

CA [04-50189](#)

DC NO. CR 02-00350-AHM
(Central District of California)

IN THE UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

INTRODUCTION

Appellant Sutcliffe asserts that numerous due process violations occurred in this case, and that those violations separately and cumulatively led ultimately to the negative OPINION against him in this Court. Appellant further argues that his appellate counsel (Sung Park) failed to raise these due process violations, inter alia, properly, and these failures led to an adverse OPINION by this court. Appellant respectfully requests that the court rehear and reconsider the OPINION.

I. DUE PROCESS VIOLATIONS REGARDING THE DESIGNATION OF THE CASE AS 'COMPLEX'

Sutcliffe's right to Due Process was violated in connection with the treatment of this case as 'complex'. The record is confused¹ on the designation of complexity and this confusion reflects the violation of rights and due process. Early in the case it was designated as a complex computer case, but not in accordance with the legal procedure required by law.

1. On May 16, 2002, (docket 23) "A stipulation and order was filed by the Judge to continue the trial date and exclude time until September 3, 2002" This stipulation listed as reason number 1 that this case was a 'complex' computer case.
2. Reference to the designation of the case as 'complex' can also be found in **Exhibit 1**, attached hereto, filed by Debra W. Yang, on August 27, 2003.
3. It is essential to understand that the designation of the case as a "complex computer case" after initial arraignment is what allowed time to be waived even though Sutcliffe never agreed to waived time. Moreover, the specific stipulation as to the complexity by the prosecutor and the Public Defender's office and judge constituted a specific finding. "We do not count continuances granted by the district court where it made no specific findings supporting a general mantra[s] of 'complexity'." (US v. Aviles, 170 F.3d 863, 869 (9th Cir.1998)).
4. Thus, there is a clear distinction between a 'complex' case as defined by law, and a regularly

¹ "all this is very technical – I *tried* very hard to follow what you were doing. *I don't think the jury could follow it.*" Trial Transcript, 11.17.2003. Judge Alvin Howard Matz, Page 809, lines 12-20

(non-legally defined) complex (or complicated). Only the actual and lawful designation of a case as legally 'complex' can be sufficient for waiving time when the Defendant does not agree to waive time. In order to waive time and justify experts, the court must follow the procedures for designating a case as complex, and *then must manage the case accordingly* - neither of which was done. Therefore, in essence, the court used the 'excuse' of complexity to waive time but failed to adhere strictly to the process, rules and laws governing complex cases.

5. To establish the fact that the case was, in fact, being treated as complex despite the failure of the prosecutor to file the required notice can be found in the transcript of September 26, 2003, on page 31 (This transcript is attached as **Exhibit 2**, hereto):
6. Ms. Duarte's comment, along with the stipulation in the record from May 16, 2002, together provide solid evidence that the court was, in fact treating this case as legally 'complex' for certain purposes.
7. Additionally, the record reflects in numerous locations that experts were ordered for the defense's case. Had the court not designated the case as complex, no experts would have been ordered at state expense. References to these experts can be found most readily in the record from September 26, 2003:
 - a. "THE COURT: Now, I don't think it is inappropriate for the record to note that I've previously authorized experts, or at least one expert... and I think could have been more than one, somebody with specific skill and advanced skill in computer technology and internet technology as well to be appointed to represent or assist prior counsel." See transcript of September 26, 2003, page 20.
8. The Manual for Complex Litigation (2004 Edition) specifies the responsibility of the court to supervise counsel: "**Fair and efficient** resolution of **complex litigation** required that the court exercise early and effective supervision (and where necessary, control), that counsel act cooperatively and professionally, and that the judge and counsel collaborate to develop and carry out a comprehensive plan for the conduct of pretrial and trial proceedings." Additionally, the Manual further specifies the specific duties the Judge should

perform in order to exercise **effective** management of a **complex case**:

“Effective judicial management generally has the following characteristics:

- *It is active.* The judge anticipates problems before they arise rather than waiting passively for counsel to present them. Because the attorneys may become immersed in the details of the case, innovation and creativity in formulating a litigation plan frequently will depend on the judge.
- *It is substantive.* The judge becomes familiar at an early stage with the substantive issues in order to make informed rulings on issue definition and narrowing, and on related matters, such as scheduling, bifurcation and consolidation, and discovery control.
- *It is timely.* The judge decides disputes promptly, particularly those that may substantively affect the course or scope of further proceedings. Delayed rulings may be costly and burdensome for litigants and will often delay other litigation events. The parties may prefer that a ruling be timely rather than perfect.
- *It is continuing.* The judge periodically monitors the progress of the litigation to see that schedules are being followed and to consider necessary modifications of the litigation plan. Interim reports may be ordered between scheduled conferences.
- *It is firm, but fair.* Time limits and other controls and requirements are not imposed arbitrarily or without considering the views of counsel, and they are revised when warranted. Once established, however, schedules are met, and, when necessary, appropriate sanctions are imposed (see section 10.15) for derelictions and dilatory tactics.
- *It is careful.* An early display of careful preparation sets the proper tone and enhances the court’s credibility and effectiveness with counsel. The judge’s role is crucial in developing and monitoring an effective plan for the orderly conduct of pretrial and trial proceedings.”
(See Manual for Complex Litigation, 4th, pages 12-13).

9. By the time this case had been on track for over a year, and with trial only weeks away, Judge Matz had no idea what was going on relating to the experts he had appointed; clearly his supervision of this case was lacking, as reflected in the record from September 26, 2003:

THE COURT: “OKAY. IT COULD BE THAT I AM MISTAKEN IN MY UNDERSTANDING AS TO WHETHER OR NOT PRIOR EXPERTS WERE LINED UP AND I HAVE NO IDEA ONE WAY OR THE OTHER WHETHER THEY DID ANYTHING IF THEY WERE LINED UP.” (See transcript of proceedings from September 23, 2006, page 21.)

10. The fact is that experts were not only ordered, but the original Public Defender’s office had not only found and secured one (paid \$5000), but that expert had analyzed over 1000 pages of data and knew the material quite well and was ready to testify. Mysteriously, none of that information was forwarded to Sutcliffe, to subsequent counsel, or made its way

into the record or trial.² Judge Matz was completely ignorant of what had taken place, and under no circumstances could a reasonable person conclude that he was managing any aspect of this 'complex computer case' or the counsel and experts appointed to defend Sutcliffe.

11. Surprisingly, also on September 26, 2003, Judge Matz directly contradicted the stipulation of complexity made on May 16, 2002 in order to reassure newly appointed counsel Reed that he would be prepared for trial on time.

"THE COURT: ... it doesn't strike me as that complicated a case. The nature of the evidence is a little bit foreign to me because I'm not good at the - - but the nature of the issues is *pretty* straightforward and clear. So I think without prejudicing it that it may not be necessary to consume significant amounts of time to assure that Mr. Reed feels in good faith in his mind that he's up to speed." See transcript of proceedings from September 26, 2003, page 74.

12. Nothing in the case had changed since May 16, 2002, when all agreed the case was, in fact, complex, but here on September 26, 2003, Judge Matz changed that determination unilaterally to persuade Mr. Reed to accept appointment as counsel and to handle the trial, *which at that point was very close at hand*. The Court's characterization of the case as uncomplicated was not truthful, and was a manipulation to secure Reed's appointment. As Reed later found out, the case had become more complicated because of the amount of time that had gone by, not to mention that several items of discovery evidence and reports and all the expert analysis had become lost or stolen³ during that time as well, further complicating the ability to mount an adequate defense. Reed was bushwhacked. And the district court admittedly knew it.⁴

² See Nicolaysen's declaration attached to 'Ex Parte Application by Defendant Steven William Sutcliffe for Order Appointing Computer Expert Under Criminal Justice Act, dated March 24, 2003, page 4.

³ See **Exhibit 3**, attached hereto.

⁴ "[REED,] YOU ARE SITTING HERE WITH A *UNDERSTANDABLE WORRIED LOOK*, IF NOT A *SCOWL* ON YOUR FACE, AND *I UNDERSTAND WHY* AND I 'M CONCERNED ABOUT THAT. WELL, IF, MR. REED, I MAKE A FINDING THIS AFTERNOON THAT BECAUSE OF MY NEGLIGENCE TO GO THROUGH, TO CROSS EVERY T AND EVERY I THAT I THOUGHT HAD BEEN ADEQUATELY COVERED - - BECAUSE THE MESSAGE CLEARLY GOT THROUGH TO MR. SUTCLIFFE, HE'S CONFIRMED THAT YET AGAIN TWICE TODAY **THAT I CONSISTENTLY TOLD HIM IT WAS NOT IN HIS INTEREST TO, BY CONDUCT OR OTHERWISE, GO IT**

13. Judge Matz failed to adhere or just ignored to due process requirements:
 - a. *Comprehensive Plan*: there was no comprehensive plan created or followed; the record reflects no such plan.
 - b. *Effective Supervision*: Judge Matz did not supervise or control counsel properly; numerous problems were reported with evidence, discovery, communications and experts, but only after months of delays was any order issued to correct and even then the corrections were inadequate.
 - c. *Active*: Judge Matz was not active but passive, waiting for problems to arise before dealing with them.
 - d. *Timely*: Judge Matz failed to rule timely on issues that affected further proceedings (see sections two and three of this document relating to the right to proceed Sui Juris and competency proceedings).⁵
 - e. *Continuing*: Judge Matz failed to stay apprised of the progress of the case except when the case was calendared; no interim supervision was exercised.
 - f. *Firm but Fair*: Judge Matz failed to hold previous counsel accountable for their failure to procure experts, obtain and turn over evidence and discovery or even to file the required complex notice in the record. Time limits were not honored but extended and waived despite the objections of Sutcliffe.
 - g. *Careful*: Judge Matz' failure to follow the law on the 'complex' designation and management of this case, particularly regarding counsel, evidence and experts, demonstrates a clear lack of care on his part.

ALONE AND WAIVE HIS RIGHT TO A LAWYER. “ Yet, Matz also claimed before this previous statement: “SO A PRUDENT THING TO DO FOR SOMEBODY IN YOUR SITUATION [SUTCLIFFE] WOULD BE IS I’LL TAKE MY BEST SHOT AT IT. YOU CAN TAKE YOUR BEST SHOT AT BEING YOUR OWN LAWYER, IF YOU WANT, OR YOU CAN BE A LAWYER.” Page 54. Ibid. Appellant wonders where this constitutional attitude was on January 14, 2003?

⁵ See “Defendant’s Motion for Court to Reconsider Orders of 8/27/03” filed September 4, 2003. This motion contained specific objections to the fact that Judge Matz improperly delayed hearing Sutcliffe’s motion to relieve Nicolaysen for months while Nicolaysen continued to act as counsel despite Sutcliffe’s objections, AND then hearing Nicolaysen’s motion to be relieved before hearing Sutcliffe’s motion to relieve him; this course of action effectively allowed Nicolaysen to blame Sutcliffe for the problems with the attorney/client relationship and prevent Sutcliffe from registering his factually-based complaints about Nicolaysen into the record. Altogether this series of improper actions by the Judge allowed him to later declare that Sutcliffe, by his actions, had waived his right to counsel.

14. Among the legal requirements are that the US attorney is required to file a "Notice to Court of Complex Criminal Case". This requirement can be found in General Order No. 07-02. A sample of this required notice is attached as **Exhibit 4**, attached hereto. The law and the notice itself specify that the form be filed no later than two business days *prior* to the time of arraignment. This Notice was never filed at any time, despite the fact that there were two arraignments, and therefore *two opportunities to meet the requirement and procedural process*. **Exhibit 5**, attached hereto.
15. The court failed to adhere to legal requirements and procedure and the result was that the case was only *partially* treated as complex. For purposes of waiving time the case was treated as complex, but for purposes of expert witnesses, judicial management and appointment of appropriate counsel for the defendant, it was not. This was another substantive violation of the Due Process Clause.
16. Experts were ordered but there was no follow through, no reports, no investigations made. At trial, the Defense had no expert except for cross-examination of the government's expert, which of course is by nature prejudicial to the defense.
 - a. Over a year after the designation as complex, still no expert reports or witness testimony had been obtained for the defense. All of the attorneys assigned to Sutcliffe failed to follow the court's instructions to provide a proper defense in this regard.⁶
 - b. Counsel Reed went so far as to attempt to justify the complete failure of all defense counsels to procure the experts on September 26, 2003:

"REED: And that's why I didn't go through with the expert - -

THE COURT: That's why what?

REED: That's why he didn't go through with actually following through, getting the experts, having them come testify; he [Nicolaysen] felt that he had sufficient information with that CD-ROM to accomplish what he needed through cross-examination of (government) witnesses and other means." (See

⁶ This established fact contributes to Sutcliffe's continual assertions that his appointed counsel was incompetent and/or ineffective.

transcript of proceedings from September 26, 2003, page 38)

- c. The above statement by counsel Reed is astonishing; it is unfathomable that a competent defense counsel would rely for his 'expert' witness (required by law in a complex case) on information provided alone by the expert for the adversary, thereby precluding cross-examination.⁷

Thus in summary on this argument we are dealing with two options, both of which result in reversible error to the case: Either the case WAS complex or it WAS NOT.

If the case WAS complex,⁸ then the court erred by

- a) Ensuring the U.S. Attorney's office filed the proper notice required by law,
- b) Failing to ensure experts for the defense were secured and managed,
- c) Failing to ensure each appointed attorney was competent to handle the complex issues of the case
- d) Failing to properly manage a complex case resulting in lost reports, files and witnesses for the defense.
- e) Deciding unilaterally on September 26, 2003 that the case was suddenly no longer complex so as to commandeer the last-minute cooperation through a bushwhacking of Mr. Reed.

If the case WAS NOT complex, then the court and U.S. Attorney erred by

- a) Waiving time improperly, violating Sutcliffe's Speedy Trial rights under the Due Process Clause; and,

⁷ Later herein we will show that Nicolaysen actually threatened Sutcliffe that he would cause him to lose the case if Sutcliffe made him look bad, go to court or otherwise did not do as he was told. Nicolaysen's failure to procure the experts as ordered can be construed to be related to this threat. Nicolaysen's declaration attached to 'Ex Parte Application by Defendant Steven William Sutcliffe for Order Appointing Computer Expert Under Criminal Justice Act, dated March 24, 2003, page 4, clearly states experts were hired and performed work but none of that work ever made it to the defendant or to the trial. Please see **Exhibit 6**, attached hereto of Transcript of 09.26.2003, Pg. 20.

⁸ First-Degree Murder trials, with one or more victims, have been brought to trial faster than this case was in the district court. "Three measures of processing time were taken from the day of the murder--to arrest, to indictment, and to final disposition. Most spouse murder defendants were arrested on the same day the killing occurred.

Average time to indictment was 4 months. Average time to final disposition was almost exactly 1 year. For husbands tried by a jury, 12 1/2 months was the average elapsed time from the day of the murder to the conclusion of the jury trial. For wives tried by a jury it was significantly longer, about 18 1/2 months." Source: U.S. Department of Justice. See <http://www.ojp.usdoj.gov/bjs/pub/ascii/spousmur.txt>

- b) Appropriating funds for the government for experts when such was not required
- c) Misrepresenting the complexity of the case to all the parties and then filing six "ends of justice" extensions for waivers of time.⁹

II. DUE PROCESS VIOLATIONS REGARDING RIGHT TO PROCEED SUI JURIS

The first noteworthy event to take place pertinent to the Sixth Amendment right to counsel is that the Public Defender's office assigned to Sutcliffe moved to withdraw from the case. Sutcliffe in fact objected to them withdrawing, citing the fact that it would cause an unreasonable delay in trial.

Why did they withdraw? They refused to enter their reasons on the record, but the Appellant avers their reason was related to two facts:

- a) that the Public Defender's office at the time supported a bill,¹⁰ which proposed abridging Sutcliffe's speech on the internet based on speech found on a website www.killercop.com,¹¹ previously owned and operated by Mr. Sutcliffe; and,
- b) that the Public Defender's office had some role in the police activity which resulted in the removal of www.killercop.com from the internet. See **Exhibit 27**, attached hereto.

The withdrawal not only of the individual Public Defender, but also of the entire office, for the entire district is extremely unusual, and created immediately an undue burden upon the Defendant. This is relevant because it establishes a pattern of behavior on the part of the Public Defenders office that they refused to aid Mr. Sutcliffe because of his political beliefs and speech. If this 'conflict' extended to every attorney in the Public Defender's office for the

⁹ "Congress did not intend the 'ends of justice' exclusion ... to be granted as a matter of course but rather to be used **sparingly** and **only when necessary**." U.S. v. Ramirez-Cortez, 213 F.3d 1149, 1155 (9th Cir. 2000) Speedy Trial Act imposes strict specificity requirements for 'ends of justice' exception; if district court fails to comply with them, period of time covered by continuance will not constitute excludable delay." U.S. v. Lloyd, 125 F.3d 1263 (9th Cir. 1997)

¹⁰ See **Exhibit 7**, attached hereto.

¹¹ "The behavior that neither resulted in a conviction nor even an arrest but that was facially unlawful, and in any event a very chilling indication of the consideration as to how likely it is that he would commit further crimes is that he undoubtedly and indisputably set up this killercop.com website." Sentencing Transcript, 04.15.2004, Page. 25.