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MAR 31 2003

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No. 03-71223
(C.D. Cal. No. ED CR 02-350(A) - AHM)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN W. SUTCLIFFE

Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent.

FILED

MAR 31 2003

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Real Party In Interest

**PETITIONER'S SUPPLEMENTAL REPLY TO REAL PARTY IN INTEREST'S
ANSWER TO PETITION FOR WRIT OF MANDAMUS
(AND REQUEST FOR A CONTINUANCE OF THE STAY NOW IN EFFECT)**

IMMEDIATE RELIEF REQUESTED

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I. THE RECORD OF MARCH 14, 2003, DOES NOT PROVIDE ANY LEGAL BASIS TO SUPPORT THE COURT'S ORDER FOR A SECOND CONSECUTIVE 4241 EXAMINATION

In order for a court to order a 4241(d) examination, it "must (1) conduct a hearing and (2) find, by a preponderance of the evidence [adduced at that hearing] that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 USC 4241(d) This did not occur.

Nothing in the transcript demonstrates that the district court made the requisite finding; in fact, the finding that was made was that it was "in the interests of justice require that [petitioner] be examined further." [RT¹ 68:16-17]

Judge Matz also stated, "The finding is that not only prudence, but the interests of justice require that Mr. Sutcliffe be subjected to a thorough examination....". [RT 63:33-5] Again, this is not the standard.

Nowhere in the transcript does the district court make any finding consistent with what is required by 4241(d) - a specific finding that, based on the hearing (and, presumably other evidence that may be considered) the court made a specific finding that petitioner was legally incompetent to stand trial.

¹ "RT" references to the March 14, 2003, transcript, followed by the page and line number(s). Petitioner has sent via overnight FedEx a complete copy of the transcript to this Court.

A. AS POINTED OUT BY THE COURT-ORDERED EXAMINING PSYCHOLOGIST, 4241(d) IS A TREATMENT PROVISION, NOT AN "EXAMINATION" PROCESS.

18 USC 4241(d) provides for a period of time to treat a person already found to be incompetent to stand trial ("...the court shall....hospitalize the defendant for treatment...". [18 USC 4241(d)] Dr. Backer reiterated this important distinction. ["If it's competency restoration, a 41(d)..." - RT 61:18-19.

B. THE COURT-APPOINTED EXAMINING PSYCHOLOGIST CONFIRMED THAT PETITIONER WAS NOT SUFFERING FROM ANY DELUSIONS.

Q, OKAY. GOOD. THANK YOU. FOR PARANOID DELUSIONAL, YOU FOUND THAT MR. SUTCLIFFE YOU DID NOT FEEL WAS, IN FACT, DELUSIONAL; IS THAT RIGHT?

A. CORRECT. [RT 57: 11-14]

Q. OKAY. SO THAT WOULD DESCRIBE MR. SUTCLIFFE? AGAIN, NOT MAKING THING SUP OUT OF THIN AIR, BUT PERHAPS, READING TOO MUCH INTO THINGS?

A. OVER REACTING. MISINTERPRETING.

Q. BUT NOT DELUSIONAL, IN THAT, HE DOESN'T UNDERSTAND REAL VERSUS NOT REAL?

A. CORRECT. [RT 57:25, 58:1 - 6]

The following is in response to questioning by the court:

Q. [THE COURT] DO YOU SEE ANY OF THE FACTORS YOU TOOK INTO ACCOUNT ON THOSE OCCASIONS WHEN YOU CONCLUDED SOMEBODY WAS NOT COMPETENT, IN MR. SUTCLIFFE?

THE WITNESS: WELL, TYPICALLY, THE PEOPLE I FOUND -- OR I OFFERED THE OPINION THAT THEY WERE NOT COMPETENT, TYPICALLY, HAVE A VERY SEVERE ACCESS [SIC - IT SHOULD BE AXIS] ONE DISORDER, SUCH AS, SCHIZOPHRENIA, SOMETIMES A DELUSIONAL DISORDER. I DID NOT SEE THOSE WITH MR. SUTCLIFFE." [RT 25:10-17]

C. DOCTOR BACKER'S "CONCERNS" DID NOT ADDRESS ANY LEGAL ISSUE OF COMPETENCY TO SUPPORT ANY FINDING MUCH LESS A NON-EXISTENT FINDING BY A PREPONDERANCE OF INCOMPETENCE OR FACTORS TO SUPPORT A 4241(d) ORDER.

Dr. Backer's "concerns" were not predicated on issues of incompetence, but that petitioner would act in a manner Dr. Backer believed to be not helpful to the petitioner. This is not a legal standard of incompetence.

Dr. Backer commented that Mr. Sutcliffe seemed upset at the March 14, 2003, hearing he witnessed and that this "concerned him a bit." [RT 26:22] Dr. Backer also stated that he did not see anything "objectively that should have caused that kind of reaction..." from petitioner - yet, Dr. Backer admitted that something had happened earlier that he did not witness, between petitioner and his court-appointed attorney. [RT 45:23-25]

Dr. Backer went on that petitioner had been "upset" with something that his court-appointed attorney had spoken to him about earlier, but that he did not know what the content was. [RT 46:5,6, 9-11]

The AUSA then sought to imply that the "cause" of the problem was a discussion she had had with the court-appointed attorney about a possible plea bargain and that was what caused petitioner to become upset. Pure speculation that is as equally incorrect as are most of the AUSA's speculative comments about this case and petitioner in particular. In fact, the early morning discussing that caused petitioner to "become upset" was his attorney's admission that he was not prepared to go to trial on March 25, 2003, and that he wanted petitioner to waive his right to a speedy trial for several more months. Nothing was said by Mr. Nicolaysen to petitioner about any possible plea bargain discussion or offer. [See Declaration of Steven Sutcliffe attached to the Reply.]

Dr. Backer expressly stated that he would be surprised if petitioner's "degree of being upset (at the hearing)" was caused by a suggested plea agreement [RT 55:19-20] and he was correct- there was no suggested plea agreement articulated to petitioner.

Furthermore, Dr. Backer had been spoken to by Mr. Nicolaysen about petitioner [RT 12:6-12] and by the AUSA, who "described...several other disruptive incidents that [she] had witnesses [sic] with Mr. Sutcliffe," [RT 49:7-10] and considered these discussions when preparing his report.

Also, the district court judge, himself, had prior communications with Dr. Backer regarding petitioner. [RT 6:15-17]

And, Dr. Backer initiated a call to Mr. Nicolaysen to address petitioner's concerns that Mr. Nicolaysen had not "come to see him." [RT 28:24-25]

The question that should have been posed to Dr. Backer if petitioner truly had an attorney who was representing him was: "Dr. Backer, if I were to tell you that petitioner was told this morning, 11 days before trial is commence and one year after he was arrested and has been continually incarcerated without bail, that his court-appointed attorney was seeking a delay because he had failed to prepare for trial; that he still did not have an expert witness retained; that the very judge whose orders were being questioned by a writ of habeas corpus was the same judge who was going to rule on that petition and who did, in fact, rule on the petition; that the same judge later admitted that his conduct and ruling were incorrect - do you think these objective circumstances would form a reasonable basis for the upset conduct you witnessed by Mr. Sutcliffe?" Because, in fact, all of these objective circumstances did occur that morning, outside the observations of, or knowledge of, Dr. Backer.

Dr. Backer admitted that even though petitioner did not want to cooperate with him in that examination process, he did participate because of the way Dr. Backer dealt with him. [RT 31:18-21] This suggests that when petitioner is treated with the same form of respect that is expected from him, he is cooperative. Dr. Backer stated that in a less stressful environment petitioner "appeared surprisingly cooperative." [RT 35:13-14] Again, Dr. Backer was unaware of the issues that had preceded his observations.

Dr. Backer speaks about an ability to "control one's behavior" and petitioner's apparent "lack" of such control at times as being the main issue of his concerns [RT 43:13-17]; however, "controlling one's behavior" is not a legal standard for competency.

Clearly, Dr. Backer never articulated any bases to change his original opinion - that petitioner was competent. In fact, Dr. Backer never changed his opinion of competency despite the continual prodding's by the court, the AUSA and the court-appointed attorney allegedly "assisting" petitioner in his defense.

D. THE DISTRICT COURT, ITSELF, DID NOT KNOW UNDER WHAT LEGAL THEORY IT WAS SEEKING TO COMMIT DEFENDANT FOR ADDITIONAL EXAMINATION.

The district court judge, without any stated finding of incompetence by Dr. Backer and without making any finding of incompetence to any legal standard, much less to a preponderance of any evidence before it, still did not know under what legal theory he could commit defendant. He just wanted to commit him. Period. It was, in fact, Dr. Backer who "steered" the district court to 4241(d). [RT 61:18-19; 62:6-7] Indeed, Judge Matz made it clear that he wanted the petitioner medicated in order to prevent a pattern of disrupting proceedings². [RT 59:16-23] The purpose of these medications, according to Judge Matz, was to "make it possible for the proceedings to be conducted in a fair and appropriate way." [RT 59:21-23] What he really means, is to permit the proceedings to occur without the participation of the medicated petitioner.

² In fact, the record does not show that petitioner ever disrupted the proceedings. In fact, just the opposite. See next argument.

Given that the district court did not know what the legal standards were to order a 4241(d) hearing in the first instance; did not know what the legal standards were to justify a 4241(d) hearing; did not know the different types of habeas corpus proceedings and therefore ruled improperly on petitioner's correctly filed writ; and did not articulate any "preponderance of the evidence" findings to support the 4241(d) order that is at issue, one cannot help but ask who is the truly incompetent player in these proceedings?

E. THE FINDINGS THAT WERE MADE BY THE DISTRICT COURT ARE NOT SUPPORTED IN THE EVIDENCE.

Judge Matz wanted to make it clear that the record was clear recognizing [petitioner's "understandable desire to make sure everything is done right" [RT 58:19-21]:

1. Judge Matz found that petitioner "refused to sit where the defendant is required to sit, namely, at counsel table and next to this lawyer." [RT 63:14-16] **In fact, petitioner asked for the court's permission to stay outside of the bar because his court-appointed counsel had him forcefully removed. The court granted him permission to stay where he was.** [RT 4:14-17] Thus, petitioner sought and obtained the permission to not be at counsel table - a proper, rational and certainly competent thing to do. Judge Matz' wrongful representation is most egregious since he is the one who afforded the permission in the first instance.

2. "The transcript reflects [petitioner was] speaking, often interrupting..." Again, Judge Matz is wrong. There is one single interruption reflected in the transcript

during the proceedings petitioner was present at: that occurs on page 5, lines 9 - 10; however there are no less than 11 instances of the court interrupting proceedings to interject; they are at: 13:15; 15:9; 17:9; 178:25; 22:18; 26:10; 33:13; 36:18; 46:2; 56:17; and 75:13. Now petitioner recognizes the right, duty and obligation of a judge to control the courtroom; however, it is equally correct that a timely objection, unless made, is waived.

3. "When [petitioner] did speak it was almost in an extremely loud voice." Wrong again. Aside from the fact that there is no mention in the entire transcript of petitioner ever being "loud" and petitioner apologized if he did, in fact, raise his voice [RT 8:16-17] noting that raising his voice was necessary for him in order to "make his record" raising one's voice was probably a necessity given where the petitioner was located in the courtroom to insure that the court as well as the reporter, heard him. Certainly, the court could have requested petitioner to lower his voice if he believed petitioner was being "loud" as a means of disrespect.

These are all of the specific findings made by the district court to "support" [sic] the 4241(d) order other than referencing Dr. Backer's testimony and report, which have already been addressed.

Even if all of the "specific findings" noted by Judge Matz were true, they would still not provide the "reasonable cause" required by 4241(a), and in the absence of any finding of incompetence as required by 4241(d), the order cannot stand and must be overruled.

F. FINALLY, PETITIONER BEING UPSET WITH HIS COURT APPOINTED ATTORNEY WAS JUSTIFIED.

Trial in this matter was to proceed on March 25, 2003, assuming a finding of competency. When Mr. Nicolaysen realized that Dr. Backer's opinion was that the defendant was competent, he panicked. It is petitioner's position that Mr. Nicolaysen with the knowledge and complicity of the AUSA and the district court, itself, set out to create an illusory basis to legitimize further delay. Petitioner provides the following as support for his position:

1. The declaration of petitioner regarding Mr. Nicolaysen's request, immediately prior to the March 4, 2003, hearing on the record, to continue trial which was refused and the subsequent surreptitious communications between the court (via the court clerk), the AUSA and Mr. Nicolaysen intentionally outside the presence of petitioner;

2. Mr. Nicolaysen stating on the record that "he was not prepared to accept, at face value, the conclusion in the report that [his] client [sic] was competent." Of course not - that would mean the trial would have to go and he was unprepared;

3. The multiple communications with, by and between Dr. Backer the court, the AUSA and his own court-appointed counsel before the report was concluded and before the 4241(a) hearing of March 14, 2003, was conducted;

4. The contrived supposition of the AUSA that the "reason" for petitioner's being upset was a plea offer made the night before. In fact, petitioner had made in unequivocally clear to Ms. Duarte directly and personally and in open court and by and

through his several court-appointed counsel regarding such prior "offers" that he would accept no plea bargain or agreement that would require him to plead guilty to any offense he did not commit including the offences for which he is presently charged.

5. And Judge Matz' comments to Mr. Nicolaysen after petitioner was taken out of the courtroom at the conclusion of the proceedings: "I want you [Mr. Nicolaysen] to get ready. Master the discovery and do whatever you can to be ready to try the case on the date that [the court] is about the set... (6 months down the road)". RT 78:21-024, and Mr. Nicolaysen's admission that as of March 14, 2003, just 11 days before the trial was to commence, that he was "planning" [sic] to submit an ex parte application for someone [he] was finally able to find as a local expert on the computer issue." [RT 79:2-4]

G. CONCLUSION

The many contrivances of the district court, and the several court-appointed counsel, all of whom failed (and continue to fail) to prepare the case for trial; the constant refusal to treat petitioner with respect; the constant errors made by the trial judge and the ego conflict expressed by the trial judge "[Petitioner] thinks he's omnipotent" [RT 17:25 - a case of the pot calling the kettle black?]; and the lack of any legal cause to order a 4241(d) examination resulting in at least another 6 month delay; the clear demonstration that his current court-appointed attorney is incompetent, failed to prepare for trial and engaged in conduct contrary to his "client's" interests in order to cover-up his own incompetence - - all support petitioner's requested relief:

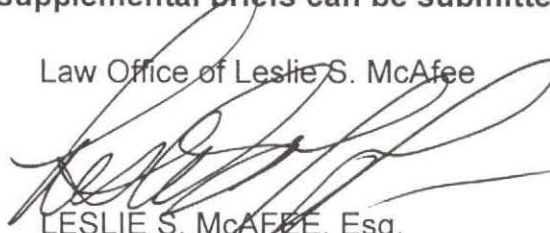
1. That the order for the 4241(d) hearing be overturned; and

2. That the order preventing petitioner from filing his own motions in the district court be overturned.

In the alternative, petitioner would like the opportunity to take Dr. Backer on cross-examination if this Court is concerned that, in any way, Dr. Backer's testimony would support a 4241(d) examination. **In order to accommodate this request, this Court is requested to extend the stay in effect until such a cross-examination can be conducted and a transcript and supplemental briefs can be submitted.**

DATED: March 28, 2003

Law Office of Leslie S. McAfee



LESLIE S. McAFEE, Esq.
Attorney for Petitioner

DECLARATION OF LESLIE S. McAFEE, Esq.

I, LESLIE S. McAFEE, declare as follows:

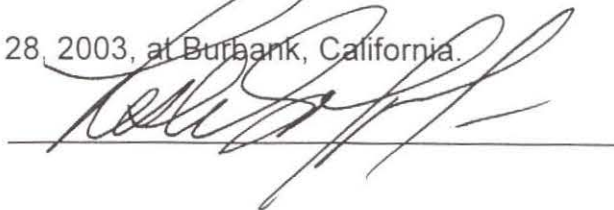
1. I am an attorney duly admitted to appear before the Ninth Circuit Court of Appeals as well as all federal district courts located in California. I am the attorney for petitioner as regards these writ proceedings. The matters stated herein are from my own knowledge to which I would so testify if called upon to do so.

2. I was informed by Mr. Sutcliffe that he was instructed by the prison to "pack up". This instruction was given the morning of March 27, 2003.

3. In the event that this Court grants petitioner the right (provided by 18 USC 4241 to cross-examine the examining doctor), a continuance of the stay order presently in effect would be required in order to prevent the Marshall's Office from transporting petitioner.

4. Therefore, I would respectfully request that should this Court deem it necessary to have the benefit of a cross-examination of the examining doctor in the record prior to making it's decision, that this Court grant an extension of the stay orders until such time as the additional material can be provided to this Court.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on March 28, 2003, at Burbank, California.



A handwritten signature in black ink, appearing to read 'Leslie S. McAfee', is written over a horizontal line.

DECLARATION OF MAILING
PROOF OF SERVICE

I, LESLIE S. McAFEE, declare:

1. I am an adult over the age of 21 years. I am a licensed attorney in the State of California and admitted to practice and to appear before all of the federal district courts in California. The statements made herein are true to my own knowledge.

2. On March 28, 2004, I served the following documents, PETITIONER'S REQUEST TO FILE SUPPLEMENTAL REPLY BRIEF and SUPPLEMENTAL REPLY BRIEF by delivering a true and correct copy of same to:

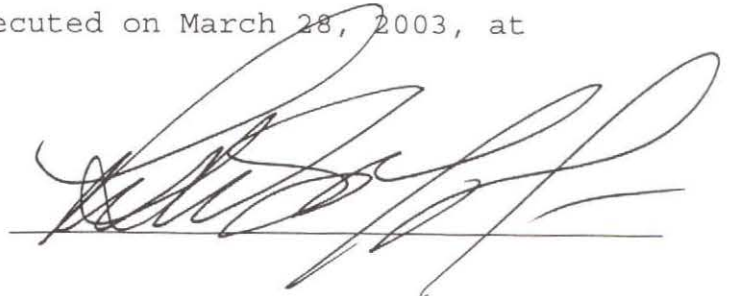
Elena J. Duarte, Esq.
Asst. United States Attorney
1500 United States Courthouse
312 North Spring Street
Los Angeles, CA 90012

Hon. A. Howard Matz, Judge
Courtroom 14
312 North Spring Street
Los Angeles, CA 90012

and by facsimile to Ms. Duarte's office (213) 894-8601

I also caused a copy to be sent to the Ninth Circuit Court of appeals by overnight FedEx this date.

I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct and that this declaration of mailing was executed on March 28, 2003, at Burbank, California.

A handwritten signature in black ink, appearing to read 'Leslie S. McAfee', is written over a horizontal line.