

Honorable John Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIC SHIBLEY,

Defendant.

No. CR20-174 JCC

DEFENSE STATUS
MEMORANDUM

Defendant Eric Shibley, by and through undersigned counsel, presents this memorandum in advance of the court's scheduled status hearing on February 10.

Procedural history

Dr. Shibley is currently charged by indictment with wire and bank fraud and money laundering arising from various loan applications he made in the spring of 2020 in connection with the federal Paycheck Protection Program and the Economic Injury Disaster Loan program.

Originally charged by complaint, he was arrested on June 30, 2020, and released on bond at his initial appearance the same day. dkt. #5. He was re-arrested on September 16, 2020, following two domestic incidents that resulted in a formal bond revocation on September 28. dkt. #28. Soon thereafter, on October 15, Dr. Shibley was indicted on the current charges and arraigned on October 22. dkt. #31, #37.

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In a November 12 minute order the court vacated the pretrial motions deadline and directed the parties to appear at a status conference. dkt. #43. In the meantime the defense moved to reopen the detention issue and for Dr. Shibley's release on bond. dkt. #46. Following a hearing on that issue on November 20, the motion was denied. dkt. #56, #58. The defense appealed the ruling. dkt. #59.

The parties filed responses to the court's minute order requesting input on "what measures, if any, the Court should take to address Mr. Shibley's health". dkt. #49, #52, #57. At a status hearing on November 25, 2020, the Court ordered a mental health evaluation of Dr. Shibley to be conducted by the FDC's medical staff and stayed consideration of his appeal of the detention order. The trial date was vacated. dkt. #61.

On February 1, 2021, the parties received from the court a copy of the evaluation of Dr. Shibley submitted by FDC psychologist, Cynthia Low, Ph.D. Both parties soon noticed that the evaluation contained pointed references to various communications over the BOP CorrLinks email system between Dr. Shibley and his attorneys, including the undersigned. The parties subsequently conferred¹ and agreed to submit to the court (and abide by) a revised version of Dr. Low's evaluation redacted of any references to attorney-client communication.

¹To their credit, government prosecutors promptly notified undersigned counsel of the email references and indicated that they had immediately stopped reading the report to avoid seeing potentially privileged material. It was referred to a special DOJ "filter attorney", otherwise unconnected to the case, who worked with undersigned counsel to properly redact the evaluation of this material. The redacted evaluation has been, or soon will be, provided to the court for proper consideration.

The competency issue

The defense requests that the redacted version of the evaluation be substituted in place of the original evaluation and filed under seal. At this time, without the need of a formal competency hearing and without waiving other potential trial defenses arising under Criminal Rule 12.2, the defense stipulates to Dr. Shibley's present-day competence to stand trial.

Appeal of detention ruling

On the issue of detention the defense has no new information or argument to add to the record already established before the U.S. Magistrate Judge in pleadings and hearings conducted on September 28, 2020 (dkt. #22, 28) and November 20, 2020 (dkt. #46, #53, #56).

Trial setting

Even without Covid pandemic considerations, this case is extended and complex and would normally justify an extended continuance. It involves novel issues of fact and law. The discovery, in the form of bank and financial records, is voluminous and still forthcoming. A protective order prohibits the sharing of much of this information with Dr. Shibley and face-to-visits, at which this type of evidence could practically be shown and discussed, have not been possible. Other circumstances, some perhaps obvious from Dr. Low's evaluation, make normal attorney/client communication difficult or

impractical. Dr. Shibley has also contracted and survived Covid 19 while in custody but still harbors residual effects.

Rather than simply schedule a trial date in an uncertain time the defense requests that the court set a new status hearing shortly after the court shutdown directive of General Order 18-20 expires on March 31, 2021. At that hearing the parties and the court will be better informed on the public health concerns posed by the pandemic and on relevant issues that might factor into an appropriate trial setting.

Respectfully submitted this 9th day of February, 2021.

/s/ Michael Nance, WSBA #13933
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Certificate of Service

I hereby certify that on the 9th day of February, 2021, I electronically filed the foregoing with the clerk of the court using the CM/ECF system. Notice of this filing will be sent electronically to counsel of record for other parties.

/s/ Michael Nance, WSBA # 13933

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