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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

- - -

THE HONORABLE A. HOWARD MATZ, JUDGE PRESIDING

- - -

U.S.A.,)
)
Plaintiff(s),)
)
vs.) CR2002-350-AHM
)
STEVEN WILLIAM SUTCLIFFE,)
)
Defendant(s).)
_____)

ORIGINAL

COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, SEPTEMBER 23, 2002

GAIL PEEPLES, CSR
Contract Court Reporter
100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 894-3013

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APPEARANCES

In behalf of the Plaintiff:

DEPARTMENT OF JUSTICE
ASSISTANT UNITED STATES ATTORNEY
BY: ELENA J. DUARTE
312 North Spring Street
Los Angeles, California 90012

In behalf of the Defendant:

FEDERAL PUBLIC DEFENDER
BY: MARILYN BEDNARSKI
BY: HILARY POTASHNER
321 East 2nd Street
Los Angeles, California 90012

1 LOS ANGELES, CALIFORNIA; MONDAY, SEPTEMBER 23, 2002; 4:08 P.M.

2

3 THE CLERK: Calling calendar item number 11, case
4 number CR 02-350, United States of America versus Steven
5 William Sutcliffe.

6 Counsel, please state your appearances.

7 MS. DUARTE: Good afternoon, Your Honor. Elena
8 Duarte for the Government.

9 THE COURT: Good afternoon.

10 MS. BEDNARSKI: Good afternoon, Your Honor. Marilyn
11 Bednarski and Hilary Potashner present with Steven Sutcliffe.

12 THE COURT: Good afternoon.

13 You all may be seated.

14 I've received an ex-parte application for certain
15 relief that requires me to review the status of this matter
16 only with Mr. Sutcliffe and his current lawyers. And I know
17 what they have said, but I still think I need to review certain
18 things.

19 That requires me to require everyone else in the
20 courtroom to be excused and to be required to wait outside of
21 the courtroom. And the marshals should take Mr. Maiben into
22 their custody and remove him there as well. Everybody
23 including the prosecutor shall wait outside until further
24 notice and the doors shall be closed.

25 MS. BEDNARSKI: Your Honor, I would request the court

1 allow Mr. Landin to remain.

2 THE COURT: Yeah. He can remain. He's part of your
3 firm.

4 MS. BEDNARSKI: We also have a Mr. Nishi here.

5 THE COURT: I can't have Mr. Nishi yet.

6 We're going to permit the representative of the
7 marshal's office.

8 What's your name, sir?

9 MR. SHAPIRO: Deputy Ben Shapiro.

10 THE COURT: Deputy Shapiro to remain.

11 And I think you should wait outside.

12 (The following proceedings held under seal.)

13 THE COURT: And I instruct you, Deputy Shapiro,
14 whatever is discussed at this proceeding you are absolutely
15 obligated to keep confidential and to disclose to no one.

16 Do you understand that?

17 MR. SHAPIRO: Yes, I do.

18 May I say I think one of the deputies is going to
19 come back after he finishes transporting one of the other
20 defendants --

21 THE COURT: I will deal with that when that happens.

22 Now Mr. Sutcliffe and Ms. Bednarski, I've got this
23 application which consists of a request by your current lawyers
24 to be relieved of their responsibilities to you as lawyers and
25 to be relieved of their status as counsel of record. And it

1 states without explanation there is an actual conflict of
2 interest that I could only be told about if you were to waive
3 your attorney-client privilege, which your lawyers think you
4 should not do, and that this conflict of interest is distinct.

5 That's the term that's been incorporated into the
6 application.

7 From the issues I reviewed with Mr. Sutcliffe and
8 with his lawyer the last time we were here -- which I think was
9 on August 22, you need to provide me with additional background
10 information.

11 Most of the time when I am encountered -- when I am
12 presented with a request to be relieved because of a conflict,
13 your office tells me about an association with some other
14 individual, often a defendant to whom they owe potentially
15 conflicting or actually conflicting duties of confidentiality
16 or loyalty.

17 Is that the situation here?

18 MS. BEDNARSKI: No, sir.

19 THE COURT: I'm sure you can explain what this is
20 about so that Mr. Sutcliffe certainly has an opportunity to
21 know what is before me as a ruling without waiving
22 attorney-client privileges. So please do so.

23 MS. BEDNARSKI: We're -- we feel that the events that
24 have passed we would not disclose to anyone hearing in this
25 case, to anyone ruling on potential motions --

1 THE COURT: Hold on one minute.

2 Who is entering the courtroom, sir?

3 MR. GROSSMAN: U. S. Marshal Service, sir.

4 THE COURT: What's your name?

5 MS. JOHNSON: Monica Johnson, sir.

6 THE COURT: Your name?

7 MR. GROSSMAN: Robert Grossman.

8 THE COURT: You'll be permitted to stay here for
9 purposes of ensuring court services. But everything that you
10 hear each of you is obligated not to disclose to anyone else
11 under any circumstances, no matter what the reason, nor to
12 discuss with each other or with Deputy Shapiro.

13 Do do you understand that?

14 MR. GROSSMAN: Yes, sir.

15 Robert Grossman. Yes, sir.

16 MS. JOHNSON: Yes, sir.

17 THE COURT: State your name again please.

18 MS. JOHNSON: Monica Johnson.

19 THE COURT: When you refer to the events that have
20 transpired, do you mean the events that are the subject of
21 investigation under the indictment?

22 MS. BEDNARSKI: No.

23 THE COURT: The events involving your communications
24 with Mr. Sutcliffe as a lawyer?

25 MS. BEDNARSKI: Yes.

1 THE COURT: And what those communications and events
2 have done to your ability to maintain mutual respect and
3 confidence?

4 MS. BEDNARSKI: Yes.

5 THE COURT: Without telling me anything about the
6 communications as such or the actual events, are you here today
7 because you think that the lawyers' ability and right to have
8 confidence in the representations and positions of the client
9 have been irrevocably impaired?

10 MS. BEDNARSKI: No. We're here because our ability
11 to do our best, to zealously represent him and to effectively
12 represent him have been impaired. We don't believe we can do
13 that and we believe he's entitled to that.

14 THE COURT: What could possibly happen that would
15 change things if a new lawyer were appointed?

16 MS. BEDNARSKI: The -- well, the past events or the
17 past communications may not occur. A new lawyer -- even if a
18 new lawyer had been -- experienced those same things that new
19 lawyer may indeed not end up in the same position.

20 In other words, that new lawyer's ability to
21 effectively represent someone may not be so damaged, so
22 affected or so infected or so compromised.

23 THE COURT: Ms. Bednarski, are you telling me in
24 plain language that the communications between your office or
25 any member of your office on the one hand and Mr. Sutcliffe on

1 the other hand have been so impaired that the ability to
2 maintain mutual trust and respect and confidence in each
3 other's respective obligations and positions has been
4 shattered?

5 MS. BEDNARSKI: Yes.

6 THE COURT: Is that a result of things that were said
7 by one side or the other side in this existing attorney-client
8 relationship?

9 MS. BEDNARSKI: In part.

10 THE COURT: Have you discussed up until this
11 afternoon your -- before this afternoon, before this proceeding
12 began here in court, your office's view that it cannot
13 adequately represent Mr. Sutcliffe? Have you discussed that
14 with him?

15 MS. BEDNARSKI: No. We communicated to him the same
16 position we communicated to you. We gave him the papers. We
17 do not believe that his position or his feelings or his ability
18 can repair where we are. In other words, it's our motion to be
19 relieved and it's not, in our view, something that can be fixed
20 by inquiry, explanation.

21 We served him -- not served. But we had somebody
22 meet with him and give him the papers as --

23 THE COURT: When was that?

24 MS. BEDNARSKI: On Thursday.

25 THE COURT: Keep going.

1 MS. BEDNARSKI: And we did so, I think -- and we did
2 that for the reasons that any, I think, professional person
3 would, which it is obviously a matter that concerns him
4 greatly. We've obviously gave -- I'm not going to say
5 obviously.

6 We've given it a lot of thought. It's something I've
7 never done. It's something that my office has rarely asked
8 for. And I can't think of a circumstance that I can draw upon
9 that gives me an experience of similar quality. It's not done
10 lightly. I actually believe it's in Mr. Sutcliffe's best
11 interests regardless of what he may believe. And he's entitled
12 to someone who can fight effectively and zealously for him.

13 THE COURT: That's true. There's no doubt about the
14 latter conviction.

15 Let me speak to Mr. Sutcliffe. You may be seated,
16 Ms. Bednarski.

17 Do you know -- without telling me what it is she's
18 referring to, do you think you know in your own mind what it is
19 she's referring to?

20 THE WITNESS: Good afternoon, Your Honor. Steve
21 Edward Sutcliffe present.

22 I wish to proceed with all rights reserved without
23 prejudice. I wish to enter into the record a record I prepared
24 in response to Ms. Bednarski serving me these papers last
25 Thursday.

1 If I may be permitted to freely speak on the record?

2 THE COURT: Yeah. Go ahead. You can do so while
3 you're sitting there.

4 THE WITNESS: Last month this court permitted me to
5 speak openly and directly about my concerns that my attorneys
6 were not competently working on my behalf. And in particular
7 that Ms. Potashner had obstructed justice. This Court gave me
8 a questioning period and solicited information regarding
9 communications and the lack of with my attorney and even
10 directed questions to my attorney, Ms. Potashner, that
11 necessarily involved attorney-client communications.

12 Neither this Court nor my attorney -- I mentioned
13 attorney-client privilege. And it would seem to me that if
14 this was any concern about attorney-client privilege, at that
15 point it was then waived --

16 THE COURT: Only you can waive the attorney-client
17 privilege. The lawyer cannot waive it for you unless you
18 authorize a lawyer to do so.

19 THE WITNESS: This court can and I hereby request it
20 conduct another sealed hearing at which time it can again
21 direct an inquiry without concern for or about the issue of
22 attorney-client privilege.

23 I believe in such an event the Court will see for
24 itself the complete and utter lack of any basis for this
25 motion, which is nothing more than a tacit admission of the

1 incompetence and failure to comply with their professional
2 responsibilities as attorneys and that this motion lacks both
3 merit and foundation.

4 I will never waive attorney-client privilege in open
5 court. And I'm glad this Court has kept this sealed, as it did
6 on August 22.

7 I am willing to waive attorney-client privilege
8 regarding the limited events of the recent telephone
9 conversations involving myself, Ms. Potashner, and
10 Ms. Bednarski that occurred August 23, 2002, August 29, and
11 September 6 and September 17, 2002 only.

12 It is my belief that the telephone conversations on
13 August 23 and September 17 as well as the 6th were or might
14 have been recorded. If this is so, I request that these tapes
15 be entered into evidence at any hearing held after this day.

16 I'm willing to waive attorney-client privilege in
17 regards to the alleged secret investigations by Ms. Potashner
18 and the public defender's office as I would like more details
19 on this events. I stand on all my other rights with the lack
20 of the prejudice.

21 Lastly, I would respectfully request this Court
22 consider having a very brief in camera hearing with the accused
23 prior to the requested hearing in the prayer that this case
24 might be able to be resolved to the benefit of all parties once
25 and for all.

1 I thank you, Your Honor, for your time and
2 consideration.

3 THE COURT: Okay, Mr. Sutcliffe, you did the right
4 thing by approaching it the way you have. And thus far,
5 nothing that has been disclosed today would in any way
6 constitute a waiver of your attorney-client privilege.

7 But I think what we all have to do is get to the real
8 issue that's before me today. Your lawyers don't want to be
9 your lawyers. Whatever their reasons are, I can only guess at.
10 It's not entirely a wild guess. But the record is the record
11 and I only have the record to rely upon.

12 They don't want to be your lawyers and they're
13 telling me as officers of the court that it's not in your
14 interest for them to be your lawyers, that they cannot properly
15 represent you.

16 And you I want to make sure and I think you want to
17 make sure that regardless of what you choose to do, regardless
18 of what your last statement about resolving the case to the
19 satisfaction of all the parties may refer to, you want to make
20 sure that at all times you have lawyers who are in a position
21 to represent you effectively and zealously. And these lawyers
22 are saying that they're not.

23 When you hear that being told to me by these lawyers,
24 as you just heard, do you still want them to be your lawyers?

25 THE WITNESS: Again, I prepared a statement

1 anticipating that question. If I may enter that into the
2 record?

3 THE COURT: Go ahead.

4 THE WITNESS: Thank you, Your Honor.

5 I previously voiced my concern to this Court that my
6 court appointed federal public defender had failed to secure
7 and obtain evidence of my physical torture and abuse by the
8 Manchester Police Department in full view of the -- and
9 apparent consent of the FBI, who were present and who observed
10 the incident.

11 This Court permitted me to speak about this,
12 conducted a brief inquiry, and then announced that it found no
13 evidence the Public Defender's Office had engaged in
14 obstruction of justice.

15 The day after the court hearing, I called Hilary
16 Potashner. She told me that after reviewing the evidence she
17 had received by subpoena and that comparing that evidence to
18 the facts I had previously provided her and then reiterated in
19 this phone call -- she stated that she believed me and my
20 description of police brutality and torture had in fact
21 occurred.

22 I asked her to request a hearing before this Court
23 where all participants would be present, by subpoena if
24 necessary, so this Court could determine what -- if it in fact
25 had occurred --

1 THE COURT: Let me just interrupt you. *Interrupt*
2 The record will reflect that you are reading from a
3 statement, which is fine with me. But I just want you to tell
4 me how many pages that statement comprises. How many more
5 pages?

6 THE WITNESS: Approximately five single-side.

7 THE COURT: All right. Go ahead and continue. I
8 don't want to cut you off. But remember, the only question I'm
9 asking you -- and I would really expect an answer that's going
10 to be yes or no -- is whether you want these people to be your
11 lawyers in light of what they've just told me.

12 THE WITNESS: It's addressed in here. I want to make
13 a clean record of why I'm doing what I'm doing.

14 THE COURT: All right.

15 THE WITNESS: You'll understand after I --

16 THE COURT: All right. Make your record. *Interrupt*

17 THE WITNESS: She said she would meet with me the
18 following week to discuss this matter further. As with all of
19 Ms. Potashner's promises, she failed to keep her promise to
20 meet with me the following week or to provide details of the
21 secret investigation she and the public defender's office
22 allegedly had conducted of the torture.

23 I have repeatedly told both of my public defenders of
24 my torture and physical abuse by the Manchester Police
25 Department and FBI and I believed this conduct constituted a

1 felony attack on my person. I have repeatedly requested that
2 my public defenders -- *INTERMIT*

3 THE COURT: Could you speak and read that more
4 slowly. The court reporter is probably having a very hard
5 time.

6 THE WITNESS: I repeatedly told both of my public
7 defenders of my torture and physical abuse by the Manchester
8 Police Department and FBI and that I believed this conduct
9 constituted a felony attack on my person. I have repeatedly
10 requested that my public defenders report this conduct and the
11 apparent destruction of the evidence of this incident. And
12 they have failed to do anything.

13 Finally, on September 17 in a phone conversation with
14 Hilary Potashner, I told her that she was guilty of misprision
15 of felon and how would she like it if she was arrested for this
16 conduct that was not so different than why I was arrested.

17 Ms. Potashner then put me on hold, then returned and
18 advised me Ms. Bednarski was with her and I was on a speaker
19 phone.

20 Ms. Bednarski then accused me of threatening
21 Ms. Potashner, which I then denied.

22 They then hung up on me, and this motion was
23 subsequently filed.

24 The Public Defender's Office has had my case since
25 April of 2000. On two prior occasions they asked this Court

1 for a continuance because they were unprepared to go forward.
2 On the last such occasion, you replaced Ms. Potashner as my
3 lead counsel and replaced her with Ms. Bednarski. It was
4 represented they would be ready to proceed to trial on the
5 continued date.

6 This Court then advised counsel it would not
7 entertain any further requests for a continuance of trial by
8 the Public Defender's Office.

9 I have been incarcerated since March, 2002, without
10 bail. I have repeatedly requested that my attorneys challenge
11 this Court's denial of bail by filing a writ of habeas corpus,
12 and they have repeatedly refused, claiming they do not want to
13 upset this Court.

14 I repeatedly asked them to obtain a transcript of the
15 hearing at which bail was denied so that I could address Your
16 Honor's concerns. And they have continued and refused to
17 request or obtain this transcript.

18 Trial is set for October 22. And to this date I have
19 yet to be told by my attorneys what evidence the prosecution
20 has produced to support any of their charges against me, what
21 witnesses the prosecution intends to call, what evidence my
22 attorneys intend to introduce in my defense, and what witnesses
23 they intend to call and/or subpoena on my behalf.

24 Today my attorneys have asked me to prepare my
25 defense arguments for my defense and to list documents

1 contained in the limited discovery that they have made
2 available to me that would support the defense and argument
3 requested of me. And I have done as requested. Even though I
4 have provided and support for same as requested, neither
5 attorney has discussed any of these materials with me in any
6 expanded scope.

7 And now four weeks before trial they appear
8 incompetent to proceed with, they bring this motion claiming
9 that an actual conflict now exists which is peculiar, unusual,
10 and quite distinct. Their words.

11 To the extent that my court-appointed public
12 defenders has failed to perform their jobs as that has created
13 a difficulty in their proceeding to trial as ordered by this
14 Court -- I've already pointed out the problems of this Court
15 with no relief -- to grant this request would be to further
16 jeopardize my right to a speedy trial, representation, and/or
17 assistance to competent counsel and right to my freedom.

18 As this Court advised at the last hearing, it would
19 need at least a half an hour just to describe the dangers of my
20 even considering to represent myself against the vast strength,
21 wealth, and weight of the United States Government.

22 I agree that self-representation is not appropriate
23 and I appreciate the counsel from Your Honor.

24 Furthermore, no panel attorney could come into this
25 case now four weeks before trial and do in four weeks what the

1 Public Defender's Office has failed do in the past six months.

2 The only reasonable, appropriate, and fair result, I
3 believe, would be to require the Federal Public Defender's
4 Office to finish what they have started. They will further
5 prove their incompetence or they will not. Either way, the dye
6 has been cast.

7 I would therefore request respectfully this Court
8 order the Public Defender's Office to be prepared to try the
9 case on October 22 as so ordered and to deny any motion to be
10 relieved.

11 Thank you for your time again and respect.

12 THE COURT: Mr. Sutcliffe, you obviously oppose their
13 motion to be relieved as your lawyers, but in the process of
14 opposing it, you have set forth in a very eloquent manner a lot
15 of disagreements and objections and dissatisfaction that you
16 have, some of which you told me about the last time we were
17 here, none of which seems to have been cured, and some of which
18 have been made worse since you were here. And I think it was
19 August 22.

20 In other words, what you're telling me is they're not
21 doing the job but you want them to finish the job they're not
22 doing.

23 What that suggests to me is that you are inviting a
24 huge problem that you could otherwise avoid and you're also
25 creating the risk that I would be making a big mistake by

1 allowing you to do this inconsistent and, I think, prejudicial
2 act.

3 If I were to require them to continue to be your
4 lawyers, I would be disregarding what all three of you were
5 saying. Because there is no dispute based on this record that
6 the communications that are necessary to have a good
7 attorney-client relationship -- and you need one. These are
8 serious charges. And right now you're innocent. You're still
9 in custody, but you're not convicted.

10 For you to go to bat and take the case to trial or
11 even to pursue a plea, if that's what you were alluding to
12 before, with these lawyers is going to be totally against your
13 interest and against my duty to assure that you get effective
14 assistance of counsel.

15 I have an independent obligation. That's my job.
16 What the lawyers say and what the clients say are very
17 important. And the record that's presented to me is necessary
18 for me to weigh and rule upon. But I have the independent
19 obligation to make sure that the relationship from both
20 perspectives is salvageable and at the very minimum sufficient
21 to make sure that the lawyers can do their job to provide
22 effective assistance.

23 All three of you are making it clear that that's not
24 the case.

25 Now what that really means for you is that -- what it

1 means for me is that I am required, against my preference but
2 definitely as part of my obligation, to grant the motion and
3 I'm going to grant it. And I am going to arrange for the
4 appointment of another lawyer. But I'm going to impose certain
5 conditions --

6 THE WITNESS: May I say something, Your Honor,
7 quickly?

8 THE COURT: Go ahead.

9 ~~THE COURT:~~ My public defender Jonathan Sacks in New
10 Hampshire who represented me --

11 THE COURT: I remember you liked him very much.

12 THE WITNESS: He figured this case out in one day
13 what they have not been able to figure out in six months.

14 Any conflict, if it exists, between Ms. Bednarski and
15 Ms. Potashner and not the Federal Public Defender's Office, I
16 would suggest to Your Honor to consider two things. Let
17 Ms. Bednarski and Potashner to pass on their opinion to fellow
18 public defenders within their office.

19 THE COURT: There is one here who is their
20 supervisor.

21 Is that your role, Mr. Landin? Are you their
22 supervisor?

23 MR. LANDIN. That is correct, Your Honor.

24 THE WITNESS: Or I would gladly accept Mr. Sacks from
25 New Hampshire as my public defender.

1 THE COURT: I don't have any authority to arrange for
2 Mr. Sacks to represent you here. I'm perfectly willing to have
3 the Public Defender's Office that your lawyers now -- in other
4 words, the LA Public Defender's Office -- notify Mr. Sacks --
5 in fact, I'll require them to notify Mr. Sacks that you have
6 requested that he be appointed to represent you. That's an
7 order I'm issuing now.

8 If Mr. Sacks got permission from -- whatever
9 permission is required, presumably from his boss -- to seek
10 leave to be admitted on a special basis -- it's call pro hac
11 veche -- to represent you in this case, I almost certainly
12 would appoint him. I'm not committing to that. That would be
13 my inclination. I don't think that's likely. But I'm willing
14 to see whether there is any basis to arrange for Sacks to come
15 in.

16 I'm not willing to require these lawyers to permit
17 you, against your best interest, to require these lawyers to
18 remain as your lawyers. You got too much baggage in this case.
19 And it's not necessary for me to make any findings about who's
20 right and who's wrong. I'm not saying you're wrong. I don't
21 know for sure. I am saying that this is not an adequate or
22 acceptable way for the lawyer and the clients -- for the
23 lawyers and the client to continue to proceed.

24 Now I want -- I'm going to call in Mr. Nishi, who is
25 a member of the court's alternative panel for lawyers. They

1 often are as experienced, sometimes more experienced, and
2 absolutely as comfortable and conversant in federal criminal
3 law and criminal procedures than members of the Public
4 Defender's Office. And I'm not just blowing smoke at you and
5 telling you this. And eight or nine times out of ten far
6 superior to retained counsel. Any judge will tell you that.

7 And Sacks in New Hampshire apparently demonstrated
8 that to you already. ^{NOT PANEL LAWYER.} So the fact that these are lawyers
9 appointed at the expense of the Government and not retained by
10 somebody with deep pockets is usually to the advantage of the
11 person who gets them. And I think that may well be the case
12 for you.

13 Now if Nishi is appointed, as he's about to be, I
14 will state that you are authorized to tell him and your lawyers
15 are required to tell him that there's a possibility that Sacks
16 will be permitted to associate in. I don't hold out a great
17 deal of promise for that. But it could be a very fine
18 development and I'm not resistant to it.

19 I won't relieve Mr. Nishi because any lawyer out of
20 state has to have a local lawyer present. It's part of the
21 rules. You'd have two lawyers.

22 It will require a continuance. You're right that
23 somebody can't take on your defense and do the job for you in
24 four weeks --

25 THE WITNESS: May I interrupt you for one second?

1 THE COURT: Don't interrupt. I'll give you a chance
2 to be heard.

3 I will have -- I want to -- in order to determine how
4 much of a continuance is necessary, I want the lawyers to tell
5 me answers right now to the following questions.

6 Have you completed your discovery, formal discovery
7 and informal discovery, available to you or available as right
8 to you from the government?

9 MS. BEDNARSKI: We as recently as last week continued
10 to receive discovery. I think last week we got about somewhere
11 between 130, 160 pages, which we forwarded to Mr. Sutcliffe. I
12 believe we've gotten almost all the discovery in the case to
13 the extent that it exists. We've gotten whatever we know
14 about.

15 I think as the Government continues to prepare, some
16 more discovery may be provided. But --

17 THE COURT: This Government lawyer was planning to go
18 out of town. I remember that being told to me. And if she
19 were out of town, who was going to get you whatever additional
20 discovery you think might be out there?

21 MS. BEDNARSKI: She didn't tell us anybody else would
22 be in charge of that. We've always been dealing just with her.

23 THE COURT: Well, I'll make a certain requirement
24 that will apply to her office when I bring her back in here.

25 What other things would have to be done by your

1 successor, assuming you turn over the entire file, all of your
2 work product?

3 Do you authorize, Mr. Sutcliffe, your communications
4 with and your rights as a client to confidentiality to be
5 turned over to your successor lawyers?

6 THE WITNESS: I'm sorry. What?

7 THE COURT: Do you permit -- I think it's not
8 necessarily your choice. But I want to know whether you have
9 any objection to the lawyers who are going to be replaced,
10 Bednarski and Potashner, turning over to the successor lawyer
11 this week their entire file?

12 THE WITNESS: No.

13 THE COURT: I know you're very upset. Would you like
14 to have some water?

15 Pour some water for your client please and assist him
16 in --

17 Would you like to have a recess?

18 THE WITNESS: Yeah. Please.

19 THE COURT: How long a recess would you like?

20 THE WITNESS: Ten minute. Ten minutes.

21 THE COURT: We'll take a recess on this matter.

22 I am required to reiterate that you remain in the
23 custody of the marshals.

24 Do you need to use the men's room?

25 THE WITNESS: No.

1 THE COURT: Do you want to go across the hall to the
2 witness room with just the marshals and yourself?

3 THE WITNESS: Please.

4 THE COURT: Take him into the witness room. Clear
5 out the witness room of anybody else who might be in there.
6 Make sure there's nothing in the witness room that would create
7 a risk. Just stay outside the witness room and give
8 Mr. Sutcliffe a chance to collect his thoughts. Come back in
9 ten minutes.

10 THE MARSHALL: Yes, Your Honor

11 Okay. We're adjourned.

12 (A recess was taken at 4:37 p.m. with proceedings
13 resuming at 4:48 p.m.)

14 THE CLERK: Please remain seated.

15 THE COURT: Mr. Sutcliffe, did you want to be heard?
16 Because when I said something about a continuance is when you
17 last asked to be heard.

18 THE WITNESS: Thank you.

19 I would again like to request of whoever you seek to
20 appoint for me that they immediately be provided a copy of the
21 the transcript of the bail hearings in April so we may address
22 Your Honor's concerns.

23 THE COURT: Is the transcript in existence?

24 MS. BEDNARSKI: It's not been transcribed.

25 THE COURT: Well, I'll order that it be transcribed.

1 I don't know how long that will take. I don't remember who the
2 court reporter is.

3 What was the date of the hearing?

4 I'll find it from the docket.

5 THE WITNESS: I would also like the new lawyer to be
6 provided with a partial transcript of the hearing of August 22,
7 last month, where you agreed to hear a new hearing for bail
8 although you reiterated you would not necessarily grant it --

9 THE COURT: That's not necessary. I'll get him the
10 transcript of the bail hearing. I don't have unlimited
11 capacity to order every transcript. He doesn't need that.

12 THE WITNESS: Is there any possible way we could
13 expedite a bail hearing?

14 THE COURT: First, your lawyer is going to have to
15 review the bail hearing transcript. As soon as he's ready to
16 seek a renewed bail application, I'll grant him a hearing.

17 THE WITNESS: I asked my counsel for that way when
18 you first -- after that first day.

19 THE COURT: You told me that. I know what your view
20 is and how you characterize their view. But there are
21 judgments that lawyers make which can often be very astute and
22 very sensible and very much in the client's interest. I'm not
23 making a finding either way. But you have a right to have me
24 reconsider it. If there's a basis to do so, I will do so.

25 Anything else?

1 THE WITNESS: No, Your Honor.

2 MS. BEDNARSKI: Your Honor --

3 THE COURT: How long do you think you would need? If
4 you knew exactly what you know about the status of the case and
5 you were coming in, if were you Mr. Nishi.

6 Is that who we lined up?

7 THE CLERK: Mr. Nishi, yes.

8 THE COURT: How long would you need?

9 MS. BEDNARSKI: It's -- that's a hard thing to say
10 because I know what has taken the time in the last six months.
11 That's a different question --

12 THE COURT: Yeah. But he needs a lot less than the
13 usual amount of time because you've done whatever you've done.

14 MS. BEDNARSKI: I would say at least six to eight
15 weeks. But I think that's a determination that should be made
16 by the other lawyer, not by me.

17 And I think the date of that first bail hearing was
18 April 16.

19 THE COURT: I'm instructing the CRD to --
20 Ms. Williams to arrange with the court reporter to compile a
21 prompt transcript of that proceeding. Whenever the date was.

22 We have a trial date of October 22. I think I should
23 set the trial. What's the estimate for the duration of the
24 trial on this?

25 I better ask Ms. Duarte that.

1 MS. BEDNARSKI: A week I think is the estimate. We
2 think it could be slightly longer. But I would say between
3 four and seven court days everyone would agree to.

4 THE COURT: Well, I want to set it for early December
5 so this case can be tried and completed before Christmas. In
6 the event Mr. Sutcliffe is acquitted, he can be free for the
7 holidays. So even though I undoubtedly have a zillion trials,
8 I am inclined to set it for December 3. I'll explore it with
9 Mr. Nishi.

10 Bring in the other lawyers.

11 This proceeding as of this point, up until the point
12 that the other people come in, the transcript will be sealed
13 and closed. Filed under seal.

14 (The following proceedings were held in open court.)

15 THE COURT: Welcome back, Mr. Nishi. Will you please
16 step forward to the lectern and be good enough to announce your
17 appearance.

18 MR. NISHI: Thomas Nishi.

19 THE COURT: You're a member of the court's indigent
20 defense panel?

21 MR. NISHI: I am.

22 THE COURT: I've explored certain issues and factors
23 and considerations with Mr. Sutcliffe and his current lawyers
24 from the Public Defenders Office, and I've made the following
25 rulings.

1 I will grant the pending motion to be relieved of
2 responsibilities as counsel of record. The Public Defenders
3 Office has been ordered -- and I'm letting the other lawyers
4 know that they've been ordered -- to communicate with a certain
5 member of another Federal Public Defender's Office. The
6 defendant's requested that individual be permitted to represent
7 him in this proceeding.

8 That other office is in a different state. I don't
9 know whether that's feasible. And I advise Mr. Sutcliffe that
10 I think it's not a likely development but that if that lawyer
11 were available and chose to agree to represent Mr. Sutcliffe in
12 this case, I would be inclined -- I have not committed to do
13 it -- to grant an application for him to do so or on a pro hac
14 veche basis in this court without in any way relieving
15 Mr. Nishi, whom I'm about to formally appoint as counsel of
16 record for Mr. Sutcliffe.

17 MR. NISHI: Your Honor, before you do that, may I be
18 heard?

19 THE COURT: Yes.

20 MR. NISHI: I'm aware of some of the facts and I can
21 indicate to the Court that I have three white collar trials set
22 back to back. I probably will not be available to the end of
23 February.

24 THE COURT: You have three trials set back to back?

25 MR. NISHI: Yes.

1 THE COURT: In this district?

2 MR. NISHI: In this district.

3 THE COURT: Are you confident they're all going to
4 go?

5 MR. NISHI: I'm confident two are going to go.

6 THE COURT: Do you know what those trial dates are?

7 MR. NISHI: Yes, I do. One is probably two weeks
8 from today, October 1. And the second one that I'm sure of is
9 December 3.

10 THE COURT: That's when I wanted to reset this date
11 for trial. I don't want the continuance that's necessitated by
12 this substitution of counsel to delay Mr. Sutcliffe's rights to
13 a speedy trial.

14 MR. NISHI: That's why I wanted to bring it to the
15 Court's attention.

16 THE COURT: I don't think it's fair to Mr. Sutcliffe
17 to appoint you, Mr. Nishi. It just won't fly.

18 MR. NISHI: I agree. That's why I brought it to the
19 Court's attention.

20 THE COURT: I wish I'd known all that before I went
21 through all this.

22 All right. I'm instructing the clerk to contact the
23 indigent defense panel and tell them I want a lawyer who will
24 be available to represent vigorously and immediately
25 Mr. Sutcliffe with a trial date of December 3 anticipated

1 for --

2 How long do you expect this trial to be?

3 MS. DUARTE: Government's evidence approximately five
4 court days, Your Honor. Maybe less.

5 THE COURT: For a seven court day trial. I don't
6 think it will take that long. They seldom do. But who knows.

7 And I want somebody who can commit to being available
8 on December 3.

9 Until you're formally replaced, you're not out of the
10 picture. So whatever duties a lawyer has to a client, you
11 continue to have to a client, including the duty to contact
12 that other lawyer we spoke about, promptly tell him about the
13 trial date as well.

14 When a substitute lawyer has been identified and has
15 made a commitment to represent Mr. Sutcliffe, we'll have to
16 have another hearing as soon as possible this week. And the
17 Public Defenders Office will be required to turn over all of
18 its files and all of its otherwise privileged communications
19 with Mr. Sutcliffe as he has agreed and authorized them to do.

20 There is going to be a effort, with the Court's
21 cooperation, to obtain a transcript of the bail proceeding.
22 And whether new counsel agreed and believes it's in
23 Mr. Sutcliffe's interest to seek a reconsideration of my
24 earlier ruling on bail will remain to be determined. But I
25 have authorized the transcript to be compiled.

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Pg
24
/ NO

1 Is there anything else that needs to be addressed?

2 MS. DUARTE: Yes, Your Honor. You mentioned another
3 hearing this week. Since I'll have to get this covered since
4 I'm leaving tomorrow, would you just let me know what the
5 person who's covering would be expected to do at that hearing.

6 THE COURT: Not much because I'm just assuming the
7 Government will be ready to go on December 3.

8 MS. DUARTE: That's fine with the Government --

9 THE COURT: If we have to change that, it won't be
10 something that I'm going to be pleased about.

11 MS. DUARTE: No, Your Honor. We're ready to go on
12 the 3rd --

13 THE COURT: I'm not saying you weren't. I assume you
14 were ready to go on the 27th.

15 I wanted to ask you about discovery. What possible
16 discovery under the most rigorous application of your discovery
17 requirements and Brady requirements that you could possibly
18 know of remains to be completed that hasn't yet been done?

19 MS. DUARTE: The only thing I can think of, Your
20 Honor, is there's a couple of things that were provided by
21 witnesses that are largely duplicates, such as printouts of web
22 sites, things like that that the witness compiled on their own,
23 that I've been holding onto to turn over when I knew what was
24 going to happen at this hearing. And I would say --

25 THE COURT: No. I want you to turn them over, your

1 office to turn them over this week. You get them to the public
2 defender, the current counsel, they'll get them to
3 Mr. Sutcliffe. He'll have it in their hands that much faster.

4 MS. DUARTE: I will, Your Honor. But I have
5 everything turned over basically.

6 THE COURT: What else besides those additional
7 statements or documents from witnesses?

8 MS. DUARTE: That's all I can think of, Your Honor,
9 that I haven't turned over or made available.

10 THE COURT: I know you have this planned absence and
11 that's fine and understandable. But I want you to arrange to
12 in the event that -- well, I want you to tell the clerk before
13 you leave -- go up there and take care of it now, please --
14 who will be looking after this case in your absence.

15 And tell that person, that assistant U.S. attorney,
16 and disclose who it is to the current counsel, that I want that
17 person promptly to contact the case agent and you should tell
18 the case agent to contact that AUSA and make sure they start
19 functioning in sync so that if there are any developments
20 involving discovery or anything else that might take place in
21 your absence there won't be any additional delay.

22 I want the information that is necessary for a new
23 lawyer to take over this case and get ready for trial on
24 December 3 to flow freely and quickly to the extent it hasn't
25 already been given to the public defender.

1 MS. DUARTE: Very well, Your Honor.

2 Is there anything Your Honor in particular -- I
3 wasn't here. But if there's anything in particular somebody
4 thinks they haven't gotten --

5 THE COURT: No. I don't have any precise thing to
6 point to.

7 MS. DUARTE: As far as I know, I've been turning
8 everything over and I will continue to do that.

9 THE COURT: What about grand jury transcripts?

10 MS. DUARTE: They have been turned over.

11 THE COURT: They have?

12 MS. DUARTE: There was only one witness before the
13 grand jury, and that's been turned over.

14 THE COURT: All right. I can't specify anything
15 else. Those are my rulings.

16 Until further proceedings, I'm going to ask the clerk
17 to contact the appropriate people about getting an available
18 member of the indigent panel today if possible. We have
19 another matter on the calendar. So we'll have to turn to that
20 as well.

21 This case is adjourned.

22 (Proceedings ended at 4:57 p.m.)

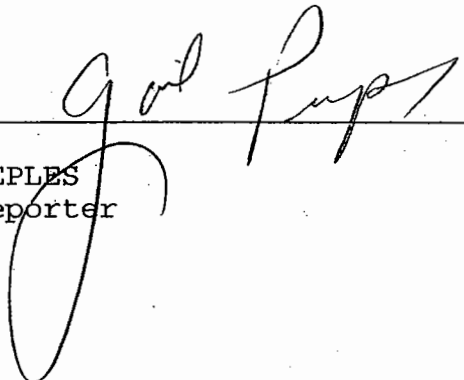
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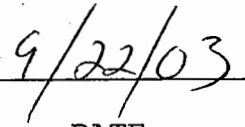
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I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
FROM THE RECORD OF THE PROCEEDINGS IN THE
ABOVE-ENTITLED MATTER.



GAIL PEEPLES
Court Reporter



DATE