

XG6NVELBC SEALED DO NOT DOCKET ORIG. TO BE RETAINED IN CHAMBERS

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 UNITED STATES OF AMERICA,

4 v.

16 CR 376 (RMB)

5 ABDULRAHMAN EL BAHNASAWY,

6 Defendant.

CONFERENCE

7 -----x

New York, N.Y.
June 23, 2016
2:06 p.m.

10 Before:

11 HON. RICHARD M. BERMAN,

District Judge

14 APPEARANCES

15 PREET BHARARA,
16 United States Attorney for the
Southern District of New York
17 NEGAR TEKEEI
18 GEORGE D. TURNER
Assistant United States Attorneys

19 FEDERAL DEFENDERS OF NEW YORK
Attorneys for Defendant
20 SABRINA SHROFF
21 CLAY KAMINSKY

22 ALSO PRESENT: ADAM JOHNSON, Supervisory Attorney, BOP
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1 (In closed court)

2 THE COURT: So my recollection is that when we were
3 together on June 16 for the arraignment, there were some
4 additional issues that came up, including the terms and
5 conditions of confinement for Mr. Bahnasawy.. We asked for Adam
6 Johnson, who we all know from the Bureau of Prisons, to join us
7 today to see if he could shed some light on some of these
8 issues.

9 Let me, before we get to Mr. Johnson, start with the
10 government, then with defense counsel, and frame the issue, and
11 then we'll talk -- see what Mr. Johnson can add to it.

12 MS. TEKEEI: Your Honor, as we understood it, at the
13 end of the last conference, the Court requested Mr. Johnson to
14 be present to address the defendant's conditions of
15 confinement, including his designation to the Special Housing
16 Unit.

17 THE COURT: And also, I think, whether any mental
18 health services were being afforded him.

19 MS. TEKEEI: That's correct, your Honor.

20 Since then, the government and defense counsel have,
21 with the Court's permission, provided Mr. Johnson with
22 additional facts and details related to the nature of this
23 case, as well as to the nature of the ongoing investigation, as
24 well as to the nature of the concerns that defense counsel has
25 raised with the Court in various letters related to Mr. El

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1 Bahnasawy's conditions of confinement.. And so we are here
2 today to discuss those exact conditions of confinement.

3 THE COURT: Okay.

4 Ms. Shroff, did you want to add anything, any
5 questions you want posed by me?

6 MS. SHROFF: Yes, your Honor.

7 So first I want to make clear that I don't think the
8 Bureau of Prisons has actually made a designation. I think
9 what it is is a default designation. I think to be fair to
10 Mr. Johnson -- and he's one person I would very much like to be
11 fair to, because he has helped our office tremendously and is
12 very responsive -- as I understand it, that is a default
13 designation which is standard for, I would say, everyone who
14 first comes in.

15 The default is you go to the SHU or you go to a
16 holding pattern, and then they make a designation based on
17 certain information that they are given. So I want to make
18 sure that the Bureau of Prisons, in fact, has the information
19 from which they will be able to make that decision. If they
20 have actually received all that information or if some of the
21 Bureau of Prison employees are still waiting for that
22 information, then the next step would be have they made a
23 decision. The third step would be if they made a decision,
24 what that decision is. And then, of course, if we disagree
25 with that decision, what Mr. Al Bahnasawy's remedies are.

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1 So if I were to frame it, that's how I would frame it.

2 THE COURT: Okay.

3 MS. SHROFF: Thank you.

4 THE COURT: One way or the other, as it were, your
5 client is in the Special Housing Unit now and we are trying to
6 find out -- I think the issue on the table is if that is
7 intentional, so to speak, by the BOP and, I guess, the
8 rationale for it, and from defense counsel's point of view
9 whether he could be or should be somewhere else in the general
10 population, etc.

11 Relatedly -- or not relatedly. I'm actually equally
12 interested in knowing about the mental health question.

13 Ms. Shroff raised that early on too, said that that was an
14 issue for him and whether the BOP is, can, or will be providing
15 any kind of support in that regard.

16 So do you think you have enough information to be able
17 to address these questions, Mr. Johnson?

18 MR. JOHNSON: Yes, your Honor, but, as a lawyer, to a
19 certain extent.

20 To address the SHU issue first, sort of walking it
21 back to the beginning when he first arrived, it is true that,
22 ordinarily speaking, when inmates first come into the
23 institution, if we don't have enough information as to the type
24 of inmate they are, whether or not we might have security
25 concerns with their placement, we will ordinarily default to

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1 Special Housing. It used to be a long time ago that everyone
2 came in through Special Housing; however, now it's more so for
3 special cases, if you will.

4 We didn't have a lot of information on him when he
5 first arrived. It was actually a weekend, if I recall
6 correctly, as I've got a lot of calls at home trying to make
7 sure that we could do everything we could to get the Federal
8 Defenders in to meet with Mr. Bahnasawy because, again, the
9 institution didn't have a lot of intelligence yet regarding the
10 nature of his charges and other pertinent information that
11 would help steer our decision as far as where to house him.

12 Later in that week he had actually been released
13 briefly to general population. I believe that was inadvertent
14 by the --

15 THE COURT: Inadvertent?

16 MR. JOHNSON: Inadvertent, yes, by the SHU lieutenant
17 as they were doing kick-outs, because we still hadn't had by
18 that point much information at all. I think it was around that
19 time that we were getting just the bare-bones information as to
20 what his criminal charges were, but no details about those
21 criminal charges.

22 THE COURT: How long did the general population -- how
23 long did that last?

24 MR. JOHNSON: It was for just about shy of a day. It
25 began on the -- I might be getting my dates wrong. It might

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1 have been the 24th to the 25th of May, but I'd have to
2 double-check.

3 THE COURT: It is my understanding that there was some
4 sort of incident with respect to Mr. Bahnasawy. Was that
5 related to general population or was that separate from him?

6 MR. JOHNSON: That was in a sense. We had placed him
7 back into Special Housing pending classification. But around
8 the same time we also then found out that his inmate personal
9 access code, both to his phone, as well as his commissary
10 account, had been compromised. So in order to learn more about
11 that, we had to also place him under a threat assessment.
12 Because it was our understanding that it was quite possible
13 that the compromising was that someone stole his commissary
14 money; that any effort to investigate that individual could
15 potentially lead back to the information having come from
16 Mr. Bahnasawy, in which case we would need to make -- take
17 steps in order to protect him from the individual who stole the
18 money from him. Because quite often in prison there's a
19 hierarchy; and, unfortunately, if someone has told on another
20 person, the person tends to want to get revenge. So the
21 ultimate decision --

22 THE COURT: Let me understand.

23 So is this a common occurrence, what happened to him?

24 MR. JOHNSON: It has happened. I don't know how
25 common it necessarily was to tell if it's a frequent event or

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1 more so. We are just learning now that there are inmates that
2 preyed on other inmates; and it sounds like this inmate preyed
3 on him when he was in general population. Again, this is
4 supposition; investigation is still going on. But all signs
5 are pointing towards this person essentially having robbed him
6 electronically.

7 THE COURT: This was electronic, this happened?

8 MR. JOHNSON: Yes.

9 THE COURT: This was not someone taking physical money
10 and putting it in their pocket?

11 MR. JOHNSON: That's correct.

12 Since inmates can't have cash inside of the jail, they
13 basically have their own debit accounts. And those accounts --
14 if they want to purchase items from the commissary, they sign
15 the commissary sheets when they come around weekly, the
16 commissary sheets go -- they're filled, and the amount is
17 deducted from the account, from their account balances.

18 THE COURT: Did someone hack that account, is that
19 what you're saying?

20 MR. JOHNSON: It appears to me that someone used his
21 name and the personal access code. So it wasn't really hacking
22 per se; they actually just took his -- more of almost identity
23 theft. They took his personal information and entered it on
24 the inmate truancy computer and then tried to put both money
25 onto this other inmate's phone account, as well as started

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1 transferring the money from the account to an outside source.

2 THE COURT: I see.

3 MR. JOHNSON: Again, we're still investigating.

4 THE COURT: An outside source.

5 MR. JOHNSON: An outside source, that's correct.

6 THE COURT: Out of the prison?

7 MR. JOHNSON: That's correct, your Honor. And since
8 it's an open investigation, I can't go into further detail
9 about it. But if your Honor would like, I could do so *in*
10 *camera*.

11 THE COURT: I get it. No, no, that's fine.

12 So anyway, back to --

13 MR. JOHNSON: So at that point he was in there both
14 still pending classification, as well as containment for this
15 threat assessment that is ongoing; but I have asked them to do
16 what they can to try and expedite so that issue is no longer an
17 issue in case the administrators are able to make a more
18 informed decision, which I'm sort of jumping ahead, but in
19 answer to --

20 THE COURT: Wait.

21 Do I understand that -- so his account, that issue is
22 still being investigated or has not been finalized or --

23 MR. JOHNSON: Correct. That issue is still being
24 investigated because there are a lot more factors regarding to
25 the prison --

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1 THE COURT: You don't have to go into anything -- I'm
2 just curious. That's still an open matter.

3 MR. JOHNSON: Correct, that is an open matter.

4 THE COURT: Is that impacting the ultimate designation
5 or designation?

6 MR. JOHNSON: It is in the sense that we need to
7 identify if there will be any individuals other than the person
8 who stole the money from whom we may need to seek to
9 potentially separate Mr. Bahnasawy for his own protection.

10 THE COURT: Okay. So that means that the -- well, I
11 don't want to put words in your mouth. So the determination of
12 the Bureau of Prisons is that it's appropriate at this point
13 for him to be in SHU; is that right?

14 MR. JOHNSON: That's correct, your Honor.

15 THE COURT: Until such time as you -- who decides --

16 MR. JOHNSON: Ultimately, the decision is that of the
17 wardens; however, he does it in conjunction with his department
18 heads and other administrators who are experts in the various
19 areas that will help him in making an informed decision.

20 THE COURT: Are you involved in that?

21 MR. JOHNSON: Yes, I am, your Honor, for certain
22 cases, yes.

23 THE COURT: I get it. Okay.

24 MR. JOHNSON: I don't know if you want me to address
25 the issue of Ms. Shroff's first question of whether or not the

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1 sealed information could be slightly unsealed for purposes of
2 the warden and the executive staff reviewing it to make a more
3 informed decision as far as the pending classification aspect
4 of his SHU confinement. The answer is it obviously has not
5 been unsealed and I've kept to the confidentiality agreement
6 and have not provided any further details to the warden or
7 other administrators, associate wardens.

8 THE COURT: Well, I have an order, a proposed order,
9 and I wanted to have this conference today. So one thought
10 I -- not thought, but one concern I had was it's a pretty big,
11 wide list. Obviously if you want me to sign it, if the
12 government and the defense want me to sign it, I'm inclined to
13 do it. I want to have assurance that when I sign this, that
14 this is secure.

15 So I always have this theory that when one person
16 knows, that means two people know; and when four people know,
17 that often means eight people know. I must say, I have had a
18 little hesitation. I would like a little assurance that who
19 would get this information and how I know that it doesn't get
20 compromised, to use a word that's been used here today. That
21 may not be your call, but that's what I'm concerned about.

22 MR. JOHNSON: Sure.

23 The more information we have limiting it to those
24 individuals who I mentioned --

25 THE COURT: How many people are you proposing that

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1 this otherwise sealed information be distributed to?

2 MR. JOHNSON: I believe I proposed the warden, the two
3 associate wardens, our captain, and Dr. Miller.

4 THE COURT: That's Dr. Miller as in mental health?

5 MR. JOHNSON: Yes, your Honor.

6 THE COURT: We're going to come to that in a minute.

7 MS. TEKEEI: Your Honor, we think it would make
8 perfect sense for Mr. Johnson to also provide those individuals
9 with a copy of the Court's sealing order and explain to those
10 individuals, as I'm sure he will in very certain terms, how
11 strict that order is and to obey that order. We have
12 confidence that the officials that he has named can be so
13 instructed and, with Mr. Johnson's good advice, be able to
14 stick to that.

15 THE COURT: I was going to ask and I am going to ask,
16 so why wouldn't it be adequate for Mr. Johnson, as counsel, to
17 confer with these people? Does everybody need to have -- I
18 don't know what it is in detail you want everybody to have, why
19 everybody needs to have it.

20 MS. SHROFF: Your Honor, as a compromise, maybe they
21 could just get the indictment as opposed to the complaint and
22 the indictment, because the indictment is the final charging
23 instrument. So perhaps if the Court's concern is assuage --

24 THE COURT: You know what I'm trying to say?

25 MS. SHROFF: Sure.

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1 THE COURT: You know how it is.

2 MS. SHROFF: We do, your Honor. And again,

3 Mr. Bahnasawy's intent is in no way --

4 THE COURT: No, I know. I understand that.

5 MS. SHROFF: Right.

6 So if the indictment -- and I think that is the final
7 charging instrument -- would suffice, then we could limit it
8 further by limiting it to the indictment.

9 MR. JOHNSON: The only other thing I would ask is if
10 the Court would grant me permission to not exactly disclose why
11 the matter is sealed, but I think something else that the
12 warden will want to consider are some of these timelines that
13 are in play as far as -- I don't know how freely I can discuss
14 what I've read here, but just --

15 THE COURT: What would the government like to have
16 disclosed --

17 MS. TEKEEI: Your Honor --

18 THE COURT: -- in addition to the indictment?

19 MS. TEKEEI: Thank you, your Honor.

20 We asked the Court for a limited unsealing of both
21 charging instruments, the indictment and the complaint, which
22 sets forth additional facts related to how the investigation --
23 and specifically CC1 -- as well as certain of the letters that
24 were filed to the Court both by defense counsel regarding the
25 defendant's conditions of confinement, and by the government

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1 regarding the necessity for sealing, as well as addressing
2 defense counsel's assertions regarding the defendant's
3 conditions of confinement. The reason why we ask that those be
4 unsealed for the limited purpose of providing them to
5 Mr. Johnson out of an abundance of caution --

6 THE COURT: To Mr. Johnson.

7 MS. TEKEEI: That's correct.

8 -- out of an abundance of caution is so that he would
9 be informed and could inform those he needed to as they
10 continue to make their assessment about the defendant's
11 conditions of confinement and interim or final designation.

12 So we think that the facts that are set forth, both
13 defense counsel's assertions that are set forth, as well as the
14 affirmative facts that are set forth in the indictment and the
15 complaint, are necessary and appropriate for those officials to
16 consider when they are considering the security risks posed by
17 Mr. El Bahnasawy while he is confined at the MCC.

18 THE COURT: This is what I would like to have done:
19 I'd like this letter rewritten to say who it's going to and
20 what exactly it is. If you have two letters in mind or four or
21 whatever --

22 MS. SHROFF: Your Honor, I'm not really clear what the
23 government -- and I want to preface this --

24 THE COURT: Wait a minute. Before we get to that, do
25 you know what I mean? So I would prefer a letter, wherever we

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1 wind up, that says exactly who the people are and what the
2 people are supposed to get so there's no miscue or missed
3 letter or, Oh, I didn't know, or blah, blah, blah. Do you know
4 what I mean?

5 MS. TEKEEI: We can certainly do that, your Honor.

6 Just so that Mr. Johnson, who's being very careful, is
7 aware, there is nothing that is in the documents that I just
8 described that we cannot talk about in open court. We provided
9 him with the redacted versions of those letters regarding
10 sealing that all the parties are aware of the facts, including
11 the Court and defense counsel.

12 THE COURT: Right.

13 MS. SHROFF: By "open court" she means closed court.
14 She just said -- she meant in court now, but in a sealed
15 courtroom, right?

16 MS. TEKEEI: That's correct. I meant in court now.
17 Thank you, Ms. Shroff.

18 MS. SHROFF: So here's the thing: I am perfectly
19 happy with Mr. Johnson getting all my letters, okay. That's
20 because Mr. Johnson knows all my concerns. He is the person
21 who helps us. There is no secret between us and the government
22 that we don't want Mr. Johnson to know about.

23 I want to be clear though, my letters deal with the
24 problems he encountered in SHU. That is not what I am talking
25 about here, and under no circumstances should that conversation

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1 be reframed to whether or not my client is getting adequate
2 treatment in SHU.

3 THE COURT: Under no circumstances should that be --

4 MS. SHROFF: The issue that Mr. Johnson discusses with
5 the AW or the warden, my concern is that the BOP get all the
6 information they need to make a determination as to whether or
7 not and when Mr. Bahnasawy gets out of SHU.

8 THE COURT: Got it.

9 MS. SHROFF: Not whether or not he's getting his Halal
10 meal through the slot or whether or not he's getting water or
11 whether or not he's getting the six other things which are
12 referenced in my letters.

13 THE COURT: I got it.

14 MS. SHROFF: That's totally different.

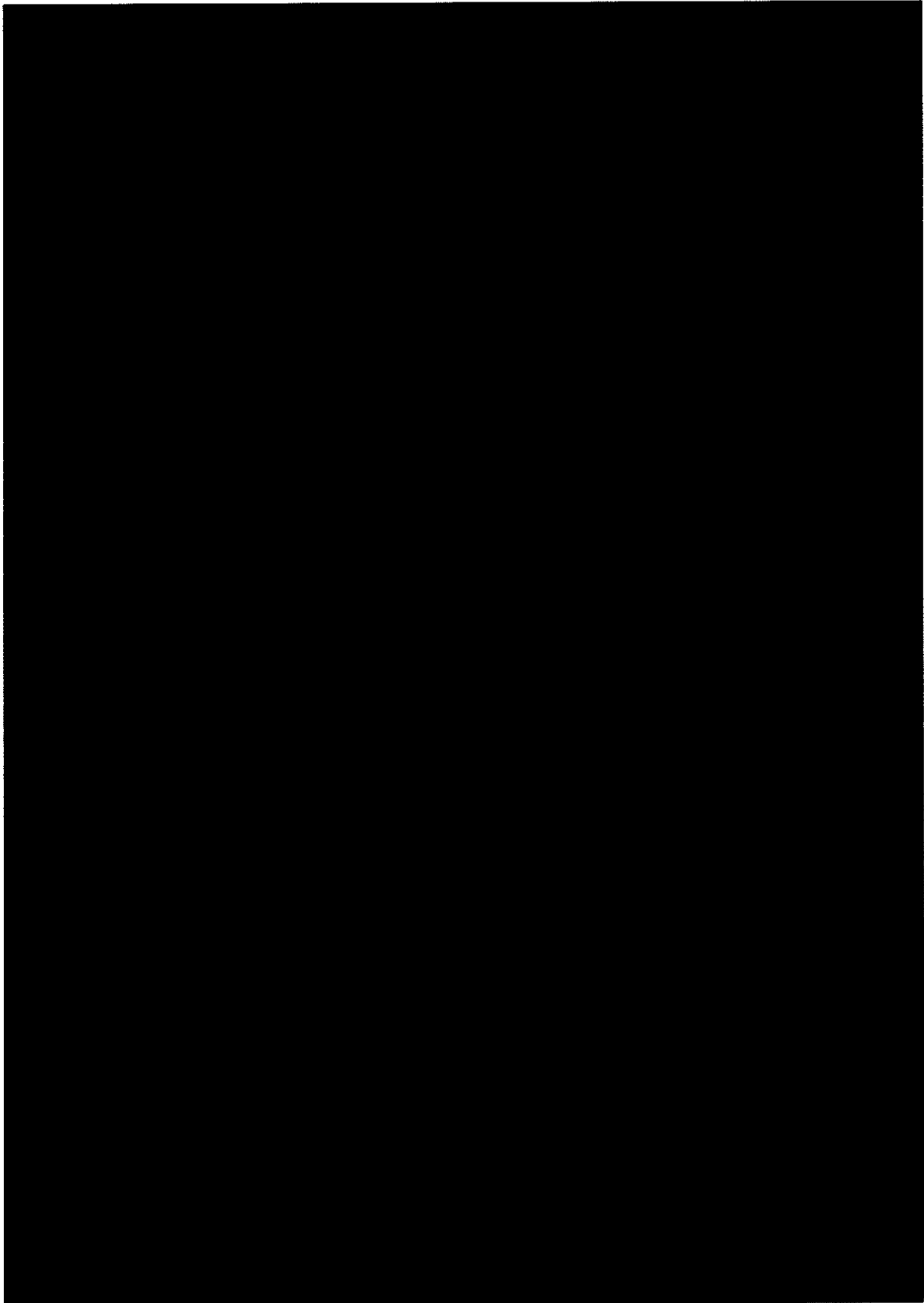
15 THE COURT: You understand that too?

16 MR. JOHNSON: Yes, your Honor.

17 THE COURT: Where is the Dr. Miller portion of this?
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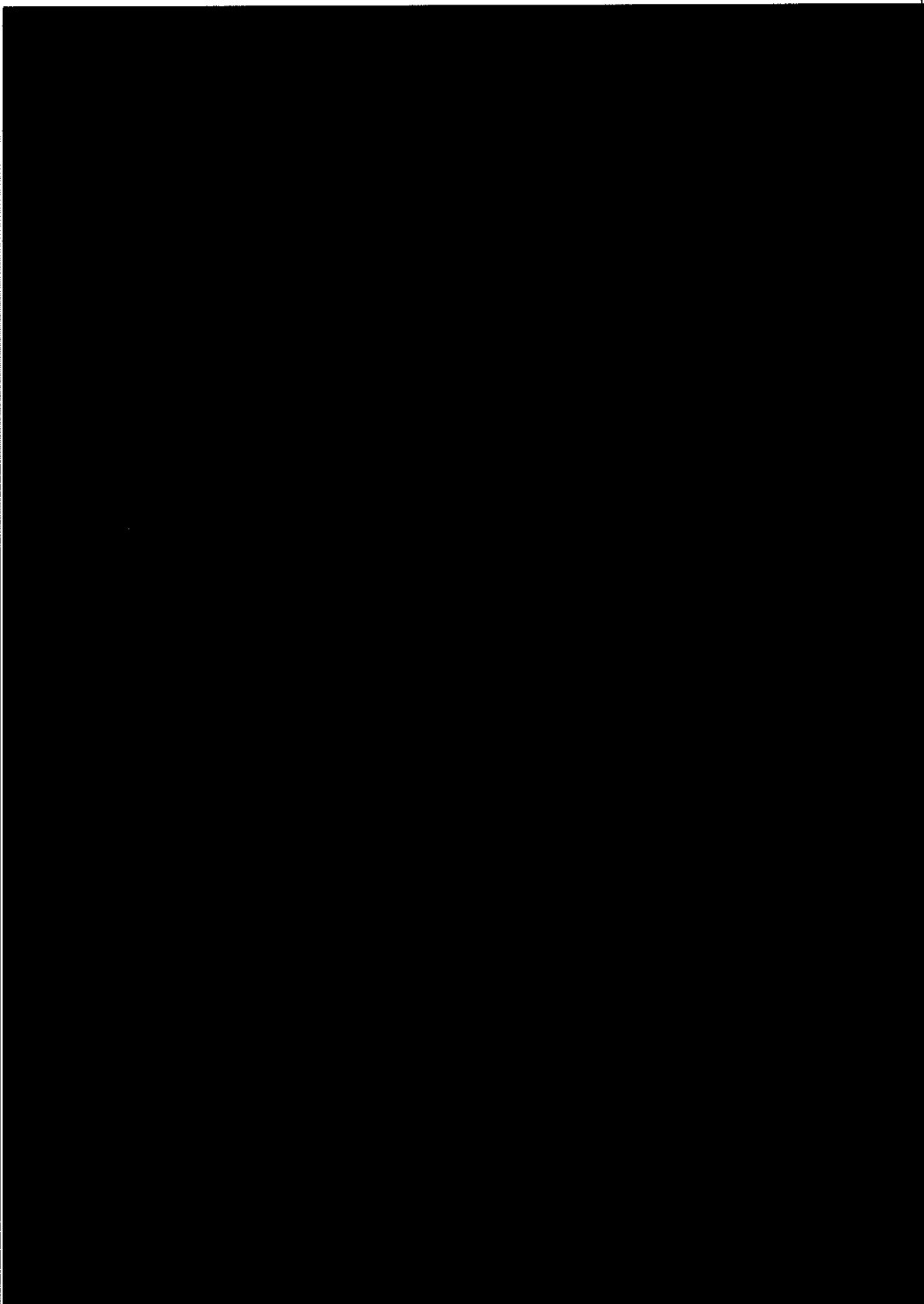
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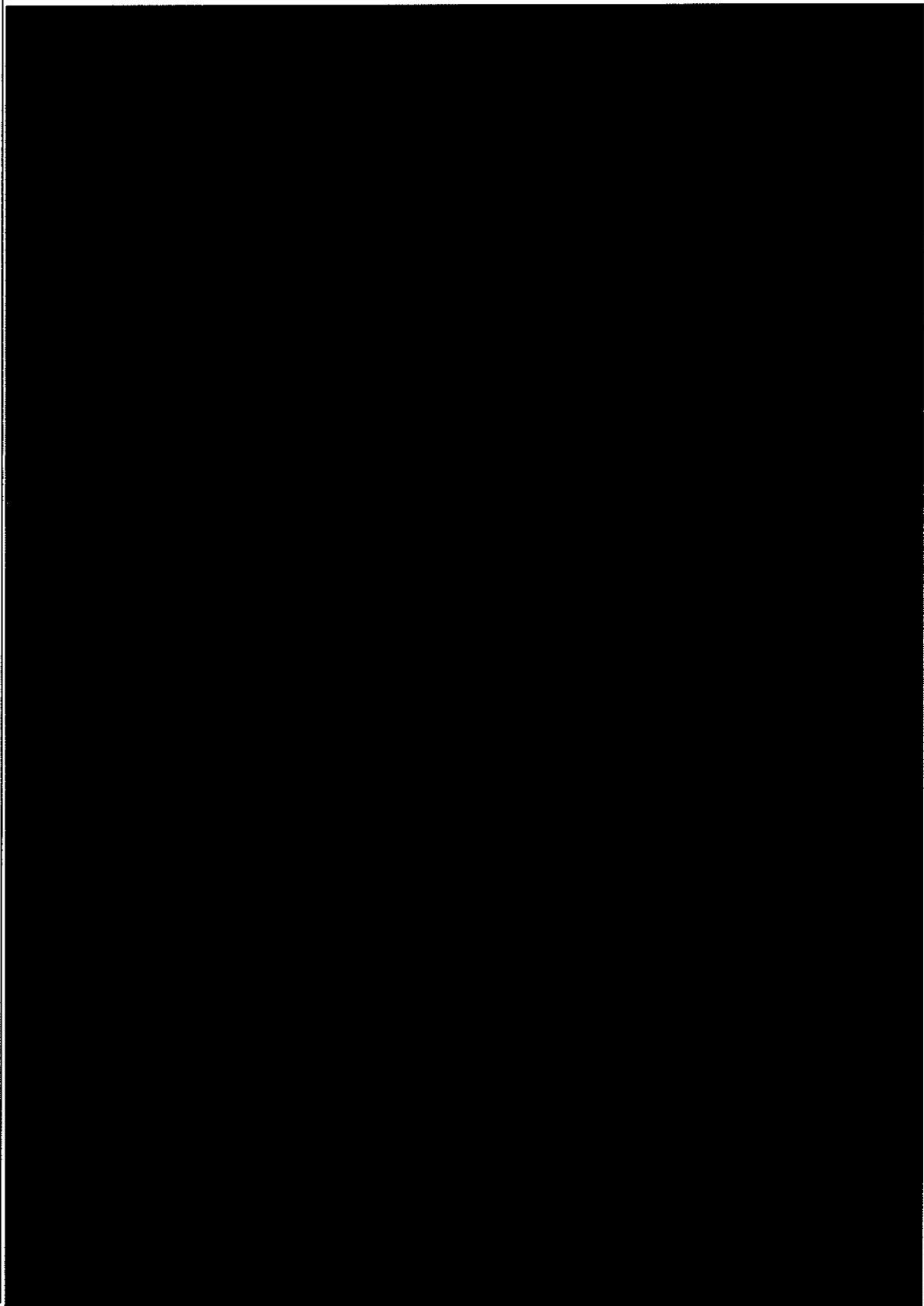
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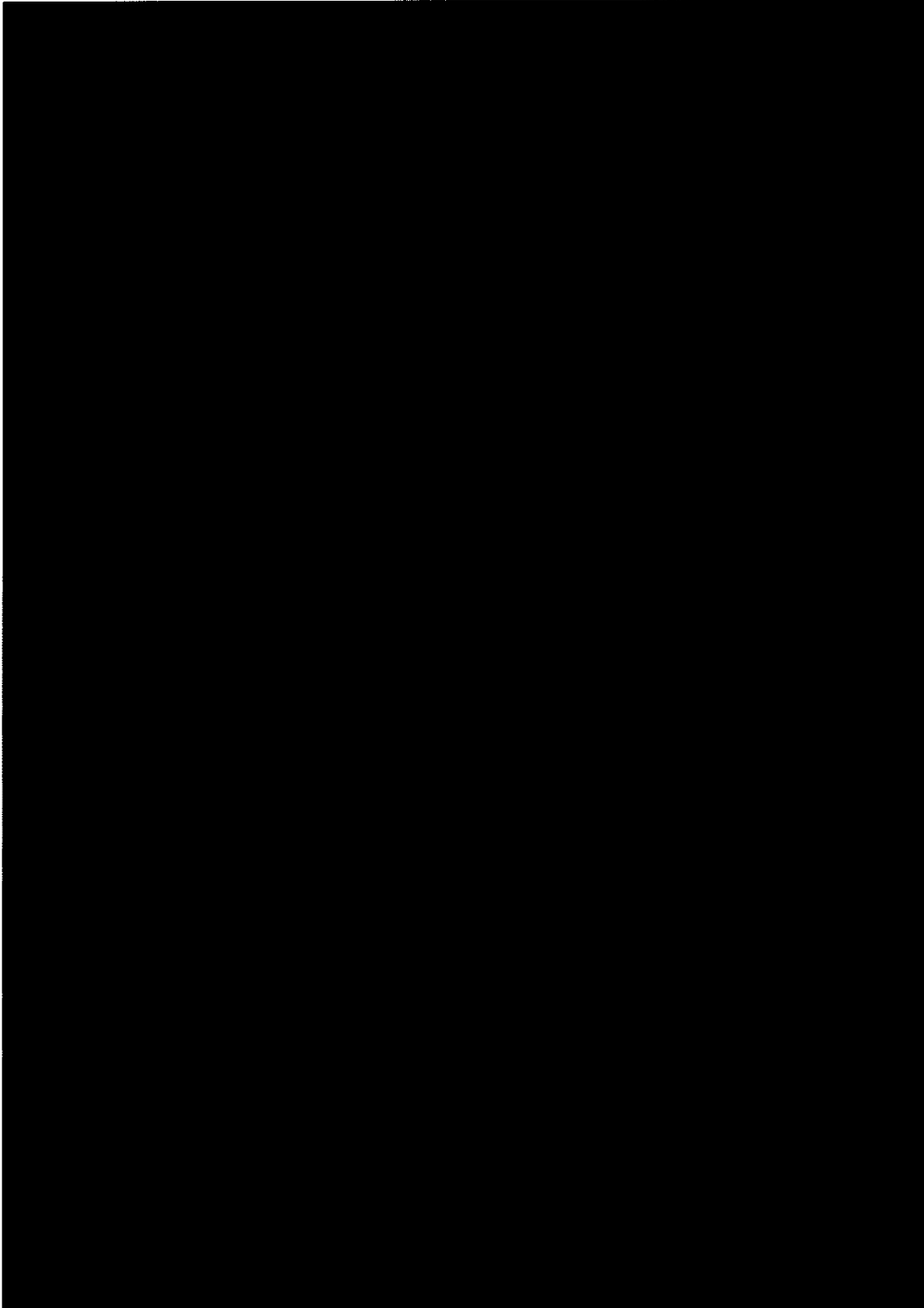
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1 THE COURT: Anything else?

2 MS. SHROFF: Well, your Honor, I know the Court is
3 going to be -- there's a chunk of period when the Court is not
4 available.

5 THE COURT: Actually, I'm planning to set a conference
6 next week. So I can just sort of -- I thought you might
7 suggest that yourself, unless you don't want me to.

8 MS. SHROFF: No, no.

9 THE COURT: I thought I would like to see the progress
10 of these issues.

11 And if you, Adam, could come back next week, that
12 would be great.

13 MR. JOHNSON: Your Honor, I do have to let the Court
14 know I am out of the office from Thursday next week and
15 returning the following Thursday; however, my co-counsel, who's
16 also up to date on a lot of these issues,
17 Ms. Scannell-Vessella, could be available if the Court was
18 planning on having me here on either Thursday or Friday of next
19 week.

20 THE COURT: I think I'll have it on a day that you're
21 here.

22 MS. SHROFF: I concur with that, your Honor.

23 THE COURT: So, number one, if the government could
24 get me a revised letter this afternoon, you could fax it over
25 to me, I'm happy to sign it. I just want to know who I'm

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1 dealing with and what the document says we've discussed. And
2 if you want to go over that with Ms. Shroff so that you can
3 submit it to me on consent, as it were, that would be great.

4 MS. TEKEEI: Thank you, your Honor.

5 Just to be totally clear, the initial request was at
6 defense counsel's request. We obviously consented to it. We
7 will speak with Mr. Johnson and clarify the very narrow group
8 of individuals with whom he thinks he needs to share this
9 information in order to make the appropriate decisions, and
10 then also speak with Ms. Shroff and propose the Court with the
11 parties' joint proposal as to this particular limited
12 unsealing.

13 THE COURT: Okay.

14 (Pause)

15 THE COURT: I'm going to put it over till Tuesday,
16 actually, the 28th, at 10:30. My notes would say that
17 continued discussion of the status of designation and also the
18 status of mental health, okay?

19 I think in our existing schedule, by that time I'll
20 have an update on Monday, I think, from the government. So
21 we'll be further along information-wise; it will be helpful to
22 inform our Tuesday conference. Okay?

23 MS. TEKEEI: Yes, your Honor.

24 THE COURT: Okay. So we have two open issues for
25 today. One is Speedy Trial Act. I forget if we have -- I

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1 think we've only excluded up until today; is that right?

2 MS. TEKEEI: That's correct, your Honor.

3 The government moves for speedy trial time to be
4 excluded through June 28th, the next conference date. So the
5 Court is aware, we've provided discovery and will continue to
6 provide discovery to defense counsel and the defendant. And so
7 this time would be used in order for us to continue to provide
8 that discovery and for defense counsel and the defendant to
9 review it.

10 MS. SHROFF: Your Honor, we previously asked the
11 government for a plea offer in this case. So for plea
12 purposes, we are more than happy to exclude time.

13 THE COURT: Okay. So I'm going to find under 18,
14 United States Code, Section 3161 that the request for
15 adjournment, joined in by both sides, perhaps for different
16 reasons, but, nevertheless, to June 28 at 10:30 is appropriate
17 and warrants exclusion of the adjourned time from speedy trial
18 calculations.

19 I further find that the exclusion is designed to
20 prevent any possible miscarriage of justice, to facilitate
21 these proceedings, and to guarantee effective representation of
22 and preparation by counsel for both sides. Thus, the need for
23 exclusion and the ends of justice outweigh the interests of the
24 public and the defendant in a speedy trial pursuant to 18
25 U.S.C., Section 3161(h)(7)(A) and (B).

