

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,)
)
)
 Plaintiff,)
)
 v.) CR 2007-143752-001 DT
)
 FRANCISCO MEDRANO TOVAR,)
)
)
 Defendant.)
-----)

BEFORE: THE HONORABLE DAVID O. CUNANAN
COMMISSIONER OF THE SUPERIOR COURT

JULY 26, 2007
Phoenix, Arizona

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(HEARING ON MOTION TO MODIFY RELEASE CONDITIONS)

PATRICIA A. CONNOLLY, R.P.R.
Certified Reporter
Certificate No. 50675

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A P P E A R A N C E S

FOR THE STATE:

DAVINA BRESSLER, ESQ., for
FRANKIE JONES, ESQ.,
Deputy County Attorneys

FOR THE DEFENDANT:

MIKEL STEINFELD, ESQ.,
JASON ROSELLE, ESQ.,
Office of the Public Defender

OFFICE OF THE COURT INTERPRETER:

EVAN GRIFFIN

1 THURSDAY, JULY 26, 2007

2 MOTION TO MODIFY RELEASE CONDITIONS

3

4 THE COURT: Counsel, ready on anything
5 else?

6 MR. STEINFELD: Number 2 on the Motion to
7 Modify calendar, Your Honor.

8 And prior to calling the Officer, I would like
9 to make a brief record on the procedures just in general.

10 THE COURT: Counsel, we can do that. Let
11 me just call the case first because I think there is some
12 moving papers as well; all right?

13 Officer, you can have a seat on either side
14 behind. We're not quite ready for you yet. Just have a
15 seat right in the back of the courtroom.

16 This is Number 2 on the calendar, CR
17 2007-143752, State of Arizona versus Francisco Medrano
18 Tovar.

19 Counsel.

20 MS. BRESSLER: Davina Bressler on behalf of
21 Frankie Jones for the State.

22 MR. STEINFELD: Good morning, Your Honor.
23 Mikel Steinfeld on behalf of Mr. Tovar who is present, in
24 custody, standing in the jury box and will need to be
25 assisted by the Court Interpreter, Your Honor.

1 THE COURT: Sir, just come on down and have
2 a seat beside your attorney.

3 Can the Interpreter announce for the
4 record, please?

5 THE COURT INTERPRETER: Evan Griffin, Court
6 Interpreter's Office.

7 THE COURT: Thank you, sir.

8 All right. Counsel, we're here today -- before
9 I do that, sir, please state your full name.

10 FRANCISCO TOVAR-MEDRANO: Francisco Javier
11 Tovar-Medrano.

12 THE COURT: Your date of birth, sir?

13 FRANCISCO TOVAR-MEDRANO: September 24,
14 1976.

15 THE COURT: All right. Counsel, we're here
16 today based upon a Motion to Modify which has been filed
17 by the Defense seeking to modify release conditions.

18 This matter was originally, I believe -- well,
19 I think I'm actually the third person to touch it which
20 is; so if my understanding is correct, it originally was
21 sent to Commissioner Fink. Commissioner Fink had it on
22 his calendar. It was then taken to Judge Baca who then
23 handed it to me. I got this, I believe, yesterday or the
24 day before and I set it to my calendar for today to be
25 heard.

1 I have had a chance to review the Motion to
2 Modify Release Conditions. Counsel, just as a preliminary
3 matter, I believe the landscape has kind of changed since
4 we had last done these particular hearings.

5 I guess it's the Court's belief now that based
6 upon the new implementation from the Supreme Court, in
7 essence, this is very much like a Motion to Modify Release
8 Conditions as we had in the traditional sense.

9 Before, I believe, we were doing the hearings
10 from the beginning and now I think it's just a little bit
11 of a different format.

12 I know in your moving papers that you had taken
13 issue with that particular format, that particular rule,
14 as well as some other issues. So before we get started, I
15 just want to have each side, if you want to put anything
16 on the record, you can do that at this time. We can
17 proceed after we have made our record on the particular
18 issues that you have; okay?

19 MR. STEINFELD: Before I begin, Your Honor,
20 just for my own personal edification, the Motion that you
21 have before you, what date was that filed on? Was that
22 the July 23rd Motion?

23 THE COURT: It is.

24 MR. STEINFELD: Okay.

25 THE COURT: I got a received stamp of July

1 23rd.

2 MR. STEINFELD: Okay. Fabulous.

3 May I approach with some of the things that
4 I'll be relying upon during my argument, Your Honor?

5 THE COURT: You may. Counsel, do you have
6 a copy of that for the State, please?

7 MR. STEINFELD: I just provided it to them,
8 Your Honor. (Handing to the Court.)

9 THE COURT: Okay. Thank you.

10 MR. STEINFELD: Your Honor, this matter was
11 initially set before Judge Fink in the RCC Courts on, I
12 believe it was the 16th. It was not this past Monday but
13 the Monday prior to that.

14 At that point, citing Rule 7.4, I requested a
15 or rather demanded a Simpson Hearing take place.

16 Commissioner Fink, in compliance with Rule 7,
17 set that seven days from that date, this past Monday, Your
18 Honor. However, on this last Friday, he changed the
19 date. He vacated that hearing.

20 It's my position, Your Honor, that the vacating
21 of that hearing was improper and also denies my client the
22 procedural rights that are set forth in Rule 7.4 b as
23 amended.

24 Specifically, as amended, Rule 7.4 b states
25 that the hearing must take place within seven days, which

1 would have been three days ago on the last Monday.

2 Now, in the State's Response to my initial
3 Motion, my initial demand for the Simpson Hearing, the
4 State presented the notion that I had filed it improperly
5 or that it should have gone to Judge Baca; and so confused
6 by this, I started looking and questioning myself as to
7 whether or not I did file this appropriately or what sort
8 of an error I may have made.

9 When reflecting upon the Rules of Criminal
10 Procedure, I found absolutely nothing that required that
11 anything in terms of a Simpson Hearing be filed
12 specifically with Judge Baca or any Judge in particular;
13 so I then turned to the Local Rules, Your Honor; and what
14 I have presented, Your Honor, is Local Rule 4.4 which
15 specifically states that motions seeking reconsideration
16 of the conditions of release shall be heard by the
17 assigned trial division.

18 Now, I presented the Motion appropriately to
19 Commissioner Fink and Commissioner Fink appropriately set
20 it seven days from that date of request.

21 Now, the Rule does go on to contemplate the
22 possibility that the Presiding Criminal Judge will hear it
23 but nowhere in the Rule does it mandate that I have to
24 file the Motions with any particular Judge.

25 Instead, I filed it appropriately with the

1 trial, with the Judge who I was in front of at the time.

2 It's my position that as a matter of procedure
3 under Rule 7.4 b, as has taken effect from July 3rd, that
4 my client is simply entitled to a bond at this point
5 because of the fact that his procedural rights have been
6 violated.

7 Now, the one concern that I did have is the
8 possibility that the Local Rules may have been amended so
9 as to consider the possibility of requiring some sort of
10 presentment of my Motion to Judge Baca.

11 What I've also provided to Your Honor is what I
12 found on line last night from the Supreme Court of Arizona
13 because any Local Rule that's amended must be approved by
14 the Supreme Court before it can take effect; and as I
15 believe the table shows, Your Honor, nothing has taken
16 effect since January 1st of 2007, meaning that Maricopa
17 County has not amended its rules by any means in terms of
18 Local Rule procedure, thus, meaning that Rule 4.4 is still
19 in effect.

20 Pursuant to local Rule 4.4, I adequately filed
21 this Motion before the assigned Commissioner in compliance
22 with Rule 7.4 b as it was amended.

23 Because Rule 7.4 b requires that the hearing
24 take place within seven days and it's now been, I believe,
25 ten or eleven days, my client simply as a matter of

1 procedural due process is entitled to, is entitled to a
2 bond and we need not have the hearing, Your Honor.

3 THE COURT: Thank you, Counsel.

4 Counsel for the State, want to be heard?

5 MS. BRESSLER: Just in response to the
6 request to have this set by Judge Baca, the State
7 requested that setting based on what Court Admin.
8 requested.

9 As for the seven-day Rule, I will leave that to
10 the Court's discretion.

11 THE COURT: Thank you, Counsel.

12 All right. Counsel, I believe the Defense
13 is correct in his assertion that you don't have to file
14 that with a specific Judge. I believe as a matter of
15 administrative convenience he would right, at that
16 particular point, it was going to Judge Baca but I think
17 you are right in terms of who it goes to. I think whoever
18 is the current assigned Trial Division, that's who gets
19 it.

20 Now, I can tell you as a matter of practice,
21 anything that happens between the IA and IPTC is coming to
22 me, to my Division; but as far as filing it, you filed it
23 in the appropriate division based upon the rules as they
24 are required to you.

25 So I think you are correct in that it doesn't

1 necessarily have to be filed with Judge Baca. I think
2 that there was a request administrative wise that it be
3 done so that it could be rendered in a more expeditious
4 fashion; but I don't think that's actually in a rule
5 somewhere and there is a difference in there in terms of
6 procedure, I think.

7 Obviously, this is somewhat of a new, again,
8 since the landscape has changed, somewhat of a new
9 situation for all parties concerned but that's the
10 situation that we have before us.

11 Counsel, in regarding your request, in essence,
12 to not have any type of hearing, just to release the
13 Defendant either on bond or some other way, I will note
14 your position for the record but I'm going to deny it at
15 this time.

16 Unlike some of the other rules which require an
17 automatic release, for example, a Preliminary Hearing
18 doesn't happen within a certain period of time. The rules
19 don't have a specific requirement for that.

20 When you fall back on the due process, I think
21 another thing that is contemplated by due process is what
22 type of prejudice has happened or happened upon your
23 client based upon the delay in the proceedings not being
24 heard within a specified period of time; and based upon
25 what I've been able to see, I don't see that that

1 prejudice has happened.

2 Basically, a week has gone by since the time; I
3 think it's even a little less than that; since the time
4 that you would have had your hearing before today's date.
5 So I don't feel that your client has been prejudiced in
6 the delay in those particular proceedings, especially
7 given the situation that we have before us.

8 I would agree that you are outside the rules, I
9 mean, you are outside the time limits. I'm not going to
10 quibble with you over who or where it was filed. I don't
11 think that's fair in terms of what the rule is.

12 Obviously, there is some administrative situations that
13 took place but we have what we have. As soon as I got the
14 matter, I put it on my calendar as expeditiously as I
15 could and I got you back in front of us within a day or
16 two.

17 But the bottom line is I don't think his due
18 process rights have been violated to the extent which
19 requires any type of remedy that you are looking for.

20 So I will note your request for the record but
21 I am going to deny it at this time.

22 Counsel, given that, do you want to put
23 anything else on the record regarding what you believe is
24 prejudice that has accrued to your client between now and
25 the last court date?

1 MR. STEINFELD: Yes, Your Honor.

2 It's my position that is not denial of the
3 liberty interest within itself and also that under State V
4 Tucker from the Arizona Supreme Court that incarceration
5 within itself does constitute sufficient prejudice from my
6 position, Your Honor; but that's the simplicity of my
7 position.

8 THE COURT: All right. Counsel, I will
9 note that for the record but again, I am going to deny
10 your request at this time.

11 MR. STEINFELD: All right.

12 THE COURT: All right. Counsel, that being
13 the case, the other issue that I think that is kind of
14 contained in your Motions are some larger issues that you
15 have with the Supreme Court's implementation of Rule 7.4
16 and how it applies to these hearings.

17 Do you want to make any other record either
18 side on those particular issues before I go forward with
19 any potential hearing?

20 MR. STEINFELD: I would like to note, Your
21 Honor, that it is our position that the amendments of Rule
22 7 just in general constitute a burden shifting that is
23 unConstitutional because what it does is it takes a
24 hearing that doesn't have the protections required by
25 Simpson, such as the assignment of Counsel and such as the

1 possibility of cross-examination or at least meaningful
2 cross-examination. Thus, the initial appearances decision
3 absent those Constitutional protections doesn't create the
4 sort of decision that should establish a shifting of the
5 presumption or a shifting of the burden.

6 Consequently, it's our position that the
7 Defendant doesn't have the burden of proving facts
8 sufficient or having to overcome any sort of burden and
9 that the rules realistically create a burden shifting
10 that's unConstitutional.

11 THE COURT: Thank you, Counsel.

12 Counsel for the State, do you want to be heard?

13 MS. BRESSLER: Your Honor, the Public
14 Defender's Office is assigned at the Initial Appearance.
15 The Public Defender's Office could be present at these
16 hearings when they are initially held.

17 Additionally, it's the State's position that
18 the Defense Attorney must show new facts that were not
19 presented at the first Simpson Hearing in order to have a
20 hearing occur.

21 THE COURT: All right. Counsel, basically,
22 what I took this as is a due process argument to Rule 7.4
23 and the amendments made by the Supreme Court to that
24 argument.

25 At this particular time, I'm going to note your

1 argument. I think they're more set out in the moving
2 papers with regard to those issues but the rule is what it
3 is at this particular time and the Court doesn't find the
4 facts and circumstances that I have that that is not
5 something this Court's going to follow today.

6 So I will note your argument and your request
7 for the record, in essence, Counsel, for a different
8 procedure in terms of the Simpson Hearing.

9 MR. STEINFELD: Thank you, Your Honor.

10 THE COURT: But I'm going to follow what
11 the Supreme Court has set down in the modifications to
12 Rule 7.4 at this time.

13 All right. Counsel, I believe that then leaves
14 us with the issue of the potential for a modification of
15 release conditions, either based upon new information or
16 additional information.

17 Counsel, since this is, in essence, the same as
18 a Motion to Modify Hearing, does the Defense have anything
19 else they want to present in terms of evidence regarding
20 release conditions?

21 MR. STEINFELD: Your Honor, in terms of
22 release conditions, I guess it's my position that
23 Mr. Tovar has certainly been present in the United States
24 for the last twelve years. He has family here. The site
25 in which he was arrested is actually his home. He was

1 gainfully employed during the period of time that he's
2 been here. He has his family and his wife as well as his
3 child. He was a productive member of society and a bond
4 can certainly guarantee his appearance here because of the
5 roots that he's established within the United States.

6 It's my position insofar as the modification of
7 release conditions that that does warrant a modification
8 of the bond; but in terms of the factual disagreements,
9 with the conclusions of the IA Court, I guess I have three
10 positions that are more legally based, Your Honor.

11 And the first and foremost of those is that the
12 first charge, misconduct involving weapons, involving the
13 reliance upon the United States Code actually
14 intrinsically requires a conviction of some sort of the
15 United States Code; specifically, I believe it's 18 USC
16 922, 922 (g) (5). Absent any sort of evidence of that
17 conviction took place at any point, I would argue that any
18 sort of admission within itself is insufficient to
19 actually establish proof evident or presumption great that
20 the violation of that has taken place.

21 Moreover, Your Honor, I would say that that's a
22 determination that State Courts are incapable of making
23 because of the fact it's actually under Federal
24 jurisdiction.

25 That being said, I believe that there is no

1 proof evident or presumption great that that charge can
2 legally be met either here or at the trial, Your Honor.

3 As to the second matter, I believe that the
4 Officer states that it was not -- that the gun was not in
5 readily viewable indicating that my client may not have
6 had knowledge of the fact of the presence of the gun.

7 And second, Your Honor, I don't believe that
8 any proof has been presented in the Form 4 or even in the
9 Departmental Report as to the notion that he was actually
10 a prohibited possessor because of the fact that the
11 possibilities do exist to reinstate one's right to possess
12 a firearm.

13 I think that because those notions exist, that
14 because of the fact that he was convicted previously of a
15 Class 6 felony and the police officer did not look into
16 any possibilities of the idea that the sentence had
17 already expired, that probation had already expired or
18 that ultimately Mr. Tovar could have reinstated any rights
19 to possess firearms, that proof evident, presumption great
20 cannot be met on that factor as well.

21 Finally, as to possession of narcotic drugs,
22 the only thing that has been presented is a field test,
23 Your Honor, which is not admissible at trial levels
24 because of the unreliability of field tests.

25 I would argue that while these field tests do

1 establish enough of a presumption to get past probable
2 cause, they do not create such a sufficient presumption,
3 Your Honor, that they can get past the finding of the IA
4 Court's would require of proof evident and presumption
5 great to actually hold Mr. Tovar nonbondable.

6 THE COURT: All right. Counsel, are you
7 able to call any witnesses or provide any testimony that,
8 well, first of all, that the field test was somehow
9 inaccurate or the information provided to the IA
10 Commissioner is somehow inaccurate or on the other hand,
11 that his rights were reinstated so it basically
12 invalidates that charge?

13 MR. STEINFELD: No, Your Honor. I'm simply
14 relying upon the record as it's presented in the Court
15 file.

16 THE COURT: Thank you, Counsel.

17 Counsel, I do need to -- some of the issues I
18 think are, in fact, factual. Some of them are legal, as
19 you indicated.

20 In the first instance that you talked about
21 where, in essence, was the basis of the charge, the
22 misconduct involving weapons, was based upon the status; I
23 can tell you I'm going to affirm the prior ruling of mine
24 that the Court of Appeals is apparently on that now where
25 I've already said that I don't think it requires a Federal

1 conviction for a violation of the Arizona State Statute.

2 I know the Defense is; in fact, Miss Nelson was
3 here earlier; she appealed me on my ruling on that; but
4 I'm going to affirm my prior ruling on that and I think
5 that's an issue for a trial issue versus an issue of
6 release at this particular juncture.

7 Counsel, on the factual issues for the
8 State, does the State want to put anything else on the
9 record?

10 MS. BRESSLER: Actually, I think the Court
11 has pretty much hit on everything I wanted to say.

12 It's the State's position that as for the drug
13 charge, a field test is sufficient to meet the burden of
14 proof evident, presumption great.

15 Additionally, as to the misconduct involving
16 weapons, there were several ways for the IA Court to find
17 that proof is evident and presumption great that the
18 Defendant committed misconduct involving weapons.

19 First of all, he's on felony probation.
20 Secondly, the Court received information as to the
21 problem, too, that the Defendant is in the United States
22 illegally. So the Court had two ways of finding that the
23 Defendant, that the proof is evident and presumption great
24 that the Defendant committed misconduct involving weapons.

25 So at this point the State would just ask the

1 Court to affirm the prior finding. It doesn't appear that
2 the Defense has presented any additional evidence than
3 what was provided at IA Court.

4 THE COURT: Thank you.

5 Counsel for the Defense, any further argument
6 you would like to make?

7 MR. STEINFELD: Yes, Your Honor.

8 It's my position that under Rule 7.4 b, as
9 amended, that at the moment that the Court granted this
10 particular hearing and allowed it to take place, that
11 effectively noted that there have been sufficient factual
12 or legal distinctions from the IA Court and so I suppose
13 the -- I guess the question from my perspective requires
14 almost a comedy argument of some sort that realistically,
15 I've already made the burden in the moving papers and that
16 this decision has already been made and should not be
17 reconsidered at this time.

18 THE COURT: All right. Thank you, Counsel.

19 Counsel, it was not the Court's intent to say
20 that your Motion made that preliminary finding. Because
21 this is so new and because of the other arguments which
22 are contained in your motion, I wanted to make sure that a
23 complete record was made for all the parties and you had
24 the opportunity to make that in case you wanted to appeal
25 to somebody else.

1 What I thought would be the most expeditious
2 way to do that to have everybody come in, you can put it
3 in the record versus just either agreeing or denying to
4 something without having that record being made.

5 So, you know, maybe that was my position but I
6 just think now I think it's important that both sides have
7 a chance to put everything on the record and make all the
8 arguments that you want to make.

9 Counsel, it's the Court's belief that under the
10 rules that we have now before us, in essence, I am not
11 going to revisit the decision of the IA Commissioner
12 unless new facts, circumstances or arguments are brought
13 to me that somehow change or would change the position
14 that they took in findings that they had made.

15 At this particular time, I don't find that the
16 Defense has made any of those arguments as such that has
17 changed what the IA Commissioner actually looked at or how
18 the decision that they made.

19 For example, if you are able to invalidate the
20 field test, if you are able to say that he had some type
21 of status, then I would reconsider that and I think I may
22 make that or hold a hearing on that.

23 However, based upon the rule, again, I treat
24 this exactly as I would a Motion to Modify. I believe
25 that new facts and circumstances have to be brought out

1 before I can make a change to the release conditions, in
2 essence, overturning the finding of the IA Commissioner.
3 It's not another, for lack of a better word, second bite
4 at the apple.

5 So any other position either one of you want to
6 put on the record regarding my findings?

7 MR. STEINFELD: For clarification, Your
8 Honor, you know, in my review of the Court record, I had
9 difficulty actually finding what the findings of the IA
10 Court were. I guess I'm curious as to where the Court is
11 obtaining this information as to what specifically the IA
12 Court held and found at that hearing.

13 THE COURT: I don't know, Counsel.

14 I'm saying they made a finding and they
15 basically held him nonbondable. I wasn't there; and I
16 don't have a transcript in front of me to do that; but
17 again, I rely on other Courts' decisions all the time.
18 I'm not necessarily there when it happened. However,
19 maybe I have just a minute entry but that's another
20 judicial finding that I have.

21 So I'm going to rely on that finding unless,
22 again, I am brought some facts or circumstances or
23 witnesses or something that says that what they did was
24 incorrect or not founded upon appropriate evidence or
25 additional evidence that you have that changes that

1 calculation or that finding, I'm going to deny your
2 motion.

3 MR. ROSELLE: Your Honor, if I may, Jason
4 Roselle for the record.

5 THE COURT: All right. Counsel, --

6 MR. ROSELLE: If I may briefly simply put
7 something on the record to make sure that this record --

8 THE COURT: Counsel, since he's the
9 attorney of record, unless you want to associate on, you
10 can associate on; otherwise, you can talk to him and he
11 can state what you want to say. I don't have any problem
12 if you want to associate on --

13 MR. ROSELLE: Associate on.

14 THE COURT: -- just as long as you are from
15 the same office.

16 MR. ROSELLE: Yes, I am, Your Honor.

17 THE COURT: All right. Go ahead.

18 MR. ROSELLE: At the IA, right now, I
19 believe there is FTR. However, the Court does not provide
20 a minute entry. There is a Form 4. There is a
21 Presentence Investigation Report done. That Presentence
22 Report investigation is destroyed after the IA.

23 And if it wasn't destroyed in this case, it
24 isn't provided to the Defense. So, in essence, when you
25 are asking us to present to you new information, there is

1 no way for the Defense to know what that new information
2 would be; and it almost seemed like an unattainable
3 position unless you have different information that we can
4 have, I would appreciate it.

5 THE COURT: All right. Counsel, I --
6 again, I see that -- I mean, I understand what you are
7 saying to me. Basically, what you want to do is you want
8 to attack what the IA Commissioner did and say there
9 wasn't sufficient evidence at that particular hearing.

10 However, I don't see a Motion to Modify as the
11 ability to attack that ruling. That ruling has already
12 been made. A Motion to Modify is for new information or
13 for additional information that has not already been dealt
14 with at that particular hearing.

15 So, for example, if you now, for example, if
16 your client had -- they originally held him nonbondable
17 because of his status and you are able to bring me a
18 passport and says he's a United States citizen, that is a
19 change in circumstance where I would modify release
20 conditions, if that was appropriate.

21 Or, for example, if you got a drug test back
22 and said, boy, that wasn't marijuana. That was some other
23 plant product. Again, I think that's a modification of
24 release conditions based upon new information.

25 But so far as to attack the sufficiency of the

1 evidence at the IA proceeding, that, I believe, is a horse
2 of a different color.

3 MR. ROSELLE: And so it is this Court's
4 position that unless we're saying to prove he's legal or
5 innocent, then there would be no possible way to amend
6 release conditions.

7 THE COURT: No. There is always -- you can
8 modify the release conditions if you have new information
9 that changes the IA Court's determination.

10 Just like any other release condition
11 modification. You know, again, take it out of this arena
12 for a second and put it in another arena. For example,
13 let's say that he entered a plea to a, you know, in the
14 regular world, if he pled to a Class 6 open-ended offense
15 and he's in custody on \$1,800 bond, you move for a
16 modification of release conditions under those situations,
17 because it's a bondable offense and you now want to
18 release him to Pretrial Services to OR. That is a change
19 in circumstances which warrants a release condition and
20 the Court can modify it.

21 You hear from the State. You hear from the
22 Defense and the Court makes a decision.

23 But, again, I think there is a different
24 situation where you are just saying I want to attack the
25 sufficiency of the evidence which was presented at the IA

1 Court.

2 So there are circumstances and situations where
3 you can do that but again, it has to comply with the rule
4 and what I have before me in terms of evidence.

5 MR. ROSELLE: I just want to make sure I'm
6 clear. In order to get a new or to get a hearing, we have
7 to present new evidence but there is no way of knowing;
8 and if the Court again can correct me if I'm wrong; there
9 is no way of knowing what evidence was presented at the
10 IA.

11 THE COURT: Counsel, from your part, I
12 think that's part of your investigation and I can't tell
13 you how to do that or what that is going to be; but that
14 is something that you feel you want to test the
15 sufficiency of that process, that's something I think you
16 as an officer and as an attorney has to be able to do.

17 But at this particular situation, I'm not going
18 to revisit what the IA Court did unless I have different
19 facts and circumstances in front of me which are
20 consistent and which are part of it.

21 MR. ROSELLE: There is one other thing I'd
22 like to put on the record. It was originally the process
23 that Defense Counsel were at the IA. The County Board of
24 Supervisors changed that process and took away funding of
25 such proceedings. Miss Bressler indicated that we could

1 be there. We cannot be there. We are not allowed at the
2 IA. Defendants are not represented at the IA.

3 And so I think we're in a really incapable
4 position; but thank you.

5 THE COURT: All right. Counsel for the
6 State, do you have anything also you want to put on the
7 record?

8 MS. BRESSLER: I just want to clarify,
9 there is an FTR at the IA?

10 THE COURT: You know, it has been literally
11 years since I have been in the IA Court so I cannot tell
12 you that; and truthfully, I don't go back and I haven't
13 reviewed what they did or did anything about that because
14 that's a prior judicial decision. So I don't know the
15 answer to that.

16 MR. ROSELLE: No one knows if it's kept on
17 or if it is kept on and I believe there is an issue as to
18 whether or not any of it if it is kept on record. So
19 there is no -- as far as I know in my investigation which
20 I can tell the Court -- I can avowal to the Court I have
21 done an investigation how to look into Court proceedings
22 so that we will know what everybody says there.

23 Because there is no minute entry, because there
24 is no Defense Counsel, because the FTR is not always on
25 and then also finding within if they are FTR becomes as

1 issue, there is no way of knowing and because the
2 Presentence Report Investigation is destroyed, there is no
3 way of finding out what happened at the IA.

4 THE COURT: Thank you, Counsel.

5 MS. BRESSLER: Your Honor, just for the
6 record, I think that at the very least, the Public
7 Defender's Office would have to show that they tried to
8 look at the FTR and that there is no information in the
9 FTR.

10 And as for representation at the IA, there is
11 nothing stopping the Public Defender's Office itself from
12 placing one of its attorneys there. The funding was
13 withdrawn from, I believe, OCAC.

14 THE COURT: All right; and Counsel, some of
15 those are -- well, I don't know. I'll let you make your
16 record on that because I don't know what the situation is
17 in that particular area.

18 It is, again, what the Court's position is, is
19 I treat this like any other Motion to Modify Release
20 Conditions and any other way pursuant to Rule 7.4 which
21 has specific requirements the same as it would in any
22 other situation where release conditions were set, in the
23 IA Court and another Court is then reviewing them.

24 So, Counsel, at this point I'm going to deny
25 your Motion. The Court doesn't find that at this

1 particular point a modification of release conditions is
2 warranted based upon the facts and circumstances and law
3 that's been presented to me.

4 Counsel, anything else from the Defense?

5 MR. ROSELLE: Just quickly, for the record,
6 to make sure I understand this ruling. It's your belief
7 then that 7.4 has overturned Simpson. In the event that
8 it requires the State after a hearing -- that's the other
9 point that I'd like to make. There is no hearing -- and I
10 will go a little further in the investigation that I did
11 do. The Commissioner will review evidence before he takes
12 the stand and that evidence is usually a Presentence
13 Report Investigation and the Form 4, it is my
14 understanding.

15 When he takes the stand, if he's not going to
16 find that the person should be held nonbondable, the State
17 who is there will get up and present, try to present more
18 information but there would be no Defense Counsel again
19 and there would have been no information at that point
20 provided to the Defendant that's being used against the
21 Defendant.

22 So there would have been no hearing at that
23 point. So at this point a determination has been made.
24 But Simpson requires a hearing and based on your ruling,
25 you are saying that 7.4 now overturns Simpson.

1 THE COURT: I think you can have a hearing,
2 Counsel but you have to bring proof to the Court that
3 somehow changes that determination.

4 Again, for example, if you were to call a
5 witness from Immigration that says that that determination
6 is wrong. That would actually -- you could test that
7 finding. You could test that finding at the IA Court by
8 way of that particular evidence and you would have an
9 Evidentiary Hearing. You could call your witnesses. You
10 could go into cross-examination, the same as the proof
11 evident, presumption great regarding the charge itself.

12 So I think you are still able to have that
13 hearing. However, it has to be something that has not
14 been brought to the Court's attention at this particular
15 time.

16 MR. ROSELLE: And then on the burden.

17 THE COURT: Or at that particular time, I'm
18 sorry.

19 MR. ROSELLE: So you are saying it hasn't
20 overturned Simpson. You are saying that Simpson still
21 applies but only in the fact that you are given a hearing;
22 but on then on the fact that it would overturn Simpson
23 on -- that it is the State's burden that 7.4 then shifts,
24 that overrules Simpson on that case, on that issue.

25 THE COURT: I think that it, by making that

1 finding, the State has already obtained their burden.
2 They have already made that finding of nonbondable.

3 You want to contest that finding. That is the
4 purpose of the Simpson Hearing but like any other
5 Evidentiary Hearing, you just don't get an Evidentiary
6 Hearing just because, just because. You have to be able
7 to bring forth to the Court some basis for that
8 Evidentiary Hearing. If you do that, hold the Evidentiary
9 Hearing, the Court decides whether what the State
10 presented was sufficient based upon what was presented in
11 contravention of that.

12 MR. ROSELLE: But that would be a
13 contradiction because you would have been entitled to a
14 hearing prior to the new rule change under a Simpson
15 Hearing just by requesting it.

16 THE COURT: There is -- well, before they
17 were doing that hearing within 24 hours of the initial
18 release and they were doing it as a full-blown hearing.

19 Based upon my interpretation of the new rule
20 that I don't see that they are contemplating doing a
21 hearing every one of the cases, otherwise, they wouldn't
22 have accumulated 7.4.

23 MR. ROSELLE: Thank you.

24 THE COURT: All right. Thank you,
25 Counsel. We're off the record on that one.

1 For your part, Mr. Tovar, I'm going to affirm
2 your current court dates.

3 Counsel, let me just look on my calendar, see
4 where the next court date is. I don't know if we even
5 have it, it is so new.

6 THE BAILIFF: It's an Arraignment.

7 THE COURT: Do you know what the date is?

8 THE BAILIFF: July 30th.

9 THE COURT: All right. I'm going to affirm
10 your Arraignment on July 30th, the year 2007. That will
11 be at 8:30 in the morning, I believe, in front of
12 Commissioner Washington. Please make sure you stay in
13 contact with your attorney. He will keep you up to date
14 as to your case if other matters change.

15 Thank you, Counsel.

16 MR. STEINFELD: Thank you, Your Honor.

17 (Whereupon, the Motion to Modify Release
18 Conditions Hearing is concluded.)

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1 STATE OF ARIZONA)
2) SS:
3 MARICOPA COUNTY)
4

5 CERTIFICATE OF REPORTER
6

7 I, Patricia A. Connolly, do hereby certify that
8 the foregoing pages constitute a full, accurate
9 typewritten record of my stenographic notes taken at said
10 time and place, all done to the best of my skill and
11 ability.
12

13
14 DATED this 27th day of July, 2007.
15
16

17 
18 PATRICIA A. CONNOLLY,
19 Certified Reporter

20 Certificate No. 50675
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