

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Action No. 1:2009-CR-00266-CMA-BNB

UNITED STATES OF AMERICA,

Plaintiff,

v.

2. DEMETRIUS K. HARPER,
a/k/a Ken Harper,
3. GARY L. WALKER,
4. CLINTON A. STEWART,
a/k/a C. Alfred Stewart,
5. DAVID A. ZIRPOLO,
and,
6. KENDRICK BARNES,

Defendants.

**MOTION TO JOIN MOTION FOR RECONSIDERATION TO INSPECT UNEDITED
TRANSCRIBER NOTES AND NOTE FILE FOR THE BENCH CONFERENCES
OCTOBER 11, 2011**

COMES NOW, Defendants, Demetrius K. Harper, Gary L. Walker, Clinton A. Stewart, David A. Zirpolo, and Kendrick Barnes, by and through their attorney, Gwendolyn M. Solomon, Attorney at Law and hereby submits this Motion to Join in Defendant David A. Banks' Motion for Reconsideration to Inspect Unedited Transcriber Notes and Note File For the Bench Conferences October 11, 2011, and in support of this Defendants state:

1. Counsel Solomon entered her appearance on October 20, 2011 on a special limited appearance for the bond hearing. Counsel's continued representation has not been determined to date. On December 09, 2011, at the direction of the court,

Counsel Solomon submitted a brief to consider whether Counsel Solomon may continue representation of the five Defendants through sentencing. A motions hearing is pending to determine Counsel Solomon's representation. In the meantime, to preserve the Defendants rights, Counsel files this Motion to join in Defendant David A. Banks' Motion For Reconsideration to Inspect Unedited Transcriber Notes and Note File for the Bench Conferences October 11, 2011.

2. On October 11, 2011, the Defendants challenged the discussion of a bench conference held where they were reprimanded by the court because their witnesses were not available. All of the Defendants recall during the bench conference, comments made by Judge Arguello that if their witnesses were not immediately available that one of the Defendants would have to testify. The courts recollection is different and there is the reason for the Defendants concern. Neither the Court's recollection nor even the paraphrase of the Judge's recollection is found in the transcribed sidebar in question. Nor, is the Defendants recollection of the sidebar found in the transcribed sidebar. Only the original unedited notes will help address this issue. (Exhibit A, October 11, 2011, Transcript, ("Tr.") at 53:21-25; 54:1-7; 108:4-25; 109:1-17; 110:2-5).

Defendants requested a copy of the unedited version of the transcript to review the context of the bench conference. (Tr. at 139:17-22). Defendant Clinton Stewart completed a CJA form to qualify and receive the unedited version of the transcript at no cost. Defendant Stewart with the assistance of Ms. Barnes, the court clerk, and Ms. Martinez, the court reporter, via paper format requested a copy of the unedited version of the transcript. The form provides the person to select either the edited or the unedited version of the transcript. At the direction of Ms. Martinez, Defendant Stewart

marked the form by circling the unedited section to receive the unedited version on the transcript to review the bench conference that had taken place prior to the Defendant Barnes' testimony. The completed transcript request made by Mr. Stewart should be available from the court reporter for inspection.

3. At lunchtime, Ms. Darlene Martinez, the court reporter, e-mailed the Defendants a bench conference. See Exh. B, attached. The transcript received did not fully disclose the conversation of the bench conference requested. (Tr. at 138:21 – 25; 139:1-22). Defendant Stewart immediately informed Ms. Martinez, that the bench conference sent was the incorrect one requested as it did not disclose the complete discussion that took place prior to Defendant Barnes taking the stand to testify. See Exh. C., attached. Ms. Martinez was directed by the court on several occasions throughout that day to provide Defendants with the transcripts they requested. (Tr. at 138:21 - 139:21, 149:21 – 150:10, 154:22 – 25, 155:6 – 9 and 16-24; Oct 12, 2011, Tr. at 208:8-15).

4. On October 21, 2011, Counsel Solomon met with Ms. Martinez in person at the court reporter's office and inquired about the status of the transcript request by Defendant Stewart. Ms. Martinez then advised that Judge Arguello denied the request made by Defendant Stewart for the unedited version of the particular bench conference in question. Ms. Martinez advised that the edited version would be available per request and for appellant purposes. Counsel Solomon then requested an expedited copy of the transcripts for October 11, 2011 and October 12, 2011. After receipt and review of the transcripts for October 11, 2011, Defendants raised the original concern

that a portion of the discussion was missing during the conversation held during the bench conference. (Tr. at 53:23 – 54:12; 138:21 -25; 139:1-22).

5. On November 14, 2011, Counsel Solomon contacted Ms. Martinez to request a copy of the unedited version of the transcript for October 11, 2011 and October 12, 2011. See Exh. D., attached; *see also*, Exh. E, Affidavit by Gwendolyn M. Solomon. 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. *Id.* When asked why and if there was a regulation, statute, or rule governing her statement to refuse the release she stated, “it was in her discretion.” *Id.*

6. Counsel Solomon then contacted Charlotte Hoard, supervisor for the court reporters, and requested the same, a copy of the unedited version of the transcripts for October 11, 2011 and October 12, 2011. Ms. Hoard advised that the unedited version was available but it was up to the discretion of the court reporter to release. *Id.* Counsel Solomon inquired if there was a rule, statute, or regulation referencing this “discretion.” *Id.* Ms. Hoard advised that she would pull the information from a website and send to my office. Moreover, Ms. Hoard then advised that the unedited version could be made available for an additional \$3.05 per page. *Id.* I advised that would be fine and asked if she would provide the amount of pages and let me know when would be available for pick up. *Id.* Counsel Solomon never received any statute, rule or regulation or any contact regarding the availability of the unedited version.

7. Later, in review of the transcript provided, two bench conferences had taken place outside the presence of the jury prior to the midday break. The concern is

that the comments made by the court and/or the Defendants are not cited from the bench conference in the transcript. Therefore, there is a need for the court and the Defendants to inspect the transcriber's notes and note file.

8. Counsel Solomon contacted Ed Butler, legal officer for the U.S. District Court, to request accessibility to a copy of the unedited version of the transcript for October 11, 2011 and October 12, 2011. Mr. Butler informed Counsel Solomon that Darlene Martinez and Charlotte Hoard advised him that the unedited version no longer existed. See Exh. E, attached; see also Exh. F. Counsel Solomon advised Mr. Butler that as of November 14, 2011, Ms. Martinez and Ms. Hoard affirmed that after the transcript was edited, the unedited version still existed, but it was up to the court reporter's discretion to release it. *Id.* Mr. Butler suggested that I file a motion with the court to request a copy. *Id.*

Wherefore, the Defendants, based on the foregoing, respectfully join in Defendant David A. Banks' Motion and request to reconsider and allow counsel to inspect the unedited transcriber notes and note file for the bench conferences October 11, 2011 as previously granted.

This, 20th day of December 2011.

Respectfully submitted,

s/Gwendolyn M. Solomon

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Attorney for Defendants,

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CERTIFICATE OF SERVICE

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

U.S. Attorney's Office-Denver

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s/Gwendolyn M. Solomon

Gwendolyn M. Solomon