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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

HONORABLE A. HOWARD MATZ, DISTRICT JUDGE PRESIDING

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
STEVEN SUTCLIFFE,)
)
Defendant.)

CR. 02-350-AHM

**CERTIFIED
COPY**

REPORTER'S TRANSCRIPT OF PROCEEDINGS
CHANGE OF PLEA
LOS ANGELES, CALIFORNIA
MONDAY, NOVEMBER 8, 2004

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1 LOS ANGELES, CALIFORNIA; MONDAY, NOVEMBER 8, 2004

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3 (COURT IN SESSION AT 4:00 P.M.)

4
5 THE CLERK: All rise. This court is again in session.
6 The Honorable A. Howard Matz presiding.

7 THE COURT: Good afternoon. Welcome. Please be
8 seated.

9 THE CLERK: Calling Item Number 6, CR02-3508(a),
10 U.S.A., versus Steven Sutcliffe.

11 Counsel, state your appearances, please.

12 MS. DUARTE: Good afternoon, your Honor. Elena Duarte
13 for the United States.

14 THE COURT: Good afternoon.

15 MR. ROME: Richard Rome, R-o-m-e for Mr. Sutcliffe.

16 THE COURT: All right. Good afternoon to both of you.
17 We're here on Mr. Rome's motion on behalf of Mr. Sutcliffe for
18 bail, pending appeal; and I've looked at the motion and the
19 Government's opposition. I don't think you filed a reply, did
20 you?

21 MR. ROME: No.

22 THE COURT: Okay. I'll tell you how I analyzed the
23 issues on this case. I've read the Castro decision carefully;
24 and of course, that decision reflects what is the fundamental
25 background context to this motion, which is that we're waiting

1 for Supreme Court guidance on the aftermath of Blakely and
2 Ameline. How soon that guidance will be provided and what it
3 will be, I have no desire to speculate about, but facing that
4 confusion, the Castro court and order that the Government
5 notes, that bail would be one permissible alternative to
6 address the rights of Mr. Sutcliffe. No bail would be another.
7 I already noted in the previous ruling that the -- on the
8 merits of the issue as to whether or not the sentence is valid
9 notwithstanding the upward departures, the Government would be
10 entitled, if it gets to have that requirement, to try to prove
11 the basis for those upward departures beyond a reasonable doubt
12 and to a jury. So there's a lot that remains to be resolved
13 about this case and about the status of the law.

14 I think that the Government is correct that under the
15 applicable standards, the defendant remains a flight risk and a
16 danger to the community. I make that finding on the basis of
17 the fact that the Ninth Circuit already affirmed my ruling on
18 both those prongs; and the situation now is no different, if
19 anything, a little bit more difficult for Mr. Sutcliffe and his
20 lawyer to overcome; and he has the burden, and it's a burden by
21 height and standard of clear and convincing evidence.

22 The sureties that he propose would provide
23 troublesome -- particularly, Mr. McAfee, not only troublesome
24 but a totally unacceptable basis to minimize or offset if I
25 were in a position to make a finding, and I could, the danger

1 to the community at the bail hearing that took place a very
2 long time ago. It came out that Mr. McAfee possessed guns. I
3 am prepared to note on the record that the testimony he gave at
4 the trial in this case and the nonsensical advice that he gave
5 to Mr. Sutcliffe in writing before the testimony at the trial,
6 clearly could be construed as part of the effort on his part to
7 give a fig leaf in cosmetic appearance of advice of counsel for
8 this pattern of criminal behavior that the jury uses the basis
9 for his conviction.

10 Mr. McAfee was an utterly incredible and unpersuasive
11 witness with a huge chip on his shoulder and a major bias. I
12 don't have information about Mr. Weatherman. I note that he's
13 present in court, but absent any further information, it would
14 be, I think, absolutely inappropriate and imprudent to consider
15 him functioning as a surety. So as a notion that there be bail
16 on Mr. Sutcliffe's own recognizance, would make no sense, given
17 the findings I've already made. That's my take on the motion
18 before me. Would you like to be heard, Mr. Rome?

19 MR. ROME: I would, your Honor.

20 THE COURT: Please proceed to the lector.

21 MR. ROME: How are you today?

22 THE COURT: I'm fine.

23 MR. ROME: I think to address some of the comments and
24 just to go over some of the items that have been briefed that
25 the -- the distinction that we're in now is that Mr. Sutcliffe

1 has already served 33 months. He's had no problems. There's
2 been no reports on him. He's actually been a very model
3 prisoner, and the primary enhancement that boosted his sentence
4 under 2(a) 6.1(b)1, which was an additional six-point upward
5 adjustment, is something that the -- that the U.S. attorney may
6 try; and you indicated that since one of the reasons that you
7 had addressed in your tentative was that it's an issue that's
8 subject to retrial, but that's all well and fine. I don't
9 think -- particularly since Mr. Sutcliffe has served 33 months,
10 he does have a tentative release date in July. By the time
11 this thing plays out, he's going to already have done all of
12 his time; and it really --

13 THE COURT: Well, I would be amenable to scheduling
14 any required hearings or hearings that are initiated by the
15 prerogative available of Government on a very expedited basis
16 even not withstanding other trial commitments and obligations I
17 have. I don't think it's a given, Mr. Rome, that the clock is
18 going to run out before there could be any further judicial
19 action.

20 MR. ROME: I appreciate that; however, just knowing
21 the way that the Ninth Circuit would work -- I mean, not to
22 degrade them, but by the time the decision comes out, it's
23 going to go through. They have a ton of cases in the backlog.
24 By the time that works it's way through, we're still in the
25 process of briefing the case. So it -- this is a situation

1 that's going to --

2 THE COURT: You're the lawyer on the appeal --

3 MR. ROME: I'm doing the appeal. This is going to be
4 a protracted situation, because this appeal is not going to end
5 by that time.

6 THE COURT: But isn't there a readily available method
7 under which jurisdiction would be available? In fact, I think
8 it is reflected in the very fact that we have this hearing,
9 notwithstanding the challenge to the appeal and not as a way to
10 avoid eventual ruling as to whether or not Mr. Sutcliffe was
11 properly convicted. I would have the authority, without
12 further proceedings at the Ninth Circuit level, to act upon
13 whatever required guidance we get from *Fanfan and Booker*,
14 including holding a hearing -- a trial, I should say, on the
15 enhancements.

16 MR. ROME: Well, of course, we don't know what *Fanfan*
17 *and Booker* is going to say; how long that's going to take. It
18 could be up there still for an extended period of time, and the
19 Supreme Court may not make a decision for several months.

20 THE COURT: That's another thing. You're right about
21 that.

22 MR. ROME: No, but I mean the entire process, we don't
23 know how it's going to play out on a time perimeter. In the
24 meantime --

25 THE COURT: Well, there are at least 800 district

1 judges in this country, who are hoping it won't take that long.

2 MR. ROME: And a lot of defendants too -- defense
3 lawyers; but sometimes these things grind slowly. So it's
4 possible that it could come back here. I think it's more
5 probable that it's not going to get back here on an expedited
6 basis. In the meantime though, the one that's being penalized
7 is Mr. Sutcliffe. He's done 33 months. He's done apparently
8 very well; and I think what's going to happen here, is there's
9 a substantial likelihood that the clock is going to run out on
10 him, and then of course, there's no reason to retry him if he's
11 already done his time.

12 So I think that's a paramount concern in our case; and
13 I think the particular enhancements that bumped his sentence up
14 are -- are quite triable issues. In other words, he was bumped
15 up because there was conduct evidencing an attempt to carry out
16 the threat. You know, there's one thing about making the
17 threat. There's another thing about whether there's conduct
18 that he could actually have carried it out, particularly, when
19 he was back in New Hampshire at the time that he was arrested
20 and at the time that some of the threats, in particular, the
21 threat on that particular count on which he was sentenced,
22 occurred.

23 So it just -- it would seem that based on the status
24 of the law that we have and based on what you indicated was
25 your prior ruling, indicating in one of your rulings that you

1 had thought the sentence was illegal, to no fault of your own,
2 but as far as the -- the law developed, I think that there has
3 to be a certain amount of equities in some of these situations.
4 Particularly, if he was looking at an extended period of time
5 and wasn't looking at getting out soon, that might be a
6 different situation. If his enhancements are -- are deleted,
7 his sentence -- we're looking at a sentence that he served a
8 couple of years ago. So this is just -- really just punitive
9 in that respect.

10 THE COURT: I think you need to be real careful in how
11 you use some of these terms. I'm not faulting you for your
12 advocacy, but inherently, we're dealing with something that's
13 punitive. We're talking about a punishment. Now, under
14 Ameline and Blakely, which I think were the full state of the
15 law at the time I made those comments on at petition for Writ
16 of Coram Nobis --

17 MR. ROME: That's correct.

18 THE COURT: -- I think even before there was some
19 later clarification, I've reached the conclusion that because I
20 made these decisions, I did them on a preponderant standard,
21 and I -- although, I think on some of them on a clear and
22 convincing standard but not on a reasonable doubt standard, and
23 did them without the benefit of a jury verdict. They were in
24 violation of Blakely and Ameline; but Blakely hadn't even been
25 extended to all of the Federal courts and all of the Circuits.

1 Ameline did to this court, but some of the Circuits reached an
2 opposite conclusion, and we later had the Supreme Court grand
3 served. So I don't think it's fair for you to say that I sit
4 here in the position of having already found something that is
5 definitively illegal and all I'm doing by denying the bail
6 request, is engaging in some kind of punitive conduct. That's
7 not what's really at issue here.

8 MR. ROME: I didn't really -- I wasn't saying it in
9 any derogatory way. I understand that when you made the
10 sentence, that you were obviously in conformance with the law,
11 and I was only referencing that the order -- that it was
12 illegal. I understand that that was after the fact; and it
13 wasn't anything that you did wrong. I'm just saying that we're
14 all basically on the same page on that point; and at the time
15 the standard that you used was correct. There's no doubt about
16 that; and I've read a substantial portion -- in fact, I've
17 really read the trial, and you did seem to help Mr. Sutcliffe
18 out in several occasions, but as we look at it, I think we just
19 have to step ahead; and like I said, what's ultimately going to
20 happen here, is that there's going to be a pass, and the
21 Government is not going to retry him, and it's because either
22 his time ran out or it's close -- it's going to be close enough
23 where it's not going to be worth to bring in the two dozen
24 witnesses.

25 THE COURT: Well, have you explored with Ms. Duarte

1 backup alternatives of scenarios to play out the number of
2 different alternatives available, including trial before a
3 jury?

4 MR. ROME: I don't think we have --

5 THE COURT: Pull up any particular schedule? Have you
6 explored her willingness to do it, absent the direction?

7 MR. ROME: No.

8 THE COURT: Let's hear from her. What's your
9 position? We haven't heard from her. What's your position?

10 MS. DUARTE: I'm sorry, your Honor. My position on...

11 THE COURT: Well --

12 MS. DUARTE: The Court's touched a number of different
13 areas.

14 THE COURT: On convening a jury to try those
15 enhancements beyond a reasonable doubt.

16 MS. DUARTE: My position, your Honor, is that the
17 resolution to the *Booker and Fanfan* petition are expected, and
18 I know that this is not a given, but they're expected to come
19 through soon, and I think that they will; and for that reason,
20 I do not agree at this time that convening a jury would be the
21 right thing to do.

22 THE COURT: How long after -- pardon me -- the
23 decisions in those cases or in neither of those cases is
24 issued, would you claim the Government needs to convene a jury
25 and try these enhancements beyond a reasonable doubt?

1 MS. DUARTE: Well, first of all, your Honor, obviously
2 there's three different ways the Supreme Court could go; and
3 two of those ways would negate even the need --

4 THE COURT: But assuming that -- I know to what you're
5 referring. And assuming that those two alternatives don't
6 apply and they find that the principles of Blakely apply to the
7 guidelines and at the Federal proceedings and require all
8 sentences on appeal, at least, if not retroactive to earlier
9 points that are inconsistent with that conclusion, be subjected
10 to early and timely, remedial proceedings, how long would it
11 take?

12 MS. DUARTE: Well, our office's position is that the
13 sentencing allegation, which is what we're calling them, need
14 to be brought before the grand jury, if Ameline is actually
15 upheld and what it seems to suggest. So that would have to be
16 done with the appropriate charging document. Then the
17 witnesses would have to be ready. I guess conceivably the
18 office could do a jury trial on the sentencing matter probably
19 within six weeks. If the Court is interested in my personal
20 trial schedule --

21 THE COURT: No, because -- because I would not delay
22 the trial based only on that. Your office would just have to
23 send someone else down.

24 MS. DUARTE: I understand that, but I didn't want to
25 suggest to the Court that I could try the matter in six weeks,

1 because I think that at this point, that would not be correct.
2 However, I could see that it probably could be done within six
3 weeks, not knowing the schedules of the witnesses and exactly
4 what sentencing allegations the grand jury would true bill --
5 obviously, I could only make a rough estimate.

6 THE COURT: Well, has your office in any other case,
7 to your knowledge, convened a jury to hear after -- a grand
8 jury to hear first the basis for sentencing charges and then
9 had a trial?

10 MS. DUARTE: We have not had a trial only on the
11 sentencing allegations, your Honor, because it's our position,
12 that we don't -- we don't have to do that.

13 THE COURT: That's what I thought.

14 MS. DUARTE: But we have had trials on both, the guilt
15 and the sentencing --

16 THE COURT: Yeah, and indictments that contain those
17 charges --

18 MS. DUARTE: Absolutely.

19 THE COURT: -- since Ameline.

20 MS. DUARTE: And I've actually, personally, and I know
21 our office has presented sentencing allegations alone to the
22 grand jury post-conviction -- or post-plea. So that's also
23 been done. As to whether or not, there's --

24 THE COURT: Post-plea but before sentence?

25 MS. DUARTE: Correct. The defendants that pled guilty

1 prior to Ameline and are now contesting their sentencing, have
2 been charged supplementally. So it's quite doable. It can be
3 done. It certainly would not be intention to stall in any way;
4 but as Mr. Rome mentioned, there are a fair number of
5 witnesses. It's my anticipation that I, at a minimum, if not
6 the trial, would be doing the sentencing allegation and that
7 there would be a fair number of those as well that would need
8 to be presented. With all that said --

9 THE COURT: Well, is it your expectation that you
10 would be seeking a verdict even as to those claimed bases for
11 enhancements that you previously made that I denied?

12 MS. DUARTE: It's possible, your Honor. I have not
13 made that assessment. I really haven't thought about it.

14 THE COURT: Okay. Well, Mr. Rome, I'm not going to
15 change my mind on this particular motion concerning bail.

16 MR. ROME: Could I address two other points for the
17 record, your Honor.

18 THE COURT: You're welcome to explore -- you may in a
19 minute. You're welcome to explore with the prosecutor any
20 follow-up you want following this colloquy. Now, what are the
21 two other points?

22 MR. ROME: Yeah, I appreciate the Court's inquiry. I
23 think in a way, it -- it confirmed the fact that even on some
24 quick expedited basis, this is going to be a situation that's
25 going to take time to wind its way through the system

1 regardless of how fast it moves. I mean, by that time, it's
2 going to be a quick approach in the July release date. The
3 only other points that I would like to make for the record, is
4 that the Court mentioned with respect to either a flight risk
5 or a danger, there was really no harm in this case. I
6 understand that there were --

7 THE COURT: Mr. Rome, don't even go down that route,
8 because you did not see the witnesses, and you did not see the
9 reactions of the jurors, and you did not hear testimony. I
10 know you're doing probably a thorough and narrow job in
11 reviewing the transcript. That no one was smashed in the face
12 is true. I grant you that.

13 MR. ROME: Mr. Sutcliffe was out --

14 THE COURT: But *hurt* and *harm* are not measured only by
15 a bodily assault.

16 MR. ROME: But Mr. Sutcliffe was out from the time the
17 web site was established until ultimately he was taken into
18 custody there was a period of months that went by. No one was
19 physically injured. So when we're talking about a harm, I
20 think there could be orders issued, that he couldn't contact,
21 he couldn't use a computer, what not. That would take care of
22 that; and on the flight risk, it's the same thing. I don't
23 think that there's any chance that he's going to flee anywhere.
24 He doesn't really have anywhere to go. As we indicated in our
25 declaration, he does have a couple of places that he can stay;

1 and it would just seem, just without being too redundant, that
2 I think the way it's going to play out, is there's not going to
3 be a retrial, because there's probably not going to have to
4 be --

5 THE COURT: I can't say you're wrong, but I don't know
6 that you're right, and I don't think that's going to be a
7 sufficient -- it isn't a sufficient basis to establish the
8 right to bail.

9 MR. ROME: But to the extent -- I appreciate it. Only
10 we'll keep in mind that to the extent that there's a relatively
11 quick decision on from the Supreme Court, we'll try to expedite
12 it. To the extent the Court's not going to grant bail, we'll
13 take the Court's suggestion and try to expedite the retrial as
14 fast as possible.

15 THE COURT: Okay. Well --

16 MR. ROME: I don't think I have anything else at this
17 point.

18 THE COURT: Okay. Well, that's my ruling.

19 MR. ROME: Wait. Can I consult with Mr. Sutcliffe?

20 THE COURT: Yes.

21 MR. ROME: I think that's all at this point, your
22 Honor.

23 THE COURT: Okay. We're adjourned.

24 (Whereupon the proceeding was adjourned at
25 4:21 p.m.)

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U.S.A., :
vs. : CR. 02-350(A)-AHM
STEVEN SUTCLIFFE :

I HEREBY CERTIFY THAT THE FOREGOING MATTER ENTITLED, U.S.A., VERSUS STEVEN SUTCLIFFE, IS TRANSCRIBED FROM THE STENOGRAPHIC NOTES TAKEN BY ME AND IS A TRUE AND ACCURATE TRANSCRIPTION OF THE SAME.

Maria R. Bustillos

MARIA R. BUSTILLOS
OFFICIAL COURT REPORTER

DATED: 12-08-04