as an alternative to the
4 member of the Fourth Estate being on the walk-through.

5 But on closer analysis I don't believe that is
6 correct because the idea of this, of having a public
7 trial, is to permit the public to basically witness what
8 is transpiring in that particular courtroom, and to the
9 extent the trial extends beyond the courtroom to witness
10 what occurs in that other venue.

11 Here somebody from the Fourth Estate will be
12 there and they can see, for instance, whether in fact some
13 kind of dialogue breaks out and all of a sudden the court
14 is asking all types of questions and there is oral
15 argument and everything else. So I think their presence,
16 to apparently monitor the integrity of the process and to
17 be in a position to report the extent the process in their
18 humble judgment deviates from what is appropriate, is
19 important.

20 So I don't really think there is an alternative
21 to this. That really leads us to the third part of the
22 analysis, and that has to do with carefully tailoring the
23 presence of the Fourth Estate so that the Fourth Estate
24 can do its job without impinging on the legitimate
25 security issues I think that have been voiced by the

1 correctional facility. So that really takes us to the
2 point that I think Ms. Sullivan wants to address.

3 I will note that I think it is clear that Miss
4 Sullivan's position is, as voiced by her and Mr. Saffran,
5 is I shouldn't permit this, but they are saying if you
6 permit it, then we would like to be heard on appropriate
7 security measures and to make sure that the relief granted
8 is appropriately tailored to the circumstances.

9 So with that backdrop I will hear from Miss
10 Sullivan.

11 MS. SULLIVAN: Thank you, your Honor.

12 We understand already that there will be a
13 restriction, and in fact that there be no photographs
14 taken and no video.

15 So with the understanding that that has already
16 been decided, on moving forward we ask that diagrams, the
17 making of diagrams not be permitted and the making of
18 notes not be permitted and that there be an agreement not
19 to publish facts about locations and characteristics of
20 the interior of the jail.

21 THE COURT: Let me hear from counsel.

22 MS. LEITH: Publish any fact about the interior
23 period of the jail? Did I understand that correctly?

24 THE COURT: I think he should be permitted -- he
25 is there to witness part of the trial, and I certainly

1 would agree that it would be inappropriate that he be
2 present to enter some type of order, when the Fourth
3 Estate is there, that they shouldn't go off on some sort
4 of tangent and basically describe locations that have
5 nothing to do with this cases. That may be debatable but
6 that seems to me appropriate.

7 Do you have any problem with that?

8 MS. LEITH: Again, if it is not relevant we
9 would have to confer.

10 THE COURT: You obviously can confer. If you
11 would like to confer, go ahead.

12 MS. SULLIVAN: Your Honor, after they consult, I
13 will just specify what I meant.

14 THE COURT: Yes. Wait until she is ready.

15 (There was a pause in the proceedings.)

16 MS. SULLIVAN: May I answer Miss Leith's
17 question first? Because it may obviate some of the
18 further discussion.

19 THE COURT: Yes.

20 MS. SULLIVAN: When I asked for agreements not
21 to publish details about certain things, obviously it
22 wasn't our request to be a broad-brush stroke in terms of
23 the reporter can't publish anything about anything he
24 sees. Obviously why would he be there if he couldn't
25 think about it or write about it.

1 But it would be specifically an agreement not to
2 publish information or facts gleaned from the viewing,
3 specifically related to check points, locks, locations of
4 locks, types of locks, security location of gates,
5 location of staff members, and where they travel in the
6 facility, if that is part of the viewing. And also
7 spacial relationships of various areas.

8 Those are the aspects that really trigger the
9 security concerns more than anything else.

10 MS. LEITH: I apologize, your Honor, but that
11 does sort of change what the original proffer was. And if
12 I could confer one more time.

13 THE COURT: That is true. It does.

14 (Newspaper counsel conferring with Mr. Kessler)

15 MS. LEITH: Your Honor?

16 THE COURT: Yes.

17 MS. LEITH: I think we are obviously willing to
18 agree not to make photographs.

19 THE COURT: Yes.

20 MS. LEITH: We are agreeable not to make
21 diagrams to the extent that on this visit, to the extent
22 there are any diagrams in evidence, I think that obviously
23 Newsday has the rights to use those.

24 THE COURT: Yes.

25 MS. LEITH: In terms of like this long list of

1 security concerns.

2 Again, he is going to see what your Honor is
3 going to see and experience. We are not looking to
4 compromise security. I don't think he is going to take
5 notes on what kind of lock it is because that is not
6 relevant to the story. But in terms of talking about that
7 he went through a certain number of check points, I don't
8 know that we can agree, without having been through the
9 experience, to what would be relevant to this proceeding.

10 THE COURT: Well, let me ask you this. To the
11 extent Mr. Kessler goes, he goes because there is a
12 portion of the trial that will be held compliments of my
13 going on this visit tomorrow morning. But for this trial
14 presumably he wouldn't be at the correctional facility.

15 MS. LEITH: Agreed.

16 THE COURT: To the extent that is true, why
17 should he be able to gather information to the extent it
18 may be irrelevant to this trial?

19 And by way of an example, and this is by way of
20 a hyperbole, let's assume that he went through and looked
21 at the locks and said, you know, I can write an article on
22 the fact that with a hairpin I could get out of that place
23 in 15 minutes.

24 That would compromise the integrity of the jail
25 by a person who is in the jail on a completely different

1 mission. It would be like an incidental benefit that he
2 would receive compliments of him being permitted to join
3 this entrance.

4 What is your response to that?

5 MS. LEITH: And I agree. I think we will agree
6 that we are not going to be reporting on the types of
7 locks because that is a specific concern that they can
8 point to.

9 In terms of some of the other concerns, again,
10 they have the burden of showing a substantial likelihood
11 that this is going to compromise something. In terms of
12 check points and the location of gates and where staff
13 members are, again, I don't see that they have shown how
14 that is any different than the 17,000 inmates that are in
15 this facility that can also release information if they so
16 choose, and for the reporter to agree in advance of the
17 proceeding where, you know, he doesn't know what it is
18 going to be like yet, to agree to a flat agreement that he
19 won't reference any of this long list of things, is a
20 little difficult.

21 I think it is, you know, a restraint on his
22 reporting that they haven't justified with, you know, a
23 compelling interest or a specific concern.

24 THE COURT: Would your client be amenable to
25 some type of understanding that the reporter can report

1 anything that he sees that bears on the subjects that have
2 been raised in this trial, but that he would not write
3 articles independent of this trial based on what he sees
4 during this visit? In other words, there may be other
5 ways he can get it.

6 You can confer.

7 (Newsday counsel conferring with Mr. Kessler.)

8 MS. LEITH: Again, I don't want to be splitting
9 hairs, and I know we all want to get out of here.

10 We're willing to proffer that we have no
11 intention of compromising the security of the jail. I
12 just think, again, it is difficult to make a specific list
13 of things that we can't report on or to make some sort of
14 agreement that it won't come up in some future reporting
15 in some way.

16 We certainly are willing to proffer that we have
17 no intention of reporting anything that would compromise
18 the security of the jail to the end of what you said, of,
19 you know, there is a lock and this is how you would pick
20 it or here is a check point and in there is how you would
21 get around it.

22 THE COURT: Thank you.

23 One of the problems we have is this. This has
24 all come up very quickly. I don't know what restrictions
25 I could place upon the Fourth Estate. I don't know. And

1 I haven't had a chance to reflect on it.

2 I am comfortable, as I have said, with the fact
3 that he should be there and he has a right to be there.
4 Also, it logically appears to me the only reason he would
5 be there is because this is an adjunct of the trial only
6 outside of the courthouse. I'm not so sure it is
7 worthwhile, but, believe me, I will listen to it to wade
8 through how some type of fine line could be drawn if that
9 is even possible.

10 For instance, the idea of preventing him from
11 taking photos. He can take notes. Unless he has a
12 photographic memory, he isn't going to remember what he
13 saw so he is going to take notes. He cannot take
14 photographs and he can't take a video because I'm
15 authorized to direct him not to do that in a federal
16 courtroom. So that is not a problem.

17 Moreover, I have to check with Miss Sullivan,
18 but she had indicated that there would be a video person
19 there tomorrow. If that is still the plan, that means
20 there will be a video done of the walk-through. Assuming
21 a foundation is laid, and I assume it can be done, that
22 would be received into evidence and that similarly would
23 be available to the Fourth Estate. So I have no problems
24 with those issues.

25 But when we get into this fine-line type of

1 thing, I have a feeling that is a subject for a Law Review
2 article and it would take all of us a month to go through
3 it because there is very little law on this and it really
4 requires a very delicate balance of interests.

5 So the question is, what do we do at that this
6 point? What you have indicated is that, as plaintiff's
7 counsel, as I understand it, that your client has no
8 intention of somehow exploiting the access which he
9 receives to the jail for the purpose of -- see, I can't
10 even do that. Because let's assume he went into the jail.
11 He is in the jail. And again, pure hyperbole, he sees
12 something which is absolutely outrageous completely
13 independent of this case. I mean, I'm not so sure I could
14 prevent him from publishing it. He might have an
15 obligation to publish it. That is the problem. I don't
16 know if I can fine-tune this.

17 Miss Sullivan, I will hear you finally on this.
18 I think because of the dialog we have an idea of at least
19 the respective positions.

20 As things now stand, it doesn't appear that
21 anybody is trying to exploit this process, but we really
22 don't know what is going to be seen in the jail. I have
23 no reason to suspect anything is going to be seen other
24 than what goes on every day, and I assume that is
25 appropriate and normal activity within the jail within the

1 proper bounds of the operations of a correctional
2 facility.

3 So I'm not suggesting anything to the contrary,
4 but I will hear you finally on this, but we have to wrap
5 it up at some point.

6 MS. SULLIVAN: I understand.

7 What I have said before was actually a pretty
8 limited list. It wasn't a long laundry list. I think I
9 outlined four types of information. In addition to no
10 drawings or diagram --

11 THE COURT: Even that he can do because we have
12 a diagram in here. Can't he do that?

13 MS. SULLIVAN: There is a diagram in evidence.
14 Of course he can.

15 THE COURT: Let's say he looks and he says that
16 this diagram is all incorrect because they have those
17 cells improperly located. Wouldn't he be able to make a
18 note to himself and draw a diagram to indicate that?

19 MS. SULLIVAN: Well, the reason we said no
20 diagram is because the spacial locations of certain areas,
21 the proximity of certain areas, is, like I said, a
22 security concern.

23 We put that diagram in and there is an
24 understanding that it was not to scale. But, of course,
25 being in person, live at a location gives a person a

1 different feeling for where certain things are located and
2 how far away they are from each other and somebody can,
3 you know, actually make a very good diagram depicting the
4 actual location in a very accurate way.

5 THE COURT: Let me ask you this. Again,
6 Ms. Leith raised the point. She says there are thousands
7 of inmates that go through there every year and they could
8 do a diagram on the inside of their shoe or something.

9 MS. SULLIVAN: Your Honor, there are
10 restrictions on inmates' behavior and --

11 THE COURT: Let's assume the person really does
12 have a photographic memory and he or she, just as a source
13 and that as soon as he or she is released, he gets out his
14 pad and paper.

15 MS. SULLIVAN: We certainly can't control
16 somebody having a photographic memory, but I'm sure
17 correction officers don't allow an inmate to stand for a
18 particular period of time and study a lock or a gate, and
19 if they found an inmate was engaged in that type of
20 conduct during that type of inspection, I'm sure they
21 would do something about it.

22 We didn't make any application because we just,
23 we didn't want for Mr. Kessler's actual physical
24 activities and movements to be retrained. That would be
25 somewhat ridiculous.

1 But inmates are restrained in what they can do
2 and we are trying the best we can to just address the
3 security concern. And, like I said, the list of items
4 that we ask not be published are locations of gates. I
5 will just read the list again so everybody can get it.

6 Locations and types of locks. Locations of
7 gates and check points. And locations of staff members
8 within the facility. And the fourth category being
9 spacial relationships to one another.

10 Of course, we provided, as your Honor is aware,
11 numerous photographs of the male clothing room which had
12 already been in evidence, and the adjoining area, to
13 Mr. Kessler. That was done in an effort to, you know,
14 show our understanding that the exhibits that are in
15 evidence are a matter of public interest and this
16 particular room is a matter of interest.

17 And, of course, there are further photographs
18 put into evidence I believe today and we would be happy to
19 give copies as well to Mr. Kessler. But we do ask that
20 some restrictions be made along the lines of the list I
21 just provided.

22 MR. HERBST: Your Honor, I don't think counsel
23 for the reporter is aware of this, but there are three
24 videos that have been made, one of which is in evidence,
25 which in part of which displays just about everything on

1 the list.

2 So I'm not sure how, I don't know if your Honor
3 could, consistent with the First Amendment restraint, I
4 don't know how your Honor would fashion the kind of
5 restraint they are talking about. I only say that because
6 I just didn't think that counsel was aware of that.

7 THE COURT: I'm prepared to do this. We have
8 two options. We can apparently, as I understand it
9 Newsday is not prepared to agree to the conditions that
10 have been delineated by the defendants although they have
11 indicated through counsel the general parameters of what
12 they would be prepared to do.

13 So against that backdrop, we could have a
14 hearing. We could have the walk-through tomorrow, which
15 is going to take 15 minutes, the actual walk-through. And
16 then if the county felt that the type of restrictions that
17 they propose could be appropriately harmonized with First
18 Amendment concerns, I would certainly be prepared to do
19 that, both sides being heard and so forth. That is one
20 option.

21 The other option is not to hold the walk-through
22 tomorrow and then to address these conditions at the
23 beginning of next week and have the walk-through sometime
24 next week.

25 I guess the third alternative would be to forget

1 about the walk-through. I'm not so sure the third
2 alternative is an appropriate concern. I think it would
3 be helpful for me to go through the facility. If either
4 party wants, I'm prepared to do either.

5 What I would suggest is do the walk-through
6 tomorrow. The defendant will have some time to reflect on
7 this and we can meet again.

8 You may say that's nice but by then the horse
9 may be out of the barn. I guess that is possible.

10 MS. SULLIVAN: I'm sorry, your Honor.

11 With respect to the conditions, are you meaning
12 to say that we should reflect on it and then bring to your
13 attention before the walk-through tomorrow morning what --

14 THE COURT: No. I don't think that is fair. I
15 don't think that is possible.

16 Firstly, it an adversarial process so even if
17 you come up with something, I have to hear from the other
18 side. I have to make a decision.

19 MS. SULLIVAN: The conditions I have listed are
20 actually, we think, pretty narrow.

21 THE COURT: They don't consent, though.

22 MS. SULLIVAN: I guess what I need to know is
23 what the problem is.

24 I know their consent to the locks, the lock
25 issue. And I have to get I guess further delineation as

1 to what their position is about check points, security
2 location of gates, and spacial relationships of areas and
3 staffing.

4 But these are the conditions we would ask for.
5 And I have to say that none of these restrictions would in
6 any way inhibit Mr. Kessler's complete viewing of the
7 actual rooms where the strip searches take place.

8 In other words, the locks and the security check
9 points and the spacial relationships have nothing to do
10 with what is in the clothing rooms. So that is another
11 consideration that I believe is important.

12 THE COURT: I don't know the layout of the jail.
13 I don't know if we can get directly into the area depicted
14 in Defendant's Exhibit RR. I suspect not. We have to go
15 through some type of security check point and go down a
16 hall. We will go directly from court directly to R and R,
17 so that is reflected in R and R.

18 MS. LEITH: Again --

19 THE COURT: I think we just have to -- I'm not
20 in a position to impose -- I withdraw that.

21 You wanted to say something. Go ahead.

22 MS. LEITH: Again, I have tried to address what
23 counsel is asking me. The issue is that I don't think
24 that your Honor is necessarily in a position to order the
25 press what they can and cannot publish if they are

1 present. We are trying to meet, you know, legitimate
2 restrictions on this access.

3 THE COURT: I think I could do it if I had a
4 full hearing and I determined that there were sufficient
5 reasons shown for these limitations.

6 MS. LEITH: Potentially, yes, but certainly not
7 on the evidence that they have presented today.

8 THE COURT: No. I agree with that.

9 MS. LEITH: So that was my point. And that is
10 our point.

11 I don't think that they can meet that burden for
12 the very reasons that have been discussed here. There is
13 a video of these same issues or the four points. There is
14 video evidence of this. Again --

15 THE COURT: Some of it, the video sort of
16 reflects where different staff members are positioned.
17 The present location of check points, that may not be the
18 same as during the class period. There are a lot of, you
19 know, there are differences.

20 In any event, if either party wants me to cancel
21 the trip for tomorrow, I will do that and let's reschedule
22 it next week. Otherwise, we will proceed with the
23 walk-through tomorrow.

24 MS. SULLIVAN: Your Honor, we don't want the
25 trip canceled. However, it may be a good idea at this

1 point to postpone the trip until Monday and we can make
2 arrangements, consult, and possibly appear here tomorrow
3 to make further argument in this regard.

4 MR. HERBST: Your Honor, at this point the
5 walk-through, and I know your Honor remembers that it was
6 our view initially that it probably was not going to be
7 all that helpful to your Honor in light of the videos
8 available.

9 THE COURT: Yes.

10 MR. HERBST: But it was our position that if
11 your Honor felt it was useful, it would be a good thing to
12 do. We are happy to do it.

13 We are now at the point where, in terms of the
14 management of the trial and the time devoted to the
15 walk-through and whether it should be done and how it
16 should be done threatens to expand to the point where we
17 may not finish by the end of next week the time devoted to
18 the walk-through is expanding.

19 It was our understanding that your Honor had
20 another commitment tomorrow in the afternoon or something
21 so we weren't working, and that was a good slot. It was a
22 good time.

23 THE COURT: We are not in a position to work
24 either on Thursday or Friday on this case.

25 MR. HERBST: Right. So our position as the

1 plaintiff is trying to preserve trial time in an
2 expeditious fashion, have the trial be conducted. It is
3 our strong request that the walk-through, if it is going
4 to occur at all, occur tomorrow because the time has been
5 set aside for that.

6 If it is put over to next week, we may lose a
7 whole other day or more than a day first debating the
8 conditions and then -- frankly, your Honor, I have had the
9 walk-through that your Honor is going to have tomorrow.
10 We did it when the jail permitted us at your Honor's
11 request to take photographs and videos. There were no
12 restrictions. We walked through and were accompanied by
13 Lieutenant Golio who very courteously permitted us to see
14 whatever was there. We videoed just about everything we
15 saw.

16 And the focus of your Honor's inspection is
17 probably going to be on the clothing room, the storage
18 area itself. Your Honor may be interested in other things
19 as well. But it is for a limited purpose.

20 I fervently request of the court that it not be
21 postponed, that we go ahead tomorrow in whatever
22 conditions that your Honor feels appropriate to set. We
23 would prefer that than to have this go on in some
24 unlimited fashion next week and eat up the trial time that
25 we were going to devote. We were going to have a full

1 next week. Monday through Thursday.

2 That is our request, your Honor.

3 MS. SULLIVAN: Your Honor, may I consult with
4 counsel for the press and counsel for the other side?

5 THE COURT: Of course.

6 MS. SULLIVAN: Maybe there is a way we can
7 resolve it at this point.

8 I, myself, we have a preference not to postpone
9 it at all, but just in fairness to the jail, they have
10 these concerns and I just want to make sure that, if there
11 are restrictions to be had, they be put in place.

12 I would like to talk to counsel and the other
13 side, if you don't mind. It will take no longer than 3
14 minutes.

15 (Recess taken from 6:05 pm until 6:20 pm.)

16 MS. LEITH: What further information is there?

17 MS. SULLIVAN: Your Honor, I understand that
18 there is, as counsel stated before, they are agreeing not
19 to publish any details regarding locks, the locations of
20 locks, and characteristics of locks. And I have been told
21 that there is no intent to report on anything that could
22 amount to a security breach or anything that could
23 compromise security at the jail.

24 With respect to locations, spacial relationships
25 of areas and security locations of gates outside the

1 facility, insofar as they are already in evidence and they
2 are outside the facility, I'm not going to maintain that
3 particular objection, although we would ask what is left
4 over is basically the security locks of check points and
5 the security location of gates inside the facility.

6 There is no agreement from counsel to refrain
7 from publishing information about that.

8 THE COURT: That is what, check points?

9 MS. SULLIVAN: The location of check points and
10 gates inside the facility.

11 Again, as lead trial counsel in this case, I
12 don't want to, the jail still wishes that those particular
13 restrictions be imposed. I, as the trial attorney in this
14 case, don't wish for the case to be unduly delayed. I
15 don't wish for there to be a postponement of the
16 walk-through. All I can do is make the record for your
17 Honor and tell your Honor what our position is.

18 We tried to work it out. We got the agreement
19 as I stated. And if your Honor considers those two
20 remaining restrictions, we ask that those be imposed, now
21 that we have cut down the list a bit. But if not, we ask
22 that the walk-through still proceed tomorrow.

23 THE COURT: So the two open items are what? The
24 location of check points and what is the other one?

25 MS. SULLIVAN: Locations of check points and

1 gates inside the facility.

2 THE COURT: As far as the items that
3 Miss Sullivan has referenced, are those restrictions
4 satisfactory to Newsday?

5 MS. LEITH: Yes, your Honor. I understand it to
6 be that the type and location of locks and then a general
7 representation that we don't intend to publish anything
8 that will compromise security.

9 THE COURT: Is that the agreement?

10 MS. SULLIVAN: That is the agreement that was
11 elicited.

12 THE COURT: I know that. You asked for two
13 other items.

14 MS. SULLIVAN: Yes.

15 (Newsday reporter and Mr. Kessler confer.)

16 MS. LEITH: I apologize, your Honor. I
17 misspoke. It is that we don't have an intent to
18 compromise security. The issue is really, again as I have
19 already said, you don't know what you are going to see
20 until you get there.

21 THE COURT: To the extent the parties have
22 agreed to certain restrictions on access and use of
23 information gathered from the access process, that is the
24 understanding and I will so order it.

25 On these other items, though, on the check

1 points and the gates inside, the burden does rest with the
2 defendants to indicate and to explain why these
3 restrictions are necessary.

4 Based on the conversation that we have had this
5 afternoon extending into tonight, including the discussion
6 about individuals who are in the jail can obviously
7 observe these items on a daily basis and so forth, I don't
8 think that the county has met its burden to tailor the
9 Fourth Estate's access as they have suggested.

10 Accordingly, I'm not going to put a restriction
11 on the check points and the gates inside the facility. I
12 would certainly hope that Mr. Kessler, who is a very
13 honored journalist, would not abuse the process, but I
14 would not deem it appropriate if I could tell him how to
15 do his job.

16 So what we will do tomorrow is, we will meet. I
17 intend to be there at 10:30. Somebody should tell me all
18 right, these are the 15 minutes. I would like to have it
19 as close to 10:30 as possible. I will go through in 15
20 minutes and I will be out. And the attorneys will be
21 there with me and Mr. Kessler.

22 We will not have a court reporter because
23 nothing is going to be said. I'm going to walk through.
24 Nothing is going to be said. I'm going to say to whomever
25 is going to be on the this tour, which could be Miss

1 Sullivan and Mr. Herbst, I'm going to say I want to see
2 what is reflected in Defendant's Exhibit RR, and then I
3 will follow you around. I will look, and that's it.

4 That is the whole process. So that is what is
5 going to happen.

6 I will see you all then tomorrow at 10:30 at the
7 jail. Thank you very much.

8 (Proceedings adjourned at 6:30 pm.)

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