

Ellsberg Lawyers Weigh New Motion for Dismissal

By MARTIN ARNOLD
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LOS ANGELES, April 29 — Defense attorneys in the Pentagon papers trial are considering a move tomorrow for dismissal of the case against Daniel Ellsberg and Anthony J. Russo Jr. because the office of Dr. Ellsberg's former psychiatrist had been broken into by men associated with the Government.

On Friday, United States District Court Judge William Matthew Byrne Jr., who is presiding, released a Justice Department memorandum saying that two of those involved in the Watergate conspiracy had broken into the office to obtain Dr. Ellsberg's health records. Judge Byrne ordered a sweeping investigation of the break-in.

The conspirators mentioned in the memorandum were G. Gordon Liddy, former Presidential assistant, and E. How-

ard Hunt Jr., a former White House consultant. The motion for dismissal would be based, in part, on the ground that both men were employed in the White House at the time of the break-in.

The psychiatrist is Dr. Lewis Fielding of 450 North Bedford Drive, Beverly Hills. His office was broken into on Sept. 3, 1971. Dr. Ellsberg underwent analysis in the late nineteen-sixties and part of 1970. He was working at the Rand Corporation at that time.

Dr. Ellsberg said yesterday that at this late stage in the trial he would rather have the case go to the jury than have it dismissed by Judge Byrne. But the attorneys involved are weighing the possibilities of moving now for a dismissal or waiting until the court-ordered investigation produces additional facts, and then asking for a dismissal. The possibility of the judge's dismissing the case tomorrow is considered unlikely.

Whatever the defense strategy, the judge will be presented

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with an affidavit tomorrow confirming that the psychiatrist's office was in fact broken into; that his file cabinets were forced open, including the one containing Dr. Ellsberg's records; that the files were scattered about the office, and that the matter was reported to the police, who were unable to catch the culprits.

None of Dr. Ellsberg's records were missing, so it is assumed that the burglars copied or photographed them.

The defense obtained the affidavit from Dr. Fielding yesterday.

When the Federal Bureau of Investigation first looked into this case, after the papers were first disclosed in The New York Times in June, 1971, the bureau managed to get Dr. Ellsberg's bank records, including the records of his canceled checks. From them, the bureau learned the names of all of Dr. Ellsberg's physicians and his two dentists and each of them was interviewed by F.B.I. agents, as were many of his friends and relatives. Dr. Fielding said, however, that he refused to discuss Dr. Ellsberg with the F.B.I.

The memorandum revealing the Liddy-Hunt break-in was written by Earl J. Silbert, the Watergate prosecutor, on April 16, and was forwarded to the prosecutor in this case, David R. Nissen, on April 26, when he turned it over to the judge. Judge Byrne made its contents public the following day.

In the memorandum, which Mr. Silbert wrote to Henry E. Petersen, an Assistant Attorney General, Mr. Silbert said that he received information alleging the break-in the previous day, April 15.

Judge Byrne said he wanted

to know, among other things, who made the allegation to Mr. Silbert.

If it is determined that the Justice Department knew about the break-in for a long time and withheld that information, and that the break-in was ordered by and conducted by men working at that time in the White House, then there is the possibility that the judge could dismiss this case.

Legal experts say that a dismissal would probably occur if it was determined that the information gathered in the break-in was, in fact, used in the courtroom against the defendants during the course of the trial.

How the burglars got the name of the psychiatrist is unclear. While Mr. Hunt was working in the White House, a special telephone reportedly was installed there to be used for gathering information on the Pentagon papers disclosure and in the investigation of Dr. Ellsberg.

The defense has moved previously for dismissal on the grounds of misconduct on the part of the prosecutor for suppressing evidence, wiretapping at the office of one of the defense attorneys, publicity given the case and statements by Vice President Agnew. These motions were denied.

On Dec. 12, 1972, a mistrial was declared — before any testimony had been made — and the first jury in this case was excused because of a long hiatus over the wiretapping incident.

In February, an espionage count against Dr. Ellsberg was dismissed as a sanction against the Government for withholding evidence. Dr. Ellsberg and Mr. Russo are now accused of six counts of espionage, six counts of theft and one count of conspiracy.