

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CRIMINAL DEPARTMENT
DIVISION NO. 5

STATE OF KANSAS,
Plaintiff,

v.

Case No. 07CR2701

COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD
OF KANSAS AND MID-MISSOURI,
Defendant.

ORIGINAL

TRANSCRIPT OF HEARING

PROCEEDINGS HAD before the HONORABLE STEPHEN R.
TATUM, Judge of Court No. 5 of the Tenth Judicial
District of the State of Kansas at Olathe, Kansas, on
the 24th day of October, 2011.

APPEARANCES

For the State:

STEVE HOWE
District Attorney
CHRISTOPHER MCMULLIN
Assistant District Attorney
Johnson County Courthouse
Olathe, Kansas 66061

For the Defendant:

PEDRO L. IRIGONEGARAY and
ELIZABETH HERBERT
Attorneys at Law
1535 SW 29th Street
Topeka, Kansas 66611
and
DIONNE SCHERFF
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Reported by Lynette L. Childers, RPR, CSR

CLERK OF DISTRICT COURT
JOHNSON COUNTY, KS

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1 (Whereupon, the following proceedings
2 were had:)

3 **THE COURT:** This is the case entitled the
4 State of Kansas vs. Planned Parenthood, Case 07CR2701.
5 Counsel, your appearances for the record.

6 **MR. HOWE:** May it please the Court, the State
7 appears by Steve Howe and Chris McMullin.

8 **MR. IRIGONEGARAY:** May it please the Court,
9 your Honor, Planned Parenthood appears by Dionne
10 Scherff, Elizabeth Herbert and Pedro Irigonegaray.

11 We are ready to proceed.

12 **THE COURT:** Thank you. This is a motion on
13 the State for a continuance.

14 You may proceed.

15 **MR. HOWE:** Thank you, Judge.

16 Judge, what I would like to do is kind of go over
17 a little bit of the sequence of events to help this
18 Court make an informed decision on this motion by the
19 State.

20 You know the preliminary hearing was set for
21 today. And in preparation of the preliminary hearing
22 the State, as it normally does in most cases, issues out
23 subpoenas for the case. That was done in September
24 asking KDHE for them to have a person appear and be able
25 to authenticate records.

1 And we notified counsel for KDHE, it would have
2 been some weeks prior to September 12th. On September
3 12th they were personally served with that subpoena and
4 we had discussions about what was needed and what
5 documents and the individuals that would be needed to
6 testify.

7 And as you know these records -- or may not
8 know -- that these records are extremely important and
9 are the essence behind the felony charges making a false
10 writing. The reports that we are speaking of are the
11 termination of pregnancy reports that are filed pursuant
12 to statute by the providers. They were provided to
13 KDHE. It's part of the statutory requirements that they
14 have.

15 What the State's case is centered around is the
16 original documents provided to KDHE and comparing them
17 to the actual documents provided by Planned Parenthood
18 to Judge Anderson and Steve Cavanaugh, special counsel.
19 And in comparison of the two and the State's allegations
20 that they are not the same and that is the essence of
21 the false writing charge.

22 So it becomes extremely important for us to get
23 the original documents, as you would guess, in order to
24 present our case.

25 After that subpoena was delivered to KDHE we

1 received a phone call from counsel from KDHE -- who I
2 will say counsel for KDHE here in the last few months
3 has been totally cooperative with us and we have had no
4 problems with these representatives of that agency.
5 Prior to September 23rd, they indicated they had
6 concern, they were having trouble locating those
7 documents.

8 And then after -- they wanted to do a further
9 investigation and inspection. And eventually, prior to
10 September 28th, they notified us that they believe that
11 those documents were destroyed and that they would issue
12 a memorandum outlining the circumstances behind that
13 destruction.

14 Why that is important -- I wanted to then back
15 track in time. First of all, I'm kind of disturbed by
16 the fact of the sequence of the events that occurred.
17 And let me explain why I feel that way. Back in early
18 2008 the State, the District Attorney's Office of
19 Johnson County, had issued subpoenas to that same
20 agency. We asked for those same records.

21 What happened was then KDHE issued a motion to
22 quash said subpoena. And the Court recalls that the
23 parties and KDHE appeared before you on April 3rd of
24 2008 to hear that very motion. During that time KDHE
25 made some representations that I think were total

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1 misrepresentations of the facts.

2 And what I want to do is cite some things done by
3 KDHE. And I will make the distinction between those
4 representatives of KDHE back then and the ones that are
5 representing this agency now, who I think have been up
6 front with us from the very start.

7 **THE COURT:** Well let me ask you this, was
8 there ever a set of records that were obtained from
9 KDHE? And where are those?

10 **MR. HOWE:** Those, Judge, were obtained by the
11 Kansas Attorney General. And through many twists and
12 turns distributed out to various agencies, parties in
13 this case, the judge, Judge Anderson. So --

14 **THE COURT:** And those are not authenticated?

15 **MR. HOWE:** Yes, they are just copies.

16 **THE COURT:** And when did that happen? When
17 were those copies first made?

18 **MR. HOWE:** The copies first made?

19 **THE COURT:** Yeah. The first copies that were
20 received by Phill Kline when he was Attorney General,
21 right?

22 **MR. HOWE:** I can't give you an exact date but
23 I'm thinking somewhere around 2004.

24 **THE COURT:** 2004?

25 **MR. HOWE:** Yes.

1 So prior to the sequence of events where the Court
2 had all the parties here KDHE had been put on notice
3 that this was subject to a criminal investigation.

4 Going back to -- their pleading back on April 3rd,
5 Judge, their pleading indicated -- here's their
6 pleading: "Wherefore, pursuant to K.S.A. 60-245a, the
7 KDHE objects to the order and subpoenas duces tecum,
8 Exhibit 1, and requests the Court to quash the subpoena
9 duces tecum for confidential abortion records and the
10 order for the appearance of Dr. Elizabeth Saadi on
11 April 7th and 8th at 9:00 a.m. to authenticate such
12 records. Should the Court deny KDHE's motion in whole
13 or part, KDHE requests the Court issue an order
14 specifically finding that the disclosure and/or
15 authentication of those records by Dr. Saadi pursuant to
16 the order and subpoena is in conformance with K.S.A.
17 65-445 and that such records may be provided with an
18 affidavit of authenticity from Dr. Saadi in lieu of
19 testimony."

20 That last part of that, Judge, is they are
21 basically saying we've got those copies and we're asking
22 that you allow her to authenticate them pursuant to
23 60-245a, okay? But there's more then.

24 The other misrepresentations were made by counsel
25 at the time, to the Court and to counsel. And these

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1 misrepresentations were to both parties and this Court
2 and allowed basically a two-year delay on an
3 interlocutory appeal to the Supreme Court.

4 KDHE went on on page six and seven of that
5 transcript and at the conclusion said, "An order
6 specifically finding that the disclosure or
7 authentication of those records by Dr. Saadi is in
8 conformance of 60-445 and that such records may be
9 provided with an affidavit of authenticity from
10 Dr. Saadi," just like they said in their pleading.

11 The Court, you, Judge, asked, "Now, I may be
12 anticipating but if the records were redacted so that
13 the identifying information was removed from those
14 records would you still make the same argument?"

15 And the response are from counsel from KDHE said,
16 "Yes, I think we would, your Honor."

17 But it even gets better.

18 Then when asked the purpose of the subpoenas, KDHE
19 said, "But I would concede that it would probably be to
20 authenticate those confidential records held by the
21 department," page eight of that transcript. And later
22 they said they would have to look at their records to
23 authenticate his copies.

24 So throughout this hearing they represented to
25 this Court and to the attorneys in this case that they

1 had those records and that they understood that if the
2 Court overruled their motion to quash that they were to
3 authenticate.

4 It was based on that representation that we filed
5 an interlocutory appeal, that we had litigation with the
6 Supreme Court. The Supreme Court heard this matter and
7 then the mandate came back down.

8 **THE COURT:** Tell me again about the reason
9 why you filed the interlocutory appeal.

10 **MR. HOWE:** Because of the motion to quash.

11 **THE COURT:** Because of the ruling on the
12 motion to quash.

13 **MR. HOWE:** Yes, yes.

14 The interlocutory appeal came back, they came
15 back, then the Attorney General joined in our
16 prosecution which is what they wanted.

17 **THE COURT:** So your argument is you felt that
18 the records were still there.

19 **MR. HOWE:** That was the representation made
20 by KDHE.

21 So, Judge, based on that presumption, based on
22 their representations back then, we moved forward like
23 we would in any case. We issued subpoenas like we would
24 in any case.

25 And then KDHE's counsel, which has been

1 cooperative now, indicated that those record were
2 basically destroyed in 2005 and so they are unable to
3 provide the original copies of the termination of
4 pregnancy reports.

5 That, of course, changes everything.

6 **THE COURT:** Well, by 2008 when the testimony
7 was given, there were no records at that time.

8 **MR. HOWE:** And they could have just stood up
9 here and said, Judge, it's a moot point, we don't have
10 them any more. And they didn't do that. So we moved on
11 that premise.

12 **THE COURT:** And what's your argument on that
13 point?

14 **MR. HOWE:** Well, our argument is that we
15 moved on the premise of the representations made based
16 on that record, that the records were still being
17 retained by that agency. We moved forward on that
18 representation. Everything we did to prepare for this
19 preliminary hearing was based on that representation
20 that the records existed. We found out they didn't.

21 That changes everything as far as our chain of
22 custody, what witnesses we would need, would we be able
23 to authenticate other copies of records made during the
24 course of this investigation. So it's a game-changer in
25 that respect in that we have to adjust to this new news.

1 As you know, this is a case of high profile. A
2 lot of interest in regards to this case. We think that
3 based on at that representation that was made in 2008
4 that left the parties at a disadvantage, there's been
5 spoliation of evidence for some reason that no one
6 really knows.

7 But that leaves the State in a position that we
8 think the Court should grant our good-faith request for
9 one continuance.

10 **THE COURT:** What a do you mean spoliation of
11 evidence?

12 **MR. HOWE:** Well, Judge, in the memorandum
13 that I received from KDHE they said that the records for
14 the other abortion clinic -- and I'm assuming that means
15 Tiller's clinic -- they still had those records up until
16 this year. But for some reason in this case where there
17 was litigation and subpoenas issued in the case, those
18 records had been destroyed.

19 **THE COURT:** Well, 2005 would have been prior
20 to the filing of this case.

21 **MR. HOWE:** Oh, I agree with you
22 wholeheartedly.

23 **THE COURT:** Shouldn't someone have checked at
24 that time to see if there were records?

25 **MR. HOWE:** Ah --

1 **THE COURT:** You weren't here.

2 **MR. HOWE:** I was an Assistant District
3 Attorney at the time when that happened.

4 **THE COURT:** Yes.

5 **MR. HOWE:** But I would say we can't undo
6 what's happened.

7 The bottom line is those records that were
8 provided are not authenticated records. It was
9 necessary to have KDHE be able to authenticate them but
10 they don't have their originals still.

11 Is it a hurdle? Yes. Does the State know what
12 its true impact is yet? No. We are still investigating
13 that and trying to determine the chain of custody of the
14 remaining records that we do have in our possession,
15 your Honor.

16 That is the request for the State is to give us
17 one continuance to allow us to see if we can resurrect
18 the foundation needed for presentation of that evidence.

19 As I stated in our motion, the State has not asked
20 for a continuance in this case. A lot of the delays
21 were when they were up at the Supreme Court and items
22 were being litigated up there. Most of the continuances
23 was based on the defendant's motions for continuance or
24 for their motions to dismiss or to quash various
25 records.

1 So we're asking for a short continuance to allow
2 us to determine how we are going to proceed at this
3 point and we'll be able to advise the Court at the next
4 hearing. And that's the State's request.

5 Does the Court have any other questions?

6 **THE COURT:** I might in just a bit, I'm going
7 to let Mr. Irigonegaray speak.

8 You filed a motion in opposition to this request
9 for continuance, Mr. Irigonegaray. I have that, so --

10 **MR. IRIGONEGARAY:** Yes, sir, we did. Before
11 I commence are there any questions the Court would like
12 to address?

13 **THE COURT:** Not yet, I just want to hear what
14 you want to say this morning.

15 **MR. IRIGONEGARAY:** All right, your Honor.
16 May it please the Court, your Honor, Counsel.

17 First of all, I am -- I am cornered about the
18 allegation that somehow KDHE misled us. It is not the
19 responsibility of KDHE to educate counsel on the
20 retention policies.

21 It is true that in 2004 when the former Attorney
22 General commenced an inquisition in Topeka which became
23 the subject of the *Alpha Beta* mandate from the Supreme
24 Court that certain records were subpoenaed from KDHE.
25 At that time it was, your Honor, the responsibility of

1 the Attorney General to issue a subpoena duces tecum for
2 authenticated records in order to have those reports
3 that he sought admissible in evidence. And had the
4 former Attorney General properly addressed the
5 evidentiary questions in 2004 we wouldn't be in this
6 situation today. And his failure to understand the law,
7 his failure to follow up with KDHE, to ascertain the
8 retention policies, should not be of harm to us.

9 Counsel used the term "spoliation". I don't
10 believe the term spoliation is appropriate in this case.
11 Spoliation of evidence is a different concept, not one
12 that is applicable in our situation here. These reports
13 that are sought which are no longer available were not
14 destroyed in some matter involving, for example, a
15 testing practice, as we would see in a products
16 liability case where a plaintiff may order a particular
17 product to be examined or in some other fashion.

18 The destruction of those records, those reports,
19 were pursuant to Kansas Historical Society record
20 retention schedules.

21 **THE COURT:** You're talking about the KDHE?

22 **MR. IRIGONEGARAY:** Yes, sir.

23 **THE COURT:** That was their retention policy
24 that they followed?

25 **MR. IRIGONEGARAY:** Yes, sir. It was from the

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1 Kansas Historical Society record retention schedule.

2 And what it required, your Honor, was that the
3 records would be kept for one year after the current
4 reporting year. So in '05, on a routine basis, they
5 were destroyed.

6 Unfortunately, what's happened is that -- you may
7 recall Counsel said that when the former Attorney
8 General sought the reports from KDHE they noticed that
9 there was a difference between our copies and the copies
10 from KDHE. But what they have not told you and what is
11 important to learn is that the differences were merely
12 on style, not content. The content of those reports
13 have been identical from the beginning.

14 **THE COURT:** I don't think we are here to
15 argue that, that particular issue today.

16 **MR. IRIGONEGARAY:** Well --

17 **THE COURT:** You're objecting to them having
18 more time to check and see if they have some other way
19 to authenticate records, right?

20 **MR. IRIGONEGARAY:** I understand, your Honor.
21 But comments made here have a life outside this
22 courtroom that we have to deal with. And we are now
23 dealing with theories of conspiracy that somehow or
24 another KDHE and Planned Parenthood were involved in
25 this immense conspiracy. And I think it's important --

1 **THE COURT:** Well, these records, as I
2 understand --

3 **MR. HOWE:** Judge, I'm not alleging that,
4 because they didn't have control of those records.

5 **MR. IRIGONEGARAY:** I'm not suggesting you
6 are, Mr. Howe.

7 **THE COURT:** Here's my comments on that.
8 These records were destroyed in 2005 which precedes the
9 filing of these charges.

10 **MR. IRIGONEGARAY:** Yes, sir.

11 **THE COURT:** So there was no knowledge -- I
12 can't impute any knowledge to KDHE that there was going
13 to be a case filed or not filed unless I hear some other
14 information that I haven't heard so far.

15 And I don't think Mr. Howe was indicating --

16 **MR. IRIGONEGARAY:** And I did not say that
17 Mr. Howe was suggesting there was a conspiracy. But
18 that is, in essence, what we have to deal with outside.
19 Because, as you said, this is a high profile case and
20 the consequences of this case have a life outside the
21 four walls of this courtroom. A consequence which is
22 not pleasant for those of us that are being accused of
23 these particular activities.

24 **THE COURT:** There are, as I understand it,
25 some records from KDHE that are not authenticated.

1 **MR. IRIGONEGARAY:** That is correct, your
2 Honor.

3 **THE COURT:** Mr. Howe has indicated in his
4 comments today he is asking for an opportunity to see if
5 there is some way to establish a -- I don't know, these
6 are my words -- a chain of custody or some way to
7 authenticate them from those other records that were
8 obtained.

9 **MR. IRIGONEGARAY:** Yes, sir.

10 **THE COURT:** So I think that's kind of the
11 point, he wants to see if he can have some more time to
12 do that.

13 **MR. IRIGONEGARAY:** I understand, your Honor,
14 that that's what he's interested in. But we have issues
15 regarding both the Kansas and the United States
16 Constitution, the Bill of Rights and our right to have
17 this matter heard in an expeditious manner.

18 Keep in mind, your Honor, that back in 2010 when
19 the Supreme Court finally issued its decision on the
20 former DA's appeal of your order to quash, we were
21 delayed by two and-a-half years, not by our fault.

22 **THE COURT:** Correct.

23 **MR. IRIGONEGARAY:** But it's another delay
24 from the prosecution.

25 **THE COURT:** Well, it took a while for that

1 opinion to come down.

2 **MR. IRIGONEGARAY:** It took a while.

3 **THE COURT:** And that's because there are a
4 number of lawsuits, as you know. The history is laid
5 out very well in the final Supreme Court opinion.

6 **MR. IRIGONEGARAY:** I understand, your Honor.

7 **THE COURT:** But it did take a while.

8 **MR. IRIGONEGARAY:** It took a while. And I
9 understand justice doesn't always move very fast.

10 However, the Supreme Court made it clear, as you
11 did, that 65-445 limits the access to those reports to
12 the Attorney General's office, or the Kansas Board of
13 Healing Arts, neither of which fit the executive
14 authority, which at that time the former district
15 attorney possessed. So that is yet another delay that
16 denies us the opportunity to be heard timely.

17 What the District Attorney's office has now, and
18 what everybody in this case now has from KDHE, are
19 copies of copies of copies, through a torturous process
20 that cannot, in our opinion, be cured.

21 So both as a matter of the evidentiary record in
22 this case, as a matter of the constitutional right to a
23 speedy hearing, both under the United States and the
24 Kansas Constitution and the Bill of Rights, as well as
25 the delays that have been incurred in this case since

1 the matter was set for preliminary hearing in July, we
2 request this Court that the remedy that is most
3 appropriate is a dismissal of the felony counts against
4 us in this matter.

5 Keep in mind that there still remains the counts
6 regarding the misdemeanors of failure to keep reports,
7 copies of the reports, which would then give them an
8 opportunity, if they could come up with an evidentiary
9 process that would cure the deficiencies that they face
10 under the Kansas Rules of Evidence would allow them to
11 present that case that we failed to retain copies.

12 But that could be resolved with a trial down the
13 road, but not to continue this preliminary hearing which
14 would take a tremendous amount of time to reschedule and
15 then another delay before we even get to trial.

16 Thank you, your Honor.

17 Do you have any questions?

18 **THE COURT:** Not right now, thank you.

19 Mr. Howe, do you have some other comments?

20 **MR. HOWE:** Judge, only that our request is to
21 set this matter over. We can set it for preliminary
22 hearing and between now and then if we cannot establish
23 a sufficient chain of custody then we will notify Court
24 and Counsel and we won't waste everybody's time. But I
25 do ask for some additional time.

1 And I would note that since the mandates came
2 down, we had a first appearance before this Court in
3 February. The defense asked for a motion setting. That
4 matter was set till July. And then when we set this
5 matter for a preliminary hearing there was a request for
6 an amount of -- a number of days, like three days. And
7 I believe at least a month of that was a scheduling
8 problem that Counsel had and that's why it was set in
9 October versus September. So I think we're acting in
10 good faith trying to promptly get this thing resolved.

11 I would ask the Court to find that because of a
12 problem with a third party that is a key piece of the
13 evidence that it's a good faith request of the State,
14 first continuance request, and allow us an opportunity
15 to see if we can cure those problems.

16 **THE COURT:** Well, on those issues of
17 scheduling since February when we got the Supreme Court
18 decision back the parties have agreed on those dates, I
19 think both parties, and to work with schedules. And so
20 those are agreed upon dates in each case that were set
21 out quite a ways. But that was by the agreement of the
22 parties and first for the motions and now for the
23 preliminary hearing that's scheduled today.

24 I think we're all surprised that these documents
25 were destroyed in 2005 when this case was filed in 2007.

1 Be that as it may, we are where we are today. And the
2 only question for me this morning is whether to give the
3 State additional time.

4 And I guess I would ask, do you feel like there
5 are some avenues to explore that would render the
6 documents that you referred to as having some spoliation
7 become in a manner in which they could be admitted in
8 Court?

9 **MR. HOWE:** Judge, we have started to conduct
10 an investigation to determine whether or not we have
11 other opportunities to do that. And that includes
12 interviewing some additional witnesses to track down
13 basically the factual basis to support this presentation
14 of secondary evidence.

15 So if I didn't have a good faith basis to ask for
16 this continuance to allow us to at least track down
17 these other avenues, I would not do that to this Court.
18 But I think at the very least we should have an
19 opportunity to run all those traps and see if we can at
20 least have a better understanding of whether we can
21 present that secondary evidence as part of the evidence
22 in this case.

23 **THE COURT:** And let me ask the parties a
24 following question: When KDHE destroyed the records
25 they didn't microfilm them? They didn't scan them into

1 a system? Do we know?

2 **MR. HOWE:** Judge, the only thing that they
3 have is what we call abstracts, which is they data entry
4 the information on those forms into a data base. So
5 they were not microfiched, they were not scanned in.
6 Basically all we have is a summary of the actual
7 documents left. And that's all they have.

8 **THE COURT:** Mr. Irigonegaray.

9 **MR. IRIGONEGARAY:** Thank you, your Honor.
10 That is my understanding. Those data were placed
11 in a form that allows for statistical analysis but not
12 for review of the actual document we submitted.

13 **THE COURT:** Thank you.

14 Counsel, I'm going to set this over for two weeks,
15 approximately two weeks, and I would like the State to
16 come in at that time and tell me if they are making any
17 progress on their theories of having some other way to
18 get documents admitted into evidence from KDHE just to
19 see if you're making that progress or not and see where
20 we're at.

21 I'm not going to reset it for a preliminary
22 hearing at this time because there are a lot of
23 unknowns, apparently.

24 **MR. HOWE:** Okay.

25 **THE COURT:** So you can make that effort for a

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1 couple weeks, come back in and see where we are at.

2 So your motion to continue is sustained for two
3 weeks for a status conference.

4 Is there anything further to take up this morning?

5 **MR. IRIGONEGARAY:** Yes, sir.

6 Do you wish to set that hearing date at this time?

7 **THE COURT:** Yes, we're going to get you a
8 date here.

9 **MR. IRIGONEGARAY:** Would it be appropriate
10 for me to call my office and get that scheduled?

11 **ADMINISTRATIVE ASSISTANT:** I have
12 November 9th at 11:00 or November 10th at 9:00.

13 **THE COURT:** Can you make that happen,
14 Mr. Irigonegaray?

15 **MR. IRIGONEGARAY:** If I could just call the
16 office and find out. November 9th at 11:00?

17 **THE COURT:** Why don't you step right out in
18 the hall and make your call.

19 **MR. IRIGONEGARAY:** I will, sir. And November
20 10th at?

21 **ADMINISTRATIVE ASSISTANT:** 9:00.

22 **MR. HOWE:** Judge, the 10th wouldn't work for
23 me.

24 **THE COURT:** The 10th of November,
25 Mr. Irigonegaray, at 9:00 works for the State.

1 MR. HOWE: No, it does not.

2 **THE COURT:** Oh, it does not. Which date
3 works for you, then?

4 **ADMINISTRATIVE ASSISTANT:** The 9th at 11:00?

5 || **MR. IRIGONEGARAY:** November 9th at 11:00.

6 **MR. HOWE:** Judge, I'm assuming that's going
7 to be based on statements of counsel? We're not going
8 to be presenting any witnesses on that?

9 THE COURT: Right. Statements of counsel.

10 MR. HOWE: Okay.

11 **MR. IRIGONEGARAY:** That works, your Honor.

12 **THE COURT:** The next date in Court then will
13 be --

14 ADMINISTRATIVE ASSISTANT: -- November 9th at
15 11:00 o'clock.

16 THE COURT: November 9th at 11:00. Counsel,
17 we will see you at that time.

18 Anything further today?

19 **MR. HOWE:** Judge, one last thing.

20 THE COURT: Okay.

21 **MR. HOWE:** You know, as Counsel we are not
22 allowed to really comment about the proceedings that
23 goes on during a pending criminal investigation. And I
24 guess I'm just asking for a gag order by all parties.

25 Mr. Brownlie, seems like after every hearing,

1 gives a little dissertation. And it seems to me,
2 considering all the publicity that's going on that we
3 ought to probably just not say anything because that's
4 the way the Court has instructed us to proceed on
5 criminal cases.

6 And I would just ask the Court to issue -- if you
7 want to do a formal gag order, just that we don't make
8 comments about what's going on and I think it's only
9 fair that that go across the board.

10 **MR. IRIGONEGARAY:** I think that's appropriate
11 for Counsel. And neither Mr. Howe nor I have been
12 involved in that.

13 But I don't think it's appropriate to do so for
14 Mr. Brownlie. And his comments have only been in
15 response to the immense amount of aggressive,
16 inappropriate and very ugly comments that we are having
17 to endure because of this prosecution. I think to deny
18 him the opportunity to speak is inappropriate. None of
19 his comments have been inflammatory or in any other way
20 harmful.

21 **THE COURT:** Well, Court proceedings are to
22 determine facts. Comments by all of those who have an
23 interest in this case or in this issue, when they make
24 any comments that are in any way inflammatory do not
25 help the process of ascertaining the facts and we would

1 ask everyone to conduct themselves accordingly.

2 Counsel does have ethical considerations and
3 restrictions. And I don't think I have authority to put
4 any other restrictions on other persons. But I think
5 everyone should use good common sense.

6 We stand in recess. Thank you.

7 **MR. IRIGONEGARAY:** Thank you, your Honor.

8 **MR. HOWE:** Thank you.

9 (Whereupon, the proceedings were
10 concluded.)
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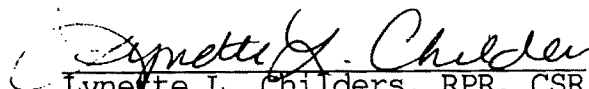
C E R T I F I C A T E

STATE OF KANSAS)
) Ss.
JOHNSON COUNTY)

I, Lynette L. Childers, a Certified Shorthand Reporter, and the regularly appointed, qualified and acting Official Reporter of Court No. 5 of the Tenth Judicial District of the State of Kansas, do hereby certify that as such Official Reporter, I was present at and reported in machine shorthand the above and foregoing proceedings.

I further certify that a transcript of my shorthand notes was typed and that the foregoing transcript is a true and correct transcript of my notes in said case to the best of my knowledge and ability.

SIGNED, OFFICIALLY SEALED, AND FILED WITH THE CLERK OF THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS, this 16th day of November, 2011.


Lynette L. Childers, RPR, CSR
Official Court Reporter
Supreme Court No. 1457