No. 03-71223
(C.D. Cal. No. ED CR 02-350(A) - AHM)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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STEVEN W. SUTCLIFFE

Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent.





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UNITED STATES OF AMERICA,

Real Party In Interest

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**PETITIONER'S REPLY TO REAL PARTY IN INTEREST'S**

**ANSWER TO PETITION FOR WRIT OF MANDAMUS**

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## I. CONTRARY TO THE DISTRICT COURT'S ORDER AT ISSUE, JUDGE MATZ' LATEST ORDER DEMONSTRATES CLEARLY THAT PETITIONER IS COMPETENT.

It is undoubtedly rare that the Ninth Circuit Court of Appeals is presented with direct evidence and such a clear demonstration from the district court judge himself that his own orders were and are invalid. That is the case here.

Notwithstanding Judge Matz' alleged concerns about petitioner's competency (or lack thereof) the petitioner has proven, once again, that it is the district court's conduct that should be of concern, not his.

The latest order of Judge Matz, correcting his previous, improper order, is demonstrative that:

1. Petitioner is so competent that he knows and presents the law better than the court and the Government:

2. Petitioner can and does present and assert his legal position properly demonstrating his clear present ability to know and understand the nature and extent of the charges against him; and an ability to understand and present appropriate pleadings on his own behalf in the fairly complex arena comprising habeas corpus proceedings - all demonstrating an uncanny competency to proceed to trial; and

3. That Judge Matz is, has been, and will continue to be, biased and proceeding on his own agenda to the prejudice of petitioner.

A. THE PRESENT ORDER

On March 13, 2003, petitioner filed a writ of habeas corpus pursuant to 18 USC 2441. Because this writ is a civil proceeding, it was not subject to the previous Order of Judge Matz precluding petitioner from filing motions directly instead of "through" his court-appointed attorney. [An order at issue in this writ petition.]

On March 14, 2003, when advised that (1) petitioner would not waive time for a speedy trial (as requested by his court-appointed attorney) and (2) that petitioner was not willing to be a "slave" to the "master" court-appointed attorney by not making or addressing objections to the court that his court-appointed attorney would not or refused to make, Judge Matz announced he had received the writ of habeas corpus and that it was denied because it was "facially defective." [Minute Order of March 14, 2003 attached to original writ petition.] When defendant requested that Judge Matz recuse himself from considering the writ, he as told, in essence, to sit down and shut up, whereupon Judge Matz denied the writ and ultimately directed that petitioner be removed from the courtroom.

Now, after the filing of an appeal *in pro se*, and the filing of a writ of mandate, Judge Matz has issued an order "correcting" his earlier "ruling" on the writ of habeas corpus. It seems that he was incorrect and that petitioner's writ was properly filed; an interesting admission from a jurist whose exercise of discretion regarding the "competence" (or lack thereof) of petitioner is being questioned.

Petitioner has asserted all along that his "competence" or lack thereof, could be determined, in whole or in part, on the basis of his pleadings, which the AUSA, in the Answer, has characterized as "frivolous" - although no judge or magistrate has ever held that any motion or pleading filed by petitioner was "frivolous."

Now Judge Matz, having shown his true bias towards petitioner, and faced with judicial scrutiny of his rulings, now must admit that petitioner was, in fact, correct and he, the district court judge, was incorrect. What better demonstration of competence can petitioner provide? How does one prove a negative - that is, that he is "not" incompetent?

This latest Order demonstrates the fallacy of the district court's position and that of the AUSA - and exposes the true nature of these proceedings - to punish and delay and to cast the petitioner in as much negative light as possible with all opportunity to defend himself taken away by specious, illegal and improper orders - some of which are the very orders now before this Court.

## II. REPLY TO REAL PARTY IN INTEREST'S "STATEMENT OF THE CASE"

At the outset, Petitioner acknowledges that he is prejudiced by the fact that he does not have and has not been provided with a complete copy of the transcript of the March 14, 2003, hearing, portions of which are referenced by Real Party In Interest who "incorporates" selected portions of the transcript into their brief.

Furthermore, Real Party's rendition of prior events occurring in court on January 14, 2003, and January 17, 2003, do not comport with petitioner's recollection of events and petitioner believes that a review of those transcripts would amply demonstrate that

great liberty was, has and is being expressed by Real Party. While petitioner has requested these transcripts, his court-appointed attorney has refused to communicate with petitioner's counsel in this matter, despite phone calls and facsimiles sent to his office.

The Answer raises issues that are irrelevant to the writ and the relief sought; and includes "ultimate facts" that are in dispute (thus, they are not "facts" but merely assertions). The "facts" of this case have yet to be determined and based on the complaints of continual delays and interference with his speedy trial rights, as raised by petitioner, such determination will not be addressed by a jury any time soon.[1]

Also, petitioner recognizes the "catch-22" the district court has placed him in. The scenario goes like this:

1. The district court denies bail due to petitioner's being such a danger to the community that absolutely no conditions of bail would be acceptable. This based on the declaration of Jeffrey Raymond Cugno, the investigating agent for the FBI. Aside from the issues that this declaration has never been subject to cross-examination and is replete with hearsay and unsupported supposition, the nature and extent of the "criminal history" of petitioner consists of a misdemeanor violation of California Penal Code section 415 (disturbing the peace) and a similar infraction, the latest occurring more than 12 years ago (June of 1991).

Sutcliffe's efforts to redress perceived wrongs by two LAPD officers were not the subject of any "investigation" and his website, "killercop.com" which is referenced in the

[1] Petitioner has listed these "facts" separately.

Answer was never challenged legally. In fact, despite numerous "investigations" into the propriety of this website, Mr. Sutcliffe was never charged with any crimes related thereto. Furthermore, though not particularly relevant hereat, "killercop.com" was a parody, stated it was a parody, and, in fact, the "weapons" referenced therein were fantasy, made-up, did not exist, and could not exist. (Weapons such as "bee shooters" a tube-like device that would shoot stinging bees...)

Introduction of a "history of domestic violence" is then addressed, referencing specifically a restraining order sought and obtained by petitioner's wife. {Answer, page 5] What is omitted is that the wife sought and obtained the restraining order at the direction of the FBI; in fact, the evidence will show that petitioner's wife was pressured by the FBI to not only seek and obtain the restraining order but to lie on the stand. This is admitted by the wife in a recorded telephone conversation with petitioner.[2]

Although petitioner challenged the denial of bail initially by a second request and ultimately to this Court, this Court found that the bases for the denial were properly articulated by Judge Matz. So, the first step is to create the illusion of a "dangerous" person - even though petitioner's charged crimes hereat involve only words, he is too dangerous for bail, but Robert Blake who is charged with capital murder (first degree murder) is out on bail - clearly, one who is charged with capital murder with special circumstances is less dangerous than a man who uses words to express his freedom of speech and frustrations over the conduct of others directed to him and his family.

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[2] Apparently, all phone calls at federal prison are recorded.

2. Step two is to continually delay petitioner's right to a speedy trial. This has been accomplished by the successive appointments of incompetent counsel who have failed to properly prepare defendant's case for trial and who refuse to permit defendant to be an active participant in the preparation of his own defense. This is a very clever procedure undertaken by the district court.

The district court first convinces petitioner that he would be foolish to consider representing himself in this matter. Indeed, Judge Matz expended considerable time advising petitioner of the numerous pit-falls and serious consequences of self-representation.

After "convincing" petitioner that self-representation would be foolish, and in recognition of petitioner's indigent status, Judge Matz then appoints the U.S. Federal Public Defender's Office. Attorney Hillary Potashner is assigned by said office and proceeds to do little if anything to prepare the case for trial. In fact, she expresses her fear of Judge Matz as constituting a basis for her refusal to bring motions on petitioner's behalf, including a motion challenging subject matter jurisdiction.

When these problems are brought to the attention of Judge Matz by petitioner, Judge Matz requests that fellow U.S. Federal Public Defender, Marilyn Bodnarsky[3] , take over for Ms. Potashner. This is agreed to by defendant. However, on the day trial was to commence in September, 2002, Ms. Bodnarsky was unprepared to go forward. Numerous requests of petitioner to his counsel had been previously ignored and faced

[3] Counsel for petitioner apologizes for any mis-spellings; but he does not have any records to verify the same.

with another complaint before Judge Matz, Ms. Bodnarsky brings an *ex parte* request to be relieved.

Whether it was because of Ms. Bodnarsky's *ex parte* request, or because of defendant's continuing complaints of his attorney's unpreparedness for trial, or both, the Public Defender's office was relieved, and a "new" attorney, William Harris, was assigned. Of course, the filing of the *ex parte* application provided a legitimizing tool for the district court to avoid the appearance of delay based on the appointment of and the ignorance of the incompetence of prior appointed counsel.

3. Step 3 is to appoint an "independent" attorney from the "indigent pool." Mr. William Harris is appointed, but when it came time for trial, he was even less prepared to proceed than his two predecessors. He failed to gather the evidence in the case; he lost critical evidence in the case that was, and is, irreplaceable; he failed to retain competent experts and refused to communicate with his client.

After continuous complaints, particularly about Mr. Harris' inability to access what evidence he was provided with and his failure to obtain all of the evidence prior to proceeding to trial and in light of the now lost-forever evidence, Judge Matz, relieved Mr. Harris, notwithstanding Judge Matz' comments on how great a job [sic] he had done. In fact, Mr. Harris' willingness to proceed to trial without having all of the evidence in hand; without reviewing all of the evidence; and having lost some of the evidence belies Judge Matz' comments on how good a job he had done.

Indeed, petitioner's mental competency would be properly questioned if he permitted his attorney to proceed to trial under these conditions without objection; yet,

just the opposite has occurred, an interesting "twist" in the scenario created and controlled by the district court.

4. In order to accommodate even more "legitimate" delay, the court, *sua sponte* orders a competency examination on the same day it relieves Mr. Harris. This after it conducts *in camera* hearing regarding whether it should relieve Mr. Harris - a hearing at which the AUSA was admittedly excluded. and at which petitioner's concerns were explored and addressed. Other than requesting that his attorney be relieved, the court articulates no concern about petitioner's conduct. The 4241 hearing is a total surprise. Even more surprising is that the AUSA prepares the order on behalf of the district court -based on what criteria, is unknown. Of course, the January 14, 2003, hearing, and the subsequent January 17, 2003, hearing transcripts are also unavailable to petitioner.

5. Despite the objections of petitioner to the 4241 hearing, the trial is placed off-calendar and petitioner is subjected to a mental competency evaluation. This evaluation is conducted over the next 60 days (violating the time constraints of the statute) and a hearing is conducted on March 14, 2003. Petitioner's court appointed attorney asks petitioner to waive time for a speedy trial because he (the attorney) is not prepared to go forward. When petitioner refuses, counsel has a discussion with the court clerk about the trial date; counsel then goes out in the hallway with the reporting psychologist and they are then joined by the AUSA and the court clerk. After they all returned to the court, and after the clerk went back, presumably, to chambers, Judge Matz takes the bench. After petitioner objects to Mr. Nicolaysen's "speaking for him",

and petitioner' s refusal to "sit quietly" and not to speak to the court unless spoken to or given permission, the court has petitioner removed. Petitioner's attorney then adduces testimony from the doctor that the doctor has now "changes his mind" about petitioner's competency and recommends, with some prodding from petitioner's own court-appointed counsel and Judge Matz, that additional testing would be appropriate. Of course, petitioner cannot properly address this since he is not in possession of the entire transcript of March 14, 2003, a determined result of the AUSA's failure to comply with Judge Matz' March 14, 2003, order..

The March 21, 2003, minute order specifically states that the Government was to order and make available to the defendant the transcript of March 14, 2003. On March 26, 2003, the AUSA claims that she ordered the transcript and had it delivered to counsel, not to the defendant. Court-appointed counsel has refused to communicate with counsel for petitioner - thus, the circle is now complete.

Neither the reasons articulated or stated by the doctor whose initial report was an unequivocal finding of competence is included in the partial transcript provided by the AUSA support an additional 4241 order. An unwillingness to cooperate with counsel is not the same as having a present ability to so cooperate. Indeed, if the district court were to find that petitioner was unwilling to cooperate with counsel, that would not be a sufficient ground to order a 4241 hearing.

. 6. The last "nail' in this scenario is to obtain the cooperation of the court-appointed counsel. The district court next appoints Gregory Nicolyasen to be court-appointed counsel. Mr. Nicolyasen delays almost 6 weeks after his appointment to even

make first contact with petitioner. Of course, one does not appreciate the freedom of freedom until one has lost it. In any event, petitioner makes an effort to work with this latest court-appointed attorney, but the relationship is strained by (1) counsel's lack of communications (less than 3 hours total to date since appointment); (2) refusal to permit his client to participate in the defense; (3) telling his client that he may not speak, make objections or address the court except by and through him, then refusing to make objections when requested by petitioner; refusing to bring motions or challenge rulings. Of course, the district court has already precluded petitioner's access to the court via his filing his own motions - thus, the "lock out" is now complete with the complicity of the court-appointed attorney.

And, as regards to the latest 4241 issue, it is Mr. Nicolaysen who seeks to obtain an opinion from Dr. Backer, that petitioner is incompetent or, at the "very least" that petitioner be sent to a federal medical facility for further testing. This is the *coups de grace.* Now everyone is in tune: the court, the Government and now petitioner's own court-appointed counsel. Since everyone agrees, it must be right.

This is, in fact, the scenario that has occurred. It is on this basis that the district court has now ordered another, consecutive 4241 examination, "not to exceed 4 months" and at a facility out-of-state. It is this scenario that frames the issues now before this Court.

## III. CONTEXT OF THE CHARGED OFFENSES

Although included in the Answer, the AUSA does not indicate in what manner these charged offenses are relevant to the issue of whether the district court's orders for mental competency exams are relevant included.

First, and most importantly, petitioner was terminated by his employer, Global Crossing, for his religious beliefs, not because of his failure to report an infraction offense that occurred years before. When Global Crossing was confronted with litigation for discriminatory wrongful termination, they "cooked-up" the excuse that the termination was for the unreported infraction (the equivalent of a traffic ticket). Only by filing bankruptcy did Global Crossing avoid the discrimination lawsuit prepared by petitioner.[4]

Petitioner did establish a website called "evilgx.com" and did post information he obtained regarding Global Crossing from various sources thereon. This information included social security numbers, and other personal information.

Obvious by its omission, is that Global Crossing sough to obtain a restraining order from the State court to prevent the publication of this information; this Order was rejected and an injunction was ultimately issued on the narrow basis that only information obtained by petitioner during his term of employment was precluded from being published. Thus, since the published information came from third-party sources well after his termination, the restraining order was ineffective to prevent the continued

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[4] Petitioner does not state that the reasons why Global Crossing filed for bankruptcy protection were because of his pending lawsuits; more likely it was the 12 billions in debt and the questionable accounting practices and over $350 million dollars taken from the corporation by Mr. Winnick just prior to filing bankruptcy that were the bases of this filing.

publication. Global Crossing never sought contempt proceedings from the State court; rather, they turned to the federal system for relief. And no wonder.

Global Crossing gave more than $3.5 million dollars to federal candidates and political parties - 26% more than ever given by Enron which had been providing contributions for many years. 75 percent of the more than $3.5 million went to Republicans. The president of Global Crossing, Gary Winnick, (one of those whom petitioner allegedly "threatened") contributed a "substantial sum" to the George Bush Presidential Library Foundation, on which he serves as a trustee.

Winnick also gave George Bush a block of stock for a speech Mr. Bush gave in 1998 to a group of global Crossing executives; rather than pay the customary $80,000 fee, the stock was worth about $14 million. Winnick also gave the former head of the antitrust enforcement in the U.S. Justice Department (Anne Bingaman) a consulting contract worth more than $2.5 million.

Thus, when petitioner "took on" Global Crossing with his website, he stepped on a lot of big toes.

The whole reference in the Answer to the "nature of the charges" is filled with unproven assertions of "ultimate facts" that have never been subject to cross-examination, including a number of false, misleading and incorrect statements about an earlier website by petitioner called "killercop.com."

## IV. HISTORY OF COMPETENT CONDUCT

Notwithstanding the myriad of problems dealing with counsel who (1) refuse to communicate; (2) fail to do their jobs by obtaining discovery; by issuing subpoenas and

other requests for discovery; (3) fail to retain and consult appropriate experts; (4) fail to protect petitioner's rights by making timely objections or filing appropriate and timely motions; and (5) refusing to permit petitioner from participating in his defense; nothing in defendant's conduct from March 26, 2002, when he was first arrested and incarcerated, until January 14, 2003, evidenced any reasonable ground to order a competency hearing. In fact, just the opposite.

During the representation by the public defender's office and subsequent "representation" by Mr. Harris, petitioner filed numerous motions that were (1) accepted by the court; and which, for the most part, were (2) ruled upon by the court. At no time did the court label any motions as "frivolous" (contrary to the unfounded representations of the AUSA in the Answer. In fact, the AUSA identifies 12 such motions (Answer, page 10) and although all were denied[5], that does not make any of them frivolous. Point of fact, the AUSA references this Court to Exhibit "A" to support their factual representation that any or all of these motions were "frivolous" - yet, nothing in Exhibit A supports this "fact."[6]

As the famous tennis instructor and commentator, Vic Braden says, "If one million people go out today to play tennis, one-half a million will go home losers." In any motion, someone wins and someone loses; the mere fact that you lose more than you win does not make your efforts as frivolous or unmeritorious.

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[5] Actually, many of these motions have been received but have not been ruled upon, including a motion to recuse Judge Matz for bias.

[6] Indeed, Exhibit "A" does not even contain the word "frivolous."

Petitioner has filed 2 writs for habeas corpus review; each was properly and timely filed. Each demonstrated the competence of the writer; the most recent was prepared and filed on March 13, 2003, the day before the second competency exam was ordered and after the first examination process concluded and found petitioner to be competent.

Certainly, by his own hands, petitioner has demonstrated his legal competence according to the legal standards in effect.

The sole issue as regards petitioner's "competency" revolves around the various counsel appointed to "assist" him. The right is the effective **assistance** of counsel and given that all counsel appointed by the district court have demanded that they run the case; that they, alone, determine how the case will be defended; that they alone will make or not make, objections to court procedures and/or rulings; that they alone will decide what evidence to obtain and review; that they alone will decide what witnesses they will subpoena - this is not assistance, this is exclusive domination. For the sole reason that petitioner expects his counsel to provide effective assistance, his mental competency is questioned.

## V. JURISDICTION

The answer essentially concedes jurisdiction: "It appears that the district court's order that defendant be transported to FMC-Rochester is interlocutorily appealable," citing cases.

The Government is less generous with the issues of jurisdiction regarding the competency order and the order precluding "pro se" filings. That is because the Government misses the point as to both: they are both Constitutional violations effecting petitioner's due process rights; access to the courts; right to speedy trial; and results in the forcing of counsel on a party when that counsel is unwanted, incompetent, or both.

The Government's position is that all of petitioner's rights should be suppressed and if he is convicted, he can raise these issues on appeal; however, the constitutional deprivations and interference with significant rights do and will affect petitioner's ability to prepare and present a defense and which otherwise preclude petitioner access to the courts and would otherwise permit his counsel to act against his own client's interests (as demonstrated by Nicolaysen's efforts to obtain a reversal of the doctor's "competency" finding and delaying the trial at least another 6 months[7]).

## VI. THE ISSUE OF EFFECTIVE ASSISTANCE OF COUNSEL

This Court does not need to be "lectured" on the significance of the right of a criminal defendant to the effective assistance of counsel, since the overwhelming case law, and in particular, the *Faretta* and *George* decisions (which were cited in the writ of mandamus) clearly spell this out. [*Faretta v. California* (1975) 422 U.S. 806; United States v. George (1966, CA9 Cal) 85 F.3d 1433]

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[7] While trial was to commence on March 25, 2003, the effect of the "new" 4221 order, as demonstrated in the Court's own minute order, is to reset the trial for September 9, 2003. [Court minute order dated March 14, 2003]

The Government's position is that neither the *Faretta* nor the *George* cases are on point - essentially because both cases involved a right to proceed "*in pro per*" - however, both the Supreme Court and this very Court were most emphatic in both of these cases as regards the very issue before this Court today and upon which the district court has so egregiously trampled: the right not to proceed *in pro per* but, rather, the right to proceed with the effective assistance of counsel.

While it is true that the Supreme Court in *Faretta* "held" that it was wrong to force a petitioner against his will to accept a state-appointed public defender and in denying the request to conduct his own defense (particularly when he was "competent" to do so; the *Faretta* court made a number of other points quite clear - points that were set forth in the writ and which were ignored by the Government in it's Answer. Points such as:

A. The *Adams* case [*Adams v. United States ex rel. McCann* 317 U.S. 269]...held...that "the constitution does not force a lawyer upon a defendant." In this case, that is exactly what the district court has and is doing. The court took great lengths to "convince" petitioner not to proceed in pro per; it then appointed a succession of attorneys who did little if anything in the preparation of the case for trial including the present attorney who, when he could not get a waiver to continue the trial, coerced the examining doctor to completely reverse his opinion to obtain a second 4221 hearing and a 6 month delay.

B. The *Faretta* Court cited to *United States v. Plattner,* 330 F.2d 271, which stated, *inter alia*, "The right to the assistance of counsel was intended to supplement the other rights of the defendant and not to impair the absolute and primary right to

conduct one's own defense in propria persona." [*Id.*, at p. 274] In the instant case, counsel's own commands to petitioner demonstrated, in fact, impairment of the right of petitioner to even participate in his own defense.

C. The *Faretta* Court reiterated that the right to have the Assistance of Counsel for his defense" are basic to our adversary system; they are a part of the "due process of law..". *[Id.* at p. 818]

D. In articulating the rights conveyed by the Sixth Amendment, the Supreme Court in *Faretta* stated, "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded "compulsory process for obtaining witnesses in his favor." [*Id.*, at p. 819] Indeed, counsel Nicolaysen and Harris as well as the Federal Public Defender's Office would do well to re-read the Sixth Amendment and recognize that the defense belongs to the defendant - not to counsel.

E. The *Faretta* Court reminds us in it's opinion that the "assistance of counsel, however, expert, **is still an assistant**...and the spirit of the Sixth Amendment contemplates that counsel...shall be an aid to a willing defendant - not an organ of the [Government] interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wishes... violates the logic of the Amendment. In such a case, counsel is not an assistant but a master and the right to make a defense is stripped of the personal

character upon which the Amendment insists. " [*Id.*, at p. 820] The Court went on to state that "Unless the accused has **acquiesced** in such representation, the defense presented is not the defense guaranteed him by the Constitution...". [*Id., at p. 820]*

Petitioner has expressly not acquiesced and this is reiterated in the selected portions of the March 14, 2003 transcript. It has also been asserted in each appearance and, in particular, at the January 14 and 17 hearings for which the transcripts are not available to petitioner.

F. The Supreme Court in *Faretta*, citing to *Powell v. Alabama*, 287 U.S. 45, *Johnson v. Zerbst*, 304 U.S. 458, *Gideon v. Wainwright*, 372 U.S. 335 and *Argersinger v. Hamlin*, 407 U.S. 25, sums these cases up by stating, "For it is surely true that the basic thesis of [these] decisions is that the **help of a lawyer** is essential to assure the defendant a fair trial." [*Id.*, at pps. 832 0 833] The Supreme Court did not state that it was exclusive representation by a lawyer that is essential - it is the help of a lawyer - the assistance contemplated by the Sixth Amendment and ignored by the district court and Government in the instant case.

G. "To force a lawyer on a defendant can only lead him to believe that the law contrives against him." *[Id.*, at p. 833] Paranoia is defined by Webster as a mental disorder characterized by systemized delusions ascribing hostile intentions to other persons, or a baseless or excessive distrust of others. Dr. Backer defined the condition as "a pattern of pervasive distrust and suspiciousness of others." Given the circumstances as petitioner has seen them in this case, and as set out in the "scenario" set-forth above, paranoia would a justified response in accordance with and an

appropriate reaction to the circumstances presented by this case - as stated by the United States Supreme Court.

This very Court took the same stance in *USA v. George* (1966, CA9) 85 F.3d 1433; the issue was the creation of a "hybrid" representation - that is, the defendant proceeding as co-counsel or with advisory counsel. In the *George* matter, the defendant sought to proceed *in pro se*, but the court, instead, made defendant co-counsel. Defendant complained his right to proceed *pro se* was violated. Sometime during the proceedings, the court changed the status from "co-counsel" to "advisory counsel." As noted by this Court,

George was "considered and treated as having pro se status." So, too, in the instant case, has the district court treated petitioner. As in *George*, petitioner has been addressed by the court on many occasions and filed and argued his own motions. Although not afforded either the status of "co-counsel" or having counsel appointed as "advisory", nonetheless, the district court up until the January 14, 2003, hearing (commencing in April 2002) has treated petitioner as though he were a "co-counsel."

The *George* decision, coupled with the *Faretta* case, dove-tail into the issue of competency - the tool utilized by the district court to legitimize the Constitutional deprivations complained about herein.

At the outset, "reasonable cause" must exist to conduct a competency hearing; and, even in the existence of reasonable cause, the court "clearly had the discretion to determine whether an examination is also necessary."

The court's own orders of January 14 and January 17 do not provide any insight into the existence of any reasonable cause; thus, one must look to the order prepared by the AUSA.

The basis of the "reasonable cause" based on the "apparent inability or refusal to consult with counsel with a reasonable degree of understanding" was "supported" [sic[ by the following:[8]

A. "Petitioner's moving to terminate the appointment and continued representation by three lawyers." There is no basis in fact or law that the mere request to terminate counsel, or any number of counsel, constitutes "reasonable cause" regarding anything. Indeed, if the basis to terminate representation is well-founded, as it apparently was in this case since all requests to terminate counsel were granted, *a fortiori*, it would seem, the requests were reasonable.

B. "Petitioner had claimed there had been a total breakdown in communications. The attorney's agreed and two of them intimated that [petitioner] had threatened them." A total breakdown in communications might, again, support a termination of counsel, but communication is two-way, and the fact that his attorneys agreed indicated that they, too, found that their lines of communication had "broken down." This again justifies termination, but does not constitute any "reasonable cause" nor does the government cite to any authority to support this ludicrous proposition.

The reference to "threats" against the attorneys is totally devoid from the record; nor is the "context' of any such "threat" explained. For example, did petitioner threaten

to file a malpractice action? Does this constitute a "threat" such as would form a "reasonable cause" for a 4221 hearing? Particularly in light of the abject incompetence of the court-appointed counsel, the strong inference is that to do anything other than to "threaten" counsel in this regard would be questionable. and whose "inference" is referenced?

C. "Defendant several times sought to file documents directly without his then-attorney's consent or even knowledge." This action was clearly necessitated by the attorney's refusal to file the documents themselves; the first attorneys articulated their "fear" of Judge Matz as justification for not filing any motions. And the fact that Mr. Harris filed some motions does not address those motions he refused to file. And, more importantly, there is nothing in the record (at least the record that was selectively provided by the Government) to support any inference that any of the motions filed by petitioner were "frivolous." And, even if every motion filed was "frivolous" there is no legal support that such conduct, in and of itself, forms in any way or part, "reasonable cause" to order a 4241 hearing.

D. "At various times, defendant has cast aspersions on his attorney's integrity and suggested that they were in cahoots with counsel for the Government." This is exactly what the Supreme Court "warned" against by such conduct of the district court as we have seen in the instant case; and, by the very fact that all counsel (save for present court-appointed counsel) have, in fact, been relieved. Casting aspersions on one's attorney, and even refusing to cooperate with counsel do not constitute grounds

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[8] Quoting from the Order re: Competency Examination filed January 17, 2003 (Exhibit

to order a 4241 hearing and the Answer provides no legal support for this equally ludicrous proposition.

E. "At the third hearing necessitated by [petitioner's] motion to dismiss [his] third attorney, [petitioner] refused to tell the Court [sic] whether he wished to represent himself or to have another attorney appointed to represent him." The Government has failed to provide the court-ordered transcript and has selectively omitted significant portions of that transcript from this record; however, in the portion that was provided [Exhibit "M" commencing on page 7 thereof, line 25: Defendant: "He [court-appointed counsel] does not speak for the accused."; page 8, lines 5-6: "He [court-appointed counsel] is dismissed with extreme prejudice." The U.S. Marshall then asks whether petitioner should be removed from the courtroom which the court then orders. Nothing in the selectively submitted transcripts has the court inquiring about self-representation, contrary to the Government's assertion otherwise.

It certainly seems clear based on the limited transcript that petitioner made it clear that he did not want his court-appointed attorney to speak for him; and that he had "discharged" him. This sounds like petitioner was seeking to proceed either *in pro per* or to have the court address the issue and address another possible appointment. It did neither.

Furthermore, the AUSA-prepared Order also lists "reasons" related to petitioner's "apparent inability to understand (rationally and factually) the proceedings against him by stating:

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"L" to Answer; page 114 thereof]

A. "[Petitioner] has stated in open court that he does not understand the charges." This flies directly in the face of the finding of the court-appointed psychologist. Moreso, it is equally on the record that when the court asked petitioner whether he understood the nature of the charges against him (at his "re-arraignment" on January 17, 2003] Mr. Sutcliffe sought to ask questions to clarify his understanding which the court refused to even hear, much less respond to. Any "misunderstanding" was created by the court's refusal to respond to petitioner's request that the "nature of the charges" be explained to him.

B. Defendant has suggested that is not properly subject to prosecution because his true legal name is not Sven William Sutcliffe, but instead, is 'Steven-William: of the Sutcliffe' [or something to that effect]". First. is this or is this not a direct quote from some record? Or is this a surmise or hearsay statement without foundation? Second, even if petitioner chooses to call himself "Steven-William of the Sutcliffes" this does not display any mental defect or disease; after all, we have "the artist formally known as Prince"; Dr. J, "P Daddy", and so on - none of their mental capacities are questioned simply because of the manner in which they wish to be addressed. [Also, by the by, this issue was discussed and discarded as insignificant by the examining doctor.]

C. The present Order re: Further Competency Determination of Defendant Pursuant to 18 USC 4241(d), also prepared by the AUSA, states unequivocally that the examining doctor "opined that defendant was competent to stand trial, that is, defendant understood the nature of the charges against him and was capable of

assisting in his defense." The Order then states that defendant "initiated a series of disruptive outbursts...". In fact, it is the court that initiated petitioner's conduct and even if petitioner's conduct was "disruptive outbursts" and the record reflects what those "outbursts" consisted of, they were neither disruptive nor did they display any disease or defect. In fact, the conduct consisted of a number of objections and/or motions including:

1. A verbal motion that Judge Matz recuse himself from hearing the writ of habeas corpus [Exhibit "M", page 5 thereof, lines 10-11] **which Judge Matz denied, but later admitted this was in error;**

2. A motion to remove his court-appointed counsel [Exhibit "M", page 5, lines 23-24 a motion which Judge Matz indicated he would consider and rule upon "later";

3. An objection to statements of Dr. Backer and a request that the doctor be placed under oath before responding to court-directed questions [Exhibit "M", page 6, lines 19 - 24];

4. Placing on the record the meeting conducted outside of his presence between the clerk of the court and his court-appointed counsel; and a subsequent "meeting" between court-appointed counsel, Dr. Backer and the AUSA, again, deliberately outside petitioner's hearing [Exhibit "M", page 7, lines 2 - 11];

5. An objection to Mr. Nicolaysen's speaking for petitioner [Exhibit "M", page 7, lines 22-23 and 25];

6. An apology for his apparent "raising" of his voice to the court [Exhibit "M", page 8, lines 16 - 17] and an explanation that petitioner is trying to make his record;

7. The court defined outburst as petitioner's speaking "before [he] is called upon; interrupting anybody else; [an] attempt to control the proceeding" - all actions that must be taken and are regularly taken by counsel to prevent any waivers by failing to timely object.

8. When petitioner sought to clarify the judge's comments regarding outburst, the judge refused to "reiterate what I said or explain it"' [Exhibit "M", page 9, lines 8 - 9] - this is similar to Judge Matz' refusal to explain the "nature of the charges" when asked by petitioner at both his "original" arraignment and at his re-arraignment 9 months later - thus, petitioner's attempts to write down the definitions and his inability to hear or capture all of them was of no consequence to Judge Matz - he either got them all on the first attempt or too bad;

9. A motion by petitioner to strike the report pursuant to 18 USC 4247(b); a motion that was heard and denied without comment that the motion was in any way an "outburst" otherwise prohibited by the court [Exhibit "M", page 11, lines 14 - 19];

10. A request that he be permitted to leave because Dr. Backer and his own court-appointed attorney were "doing their own show" and that the court "was not listening to [petitioner]." [Exhibit "M", page 12, lines 18 - 20.

Nothing in this exchange is demonstrative of any reasonable cause to order a 4241; in fact, if anything, it is a continual display of his actual, factual and rational competence to participate in his own defense.

The fact of the matter is that the district court has acted and continues to act in a manner to display actual bias and prejudice; it has become an ego issue with Judge Matz personally; and his Orders are designed solely to punish and delay and to bully petitioner into submission. If anything, it is Judge Matz' competence that should be questioned, not the petitioner's based on this record.

## VII. THE PURPORTED "LACK OF SHOWING"

The Government alleges that petitioner has "not made any showing, much less the 'strong showing' required that he is likely to succeed on the merits assuming he defines 'success' by winning reversal of the district court's order [prohibiting him from filing his own motions]." How nice that the Government knows in advance what the results of each of the motions filed and which may be filed will be; the fact of the matter is, that each of the filed motions "pending" address material issues, any one of which may have a material and significant effect on the outcome of this case.

The Government argues that petitioner has not shown that he will "irreparably injured absent a stay." The government has not suffered the complete and total loss of its freedom, family, and possessions since March of 2002; any unreasonable and unwarranted delay is prejudice to one incarcerated.

The Government claims that the "district court and the government...have suffered and will continue to suffer injury from defendant's numerous and frivolous filings, as the unauthorized filings require substantial resources to process and address." [Answer, page 17]

Petitioner has no resources, much less "substantial resources"; secondly, the court has never characterized any of petitioner's motions as being "frivolous"; third, the number of motions is irrelevant to their materiality; and fourth, that AUSA has numerous attorneys, legal assistants, investigators, FBI agents, etc., upon which it can call upon. The number of meritorious motions does not constitute prejudice nor does it equal the prejudice caused by the incarceration for 8 months under one theory (general intent) and the changing of the theory on the day of trial by means of a "re-arraignment" to charge "specific intent."

Incredibly, the government claims that the remedy to the order prohibiting defendant from filing his own motions "lies in the district court where defendant may choose [sic] to hire new counsel or act as his own counsel...". [Answer, page 17.] Since the government has incarcerated petitioner without bail now for a year; petitioner lacks any resources to "hire his own attorney"; furthermore, not only is he not required by law to do so, he is afforded the Constitution right to an attorney and the assistance of same. Also, the government overlooks the fact that petitioner is precluded by court order from making any request to the court - this is the exact nature of the insidious nature of this order; when can petitioner make his own motions against the court's order and when can he not; why does the court consider some motions made in contravention of this order and abjectly refuse to hear or permit the filing of others? If this is not the epitome of arbitrary and capricious application of absolute power, one would be hard pressed to find a better example in action.

Finally, the government argues that defendant is "already legally [sic] detained pending trial as a danger to the community and the evaluating psychologist has opined that further evaluation is required in order to determine whether the defendant is competent." Yet, the evaluating psychologist makes no mention of the "dangerousness of petitioner" to the community; and the issue as to whether petitioner is, in fact, "legally detained" is, again, pending before this Court. The reason why the government included this argument is that since petitioner is [legally] detained anyways, what difference does it make where he is detained?

The "difference" can be found in 18 USC 4247(b) which reads, in pertinent part, "Unless **impracticable,** the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. "(Emphasis added)'

There is no showing that (1) the federal medical facility in Rochester, Minnesota, is the most practicable location closest to the court to conduct this examination; nor (2) that there is no other federal medical facility closer than Minnesota that is capable of conducting this exam should a second exam be deemed appropriate.

No, the clear purpose behind ordering this second exam in the first instance was and is to punish and to send petitioner out-of-state and away from the resources he has here to defend himself, and to subject petitioner to the unreasonable delay of an additional 6 months and to subject petitioner to the impossible task of proving a negative - that he is not incompetent.

Furthermore, petitioner could be subjected to a prolonged "stay" at such facility for "treatment" which could include forced medications until and unless the facility

opined that petitioner's condition had "improved sufficiently." This is outrageous based on this record and this Court cannot and must not permit such a result to occur in the absence of any reasonable cause to order any 4241 determination, much less a second consecutive examination out-of-state resulting in a minimum 6 month further delay.

## VIII. CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that this court grant petitioner's request for the issuance of an emergency stay and writ of mandamus as previously requested.

DATED: March 27, 2003

Law Office of Leslie S. McAfee

LESLIE S. McAFEE, Esq.

DECLARATION OF LESLIE S. McAFEE, Esq.

I, LESLIE S. McAFEE, declare as follows:

1. I am an attorney duly admitted to the practice of law before the Ninth Circuit Court of Appeals and all federal district courts in California. I am acting as counsel for petitioner *pro bono*.

2. At approximately 9:16 a.m. on March 16, 2003, and continuing to 9"39 a.m., I received **more than 100 pages via facsimile** from the U.S. Attorney's office. These facsimiles came in 4 or 5 separate transmissions, often in mid-document, creating some initial confusion as the pagination is inconsistent due to multiple transmissions and the fact that the exhibits are not sequentially numbered at the bottom. The transcript of March 14, 2003, partially presented as Exhibit "M" contains the following missing pages based on the transcript page numbers on the document itself: 14-17, 22 - 25; 27-39; 43-47; 49 - 58; 59 - 62; 64 - 68; and all pages after page 69.

3. I attempted to contact Ms. Duarte, the Assistant United States Attorney whose signature graces the Answer, but only her voicemail rang. I left a message regarding the missing pages. Ms. Duarte did not provide any other contact telephone numbers. I expended 30 minutes trying to track down a telephone number of a secretary or someone who could provide the missing pages.

4. I finally was given the name, "Yolanda" and transferred to her. She confirmed she was Ms. Duarte's secretary. I told her I was missing the pages above and she indicated she would send them to me. I asked her for a direct telephone

number in the event there were more problems in receiving the facsimile. She gave me a number she represented was her "direct line."

5. After waiting almost an hour for the missing pages, I attempted to contact Yolanda at the number she provided; it was not her number, but was, instead, a number to the U.S. Attorney's office. After numerous explanations, I was finally transferred back to Yolanda, but got only her voicemail. I then called back and asked to speak with Ms. Duarte's supervisor. I was transferred to yet another person by the name of "Chris" and received his voicemail. I left him a message and brief explanation of what I was seeking.

6. At 11:25 I received a facsimile signed by Ms. Duarte in response to my voicemail message. I have attached a true and correct copy of same hereto as Exhibit "1". Ms. Duarte indicates she attached only those pages of the March 14, 2003, transcript (Exhibit "M") that were quoted or referenced in her filing.

7. I immediately attempted to call Ms. Duarte to address her letter but, again, got only her voice mail.

8. I then sent her a facsimile, a true and correct copy of which I have attached hereto as Exhibit "2". In this letter, I set out the reasons for my call and my request for the entire transcript. This facsimile was sent at 12:08 p.m.

9. At 12:31 I received another facsimile from Ms. Duarte, a true and correct copy of which I have attached hereto as Exhibit '3". The gist of this letter is to tell me she was not sure what I wanted, in spite of my earlier facsimile despite acknowledge receipt of my earlier facsimile which set forth specifically my concerns.

10. I again attempted to contact Ms. Duarte directly and, again, got only her voicemail, so I, again, sent her another facsimile. This was sent at 12:48 or 17 minutes after the receipt of her previous facsimile. I have attached a true and correct copy of this letter hereto as Exhibit "4".

11. I then received a return telephone call from "Chris" who was identified to me as being Ms. Duarte's supervisor, who wanted to know what I was bitching and complaining" about. I explained to him what the problem was and he agreed to tell Ms. Duarte, whom he stated he saw walk past him as we were speaking, what my concerns were.

12. Ms. Duarte's last facsimile at 12:53 indicated she had sent a copy of the transcript to petitioner's attorney "per the court order." [In fact, the order is to deliver to the defendant, not his attorney, the transcript.] Ms. Duarte agreed "as a professional courtesy to [me]" to send me a complete copy. She did not do so. I have attached a true and correct copy of this facsimile hereto as Exhibit "5".

13. I am required to be out of the office on March 27, 2003 attending a demurrer proceeding in Orange County in the morning and a Labor Board hearing in the afternoon. On Friday, March 28, 2003, I will again be in court (downtown Los Angeles) on a large hearing concerning the multiple defendant cases involving the Trevor Law Group and thousands of small automotive repair shops. I must also find some time to visit petitioner in prison in order to obtain his declaration and discuss with him the Answer and my Reply. Since I cannot meet with him before the deadline to respond to this Court, I have prepared and sent the Reply in advance of the deadline

and without the opportunity to review the entire transcript of March 14, 2003. I must also find the time to prepare a motion to permit petitioner to proceed *in forma pauperis* on the pending appeal even though petitioner made such a request within the body of the appeal; has been proceeding *in forma pauperis* in federal district court. This, too, will require a prepared declaration signed by petitioner which will require that I first meet with him to obtain the facts, then return to my office to prepare the declaration, then return, again, to the prison to obtain his approval as to the accuracy of the declaration and obtain his signature thereon.

14. Based on the limited portions of the March 14, 2003, transcript, and in particular, the testimony of Dr. Backer, I have serious concerns about the efficacy and validity of his "recanted" opinion regarding petitioner's competency. It appears from this limited record that he was directed and steered into this "change of opinion" by petitioner's own court-appointed counsel; and, in any event, that the expressions of "concern" by Dr. Backer were equivocal and did not meet the standard expressed in the cases to support a 4241 hearing. I find the entire proceedings of March 14, 2003, regarding Dr. Backer to be irregular and improper. I would request that t his Court review the entire testimony with a calloused eye and determine whether Dr. Backer is expressing a true opinion or whether that opinion was created for him by counsel (or others). An independent reading of the report (along with referring to petitioner as David Sutcliffe and David Snyder) does not correlate to his later comments made in the March 14, 2003, hearing and the clumsy and obvious attempts to legitimize his "change of opinion" are fallacious on their face.

15. **In the alternative, I would request an opportunity to cross-examine Dr. Backer on both his report and his "change of opinion"** as a real legal representative of petitioner as opposed to the contra-conduct of petitioner's court appointed counsel Gregory Nicolaysen whose conduct was motivated by his lack of ability to proceed to trial on march 25, 2003 (in light of Dr. Backer's initial findings) and petitioner's refusal to stipulate to waive his right to a speedy trial to permit Mr. Nicolaysen to seek a continuance of the trial date. I would also request that this court order such an opportunity and that a transcript of the proceedings be made available in time to permit a supplemental brief, answer and reply to be provided to this Court prior to any final determination. Contrary to the AUSA's representations that I have submitted this report which was filed under seal to this Court, that is simply not true. I have provided this Court only with the conclusions of Dr. Backer as contained in the report - less than one page total. I would be happy to provide this Court with the entire report should it so request.

16. In the event this Court deems Dr. Backer's testimony as sufficient to permit the second, consecutive 4241 examination, and otherwise will not grant my request to cross-examine Dr. Backer, I would request that such exam occur locally pursuant to 18 USC 4247(b) as there is no showing that it is "impracticable" to conduct such an exam locally.

17. I just received a copy of Judge Matz latest order admitting his error in denying the writ of habeas corpus; I have attached a true and correct copy of same hereto as Exhibit "6". I regret I did not have sufficient time to obtain a certified copy of

same within the time constraints of this emergency proceeding. I am confident that the government would confirm that the copy attached hereto is, in fact, a true and correct copy of same.

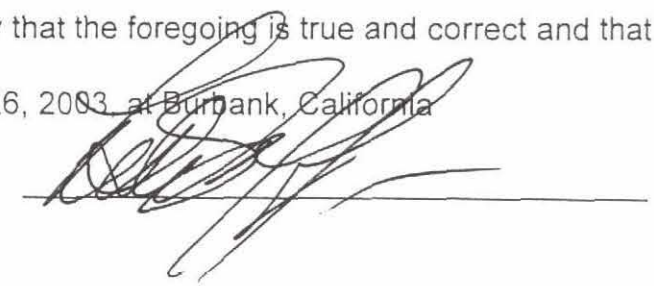
18. Finally, I would like to thank the Court for considering this petition and reply that were, by necessity, hastily prepared and which may contain numerous errors. In such instances, I submit that any errors are unintentional and the result of having to try to keep 100 un-numbered pages of facsimile in some order that it could be referred to in the preparation of the Reply and on my limited ability to review a complete record of this matter. Furthermore, I apologize if the number of pages exceeds the limitation and in such an event, I would ask the Court for leave to file the additional pages since the answer contained so many false representations that I felt had to be addressed.

19. I confess my own personal concerns about my profession based on the circumstances of this case and I remain gravely concerned that petitioner has been incarcerated since March of 2002 without any bail conditions whatsoever. I have represented petitioner as his attorney for several years and in that capacity I have not experienced the problems he has had with his court-appointed counsel. Mr. Sutcliffe is a particularly bright and capable man who wants to participate in these legal proceedings. He has adopted a life style that subjects him to standing out; he accepts this and is willing to stand up for what he believes in even if this results in his incarceration. His efforts on the "killercop.com" website were brilliant and the federal Magistrate in New Hampshire expressed similar sentiments. This does not mean that I or the magistrate personally agree with or approve of Mr. Sutcliffe's efforts, but that we

respect his right and abilities to present his case on the web in an informative, interesting, provocative and cutting-edge format that, if nothing else, challenges the viewer to think and confront uncomfortable issues involving the police, the courts and "the system."

20. I have never had any concerns about Mr. Sutcliffe's mental capacities; I have had him and his wife and daughter to my home for dinner. I am and have been aware of the many difficulties experienced between petitioner and his wife. I am aware that his wife "kidnapped" their daughter and fled to Israel and that petitioner had to seek the assistance of the U.S. State Department to bring his child back to this country. I spoke with his wife after petitioner was arrested and am familiar with the circumstances that lead up to her seeking and obtaining a restraining order, including the befriending of her by a female FBI agent who surreptitiously posed as someone else. In short, this whole case stinks, and it is high time that this matter was brought to a jury for determination.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on March 26, 2003, at Burbank, California



DECLARATION OF MAILING

I, LESLIE S. McAFEE, declare:

1. I am an adult over the age of 21 years. I am a licensed attorney in the State of California and admitted to practice and to appear before all of the federal district courts in California. The statements made herein are true to my own knowledge.

2. On March 27, 2004, I personally served the following documents, PETITIONER'S REPLY TO ANSWER OF REAL PARTY TO PETITIONER'S WRIT OF MANDAMUS by delivering a true and correct copy of same to:

Elena J. Duarte, Esq.
Asst. United States Attorney
1500 United States Courthouse
312 North Spring Street
Los Angeles, CA 90012

Hon. A. Howard Matz, Judge
Courtroom 14
312 North Spring Street
Los Angeles, CA 90012

I also caused a copy to be sent to the Ninth Circuit Court of appeals by overnight FedEx this date.

I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct and that this declaration of mailing was executed on March 26, 2003, at Burbank, California.

**U. S. Department of Justice**

***United States Attorney***
***Central District of California***

*Elena J. Duarte*
*Assistant United States Attorney*
*Computer Crimes Section*

*1500 United States Courthouse*
*312 North Spring Street*
*Los Angeles, California 90012*
*213-894-8611*
*213-894-8601 (facsimile)*

March 26, 2003

Leslie McAfee, Esq.
231 East Palm Avenue
Burbank, CA 91502

By facsimile: (818) 566-7115

Re: Steven William Sutcliffe
CA No. 0371223

Dear Mr. McAfee:

I received your voice mail message confirming that you received the government's filing in this matter, with exhibits, and your query regarding Exhibit M (portions of 3/14/02 RT). Please be advised that the Ninth Circuit allows, although does not require, that **quoted** pages from transcripts be submitted with the filings that quote them. For this reason, only the pages from transcripts quoted in my filing are included in the exhibits thereto. It appears that you did indeed receive the entirety of my filing and exhibits thereto; there was no omission. I apologize for the confusion.

Very truly yours,

DEBRA W. YANG
United States Attorney

ELENA J. DUARTE
Assistant United States Attorney

Law Office of Leslie S. McAfee
Tel: 818 566-1986
Fax: 818 566-7115

# FACSIMILE COVER PAGE

| | |
|---|---|
| To: Esq. ELENA J. DUARTE | From: Leslie S. McAfee |
| Fax #: 1 213 894-8601 | Fax #: 818 566-7115 |
| Company: US Attorney | Tel #: 818 566-1986 |
| Subject: US v Sutcliffe CR02-350 AHM | |
| Sent: 3/26/03 at 12:08:00 PM | Pages: 3 (including cover) |

## MESSAGE:

SEE ATTACHED





Ex 2

*LAW OFFICE OF LESLIE S. McAFEE*
ATTORNEY AT LAW
231 East Palm Avenue
Burbank, California 91502
email: trialattorney@sbcglobal.net
trialattorney@hotmail.com

(818) 566-1986
Facsimile (818) 566-7115

Leslie S. McAfee

March 26, 2003

ELENA J. DUARTE, Assistant United States Attorney
1500 United States Courthouse
312 North Spring Street
Los Angeles, CA 90012

SENT VIA FACSIMILE ONLY (213) 894-8611

Re: *United States of America v. Steven William Sutcliffe*
Case No. CR02-350 AHM

Dear Ms. Duarte,

Thank you for your response to my voicemail left early this morning. I note that you did not respond to my previous voicemail nor my previous facsimile to you and it is interesting that today's message deals with the same concerns expressed earlier.

You have advised me in your recent facsimile that you attached only those portions of the March 14, 2003, transcript that were quoted in your filing, which, of course, is not true. In fact, you selectively filed pages that were neither referenced nor quoted in your Answer but which you obviously believe are "beneficial" to the U.S. position, while excluding pages that may not be as helpful. You were ordered by Judge Matz to have the entire transcript to the defendant by March 21, 2003; you did not do so. Now, portions of this transcript may be relevant to my client and the Ninth Circuit Court of Appeals and you, again, have selectively decided which pages we will have access to and which you will omit. This conduct is both unprofessional and ethically outrageous and I will apprise the Ninth Circuit Court of Appeals of the same.

Finally, I would note "for the record" that in the numerous attempts I have made to communicate with you directly, you have neither called nor left me any messages on my voicemail; you have not responded to my inquiry regarding the Government's compliance with Judge Matz' March 14, 2003, Order, and you are continually "unavailable" by telephone. You provide no additional numbers (other than facsimile) so I can direct any questions to a secretary or other AUSA or supervisor and you are

Ex 2

aware there is a short time frame within which to respond to your pleading to the Ninth Circuit Court of Appeals. I had to expend more than ½ hour this morning trying to track down a "live" person I could communicate with, that being "Yolanda" who represented herself as being your secretary. Yolanda then gave me her "direct line" which, in fact, is not her direct line but, rather, a line to the U.S. Attorney's office in general.

Thank you for your apology for "the confusion" but I believe I understand the facts clearly.

Very truly yours,

LESLIE S. McAFEE, Esq.

Ex 2

## Received Event (Event Succeeded)

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| Date: | 3/26/03 | Fax Number: | |
| Pages: | 1 | Pages Sent: | 1 |
| Time: | 12:11 PM | Billing: | |
| Company: | | | |



**U. S. Department of Justice**

***United States Attorney***
***Central District of California***

*Elena J. Duarte*
*Assistant United States Attorney*
*Computer Crimes Section*

*1500 United States Courthouse*
*312 North Spring Street*
*Los Angeles, California 90012*
*213-894-8611*
*213-894-8601 (facsimile)*

March 26, 2003

Leslie McAfee, Esq.
231 East Palm Avenue
Burbank, CA 91502

By facsimile: (818) 566-7115

Re: Steven William Sutcliffe
CA No. 0371223

Dear Mr. McAfee:

I received a message from our front desk that you were trying to reach me and searching for "paperwork." I did not receive any messages or faxes from you concerning any request. I thought from your earlier message today that you had received a full and complete copy of my paperwork, filed today in the Ninth Circuit. If I am mistaken, or if there is anything else you need, please send your request to me in writing at the fax number above and I will attempt to assist you. Right now I am not sure what it is that you want – much less whether or not it is something I am able to assist you with. I will look forward to receiving your written communication. Thank you.

Very truly yours,

DEBRA W. YANG
United States Attorney

ELENA J. DUARTE
Assistant United States Attorney

Law Office of Leslie S. McAfee
Tel: 818 566-1986
Fax: 818 566-7115

# FACSIMILE COVER PAGE

| | |
|---|---|
| To: Esq. ELENA DUARTE | From: Leslie S. McAfee |
| Fax #: 1 213 894-8601 | Fax #: 818 566-7115 |
| Company: US Attorney | Tel #: 818 566-1986 |

| | |
|---|---|
| Subject: US v Sutcliffe CR02-350-AHM | |
| Sent: 3/26/03 at 12:48:10 PM | Pages: 3 (including cover) |

**MESSAGE:**

SEE ATTACHED

*LAW OFFICE OF LESLIE S. McAFEE*
ATTORNEY AT LAW
231 East Palm Avenue
Burbank, California 91502
email: trialattorney@sbcglobal.net
or
trialattorney@hotmail.com

(818) 566-1986
Facsimile (818) 566-7115

Leslie S. McAfee

March 26, 2003

ELENA J. DUARTE, Assistant United States Attorney
1500 United States Courthouse
312 North Spring Street
Los Angeles, CA 90012

SENT VIA FACSIMILE ONLY (213) 894-8611

Re: *United States of America v. Steven William Sutcliffe*
Case No. CR02-350 AHM

Dear Ms. Duarte,

Thank you for your second facsimile of this date. You advised me that you had forwarded the March 14, 2003, transcript to Mr. Sutcliffe's court-appointed attorney; however, the court order is rather specific - it states that a copy of the transcript shall be given to defendant, not defendant's court appointed attorney.

Furthermore, Mr. Nicolaysen seems to harbor the same reticence to communicate directly, as I have left him several messages regarding the March 14, 2003, transcript to which he has not responded. Thus, whether he ever received the transcript that should have been sent to Mr. Sutcliffe, is unknown to me.

Finally, it is spurious for you to tell me that "most attorneys would have ordered the transcript" since (1) I am not Mr. Sutcliffe's attorney for the criminal matter (as you point out in your Answer) and )(2) the writ was filed only recently; (3) Mr. Sutcliffe is indigent and (4) there would be insufficient time to obtain the transcript as regards to these proceedings.

I appreciate your willingness to provide me with the transcript in it's entirety; it would appear that you have provided most of the transcript aside from the selectively omitted pages. Indeed, although I do not know this for a fact, it certainly appears that you have sent me more pages than you have withheld. If this is incorrect, I apologize in advance.

Ex 4

Perhaps not speaking to each other is the "customary practice" in Federal Criminal practice; I would not know since this is not my area of practice. In my experience, attorneys usually pick up the phone and speak to each other as professionals in a courteous and professional manner. I apologize for not knowing the appropriate communication procedures.

It would seem easier to provide me with the missing pages rather than to duplicate what has already been provided; in either case, however, I would request that either the missing pages or the entire transcript be sent today, as I have a time constraint to respond to your Answer.

Thank you for your further assistance in this regard.

Very truly yours,

LESLIE S. McAFEE, Esq.

## Received Event (Event Succeeded)

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| Date: | 3/26/03 | Fax Number: | |
| Pages: | 1 | Pages Sent: | 1 |
| Time: | 12:34 PM | Billing: | |
| Company: | | | |



U. S. Department of Justice

*United States Attorney*
*Central District of California*
*1500 United States Courthouse*
*312 North Spring Street*
*Los Angeles, California 90012*
*213-894-8611*
*213-894-8601 (facsimile)*

*Elena J. Duarte*
*Assistant United States Attorney*
*Computer Crimes Section*

March 26, 2003

Leslie McAfee, Esq.
231 East Palm Avenue
Burbank, CA 91502

By facsimile: (818) 566-7115

Re: Steven William Sutcliffe
CA No. 0371223

Dear Mr. McAfee:

I received your latest facsimile. From what I can glean from your interesting letter, you do not have access to the complete transcript of March 14, 2003, and are seeking access. I had assumed that Sutcliffe had received a copy of the transcript, which I sent last week to his attorney per the court's order. I was not ordered to provide the transcript to you, and did not, and apparently you did not order it from the reporter, as most attorneys would do.

I will construe your letter as a request that I provide you with a copy of the 3/14/03 transcript in its entirety and will do so as a professional courtesy to you. I will fax a copy over to follow this letter, without separate cover page. Please let me know, in writing, if you require any further assistance in this regard.

Very truly yours,

DEBRA W. YANG
United States Attorney

ELENA J. DUARTE
Assistant United States Attorney



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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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| STEVEN WILLIAM SUTCLIFFE,<br>Petitioner,<br>v.<br>THE UNITED STATES OF AMERICA, et al.,<br>Respondents. | CASE NO. CV 03-01781-AHM<br>CASE NO. CR 02-350(A)-AHM<br>ORDER CLARIFYING AND VACATING RULING IN ANOTHER CASE DENYING HABEAS CORPUS PETITION |

At a status conference in another case, *United States v. Sutcliffe*, CR 350(A)-AHM, conducted on March 14, 2003, the Court stated that it had just been handed a habeas corpus petition filed the previous day. The Court went on to say "I deny the motion [sic] for habeas corpus, and no further briefing is necessary. The petition is factually defective on its face."

It was ill-advised for the Court to phrase its views that way. The Court does not deny the petition and this Order is meant to clarify that whatever procedural and substantive rights Mr. Sutcliffe may have under 28 U.S.C. § 2241 are not affected by the Court's statement in that case.

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At the hearing, the Court mistakenly believed that Defendant had made yet

another motion in that criminal case, where he is represented by a lawyer who (like three previous lawyers) has been the object of Mr. Sutcliffe's criticism. What concerned the Court (and what the Court intended to avoid) was that Defendant inadvertently might have been foreclosing his right to habeas relief by directly filing another motion in violation of Local Criminal Rule 1.1 and Local Rule 83-2.9.1. (The Court had issued prior rulings concerning these violations by Defendant.)

The Court now realizes that Mr. Sutcliffe in fact did file a separate, civil habeas petition in this case, in which he is proceeding *pro se*. He is entitled to do so, and the Clerk is permitted to accept and file papers Mr. Sutcliffe files in this case. Accordingly, the petition shall be randomly assigned to a Magistrate Judge and further proceedings shall be conducted under General Order 01-13.

This order moots Petitioner's request for issuance of a certificate of appealability.

IT IS SO ORDERED.

Dated: March 20, 2003

A. HOWARD MATZ
United States District Judge

Notice to Counsel from Clerk:

This case has been randomly referred to Magistrate Judge Andrew J.Wistrich .

Case now reads as CV 03-1781 AHM (AJW).

# Affidavit of Facts

03:26:2003

I, Steven-William: Sutcliffe, a Citizen of one of the United States, hereby State and declare, under the pain and penalty of perjury the following facts.

1) In a letter, dated 12:09:2002, my previous court imposed counsel, William Harris, stated "from my observation it does not appear you suffer from a mental defect." Further he states "I do not intend to obtain a psychiatric work-up and assert a diminished incapacity defense."

2) On 01:14:2003 Judge Matz held an In Camera hearing on my motion and I motioned to remove Harris as incompetent. He agreed. I had asserted my rights under the Sixth Amendment and on my motion the court, on the record took judicial notice of Faretta v California, 422 U.S. 806. Only after my challenge to Mr. Harris and his incompetency did Mr. Harris raise the issue of my [in]competency.

3) On 01:17:2003 I was again brought forth to plead on a superseded indictment and Judge Matz attempted to appoint another counsel to "represent" me. I objected and motioned for anyone present to state their authority to speak for me. No one answered. [See Title 28 § 2072(b)]

4) On 02:12:2003 I met for the first time with a Dr. Backer. We met again on 02:18:2003 and 02:19:2003, at which point I informed him I was finished discussing any issues of my competency. He came to see me on 02:28:2003 to inquire into a meeting where the court appointed counsel had appeared to visit me. As he left he told me "Remember Steve, co-operate!"

5) On 03:13:2003 Dr. Backer again called me upstairs to his office. He stated he had finished his report and wanted me to read it since I had a hearing on it tomorrow. After reading his report he asked me what I thought about it and what I intended to do tomorrow. I told him I agreed I was competent just as the report stated. I told him I intended to protect all of my rights tomorrow at the hearing, including, but not limited to, the right to the Confrontation Clause and Due Process Clause. He then stated "I don't believe it would be wise for you to confront anyone tomorrow." I thanked him for his counsel and returned back to my cell.

6) On, or around 02:21:2003 Gregory Nicolaysen [my court appointed representative] visited me for the first time at the Metropolitan Detention Center. I had not heard nor seen him since 01.17.2003. He stated he refused to assist me in any challenge to recuse the judge. He stated he refused to assist me in any challenge to the jurisdiction of the court. He stated he would consider a motion for bail, if I proved to him and the judge that we could get along and work together. He went on to state that he had "just received your file from previous counsel, in three un-organized boxes" and was in the process of having his assistant sort and organize them. When asked why he had taken so long to contact me he stated "I have lots of other cases." He stated he would talk to Dr. Backer and tell him he believed we could get along. He stated he would return to visit me on 02:24:2003.

7) On 02:24:2003 Gregory Nicolaysen failed to visit.

8) On 02:28:2003 Dr Backer came to see me and inquired about my meeting with Mr. Nicolaysen and how we were getting along. As he departed he stated "Remener Steve, cooperate!"

9) On 03:03:2003 Mr. Nicolaysen visited me. In his folder I observed a document titled Motion for a hearing related to the issue of my competence set for 03:10:2003, at 1700 hours. At the onset he stated "The United States is pressuring me to say you are incompetent." I asked which of the United States and he replied "Elena Duarte." He further stated "Don't worry" since he believed I was "indeed competent" and that "You don't belong in prison here along with drug-dealers and gang members being subjected to eating crappy food and breathing canned-air. I concured and he departed.

10) On 03:14:2003, at 10:00 hours, I was taken from my holding cell to see Mr. Nicolaysen, prior to my competency hearing. He proceeded to state that both he and Dr. Backer found me to be competent. He stated that the judge had set My trial for 03:25:2003, due to my demanded Sixth Amendment Right. He further stated that he wanted me to inform the judge that I would agree to waive time on this date. He further stated that he needed "a month or two" to be prepared for trial. I declined this request.

I told him I wanted him to state, on the record, at the begining of the hearing, to the judge just what he had told me. Further, I told him I expected him to challenge the timeliness, under 4247(b), of Dr. Backers report, if the judge refused to remove him. Further, I told him to make a motion to recuse the judge for bias under the Due Process Clause of the fifth amendment of the Bill of my Rights. He became upset and stated "This is my case and I will decide what to file and what motions to make. I will not attack Dr. Backer, he's a nice guy. I will not attack the judge either." He then left.

11) On 03:14:2003, at 10:45 I was brought into the court and seated at the defense table. Gregory Nicolaysen entered and sat next to me. He stated "Have you changed your mind?" I stated NO. The clerk motioned him over to his table and whispered to Mr. Nicolaysen "The judge wants to know if he's going to waive the 25th trial date." Mr Nicolaysen stated NO. Dr. Backer then entered the courtroom. Mr. Nicolaysen proceeded to ask me my position related to our discussion at 10:00. I stated "What part of NO did you not understand?" He then told me to "Take a time out Steven!" and told the Marshal to remove me from the defense table outside of

The Clerk left his table and exited through a door adjacent the judges bench. Mr. Nicolaysen then went over to the prosecutors table and spoke softly to her. On noticing Dr. Backer he exited the bar, they spoke for a minute then exited into the hallway out the front door. I then heard the prosecutor state, "I'm going to join them." She then exits out the same door. At I see the judge peek through the hole in the door as if to enter, he sees me then retreats back into his chambers. About ten minutes later all three of the actors in the hallway enter, take their positions, then the judge takes the bench. The court imposed Counsel ignores my instructions and I object. The judge states he received my Habeas Writ, I motion he recuse himself from ruling on it and object; he too ignores this demand to protect my rights. He states he will have me removed if I, A) interupt or B) speak again without first obtaining his permission. When the court failed to halt the proceedings and imposed the aforesaid conditions on me which I would have to break to make a timely objection I simply stood up and removed myself from the charade.

12) Later that day I was returned to the courtroom. Mr. Nicolaysen was not present. When I attempted to stand up and make a motion to object to the jurisdiction,

one of many I have made in the past to both the court and his imposed counsel, the judge waved his hand and in the middle of my objection the Marshals grabbed me by the chains around my waist and proceeded to drag me out of the court to prevent me from making a record. Just prior to this the judge alluded; I guess in an attempt to convince me I was not a victim of a Star Chamber, that I would personally receive a copy of the transcript. In light of the fact that I have personally witnessed him divulge sealed In Camera communications, to both Dr. Backer and the prosecutor; and the fact that I witnessed him engage in Ex Parte communications with previous counsel he had "personally" picked [to assist me]; and the fact that as of todays date I have neither seen nor received a copy of said transcript, this Affiant would indeed be nuts to place any honor on the words of the court.

I declare under penalty of perjury that the foregoing is true and correct.
3:27:2003

Steven Sutcliffe