

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. 06-CR-50064
	)	
VS.	)	March 9, 2007
	)	
HOLLIS WAYNE FINCHER,	)	2:40 P.M.
	)	
Defendant.	)	

REQUEST FOR APPOINTMENT OF NEW ATTORNEY  
BEFORE THE HONORABLE JIMM LARRY HENDREN  
UNITED STATES DISTRICT JUDGE  
FAYETTEVILLE, ARKANSAS

APPEARANCES BY TELEPHONE

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FOR THE PLAINTIFF

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FOR THE DEFENDANT

Prepared by:

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1 MR. STILLEY: Yes, Your Honor.

2 THE COURT: Mr. Stilley, did you get a copy of the  
3 Court's Order?

4 MR. STILLEY: Yes, Your Honor, I did.

5 THE COURT: All right, thank you.

6 Mr. Fincher is here in court. Mr. Fincher, inasmuch  
7 as I'll be asking you certain questions, sir, I will again ask  
8 you to stand and raise your right hand and be sworn so that your  
9 responses will be under oath.

10 (THE DEFENDANT WAS DULY SWORN.)

11 THE COURT: All right, thank you. Mr. Fincher, Mr.  
12 Stilley, and Ms. Johnson, would the three of you come up front  
13 so that I can maybe talk directly to you and not be shouting  
14 across the courtroom? I'd appreciate it if you all would just  
15 stand up in front, right up here in front of the bar, please.

16 All right, first, Mr. Fincher, let me inquire, sir, I  
17 know that early on in these proceedings, you had indicated you  
18 were -- are you hearing me okay, sir?

19 THE DEFENDANT: Yes.

20 THE COURT: That you were having some trouble, and we  
21 had you seen in an emergency room.

22 THE DEFENDANT: Yes.

23 THE COURT: How are you getting along down there? Are  
24 you okay now?

25 THE DEFENDANT: Well, I'm flying pretty level. I'm

1 holding. I'm holding.

2 THE COURT: Okay. Not in any serious distress --

3 THE DEFENDANT: No.

4 THE COURT: -- at the moment?

5 THE DEFENDANT: I'm doing all right for the moment.

6 THE COURT: Do you feel like you're okay today?

7 THE DEFENDANT: Yeah.

8 THE COURT: You know where you are and what you're  
9 doing?

10 THE DEFENDANT: Sure.

11 THE COURT: Okay. Now, Mr. Fincher, did you follow  
12 what I said when I first came out, why we're having this hearing  
13 today?

14 THE DEFENDANT: About the attorney?

15 THE COURT: Well, did you understand that I -- I got  
16 a letter from you --

17 THE DEFENDANT: Yes.

18 THE COURT: -- and that's why I immediately asked for  
19 this hearing, to have you come up so we could talk about it and  
20 have the attorneys present.

21 THE DEFENDANT: Sure.

22 THE COURT: Did you follow that?

23 THE DEFENDANT: Yes.

24 THE COURT: All right. Let me ask you, sir. I have  
25 here what I presume is a letter from you. I want to address

1 that first of all. Let me hand it down to you. I'll hand it to  
2 Ms. Garner. Would you take a look at it, Mr. Fincher, and tell  
3 me, is that, in fact, a letter -- can you see it okay?

4 THE DEFENDANT: Yeah.

5 THE COURT: Is that your letter, sir?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And you did send it to me?

8 THE DEFENDANT: Yes.

9 THE COURT: All right. Ms. Johnson, you have indi-  
10 cated that you got a copy of my letter, and I believe there was  
11 a copy of Mr. Fincher's letter attached. Is that right?

12 MS. JOHNSON: That's correct, Your Honor.

13 THE COURT: Mr. Stilley as well? Is that right?

14 MR. STILLEY: Yes, Your Honor.

15 THE COURT: All right. Let the record show that Mr.  
16 Fincher's letter to the Court then will be Court's Exhibit  
17 Number 1, and let's let it be entered as a matter of the record.

18 All right, Mr. Fincher, I wanted to ask you some ques-  
19 tions about that. When a party is represented by an attorney,  
20 normally, the communications are from the attorney, so it's a  
21 little unusual to get a direct communication from a defendant,  
22 but certainly, it's not unheard of, and so I am obliged, when I  
23 get a communication that's called an ex parte communication,  
24 that apparently one side or both don't know about, I'm obliged  
25 to immediately notify them, because they are the parties before

1 the Court. So that's why I notified the United States that you  
2 had communicated, and I notified Mr. Stilley.

3 And so I want to address this, sir. You asked me, you  
4 say, "I have released Mr. Oscar Stilley from my service as my  
5 attorney because of irreconcilable differences." Is that  
6 correct, sir?

7 THE DEFENDANT: Uh-huh.

8 THE COURT: So he no longer -- you no longer wish him  
9 to represent you?

10 THE DEFENDANT: Right.

11 THE COURT: Now, Mr. Stilley, do you understand that,  
12 sir?

13 MR. STILLEY: Yes, Your Honor.

14 THE COURT: And are you comfortable with that?

15 MR. STILLEY: Yes, Your Honor.

16 THE COURT: Now, Mr. Fincher, you say, "I do not know  
17 how to carry on from here," and I want to address that next.  
18 If you've released Mr. Stilley, is there anything left between  
19 you? I don't know if he was retained or whether there's any-  
20 thing going on that way or not. Are you satisfied that he can  
21 be separated and simply go his way, and you go on from here by  
22 yourself or with somebody else?

23 THE DEFENDANT: I would ask for Mr. Dunagin back. I'm  
24 indigent. I have no way to --

25 THE COURT: Well, let me address that in a minute

1 here. But I want to make sure that when I release Mr. Stilley  
2 -- and based on what you're asking me to do here, I want to hear  
3 comments from the United States, and Mr. Stilley as well, but if  
4 I do that, I need to insure that Mr. Stilley will hand over and  
5 deliver over to you whatever he might have that might be useful  
6 in your defense so that your new attorney would have that.

7 So have you done that, Mr. Stilley?

8 MR. STILLEY: I have not yet turned over the docu-  
9 ments. I realized, probably a couple of weeks ago, that he  
10 wanted to release me, and I had sent a document down to the jail  
11 to get him to sign for that, so --

12 THE COURT: Well, are you prepared to give him over  
13 whatever you have that belongs to him today?

14 MR. STILLEY: Certainly. I've already given over most  
15 of it, but the remaining part I can get to him very promptly.

16 THE COURT: All right. You can do that today?

17 MR. STILLEY: Yes, Your Honor, I think I can.

18 THE COURT: There's a matter of some urgency here, and  
19 I'll address that in a moment, but I'd like to see, if you  
20 possibly could get it done, to get the materials in Mr.  
21 Fincher's hands today. Could you do that?

22 MR. STILLEY: Your Honor, I think I could. There's a  
23 few things that I'd like to copy before I turn that over, but  
24 other than that, if I could take it down to the jail this  
25 evening, I could get it to him today, if that works.

1 THE COURT: Well, I don't know. What do you mean,  
2 take it down to the jail?

3 MR. STILLEY: To -- he's at the Sebastian County Jail  
4 right now. What I was saying is, I've got the file with me  
5 today, but I wanted to look and make sure that I would have  
6 copies of all this material.

7 THE COURT: How big a file is it?

8 MR. STILLEY: It's not very.

9 THE COURT: Well, would you have any problem -- Ms.  
10 Johnson, would you have any problem -- I've got a copy machine  
11 back there, and I've got no problem, to try to expedite this, to  
12 allow Mr. Stilley to go back there on our machine, copy whatever  
13 he wants, and take it with him. Do you have any problem with  
14 that?

15 MS. JOHNSON: No objection, Your Honor.

16 THE COURT: Mr. Fincher, what about that?

17 THE DEFENDANT: Fine with me.

18 THE COURT: Mr. Stilley?

19 MR. STILLEY: I'll review my file and tell you what,  
20 if anything, needs to --

21 THE COURT: Well, I mean, I don't care. I don't even  
22 want to know whatever it is you copy. That's none of my  
23 business. But I'm saying rather than having you have to go to  
24 the jail, or wherever, and seek out a copy machine, we have one,  
25 and -- unless you're talking about a Sears and Roebuck catalog.

1 How big is it?

2 MR. STILLEY: It's not big.

3 THE COURT: Are we talking twenty or thirty pages or  
4 something like that?

5 MR. STILLEY: It might be a little more than that that  
6 we'd need to copy.

7 THE COURT: Erin, would you go back and check with  
8 Anne and see -- I think we can do that. No, you don't need to  
9 do that. I'm going to say that as soon as this hearing is over,  
10 Mr. Stilley -- and none of my staff will participate. It's none  
11 of our business. We'll let you go in and use our copy machine  
12 to copy whatever you want out of the file, and then you'll give  
13 it over to Mr. Fincher. Is that right?

14 MR. STILLEY: Certainly.

15 THE COURT: Will you do that?

16 MR. STILLEY: (Nods his head up and down.)

17 THE COURT: All right, now anything else? Is there  
18 any other compensation or money problems between you two or is  
19 this -- can this be at an end right here if I release Mr.  
20 Stilley today and he gives you his file? Mr. Fincher, are you  
21 comfortable with that?

22 THE DEFENDANT: I really don't know how to answer  
23 that.

24 THE COURT: Well, I mean, more pointedly, do you  
25 believe that Mr. Stilley owes you any refund of any money that

1 you've paid him or anything?

2 THE DEFENDANT: I haven't paid him any money yet.

3 THE COURT: So you haven't paid him?

4 THE DEFENDANT: (Shakes his head from side to side.)

5 THE COURT: All right. Mr. Stilley, I feel like an  
6 auctioneer here. If I release you, are you going to be looking  
7 to Mr. Fincher for payment, and if so, how much?

8 MR. STILLEY: Yes, Your Honor, there is -- pursuant to  
9 our contract. We have a contract and a certain amount is owed.

10 THE COURT: Well, I don't know that I need to go in  
11 and address that. But are you comfortable, Mr. Fincher, that if  
12 I release Mr. Stilley, that'll be between you and him as to  
13 whether he pays you back, or whether you pay him, or whatever?

14 THE DEFENDANT: Well, you asked me before if I had  
15 paid him any money. I -- we had a contract for Ten Dollars per  
16 year. I have paid him two years worth.

17 THE COURT: Ten dollars per year?

18 THE DEFENDANT: Yes. There was another billing  
19 instrument involved. But I just wanted to clear that up. Yes,  
20 I've paid him --

21 THE COURT: Okay. Well, what I'm trying to sort out,  
22 Mr. Fincher, if you want -- you've released him, you tell me.  
23 He is no longer -- you don't want him as your attorney anymore,  
24 right?

25 THE DEFENDANT: Correct.

1           THE COURT: I just want to make sure there's no  
2 dangling ends here. Are you comfortable that if I release him  
3 today and he gives you over the file that I've just talked  
4 about, are you comfortable with that? And then whatever else  
5 might lie between the two of you about if you owe him or he owes  
6 you, that's between the two of you?

7           THE DEFENDANT: Yes.

8           THE COURT: Is that okay?

9           THE DEFENDANT: (Nods his head up and down.)

10          THE COURT: Because I don't want you to come back in  
11 and say, "Now, Judge, wait a minute. You should have  
12 straightened that out before you let him go." So I'm trying to  
13 figure that out. Are you comfortable with that?

14          THE DEFENDANT: To the best I understand it, sir. I  
15 think so.

16          THE COURT: Well, what do you not understand?

17          THE DEFENDANT: I said the best I understand it. I --  
18 this is new to me, you know. I indicated to him that I was  
19 releasing him, and I wrote you the letter.

20          THE COURT: All right. Well, I think what I'm going  
21 to do, Mr. Stilley, is he -- a criminal defendant, I think, has  
22 a right to release his retained attorney anytime he wants to.  
23 It's a little different if it's just an appointed attorney, but  
24 I think if he wants to do that, and he says that he does, that  
25 he can, and what lies between you in terms of whether he owes

1 you or not, I think is between the two of you. Are you agree-  
2 able with that?

3 MR. STILLEY: Yes, Your Honor, I do.

4 THE COURT: All right. Ms. Johnson, let me inquire,  
5 do you have any comments or problems with the Court releasing  
6 Mr. Stilley as the attorney of record, and then we'll address  
7 the question of what to do about further representation for Mr.  
8 Fincher?

9 MS. JOHNSON: No, Your Honor.

10 THE COURT: All right. Let me inquire, Ms. Donna  
11 Brown is in court. Ms. Brown, you are the U. S. probation  
12 officer that is assigned to this case, and can you give me some  
13 clue as to where we stand? Now, Mr. Fincher had his trial, and  
14 he was convicted, and so we are now in the pre-sentence investi-  
15 gatory stage. Can you give me any idea where that is?

16 MS. BROWN: Yes, Your Honor. I need to visit with Mr.  
17 Fincher, and I plan to do that early next week, as soon as this  
18 matter is settled concerning his attorney, and I anticipate  
19 about ten days.

20 THE COURT: So you're along the way?

21 MS. BROWN: Yes. Yes, sir.

22 THE COURT: All right. Then I think, Ms. Johnson and  
23 Mr. Fincher and Mr. Stilley, that I will then recognize on the  
24 record that you have officially and formally released Mr.  
25 Stilley as your counsel, and he'll no longer be your attorney of

1 record. Whatever other matters that lie between you with  
2 respect to fees, I want to make clear to you, Mr. Fincher, I'm  
3 not -- I'm not expressing any opinion about that because I don't  
4 know what lies between you, and I'm saying that whatever that is  
5 is between the two of you. You understand that, sir?

6 THE DEFENDANT: (Nods his head up and down.)

7 THE COURT: And Mr. Stilley understands that.

8 THE DEFENDANT: Yes.

9 THE COURT: So I'm going to release him, and we'll  
10 enter an Order, a paper Order here, after this hearing to show  
11 that that's being done. And, Mr. Stilley, the Order will show  
12 that you will today, before you leave, deliver over to Mr.  
13 Fincher to put in his custody whatever you have in his file that  
14 would be useful to him.

15 Now, if you don't have everything, and you may not,  
16 I'd ask you, sir, to commit that you will deliver that over to  
17 him or his new counsel as soon as you discover that you have it.  
18 Will you do that, sir?

19 MR. STILLEY: Certainly, Judge. I'll be glad to.

20 THE COURT: All right, thank you, sir. Mr. Stilley,  
21 if you'd like, you may have a seat or go on and start your  
22 copying. I'll leave that up to you.

23 Let's address this other matter about counsel. Mr.  
24 Fincher, now you mentioned something about what you'd like to do  
25 from this point on, and I kind of cut you off because I wanted

1 to settle this other matter. Now, would you like to say that  
2 again, sir?

3 MR. FINCHER: Well, I had a Mr. David Dunagin  
4 appointed, a state-appointed attorney, United States appointed  
5 attorney.

6 THE COURT: Uh-huh.

7 MR. FINCHER: If you'd like to reappoint him, I think  
8 that would be okay.

9 THE COURT: Ms. Johnson, what say you?

10 MS. JOHNSON: I have no objection to that, Your Honor.  
11 I have spoken to Mr. Dunagin.

12 THE COURT: Mr. Fincher, I'm hesitating for a reason.  
13 This type of a situation does not arise frequently. Are you  
14 comfortable standing there? I don't want to -- are you okay?

15 THE DEFENDANT: Yes, I'm all right.

16 THE COURT: Here's what my concern is. Anticipating  
17 that this might occur, because I got your letter, and that's  
18 what you said you wanted to do --

19 THE DEFENDANT: Sure.

20 THE COURT: The question arose in my mind that if Mr.  
21 Fincher releases Mr. Stilley and he's out of the case, what do  
22 I do to appoint Mr. Fincher a new lawyer. Now, there are a  
23 couple of things that I can't do. Generally speaking, I can't  
24 permit a defendant who wants to have somebody appointed to say,  
25 "Judge, I want this one or I want that one." On the other hand,

1 I don't even want to know who might be the next attorney in  
2 line. And I don't know at this point. As a matter of fact, I'm  
3 not sure Ms. Garner knows. She may. But as I recall, in your  
4 case, the United States Public Defender disqualified. They have  
5 a conflict or something. I'm not sure. Gail, is that right?

6 MS. GARNER: Yes, sir.

7 THE COURT: The U. S. Public Defender has indicated  
8 that they cannot accept an appointment to represent you, and I  
9 don't know why, but that's what they've said. So that would  
10 mean that we would select a panel attorney. This is a prac-  
11 ticing lawyer who is certified as a capable defense counsel.  
12 Mr. Dunagin is such an attorney. I believe that's how he was  
13 initially appointed. Was it not, Ms. Garner?

14 MS. GARNER: Yes.

15 THE COURT: So he was appointed, I think, in that same  
16 fashion. So what I turn over in my mind is, is it appropriate  
17 for me to allow you to say, "Well, I want Dunagin back," or  
18 would it be appropriate for me to say I will just appoint the  
19 next panel attorney, whoever is on that list. I don't know who  
20 it might be, but I can assure you that if they're on the list,  
21 they've been certified as being capable as defense attorneys.

22 The reason I don't want to know, Mr. Fincher, is I  
23 don't want you to feel, or anybody else to feel, that I'm  
24 personally selecting somebody I want you to defend -- to defend  
25 you. It doesn't matter to me. I just want to be sure that you

1 have capable legal counsel. Beyond that, it's none of my  
2 business who he or she may be.

3 Now, as I talk this thing through, I can recall -- Ms  
4 Garner, help me if I'm wrong -- there have been occasions in  
5 which a public defender has been on the case, the Defendant has  
6 then hired a lawyer, and then for some reason that lawyer went  
7 away, and the public defender has stepped back in. Am I right?

8 MS. GARNER: Yes, sir.

9 THE COURT: And it's been the same one?

10 MS. GARNER: Yes, sir.

11 THE COURT: But I think when I've done that, I have  
12 done that only with the consent of the attorney who had stepped  
13 out, right?

14 MS. GARNER: Yes, sir.

15 THE COURT: Am I right? Ms. Johnson, maybe you can  
16 help me, too.

17 So you're telling me on the record you want Dunagin?

18 THE DEFENDANT: He's the only one I know, sir. I  
19 mean, he's a -- he seemed to be acceptable at the time. I got  
20 with Mr. Stilley, and he had to retire.

21 THE COURT: So you don't have any problems with  
22 Dunagin?

23 THE DEFENDANT: Not that I know of, sir. I mean, he  
24 is -- otherwise, I have to start totally fresh again with some-  
25 one I have never met or, you know --

1           THE COURT: All right. Mr. Fincher, what I'm going to  
2 do, I'm going to take a recess, and Mr. Stilley is going to,  
3 hopefully, during that time do his copy work. I'm going to ask  
4 the marshals to keep you here.

5           I don't know, gentlemen, whether you need to take him  
6 to the holding cell or what. But, Mr. Fincher, what I intend to  
7 do is ask Ms. Johnson to go back with me because she needs to  
8 hear this, I suppose, and I plan to see if I can get Dunagin on  
9 the telephone, and tell him that this is what has transpired,  
10 and that in court, you are telling me that you want him back,  
11 and that you don't have any problems with him as far as you  
12 know. He's the only one you know, and you're willing to go  
13 forward with him. Is that right?

14           THE DEFENDANT: Pretty well, yeah. Yes. That's the  
15 best I -- I've never been down this road before, sir.

16           THE COURT: Well, I'm not sure I've been down this one  
17 either, but I'm trying to be as fair with you, Mr. Fincher, as  
18 I know how, but I've got to be fair to Dunagin, too. I don't  
19 think it's right --

20           THE DEFENDANT: Well, if he objects --

21           THE COURT: Well, he may say, "Hey, you know, this  
22 guy threw me over for somebody else, and I don't want to dance  
23 with him anymore." I don't know. But I think in fairness to  
24 him, I need to ask him.

25           THE DEFENDANT: Certainly.

1 THE COURT: Now, if I -- and I'll have Ms. Johnson sit  
2 in so that she can -- or you can sit in, if you want to. I'm  
3 not sure that'll work too well, but you understand what I want  
4 to do? I just want to put it to him and say, "This is the  
5 situation." And, frankly, Mr. Fincher, if he says, "I don't  
6 want to do that," I don't think --

7 THE DEFENDANT: Sure.

8 THE COURT: And I know Mr. Dunagin, and I respect him,  
9 but you don't want somebody representing you that doesn't want  
10 to, for whatever reason.

11 THE DEFENDANT: That would be it, so if he didn't want  
12 to represent me.

13 THE COURT: Okay. Well, let me ask him.

14 THE DEFENDANT: Sure.

15 THE COURT: And, Ms. Johnson, if I get a reply from  
16 Mr. Dunagin that he is willing to go forward, are you comfort-  
17 able for his reappointment?

18 MS. JOHNSON: Yes, Your Honor.

19 THE COURT: Now, if he doesn't, Mr. Fincher, I can  
20 tell you right now my thought would be that I would look to my  
21 panel attorney, and I would appoint whoever is up for the next  
22 go-around. I don't know who it might be, but let me emphasize  
23 again, these attorneys that are qualified as panel attorneys,  
24 they are qualified, because we've reviewed their credentials and  
25 they know what they're doing.

1           Now, who -- you know, lawyers are different. You  
2 know, their personalities are different and whatever. But you  
3 don't have, as an indigent person, the right to pick and choose  
4 a particular attorney, but you're entitled to say, "Have a  
5 qualified attorney to represent me." Do you understand that,  
6 sir?

7           THE DEFENDANT: Yes.

8           THE COURT: All right. Let's take a recess. I will  
9 go back, and I think what I will do, Mr. Fincher, so that this  
10 record is complete, I'll have Ms. Johnson sit in, but I will do  
11 this on the record so there will be a record of what I say and  
12 what Mr. Dunagin says and what we do. As soon as I've made that  
13 call, I'll come back out and we'll see where we are at that  
14 time.

15           We'll be in recess, and we'll make that call. Ms.  
16 Johnson, if you please, join me back in chambers.

17 (A PHONE CALL WAS INITIATED WITH ATTORNEY DAVID DUNAGIN AS  
18 FOLLOWS:)

19           THE COURT: David, this is Jimm Larry Hendren calling,  
20 and let me mention now that I have this on speaker phone, and  
21 for reasons that I think will become clear in a moment I am  
22 doing this on the record. I have with me my court reporter,  
23 Theresa Sawyer. Also, my lawyer, Ms. Erin Setser. The U. S.  
24 attorney, Wendy Johnson is here, as well as Gail Garner, my  
25 courtroom deputy.

1           We have just had -- commenced a hearing with respect  
2 to Mr. Hollis Wayne Fincher. Mr. Fincher had forwarded to me a  
3 letter telling me that he had terminated his arrangement of  
4 representation with Mr. Stilley, and that he didn't know what to  
5 do from this point forward. What do I do sort of thing. I set  
6 the hearing immediately.

7           I have Mr. Stilley here. He's not in the room because  
8 we've progressed to the point that I've satisfied myself that  
9 Mr. Fincher no longer wants his representation, and he is with-  
10 drawing. I am letting him withdraw. He is copying all his file  
11 that he wants to keep, and he will turn over everything that he  
12 has to Mr. Fincher this afternoon before he leaves.

13           Afer I had done that, I -- Mr. Fincher volunteered  
14 that since he had let Mr. Stilley go, that he'd like to have  
15 David Dunagin back. I put him off when he first said that and  
16 attended to the other matters that I needed to attend to to make  
17 sure that that was all squared away, and when I came back to it,  
18 I said, "Now, look, you need to understand that I have certain  
19 criteria --" and this is not verbatim. I can't remember what  
20 I said verbatim, but several tenants.

21           One is that, normally speaking, a defendant is not  
22 entitled to select whatever attorney he might want to represent  
23 him, and secondly, it matters not to me who. As a matter of  
24 fact, I don't know who would be on the list of certified panel  
25 attorneys that might next be appointed, and I've made it my

1 business not to know. I don't want to know, so that there can  
2 be no suggestion that I'm trying to handpick somebody to repre-  
3 sent the guy.

4           It appears that the United States public defenders  
5 have disqualified. I've had cases where the Defendant had hired  
6 counsel, only at some later point asked for the hired counsel to  
7 leave, and then the public defender had been reappointed, but had  
8 always done it with the consent of both the Defendant and the  
9 public defender. So I told him that if he was requesting you --  
10 and he said at least twice, he said, "Yeah," he said, "he's  
11 the only one I know, and he knows my case. I'd be starting all  
12 over again, and I'm satisfied with him as far as I know."

13           And I said, well, okay, the only way I would consider  
14 doing that is for me to call Mr. Dunagin, explain the situation  
15 to him, and see what he says. I told Mr. Fincher on the record  
16 that if you said, "No, he threw me over once, and I don't want  
17 to dance with him anymore," then that I would not reappoint you  
18 because I didn't think it would be a good idea for him to have  
19 somebody that didn't want to represent him, and I didn't -- you  
20 know, I just wouldn't feel comfortable with him being able to  
21 pick and choose.

22           But if you have no problems and you are amenable to  
23 doing it, he wants you, and if you want to do it, then I would  
24 probably reappoint you, and the United States said they would  
25 have no problem with it. If you don't, then I have explained to

1 Mr. Fincher that I would probably -- and I say "probably"  
2 because I think I need to re-look at his indigency affidavit,  
3 but I think I would probably go ahead and appoint somebody else.

4           So with that background in mind -- and, as I said,  
5 Wendy Johnson is here, and I am making a record -- what say you?

6           MR. DUNAGIN: You and I have known each other forever,  
7 it seems like.

8           THE COURT: Well, maybe for you; not for me. I have  
9 known you a long time, and I might say well and favorably, too.

10           MR. DUNAGIN: Well, thank you, Judge. I would be  
11 honored to practice in front of you, but I have problems with  
12 this case. I outlined to Mr. Fincher what I thought the appro-  
13 priate defense should be, and he rejected it by hiring Mr.  
14 Stilley, and I would have done it a hundred and eighty degrees  
15 different than they have done it, and I know that some in his  
16 quarters have written bad things about me online and some in the  
17 Northwest Arkansas (unintelligible). I don't see how I can help  
18 this man.

19           THE COURT: David, try to speak up as loud as you can.  
20 Theresa is really having trouble hearing you.

21           MR. DUNAGIN: I'm going to switch to another phone.  
22 Just a minute.

23           THE COURT: All right, sir.

24           MR. DUNAGIN: Is this better?

25           THE COURT: That's much better.

1           MR. DUNAGIN: All right, thank you. As I was saying,  
2 I outlined to Mr. Fincher, when I was appointed, my theory on  
3 how this case should be tried, which was to basically challenge  
4 the constitutionality of the statute, bring in expert witnesses,  
5 get Briefs from the various pro-gun organizations in the country  
6 who have litigated these things before, made a very complete  
7 record for appellate purposes.

8           You know, I outlined that same idea to Mr. Stilley,  
9 and Mr. Fincher then hired Mr. Stilley, and has obviously  
10 rejected what my theories were by doing that. I am aware -- I  
11 have seen online out of the Morning News of Northwest Arkansas,  
12 I believe it was, where some of Mr. Fincher's followers had bad-  
13 mouthed me, said I didn't know what I was doing in the  
14 courtroom. I'm just not interested in being involved with that  
15 kind of a person right now.

16          THE COURT: All right, sir. I understand that, and I  
17 appreciate your candor, and I hope you understand why I felt  
18 obliged to make this call. I wanted to be as fair as I can  
19 possibly be to Mr. Fincher, and certainly to the United States,  
20 and all concerned. And since he said that he wanted to have  
21 you, I felt obliged to bring the matter to your attention. I  
22 thank you for your time.

23          MR. DUNAGIN: I want you to understand, Judge. I've  
24 discussed this with at least two other members of the bar here  
25 that I trust, and they said, "Yes, that is the decision you

1 should make."

2 THE COURT: Well, I appreciate that. Okay, well,  
3 thank you very much, and I will tell you then that I will not be  
4 reappointing you, but I understand your concerns, and I hope you  
5 understand my reasoning. I just don't think it's fair to you,  
6 or really appropriate under the circumstances, to ask you to  
7 come back into it. So thank you very much. I appreciate it.

8 MR. DUNAGIN: Thank you, Judge.

9 THE COURT: All right, thank you.

10 (PROCEEDINGS RETURNED TO OPEN COURT AS FOLLOWS:)

11 THE COURT: All right, Mr. Fincher, I mentioned to you  
12 that I would be contacting Mr. David Dunagin by telephone, and  
13 I did so, and Ms. Johnson was present during the call, as was my  
14 courtroom deputy, Ms. Gail Garner, my attorney, Ms. Erin Setser,  
15 and the court reporter.

16 We spoke with Mr. Dunagin, and he declined to repre-  
17 sent you further. I won't go into detail. That's a matter --  
18 it's on the record, but I sense, and I think he said, that there  
19 had been, and he thought there might be, differences of opinion  
20 about how to proceed, and he didn't -- he didn't feel he should  
21 do that.

22 Accordingly, sir, I have before me your previous  
23 Affidavit of Indigency which you filed. Is that still essen-  
24 tially correct, Mr. Fincher?

25 THE DEFENDANT: Yeah.

1           THE COURT: I'm going to go ahead and recognize that  
2 then, and on the strength of that, determine that we should  
3 appoint the next available panel attorney who is qualified to  
4 provide representation to you, to contact you and undertake your  
5 representation.

6           Now, as we speak, Mr. Fincher, I don't know for sure  
7 who that might be. What is normally done in these instances is  
8 that when the Affidavit is approved, normally, the U. S.  
9 attorney -- the U. S. public defender -- would be appointed, if  
10 he can do it. If he or she can do it. If not, we just appoint  
11 the next available panel attorney. Those representations  
12 rotate, generally, in no particular order. So that would be  
13 what I would do.

14           As I sit here now, I can't tell you for sure who that  
15 would be, but I will direct my courtroom deputy to contact the  
16 panel attorneys in the order that they are listed and to -- it  
17 may be that whoever is next on the list can't, for whatever  
18 reason, represent you because of other business. I just don't  
19 know. But we'll get that done, hopefully -- maybe this after-  
20 noon. Doubtfully. Probably, the first of the week, we'll get  
21 that done.

22           As soon as we get that attorney appointed to make  
23 contact with you, make sure that the attorney has all the  
24 materials that Mr. Stilley is going to leave for you so that you  
25 can proceed with them. Would that be agreeable, Mr. Fincher?

1 THE DEFENDANT: (Nods his head up and down.)

2 THE COURT: You need to answer audibly.

3 THE DEFENDANT: Yeah.

4 THE COURT: Maybe you did. I just didn't hear you  
5 back there.

6 Are you comfortable with that, Ms. Johnson?

7 MS. JOHNSON: Yes, Your Honor.

8 THE COURT: All right. Is there anything further we  
9 need to take up at this time, Ms. Johnson?

10 MS. JOHNSON: No, Your Honor.

11 THE COURT: Mr. Fincher?

12 MR. FINCHER: No.

13 THE COURT: All right. As soon as that panel attorney  
14 is appointed, then he or she will enter the appearance, and  
15 we'll proceed from there.

16 You heard Ms. Brown say that in conjunction with her  
17 work, one of the next things she'll need to do is to confer with  
18 you. You may recall at the time of -- after the jury verdict  
19 came in, I advised you that you didn't have to talk to her, but  
20 I think it would help her to kind of get the full picture if you  
21 did, and help me, and probably you.

22 But again, I'll remind you, you may be guided by  
23 whatever your attorney's advice is on that. You know, I'll  
24 leave that up to you. But that'll be probably the next thing.  
25 You'll be hearing from her.

1 All right, Marshals, thank you very much for getting  
2 Mr. Fincher up here on such short notice.

3 Ms. Johnson, I thank you very much for coming in on  
4 short notice, and I do apologize to all concerned for my tardi-  
5 ness. I was late getting here. I've got good excuses, but I  
6 just apologize for making you wait.

7 This concludes the matter, and we are adjourned.

8 (WHEREIN THE HEARING WAS CONCLUDED.)

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