

CA 04-50189
DC NO. CR 02-00350-AHM
(Central District of California)

IN THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff/Appellee,)
)
vs.)
)
STEVEN WILLIAM SUTCLIFFE,)
)
Defendant/Appellant.)
)
)
)
_____)

I

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- A. WHETHER APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL.
- B. WHETHER THE TRIAL COURT LACKED JURISDICTION.
- C. WHETHER SECTION 875(C) IS UNCONSTITUTIONAL ON ITS FACE FOR VAGUENESS.
- D. WHETHER APPELLANT WAS SUBJECTED TO UNCONSTITUTIONAL SELECTIVE PROSECUTION.
- E. WHETHER THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE INDICTMENT ON SPEEDY TRIAL GROUNDS.
- F. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO RECUSE JUDGE MATZ.

- G. WHETHER THE DISTRICT COURT ERRED IN DENYING MR. SUTCLIFFE'S REQUEST TO RECONSTRUCT THE WEBSITE "EVILGX.COM".
- H. WHETHER THE DISTRICT COURT ERRED IN DENYING MR. SUTCLIFFE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF THE RIFLE.
- I. WHETHER THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE INDICTMENT.
- J. WHETHER THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.
- K. WHETHER THE DISTRICT COURT COMMITTED A REVERSIBLE ERROR IN ITS JURY INSTRUCTION.
- L. WHETHER THIS CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR RESENTENCING.

II

ARGUMENTS

A. APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

The government argues that the record supports the district court's determination that Mr. Sutcliffe had knowingly and intelligently waived his right to counsel. Mr. Sutcliffe disagrees.

1. The Record Does Not Support the District Court's Finding that Appellant Waived His Right to Counsel.

With respect to the dismissal of Mr. Sutcliffe's first appointed attorneys, the record shows that Ms. Potashner and Ms. Bednarski from the Public Defender's Office both began representing Mr. Sutcliffe together.¹ (RT 8/22/02 at 18; GER 11)². When Mr. Sutcliffe complained of dissatisfaction with Ms. Potashner, the district court simply shifted the main responsibility of representing Mr. Sutcliffe to Ms. Bednarski as a practical solution to allow the Public Defender's Office to continue representing Mr. Sutcliffe. (RT 8/22/02 at 18-19; GER 11-12). The court did not make

¹ "But in all candor, we are both on this case, Your Honor." (RT 8/22/02 at 18; GER 11).

² RT refers to the Reporter's Transcript followed by the date and the page number; GER refers to the Government's Excerpts of Record; AOB refers to Appellant's Opening Brief; AB refers to the Government's Answering Brief; ER refers to Appellant's Excerpts of Record.

any finding of fault with Mr. Sutcliffe in making such a change.

When Ms. Bednarski moved to relieve the Public Defender's Office from representing Mr. Sutcliffe, the district court recognized the breakdown in the relationship (RT 9/23/02 at 19) and granted the motion. (Id. at 20). In doing so, the court specifically stated that "it's not necessary for [the court] to make any findings about who's right and who's wrong. [The court's] not saying you're (Mr. Sutcliffe) wrong. . ." (Id. at 21). Therefore, nothing in the record shows that the dismissal of the Public Defender's Office was of Mr. Sutcliffe's own doing or motivated by Mr. Sutcliffe's desire to delay the proceedings and frustrate the judicial process as alleged by the government (AB 25).³

Mr. Sutcliffe's next attorney, Mr. Harris, was also relieved after the district court determined that the attorney-client relationship had been shattered.⁴ (RT 1/14/03 at 12-13). Mr. Sutcliffe had been complaining of

³Contrary to the government's allegation that Mr. Sutcliffe engaged in dilatory tactics, Mr. Sutcliffe did not want another attorney, rather, he requested the court to require the public defender's office to do a competent job and continue to represent him in order for the trial to proceed as scheduled. (Id. at 13-18).

⁴The district court did not make any finding as to what caused the breakdown in the relationship. More importantly, the court did not fault Mr. Sutcliffe for the breakdown in the relationship.

Mr. Harris' incompetence with respect to computers and the Internet technology. (RT 12/04/02 at 16-18; RT 1/14/03 at 16, 23-24). Mr. Harris had also acknowledged that he is a computer illiterate and that he might not be competent to represent Mr. Sutcliffe in a computer case. (RT 11/21/02 at 14-15, 17).

The government alleges that after the dismissal of Mr. Harris, Mr. Sutcliffe refused to accept any attorney, thereby insinuating that Mr. Sutcliffe acted unreasonably.⁵ (AB 18). The government takes Mr. Sutcliffe's statement out of context.

Mr. Sutcliffe did not refuse to accept any attorney; rather, he was asking the court to appoint him a **competent** attorney. Mr. Sutcliffe stated: "I want this case dismissed. How many lawyers do I have to go through? If Your Honor was sitting in a prison where I'm sitting right now waiting for me to find you a **competent** lawyer I think this shoe would be on a different foot. I have gone through three lawyers now. How many do I have to go through? . . ."

(RT 1/14/03 at 17; GER 51)(emphasis added).

⁵At other places, the government uses the same statement made by Mr. Sutcliffe to argue that he intended to delay the proceedings by refusing to work with the lawyers and keep going through different lawyers. (AB 15, 23).

As argued in the opening brief, nothing in the record demonstrates that the dismissal of Mr. Harris was of Mr. Sutcliffe's own making or a self-serving attempt to sabotage his attorney-client relationship in order to obstruct or delay the proceedings.⁶

With respect to Mr. Nicolaysen, the opening brief adequately sets forth the events leading up to his dismissal. (OB 30-34). In Mr. Nicolaysen, Mr. Sutcliffe had an attorney who, from the time of his appointment, wanted to find Mr. Sutcliffe incompetent to stand trial (RT 1/17/03 at 16-17), who later refused to accept the doctor's conclusion that Mr. Sutcliffe is competent (RT 3/14/03 at 11)⁷, who eventually convinced the court to order more psychological tests (Id. at 60-61, 67), and who ultimately attempted to have Mr. Sutcliffe be treated for mental defect when there was nothing wrong with Mr. Sutcliffe (RT 4/7/03 at 3-9).

No defendant should be compelled to undergo a trial with an attorney who repeatedly attempts to portray his

⁶Although the district court might have been frustrated over the fact that it had to relieve Mr. Harris, it did not make any findings as to who was at fault for the dismissal of Mr. Harris.

⁷Even the government conceded that Mr. Sutcliffe was competent; yet, Mr. Nicolaysen was "not prepared to simply accept, at face value, the conclusion in the report, that my client is competent." If this is not conflict of interest,

client as a mentally ill person **when he is not.**⁸ As this Court has stated in Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970), “[t]o compel one charged with grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.” Clearly, Mr. Sutcliffe was justified in requesting the district court to relieve Mr. Nicolaysen because of the irreconcilable conflict.

After relieving Mr. Nicolaysen, the district court refused to appoint another attorney, stating that Mr. Sutcliffe fought with all four attorneys (Ms. Potashner, Ms. Bednarski, Mr. Harris, Mr. Nicolaysen), insisted on firing all of them, refused to waive the Sixth Amendment right to counsel, and sued at least one lawyer (RT 8/27/03 at 60; GER 131). However, as shown above and in the opening brief, the record does not support such a conclusion.⁹

After ordering Mr. Sutcliffe to proceed in pro per and appointing Mr. Reed as a standby counsel, the court reversed

we do not know what is.

⁸Mr. Sutcliffe was not treated for mental illness, let alone found to be incompetent.

⁹All of the attorneys moved to withdraw. The district court did not make any finding as to who was at fault for the dismissal of the Public Defender’s Office and Mr. Harris. And clearly, Mr. Sutcliffe was justified in relieving Mr. Nicolaysen.

its position and appointed Mr. Reed as counsel. (RT 9/26/03 at 63, 68; GER 140, 145). The government again insinuates that Mr. Sutcliffe created problems by refusing to work with Mr. Reed. (AB 21). The government's reference to Mr. Reed's complaint that he never obtained Mr. Sutcliffe's assistance is again taken out of context.

Mr. Reed intended to say that he had not obtained Mr. Sutcliffe's assistance while he was a standby counsel.¹⁰ Specifically, Mr. Reed complained that while he was a standby counsel, Mr. Sutcliffe demanded to see all of the discovery (hard drives and CDs) without explaining exactly what he wanted to see and for what purpose. (RT 10/1/03 at 7-11).¹¹

Mr. Sutcliffe's issue with Mr. Reed was the fact that he was seeking to continue the trial date.¹² (RT 10/1/03 at 17-21). Mr. Sutcliffe simply wanted to protect his speedy trial rights and not have to further delay the trial that had been already delayed for 18 months.

¹⁰ However, even this statement was refuted later, as Mr. Reed conceded that Mr. Sutcliffe assisted him in the beginning. (RT 10/1/03 at 29-30).

¹¹ Mr. Reed was appointed as counsel on September 26, 2003 (Friday); he went to see Mr. Sutcliffe at MDC on September 29, 2003 (Monday); they got into an argument over continuing the trial date; Mr. Reed moved to be relieved on October 1, 2003 (Wednesday). (RT 10/1/03 at 11-18).

¹² Mr. Reed alleged that Mr. Sutcliffe threatened to sue him if he moved for a continuance. (RT 10/1/03 at 20-21).

Mr. Sutcliffe's objection to any further continuance should not have been a ground to relieve Mr. Reed and force Mr. Sutcliffe to try the case pro se. The government astutely **urged** the district court at the hearing to keep Mr. Reed as the counsel and continue the trial over Mr. Sutcliffe's objection to give sufficient time for Mr. Reed to prepare for the trial. (RT 10/1/03 at 32-33).¹³ The district court should have followed the government's suggestion, but it did not. Instead, it relieved Mr. Reed as counsel, continued the trial date over Mr. Sutcliffe's objections, and forced Mr. Sutcliffe to proceed in pro per.

As demonstrated above and in the opening brief, the record does not demonstrate that Mr. Sutcliffe refused to be represented by counsel.

The government relies on United States v. Kelm, 827 F.2d 1319 (9th Cir. 1987) to argue that Mr. Sutcliffe waived his right to counsel. United States v. Kelm simply does not apply to this case.

¹³The government now tries to justify the dismissal of Mr. Reed by alleging that "[d]efendant demonstrated that he could not work effectively with Reed, accusing him of perjury and other 'lies'." (AB 22). The government again takes Mr. Sutcliffe's complaint out of context. At a hearing on October 21, 2003, Mr. Sutcliffe complained that Mr. Reed made misstatements of fact to the court on October 1, 2003 hearing in trying to get himself relieved. (RT 10/21/03 at 48-49).

In Kelm, the defendant failed to retain an attorney despite three continuances for him to find an attorney. This Court concluded that the defendant in Kelm "was in control of whether or not he had counsel. He chose not to retain counsel to frustrate the judicial process." See United States v. Meeks, 987 F.2d 575, 579 (9th Cir. 1993).

In this case, the district court was in control whether Mr. Reed continued his representation. See Ibid. The district court should have kept Mr. Reed as Mr. Sutcliffe's counsel and continued the trial to grant him sufficient time to prepare for the trial. See Morris v. Slappy, 461 U.S. 1, 13-14 (1983)(holding that the Sixth Amendment requires only competent representation and does not guarantee a meaningful relationship between a defendant and counsel).

The government also cites Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000), United States v. Robinson, 913 F.2d 712 (9th Cir. 1990), and Hudson v. Rushen, 686 F.2d 826 (9th Cir. 1982) to argue that the Sixth Amendment right to counsel is not violated by a refusal to appoint substitute counsel if the conflict between a defendant and his appointed counsel is of defendant's making. These cases are all distinguishable.

In Schell, the state trial court somehow overlooked to address the defendant's motion for substitution of attorney

and proceeded to trial with the then existing attorney. Schell, 218 F.3d at 1021. After stating that the state trial court erred by failing to address the defendant's motion for substitution of counsel, this Court pointed out that in a habeas proceeding the ultimate issue in the case is whether the "error actually violated the Schell's constitutional rights in that the conflict between Schell and his attorney had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment." Id. at 1026.

It was in this context this Court stated that "[i]t may be the case, for example, that because the conflict was of Schell's own making, or arose over decisions that are committed to the judgment of the attorney and not the client, in fact **he actually received what the Sixth Amendment required in the case of an indigent defendant,** notwithstanding the State trial court's failure to inquire." Ibid. (emphasis added). This Court simply pointed out that because the conflict might have been of the defendant's own making that, despite the conflict, he might have received effective representation.

In Robinson, the defendant specifically requested to proceed pro se. Robinson, 913 F.2d at 713. This Court found knowing and voluntary waiver of right to counsel although the defendant argued that the waiver of right to counsel was involuntary because he was forced to choose between self representation or an appointed counsel with whom he had disagreements. Id., at 715-716. That is not the case here.

Hudson is also distinguishable because although the trial court denied defendant's motion for substitution of attorney as untimely, the defendant was represented by the then existing attorney. This Court found that the trial court properly denied the motion for substitution of attorney and found that the defendant was not denied effective representation. Hudson, 686 F.2d at 832.

The government also relies on United States v. Fazzini, 871 F.2d 635 (7th Cir. 1987) and United States v. Moore, 706 F.2d 538 (5th Cir. 1983) to argue that Mr. Sutcliffe's conduct constituted a waiver. These cases are also distinguishable.

In both Fazzini and Moore, the defendants refused to cooperate with numerous appointed counsels despite being warned that their failure to cooperate would constitute a

waiver of their right to counsel. Fazzini, 871 F.2d at 642; Moore, 706 F.2d at 539.

In this case, the record shows that Mr. Sutcliffe was actively involved in his defense. Nothing he did to have his counsels relieved constituted a waiver of his right to counsel.

B. THE TRIAL COURT LACKED JURISDICTION.

It appears that the issue of whether posting an allegedly threatening message on the Internet satisfies the interstate commerce requirement under section 875(c) has not been clearly determined by this Court. The government cites to United States v. Pirello, 255 F.3d 728 (9th Cir. 2001) to argue that the interstate commerce requirement has been satisfied.

However, in United States v. Pirello, 255 F.3d 728 (9th Cir. 2001), this Court did not hold that information posted on the Internet necessarily crosses state lines, let alone hold that internet is an instrumentality of interstate commerce. The Court simply stated as a background to the case that Internet could be used to reach a large number of people.¹⁴

¹⁴This Court stated that "[t]he Internet engenders a medium of communication that enables information to be quickly,

The government also cites United States v. Ellyson, 326 F.3d 522 (4th Cir. 2003) and United States v. Kilmer, 335 F.3d 1132 (10th Cir. 2003). These cases are also distinguishable.

In United States v. Ellyson, the Fourth Circuit held that in a possession of child pornography case, the prosecution met the interstate requirement because some of the pornographic images that were downloaded contained the Internet addresses for European child pornography websites or other indications that the image originated from a particular website, such as a logo. The Fourth Circuit concluded that a graphic reference to a European child pornography website, where it is superimposed over the visual depiction itself, is sufficient evidence, albeit circumstantial, to establish an interstate nexus. United

conveniently, and inexpensively disseminated to hundreds of millions of individuals worldwide. This quality makes the Internet a well-known and valuable tool for businesses and individuals seeking to advertise their goods to a large number of people. Unfortunately, however, the power to solicit money instantly and inexpensively from hundreds of millions of people through Internet advertising presents a double-edged sword. The same characteristics that make the Internet a valuable tool in today's commerce --i.e., the ability to effectively and efficiently reach a large audience of prospective buyers --also make it a seductive playground for unscrupulous individuals bent on defrauding innocent victims." United States v. Pirello, 255 F.3d at 729-730 (citations and quotations omitted).

States v. Ellyson, 326 F.3d at 533. That is not the case here.

In United States v. Kilmer, the evidence introduced at trial established that every pornographic image the defendant received or distributed using his and his family's Hotmail accounts traveled through the Hotmail servers in California and his internet service provider in Missouri before reaching his computer in Wichita, Kansas. En route, the data traveled across state lines, at least some of the way over ordinary phone or cable lines. Even email messages sent from one of defendant's accounts to another account on his computer traveled across the Kansas state line to his internet service provider located in Kansas City, Missouri, then back over the state line to the defendant's computer in Kansas. United States v. Kilmer, 335 F.3d at 1135. In light of such evidence, the Tenth Circuit found evidence of interstate transmission. Id., at 1139-1140.

In this case, there is no evidence to show that the materials that were posted on the website were actually transmitted across state lines. First of all, with respect to Counts Three, Six, Seven, and Nine, the government cannot even prove where the servers were located at the time the postings were uploaded at evilgx.com. Without proving where the servers were located and where Mr. Sutcliffe or the

person who posted the webpages was at the time the webpages were posted, the government cannot demonstrate that the messages crossed state lines.

Moreover, the government must prove that information transmitted across the Internet crossed state lines and was transmitted or edited on the server in Interstate Commerce by the defendant. Here we have a case where the government did not prove that Mr. Sutcliffe transmitted the messages because the government failed to produce any network log files that specifically identified his MAC address and a corresponding IP address showing the dates and files uploaded or edited by Mr. Sutcliffe.¹⁵ Network log files are the only way to prove a specific computer uploaded any file and the dates and times of the upload or edit on a server. An IP address by itself without the corresponding MAC¹⁶ does not show which computer was used to upload a

¹⁵ "The MAC address actually is the single identifier for a PC or a computer device, and that is essentially what ties a computer to an IP address at a given time." (RT 1276).

¹⁶ "Clearly, the FBI needs engineering personnel to develop and deploy sophisticated electronic surveillance capabilities in an increasingly complex and technical investigative environment, skilled CART personnel to conduct the computer forensics examinations to support an increasingly diverse set of cases involving computers, as well as expert NIPC personnel to examine **network log files to track the path an intruder took to his victim**. In cases such as Los Alamos or Columbine, both NIPC and CART personnel were called in to bring their *unique areas of expertise* to bear on the case." See, Statement for the

file. The government did not match the MAC address to Mr. Sutcliffe's computer during the trial. The government can make an inference but nothing conclusive or entirely reasonable beyond doubt can be establish without the log files containing the MAC address from the servers as well as the defendant's matching MAC from a computer identified as being used by the defendant.¹⁷ Mr. Sutcliffe was not the only one with access to the files in question nor was he the only one in possession of a username and password or a computer.¹⁸ (See also RT 1303-1304). Without the log files the government's jurisdiction argument fails.

Record of Louis J. Freeh, Director Federal Bureau of Investigation on Cybercrime Before the Senate Committee on Appropriations Subcommittee for the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Washington, D.C. February 16, 2000 (emphasis added).

¹⁷ "The fact that he had access to it shows his identification, **shows it was most likely him** that posted it." (RT 2139)(emphasis added).

¹⁸ "BY MR. SUTCLIFFE:

Q: Of these pages you talked about that were created - on 'evilgx' that were created on this computer, can you tell with 100 percent accuracy whether all of these pages were created by the defendant?

A: No, I cannot.

Q: And if those pages were downloaded to somebody else who had FTP access to that website, they could tinker with the page, too, couldn't they?

A: Yes. They could alter the webpages that were up on the internet.

Q: Can you tell, through your analysis, where physically the defendant or anybody was when that page, or any of those pages, was put up on the website?

A: No, I can't tell you where the computer was physically located when the webpages were created and posted to the

C. SECTION 875(C) IS UNCONSTITUTIONAL ON ITS FACE FOR VAGUENESS.¹⁹

The government does not deny that only true threats and threats made with specific intent are punishable under section 875(c). However, it argues that the statute does not need to define what constitutes a threat or spell out the intent requirement in order for it to make clear what conduct is prohibited. (AB 33). The government is wrong.

Without the definition of a true threat and the requirement of a specific intent provided in the statute, an ordinary citizen would not be able to determine which conduct is prohibited. For example, threats made in jest or threats that constitute a political hyperbole (See Watts v. United States, 394 U.S. 705 (1969)) do not qualify as true threats under section 875(c); however, the statute as worded would make them punishable.

Without any guidance within the statute as to what constitute a true threat, section 875(c) fails to provide fair warning of the prohibited conduct to those it regulates. This is especially true because the statute involves a constitutionally protected right of freedom of speech. See Planned Parenthood Fed'n of Am, Inc. v. Gonzalez, 435 F.3d

internet." (RT 1609-1610).

¹⁹Mr. Sutcliffe filed a motion, challenging the vagueness of the statute. (ER 208).

1163, 1181 (9th Cir. 2006) ("The need to avoid vagueness is particularly acute . . . when [the statute] implicates constitutionally protected rights.").

Moreover, the government's blanket statement that section 875(c) establishes standards sufficient to allow police and prosecutors to enforce the law in a non-arbitrary, non-discriminatory manner is unconvincing. To the contrary, the vagueness of the statute allows the government to pick and choose which threats and whom to prosecute arbitrarily and discriminatorily.²⁰ See United States Civil Service Comm. v. Letter Carriers, 413 U.S. 548, 597, 599 (1973) (Douglas Dissenting--"The chilling effect of these vague and generalized prohibitions is so obvious. . . So the Commission ends up with open-end discretion to penalize X or not to penalize him.").

D. APPELLANT WAS SUBJECTED TO UNCONSTITUTIONAL SELECTIVE PROSECUTION.

The government concedes that "Shmoe" threatened Mr. Sutcliffe and was not charged. (AB 37). However, the government first argues that Mr. Sutcliffe has failed to

²⁰The government's claim that its "failure" to prosecute "Shmoe" was nothing more than an exercise of prosecutorial discretion (AB 35) is not persuasive. It appears that the government arbitrarily did not take "Shmoe's" threat as a serious threat.

show that other similarly situated individuals were not prosecuted for conduct similar to his and then argues that Mr. Sutcliffe has failed to establish discriminatory motive in prosecuting him.

Appellant has amply demonstrated that "Shmoe" was similarly situated as he was. Joe Shmoe used the Internet to threaten to kick Mr. Sutcliffe's ass, all the while Mr. Sutcliffe was being accused of doing the same thing--posting on the Internet threats to Global Crossing employees. Joe Shmoe's threat to kick the defendant's ass was not different from the alleged threats made by Mr. Sutcliffe. In fact, it was more. (In deed, the government fails to point out that Schmo e-mailed his threat **directly to the defendant**. In this case, all the alleged victims knowingly, intelligently and willingly sought out the pages to read through a labyrinth of pages. NOBODY was a captive audience to the government's version of a true threat except the defendant). There is no doubt that Mr. Sutcliffe and Shmoe were similarly situated.

Moreover, Mr. Sutcliffe was clearly exercising his constitutional right of freedom of speech when he was selectively prosecuted. (See AOB 48). Because Mr.

Sutcliffe satisfied both elements of selective prosecution, Counts One through Four should have been dismissed.²¹

E. THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE INDICTMENT ON SPEEDY TRIAL GROUNDS.

The government first argues that the district court properly delayed the trial on the basis of its findings that the ends of justice served by delaying the trial. (AB 46-48). However, the government fails to address the issue that the continuances were necessitated by the court's appointment of attorneys who were either incompetent (the Public Defender's Office and Mr. Harris) or who had an irreconcilable conflict of interest (Mr. Nicolaysen). In addition, the government fails to address the issue of Mr. Sutcliffe not consenting to the continuances sought by the defense counsels and not waiving his right to speedy trial.

Although 18 U.S.C. section 3161(h)(8) permits the exclusion of "any period of delay resulting from a continuance granted by any judge . . .," the continuances must be "justified." United States v. Lloyd, 125 F.3d 1263, 1268 (9th Cir. 1997). In this case, the delays were not justified.

²¹Mr. Sutcliffe maintains that the district court erred in denying his request to subpoena Debra Yang in support of his selective prosecution argument.

When the Public Defenders' Office sought to be relieved on September 23, 2002, Mr. Sutcliffe opposed their motion based on the fact that relieving the Public Defenders' Office would delay the trial. (RT 9/23/02 at 17). Mr. Sutcliffe also pointed out that it was their way of covering up their incompetence and failure to do their job. (Id., at 10-11). Mr. Sutcliffe demonstrated his willingness to work with the Public Defenders' Office if they were ordered by the court to do a competent job. Mr. Sutcliffe actually requested the district court to require the Public Defenders' Office to continue to represent him. (Id., at 18). However, the district court, without making any specific findings (other than the fact that their relationship has soured) as to the reasons for relieving the Public Defenders' Office, relieved the Public Defenders' Office, thereby making it impossible for the trial to proceed on October 22, 2002. The district court should have required the Public Defenders' Office, which had the case for over six months, to continue representing Mr. Sutcliffe and kept the trial date of October 22, 2002. Therefore, the district court's continuance of the trial to December 3, 2002 (after appointing Mr. Harris) and the subsequent

continuance to January 14, 2003 (to give more time to Mr. Harris) were not justified.²²

Although the government argues that motions (application for bail review and motions to dismiss) filed by Mr. Harris were pending since October 23, 2002, those motions would not have been necessary had the trial proceeded on October 22, 2002 as had been scheduled. Furthermore, the Speedy Trial Act does not exclude all pretrial delay that merely coincides with the pendency of a motion; it only excludes pretrial delay "resulting from" that motion. See United States v. Clymer, 25 F.3d 824, 830 (9th Cir. 1994). In other words, "section 3161(h)(1)(F) applies only when the delay in bringing the case to trial is the result of the pendency of a pretrial motion. That provision does not refer to delay 'coinciding with' or

²²When Mr. Sutcliffe moved to dismiss the indictment for violation of his right to speedy trial, the court did not even hold a hearing. It simply stated that "[Mr. Sutcliffe's] rights have been protected under the speedy trial act and they will continue to be protected" (RT 12/4/02 at 29) and denied Mr. Sutcliffe's motion without making any findings of excludable time. See Zedner v. United States, 126 S.Ct. 1976, 1989 (2006) ("The Act requires that when a district court grants an ends-of-justice continuance, it must 'se[t] forth, in the record of the case, either orally or in writing, its reasons' for finding that the ends of justice are served and they outweigh other interests. . . . In ruling on a defendant's motion to dismiss, the court must tally the unexcluded days. This, in turn, requires identifying the excluded days. . . . Thus, without on-the-record findings, there can be no

'accompanying' the pendency of a motion. It refers only to delay 'resulting from any pretrial motion.'" Ibid. Since the motions only coincided with the continuance already granted by the court, the pendency of the motions cannot be a justification for the speedy trial violation.

Moreover, had the district court granted Mr. Sutcliffe's motion to relieve Mr. Nicolaysen on March 14, 2003, prior to the competency hearing²³, Mr. Sutcliffe would have been found competent at the March 14, 2003²⁴ hearing and there would not have been any need for further testing (or treatment, depending on how one construes what the district court ordered subsequently) or the delay until August 27, 2003 to find Mr. Sutcliffe competent. Because the delay from March 14 to August 27, 2003 was based on the

exclusion under section 3161(h)(8).

²³The district court should have at least held a hearing on Mr. Sutcliffe's motion for substitution of counsel. See United States v. Smith, 282 F.3d 758, 763 (9th Cir. 2002)(when a defendant seeks substitution of attorney, the court must hold a hearing to inquire into the defendant's complaint and the extent of conflict between the defendant and counsel and also to consider the timeliness of the motion and the extent of resulting inconvenience and delay). Had the district court held a hearing, it would have found out the extent of the conflict (Mr. Nicolaysen wanted to find Mr. Sutcliffe incompetent) and would (and should) have granted the motion since it was timely made. The court's failure to hold a hearing violated his right to counsel.

²⁴That would be the case since the doctor found him competent, and if Mr. Nicolaysen were relieved, Mr. Sutcliffe would not have been removed from the court because of his strenuous objection to Mr. Nicolaysen's questioning

district court's failure to hold a hearing and relieve Mr. Nicolaysen, the delay was not justified.

Although the government also argues that Mr. Sutcliffe's own actions contributed to the need for an "ends of justice" continuance under the Speedy Trial Act, it fails to identify what actions it is referring to.²⁵

The government finally argues that Mr. Sutcliffe did not suffer prejudice because of the delay. "Traditionally, actual prejudice can be shown in three ways: oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the accused's defense will be impaired." United States v. Beamon, 992 F.2d 1009, 1014 (9th Cir. 1993). Mr. Sutcliffe has already amply demonstrated that he had suffered a tremendous anxiety and strain during the 19 months of incarceration awaiting the trial.²⁶ (AOB 57-58).

In addition, as the trial got delayed, missing discovery became a problem. There were several CD-Rom discs that were missing (RT 1/14/03 at 36-39), and the government failed to make copies of the missing CD-Rom discs prior to

of the doctor.

²⁵The record does not support the government's assertion that Mr. Sutcliffe is wholly responsible for the substitutions of counsel and thus the delays.

²⁶Mr. Sutcliffe even had an emotional breakdown in court when the court continued his trial. (See RT 12/4/02 at 25).

turning them over to the defense. (RT 1/14/03 at 36-40). Mr. Sutcliffe never received the missing CD-Rom discs, and he has no knowledge of what was on the discs and how he could have used the missing discovery for his defense. The delay of the trial clearly prejudiced Mr. Sutcliffe.

F. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO RECUSE JUDGE MATZ.

Mr. Sutcliffe disagrees with the government's blanket statement that Judge Matz made every effort to appoint competent counsel for him and that the judge, in fact, appointed him competent counsel. (AB 53). Early on after Mr. Harris was appointed, Mr. Sutcliffe filed a motion regarding Mr. Harris' lack of computer knowledge and ineffectiveness. Judge Matz refused to acknowledge that someone with computer knowledge was essential in defending Mr. Sutcliffe. Instead, Judge Matz stated that computers and [internet] technology were not "really much of an issue in this case" and did not think "that's what the trial is likely to focus on at all." (RT 12/04/02 at 18). Judge Matz further went on to state that he believed a lawyer who had never even seen a computer could effectively represent Mr. Sutcliffe and do a "bang-up job." (Ibid).

However, a short time after Mr. Harris was relieved and contrary to his earlier position, Judge Matz appointed Mr. Nicolaysen, specifically because of his "unusually extensive experience with computer law, computer usage and computer technology." (RT 1/17/03 at 3; GER 78). Judge Matz should have appointed someone with technical proficiency from the very beginning.²⁷

Also, Mr. Nicolaysen attempted to find Mr. Sutcliffe incompetent to stand trial from the time he was appointed, which created an irreconcilable conflict of interest between Mr. Sutcliffe and Mr. Nicolaysen. Judge Matz should have recognized the conflict and should have relieved Mr. Nicolaysen sooner (when Mr. Sutcliffe initially moved to relieve Mr. Nicolaysen), but did not do so. (See Right to Counsel Claim and Violation of Speedy Trial rights claim, *supra*).

It was Judge Matz's continued refusal to appoint competent counsel and prolonged delay in the trial, coupled with Judge Matz's comment that he will not consider any alternative other than a trial and his impatience demonstrated against Mr. Sutcliffe that form the basis for

²⁷ Contrary to his opinion that it is a rather simple case, Judge Matz granted several continuances after finding the case to be complex because of the large volume of electronic evidence and the "novel Internet-based nature of the

the judge's recusal. Since any reasonable person with knowledge of all the facts would conclude that Judge Matz's impartiality might reasonably be questioned, the motions for recusal should have been granted.

G. THE DISTRICT COURT ERRED IN DENYING MR. SUTCLIFFE'S REQUEST TO RECONSTRUCT THE WEBSITE "EVILGX.COM".

The government does not dispute that the website was not fully captured in its original form. (RT 421-422; 478-480).²⁸ The government also does not dispute that whether Mr. Sutcliffe's words constitute a true threat "should be considered in light of their entire factual context. . . ." United States v. Orozco-Santillan, 903 F.2d 1262 (9th Cir. 1990)(citations omitted).

As argued in the opening brief, there is no reason why the website should not have been reconstructed since the

prosecution." (ER 7, 126).

²⁸ "PROSECUTOR: . . .when you accessed the website and you made a copy of it, was there a link that you did not actually capture in your download?

WITNESS: Well, I captured the link, but I didn't capture the content the link pointed to. . . ." (RT 421).

"DEFENDANT: It's your recollection you only captured two or three that you've testified to so far; is that correct? You mentioned --

WITNESS: I viewed every link within "evilgx.com" and where it went. . . So, where pertinent, I captured the external links that pointed to content that I felt was relevant to the investigation.

. . .
WITNESS: I captured as much of the website as I could." (RT

government had the ability to reconstruct the website. (AOB 64-65). The district court's refusal to order reconstruction of the website denied Mr. Sutcliffe an opportunity to present a defense that the alleged threats were not true threats given the whole context of the website.²⁹

H. THE DISTRICT COURT ERRED IN DENYING MR. SUTCLIFFE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF THE RIFLE.

The government argues that the evidence of the rifle was necessary to prove Mr. Sutcliffe's intent to threaten, specifically when he stated "keep your dogs at bay; I am now armed." (AB 57). This alleged threat was charged as Count Three in the Superseding Indictment. However, not only does the words "I am now armed" not refer to the rifle which he had for a long time prior to making the alleged threat, Mr. Sutcliffe should not have even been tried on this count (this count should have been dismissed when Mr. Sutcliffe moved to dismiss the indictment, see Failure to Dismiss

478-480).

²⁹The district court's suggestion that Mr. Sutcliffe can "argue context to the extent that there are or were, at one earlier previous time, materials on a website that are no longer accessible or retrievable . . . you can . . . try to elicit . . . evidence that you think is relevant about what was on or could have been on those websites" is simply incorrect. How can Mr. Sutcliffe elicit evidence that is not there or argue based on evidence that this no longer

Indictment claim, infra) because it fails to state an offense. There is no way that Mr. Sutcliffe's statement as stated in the indictment could be construed as a communication threatening to injure a person, as **evidenced by his acquittal**. Therefore, the evidence of the rifle was totally irrelevant and should not have been admitted to show his intent to threaten.

The introduction of the rifle with its bayonet extended constituted improper character evidence and prejudiced Mr. Sutcliffe by portraying him as a generally violent and dangerous person.

I. THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE INDICTMENT.

The government argues that the statements alleged in the indictment sufficiently state threats to injure. (AB 62). Mr. Sutcliffe disagrees.

As argued in the opening brief (AOB 74), the statement "I will personally send you back to the hell from where you came" in Count One simply does not contain any threat to injure the listener; nor does the statement "This is all far from over" with the words "Dead-icated to Elizabeth Greenwood" in Count Four. (See AOB 74-75). Because the

accessible?

statements were not threats to injure, the indictment failed to state an offense under section 875(c).

The government next argues that in charging Mr. Sutcliffe with a violation of section 1028(a)(7), the indictment does not need to state the principal whom Mr. Sutcliffe intended to aid and abet or state that the fraudulent use of the social security numbers was actually committed or attempted. (AB 63). The government is wrong.

Under section 1028(a)(7), an unauthorized transfer of a means of identification of another person would not be punishable without an "intent . . . to aid and abet an unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law." The statute specifically states that the unlawful activity has to constitute a violation of Federal law. Therefore, the indictment alleges that Mr. Sutcliffe committed an unauthorized transfer of Social Security numbers with intent to aid and abet a **false representation** of Social Security numbers in violation of 42 U.S.C. section 408(a)(7)(B).

However, where is the false representation that Mr. Sutcliffe is accused of intending to aid and abet? Since aiding and abetting cannot be achieved without someone actually committing the offense or attempting to commit the

offense (United States v. Korab, 893 F.2d 212, 213 (9th Cir. 1989)), the indictment fails to allege an offense under 1028(a)(7) absent any allegation that someone actually committed or attempted to commit false representation of the Social Security numbers.

J. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

As argued in the opening brief (AOB 79-82), there is no doubt that the statements made to Hall and Greenwood in this case were made as a part of Mr. Sutcliffe's protest of his termination from employment.

Hall was entangled in Mr. Sutcliffe's labor dispute with Global Crossing by trying to serve Mr. Sutcliffe with a TRO and by contacting Child Protective Services to report Mrs. Sutcliffe. Given Hall's involvement in Mr. Sutcliffe's labor dispute with Global Crossing and the full context (the conditional nature of the statements as set forth in the opening brief) of the statements, the statements directed at Hall were merely "a kind of very crude offensive method" of telling Hall to stay the hell out his labor dispute with Global Crossing and were not a true threat.

Same argument applies to the statement made to Elizabeth Greenwood. Simply posting the words "Dead-icated

to Elizabeth Greenwood" cannot be construed as a serious expression of intent to physically harm her. It is a play on words and there was nothing else in the context of the statement that made it a true threat.

Again, the government makes the same argument that it is not required to prove that the Social Security numbers were unlawfully used in order to find Mr. Sutcliffe guilty of section 1028(a)(7). (AB 68-70). As argued supra and in the opening brief, without evidence of false representation, Mr. Sutcliffe cannot be convicted under section 1028(a)(7) with intent to aid and abet false representation of Social Security numbers in violation of 42 U.S.C. section 408(a)(7)(B). Therefore, the district court should have granted Mr. Sutcliffe's motion for acquittal.

K. THE DISTRICT COURT COMMITTED A REVERSIBLE ERROR IN ITS JURY INSTRUCTION.

The government does not deny that the district court failed to instruct the true threat definition set forth by the United States Supreme Court in Virginia v. Black, 538 U.S. 343, 359-50 (2003). However, it argues that in totality, the jury was properly instructed. Mr. Sutcliffe disagrees.

The true threat definition instructed by the district court allowed the jury to determine **objectively** whether the threatening statements at issue are statements that the **listeners** will believe they will be subjected to physical violence upon their persons. However, the United States Supreme Court required "true threats" to be statements where the **speaker** means to communicate a serious expression of an **intent to commit** an act of unlawful violence to an individual.

Therefore, according to the Supreme Court, a true threat requires more than just an intent to threaten. In order for a threatening expression to be a true threat, it has to show the speaker's intent to commit an act of unlawful violence upon the listener.

In this case, the erroneous instruction prevented the jury from determining whether Mr. Sutcliffe conveyed his intent to commit an act of unlawful violence. Rather, it prejudicially allowed the jury to find the alleged statements to be true threat only by looking at whether the listeners (viewers in this case) will believe they will be subjected to physical violence.

L. THIS CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR RESENTENCING.

1. APPELLANT WAS DENIED HIS RIGHT TO COUNSEL AT SENTENCING.

The government claims that the district court appointed Mr. Reed to represent Mr. Sutcliffe at sentencing. (AB 75). The record does not support such a claim.

The record shows that the district court, immediately after the guilty verdict, ordered Mr. Reed to continue to act as a standby counsel for Mr. Sutcliffe for purposes of sentencing. (RT 2194). On March 1, 2004, the court reiterated that it had appointed Mr. Reed to function as standby counsel for Mr. Sutcliffe for purposes of the sentencing proceeding and that Mr. Sutcliffe had been representing himself thus far. (RT 3/1/04 at 25).³⁰

Moreover, in the order denying Mr. Sutcliffe's request for assistance of counsel, the district court stated that the court's order "requiring Mr. Reed to prepare and file a sentencing memorandum under seal . . . does not either contemplate or require that defendant's pro se status be terminated. . ." (ER 462). Clearly, Mr. Sutcliffe proceeded pro se during the sentencing.

³⁰ Even the notation entered in the docket state that Mr. Reed was appointed to represent **pro se** defendant at his sentencing. (CR 357).

Because the district court refused to appoint a counsel to represent Mr. Sutcliffe during the sentencing despite his request for a counsel, the case should be remanded for resentencing.

2. APPELLANT'S SENTENCE VIOLATED HIS SIXTH AMENDMENT RIGHT TO HAVE A JURY DETERMINE BEYOND A REASONABLE DOUBT THE FACTS WHICH RESULTED IN HIS ENHANCED SENTENCE

The government concedes that the district court enhanced Mr. Sutcliffe's sentence based on facts found by the court and not by the jury in violation of the Sixth Amendment. (AB 77). However, it argues that Mr. Sutcliffe has failed to demonstrate that his sentence would have been different had the district court known that the sentencing guidelines were advisory. In support of its argument, it points to the fact that the district court imposed at the high end of the guideline range. (AB 78).

In Ameline, this Court stated that the reviewing court need not speculate about the effect of the error but should ask the sentencing judge. United States v. Ameline, 409 F.3d 1073, 1081 n.4 (9th Cir. 2005). Here, it is unclear what the district court would have done had it known that the Sentencing Guidelines were advisory. The district court had an opportunity to make its position known in its Order Denying Petition for Writ of Error Coram Nobis. (ER 482-484). Although the district court was aware of Ameline when

it issued the order, it simply stated that it will proceed accordingly if this Court remands the case for resentencing. (ER 484). Therefore, this Court should remand the case to the district court for resentencing

V

CONCLUSION

For the foregoing reasons, Defendant respectfully urges this Court to reverse Mr. Sutcliffe's convictions.

Dated: November 21, 2006

Respectfully submitted,

Sung B. Park, Esq.

Attorney for Appellant
Steven Sutcliffe

CERTIFICATE OF RELATED CASES

Counsel for the appellant hereby certifies that there are no cases related to this appeal known to him pending in this Court at this time.

Dated: November 21, 2006

Respectfully submitted,

Sung B. Park, Esq.

Attorney for Appellant
Steven Sutcliffe

**CERTIFICATE OF COMPLIANCE PURSUANT TO FED.R.APP.32(A)(7)(C)
AND CIRCUIT RULE 32-1 FOR CASE NUMBER 04-50189**

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached reply brief is

Monospaced, has 10.5 or fewer characters per inch and contains 5,947 words.

Dated: November 21, 2006

Respectfully submitted,

Sung B. Park, Esq.

Attorney for Appellant
Steven Sutcliffe

CERTIFICATE OF SERVICE

I, the undersigned, declare: that I am a citizen of the United States and a resident of Los Angeles County and employed in Van Nuys, California; that my business address is 17620 Sherman Way, Suite 211, Van Nuys, California, 91406; that I am over the age of eighteen years; that I am not a party to the above-entitled action; the service by mail was made to:

Elena Duarte
AUSA
1200 U.S. Courthouse
312 N. Spring Street
Los Angeles, California 90012

by placing in the United States Mail at Los Angeles, California on November 21, 2006:

ONE COPY OF APPELLANT'S REPLY BRIEF

This certificate is executed on the date shown below, at Van Nuys, California.

Sung B. Park

DATE OF EXECUTION: November 21, 2006