

1 (In open court)

2 THE COURT: All right. So the first thing that I
3 think we should address, sounds like it might be a brief
4 conversation, is the Curcio issue I had alerted the government
5 that there is -- a Curcio issue has arisen. I had appointed
6 Ms. Sternheim to be Curcio counsel. She's here.

7 MS. STERNHEIM: Yes.

8 THE COURT: But my understanding -- Ms. Sternheim,
9 you'll let me know if I'm wrong about this -- that we're not
10 yet ready to address all the issues. I know you've been
11 working diligently on it, but we're not quite done; is that
12 right?

13 MS. STERNHEIM: That is correct, Judge. And I can
14 contact the parties and your Honor as to a schedule if that is
15 helpful, but I do not have that in place.

16 THE COURT: Okay. That's fine. That sounds like a
17 good suggestion, and we can go from there. So I'll thank you
18 again for taking on this assignment. I thank you for being
19 here today and for the update.

20 The next issue, I think it makes sense to address, is
21 this question of sealing the correspondence with regard to
22 prison conditions, prison designation and then I think we have
23 to resolve the issue of Mr. Tartaglione's housing. So I've
24 read all the letters.

25 I don't know, Ms. [REDACTED] if you want to add anything.

[REDACTED]

1 MS. [REDACTED] No, your Honor. I have nothing to add.

2 We'll rest on our papers.

3 THE COURT: Okay.

4 And I take it that counsel for Mr. Tartaglione remain
5 agnostic on this issue; is that right?

6 MR. BARKET: Yes.

7 THE COURT: Okay. All right. So what we're talking
8 about here is the government's request to seal letters that
9 have been docketed. There have been redacted versions filed,
10 but we're talking about Docket Numbers 150 and 153.

11 And the background of this is that back on
12 August 21st there was a conference where we discussed, among
13 other things, issues related to Mr. Tartaglione's housing in
14 the MCC, and what I had asked the government to do is inquire
15 about options for housing Mr. Tartaglione at either the MCC or
16 MDC because those are the only two Bureau of Prisons facilities
17 in the New York metropolitan area. Because it turns out that
18 the other facilities, whether they were in Nassau County or
19 here in Westchester County or in other counties, those are not
20 federal facilities and those facilities either didn't have
21 contracts with the Southern District Marshals, or otherwise had
22 advised that they were not going to house Mr. Tartaglione. So
23 the particular question was whether or not MDC would be willing
24 to take Mr. Tartaglione back, and we had had a pretty fulsome
25 discussion about the issues that had led to Mr. Tartaglione's

1 transfer from MDC to MCC.

2 The government followed up, as I had asked it to,
3 with a letter dated August 23rd, and that's the letter, the
4 first letter the government ask be placed under seal that
5 addressed the issue about housing Mr. Tartaglione at MDC and
6 MCC, and the government, as I said, asked that the letter be
7 sealed. The Court, on August 26th, temporarily filed it under
8 seal, but then asked the government to further explain its
9 reasons for permanently sealing that letter.

10 On August 28th, counsel for Mr. Tartaglione filed a
11 letter which addressed the merits of the government's housing
12 options as presented in the August 23rd letter and counsel had
13 asked that that letter be filed under seal because it was
14 responsive to the government's letter which had been filed
15 under seal.

16 On August 29th, the government filed a letter arguing
17 that its August 23rd letter or at least a portion of it should
18 be filed under seal because it addressed Bureau of Prisons'
19 reasoning for either why it was that certain things had been
20 considered and certain steps that the Bureau of Prisons thought
21 would be necessary to house Mr. Tartaglione, and also the
22 government filed a letter stating that the August 28th letter
23 should remain under seal, that is, counsel for Mr. Tartaglione.

24 On September 5th, the New York Post and the New York
25 Daily News filed a letter arguing for the unsealing of the

1 letters. They were joined by the *New York Times* on
2 September 10th.

3 The government, as the Court had previously asked,
4 had submitted a response to I guess the first letter from *The*
5 *Post* and the *Daily News* explaining why and really reiterating
6 its argument for sealing and that's when counsel for
7 Mr. Tartaglione announced their agnosticism on the issue.

8 So the question actually has a couple of layers to
9 it. So the first question is whether or not the government's
10 letters are considered judicial documents. And a judicial
11 document is an item that is, "relevant to the performance of
12 the judicial function and useful in the judicial process," and
13 that's from the Second Circuit's decision in *Bernstein v*
14 *Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139,
15 quoting from an earlier Second Circuit's decision in a case
16 called *Lugosch v Pyramid Company of Onondaga*, 435 F.3d 110,
17 119. The mere filing, however, of anything, whether it's some
18 kind of a document or a letter with the court by itself doesn't
19 render such a document a judicial document. That's from the
20 Second Circuit's decision in *US versus Amodeo*, 44 F.3d 141,
21 145. But if an item is a judicial document, then the public
22 has a presumptive right of access to it under both the common
23 law and the First Amendment. Also from Amodeo. The purpose of
24 this right is to ensure that courts are held accountable and
25 that the public has "confidence in the administration of



1 justice." Also from *Amodeo*.

2 Under the common law analysis, the Court is to
3 determine the weight of the presumption of access. "Generally,
4 the information will fall somewhere on a continuum from matters
5 that directly affect an adjudication to matters that come
6 within the court's purview solely to ensure their irrelevance."
7 That's from the second *Amodeo* case, 731 F.3d at 1049.

8 "Finally, after determining the weight of the
9 presumption of access, the Court must 'balance competing
10 considerations against it.'" *Lugosch* at page 120.

11 Competing considerations include both "the danger of
12 impairing law enforcement or judicial efficiency," or "the
13 privacy of interests of those resisting disclosure."

14 The first Amendment analysis requires two different
15 approaches. The first considers "experience and logic," that
16 is, "whether the documents have historically been open to the
17 press and general public" and "whether public access plays a
18 significant and positive role in the function of the particular
19 process in question." That's from *Bernstein* at page 141.

20 The second approach which applies when the judicial
21 proceedings themselves are covered by the First Amendment
22 considers whether the documents are "derived from or a
23 necessary corollary of the capacity to attend the relevant
24 proceedings." That's from *Lugosch* at 120.

25 Under either approach, the moving party has to


1 demonstrate that sealing is "essential to preserve higher
2 values and is narrowly tailored to serve that interest."
3 Bernstein at 134. Further, the Court has to make "specific,
4 on-the-record findings...demonstrating that closure is
5 essential to preserve higher values and is narrowly tailored to
6 serve that interest." Lugosch at 120.

7 So the Government's argument is that the August 23rd
8 letter, in the first instance, is that the August 23rd letter
9 doesn't qualify as a judicial document because it has no
10 bearing on the charges contained in the pending indictment" and
11 "the location where [Mr. Tartaglione] is to be detained pending
12 trial is ancillary to this criminal prosecution." So in the
13 Government's view, its August 23rd letter is status report
14 about the BOP's "internal deliberations."

15 The government argues in the alternative that even if
16 it is a judicial document, that redacting certain information,
17 including most specifically BOP's explanation of
18 Mr. Tartaglione's housing options, is appropriate. And that's
19 because, according to the government "the BOP maintains that
20 the public filing of those paragraphs would jeopardize its law
21 enforcement functions and inappropriately hamper its interim
22 deliberative processes." I guess the BOP is arguing that any
23 presumption of access is overcome because the letter also, to
24 the extent it's even a judicial document, it still addresses
25 what BOP considers an ancillary matter. And so a public filing



1 would "hinder the internal deliberative process of the MDC and
2 thereby jeopardizes the BOP's ability to carry out its function
3 of securing pretrial defendants," because the letter provides
4 details that were "taken into account to make an appropriate
5 housing decision for a defendant charged with multiple
6 murders." Also, the assertion is the public filing of the
7 document, the letter, would "risk circumvention of the law"
8 because "the public revelation of internal deliberations" would
9 "enable all inmates to alter their behavior and manipulate
10 their housing assignments to cause harm to others or engage in
11 illicit behavior."

12 The aforementioned media organizations argue that the
13 letter, the letter of August 23rd, is a judicial document
14 because it was submitted to the Court for purposes seeking or
15 opposing an adjudication, and also that there's significant
16 public interest in the conditions in BOP facilities, and
17 finally the conditions of Mr. Tartaglione's confinement are
18 relative to his case and his rights.

19 So addressing the threshold question about whether
20 the August 23rd and August 28th letters are judicial documents,
21 the Court concludes that they are. While the letters
22 themselves may not directly address the actual charges filed
23 against Mr. Tartaglione, that is not the governing standard.
24 The correct standard I've already mentioned is broader than
25 that, and therefore, in my view, the letters are "relevant to



1 the performance of a judicial function and useful in a judicial
2 process." First of all, the letters were filed in response to
3 a court order. So calling them a nonjudicial document seems
4 anomalous as they were directed as part of the judiciary's
5 overseeing of this case.

6 Second, the letter is related to an issue, that is,
7 Mr. Tartaglione's conditions of confinement, that could
8 substantially impact his ability to mount a defense and thus
9 are directly related to his trial rights, his constitutional
10 rights, among other things, to defend himself.

11 Indeed, the housing issue has been repeatedly raised
12 by counsel for Mr. Tartaglione precisely on that ground, and I
13 think understandably so, and so the relevance of the letters
14 follows from the relevance of Mr. Tartaglione's conditions, and
15 of course it's not irrelevant that this is a capital case.

16 The proof of that is that the issues that are
17 addressed in the letters have been addressed here in open court
18 really from the very first time that these issues have been
19 raised.

20 So put it in the language of the Second Circuit, the
21 specific contents of the letters are "relevant to the nature of
22 the proceeding," that is, how Mr. Tartaglione is being housed
23 in connection with his ability to defend himself in this
24 capital case. And I think it certainly is the case that
25 access, public access to the letters "would materially assist

1 in the public's understanding of these housing issues before
2 the Court in evaluating the fairness and integrity of the
3 Court's proceedings." That's from Second Circuit's decision in
4 *Newsday LLC County of Nassau*, 730 F.3d 156, 166-67. And of
5 course all this, in the Court's view, is consistent with
6 holding those of us in the criminal justice system accountable
7 for what it is we do.

8 So given the letters are judicial documents, the
9 Court proceeds to consider the weight of the presumption of
10 access and whether any competing interest overcomes the weight
11 of access such that portions of the letters may be redacted.

12 There is, I think, at the outset a waiver issue,
13 because a lot of even the deliberative process of the MDC has
14 been discussed before. So, for example, some of the
15 disciplinary issues that Mr. Tartaglione had they have been
16 discussed. There's been a great deal of discussion involving
17 conversation with counsel for MCC all the various things MCC
18 has had to do to accommodate Mr. Tartaglione's concerns, and
19 there's been a great deal of discussion, for example, about
20 conversations for Mr. Tartaglione and MCC officials and counsel
21 for the government and MCC officials, but in any event, the
22 weight of the presumptive right of access here is heavy. This
23 is a capital case. Given the obvious stakes involved, the
24 public has a deep interest in ensuring judicial accountability
25 in all aspects of the case, including adjudicating any



1 grievances related to pretrial confinement that might affect
2 Mr. Tartaglione's ability to defend himself in the case. Of
3 course that goes to the very fairness of the proceedings. Also
4 the public has an interest in the conditions of confinement in
5 BOP facilities in general. Anything that would suggest to the
6 contrary would be Kafkaesque. And Mr. Tartaglione's conditions
7 in particular, and in ensuring that BOP's decision-making on
8 inmate housing is reasonable seems to me precisely the kind of
9 thing that should be accessible to the public. So I think
10 BOP's argument in that regard falters.

11 To the extent BOP is arguing that its deliberative
12 process in this case satisfies the sort of compelling interest
13 that could justify sealing the portions of the letters that it
14 wants sealed, it bears noting that the parties seeking sealing
15 that wants to overcome this presumption has to show that
16 sealing will further a compelling interest, such as a law
17 enforcement concern, a national security concern, a public
18 safety concern. Obviously privilege is certainly a valid
19 concern, as are privacy interests. And the burden, of course,
20 is on BOP to make that showing. But I don't think BOP has done
21 that here. The deliberative processes that BOP is talking
22 about are not protocols, for example, that it never publicizes
23 as to how it is that it might secure inmates at a facility.
24 That would be different. That could very well be a situation
25 where disclosure of how BOP addresses specific security



1 concerns could alert people to then circumvent those concerns
2 and put not only BOP officials at risk but also other inmates
3 at risk. That's not what we're talking about here. We're
4 talking about the deliberative process that BOP says it engaged
5 in in evaluating where to house Mr. Tartaglione and how in
6 particular it would do so at MDC and MCC.

7 So, for example, to the extent that Bureau of Prisons
8 has some concerns about housing Mr. Tartaglione in the general
9 housing and explains why, a lot of the things that letters that
10 the BOP had the government put in its letter are things that
11 people know. So the fact that Mr. Tartaglione is facing the
12 death penalty, the fact that he used to be in law enforcement,
13 the fact that there's been this whole public scrutiny over what
14 happened with Mr. Epstein and Mr. Tartaglione being involved in
15 that, these are things that are commonly known. So to the
16 extent that the BOP took factors that were commonly known into
17 its so-called deliberative process in evaluating how it is that
18 he could be housed at the two facilities, including, by the
19 way, the fact that there have been prior disciplinary issues,
20 that's also been publically discussed here in Court, and it's
21 been the subject of letters. So the cellphone thing, for
22 example, and other prior disciplinary issues, that's all been
23 publicly discussed, and to the extent BOP took all those things
24 into consideration, I think it's hard for BOP to argue that
25 taking into consideration factors that were publicly known



1 about how it is best to house Mr. Tartaglione is the type of
2 discussion of security protocols that otherwise aren't public.
3 So I think it distinguishes between what BOP has done here and
4 what it maybe does in coming up with very specific protocols,
5 either as to a particular individual or as to how it is it
6 houses people generally at its facilities.

7 So I just don't see how unsealing the letters and
8 revealing the deliberative process is something that's going to
9 uniquely publicize certain things that are going to jeopardize
10 BOP officials or other inmates. For example, to the extent BOP
11 argues a disclosure could lead to bad behavior, that inmates
12 could manipulate their housing assignments, I just don't see
13 that here.

14 There are certain things about Mr. Tartaglione that
15 he has no control over. He has no control over the fact
16 that -- in terms of things he can change. He was a law
17 enforcement officer. The fact that BOP took that
18 consideration, I don't see how somebody can manipulate that to
19 somehow pretend that, for example, they weren't a law
20 enforcement officer. You can't change your history. So I just
21 don't understand how that's going to somehow lead to
22 circumvention of security protocols.

23 So I just don't think BOP has made the case that the
24 public disclosure is going to risk harming anybody, and so give
25 given the BOP'S, in my view, failure to establish a compelling



1 interest to overcome the presumption of public access, I'm
2 going to order the letters be unsealed.

3 If BOP wants to have you go to the Second Circuit,
4 can you let me know. I mean, I'll wait a day, Ms. [REDACTED] if
5 they're that concerned, but you'll let me know by the end of
6 business tomorrow? .

7 MS. COMEY: Yes, your Honor.

8 the court: Okay, thank you.

9 All right, any updates from the government?

10 MS. [REDACTED] Your Honor, we remain in the same place
11 we were last time, the government is ready for trial. We would
12 ask the Court to set a trial date.

13 THE COURT: Okay.

14 Mr. Barket.

15 MR. BARKET: Well, I mean, before I get to the trial
16 date part, we actually have something to say about that today.

17 THE COURT: Yes.

18 MR. BARKET: I'm curious about the issue concerning
19 the telephone which has been stewing for some while.

20 MS. [REDACTED] The government will not be seeking a
21 warrant for that phone.

22 THE COURT: Okay.

23 MR. BARKET: I guess, less work.

24 On the issue of the trial date, we have had some
25 discussions among counsel as to laying out what we think is a

1 reasonable schedule among us. We've had a preliminary
2 conversation about it with Mr. Tartaglione. We are still in
3 the process of kind of finalizing that. So what I'm going to
4 suggest to the Court is that you allow that process to continue
5 internally, and that before the next Court date we'll have
6 completed it, met with the government, proposed it to them and
7 hopefully gotten their agreement on it and then we can come
8 back with a joint scheduling order all the way through to the
9 trial.

10 (End of excerpt)

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