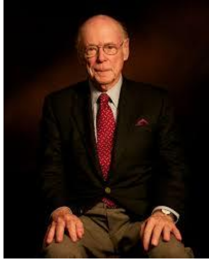

Judge H. Lee Sarokin

http://en.wikipedia.org/wiki/H._Lee_Sarokin

H. Lee Sarokin served on the United States District Court (N.J.) appointed by President Carter, and the United States Court of Appeals (3rd Cir.) appointed by President Clinton. He retired in 1996 after 17 years on the federal bench and now resides in Rancho Santa Fe, CA. He is also known for, overturning the Rubin “Hurricane” Carter wrongful convictions case in 1985.

The Case of the Missing Transcript

Posted: 05/05/2014 7:09 pm EDT Updated: 05/05/2014 7:59 pm EDT

Defendants in a Colorado case, *United States of America v. Banks et al.*, claim, in addition to asserting their innocence, that their Fifth Amendment rights were violated when the trial judge compelled them to testify. Following a jury trial, all six defendants (five black and one white), known as the "IRP6," were convicted of mail fraud or conspiracy, were sentenced to terms of imprisonment ranging from 87 to 135 months beginning in July 2012, and are presently incarcerated pending appeal. They represented themselves during the trial, and although they were aware of their right against self-incrimination (and named themselves on a potential witness list), they contend that the judge compelled waiver of that right. Apparently the judge was frustrated by their failure to produce witnesses in a timely fashion, and they claim the judge said something that led them to believe that at least one of them had to testify in order to keep their defense open. The case is now on appeal. Usually out of deference to the circuit court handling the matter, I would not comment. However, there is one aspect of the case that intrigues me, and since the matter has been pending for a considerable period while the defendants languish in prison, I thought some general airing might be appropriate.

Resolving the issue should be a no-brainer, right? Look or listen to the transcript; read or hear what the judge said and decide whether or not the defendants reasonably concluded that at least one of them had to testify. But here's the rub. There apparently is no record or transcript of the conversation available to either the defendants or the appellate court. The advocates for the defendants (a-justcause.com), who have asked me to review and comment on this matter, claim that efforts to obtain the record of the conversation between the judge and the defendants on this issue have been met variously with claims that there is no record (the reporter missed the conversation), that it exists but is missing, that it existed but has been destroyed, or that "we have it but won't turn it over." They also claim that all informal and formal attempts to obtain that critical exchange between the court and the defendants have been denied either by the court reporter or the court. They advise that the relief was even denied in a separate civil suit brought against the reporter for the turnover of the transcript.

Because there is always a danger in these matters of hearing one side, I insisted that I be furnished with the government's version of what transpired in this disputed exchange. The government's brief (U.S. Answering Brief) summarily dismisses the claim by stating, "Because nothing in the record other than the defendants' own self-serving assertions supports their claims of compulsion, *the exact language used by the district court during the sidebar conference is immaterial*" (emphasis mine). Roughly translated, the statement should read, "There is nothing to support the defendants' position on the record, because there is no record." It is an obvious concession by the government that the record before the court of appeals does not contain evidence of what the trial judge said to the defendants -- which they claim caused them to believe that they had to testify or be foreclosed from proceeding with their case.

Although the defendants vehemently proclaim their innocence, I do not have sufficient information to comment on their convictions. But I have no doubt that whether or not they felt compelled to testify depends exclusively on what the judge said to them at that precise moment. To suggest that the court's "exact language" is immaterial is ludicrous, particularly since the court and the defendants disagree as to what was said.

Certainly no judge would direct a criminal defendant to testify against his or her own will, but it is conceivable that something was said that reasonably led them to that conclusion. The answer lies in the record, which apparently does not exist, for reasons that seem to be elusive. The case raises numerous other serious questions about the prosecution, conviction and incarceration pending appeal of these defendants, but my comfort level limits me to this one strange mystery: the missing transcript. The case does raise the question of why six respected businessmen would engage staffing companies to hire and pay workers for a project that (as the government contends) defendants had no intention of completing and selling. Were they just interested in increasing the level of employment in their community? Or were they merely a typical company whose goals were delayed in fruition, did some puffing in the process and owed money as a result?

The Missing Transcript Case Becomes More Curious -- Part II

Posted: 05/16/2014 1:29 pm EDT Updated: 05/16/2014 1:59 pm EDT

In an earlier post involving the case of *United States of America v. Banks et als.*, I reported the assertion of the 6 defendants that, in addition to their claims of innocence, they contend that their 5th Amendment right against self-incrimination was violated. They claim that the presiding judge instructed them that unless one of them took the stand, their defense would be closed and their case over. The presiding judge denies giving that ultimatum. The answer lies in the transcript, but there is no record of that exchange. In my earlier post I mentioned that a separate civil suit was instituted against the court reporter to turn over the transcript. That suit was dismissed on legal grounds, but now having read the court's opinion, its factual findings confirm without question the defendants' contention -- not about what was said, but rather that there is no record of what was said.

Judge R. Brooke Jackson, in an incredibly detailed opinion considering the miniscule nature of the claim, but obviously sensitive to the charges asserted, made detailed factual findings. His opinion should serve in lieu of a remand for a hearing on this sole issue. Very significant to me is that following this exchange between the defendants and the Court, *Mr. Barnes*, one of the defendants took the stand, and shortly thereafter it was government counsel that expressed concern. He "asked the court to make it clear on the record that all parties 'had every reason to believe that Mr. Barnes intended to testify no matter what happened in this case...regardless of the fact that the defense otherwise ran out of witnesses this morning." Why would he bring it up, unless he was concerned that something had transpired which made that clarification necessary?

And then the donnybrook followed. Sample statements from the defendants at the original trial:
"Actually, Your Honor, it was something we felt we had to do."
"And you also said if one of them (a witness) wasn't available, we had to put one of us on."
"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."

The Court denied making such statements. Then when the government starting cross-examining Mr. Barnes, *Mr. Walker*, another defendant asked "for a retrial based on our being forced to testify." So it is apparent that this was not some afterthought, some trial strategy, but rather a simultaneous assertion by the defendants immediately following the side-bar conference. I won't bother going through all of the recitations regarding the defendants' efforts to obtain the transcript, but rather focus on Judge Jackson's findings. He did not find any skullduggery by the court reporter. Rather he concluded:

"No statement like that which was recalled by the court or that which was recalled by the defendants appears in the transcript...There is no dispute that something was said that does not appear in the transcript." Judge Jackson quotes directly from the trial judge: "Unfortunately this portion of the sidebar was not transcribed by the reporter," and comments that "The judge offered no explanation at the time as to why one of her statements was not recorded." Later this explanation was tendered by her: "For whatever reason, whether the parties spoke too far from the microphones or the court reporter took off her headphones, the court reporter did not hear everything that was said at the sidebar..."

And finally the judge in the civil suit concludes: "It is undisputed that Judge Arguello said something that does not appear in the transcript -- either the unedited or the final version." So in all fairness, my use of the phrase "missing transcript" is not accurate. The transcript is neither missing, altered or destroyed, but rather the critical conversation apparently was not recorded and was never included in the transcript for reasons unknown. But having now resolved the factual issue so clearly by an independent court, one cannot help but wonder wherein lies the delay? If there is no way to determine whether or not the 5th Amendment rights of the defendants were violated, does the Court of Appeals have any other choice but to either reverse and remand for a new trial or dismiss? The defendants languish in prison still asserting their innocence. They deserve a prompt answer to a simple question. Can this issue be resolved without the transcript of what the court said to the defendants?

The Case of The Missing Transcript Solved - Part III

Posted: 05/16/2014 12:30 am EDT Updated: 05/19/2014 11:59 am EDT

In prior posts on this matter, I have assumed that absent a transcript of precisely what was allegedly said by the judge to lead these defendants to believe that they were compelled to testify, that no resolution could be made of that issue. However, after having read more of the record, the Court of Appeals has ample opportunity to accept the defendants' factual versions as true and be guided accordingly in its ruling. Here are the uncontested facts upon which the court could reach a determination that the right against self-incrimination was actually violated by the trial court even without the critical transcript:

1. The judge was frustrated at the slow pace of witnesses and said "something" to the defendants about the future of the trial.

2. Immediately following the side-bar, the defendants caucused, and one of the defendants, Mr. Barnes, then took the stand.

3. No inquiry was made by the Court regarding defendant's waiver of his right not to testify.

4. Shortly into the testimony, the U.S. Attorney (not the defendants) wanted clarification that the defendants were going to testify in any event despite the problem producing witnesses. Clearly, he, too, was concerned about the Court's comments at the side bar and that they might have been misinterpreted as being coercive.

5. Once the issue was raised by the government, upon inquiry by the court to the defendants, they were unanimous in their impression of the judge's remarks--that the judge had made it clear to them that if they didn't have a witness, one of them would have to testify in order to keep their defense alive. Each contemporaneous statement on the record confirms this.

6. Although the court denied making such statements, she did not recall her exact language. "I don't know what my exact phrasing was."

7. The failure to have a record of that conversation must be laid at the feet of the court or the government. The absence of this critical conversation, the transcript of which was called for and ordered that very day certainly creates justifiable suspicions. Strangely, in the separate civil suit against the court reporter, the U.S. Attorney stepped in claiming the reporter was an employee of and on government business. But even accepting Judge Jackson's finding in the civil case of no skullduggery by the court reporter, the defendants have good reason to cry "foul."

8. Mr. Banks asked to see a copy of the transcript of the bench conference before proceeding further, and the court advised that "the transcript would be provided at the end of the day." The

court reporter has never (to my knowledge) through affidavit or testimony explained the absence of this entry.

9. On cross-examination of Mr. Barnes by the government, Mr. Walker objected, pleaded the 5th Amendment based on "being forced to testify". When government cross-examination resumed, Mr. Barnes pled the 5th in response to every remaining question -- all in the presence of the jury. It is difficult to imagine anything more prejudicial.

10. Nor (to my knowledge) has the court reporter or the U.S. Attorney provided an affidavit or testimony of what they recall being said by the Court nor denying what the defendants claim was said by the court. This omission by the U.S. Attorney speaks volumes.

With all of this uncontroverted evidence, the Court of Appeals certainly has enough evidence to conclude that the right against self-incrimination indeed was, violated by the trial court; that defendants reasonably believed that at least one of them was required to testify in order to have the defense remain open; and that they succumbed to that threat, and immediately voiced their objections. Lacking any competent evidence to rebut those claims of constitutional violations, the claim of the defendants must be recognized as valid -- even without the missing entry in the transcript.

The Case of the Missing Transcript Becomes Stranger Yet (Part IV)

Posted: 07/25/2014 10:24 am EDT Updated: 07/25/2014 10:59 am EDT

The *IRP6* defendants renewed their application for bail pending appeal based upon findings in a related case that clearly supported their claim that their 5th Amendment rights had been violated. Although their appeal has been pending for more than 14 months, their application was denied by return mail and signed only by the clerk of the court -- not by one of the judges on the panel. Curious about the speed and the signature, a representative of the defendants telephoned the chambers of the three judges, reached two, and was informed that the judges had not received the motion, and thus had not ruled upon it. Counsel immediately wrote to each of the panel members seeking clarification. No response was ever received as of this writing.

As a retired U.S. Court of Appeals judge, I have been hesitant to comment upon a pending case. I recognize the pressures and the demands that frequently result in delay. I have been there. But each new revelation in this case has prompted me to speak out. I have concluded that the defendants may well be innocent and that there is strong evidence that their constitutional rights were violated in any event -- innocent or not. They have been in prison for two years. They deserve a decision.

The government's theory was that the defendants' software program was a scam and that they hired staffing companies to provide programmers never intending to pay. Defendants have never denied owing the money and contended throughout that the business was legitimate and that they

had every expectation of paying their debts. Despite some unknown person or company's persistence in seeking to charge them criminally, the FBI refused to investigate stating that it was a civil, not a criminal, matter, and likewise a grand jury refused to indict -- presumably for the same reason. Everything seems to indicate that those initial reactions were correct and valid.

However, a grand jury eventually indicted, and the defendants were tried and convicted. My view regarding the possibility of their innocence is prompted by these unanswered questions. If one were to create a scam software program, would one choose only law enforcement agencies as potential customers? The program was designed to coordinate and integrate information for law enforcement. If it were a scam why would you give up your other employment and devote almost a decade to the project? Why would you personally guarantee payment to the staffing companies? Why would you go from one staffing company to another to have programmers work on the project if it were a scam? The staffing companies paid the programmers -- the payments did not go to the defendants. The government claimed that as a result the defendants received "free labor", but for what? If the program was a phony, why spend all of this money to improve it and try to meet the needs of potential and interested customers?

Why would these men, respected members of their community and church, experienced in the computer world with impressive backgrounds, no criminal records, some of whom were veterans(one had a presidential appointment to the Air Force Academy), spend their own time and money and hire companies to work on a program they had no intention of selling?

And then the case itself raises so many unanswered questions: Why wasn't the critical conversation regarding the Court's direction to the defendants upon which they base their constitutional violation recorded? Why did these defendants with no criminal records, no risk of flight, convicted of a non-violent crime receive such harsh sentences -- 7 to 11 years and repeatedly be denied bail pending appeal? Why has it taken this long to decide the appeal? The defendants were imprisoned in July 2012; the appeal was perfected in May, 2013. And why, most recently hasn't the court extended them the courtesy of responding to their inquiry regarding the latest bail application considering the information furnished to them by the judges' chambers -- that the motion was denied without their knowledge of its existence?

If ever the saying "Justice delayed is justice denied" has applicability, it is in this strange case. Defendants who may be innocent and whose constitutional rights were likely violated sit in prison; their families sit at home awaiting the court's judgment; an entire community sits and awaits their return. And Justice sits and awaits a ruling.

The Case of the Missing Transcript Faces Another Defeat (Part V)

Posted: 08/06/2014 1:36 pm EDT Updated: 08/06/2014 1:59 pm EDT

Today is a sad day for me and certainly for the defendants and their families in the *IRP6* Colorado case. The Court of Appeals has affirmed their convictions, but I still cannot shake my

belief that an injustice has occurred in respect to their guilt. Apart from all that I have already said in the past about this case in particular, there is the fact that every day we read of corporate fines for criminal activities, but no personal charges against the executives who directed or approved those crimes no matter how great the losses -- both personal and financial -- or how many persons suffered from them. http://www.huffingtonpost.com/judge-h-lee-sarokin/deaths-caused-by-corporat_b_5348182.html But in this case, for basically the crime of failing to pay corporate debts that pale by comparison (and probably puffing or even lying about their future prospects), these business men, five black and one white, all members of the same church, several of them veterans, with no criminal records, were charged, convicted and are serving sentences of seven to 11 years in prison, even though they had every intention to make their business a success and pay their debts. The government's contention that their business was nothing but a scam defies reality.

If a scam, would you single out law enforcement agencies as your sole customers? Would you work for years developing the program? Would you leave other gainful employment to join in the venture? Would you hire former law enforcement personnel to work on the project? Would you spend your own time and money for years to improve it? Would you personally guarantee the corporate debts and risk your own financial security? If a scam, wouldn't the perpetrators make some money out of it? The only possible way that the defendants could profit was if the company were a success!

The matter was first brought to the attention of law enforcement through a lawyer who failed to disclose whom he was representing -- undoubtedly a claimant or a competitor. The FBI declined to investigate on the basis that it was a civil matter (debt collection), and the grand jury to whom it was presented refused to indict. Yet for reasons unknown, someone insisted that the matter be pursued and the indictment and convictions ensued. I have written at length about what has transpired in this case -- the treatment of the defendants at trial, the harsh sentences imposed, the refusal to grant them bail pending the appeal, a delay of more than a year until the decision was reached today and questions about bail motions and their disposition.

All of that now is rendered moot. Reading the Court's decision today, as persuasive as it is, still leaves me with this gnawing feeling that justice was not served. The government proved that the defendants incurred debts and did not pay them, but it failed to prove that they did not intend to pay them when incurred, because that was not their true intention. Now, although all of the legal arguments have been neatly sewn up and put aside, I cannot help but believe that the fabric of justice has been frayed in the process.

For more information about the wrongful convictions of the IRP6 in Colorado, please visit the following websites: www.a-justcause.com, ajcradio.com and www.freetheirp6.org.

Also, listen to AJCRadio interview with Judge, H. Lee Sarokin about missing transcript in IRP6 case needed for Appeal: **http://www.blogtalkradio.com/ajcradio2/2014/04/16/a-just-cause-coast2coast-discusses-jury-instructions-and-the-appellate-process**.