

27178
Vancouver Registry

In the Supreme Court of British Columbia
(BEFORE THE HONOURABLE MADAM JUSTICE HOLMES AND JURY)

Vancouver, B.C.
June 15, 2017

REGINA

v.

PATRICK HENRY FOX

PROCEEDINGS AT TRIAL
(Excerpt - Excluding Testimony of Desiree Capuano)

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**BAN ON PUBLICATION;
INHERENT JURISDICTION**

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**BAN ON PUBLICATION;
INHERENT JURISDICTION**

Crown Counsel:

M. Myhre

Appearing on his own behalf:

P. Fox

Defence Counsel:

A.J. Lagemaat
M. Chatha, A/S

BAN ON PUBLICATION; INHERENT JURISDICTION

Vancouver, B.C.
June 15, 2017

(EXCERPT FROM PROCEEDINGS)

DESIREE CAPUANO

a witness called for the
Crown, continuing.

[TESTIMONY OF DESIREE CAPUANO FROM START OF
DAY TO 10:37:57 A.M.]

(JURY OUT)

THE COURT: All right.

MR. LAGEMAAT: It's -- it's my theory that this -- this
was a custody battle gone very bad and Ms. Capuano
has made it look like Mr. Fox essentially -- I use
the word kidnapping, but took the child and
disappeared for nine years or ten years.

And this letter is the first -- the beginning
of a correspondence at the end of that period, and
it's her saying what she has been up to, but most
importantly in my view it is her saying that she
agreed for him to take the child and raise the
child, because -- and that's on the first page and
then she says she thought it would be better for
her to get her life together, and she goes on to
explain for a few pages what she has done to do
that.

So it's -- it's my position this letter sets
out what had happened and the part I am mostly
re -- relying on is the first paragraph -- or the
second full paragraph, the long one [as read in]:

What changed for me, what made me stop
fighting, was a conversation you and I had
where you actually asked me not to take
{GR}. You were sincere.

So she agrees in -- in -- and I'm sure she'll
have her own point of view, but she agrees that
{GR} should go with him, and then she takes
these steps to improve her life and be in a better
position for when she could essentially be a
mother again, and at one point she says:

2
(Jury Out)
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1 I could search him out, that is true, but why
2 would I do that?
3
4 which it would be my position that she wasn't
5 taking steps.
6 THE COURT: So do I take it from that that it would be
7 cross-examination on a previous inconsistent
8 statement?
9 MR. LAGEMAAT: Yes.
10 THE COURT: So normally the statement wouldn't go in,
11 and particularly when it's much longer than what
12 you are proposing to cross-examine on.
13 MR. LAGEMAAT: Then I would suggest I would -- it won't
14 go in and I'll just cross-examine her -- I'll put
15 it to her and cross-examine her on what she said
16 in the letter, but I will read it in.
17 THE COURT: It may be that her responses will take us
18 to other parts of the letter.
19 If it gets to the point that the jury is
20 going to need the whole thing in order to
21 understand the evidence, then we might reconsider,
22 but if you are simply proposing to put certain
23 portions to her as previous inconsistent
24 statements then I would think -- subject to any
25 further submissions from either of you, I would
26 think that it shouldn't -- copies should not go to
27 the jury and the statement itself would not be an
28 exhibit.
29 MR. LAGEMAAT: And what about me reading in sentences
30 to -- or putting those to her?
31 THE COURT: Well, you need to do that, yes --
32 MR. LAGEMAAT: Yes, okay. Then --
33 THE COURT: -- so that the jury knows what she --
34 MR. LAGEMAAT: Then we'll leave it at that and I'm only
35 relying on small portions, not enough that it
36 needs to be an exhibit.
37 THE COURT: And I am wondering, since we have broken,
38 whether I should give the jury a mid-trial
39 instruction about previous inconsistent
40 statements --
41 MR. LAGEMAAT: I -- I think that would be a good time
42 to do that, My Lady.
43 THE COURT: -- explaining that it would go to
44 credibility only.
45 MR. LAGEMAAT: Yes.
46 THE COURT: Yes? Yes, Mr. Myhre?
47 MR. MYHRE: I agree, My Lady.

3
(Jury Out)
Proceedings

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1 MR. LAGEMAAT: And there's one issue -- one -- one
2 other issue I could bring up now, rather than
3 saving -- removing the jury again later, and it's
4 to do with what we talked about Carrington College
5 yesterday, the hearsay.
6 And I looked back through my student's notes,
7 which are quite precise, and a similar statement
8 was made about her job at Phoenix, that she was
9 told she was let go because she was a security
10 risk.
11 THE COURT: Yes.
12 MR. LAGEMAAT: I believe that should be added on to the
13 Carrington instructions.
14 THE COURT: Do you wish me to give another mid-trial
15 instruction or keep that thought --
16 MR. LAGEMAAT: Yes.
17 THE COURT: -- for the final instructions?
18 MR. LAGEMAAT: I would say keep it for final
19 instructions. I just wanted to bring it up while
20 we have everybody out.
21 THE COURT: What was it called again?
22 MR. LAGEMAAT: It -- it was the Phoenix University, her
23 first job that she said she lost, and it was --
24 she was told she was let go because she was a
25 security risk, and then the Carrington was she was
26 told she didn't get the job because of --
27 THE COURT: I'm not sure it was Phoenix University.
28 MR. MYHRE: It was Apollo.
29 MR. LAGEMAAT: Or, sorry, sorry, Apollo, who owns
30 Phoenix, yes.
31 MR. MYHRE: And the other was Pima Community College.
32 Pima Community College was the one that she said
33 that she --
34 MR. LAGEMAAT: Pima -- Pima -- not Carrington, Pima.
35 MR. MYHRE: -- [indiscernible/ 10:43:55 AM].
36 MR. LAGEMAAT: I apologize.
37 THE COURT: All right. Now, logistics, should I be
38 giving the instruction about previous inconsistent
39 statements in the presence of Ms. Capuano or not?
40 MR. LAGEMAAT: I don't have a submission on that, My
41 Lady.
42 MR. MYHRE: Me neither, My Lady. I don't think it
43 matters.
44 THE COURT: All right.
45 MR. LAGEMAAT: I have no -- either way.
46 THE COURT: Then we I think only need to stand down
47 once. Will this be a lengthy line of cross-

(Jury Out)
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1 examination? I was -- you were looking at the
2 clock, Mr. Lagemaat, and I'm wondering whether we
3 should just take the morning break early.
4 MR. LAGEMAAT: I think that would be a good time to do
5 that, My Lady.
6 THE COURT: Now, I've not given the usual warning to
7 Ms. Capuano. Mr. Myhre, would you just remind
8 her, without saying anything else, please?
9 MR. MYHRE: I will.
10 THE COURT: Is there anything else we should deal with?
11 MR. LAGEMAAT: Not from me, My Lady.
12 THE COURT: Mr. Sheriff, if you wouldn't mind advising
13 the jury we're going to now take the morning
14 break?
15 THE SHERIFF: Yes, My Lady.
16 THE COURT: Thank you.
17
18 (PROCEEDINGS ADJOURNED FOR MORNING RECESS)
19 (PROCEEDINGS RECONVENED)
20
21 (JURY IN)
22
23 [TESTIMONY OF DESIREE CAPUANO FROM 11:05:10
24 TO 11:53:30 A.M.]
25
26 (JURY OUT)
27
28 MR. MYHRE: ... starting the procedure when we come
29 back, after my friend has a chance to confer with
30 Mr. Fox.
31 There actually is a little bit of case law on
32 how to deal with potential disputes between s.
33 46.3 counsel and a self-represented accused, and
34 so I wanted to take you -- Your Ladyship to that
35 before we broke and just point out the relevant
36 paragraphs, so that you could at least read a few
37 paragraphs before we come back in.
38 Now, I understand that this situation arose
39 in a case with Justice Harvey. It was in 2013. I
40 can give you a case number, if you like, but the
41 way they dealt with the matter was --
42 THE COURT: Do you have a copy of that?
43 MR. MYHRE: I -- there is no written decision actually,
44 or I don't have one. I just was talking to a
45 colleague who is actually dealing with an appeal
46 of what happened there, but I don't have a copy of
47 Justice Harvey's decision, because it doesn't

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1 really -- there was no formal order.

2 The way they dealt with it in court --
3 THE COURT: Which Justice Harvey was this, in New
4 Westminster?

5 MR. MYHRE: It was in New Westminster. The way they
6 dealt with it in court was after cross-examination
7 the complainant was stood down, counsel conferred
8 with the accused, and they came back into court
9 and laid out the exact issues.

10 I think there were only two or three in which
11 the accused wanted the complainant cross-examined
12 and counsel wasn't willing to do that, and what
13 ultimately happened at the end of that was the
14 judge decided that the lines of questioning were
15 irrelevant and so they weren't allowed, but it was
16 it seems to me beneficial to at least put that on
17 the record, so that if there is a review it is
18 clear where the lines of dispute were, if there
19 are any.

20 Now, there are two cases that I am aware of
21 that deal with the responsibilities of s. 46.3
22 counsel and you have already seen one of them in
23 the 46.3 application. I have another copy here.
24 It's the *Faulkner* case.

25 And then there is another case called
26 *Thornton*, and I have copies for Your Ladyship, for
27 my friend and for Mr. Fox, and I will just refer
28 Your Ladyship to a few paragraphs.

29 THE COURT: Thank you.

30 MR. MYHRE: Mr. Fox. No? Okay.

31 Sorry, I handed someone my little notes --
32 no, no, here they are.

33 So, My Lady, I am not going to take you to
34 particular paragraphs right now, but I will just
35 point them out. In the *Thornton* case it's
36 paragraphs 58 and 59, and in the *Faulkner* case
37 it's paragraph 35 that are relevant and -- and
38 basically *Thornton* says appointed counsel
39 shouldn't be putting any line of cross-examination
40 to the complainant that's not admissible or
41 unethical, whereas in *Faulkner*, as you saw,
42 Justice Code states that this counsel would have
43 the same obligations as retained counsel and
44 therefore makes their own tactical decisions about
45 a cross-examination.

46 THE COURT: All right. Mr. Fox?

47 THE ACCUSED: I'm -- I'm sorry, I'm not a hundred

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1 percent clear on what exactly the concern is here.
2 I wonder if Mr. Myhre might enlighten me on that?
3 Is this about a recording of that interview or --
4 THE COURT: No -- oh, do you mean to what it relates?
5 THE ACCUSED: What -- yeah.
6 THE COURT: The -- the concern expressed generally
7 as --
8 THE ACCUSED: Oh, okay.
9 THE COURT: -- far as I understand is that there may
10 when the cross -- when Mr. Lagemaat has finished
11 cross-examination, there may be lines of cross-
12 examination that you would like him to pursue that
13 he determines are not appropriate to pursue; how
14 do we deal with that, with this situation of
15 counsel appointed by the court who is not counsel
16 that you have retained.
17 MR. LAGEMAAT: Correct.
18 THE COURT: And Mr. Myhre is trying to alert me to this
19 possibility, and equip me with the case
20 authorities he has come across, that address this
21 in some way.
22 THE ACCUSED: Okay. So we're just speaking in general,
23 not about specific evidence? Okay.
24 THE COURT: At this point, yes.
25 MR. LAGEMAAT: And -- and that's one reason, My Lady, I
26 requested the extra time. I want to make sure Mr.
27 Fox fully understands what we're discussing here.
28 THE COURT: All right. Thank you.
29 MR. MYHRE: Now, could we also discuss just the
30 logistics and witnesses, My Lady --
31 THE COURT: Yes.
32 MR. MYHRE: -- as far as proceeding?
33 In terms of not wasting the jury's time, I
34 wonder if we could come back half an hour or 15
35 minutes before two o'clock to try to sort this
36 out, in the hopes that we would be ready for the
37 jury at two?
38 The other thing I anticipate happening this
39 afternoon is I do have some re-examination, and I
40 don't know if Your Ladyship would prefer to find
41 out from me first, before I embark on it, what I
42 intend to re-examine on or if you'd prefer to --
43 and if you do then we need a little bit of extra
44 time for that, but that would have to happen after
45 any cross-examination is finished.
46 I'm just alerting Your Ladyship to potential
47 delays I see this afternoon.

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1 So then following up on that, I can have
2 Constable Potts here this afternoon and that is my
3 intention, so that if we do finish before three
4 o'clock we can at least keep going with Mr. Fox's
5 statement to Constable Potts and get started on
6 that.

7 That said, Constable Potts would be the only
8 witness I have prepared for Friday, and so if we
9 start Constable Potts this afternoon, if we get an
10 hour of the statement in we'll finish it tomorrow
11 morning, or we could break early this afternoon if
12 we do finish early and then Constable Potts could
13 be until about three o'clock tomorrow.

14 I don't think we have to -- well, we kind of
15 do have to decide that now. I have to know if I
16 should bring Constable Potts in.

17 THE COURT: Well, first of all, let's work out the
18 first issue.

19 Mr. Lagemaat, Mr. Myhre is suggesting that we
20 resume without the jury for 15 minutes to iron out
21 some of these issues, but will that -- if we were
22 to resume at quarter to two does that give you
23 enough time?

24 MR. LAGEMAAT: The -- the only one concern I have, My
25 Lady, is -- is if I do decide to embark on another
26 line of cross-examination I haven't already,
27 there's a potential issue if I have to print out
28 materials. I have to go to my office if it's 18
29 copies of -- or 16 copies of materials, I will
30 have to return to my office to do that.
31 That's -- that's one concern I have.

32 Other than that, if at all possible I'm --
33 I'm fine with coming back early and starting
34 without the jury for the last -- or the 15 minutes
35 before two o'clock or 30 minutes, and if I need
36 more time with Mr. Fox poten -- possibly we can
37 get -- I -- I can't say how much time I'm going to
38 need.

39 I haven't had this discussion with him yet,
40 but we could potentially come back and get those
41 matters done, and if I needed more time then I
42 could go spend more time.

43 THE COURT: Or there might be some other way of getting
44 printing done --

45 MR. LAGEMAAT: Yes.

46 THE COURT: -- more quickly. So 1:45 would work?

47 MR. LAGEMAAT: Yes. Yes, My Lady.

(Jury Out)
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1 THE COURT: And then we'll ask the jury to come back at
2 two?
3 MR. LAGEMAAT: Yes.
4 THE COURT: And should we have Constable Potts for the
5 afternoon?
6 MR. LAGEMAAT: I think that is -- there is such a big
7 unknown here of what is going to happen with Mr.
8 Fox, so I can't really say and I -- that's -- I'm
9 out after the cross-examination, so that would be
10 an issue for Mr. Myhre and Mr. Fox.
11 THE COURT: I think it would be a good idea to have him
12 here. It's quite possible that everything will
13 wrap up very quickly with Ms. Capuano. That is
14 one possibility, and we'll have sent the jury away
15 for two hours.
16 It will be nice that there be something that
17 they are coming back to, even if it means tomorrow
18 they are sitting only part of a day, and we all
19 know that when recordings are played and so forth
20 of statements there can be technical problems that
21 slow things down, and so I think we want to allow
22 plenty of time for that.
23 MR. LAGEMAAT: Very good.
24 THE COURT: All right. Do I need to bring the jury
25 back in or, Mr. Sheriff, would you be able to just
26 ask them, please, to --
27 THE SHERIFF: I could ask them.
28 THE COURT: -- start their lunch, take a longer lunch,
29 and come back at two?
30 THE SHERIFF: Yes. Yes, My Lady.
31 THE COURT: All right. Thank you. And is that
32 everything?
33 MR. MYHRE: Yes.
34 THE COURT: All right. Then we'll be back at quarter
35 to two. Thank you.
36 MR. MYHRE: Thank you, My Lady.
37
38 (PROCEEDINGS ADJOURNED FOR NOON RECESS)
39 (PROCEEDINGS RECONVENED)
40
41 MR. LAGEMAAT: My Lady, I have no more than ten minutes
42 of questioning to -- that's an estimate to finish
43 my cross-examination and it's my understanding --
44 Mr. Fox will speak for himself -- but there are no
45 issues arising that Mr. Fox wishes to -- me to
46 examine on.
47 There's been no dispute is what I am trying

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1 to say so that I expect, unless Mr. Fox says
2 something different, that will be the end of my
3 cross-examination
4 THE COURT: All right. So it seems that at the end of
5 the cross-examination we should probably stand
6 down. I don't want to be canvassing this issue in
7 front of the jury.
8 MR. LAGEMAAT: Is -- is My Lady saying do one last
9 check after I finish my cross-examination, is that
10 what you're --
11 THE COURT: Yes.
12 MR. LAGEMAAT: I -- that would be appropriate and I --
13 I expect that wouldn't take more than a couple of
14 minutes, from our discussion we just had.
15 THE COURT: All right. And Mr. Myhre, you are
16 expecting to have some re-examination.
17 MR. MYHRE: Yes, My Lady. I would estimate -- well, 20
18 minutes or so, but has Your Ladyship decided
19 whether you'd like to know in advance the lines of
20 questioning?
21 THE COURT: I think if you are estimating 20 minutes
22 then the answer is yes, I would, please.
23 MR. MYHRE: I'm happy to.
24 THE COURT: All right. Unless you have discussed it
25 with Mr. Lagemaat and -- no. Is there anything
26 else we should discuss now?
27 MR. LAGEMAAT: I don't think so.
28 MR. MYHRE: No, My Lady.
29 THE COURT: I don't think we have the jury just yet,
30 unless --
31 THE SHERIFF: Just hold on a second, My Lady. We can
32 call them.
33 THE COURT: Then we need to stand down. They are
34 ready?
35 We'll need to stand down so Ms. Capuano can
36 come back into the courtroom, so we'll do that and
37 then we will resume.
38
39 (PROCEEDINGS ADJOURNED)
40 (PROCEEDINGS RECONVENED)
41
42 (JURY IN)
43
44 [TESTIMONY OF DESIREE CAPUANO FROM 1:54:36 TO
45 2:03:18 P.M.]
46
47 (JURY OUT)

10
(Jury Out)
Proceedings

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(PROCEEDINGS ADJOURNED)
(PROCEEDINGS RECONVENED)

THE COURT: ... do you need?
MR. LAGEMAAT: Like minutes -- five minutes.
There's --
MR. MYHRE: Well, the good news is we have canvassed
re-exam --
MR. LAGEMAAT: Yes.
MR. MYHRE: -- and there are no issues so that's
[indiscernible].
THE COURT: All right. Then we'll stand down for
another five minutes.
MR. LAGEMAAT: Thank you, My Lady.

(PROCEEDINGS ADJOURNED)
(PROCEEDINGS RECONVENED)

(JURY OUT)

MR. LAGEMAAT: Yes, My Lady. There is one piece of
evidence that Mr. Fox was hoping would go in
through my cross-examination. I knew that all
along.
It's -- it's a statement of the complainant
and -- and I tried to impeach her on it several
times, but she accepted it, and I never raised the
statement and Mr. Fox will at this time make a
submission on that piece of evidence.
THE COURT: Can I just, first of all, Mr. Lagemaat, ask
you to tell me which statement?
MR. LAGEMAAT: It's -- Ms. Capuano made four statements
to the police and it was the last statement she
gave on Wednesday, July 13th, 2016, at 1323 hours
to a Corporal B. Wilcott [phonetic], who I
believe -- oh, yeah, Burnaby RCMP.
THE COURT: And what is it you say you cross-examined
on and she accepted?
MR. LAGEMAAT: I had -- I had cross-examined her on a
couple of things she said in the state -- the
statement and -- and she accepted them, and if she
didn't accept them I was going to put the
statement to her, but I never had an opportunity
to, because she -- there was a couple of areas I
went into and she accepted them, so...
THE COURT: Can you remind me what they were?

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1 MR. LAGEMAAT: I'm not sure if I can, My Lady. Just
2 let -- let me have a quick look.
3 THE COURT: Was this today or yesterday?
4 MR. LAGEMAAT: One of them was where she took -- and --
5 and this was the main area, where -- where she --
6 Ms. Capuano took some pleasure in the fact that
7 her tip to ICE had resulted in Mr. Fox being
8 deported, and I asked her, "Did you take pleasure
9 in that," and she agreed she had, and I said,
10 "Isn't it true you actually wished you could
11 be" -- these aren't the exact words, but "You
12 wished you could be in the courtroom or the
13 courthouse when they came and got him," and she
14 accepted that, and I left it at that.
15 And again I -- I can tell My Lady that I was
16 going to -- if she denied that, I was going to
17 seek to play the audio of the statement and this
18 is when Mr. Fox's submissions will be, from my
19 understanding, because in the audio there is some
20 laughing, which is even transcribed as brackets
21 laughing.
22 And -- and that was the only reason I was
23 going to try to play a part of that, a small
24 portion of that statement, if she denied the fact
25 that she was laughing and took enjoyment in the
26 fact that her call resulted in Mr. Fox's
27 deportation.
28 THE COURT: All right. I am just looking for my notes.
29 I remember that portion of the cross-examination.
30 Was there another portion?
31 MR. LAGEMAAT: No, My Lady, that -- that was it. Oh,
32 and --
33 THE COURT: I think --
34 MR. LAGEMAAT: -- I apologize.
35 THE COURT: My note is that she said -- you asked her
36 was she amused and she said she probably laughed,
37 but not in amusement.
38 MR. LAGEMAAT: Mm-hmm. There -- there was one area --
39 other area, My Lady, and that was the last -- the
40 second to last line of questioning about Mr. Fox
41 previously having or owning firearms, and it was
42 about her knowledge that in 2005 or 2006 he did
43 have a firearm in Phoenix and she accepted that
44 also, that that came from her mother, and that we
45 got into a discussion whether it was owning or
46 having and -- but that's -- if she had denied
47 knowledge of that, I would have taken her to the

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1 statement.

2 And that's the two areas where I was -- would
3 have referred to the statement, if she had not
4 accepted what I put to her.

5 THE COURT: And the issue that may engage the question
6 of your role as appointed counsel is whether there
7 should be further cross-examination?

8 MR. LAGEMAAT: No, if I could interrupt --

9 THE COURT: All right.

10 MR. LAGEMAAT: -- there's no question about my role in
11 cross-examination. That's -- we finished that.

12 Mr. Fox, and I believe he'll tell you this,
13 has no -- no issues with my cross-examination.
14 I'm only bringing this up because he is going to
15 make a submission to you now about -- that he
16 feels that statement as a whole should be entered,
17 and I'm not sure what the basis of that submission
18 will be, but he is going to make a submission and
19 I don't believe he sees it as an issue with my
20 cross-examination.

21 He just wants that statement in -- to be
22 heard by the jury in its entirety and he -- he'll
23 -- I expect he'll tell you why.

24 THE COURT: All right. Then Mr. Fox, I'll hear from
25 you, please.

26 THE ACCUSED: Okay. In -- not the entire statement,
27 the entire -- the entire recording is almost two
28 hours, so it's the second hour of a -- of the
29 recording.

30 There are frequent statements that Ms.
31 Capuano makes as she is speaking with the RCMP
32 where her demeanour and her overall character
33 throughout the -- the statement is extremely
34 contrary to what she is trying to present here in
35 court today and what she has presented on the news
36 media.

37 For example, when she was talking about the
38 incident with punching herself in the stomach to
39 try to cause a miscarriage, that she claims is not
40 true, she's very somber when she speaks about that
41 normally, but in this interview she's actually
42 laughing and joking with the officer about it and
43 talking about how she joked with {GR} about it,
44 as if it's all just a big game.

45 And I think that, given it's a criminal
46 harassment case, not only fear for her safety is
47 a -- well, an element of the offence, but the

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1 credibility of the complainant is at least in this
2 case very, very significant.
3 For that reason and for the other comments
4 that she makes in here, and the laughing and the
5 joking, I think it is critical for the jury to be
6 able to see what she really thinks of these issues
7 outside, when there is no cameras on her and when
8 a jury is not looking at her. There's also a
9 statement that she makes at --
10 THE COURT: Now, just before you go on --
11 THE ACCUSED: I'm sorry.
12 THE COURT: -- -- you say where -- when there are no
13 cameras on her.
14 THE ACCUSED: Oh, meaning the news media.
15 THE COURT: But there were -- usually the RCMP will
16 have a video camera.
17 THE ACCUSED: This one was just audio recorded and also
18 this was conducted in her home.
19 THE COURT: All right.
20 THE ACCUSED: The -- the other interviews that she had
21 done with the RCMP, one was done from her
22 attorney's office -- I'm not sure where the others
23 were done from, but they were all done on the
24 telephone.
25 There is another point in -- in this
26 interview where she openly admits that -- well,
27 first she says that she has proposed to me
28 numerous times, that if I would just take the
29 website down then everything could go back to
30 normal, and then she goes on to say that she has
31 no resentment and if I would just stop then
32 {GR} would continue coming or go back to coming
33 out here for visitation, which seems to me a very
34 clear admission that she is blatantly using
35 {GR} to try to get me to take down the website
36 or engage in any other type of conduct.
37 Now, that of course doesn't have anything to
38 do with the laughing and joking, but I thought it
39 was quite important that that should be brought
40 up.
41 THE COURT: Can you tell me a bit more about why -- I
42 think there are two issues I need to deal with
43 here. It does seem to me that particularly --
44 particularly that last point is something in which
45 it's your wish that there be cross-examination on
46 that and Mr. Lagemaat has not cross-examined on
47 that.

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1 THE ACCUSED: I -- I would agree with that, but I
2 wouldn't say that I think that Mr. Lagemaat was
3 deficient in that respect at all. This was
4 something that I myself just noticed very recently
5 and so perhaps it just fell through the cracks.

6 THE COURT: Well, perhaps one reason that it may not
7 have been picked up is that it doesn't seem -- and
8 I'll hear from you further, but it doesn't seem to
9 me to go the issues that the jury needs to decide.
10 The issue in this trial is not whether Ms.
11 Capuano was using {GR} as a pawn
12 inappropriately. The issue is did the website and
13 the other communications amount to criminal
14 harassment, and it's quite possible that both
15 could have coexisted, that she in theory could
16 have used {GR} as a pawn and the website could
17 have resulted in criminal harassment. They're --
18 what I am trying to say is they're separate
19 issues.

20 THE ACCUSED: Sure.

21 THE COURT: So I am having trouble seeing how that
22 would be relevant to the issues in this trial.

23 THE ACCUSED: Okay. I should have explained -- or I
24 should have mentioned also that this is one of the
25 claims that Ms. Capuano has made against me
26 repeatedly, I'm not sure if she did while she was
27 on the stand testifying though, that I have been
28 trying to use {GR} against her and using him as
29 a pawn.

30 So I thought that this might be another
31 example of how she is repeatedly accusing me of
32 doing the things that she is actually doing to me,
33 and meanwhile there is no evidence that I'm
34 actually doing any of the stuff that she's
35 claiming.

36 So that -- that was one of the reasons I
37 thought that that might be significant, but
38 certainly the most important aspect I think of
39 this recording is her overall demeanour as she is
40 going through and explaining the -- we're talking
41 about the very things that while she's on the
42 stand she was reduced to tears and getting very
43 emotional and choked up about, yet when she
44 doesn't believe people are watching her she is
45 only laughing and joking, like I said there's
46 really nothing to it.

47 THE COURT: All right. Thank you. Now, doesn't that

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1 engage the question of what you would like Mr.
2 Lagemaat to cross-examine on?
3 THE ACCUSED: Well, I believe Mr. Lagemaat's position
4 on it was that he could only have it admitted if
5 there was a prior conflicting statement, but what
6 I'm hoping to argue here or to persuade the court
7 of is that it's more a question of her demeanour
8 and her mindset, as she was making these
9 statements, as opposed to whether or not they
10 conflict with what she is verbalizing on the stand
11 now.
12 THE COURT: All right. Thank you.
13 THE ACCUSED: I should also mention, though, that
14 rather than making a decision about proceeding
15 with allowing it before the jury, at this point I
16 would probably request that the court listen to it
17 first and then make a decision, or at least listen
18 to some of the more [indiscernible] parts.
19 THE COURT: Mr. Lagemaat, it seems to me that in a
20 sense Mr. Fox is saying that there's more
21 inconsistency in the statement than you cross-
22 examined on.
23 MR. LAGEMAAT: He is saying there is inconsistency in
24 her demeanour, between her demeanour at the time
25 of the statement and her demeanour here today, and
26 I would not have chosen that line of cross-
27 examination and I have listened to the recording
28 many times.
29 THE COURT: All right. I am going to ask you to
30 clarify. Is it your understanding that the law
31 would permit you to cross-examine on essentially
32 inconsistent demeanours at different times --
33 MR. LAGEMAAT: If -- if I was going to cross-examine on
34 it I would have done what I did with the -- her
35 fly on the wall comment. I would have said did
36 you find that amusing, that he had been deported,
37 which is what I did, and did you laugh, and she
38 agreed, not in precisely those words, and that's
39 how I would have done it and -- and in my view
40 that was the most significant example in the
41 statement of her taking it lightly and I did go to
42 that.
43 THE COURT: Thank you. Mr. Myhre, do you have anything
44 to contribute?
45 MR. MYHRE: Yes, and on the point of cross-examining
46 her on her demeanour during the statement it seems
47 to me as a general proposition that certainly

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1 could be relevant, but the further those purported
2 times of amusement are from the issues that we're
3 dealing with the less relevant they get, and so
4 if -- my submission would be that if the only
5 example is Ms. Capuano laughing it sounds like
6 about how ridiculous the notion that she was
7 punching herself in the stomach was, we're just so
8 far removed from the time and the issues of this
9 trial that it's -- it just has no relevance. If
10 we're talking about things like --
11 THE COURT: I think another area of concern for Mr. Fox
12 was --
13 MR. MYHRE: Her -- Ms. Capuano using {GR}.
14 THE COURT: Yes, and the business about laughing if she
15 had the opportunity to see him removed from the
16 country.
17 MR. MYHRE: As I say I -- I think that would be proper
18 to put to her in -- in either format. There's
19 nothing improper about that. That's -- that's one
20 of the turning points in this -- the whole --
21 THE COURT: I think we're struggling a little bit with
22 what the issues are, Mr. Fox. You -- you've said
23 that in -- Ms. Capuano in the police statement was
24 talking about things that had -- that reduced her
25 to tears in this courtroom, but seemingly caused
26 her to laugh when she was speaking with police
27 officers. What kinds of things?
28 THE ACCUSED: I'm sorry, may I just -- one moment.
29 Do you have that list that I gave you with
30 the timing positions where various
31 [indiscernible/2:48:20 PM].
32 Another -- another thing that I think is very
33 relevant or very interesting about this interview,
34 My Lady, is --
35 THE COURT: Well, can we just deal with this one
36 question first?
37 THE ACCUSED: Oh, sure, yes, I'm sorry. Oh, no, when I
38 gave you the transcript of it, it was -- it had
39 highlights in yellow.
40 MR. LAGEMAAT: I -- I gave you that transcript back.
41 THE ACCUSED: Yeah. I gave you the transcript
42 [indiscernible].
43 MR. LAGEMAAT: I've given -- I gave you the entire
44 transcript.
45 THE ACCUSED: Okay. Well, I'll start with this. So an
46 example then would be where she talks about
47 wishing that she could have been in the courthouse

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1 and what she says is that -- oh, I have it here --
2 "And I called the FBI agent that morning," and
3 then it says chuckles here, but actually it was
4 much more than chuckles. "I wish I was a fly on
5 the wall," and then she laughs some more.

6 Down below on the same page, she laughs
7 through an entire section here and says [as read
8 in]:

9
10 So if you can picture it, there was Richard
11 at the courthouse arguing with him, demanding
12 that his hearing is supposed to happen and
13 trying to figure out why it's not scheduled,
14 knowing that he's there illegally and the FBI
15 walking in and arresting him.

16
17 There's another part where she's also laughing
18 about the scars that she has, from having to deal
19 with me over the years, and then the officer joins
20 in at that time and starts laughing with her.

21 And I apologize, I wish I had more organized
22 notes on this at this point. Then when she is
23 talking about the allegations of the LinkedIn
24 profile, she says [as read in]:

25
26 Um, but you might not want -- you might not
27 want to put up on your LinkedIn profile that
28 you're a stripper --

29
30 I guess she's referring to what other people were
31 saying to her.

32
33 -- and I said I don't -- I don't -- what
34 you're talking about. She said your LinkedIn
35 profile it says you're a stripper and you
36 smoke pot and I'm not, she says.

37
38 [Indiscernible]. Now, as she was saying that she
39 was also laughing as well, but there I have the
40 notes.

41 Now, there is a point in the interview as
42 well, where she is talking about getting the order
43 of protection in Arizona, and the Arizona order of
44 protection is supposed to be based on solely a
45 person's credible fear for their safety from the
46 other party, and she admits in this interview very
47 likely that her only goal with that was to try to

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1 get the website taken down and it had nothing at
2 all to do with her safety. She did make a brief
3 reference to that in her testimony.

4 And there is one point where she's laughing
5 and then immediately moments later crying -- or
6 no, sorry, she was crying about the quote unquote
7 "sick people that would read the website and
8 potentially harm her children," and then she
9 immediately goes into laughing about something
10 which is unknown, even hard to tell what she is
11 saying on the recording, and she also laughs and
12 makes jokes about how it is that I seemed to
13 frequently know more about her legal proceedings
14 than she did, I would often know about coming
15 hearings before she did.

16 So on the one hand here in court she's --
17 she's claiming before the jury that that was very
18 frightening for her, that I was able to know that
19 before she did even, but then in this recording
20 she's laughing and joking about it.

21 Oh, yes, and she also finds it very, very
22 funny that the family court in California kept
23 delaying my petition for the child support, and
24 she makes a number of jokes about that and laughs
25 about that as well.

26 And those were -- those were the ones that I
27 wrote down on here, the ones that I wanted to
28 bring up in the 486 hearing.

29 THE COURT: And you're saying you would like Mr.
30 Lagemaat to cross-examine on each of those points,
31 because some of them he didn't touch on.

32 THE ACCUSED: If people with much more knowledge and
33 experience than myself, such as the attorneys and
34 yourself, believe that those are areas that should
35 be cross-examined then I would definitely like
36 that to happen as well, but I -- I think that the
37 most important thing that I would hope to get from
38 this would be for the members of the jury to see
39 how Ms. Capuano is when they're not sitting there
40 looking at her, in other words how the real Ms.
41 Capuano is.

42 THE COURT: All right. Thank you.

43 THE ACCUSED: But may I just point out one other thing
44 that I would hope to show the jury with this is
45 the frequency and the quickness with which Ms.
46 Capuano can transition from crying about one thing
47 at one moment -- I mean literally crying -- to

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1 laughing almost hysterically about something a few
2 moments later and then going right back to crying
3 again, which I think really goes to her
4 credibility.

5 When they see this or when they hear this,
6 it's very clear that there is not a lot of
7 sincerity to the emotions that she is expressing,
8 so then I think projected that onto the testimony
9 she provided here and question whether there is
10 really any sincerity to what she is demonstrating
11 in court. Thank you.

12 THE COURT: Thank you. Mr. Lagemaat, now that you have
13 heard that spelled out in some detail what is your
14 suggestion?

15 MR. LAGEMAAT: Well, I will repeat that I ran the
16 cross-examination the way I would have run the
17 cross-examination. I am appointed by the court
18 and if the court orders me to bring up these lines
19 of cross-examination I will.

20 I have the statement on my computer. I
21 believe we have sound equipment here. The only --
22 the only time -- it would take a little bit of
23 time to get to the remarks, but Mr. Fox has them
24 marked down quite accurately where they are --

25 THE COURT: Yes.

26 MR. LAGEMAAT: -- because I have already looked them up
27 on the -- on the audio. They are quite easy to
28 find.

29 THE COURT: All right. Thank you.

30 Mr. Myhre -- and I do have a question for
31 both Mr. Myhre and Mr. Lagemaat.

32 MR. MYHRE: It seems to me most of that is -- it's not
33 irrelevant.

34 THE COURT: Not irrelevant?

35 MR. MYHRE: And -- it's not irrelevant and so -- so if
36 Mr. Lagemaat is willing to do it, even though he
37 might not have done it that way, I am not opposed.

38 THE COURT: So I'd like to raise a question for you to
39 consider, and it comes from something Mr. Fox
40 said. He asked essentially for the court's advice
41 on whether these additional areas should be
42 introduced through cross-examination or not.

43 I can say that I have reviewed the two cases
44 Mr. Myhre gave me, *R. v. Thornton* and *R. v.*
45 *Faulkner*, and I have come to the view that I would
46 share with Justice Gray in *Thornton* the view that
47 counsel appointed under s. 486.3 is not in a

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1 solicitor-client relationship with the accused in
2 the way that defence counsel is, but is subject to
3 ethical duties that may be very similar to those
4 that retained counsel bears, and of course is
5 subject to the requirement that a cross-
6 examination be on relevant points and -- and
7 confirm in the various other ways with the rules
8 of evidence.

9 However, ultimately it is my view, as it is
10 the view of Justice Gray, that where an accused
11 person is self-represented in the trial it's the
12 accused person's decision that governs concerning
13 the lines of inquiry to be pursued in the cross-
14 examination, subject to the ethical duties on
15 counsel who is conducting the cross-examination
16 and the rules of evidence.

17 And I reach that view because appointed
18 counsel is not defence counsel, is not appointed
19 for the benefit of the accused person, but rather
20 is appointed to protect potentially vulnerable
21 witnesses from being cross-examined by the very
22 person against whom they have made allegations.

23 So it is a measure to protect potentially
24 vulnerable witnesses, not to restrict the accused
25 person's right to present the case in the way that
26 he wishes to put it before the court.

27 That is my view concerning the role of
28 appointed counsel, but there is an additional
29 factor to be considered, and that is the role of
30 the court in ensuring that Mr. Fox has a fair
31 trial as a self-represented person and that his
32 own decisions about the course of his defence
33 don't cause him to -- particularly where he has
34 sought the advice of the court to -- I won't say
35 lead himself into error, but to make a very bad
36 strategic decision.

37 It is clearly Mr. Lagemaat's view that the
38 various lines of cross-examination Mr. Fox spoke
39 of were either not proper or were strategically
40 dis -- not -- not of advantage to Mr. Fox.

41 So can counsel assist me on the question of
42 to what extent there is a duty on the court to
43 consider the -- the potential strategic advantages
44 and disadvantages of this line of cross-
45 examination?

46 MR. LAGEMAAT: I haven't reviewed the cases in depth,
47 but it would be my submission that once the 486

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1 appointee, me, has said they've completed their
2 cross-examination, it could be the court's role to
3 order to continue on and I believe the case said
4 if you feel it's relevant and yes, he -- Mr. Fox
5 does have a right to have those lines if -- if --
6 for his fair trial to have the line of cross-
7 examination he would have taken if he was self-
8 represented heard, if it's relevant.

9 THE COURT: Does the court have an obligation to, for
10 example, listen to this audio recording and make
11 an assessment of whether cross-examining on it
12 would assist Mr. Fox or not?

13 MR. LAGEMAAT: I would think that would be the only way
14 he could do it, rather than us just summarize it,
15 this is what it says.

16 Mr. Fox is looking for the demeanour. I
17 would think that would be the only way the court
18 could make that determination is by listening to
19 it.

20 THE COURT: But I mean I, the judge, not the jury.

21 MR. LAGEMAAT: Yes. Yes, you the judge, to make a
22 determination on whether it's relevant and you go
23 a step further and order counsel to cross-examine
24 on it, because it is demeanour Mr. Fox is seeking
25 to get at, which isn't -- I mean there is in
26 brackets laughing, but I've listened to it and you
27 don't get it out of the transcript quite as much.

28 THE COURT: All right. Thank you. Mr. Myhre?

29 MR. MYHRE: My Lady, I think that is a dangerous area
30 for the court to go into, because you do not have
31 all the context that counsel do, both myself and
32 appointed counsel.

33 Obviously I am not giving any advice and I
34 think it would just be dangerous to give strategic
35 advice to Mr. Fox, when you don't have everything.

36 I would think the most appropriate course of
37 action would be to encourage Mr. Fox to rely on
38 counsel, but after that, short of trying to
39 introduce improper or irrelevant evidence, I would
40 say it's up to him.

41 One question I would have is I -- I'm not
42 sure how I would get this in, if she accepts that
43 she was laughing and taking it lightly, as she did
44 on the most significant -- what I will say is the
45 most significant one, the being the fly on the
46 wall and laughing, she accepted that she wished
47 she was there and so it would be my concern --

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1 also how I would get this in if she accepts it
2 that Mr. Fox has one, two, three, four -- nine
3 clips here, none of them are more than from my
4 estimation a minute.

5 THE COURT: Mr. Fox?

6 THE ACCUSED: To clarify, though, there's nine clips on
7 there, but those were just the ones that I thought
8 at the time of the 486.3 hearing would be the most
9 important ones to bring to your attention.

10 There is actually a lot more through that 45
11 minute to one hour stretch of the audio and there
12 are many points and in fact, if we want to hear
13 how we frequently moves from laughing to crying
14 and back and forth so much, then it would be a
15 matter of simply playing the eight or nine clips
16 that are referred on there.

17 THE COURT: All right. Generally, Mr. Fox, we don't
18 play -- there are some exceptions where a very
19 different use is made of previous statements, but
20 generally we don't play recordings of witnesses
21 giving interviews.

22 I have your point that you wish Ms. Capuano
23 to be cross-examined on her basically ability to
24 turn the tears on and off -- I am paraphrasing --
25 and to quickly change emotions and to apparently
26 be a lot more lighthearted in talking about things
27 that here are apparently causing her much more
28 concern. That's -- that's your position. I don't
29 know. I haven't heard this audio recording.

30 Mr. Lagemaat is a very experienced lawyer.
31 He tells the court that he has listened to this
32 audio recording several times, and that in his
33 professional view it is not suitable to cross-
34 examine further on those kinds of topics, but
35 ultimately it is your call, Mr. Fox, and if you
36 wish there to be some further cross-examination
37 there will be, and I will ask Mr. Lagemaat to
38 conduct it on your behalf, but you need to be
39 aware of several things.

40 One is that you could be making an unwise
41 decision. It's possible that what to you sounds
42 like making light of things by laughing is nervous
43 laughter, or is the kind of laughter stimulated by
44 strong emotion that has nothing to do with finding
45 something funny, and the strong emotion could be
46 fear.

47 So there is a danger that further examination

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1 -- cross-examination on these points could
2 backfire for your case, and in fact there is even
3 a little bit of a basis in something Ms. Capuano
4 has said already, which was when she was being
5 cross-examined about laughing she said that it
6 wasn't amusement that was causing her to laugh,
7 she was scared, something along those lines. So
8 there is the germ of that idea there and you would
9 run the risk that further cross-examination would
10 just solidify that.

11 I should also tell you that further cross-
12 examination would be restricted by the rules of
13 evidence. It would almost certainly not be
14 permitted for Mr. Lagemaat to just start the tape
15 and run it.

16 If he were to, for example, suggest to Ms.
17 Capuano that on repeated occasions she laughed and
18 in fact she went quickly from laughing to crying
19 and back to laughing, and she did this, you know,
20 15, 20 times, whatever it is, if she agrees that's
21 the end of it. The tape doesn't get played.

22 It's only if she says, oh no, that wasn't
23 what happened that then the tape could be played
24 to show that that is in fact what happened. So
25 we're not going to be in a situation where we
26 start at the beginning of the tape and play it for
27 an hour, or the second half, or whatever it is
28 that most interests you.

29 I think what we're going to do is we're going
30 to take a short afternoon break, about ten
31 minutes. I am going to encourage you to think a
32 little bit more about these questions. If you
33 wish Mr. Lagemaat to pursue them in further cross-
34 examination, then he will do so, so long as they
35 are relevant to the issues in the trial.

36 And there are some of the issues you
37 mentioned that probably are not relevant, at least
38 the substance -- for example the premature birth,
39 what actually happened is not going to be
40 relevant. Perhaps the changes of emotions while
41 she talked about that may be relevant.

42 So do you have something you wish to ask me,
43 Mr. Fox?

44 THE ACCUSED: No, no, My Lady.

45 THE COURT: Anything further to say at this point?

46 Otherwise I think we'll take ten minutes and you
47 can think it over some more.

24
(Jury Out)
Proceedings

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1 THE ACCUSED: Yes, ten minutes sounds great. I am
2 wondering, though, if I might be able to confer
3 with Mr. Lagemaat during that time?
4 MR. LAGEMAAT: Of course.
5 THE COURT: Yes.
6 THE ACCUSED: Okay.
7 THE COURT: Mr. Myhre, anything further?
8 MR. MYHRE: My Lady, counsel and Mr. Fox and I had
9 discussed the potential re-exam and there was one
10 issue that came up about the authenticity of an
11 email. It was agreed amongst all of us that it
12 would be okay to ask Ms. Capuano if she has that
13 email, so I am just asking the courts leave to ask
14 her about that specific thing over the break, do
15 you have the specific email we discussed.
16 THE COURT: Do you agree?
17 MR. LAGEMAAT: That is the agreement we came to, My
18 Lady.
19 THE COURT: All right. Do I need to tell Ms. Capuano
20 that?
21 MR. LAGEMAAT: I think you can rely on me as officer of
22 the court, My Lady.
23 THE COURT: I'm not worried about my relying on you,
24 but as long as she will accept that --
25 MR. LAGEMAAT: If she tried to broach anything I would
26 shut it down, My Lady.
27 THE COURT: No, I want her to be confident that she is
28 permitted to speak to you about that.
29 MR. LAGEMAAT: I see. Pardon me.
30 THE COURT: You can advise her that you have been
31 permission by the court.
32 MR. LAGEMAAT: Thank you.
33 THE COURT: All right. Thank you. We'll stand down.
34
35 (PROCEEDINGS ADJOURNED FOR AFTERNOON RECESS)
36 (PROCEEDINGS RECONVENED)
37
38 (JURY OUT)
39
40 MR. LAGEMAAT: Mr. Fox has decided and you can confirm
41 this with him, that there is nine files he intends
42 to have questioning on five of them, and we are
43 all ready to go. It won't take up much of the
44 court's time and none of them are more than one
45 minute.
46 THE COURT: All right. So we're all set to go
47 essentially?

25
(Jury Out)
Proceedings

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1 MR. LAGEMAAT: We're all set to go, My Lady.
2 THE COURT: All right. Mr. Myhre, you're nodding. Mr.
3 Fox, you're agreed?
4 THE ACCUSED: Yes.
5 THE COURT: All right. Please.

6
7 (JURY IN)

8
9 [TESTIMONY OF DESIREE CAPUANO FROM
10 3:41:37 P.M. TO END OF DAY]

11
12 (WITNESS EXCUSED)

13
14 (PROCEEDINGS ADJOURNED TO JUNE 16, 2017, AT
15 10:00 A.M.)

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19 Transcriber: S. Curran
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I hereby certify the foregoing to be a true and accurate transcript of the evidence recorded on a sound recording apparatus, transcribed to the best of my skill and ability.



Sandy Curran
Court Transcriber