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TRANSCRIPTION OF RECORDED PROCEEDINGS

REGARDING FOTI VS. MCHUGH 05-16079

ORIGINAL

TRANSCRIBED BY: DONNA K. NICHOLS, RPR, CSR. 5660

1 MS. JENSEN: Good morning, your Honor. May it
2 please the Court, my name is Alice Jensen. I am from
3 the law firm of Fenwick and West, pro bono counsel for
4 plaintiff/appellants in this case, Robert John Foti and
5 Kenneth Augustine.

6 I'd like to reserve two minutes of my time for
7 rebuttal if your Honor --

8 THE COURT: Okay.

9 MS. JENSEN: In this case the district court
10 dismissed plaintiff's pro se complaint on the pleadings
11 without reaching the merits of whether or not the
12 government's photo identification requirement to enter a
13 federal courthouse violates the constitutional rights of
14 access of those who do not possess identification.

15 As the record indicates, there are multiple
16 facts that could materially influence this analysis,
17 therefore, the district court should have allowed this
18 case to proceed to the merits phase.

19 THE COURT: Now, do we know that Mr. Foti
20 didn't possess identification, or do we know that he
21 just didn't want to produce identification?

22 MS. JENSEN: No, Mr. Foti and Mr. Augustine do
23 not possess identification as a matter of strongly-held
24 principle. So they don't own any identification. It's
25 not that they had it and they forgot it in their car

1 or --

2 THE COURT: Identification meaning pieces of
3 paper that have their photographs on them provided by --

4 MS. JENSEN: A government-issued identification
5 which is what the -- as far as we can tell, what the
6 government requires for you to enter a federal
7 courthouse.

8 THE COURT: But they might have such things as,
9 oh, you know, PG&E bills with their names and address on
10 them?

11 MS. JENSEN: Yes, potentially. What they
12 object to on principle is the requirement that you give
13 state-issued government identification like a driver's
14 license, for instance, to enter the courthouse. But
15 presumably they have many other pieces of identifying
16 documents that would allow them to prove they say -- who
17 they say they are.

18 THE COURT: And would they have -- would they
19 have objection to providing, say, a PG&E bill with a
20 name on it and address?

21 MS. JENSEN: I don't think so, your Honor. But
22 the point is that the district court never reached the
23 merits, so there was no factual findings as to whether
24 or not that would have been a sufficient form of
25 identification.

1 THE COURT: Okay.

2 MS. JENSEN: By dismissing on the pleadings the
3 district court precluded fact finding, as -- as I just
4 stated, on whether or not a photo identification
5 requirement is a necessary measure to accomplish a
6 legitimate government interest.

7 I'd like to highlight three things. First,
8 that there was no factual finding because it was
9 dismissed on the merits -- I mean dismissed on the
10 pleadings, that whether or not a photo identification
11 that's state issued is a necessary measure.

12 Second, the court below precluded consideration
13 on the merits of whether or not a less restrictive
14 alternative is available that would provide greater or
15 equal security at minimal cost.

16 And third, the district court erred in holding
17 that it did not have subject matter jurisdiction because
18 controlling Ninth Circuit precedent establishes that the
19 Administrative Procedure Act provides an explicit waiver
20 of sovereign immunity.

21 As to the first point, plaintiffs concede that
22 protecting the courthouse is a legitimate government
23 interest and that the government has a right to enact
24 security measures to protect -- to accomplish that goal.

25 THE COURT: Now, I assume that the screening

1 that took place in this case took place at the entrance
2 to the building.

3 MS. JENSEN: Yes, your Honor.

4 THE COURT: Now --

5 MS. JENSEN: It's the entrance once you enter
6 the front doors, the first thing -- as it is in this --
7 this building, the first thing you encounter is the
8 magnometer and the x-ray machine to put your belongings
9 on.

10 THE COURT: And it was there that the request
11 for government-issued photo ID was made?

12 MS. JENSEN: Yes.

13 THE COURT: Now, of course, 450 Golden Gate is
14 a government building that contains within it
15 courtrooms.

16 MS. JENSEN: Correct.

17 THE COURT: My question is then how do you turn
18 this into a clean case of access to courthouse because
19 it may well be that someone coming in -- I'm not saying
20 this was -- this was true of Mr. Foti, but I'm saying
21 that someone coming to the front door, coming to the
22 guard says I'm going into the courthouse or I'm going
23 into the courtrooms, I, therefore, don't have to provide
24 photo ID, but, in fact, he's going to the -- or has
25 something -- going somewhere else.

1 How do we -- as a practical matter, how are we
2 supposed to treat this as purely a courthouse case when,
3 in fact, the screening is done at the entrance to the
4 building?

5 MS. JENSEN: This -- in this particular case
6 Mr. Foti was a pro se litigant in the underlying case.
7 So he was listed on the docket for the summary judgment
8 hearing or any other hearing that he was going to as a
9 litigant. And so that would have been -- we would have
10 been able to determine, had we -- the district court
11 reached the facts that he was, in fact, on the docket
12 and that he was entitled to be there and, in fact,
13 ordered to be there for pretrial conferences and -- and
14 other court proceedings.

15 THE COURT: And if we hold -- I mean if
16 there's kind of -- it's kind of like a Chinese box
17 logical puzzle here.

18 If we hold that he has a right to go to the
19 courtroom without presenting ID because he's on the
20 docket, how are those guards supposed to know whether
21 he's who he says he is?

22 MS. JENSEN: Right, your Honor. And that is --
23 that is a -- a bit of a catch 22. And the plaintiffs
24 are -- are sort of in a catch 22 in a sense because
25 they're prevented from going into the courtroom to then

1 challenge whether or not they need ID to go into the
2 courtroom, so they sort of get in this (unintelligible)
3 that they can't get out of.

4 Which is why we would request that this Court
5 remand to the district court for factual findings.
6 Because the -- who he says -- whether he is who he says
7 he is, the fact of the matter is the security screening
8 at the courthouse door is designed to detect weapons,
9 basically. You walk through a metal detector, you put
10 your belongings in the x-ray machine because they don't
11 want to allow weapons into the courthouse. That makes
12 sense. We can see that that is legitimate security
13 interest.

14 Beyond that --

15 (Voices speaking over each other).

16 THE COURT: Isn't (unintelligible) security to
17 find out who is going into the courthouse, for instance,
18 a known repeated felon?

19 MS. JENSEN: Yes, the Court does have that
20 interest. However, the --

21 THE COURT: How do we tell that Mr. Foti isn't
22 one of those?

23 MS. JENSEN: Well, the flashing of the
24 identification in this case isn't -- doesn't provide an
25 additional measure of security and it can't tell whether

1 he's one of those because it's not checked against a
2 list. It's not like the TSA when you go to fly, checks
3 your reservation against the no fly list. In this case
4 it's simply literally a flash, you just flash your ID,
5 they look at it, and they let you in. And you don't
6 have one, they don't let you in.

7 THE COURT: Police may know who they're looking
8 for.

9 MS. JENSEN: But there's no evidence that they
10 were matching identification against a list of who they
11 were looking for.

12 THE COURT: They may know the list in their
13 minds.

14 MS. JENSEN: There is potential that they could
15 know the list in their mind, your Honor.

16 THE COURT: If they don't do it exactly the way
17 the TSA does it, I suppose there's some variety in
18 federal law enforcement.

19 MS. JENSEN: There is. And we concede that,
20 your Honor.

21 THE COURT: Now, would that be a matter though
22 of factual finding, that is to say as to do they have a
23 list, do they care about a list, do they care about the
24 identification of who might be coming in and so on?

25 MS. JENSEN: Yes, your Honor. And that's

1 exactly the point, which is the district court never
2 reached that issue because it dismissed with prejudice
3 on the pleadings. If the district court had gone on to
4 the merits, we could have discovered facts as to whether
5 or not the particular officers had a list in their mind,
6 had a list on paper, what the policies were, whether or
7 not the --

8 THE COURT: I -- I thought they handed a list
9 when I -- okay.

10 MS. JENSEN: Right. But the fact is that there
11 was no fact finding on that issue, and this was -- this
12 case was dismissed with prejudice.

13 THE COURT: And what -- what kind of relief are
14 you seeking here?

15 MS. JENSEN: We're seeking that the -- that the
16 Court remand the case back to district court and reverse
17 the dismissal with prejudice.

18 THE COURT: And what kind of relief are you
19 seeking in the district court?

20 MS. JENSEN: At the district court the
21 plaintiffs are seeking injunctive relief against the
22 government and asking for the Court to look at the facts
23 and determine whether or not, A, the photo
24 identification was a necessary measure, and, B, whether
25 or not there is a less restrictive alternative for those

1 who don't have identification.

2 THE COURT: Are you seeking damages?

3 MS. JENSEN: They are seeking damages, your
4 Honor, on the -- on the Fourth Amendment claim -- on the
5 unreasonable searches and seizures, when Mr. Foti was
6 grabbed in a wrist lock control hold, ejected from the
7 courthouse without his shoes which were still on the
8 conveyor belt and held -- surrounded by officers and not
9 allowed to leave for 20 minutes.

10 THE COURT: Do you have some procedural
11 difficulties for failure to exhaust administrative
12 remedies under the Federal Torts Claim Act?

13 MS. JENSEN: Yes, we do concede that the
14 plaintiffs did fail to exhaust their administrative
15 remedies, however the Court here should -- has the
16 discretion and the power to consider this issue raised
17 the first time on appeal.

18 This case actually falls squarely within the
19 exception for considering an issue for the first time on
20 appeal for two reasons, and the Court should entertain
21 it. First, that important constitutional issues were
22 raised by these pro se litigants and that it's well
23 established that pro se pleadings are treated with more
24 liberality because they're drafted by untrained lay
25 people.

1 And secondly, the -- since this is a --
2 sovereign immunity is a particularly arcane and
3 difficult area of the law, it's unreasonable to expect
4 that a layperson would understand that.

5 And more importantly, this case falls squarely
6 within the --

7 THE COURT: Arcane? It is arcane. It goes
8 back to the idea that the king cannot be sued. It's
9 been around since before we were a nation.

10 MS. JENSEN: Understood, your Honor.

11 THE COURT: But it means -- there's the old
12 idea that old process is due process, and sovereign
13 immunity certainly isn't anything new.

14 MS. JENSEN: Understood. The -- the problem
15 with --

16 THE COURT: You -- do you really believe that
17 your sovereign immunity waiver argument based on the APA
18 702? I mean you think that that waives sovereign
19 immunity?

20 MS. JENSEN: Absolutely, your Honor.
21 Presbyterian Church versus --

22 THE COURT: You think this is final agency
23 action?

24 MS. JENSEN: The --

25 THE COURT: What happened at the courthouse is

1 final agency action?

2 MS. JENSEN: The Presbyterian Church case
3 actually addresses that agency action language and
4 specifically states that it should not be used to
5 hypertechnically parse the --

6 THE COURT: Hypertechnically is a rhetorical
7 device meaning that you don't agree.

8 MS. JENSEN: Correct, your Honor. That the --
9 yes, but we do think that this Section 702 of the APA
10 does waive sovereign immunity, it states it
11 specifically, and the issue of whether this Court should
12 consider it for the first time on appeal is --

13 THE COURT: Final agency action was the
14 Department of Homeland Security adopting this
15 requirement. You didn't sue the Department of Homeland
16 Security. You still haven't sued them.

17 MS. JENSEN: Correct. We did not sue the
18 Department of Homeland Security.

19 The statute that actually governs homeland
20 security specifically states that it is not going to be
21 interpreted as allowing for the creation of a national
22 identity card. So there's no law that says that you
23 have to have a national identity card or a
24 government-issued ID to exist as a member of this
25 society.

1 The clients -- our clients have a deep and
2 abiding belief that the increasing requirement to carry
3 photo identification is a threat to constitutional
4 liberty. This Court doesn't need to address that
5 broader issue here. But the access to the courts is a
6 fundamental right, and that should not be used as a
7 mechanism to force people to get identification so that
8 they can exercise their constitutional right and access
9 important governmental --

10 THE COURT: Now, we've taken you a little bit
11 over time. Why don't we hear from the government, and
12 then we'll give you a chance to respond.

13 MS. JENSEN: Thank you, your Honor.

14 MR. SIMMONS: Thank you very much, your Honor.

15 My name is Abraham Simmons, I'm an assistant
16 United States attorney. I represent the defendant
17 appellees in this case. It is a very interesting case
18 to the extent that Mr. Foti does require that he be
19 permitted to walk into courtrooms without identifying
20 himself.

21 But what I -- this courtroom --

22 THE COURT: Wait a minute (unintelligible). Is
23 he unwilling to provide his name?

24 MR. SIMMONS: Your Honor, on --

25 THE COURT: Is he unwilling to say when asked

1 his name I am so and so?

2 MR. SIMMONS: As I understand it, on page ten
3 of his complaint or so he claims that he would like to
4 enter a building anonymously. That means without saying
5 who he is. Although we have just heard from opposing
6 counsel that perhaps he's willing to identify something
7 that identifies himself. I'm not sure whether now
8 they're trying to say it has something to do with a
9 picture identification or with the government aspect of
10 the identification.

11 But the way that the complaint is written,
12 clearly it says I should be able to enter anonymously,
13 i.e., without anyone ever knowing who I am. And that's
14 not just the courthouse, it's the building where the
15 courtroom is in. And I think that your Honor did put
16 your finger on one very troubling aspect of what happens
17 when someone is permitted to do that in a federal
18 building. That is, the courthouses do share, and they
19 share with others who may have other reasons for
20 requiring security, not just the obvious reasons that
21 are available to the courthouse.

22 Also, I should apologize to the Courts. The
23 first time I filed a brief in this case in opposition to
24 the pro se appellate briefs, it was November of 19 -- of
25 2005. Gilmore had not yet been decided. They did file

1 an additional brief after getting counsel, and when I
2 did my follow-up research, I did not look closely enough
3 to find Gilmore. But obviously that case blows quite a
4 hole in some of the arguments that they would like to
5 make, especially with respect to the Fourth Amendment.

6 THE COURT: Your argument -- excuse me, your
7 brief both before and after -- your -- basically the
8 same brief that you filed?

9 MR. SIMMONS: Yes, they are. Yes, your Honor.

10 THE COURT: You changed -- maybe -- I don't
11 know, maybe you changed a word or two, but it's --

12 MR. SIMMONS: That's right. And I think I
13 should have found Gilmore and I should have explained
14 that a little bit more.

15 The Gilmore case does pretty well say that
16 we're not going to be concerned with the request for --
17 for identification. It's not a Fourth Amendment
18 seizure, and it's not a violation, and that there are
19 reasons -- if you will look at how Gilmore decided the
20 case, neither did Gilmore, as did the case -- the
21 district court in this case actually try and look at
22 less restrictive alternatives or look at other things
23 that they would like to require in this case on appeal.

24 THE COURT: Okay. Let me ask you this about
25 the sovereign immunity question. Put damages to one

1 side and asking only about injunctive relief against
2 governmental officers.

3 Is the government claiming that it is immune
4 from -- based on sovereign immunity from an injunctive
5 suit for future action by government officials?

6 MR. SIMMONS: In that respect, your Honor, I
7 think it is very important to look at the precise
8 defendant. I don't make that argument for all possible
9 defendants in this case.

10 THE COURT: How about the particular officers
11 who have in the past and are likely in the future to
12 restrain Mr. Foti from entering the building without
13 identification?

14 MR. SIMMONS: Yes.

15 THE COURT: Is the -- does the government claim
16 sovereign immunity for an injunctive suit against them?

17 MR. SIMMONS: I believe so, your Honor.

18 THE COURT: On what basis?

19 MR. SIMMONS: They are qualifiedly immuned in
20 this --

21 THE COURT: Oh, no, the qualified immunity goes
22 only to damages. And I put damages to one side in my
23 question.

24 I'm asking only about prospective injunctive
25 relief. Does the government claim sovereign immunity

1 with respect to prospective injunctive relief as to
2 individual officers who, at least according to the
3 allegation, will prevent Mr. Foti from what he claims to
4 be his constitutionally-protected access?

5 MR. SIMMONS: The question is well understood
6 now your Honor.

7 And with respect to the allegations in this
8 complaint the answer is yes. Is there a case in which
9 their immunity --

10 THE COURT: The answer is, yes, you claim
11 sovereign immunity even in that circumstance?

12 MR. SIMMONS: Then the answer would be no. If
13 there were --

14 THE COURT: Let me make sure you -- I have it
15 right. To answer my question then, do you claim
16 sovereign immunity as against a suit for injunctive
17 relief against individual officers? Your answer is no?

18 MR. SIMMONS: I do not find a case that says
19 that we are entitled to that, your Honor.

20 THE COURT: Okay.

21 MR. SIMMONS: And so with respect to what
22 allegations or what complaints may arise in the future
23 which -- in which there may be a significant
24 constitutional violation, perhaps. And but we need to
25 see that case in order to find out which laws are --

1 THE COURT: Okay, but as a -- I think what
2 we're dealing with, when we're talking injunctive relief
3 for prospective --

4 MR. SIMMONS: That's correct.

5 THE COURT: -- relief is --

6 MR. SIMMONS: Are obviously limitations to what
7 the marshals and what officers can expect in the future
8 with respect to --

9 THE COURT: But there's a -- there's a very
10 long line of cases, most of them coming up under ex
11 parte and state officers, but there's a -- but
12 there's -- there's sort of a parallel line of federal
13 cases that say no sovereign immunity for that kind of
14 relief. Isn't that right?

15 MR. SIMMONS: That's right, yeah.

16 THE COURT: Okay.

17 MR. SIMMONS: If there are other precise
18 questions -- I think we've -- we pretty well understand
19 the limitations to the Fourth Amendment claims to
20 this -- in this case. There are no -- there is no Fifth
21 Amendment violation that has been made out in the
22 complaint. I think what's important to look at is --

23 (Voices speaking over each other).

24 THE COURT: There's no -- there's no due
25 process complaint here?

1 MR. SIMMONS: Not in this -- there's no
2 violation as alleged in the complaint. Perhaps the best
3 thing I could do with the -- with the time remaining,
4 your Honor, is just to -- to pay very close attention to
5 the allegations that were made in the complaint.
6 Because things do begin to shift as we get on to appeal.

7 I think it's very important to look at pages
8 four, seven and nine which end up being on pages 33, 36
9 and 37 of the excerpts of record. They are the
10 beginnings of paragraphs seven, eight and nine. And
11 what you find when you look at these paragraphs, your
12 Honor, is the claim about the Fourth Amendment being
13 about the right to step in and ignore the request to
14 stop.

15 THE COURT: You know, I'm -- you know, I'm more
16 interested in the access to the courthouse claim.

17 What is your argument that the government has
18 more than a security-based interest in access -- in
19 preventing access? That is, I think we all agree, it's
20 common ground probably for everyone in this courthouse,
21 maybe everyone in the entire country, that the
22 government has an appropriate interest in protecting the
23 security and the safety of people in the courthouse.

24 MR. SIMMONS: Yes.

25 THE COURT: But the -- but that's -- there's

1 some subsidiary questions, and that is what does the
2 government have a right to ask for in furthering or
3 protecting that interest. And what's your argument as
4 to why the -- the government is entitled to ask for --
5 okay, I'll take this version of the -- of the
6 plaintiff's claim, government-issued photo ID assuming
7 that the government is able to conduct all kinds of
8 magnet -- magnetic searches, x-ray searches, strip
9 searches and so on?

10 MR. SIMMONS: Well, you raise an -- an
11 interesting point with respect to why identification.
12 In that regard, I would posit that the Courts have an
13 interest in identifying who is in court. The Courts
14 have an -- have an interest separate and apart from
15 security from knowing for all the same reasons that we
16 don't require -- we don't allow even anonymous filings
17 in court or we don't permit filings to be made without
18 persons -- without it being public so that we have an
19 interest in understanding who is who in the court --

20 THE COURT: You know, there's something --
21 there's something sort of odd about this case, because
22 Mr. Foti claims he doesn't want to identify himself and
23 there may be some issues as to what form of
24 identification we're talking about at the door, but it's
25 clear he's going to identify himself when he gets to

1 court because he's got a lawsuit.

2 MR. SIMMONS: Exactly. Exactly the point, your
3 Honor.

4 So that at least to the extent that you were
5 asking what interest other than security is there in
6 identifying the person, clearly we have to know who he
7 is --

8 THE COURT: Well, but I --

9 (Voices speaking over each other).

10 THE COURT: But I assume he's conceded at least
11 passively that he's going to identify himself when he
12 gets to Judge Illston's courtroom.

13 MR. SIMMONS: That's right.

14 THE COURT: That's his argument is I have to
15 get up there because I'm in a lawsuit.

16 MR. SIMMONS: Right. Now, to be clear, not all
17 of the plaintiffs in this case have raised that precise
18 argument, somebody to witness what was going on in the
19 court. So it is important to address, I think, the --
20 those -- the arguments of -- of the witnesses as well.

21 And with respect to that we think, yes, it's
22 still important to understand that not all of the
23 reasons and not all of the procedures have been put
24 before this Court. But that was because the procedural
25 aspects of -- of where this Court came.

1 You saw in Gilmore that with respect to some
2 policies it is not wise to make less than an in camera
3 presentation of what all the rules are. In this case it
4 may be that the act of requesting identification may
5 lead to some sort of -- of investigation. It may be
6 that there is a list in the heads or there may be just
7 the chance that the production of an identification
8 identifying someone as Osama bin Laden or something of
9 the sort would trigger some sort of reaction other than
10 to just let them through.

11 It is not just pro forma, and it is required.
12 And, in fact, when I printed up a schedule for this
13 particular argument, it said right there on the bottom
14 ID required to get into the courtroom. There's a reason
15 for that. There's a reason why this Court requires it.
16 There's a reason why the district court does.

17 As to each and every reason, we didn't get that
18 far because there was not a sufficient enough claim as
19 presented. Mr. Foti walked into the courtroom when
20 asked to stop. The marshals told him please stop. He
21 said he objected loudly and did not. That's in the
22 complaint. That's what we needed to know. That's why
23 this case did not go any further.

24 With respect to the FTCA claims, there was no
25 administrative complaint filed. That's not just a

1 matter of is there some way of addressing a claim on
2 appeal as we heard by opposing counsel. That is -- that
3 claim is gone forever because there was not within the
4 two years an administrative complaint filed. That's not
5 a complaint that we can -- that is challengeable just
6 because it was with prejudice or without prejudice. The
7 claim is gone.

8 They can always, if they want to again, try and
9 create additional facts, different facts, and come again
10 before this Court if they think that there is a way to
11 get in. But as plead with the facts that we already
12 know, what's -- with what's admitted, there's nothing
13 more to do with this case. We would request that you
14 affirm.

15 THE COURT: Thank you.

16 MR. SIMMONS: Thank you.

17 THE COURT: Response.

18 MS. JENSEN: Thank you, your Honor. With
19 respect to the Federal Torts Claim Act, that statute
20 doesn't control the constitutional issues in this case.
21 We concede that plaintiffs did not exhaust their
22 administrative remedies, however, that's the reason that
23 we request remand and reversal of the dismissal with
24 prejudice so that they can be allowed to amend their
25 complaint after they exhaust their administrative

1 remedies.

2 As to the issue of whether or not Mr. Foti and
3 Mr. Augustine are willing to state their name or
4 otherwise identify themselves with something other than
5 government-issued ID, the fact of the matter is we just
6 don't know because the facts are not developed in this
7 record.

8 I will -- I will let you know that there is a
9 less restrictive alternative. In fact, we -- the irony
10 was not lost upon us when we saw the notice of hearing
11 that said photo ID is required. In fact, Mr. Foti and
12 Mr. Augustine and Mr. Gilmore of Gilmore Gonzales are in
13 the courtroom today, Your Honor. None of them came in
14 with ID. They were signed in by counsel. There is
15 another way to get people without identification into
16 the courthouse.

17 THE COURT: Difficult to sign in by counsel if
18 you're appearing pro se.

19 MS. JENSEN: Understood, your Honor. That's
20 why we argue that there needs to be a less restrictive
21 alternative to get into the courthouse, because you
22 can't always be signed in by counsel, especially if
23 you're representing yourself.

24 As to the Gilmore Gonzales case, that was an
25 airline case, and opposing counsel suggests that the

1 Fourth Amendment issues are not -- in this case are
2 precluded by the -- the Gilmore case.

3 However, the Gilmore case is one that's raised
4 in the airline context. And the Ninth Circuit
5 specifically said that there is no right to travel by
6 airplane -- by commercial airplane. And that's a huge
7 distinction because there's no constitutional right to
8 travel by airplane, however, there is a constitutional
9 right to access the court.

10 THE COURT: Constitutional right to travel,
11 Palco (phonetic) versus Connecticut, right?

12 MS. JENSEN: Understood, yes, but there's no
13 constitutional --

14 THE COURT: On the carrier.

15 MS. JENSEN: Understood, and --

16 THE COURT: Refusing it if you pay the fare.

17 MS. JENSEN: Right. And the -- the fact of the
18 matter is --

19 THE COURT: But Gilmore's on his way on
20 (unintelligible) okay, here we go.

21 MS. JENSEN: And that's not my case to argue,
22 your Honor.

23 But the fact of the matter is that the Ninth
24 Circuit did uphold a less restrictive alternative, a
25 secondary security screening that could be implemented

1 at the courthouse door for very minimal cost because
2 the -- the number of people who don't have
3 identification is relatively small. And that actually
4 would provide greater security than the flashing of
5 identification because the officers would be able to
6 confirm through visual and physical search of a person's
7 body and their belongings that there are no weapons.
8 And so that actually provides greater security which is
9 the justification offered for the identification
10 requirement.

11 Thank you, your Honor.

12 THE COURT: Thank you very much for your
13 argument.

14 Case of Foti versus McHugh is now submitted for
15 decision.

16 (End of recording)

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1 CERTIFICATE OF CERTIFIED SHORTHAND REPORTER

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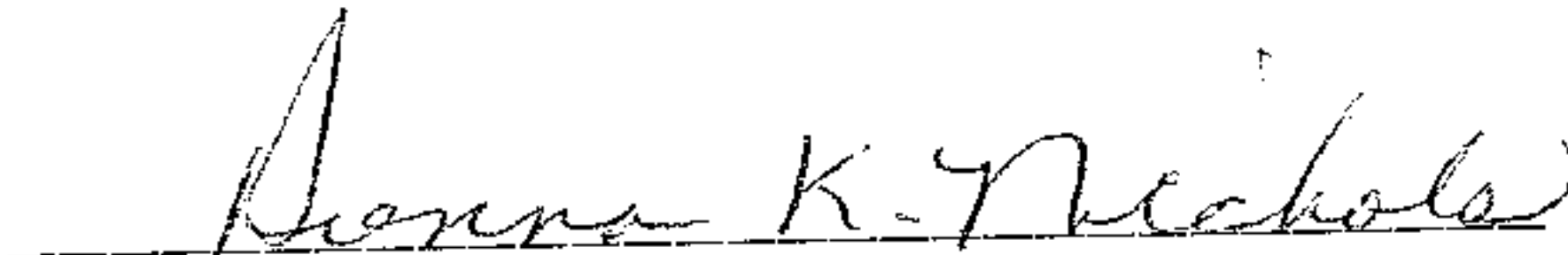
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10 audio recording were thereafter transcribed into
11 typewriting by me to the best of my ability;

12 That the foregoing transcript is a record of the
13 audible statements of all parties made on the audio
14 recording.

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16 Dated: MAY 21, 2007

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DONNA K. NICHOLS
Certified Shorthand Reporter
Certificate No. 5660

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