

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Christine M. Arguello

Criminal Case No. 09-cr-00266-CMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. David A. Banks,

Defendant

**Motion to Reconsider its Motion For Release of Unedited Transcriber Notes and Note File
for the Bench Conferences Occurring on October 11, 2011 [DKT. 631]**

COMES NOW, Defendant David A. Banks, by and through his attorney, Charles H. Torres, and hereby submits this Motion to Reconsider its Motion For Release of Unedited Transcriber Notes and Note File for the Bench Conferences Occurring on October 11, 2011 [DKT. 631]. In support thereof, Defendant states:

Duty To Confer

Counsel has conferred with the AUSA and he opposes this Motion.

During the trial and shortly after the bench conference in issue, the Defendants and the Court disagreed about what was stated during that bench conference. The problem is that while the Defendants' recollection of what was stated during the bench conference is not found in the transcribed notes, neither is the Court's recollection of what it stated during the bench conference. The transcription of the sidebar in the clerk's office fails to disclose either the Court's recollection or the Defendants' recollection of the sidebar discussion.

After the sidebar, the Court had the following discussion about the exchange at the sidebar:

“MR. WALKER: All right, Your Honor. Given that, and given the instruction to the jury to either put one of those people on or to put one of us on, we put Mr. Barnes on, who we had not –

THE COURT: No, I gave no instruction to the jury.

MR. WALKER: I am sorry, to us.

THE COURT: Privately at the bench, I said you need to call your next witness.

MR. WALKER: And you also said if one of them wasn't available, we had to put one of us on.

THE COURT: I didn't say you had to put one of you on. I said if you intended to testify, then one of you should take the stand, because we weren't going to continue. (emphasis added)

MR. WALKER: Your Honor, with all due respect, I don't remember the phrase, "if one of us was going to take the stand."

THE COURT: I don't know what my exact phrasing was, but the fact of the matter is, I did not direct you to do anything, Mr. Walker. You chose to put a witness on the stand. He has freely testified. You can make your record for whatever you want. But you all gave opening statements saying you were going to put this -- you were going to have this information on there, so you chose to call him. That's fine. You can make whatever record you want for appeal, but I never told you you had to put one of you on the stand. I said we are moving forward, call your next witness.

MR. WALKER: I would like to make this statement for the record. When we approached the bench, your words to us were "Put one of your witnesses on or one of the defendants will have to testify." In response to those statements and our understanding, we put Mr. Barnes on, who we had not made a decision on whether or not he would testify at this point. And at this point we are not -- we are not – have not made a decision

for any of the other 5 co-defendants to testify. And at that point we had not made a decision for Mr. Barnes to testify. So at this point – “

(October 11, 2011 Transcript (“Tr.”) at 108:3-25; 109:1-17). Exhibit A.

The transcribed section covering the sidebar provided only the following:

“**MR. WALKER:** Your Honor, the defense -- can we approach?

THE COURT: You may.

(A bench conference is had, and the following is had outside the hearing of the jury.)

MR. WALKER: Our next witness is scheduled at 10:30. We anticipated -- it's going quicker.

THE COURT: That is unacceptable. I told you to have witnesses here. We are not going to recess again until 10:30. That is 40 minutes away. I told you to be prepared. They need to be here. Your witnesses are not taking long. We are going to go. The eight you named, you still have time. So you better get them here. So call your next witness.

MR. WALKER: Yes, Your Honor.”

(October 11, 2011 Transcript (“Tr.”) at 53:18-25; 54:1-7.) Exhibit A.

A review of what is contained in the transcribed notes located in the clerk’s office does not disclose either the Court’s recollection of the discussion at the bench or even a paraphrase of what the Court stated. Also missing is the discussion recalled by the Defendants.

28 U.S.C. § 753 (b) cited by Defendant Banks and the Court does not distinguish between edited and unedited notes. It states all original notes are required to be preserved and available in the clerks office:

.....The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file

them with the clerk who shall preserve them in the public records of the court for not less than ten years. , 28 U.S.C. § 753(b).

The Guide to Judiciary Policy Vol. 6, Court Reporting is in accord:

§ 120.20.30 Certifying and Filing Transcripts and Notes

- (a) A court reporter must promptly certify and file with the clerk of court all original shorthand notes and other original records of proceedings the reporter has recorded, identifying in the certification the court in which the proceedings were conducted. § 140 (Records and Reports). Guide to Judiciary Policy Vol. 6, Court Reporting.

“Original” shorthand notes are not consistent with edit notes, edited notes are not the original notes.

If original notes are now meant to mean edited transcript notes, the term “original” becomes meaningless and confusing. *Lamb et. al. v. Thompson*, 265 F.3d 1038, 1051, 1052 (10th Cir. 2001).

It is a cardinal canon of statutory construction that a statute ought to be construed that no clause, sentence or word shall be superfluous, void or insignificant. *Mattieson v. Banc One Mortgage Corp.*, 173 F.3d 151,154 (10th Cir. 1997) (Courts are to give effect to every word, reversing district court’s interpretation of the statute).

If the statute meant to state that only the edited notes were required to be certified, it would be so stated, rather than stating “original” shorthand notes. When the wording of the statute is unambiguous it should be given its normal construction. *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001). The need to preserve original notes is illustrated by the fact that neither the Court’s recollection or Defendant’s recollection is found in the transcription provided by the court reporter.

Unless Defendant has missed a transcript page, the Court did order the court reporter to turn over transcripts, but there is no mention of unedited transcripts. (October 11, 2011 Tr. at 138:21 - 139:21, 149:21 – 150:10, 154:22 – 25, 155:6 – 9 and 16-24; see also Tr. Oct 12, 2011, 208:8-15).

Exhibit A. This seems to be the understanding of the court reporter, based on her conversations with Ms. Solomon.

Ms. Solomon, counsel for five of the Defendants, on November 14, 2011, reports she contacted the court reporter, Ms. Martinez, to request a copy of the unedited version of the transcript for October 11, 2011 and October 12, 2011. Ms. Martinez advised that the version was available but it was up to her discretion to release and once she provides the edited version that she would not release the unedited version. Exhibit B.

Finally, Ms. Solomon reports, pursuant to the Court's direction, that she was to contact Ed Butler, legal officer for the U.S. District Court, to address any questions she might have regarding transcripts. Ms. Solomon reports that Mr. Butler informed Ms. Solomon that Darlene Martinez and Charlotte Hoard, supervisor of the Court reporters, advised him that the unedited version no longer existed. Ms. Solomon states she advised Mr. Butler that Ms. Martinez and Ms. Hoard told her that after the transcript was edited, the unedited version still existed, but it was up to the court reporter's discretion to release it. Mr. Butler suggested that Ms. Solomon file a motion with the court to request a copy. Defendants, under the statute, are entitled to review all original transcription notes/note files. 28 U.S.C. § 753(b). Exhibit B.

The unedited notes and/or note files are not available in the information filed with the clerk of the court. The unedited notes and/or note files should still exist and should be available for inspection.

Wherefore, the Defendant, based on the foregoing, respectfully requests the Court reconsider Defendant David A. Banks' Motion For Release of Unedited Transcriber Notes and Note File for the Bench Conferences Occurring on October 11, 2011 [DKT. 631].

Dated this 20th day of December, 2011.

CHARLES H. TORRES, P.C.

/s/ Charles H. Torres

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

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