

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE A. HOWARD MATZ, JUDGE PRESIDING

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

STEVEN WILLIAM SUTCLIFFE,)

Defendant.)

Case No. CR 02-350(A)-AHM

CERTIFIED COPY

REPORTER'S TRANSCRIPT OF JURY TRIAL PROCEEDINGS

Los Angeles, California

Wednesday, November 26, 2003

DAY 9

(Pages 1649-1727)

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Court Reporter

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I N D E X

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DEFENSE
WITNESSES DIRECT CROSS REDIRECT RECROSS

McAFEE, Leslie
By Mr. Sutcliffe 1669 (resumed)

1 LOS ANGELES, CALIFORNIA;

2 WEDNESDAY, NOVEMBER 26, 2003; 8:13 A.M.

3 (Jury out.)

4 MS. DUARTE: Good morning, Your Honor.

5 Elena Duarte and Frank Harrill on behalf of the
6 United States.

7 THE COURT: Good morning.

8 MR. SUTCLIFFE: Good morning, Your Honor.

9 Steven William Sutcliffe, accused, present.

10 MR. REED: David Reed, advisory counsel.

11 THE COURT: Good morning to both of you. I
12 understand you have something to bring up.

13 MS. DUARTE: I do, Your Honor.

14 I have several matters. For the last matter, it
15 won't take long. For the last matter, I would ask that the
16 witness in the courtroom be excluded. I can go ahead and bring
17 up the first few matters, if the Court will allow me to exclude
18 the witness.

19 THE COURT: Let's exclude the witness, first. The
20 witness being Mr. McAfee.

21 MS. DUARTE: Your Honor, would it also be possible to
22 exclude any other collateral people here, whose presence is not
23 necessary, for the limited purpose of what I'm about to bring
24 up?

25 THE COURT: Yes. The only people who will remain are

1 the defendant, Mr. Reed, and representatives of the marshal
2 service. I'm not sure who you are, sir, but could you leave,
3 please.

4 MS. DUARTE: First, Your Honor -- this is not a
5 private matter -- I did speak with Special Agent Cugno about
6 the Court's order that he return on Tuesday. He has advised me
7 that he's having, at least as of last night, a little bit of a
8 problem with the airlines, just with some technical issues
9 about refunds and the like. And he asked if there was some
10 kind of minute order -- I can get him a subpoena -- but he
11 asked if there was some kind of minute order that might issue
12 that requires his presence here.

13 THE COURT: Okay.

14 MS. DUARTE: Actually, I misquoted. I offered to ask
15 this Court for a minute order for him. He only asked me what
16 he should do.

17 THE COURT: What's his first name?

18 MS. DUARTE: Jeffrey, J-e-f-f-r-e-y, Cugno,
19 C-u-g-n-o. And he just needs proof that his presence is
20 required in Federal Court in Los Angeles at 8:00 a.m. on
21 Tuesday, December the 2nd, and if there were any way, later
22 this afternoon, for me to acquire that from Mr. Montes and fax
23 it over.

24 THE COURT: Okay. I'll get it.

25 MS. DUARTE: Thank you, Your Honor. I appreciate

1 that.

2 Your Honor, the second matter is, I have copied --
3 per the Court's order yesterday, I caused to be copied all of
4 the defense discovery that was given to me. We did Bates stamp
5 the originals, and I have provided the Court with its copy, and
6 I have provided the originals again to Mr. Sutcliffe.

7 There was one thing in particular, although I realize
8 that all these will be subject to objection at the time they
9 are offered, if they are for admission. There was one thing in
10 particular I wanted to bring to the Court's attention that I
11 would be asking, because it would be a little bit complicated
12 to try to do in front of the jury.

13 Directing the Court's attention to page 16, Bates
14 stamped 16 of this packet, is what appears to be a memo to
15 Mr. Sutcliffe from Leslie McAfee.

16 I'm not forming an opinion yet, Your Honor, or asking
17 the Court to find any relevance about this memo and whether or
18 not it may or may not be admissible. However, to the extent
19 that it is proffered and asked to be admitted, I would ask this
20 Court to give a limiting instruction immediately upon its
21 acceptance for admission; that this document, which is pages 16
22 through 21 -- Your Honor, it could be 20. Let me check. 16
23 through 19.

24 THE COURT: It looks like it's 19 to me.

25 MS. DUARTE: 16 through 19. My fault.

1 To the extent that 20 and 21 may be an appendage of
2 that, my request would extend to those pages -- that the
3 contents of this memorandum are not being offered -- or
4 accepted, I should say, for the truth. They contain a good
5 deal of law, Your Honor, and legal conclusions that are
6 questionable.

7 THE COURT: That's what I said yesterday. I have
8 notes of what I said I would instruct the jury, yesterday.

9 MS. DUARTE: I understand that the Court is
10 instructing as to the basic advice of counsel.

11 THE COURT: No. As to the testimony -- any testimony
12 that Mr. McAfee gives or Mr. Sutcliffe, for that matter, about
13 what Mr. McAfee may have told him --

14 MS. DUARTE: Is not for the truth, but for the
15 effect.

16 THE COURT: Right.

17 -- and I'm going to tell them that it's not
18 necessarily a correct statement of the law; that the Court will
19 define what the law is that's applicable to the case; that the
20 evidence is introduced solely for the jury to evaluate whether
21 the government proved that the defendant had the necessary
22 state of mind; namely, the specific intent to threaten.

23 MS. DUARTE: I didn't understand that you were going
24 to do that for these exhibits, so that's good. Thank you, Your
25 Honor. That's what I wanted to know.

1 The third matter is, I understand that Mr. Robert --
2 Detective Robert Campbell has been subpoenaed by the defense.
3 That is the witness that apparently they are planning on
4 calling to impeach witness Tracy Hall-Fraser on what I would
5 argue would be a collateral matter.

6 To the extent that that witness may be offered today,
7 I wanted to inquire about that. I would like to speak to that.
8 To the extent that that witness may not be offered today, I
9 don't want to waste any time. I would speak to that next week,
10 when I've had a chance to research the issue more thoroughly.

11 I wonder if the Court could inquire as to whether the
12 defense plans on calling the witness today.

13 THE COURT: Do you plan on calling Campbell today?

14 MR. SUTCLIFFE: We've been in touch with
15 Mr. Campbell. He's not available today. We expect him to be
16 coming in Tuesday morning.

17 THE COURT: Okay.

18 MS. DUARTE: With the Court's permission, I'll
19 address the issue, then, at that time.

20 And, lastly --

21 THE COURT: If you believe that evidence or testimony
22 that he would give, inconsistent with whatever Tracy Hall said,
23 would be collateral, or otherwise for some other reason
24 inadmissible, then you should file a memorandum on Monday
25 morning, and arrange to have a copy given to Mr. Sutcliffe on

1 Monday as well.

2 MS. DUARTE: I will do that, Your Honor.

3 THE COURT: At least you bring it to the prison.

4 MS. DUARTE: Or have it brought.

5 THE COURT: Or have it brought. Not you personally.

6 MS. DUARTE: Understood. I will look into that,
7 then.

8 And I believe this is the last issue. Your Honor --

9 THE COURT: As a courtesy to Mr. Reed, I don't know
10 if he's going to be consulted about it by Mr. Sutcliffe, but
11 make it available to Mr. Reed, too.

12 MS. DUARTE: I'll fax it to Mr. Reed, if I file it.

13 Before trial, the Court made an order that previous
14 litigation, or litigation that has come up in relation to the
15 instant case, that those matters would not be available to be
16 brought up, in summary.

17 The testimony of Mr. McAfee, I believe, may result in
18 improper cross-examination. My inquiring -- in order to
19 inquire as to his possible biases, as well as --

20 THE COURT: Sir, who are you?

21 UNIDENTIFIED SPEAKER: I was just going to watch the
22 trial, but I'll leave.

23 THE COURT: You can come in in a few minutes.

24 MS. DUARTE: To the extent that he -- to the extent
25 that I may need to inquire as to certain other documents he's

1 filed in this case, as well as in the civil case with Global
2 Crossing --

3 THE COURT: You mean in this criminal case?

4 MS. DUARTE: In this criminal case.

5 His declaration that he made to this Court has
6 something in it that I may need to ask him about. There is a
7 Complaint that was filed based on Mr. Nicolaysen's actions in
8 this Court that had some interesting things that I may need to
9 inquire about. There were a few orders that were issued in the
10 Global Crossing case, wherein Mr. McAfee had declarations that
11 have some things in them.

12 And I wanted to make -- and also, and most
13 importantly, Your Honor, because this is the thing that I
14 really wanted to make sure is all right, Mr. McAfee, in 1998,
15 which is less than a year, I believe, prior to some of these
16 writings that are included in the discovery, was sanctioned by
17 Judge Wilson. And Judge Wilson used a couple of sentences in
18 particular in that order that I would be interested in asking
19 Mr. McAfee about should he again raise the issue of --

20 I know this Court has declined, thus far, to qualify
21 him as an expert and, of course, I would continue to object to
22 that qualification. But to the extent that the questions and
23 answers suggest some sort of competence, that is perhaps --

24 THE COURT: Do you have this order of Judge Wilson?

25 MS. DUARTE: I do.

1 THE COURT: Let me see it. Give a copy, please, to
2 Mr. Sutcliffe.

3 MS. DUARTE: Perhaps we should address this
4 particular order separately from those other documents I was
5 discussing.

6 Let me draw the Court's attention on this order,
7 however, as long as we are on it, to page 8, "Improper
8 Purpose," large "B" at the top of the page. This is where the
9 findings were made against Mr. McAfee. And it reads, in part,
10 "Mr. McAfee's conduct in bringing and maintaining this
11 frivolous claim crosses the line into abuse of process."

12 The history -- excuse me, turning to page 9, line 3,
13 "The history of this case and the egregiousness of McAfee's
14 violation leads this Court to believe that a significant
15 sanction is warranted in order to deter McAfee from further
16 abuses of judicial process."

17 Now, the last time I checked the docket, Your Honor,
18 this order was still in effect. It has not been in any way
19 abrogated, as far as I am informed.

20 Again, I would only bring this up if Mr. McAfee
21 insists on maintaining as he did. I have noted, when I
22 reviewed the earlier civil litigation in the Global Crossing
23 case, he actually filed several declarations, wherein he
24 expressly described these sanctions as not including any
25 findings of impropriety on his part but being purely

1 jurisdictional, which is clearly not true. He has already
2 filed declarations saying that in civil court.

3 To the extent that he tries to say that, if it comes
4 up in this courtroom, that would be impeachment evidence
5 against him.

6 THE COURT: I'm having a little trouble following
7 what you are referring to about whatever he's filed in the
8 civil litigation involving Global Crossing, but I'll tell you
9 this: Nothing he's said so far would permit cross-examination
10 based upon Judge Wilson's order, but if he opens the door in
11 other testimony, then it may well entitle the government to
12 inquire about this, at least for purposes of either credibility
13 or competence.

14 MS. DUARTE: And those are the purposes that I was
15 intending to offer.

16 THE COURT: I don't give you permission to inquire
17 about this based on the record right now.

18 MS. DUARTE: I understand that, Your Honor.

19 Let me make clear that this is all anticipatory. I
20 bring it up to make sure that it's within the Court's earlier
21 order.

22 THE COURT: Okay.

23 MS. DUARTE: And about the additional documents that
24 I described, Your Honor, that were actually filed in, and
25 collateral to, this case in the civil litigation, other than

1 the sanctions, the documents that were filed that have some
2 declarations by Mr. McAfee made to this Court, the Complaint
3 that was filed, to the extent that those become relevant, do I
4 also have permission to inquire into those?

5 THE COURT: Yes.

6 MS. DUARTE: Thank you.

7 I believe that's it. If I could just check my notes.

8 THE COURT: In order to avoid confusion for you,
9 Mr. Sutcliffe, confusion that would only serve to your
10 detriment if it came up in the presence of the jury, I'm
11 looking at the first page, 0001, of what was Bates stamped
12 after you gave it to the government yesterday.

13 MR. SUTCLIFFE: Your Honor, if I can maybe be heard
14 for one second before you go on. I'm going to stop you right
15 there, only to save the Court time.

16 I have given a lot of thought about yesterday's
17 events, and --

18 THE COURT: About the what?

19 MR. SUTCLIFFE: Yesterday's events.

20 -- and I conclude that my defense witness,
21 Mr. McAfee -- I want to get this trial over quickly. I'm sure
22 everybody on that jury does, too. I'm sure the Court does. I
23 have heard you express that numerous times.

24 THE COURT: Yes, but I want you to understand -- I
25 have to respond to that -- the objective is not to get it over

1 quickly. The objective is to get it over fairly.

2 The secondary related objective is to make sure that
3 the predictions and representations made to the jury were made
4 in good faith. So I've been concerned about the jury's
5 schedule and the Court's assurances. I have no other agenda.

6 MR. SUTCLIFFE: It's interesting you said that, Your
7 Honor, because I'd like to get it over fairly, too, which would
8 lead me to my next motion I'd like to be heard on, which is I'd
9 like to file a motion, orally, right now, to dismiss this case
10 based on the prejudice that the defense has suffered.

11 The defense has read the e-mails that were provided
12 yesterday by the government. The defense has clearly,
13 specifically, demanded all Brady material from the government,
14 and defense, clearly, in letter form sent to the government,
15 clearly demanded unredacted copies of all previously provided
16 Brady material, all Bates-stamped discovery.

17 We now -- at the twelfth hour and one minute, I've
18 been provided six documents with impeachment witnesses I could
19 have subpoenaed under the compulsory process of the Sixth
20 Amendment. These are not lost to the defense forever.

21 I would move for either a mistrial so I may go and
22 subpoena these witnesses to impeach the two witnesses, Mr. Saly
23 and Mrs. Greenwood, who have already come and gone.

24 There are numerous people within these documents.
25 There is a Lawrence Burke. There is a Sandra MacArthur.

1 THE COURT: You need to do a lot more than tell me
2 who is mentioned or who these concern to establish some kind of
3 violation of your constitutional rights under Brady.

4 This is your opportunity to do more. Tell me, with
5 precision, what it is that you think, in the material that the
6 government said they didn't have the ability to corroborate
7 perfectly, as having been given to you, although it may have
8 been, you had a right to get that you didn't get, and your
9 constitutional rights were violated, and you are not getting.
10 Will you be specific, please.

11 MR. SUTCLIFFE: Your Honor, I'll be very specific.
12 The Constitution, specifically the Fifth Amendment, affords the
13 right to the defendant --

14 THE COURT: I know that.

15 MR. SUTCLIFFE: Excuse me, Your Honor.

16 THE COURT: Just tell me what the documents are. I
17 know what the law is. You don't have to make a record. I
18 understand what the law is under the Fifth Amendment.

19 Please tell me which documents you think you should
20 have gotten earlier that the failure of the government to give
21 you has prejudiced you.

22 MR. SUTCLIFFE: Your Honor, the Sixth Amendment gives
23 the defendant the right to have the compulsory process for
24 obtaining witnesses in his favor.

25 The defendant cannot exercise his right to have

1 compulsory process for obtaining witnesses in his favor when
2 the government intentionally and willfully prejudiced the
3 defendant by willfully and intentionally failing to turn over
4 requested discovery matter, which is a matter of due process
5 right of the defense.

6 I do not have to prove anything. I have made my
7 record. I will stand on my record.

8 I will move this Court to immediately dismiss or
9 declare a mistrial for the failure of the government to uphold
10 the defendant's constitutional right to a fair trial.

11 You said it yourself. You want to get this over
12 fairly. There has been an egregious violation of fairness, due
13 process, compulsory process, and a violation of the defendant's
14 constitutional rights.

15 With that, I will stand on --

16 THE COURT: The motion is denied based upon that
17 showing.

18 Turning to the documents, Mr. Sutcliffe, that I ✓
19 started to address before you intervened -- and I haven't done
20 anything more than look at page 1, which is page 92 of some
21 publication. Circled on it is part of a snippet of an article
22 concerning Lars Ulrich, and I guess that's the part that is
23 perceived to be relevant.

24 If you are -- could you make a proffer, please. You
25 said that you were going to introduce all of these documents.

1 Can you explain to me what the relevance is and how
2 it affects your defense that whatever this publication is
3 contains the portion -- is the portion circled on page 1, the
4 part that you think is -- the part you want to call attention
5 to?

6 MR. SUTCLIFFE: Yes, Your Honor.

7 THE COURT: Please explain in what way that is
8 relevant to this case.

9 MR. SUTCLIFFE: Your Honor, I don't believe anything
10 is relevant to this case at this point, and I would make a
11 motion to dismiss this case for the failure of the Court to
12 uphold my constitutional rights.

13 THE COURT: Okay. That motion is denied.

14 MR. SUTCLIFFE: Then I would make a motion to dismiss
15 this case for the failure of the Court to uphold the
16 Constitution, which it has taken a sworn oath to do.

17 THE COURT: And that motion is denied.

18 MR. SUTCLIFFE: Thank you, Your Honor.

19 I have nothing further.

20 THE COURT: Then I'm going to rule. If you seek to
21 introduce evidence that, in publications available to the
22 public, nasty language is used -- and the particular one that
23 is circled, on 0001, it shows a picture of someone -- I don't
24 know who it is, but I assume it's Lars Ulrich. The facial
25 expression is, I guess, one can say, angry or frowning. The

1 caption beneath that says, quote, "What do you mean? This is
2 my happy face." There is some text, about two or three very
3 short paragraphs. The part that's been quoted says, "Quote" --
4 and the word "quote" is in the quote. Then it says, in
5 quotation marks, "You want to fucking see in three months how
6 we can fucking blow your measly little company apart? No
7 problem."

8 Statements like that that reflect communications like
9 that, not directed to specific individuals and not in the
10 context of the evidence that, thus far, has been introduced by
11 both sides, because much of it has been elicited and presented
12 by the defendant, would not be relevant.

13 MR. SUTCLIFFE: Your Honor --

14 THE COURT: I'm just giving you an indication so you
15 don't feel that you are prejudiced if I entertain and rule
16 upon -- don't interrupt me -- objections that the government
17 may make.

18 I'm not sure what the government is going to do. I'm
19 not excluding them now, but I'm just telling you, in advance,
20 that I don't understand, and you haven't established, any basis
21 whatsoever for those to be admitted.

22 MR. SUTCLIFFE: Your Honor --

23 THE COURT: That's not an issue of authentication or
24 foundation.

25 MR. SUTCLIFFE: I understand, Your Honor. But

1 just -- that document right there, you'll note that right below
2 that quote you just quoted that is circled, you'll see the
3 case United States v. Whiffen, W-h-i-f-f-e-n, comma, First
4 Circuit, 1997.

5 That case specifically dealt with the same standard
6 as being applied to defendant, and in that case right there,
7 the accused in that case had called up an insurance company and
8 used, roughly, the same words about "Your building is going to
9 go boom" or "get blown up," or words to that effect.

10 Under the reasonable person standard, he was found
11 guilty.

12 Now, the same standard can be applied to Mr. Lars
13 Ulrich, "Fucking blow your measly little company apart." That
14 can be taken out of context, too, just like --

15 THE COURT: I haven't read Whiffen. I will try to
16 find it. It doesn't have a citation here.

17 But you are telling me, even in the case you are
18 calling my attention to, the defendant was convicted and the
19 conviction was sustained?

20 MR. SUTCLIFFE: That is correct, Your Honor. Because
21 he made -- in the New Hampshire transcript, the facts of the
22 U.S. v. Whiffen case, I believe, were cited at the preliminary
23 hearing that took place back on March 26th of 2002.

24 Mr. Ulrich is known for going after companies who
25 promote or download e-mail -- excuse me, songs, file-sharing

1 songs, companies that promote that; and so a reasonable person
2 who owns one of those companies could say, Well, pooh, I took
3 that as being applied to me, because he testified, in Congress,
4 that these companies that promote and download these
5 file-sharing things over the Internet are taking away his
6 money.

7 So anybody can reasonably come and say, "Well, that
8 was directed toward" -- "I felt fear. I felt it was directed
9 towards me." The same standard can be applied, Your Honor, as
10 being applied to me.

11 Just like Mrs. Greenwood said, "We can come up with
12 some more threats if we searched." Sure, you can. Anybody can
13 search long and hard enough and come up with -- take things out
14 of context, especially when you have an agenda.

15 THE COURT: Okay. Anything else that needs to be
16 brought up?

17 MS. DUARTE: No, Your Honor.

18 THE COURT: Bring in the witness, bring in the
19 jurors. I'll be back in a minute.

20 (Brief recess.)

21 (Jury in.)

22 THE COURT: We are going to resume with the evidence,
23 and today our schedule will be 8:30 to 1:30, as it's been on
24 most of the days. Then we'll break for the holiday. There
25 will not be a trial on Monday. You will not need to come in on

1 Monday. I will remind you what the schedule will be as we say
2 goodbye this afternoon.

3 We will take periodic breaks, probably two breaks
4 between now and 1:30.

5 **LESLIE MCAFEE, DEFENSE WITNESS, PREVIOUSLY SWORN**

6 THE COURT: Mr. McAfee, I remind you that you are
7 under oath, and you have the continuing obligation to testify
8 truthfully. Do you understand that?

9 THE WITNESS: I do, Your Honor.

10 THE COURT: You may proceed, Mr. Sutcliffe.

11 MR. SUTCLIFFE: Thank you.

12 **DIRECT EXAMINATION (Resumed)**

13 BY MR. SUTCLIFFE:

14 Q Good morning, ladies and gentlemen of the jury. Good
15 morning, Mr. McAfee.

16 A Good morning.

17 Q Mr. McAfee, do you recall a time in October, specifically
18 the 18th, of 2001?

19 A Do I recall the date in general?

20 Q Yes. Do you recall anything that happened on October 18th
21 of 2001? Did someone come to your office, a female,
22 specifically?

23 A I was visited by a woman by the name of Tracy Hall, at
24 least who identified herself to me as Tracy Hall.

25 Q Had you ever seen this woman before, "yes" or "no"?

1 A There is a sequence of events, and I can't recall if I had
2 seen her before that date. I believe I had seen her before
3 that date, but didn't know who she was.

4 Q When she came into your office, did she tell you why she
5 was there?

6 A Yes, she did.

7 Q Would you please tell the jury what she told you?

8 A Yes. She told me she was looking to serve documents on a
9 Mr. Sutcliffe, and I invited her into my office to show her
10 that Mr. Sutcliffe wasn't there.

11 Q At some point of this meeting, did she ask you, "How would
12 you feel if your personal information, such as your home
13 address, your home telephone number, and your personal social
14 security number, were put on the Internet?"

15 A She did.

16 Q Did she claim that her telephone number, her personal
17 social security number, or her address were ever put on the
18 Internet?

19 MS. DUARTE: Object to leading, Your Honor.

20 THE COURT: Sustained.

21 BY MR. SUTCLIFFE:

22 Q Did she seem upset with you?

23 A She did.

24 Q Did she seem upset with the defendant?

25 A In particular she did.

1 Q Did she ever make the statement she was going to make the
2 defendant's legal life miserable?

3 A She not only made that statement about the defendant, but
4 she made that statement about myself and my family as well.

5 Q Did you ask the defendant -- excuse me. Did you ask
6 Ms. Fraser -- Ms. Hall to leave your office at some point?

7 A I did. In fact, I demanded that she leave or I would call
8 the police.

9 Q Did, in fact, you call the police?

10 A No. Fortunately, a client of mine had come in and I guess
11 the numbers convinced her that she should leave.

12 Q Do you recall a man by the name of Jeff Brenner?

13 A I do.

14 Q What was the nature of your relationship with Mr. Brenner?

15 A I received a phone call from Mr. Brenner on November
16 1st --

17 THE COURT: No, that's not responsive, Mr. McAfee.

18 THE WITNESS: Sorry.

19 THE COURT: Was the client a friend? a business
20 acquaintance? Just answer the question.

21 THE WITNESS: I received a phone call from him. He
22 was none of the above.

23 BY MR. SUTCLIFFE:

24 Q Did he identify himself to you as to who he was?

25 A He did.

1 Q Did he identify himself as to his nature to anybody else?

2 A He did.

3 Q Could you tell the jury what was that nature?

4 A Yes. He informed me he was a previous employee of Global
5 Crossing who had worked in the -- with the computers at Global
6 Crossing.

7 Q And did Mr. Brenner give you any information or offer any
8 information to you?

9 MS. DUARTE: Objection. Calling for hearsay.

10 THE COURT: Sustained.

11 BY MR. SUTCLIFFE:

12 Q Did Mr. Brenner -- what was your discussion with
13 Mr. Brenner? What was his concern?

14 MS. DUARTE: Same Objection, Your Honor.

15 THE COURT: Sustained.

16 BY MR. SUTCLIFFE:

17 Q Did Mr. Brenner -- was Mr. Brenner concerned about the
18 website "evilgx.com"?

19 MS. DUARTE: Objection, Your Honor.

20 Calling for hearsay to the extent that it's offered
21 for the truth.

22 THE COURT: And it calls for a conclusion or
23 speculation based on what we know thus far.

24 You can try to lay a foundation, and it may be that,
25 for limited purpose, Mr. McAfee will be permitted to respond to

1 questions concerning this individual, Mr. Brenner, but you have
2 to do it the right way.

3 MR. SUTCLIFFE: Thank you, Your Honor.

4 Q Did Mr. Brenner ask you for any legal advice?

5 A He did.

6 Q Can you please tell the jury what legal advice he was
7 seeking from you?

8 A He was asking if he was required to sign a declaration
9 that had been prepared for him by the attorneys for Global
10 Crossing.

11 Q What, if anything, did you tell him?

12 A I advised him that if he did not believe the declaration
13 was truthful, which is what he was declaring under penalty of
14 perjury, that he need not sign that declaration.

15 Q So he was concerned that he was being asked to sign a
16 declaration that was containing perjury?

17 MS. DUARTE: Objection, Your Honor.

18 Misquotes the witness. Assumes facts not in
19 evidence.

20 THE COURT: It does and it's a leading question. It
21 calls for a conclusion. So the objection is sustained on all
22 of those grounds.

23 MS. DUARTE: Your Honor, move to strike the question.

24 THE COURT: The question itself is not evidence. I
25 think I've already explained that, but I'll repeat that. I

1 realize you've heard it, but you are to disregard the question
2 and not take it into account at the time you deliberate in the
3 case.

4 BY MR. SUTCLIFFE:

5 Q To your knowledge, did Mr. Brenner ever sign a
6 declaration?

7 A Not to my knowledge.

8 Q Did you have any conversations with Global Crossing's
9 attorneys related to your conversation with Mr. Brenner?

10 A I did. I sent a letter to Laura, I believe her last name
11 is Premi, from Christensen, Miller, the attorneys for Global
12 Crossing.

13 Q Do you have a copy of that letter with you?

14 A I do.

15 Q May I see that letter, please?

16 A It will take me a minute to find it.

17 Q Sure. Take your time.

18 MS. DUARTE: Your Honor, while he's looking, I want
19 the record to reflect that Mr. McAfee has a redwell full of
20 numerous papers in front of him up at the podium that he's
21 looking through.

22 THE COURT: The record will so reflect.

23 THE WITNESS: Sorry. Here it is.

24 THE COURT: Let's present this letter to
25 Mr. Sutcliffe, for whatever use he thinks he can make of it. I

1 think if you have the declaration to which this letter refers,
2 I need to see it before I can permit further inquiry.

3 Do you have the declaration?

4 THE WITNESS: I do, Your Honor.

5 THE COURT: Let me see both declarations to which
6 your letter refers.

7 MS. DUARTE: Also, for the record, Your Honor, I do
8 not believe I have a copy of that letter.

9 THE COURT: Well, we'll have to do it the hard way.
10 Give me the declarations.

11 THE WITNESS: This is the only declaration I have,
12 Your Honor.

13 THE COURT: What Mr. McAfee has handed me, as the
14 declaration to which the letter Mr. Sutcliffe is now holding
15 onto refers, contains handwriting. Whose handwriting is it?

16 THE WITNESS: That is my handwritten notes I took
17 when I was talking to Mr. Brenner.

18 THE COURT: This declaration has to be part of the
19 letter and of any use to the letter and has to be shown to the
20 government as well.

21 I'm handing the declaration to the clerk to give to
22 Mr. Sutcliffe. If you want to proceed, you are going to have
23 to bring that declaration to the attention of the jury.

24 MS. DUARTE: Your Honor, I've taken a quick look at
25 it.

1 THE COURT: All right. You may proceed.

2 BY MR. SUTCLIFFE:

3 Q This conversation you had with Mr. Brenner, you said he
4 informed you he was also a member of the IT -- or the
5 Information Technology Department at Global Crossing where the
6 defendant worked; correct?

7 A That is correct.

8 Q Did he tell you, if anything, when his -- when he was
9 terminated or if he was terminated?

10 MS. DUARTE: Objection, Your Honor.

11 It's offered for the truth. It's hearsay.

12 THE COURT: I will instruct the jury that although
13 I'm not sure where we are heading with this, I will permit some
14 limited inquiry to see if there is some relevance.

15 Whatever the witness says, you must not, and may not,
16 consider for the truth of whatever it was that he's going to
17 tell us he was told. So if he tells us, for example, that
18 Brenner told him he was terminated on October 1st, that doesn't
19 constitute a basis for you to find, even if it is relevant,
20 that Brenner was, in fact, terminated on October 1st.

21 Instead, the only limited purpose for which you may
22 consider whatever it is that this witness is going to say, in
23 response to the question about what Brenner told him, is for
24 the purpose of understanding what was in this witness's mind,
25 assuming that, in some way, it may be relevant to the

1 allegations against Mr. Sutcliffe.

2 So nothing that you are about to hear, at least at
3 this stage of this witness's testimony, means that what he was
4 told was true. We are only letting you hear the evidence to
5 find out what he was told and to see if it had any impact on
6 the other events and the other issues that are relevant in this
7 case.

8 You may proceed, Mr. Sutcliffe.

9 MR. SUTCLIFFE: Thank you.

10 I have forgotten my question.

11 THE WITNESS: Sorry.

12 THE COURT: Just ask it again.

13 BY MR. SUTCLIFFE:

14 Q I forgot the question. Something about when he was
15 terminated.

16 Did he tell you when he was terminated?

17 A I don't have a recollection. It may be in the letter. I
18 don't have an independent recollection.

19 Q Basically, why he was calling you was regarding a
20 declaration he wanted legal advice on?

21 A Correct.

22 Q And the declaration was being prepared by who, if anybody?

23 A I believe it was prepared by Laura Premi, an attorney at
24 Christensen, Miller, who were representing Global Crossing.

25 Q And who else works at Christensen, Miller in that law firm

1 that was representing Global Crossing against the defendant?

2 A That I had contact with, initially, it was Mark Block,
3 B-l-o-c-k -- that was in early October 2001 -- and a Mark
4 Labaton. I couldn't tell you exactly when I had contact with
5 him.

6 MR. SUTCLIFFE: I have nothing further, Your Honor.

7 THE COURT: No further questions?

8 MR. SUTCLIFFE: No further questions, Your Honor.

9 THE COURT: Any cross-examination?

10 MS. DUARTE: I do, Your Honor, but I have a question.
11 Was the Court planning on giving the instruction that
12 was discussed, based on yesterday's testimony and where it
13 ended?

14 THE COURT: No. There was no testimony about
15 assertions of law.

16 MS. DUARTE: Okay. Could I have just a moment?

17 THE COURT: Yes.

18 MS. DUARTE: I have no questions, Your Honor.

19 THE COURT: Okay. You are excused, Mr. McAfee.

20 THE WITNESS: Thank you, Your Honor.

21 THE COURT: Please call your next witness,
22 Mr. Sutcliffe.

23 MR. SUTCLIFFE: Your Honor, we are currently waiting
24 on Mr. Robert Campbell from the Los Angeles Sheriff's
25 Department. I've been informed he will not be available until

1 Tuesday. As the Court is well aware, Agent Cugno is also out
2 until Tuesday.

3 So if the Court is so inclined, feel free to give the
4 members of the jury an early Thanksgiving. I have no other
5 witnesses until Agent Cugno gets back so I can continue my
6 cross-examination and when Sheriff Robert Campbell comes in for
7 impeachment purposes of Witness Hall.

8 MS. DUARTE: Your Honor --

9 THE COURT: Don't say why he may be relevant. I'll
10 make a ruling at the appropriate time.

11 MR. SUTCLIFFE: That's where I stand, Your Honor.

12 THE COURT: Are you representing to me,
13 Mr. Sutcliffe, that the only remaining witnesses you seek to
14 call in your case are Cugno and Campbell?

15 MR. SUTCLIFFE: Yes, Your Honor.

16 THE COURT: No other witnesses?

17 MR. SUTCLIFFE: No, Your Honor, subject to the
18 reservation of rights to recall any other agent, like
19 Mr. Harrill, if I needed to, which I believe I reserved that
20 right.

21 MS. DUARTE: Your Honor, I ask, if that right is
22 going to be exercised, it be exercised right now while we are
23 here. Agent Harrill is ready to testify if he's going to be
24 called.

25 THE COURT: I would permit you to question

1 Mr. Harrill. But if you are going to question Mr. Harrill and
2 it's your plan to question Mr. Harrill, let's take advantage of
3 the opportunity you have now, because this impact on scheduling
4 is coming as a surprise to me.

5 I will not force you to rest, so I may be required to
6 permit the jury to go home, but I'm not going to do something
7 that's going to consume time next week that can be productively
8 used now.

9 So if you wish to question Agent Harrill, I'll allow
10 you to call him to the stand.

11 MR. SUTCLIFFE: I understand, Your Honor.

12 The last thing I want to do is waste any more time.
13 Unfortunately, I can't -- in my defense strategy, I can't tell
14 the Court with a definitive answer at this point whether I will
15 seek to recall Agent Harrill after I have spoken to Agent
16 Cugno. I'm placed between a rock and a hard place.

17 So I would just suggest that we all go home and have
18 an early Thanksgiving, at this point, and meet back here
19 Tuesday, respectfully.

20 THE COURT: I'm going to excuse you for just a
21 moment, ladies and gentlemen. Please go into the jury room.

22 (Jury out.)

23 THE COURT: First, Mr. Sutcliffe, I know you realize
24 this and I know it's been touched on, both directly and
25 indirectly, on many occasions, but I feel it's my duty to

1 advise you that you do have the right to testify on your own
2 behalf, and nothing arising out of, or relating to, the fact
3 that you are representing yourself at this trial would prevent
4 you from exercising that right.

5 Do you understand that?

6 MR. SUTCLIFFE: I've given a great deal of thought to
7 that, Your Honor. You said that several times.

8 I have this feeling that if I did that, I would look
9 like a nut.

10 "Mr. Sutcliffe, did you not...."

11 "No, I did not."

12 "Yes, you did."

13 "No, I did not."

14 They would think I'm nuts. So I'm going to
15 respectfully pass on cross-examining myself or testifying on my
16 own behalf, as is my right under the Constitution and Bill of
17 Rights.

18 THE COURT: It may be a wise tactical decision as
19 well. As long as you understand that you have that right, I
20 can move on to the next point. And you do understand that?

21 MR. SUTCLIFFE: I do understand that, Your Honor.

22 MS. DUARTE: Additionally, Your Honor -- I'm sorry to
23 interrupt -- perhaps defendant should be reminded, although I
24 know the Court has advised him of this, that he could write out
25 his questions word for word and have Mr. Reed ask them to him

1 should he be concerned about the appearance of asking them to
2 himself.

3 THE COURT: I did already tell him that, and you
4 remember that, don't you, Mr. Sutcliffe?

5 MR. SUTCLIFFE: I'm as cognizant as can be, Your
6 Honor.

7 THE COURT: Secondly, it sounds to me like you've
8 thought through this and that's to your credit, but I think it
9 would be very unfortunate, and most especially from your point
10 of view, Mr. Sutcliffe, if during the intervening days you
11 think through it, yet further, and change your mind and request
12 leave to call in witnesses next week who could have been
13 questioned today, if you were to call back Mr. McAfee or decide
14 to testify on your own behalf, I probably would permit you to
15 do it, but I think it would look very, very bad in terms of
16 your credibility perhaps or other aspects of the jury's
17 evaluation of you in terms of the evidence and the charges
18 against you.

19 So I felt compelled to tell you that, if you're
20 quietly or silently thinking that you could always bring on new
21 witnesses next week and bide time to prepare, you might be
22 right, because I would bend over backward not to prevent you
23 from putting on witnesses. But you might be greatly injuring
24 your own prospects of persuading the jury that the government
25 has failed to meet its burden of proof.

1 Do you understand that?

2 MR. SUTCLIFFE: I understand it, very clearly, Your
3 Honor. And I have no intention of calling any other witnesses
4 other than Mr. Campbell and continuing my cross-examination of
5 Mr. Cugno.

6 THE COURT: Has Mr. Campbell actually been
7 subpoenaed?

8 MR. SUTCLIFFE: Yes, he has, Your Honor.

9 THE COURT: And you have been informed that he is not
10 available today but will be available on Tuesday?

11 MR. SUTCLIFFE: That's correct, Your Honor.

12 THE COURT: Mr. Reed, I know you've been moving
13 around there. Is there anything you wish to call to my
14 attention?

15 MR. REED: Well, Your Honor, technically, I spoke to
16 Detective Campbell yesterday. I didn't actually speak to
17 himself personally. I left a voicemail message for him. He
18 had called me previously. He acknowledged the service of the
19 subpoena.

20 And on that message that I left him, I told him that
21 if it was possible, he could run down here today and show up
22 before 1:30, and we could squeeze him in as an out-of-order
23 witness.

24 And since I left that message, I never really got
25 back to him and he's never returned our phone call.

1 So there may be a possibility today, Your Honor, you
2 might see a detective, if you are intending to release us
3 early. There may be a detective walking in here like at around
4 10:30, 11:00. There is nothing I can do to prevent that.

5 THE COURT: Well, I'm not going to subject the
6 parties, their lawyers, advisory counsel, or the jury to
7 further tour of duty in this courtroom or the jury room waiting
8 for that possibility.

9 If Campbell comes today, I'll instruct him to come
10 back on Tuesday, assuming that I adjourn the trial, which is
11 pretty clearly, to me, the thing I have to do. I don't
12 understand whether there is any meaningful or better
13 alternative.

14 Do you wish to be heard about that?

15 MS. DUARTE: Your Honor, I don't see any alternative,
16 either.

17 THE COURT: Then what I propose to do, but I want
18 both sides to have an opportunity to suggest a different way of
19 framing it, is to call the jurors back in, excuse them now
20 until Tuesday. We'll resume on Tuesday at 8:30. And I think
21 there is a high likelihood that we'll have closing arguments
22 and jury instructions on Tuesday.

23 Actually, I think what I'll do is keep the parties
24 and the lawyers here today and talk about jury instructions
25 later this morning, so we could save time in that regard.

1 THE COURT: All the jurors are back in their
2 respective seats. Everyone else may be seated.

3 Ladies and gentlemen, in any trial, it's
4 frequently -- or in many trials, it's frequently the case that
5 the parties, the lawyers, and the judge are not able, with
6 perfect control or accuracy, to predict the sequence of
7 witnesses, the availability of witnesses, and how long things
8 will take.

9 We don't have witnesses who are available to testify
10 right now, so we are going to take an adjournment of the
11 testimony stage and proceedings that occur before the jury
12 today. But you are going to go home in a couple of minutes is
13 what I'm about to tell you.

14 We will resume the trial on Tuesday. There will be,
15 as I'm currently understanding it, probably one or two
16 witnesses. And I'm not sure whether there will be any -- those
17 will be witnesses questioned by the defendant. And I don't
18 know if there'll be any redirect evidence rebuttal, it's
19 called, put in by the government.

20 I think it's a very good possibility that on Tuesday
21 and an even more likely possibility, an extremely strong
22 possibility, that by Wednesday you will be given jury
23 instructions and closing argument and begin your deliberations.

24 It really could well happen on Tuesday. There are
25 certain things I'll go over with the parties to the case in

1 your absence this morning to save time next week so we can
2 speed things along.

3 So please enjoy your Thanksgiving holiday. I
4 personally think that Thanksgiving is the most meaningful
5 holiday on our calendar. To celebrate what the pilgrims
6 celebrated, as part of our national recognition of who we are
7 as a people and as a nation, inspires me. I hope you feel the
8 same way. In any event, enjoy your weekend. You are
9 contributing, as citizens, to what we all have to be thankful
10 for. I want to thank you for doing so.

11 I ask you and instruct you to remember the
12 admonition. There's a few days' span between now and next
13 Tuesday. Don't form opinions about the case. Don't discuss
14 your views about the case or developments in the case with
15 other people. Please keep an open mind, in fairness to both
16 sides.

17 Be ready to proceed and in the jury room so that you
18 can take your respective jury seats at 8:30 on Tuesday morning.

19 With that, you are excused. Have a good weekend.

20 (Jury excused at 9:08 a.m. and following proceedings had.)

21 THE COURT: Everyone may be seated.

22 I'm going to need probably at least an hour to review
23 certain material that I want to double-check on. But I want to
24 make sure I correctly cite the state of filed proposed
25 instructions.

1 I, secondly, want to make sure that both sides have
2 those here in the courtroom, so that when I talk about them and
3 issue my rulings on them, it will be clear as to what I'm
4 referring.

5 On or about January 8th of 2003, at a time when
6 Mr. Sutcliffe was represented, I believe by Mr. -- yes, by
7 Mr. Harris, both sides submitted a document entitled "Joint
8 Proposed Jury Instructions," along with the accompanying disk.

9 On the same date, the government submitted a document
10 entitled "Government's Proposed Jury Instructions," containing
11 four instructions: Threats to injure; true threat defined,
12 citing the Planned Parenthood case; aiding and abetting; and
13 proof of knowledge or intent.

14 On or about September 23rd, the government submitted
15 another -- filed another document entitled "Government's
16 Supplemental Proposed Jury Instructions," basically -- not
17 basically, but stating, in its entirety, quote, The Internet is
18 an instrumentality of interstate and foreign commerce, and
19 citing various authorities for that.

20 So far as I know, those are the only instructions
21 that the Court has received. Are there any other instructions
22 that you have filed?

23 MS. DUARTE: Not that I have filed. I do have other
24 instructions, however.

25 THE COURT: You have what?

1 MS. DUARTE: I do have other instructions that my
2 filed stamp is January 8th by defense.

3 THE COURT: January 8th?

4 MS. DUARTE: Yes. I have another copy.

5 THE COURT: May I see those? I don't have them.

6 MS. DUARTE: I'm giving you my filed stamped copy.
7 They were filed by Mr. Harris. There are also a series of
8 objections, Your Honor.

9 THE COURT: Whose objections?

10 MS. DUARTE: The government objected to those
11 instructions. And I believe the defendant, through Mr. Harris,
12 objected to some of mine. Yes.

13 Would the Court like copies of that?

14 THE COURT: Yes. I'll have to speak to my staff
15 about why those weren't gathered. It would help to see those
16 instructions.

17 MS. DUARTE: I have an extra of the government's
18 objections, and I'm also giving the Court my only copy of the
19 defendant's objections.

20 THE COURT: The document entitled "Government's
21 Objections to Defendant's Proposed Jury Instructions" you don't
22 need back?

23 MS. DUARTE: That is correct.

24 THE COURT: But the document entitled "Defendant
25 Steven William Sutcliffe's Proposed Instructions" you do need

1 back?

2 MS. DUARTE: No, Your Honor. I only need the one
3 back that is his objections to my instructions.

4 THE COURT: Okay. The clerk will make copies. You
5 can instruct the secretary to make copies of the document filed
6 January 13, 2003, entitled "Defendant Steven William
7 Sutcliffe's Response to Government's Objections to Defendant's
8 Proposed Jury Instructions."

9 Before you make just one copy, I want to ask
10 Mr. Sutcliffe, are there any other instructions that you have
11 filed or any of your -- any of the individuals who, at any
12 previous time, were then functioning as your appointed counsel,
13 that you know of?

14 MR. SUTCLIFFE: Not that I know of, Your Honor.

15 However, I do have a proposed jury instruction I
16 would like filed at this point.

17 THE COURT: Okay. Would you hand it to the clerk and
18 we'll get it filed.

19 MR. SUTCLIFFE: Thank you, Your Honor.

20 THE COURT: Is it a two-pager or two different --

21 MR. SUTCLIFFE: Two different issues, Your Honor.

22 THE COURT: Two different instructions?

23 MR. SUTCLIFFE: Yes.

24 THE COURT: What I'll do, for purposes of having this
25 filed into the record, is, I will prepare a cover sheet and it

1 will say "Defendant's Supplemental Instructions." I will do
2 that now, and I'll make copies for the government and get them
3 filed and consider them back in my chambers.

4 Is that the entire array of instructions that both
5 sides wish me to consider? Is there anything else?

6 MS. DUARTE: If I could have just a minute, Your
7 Honor.

8 There was one that I had contemplated. Let me just
9 check my notes because I'm not sure that there is still a need.

10 Your Honor, I don't have anything to propose at this
11 time.

12 MR. SUTCLIFFE: I would just like to make the record
13 that I have objected in the past to the government's standard
14 of which I'm being tried, under the, quote/unquote, true threat
15 standard.

16 I believe that that standard there is only for
17 national -- something that would apply to a national interest
18 of the government, such as a threat made to the President of
19 the United States of America.

20 THE COURT: Here's what we'll do. Let me interrupt,
21 although I ordinarily try not to.

22 You'll have, and so will the government have, an
23 opportunity to address each and every proposed instruction I
24 contemplate giving. That will be done after I go over these
25 instructions. It won't take less than an hour. It could take

1 a little bit more. Then you can share what you have to say.
2 You have a right, and you'll be afforded the right, to make a
3 very explicit objection, so do it later this morning.

4 MR. SUTCLIFFE: Thank you, Your Honor.

5 THE COURT: All right. I'm going to, with that, go
6 back and review these instructions and some other material, and
7 the clerk will let you know when I'm ready to come out. You
8 can all be seated.

9 (Recess taken at 9:15 a.m. to 12:55 p.m.)

10 THE COURT: We are here to discuss and resolve jury
11 instructions, and here's how we'll go about doing it:

12 First of all, I've prepared and circulated for your
13 review already a series of standard jury instructions tailored
14 to the names of the parties in this case and to the fact that
15 Mr. Sutcliffe is representing himself that deal with recurring
16 issues of jury instructions.

17 It contains a number of instructions, ending with
18 No. 26, although some are not by number, certain numbers don't
19 have instructions accompanying them. Altogether, it's 29
20 pages, and that doesn't contain the disputed instructions nor
21 the instructions that relate to the specific crimes that are
22 alleged and to the elements of the offenses. Those I'll go
23 over with you.

24 I haven't had time to put those into the format and
25 into the sequence and assign them the number that they'll be

1 given on Tuesday or Wednesday, but we will resolve those today.

2 I've also circulated to each of you a new
3 instruction, also lacking a number and even a page number,
4 relating to the First Amendment.

5 So the first thing I want to do is ask whether you
6 have any objections to the, I think, standard of
7 noncontroversial instructions that are in the group that have
8 the caption of the case and the title "Jury Instructions" on
9 those before we address the other ones that each side submitted
10 and to which there were some objections.

11 So starting with that set only, any objections,
12 Ms. Duarte?

13 MS. DUARTE: Yes, Your Honor.

14 Well, the only thing I want to point out is, as to
15 Instruction 13A on page 17, I'm not sure that that instruction
16 is actually necessary.

17 THE COURT: No, it isn't. Well, wait a minute.

18 MS. DUARTE: I don't really have an objection to it.
19 I'm just not sure it's necessary.

20 THE COURT: I don't think it's appropriate and I
21 don't think we should include it.

22 I assume you agree, Mr. Sutcliffe?

23 MR. SUTCLIFFE: Are we looking at page 17? Mine says
24 15.

25 MS. DUARTE: Also, Your Honor --

1 THE COURT: Wait. Let me hear from Mr. Sutcliffe.

2 MR. SUTCLIFFE: We seem to be looking at two
3 different page 17s. Hers says something different than mine.

4 MS. DUARTE: I just realized the problem with mine.
5 It's a pagination problem. I have two 17s, no 15, no 16, and
6 no 19 in my packet. At least we are talking about the same
7 instruction, 13A.

8 THE COURT: I'll fix the pagination.

9 MR. SUTCLIFFE: 13A?

10 THE COURT: Yes.

11 MR. SUTCLIFFE: I have no problem with that, Your
12 Honor.

13 THE COURT: 13A will be deleted.

14 MS. DUARTE: And the last thing, Your Honor, I'm not
15 sure yet that we'll need No. 13, which immediately precedes
16 13A, but I understand that if it's in just for Tracy Hall, the
17 Court will make that determination at a later time, unless
18 there is some other --

19 THE COURT: I think that it belongs there regardless
20 of what happens with Tracy Hall because Mr. Sutcliffe
21 undoubtedly thinks that he's established that as to somebody he
22 cross-examined.

23 MS. DUARTE: Oh, other inconsistencies during cross?

24 THE COURT: Yes.

25 MS. DUARTE: Okay. All right. I don't have any

1 objection to it. I just didn't see the need for it.

2 THE COURT: That's all you want to say about that
3 portion of these instructions?

4 Anything you want to say about those?

5 MR. SUTCLIFFE: Nothing, Your Honor.

6 THE COURT: Okay. Those will all be given except for
7 13A. They'll be renumbered and they'll be given page numbers.

8 I reserve the right, where there is a numerical gap,
9 to put in a page that says -- I'm just making this up as an
10 example. There is no Jury Instruction 12.

11 If I skip from 11 to 13, the jury will know that it
12 wasn't inadvertent and something had been left out. The reason
13 I'm doing that is that some of these are already on my word
14 processing system. It's the fastest way to assemble them.

15 MR. SUTCLIFFE: May I be heard, Your Honor, on some
16 of these also?

17 THE COURT: I thought you said you didn't have
18 anything to say.

19 MR. SUTCLIFFE: To her objection.

20 THE COURT: No, you didn't understand.

21 Sure, you may be heard.

22 MR. SUTCLIFFE: Thank you, Your Honor.

23 On page 5, on Court's Instruction No. 4, the defense
24 would request that on line 11 --

25 THE COURT: Wait a minute. I don't have a page 5. I

1 see. This got all messed up, the way it was done. We'll fix
2 it. I see where you are at.

3 MR. SUTCLIFFE: It starts, in the middle, "On the
4 other hand," and then it has a sentence that starts out, "if
5 after a careful," and then it ends with the word "guilty" at
6 the bottom.

7 The defense would request that the "ifs," starting on
8 line 9, "if after a careful and impartial consideration," those
9 two paragraphs be switched so that it would start out "if after
10 a careful and impartial consideration of all the evidence, you
11 are convinced beyond a reasonable doubt that the defendant is
12 guilty, it is your duty to find the defendant guilty."

13 "On the other hand, if after a careful and impartial
14 consideration of all the evidence, you are not convinced beyond
15 a reasonable doubt that the defendant is guilty, it is your
16 duty to find the defendant not guilty."

17 THE COURT: Okay. I decline to transpose the
18 sequence of those two sentences.

19 MR. SUTCLIFFE: Could I ask why, Your Honor?

20 THE COURT: It's unnecessary to, and I don't even
21 think it's in your interests. But it's totally unnecessary and
22 it won't affect the substance of what the jury is told.

23 MR. SUTCLIFFE: The defendant believes that the last
24 thing most people hear or see leaves an impression upon their
25 mind, and the last thing that is going to be left for the jury

1 to read, the defendant would request that it be "find him not
2 guilty" as opposed to "find him guilty."

3 THE COURT: Some people think that the first thing
4 people see and hear is what they remember most. The
5 psychologists are in dispute, but I'm not switching it.

6 Anything else?

7 MR. SUTCLIFFE: Yes, Your Honor. One second.

8 No, that's it, Your Honor. Thank you very much.

9 THE COURT: Okay. Now, on the stand-alone single
10 page relating to the First Amendment, this works off of
11 something that we'll turn to again later when we review the
12 instructions submitted by Mr. Harris on behalf of Mr. Sutcliffe
13 to which the government filed objections and Mr. Sutcliffe,
14 through Mr. Harris, filed a response. We'll have to go through
15 all of those for the record anyway.

16 I do believe that notwithstanding the government's
17 objection to any instruction about the First Amendment,
18 Mr. Sutcliffe is entitled to some instruction, and this is the
19 one I propose to give.

20 Do you want to be heard, Ms. Duarte?

21 MS. DUARTE: No, Your Honor. I'll agree to this
22 instruction.

23 THE COURT: Okay. Do you agree to it?

24 MR. SUTCLIFFE: No, Your Honor.

25 I would object that the First Amendment instruction

1 be modified to say that "The First Amendment to the United
2 States Constitution provides" -- and strike out "in essence" --
3 "that the government may not abridge a citizen's right to
4 speech or press."

5 MS. DUARTE: Speech or what?

6 MR. SUTCLIFFE: Or "of the "press."

7 THE COURT: Is that your only modification?

8 MR. SUTCLIFFE: No. I'm sure the Court would not
9 agree, but I would like that the next line "Not all forms of
10 written, printed or oral speech are protected by this
11 provision, however," be stricken or modified to add that
12 "unless the danger from the speech is imminent, specific,
13 unequivocal, and unconditional," which is the constitutional
14 standard under this country, I believe.

15 THE COURT: If you want the words "in essence" to be
16 deleted, I don't have an objection to that. I'll delete them.

17 The substitution of "citizen's" for "person's," I
18 don't object to it. It isn't what the constitution says and it
19 isn't the law, because noncitizens have certain rights, too, if
20 they are resident aliens. But if you want it, I'll give it.
21 It's not complete, but it isn't wrong, either. So we'll
22 substitute "citizen's" for "person's." We'll get rid of "in
23 essence."

24 I'm not going to substitute "press" for "expression,"
25 and I'm not going to delete anything else because it's all a

1 correct statement of the law.

2 And your contention as to what the constitutional
3 requirements are and what the standards are and how imminent
4 the threat has to be are incorrect as a matter of law.

5 So I'll give that instruction as modified, but only
6 as I agree to modify it.

7 MR. SUTCLIFFE: Would the Court agree that it's only
8 incorrect in certain jurisdictions within this country, not all
9 the jurisdictions?

10 In some jurisdictions, the test is imminent,
11 specific, unequivocal, and unconditional.

12 THE COURT: I'm not going to debate what the law is
13 in other jurisdictions, and I'm not going to -- let me finish.
14 I'm not going to modify the instruction to incorporate
15 provisions that don't apply in this circuit and that don't
16 govern in this jurisdiction. That's all I'm going to do.

17 MR. SUTCLIFFE: But the Court does recognize that?

18 THE COURT: What am I, taking a test in law school?

19 MR. SUTCLIFFE: No, Your Honor.

20 THE COURT: I'm not going to respond to that,
21 Mr. Sutcliffe. This is a correct statement of the law.

22 Now, let's turn next to the joint proposed jury
23 instructions that were jointly proposed by your then counsel in
24 January.

25 Now, the aiding and abetting instruction, which I

1 annotated and circulated, has been slightly revised in the
2 model jury instructions. There is a later supplement in March
3 of '02. You might want to note that for your office,
4 Ms. Duarte.

5 MS. DUARTE: I did, Your Honor.

6 I wasn't aware of that.

7 THE COURT: And although it has no practical impact,
8 I think, I'm just going to update this aiding and abetting
9 instruction on the transmittal of the threats to reflect the
10 current model instruction that the Ninth Circuit --

11 MS. DUARTE: That's fine, Your Honor.

12 I'm just not sure where you are looking at right now.
13 I'm sorry.

14 THE COURT: I'm looking at the joint proposed jury
15 instructions. No. 1 was an aiding and abetting instruction
16 relating to threats to injure.

17 MS. DUARTE: Thank you. I'm sorry.

18 THE COURT: Did you not get a piece of paper that
19 contained some writings on it?

20 MS. DUARTE: I got the modifications the Court made
21 to the government's proposal which contains similar
22 modifications.

23 THE COURT: But you should have gotten it as to the
24 joint.

25 MS. DUARTE: Let me check. I did. It's last in my

1 packet. I'm sorry.

2 THE COURT: I'm going to make those changes to No. 1.
3 Do you want to be heard, Mr. Sutcliffe?

4 MR. SUTCLIFFE: Just so we are on the same page, Your
5 Honor, are you referring to the January 8, 2003, filed joint
6 proposed jury instructions --

7 THE COURT: Yes.

8 MR. SUTCLIFFE: -- that listed a trial of
9 January 14th; correct?

10 THE COURT: Yes.

11 MR. SUTCLIFFE: And you are on page 4, I assume?

12 THE COURT: Yes, I am. But I handed it out also.
13 There is a page 4 stand-alone with some writing on it.

14 MR. SUTCLIFFE: Right. Yes. I see that one you are
15 referring to.

16 I'd like to be heard on that, Your Honor.

17 THE COURT: Go ahead.

18 MR. SUTCLIFFE: Starting on line 15, I would like
19 this to read, "The government is not required to prove that the
20 defendant intended to carry out the threat, but it must
21 prove" -- excuse me, let me modify that. "The government is
22 not required to prove that the defendant intended, but it must
23 prove that the defendant had the specific intent to carry out
24 the threat, or had the ability to do so, but it must prove that
25 the defendant had the specific intent that the communication

1 would threaten," or words to that effect, Your Honor.

2 I see where you -- did you mark that line up right
3 there, after "do so, but it must prove"?

4 THE COURT: You are looking at a different page than
5 I am.

6 MS. DUARTE: I don't know where he's looking.

7 THE COURT: Listen carefully, Mr. Sutcliffe. I know
8 this is a new experience, so I'll try to make it helpful to
9 you.

10 Right now, what we're talking about are instructions
11 that were jointly proposed. The one that you are talking about
12 was separately proposed and objected to by you or your prior
13 lawyer. And I'll turn to that in a few minutes.

14 MR. SUTCLIFFE: Okay.

15 THE COURT: The only one I'm talking about right now
16 is "Joint Proposed Instruction No. 1."

17 MR. SUTCLIFFE: I'm on that page.

18 THE COURT: That's what it says at the top of the
19 page. Do you see it?

20 MR. SUTCLIFFE: Yes, Your Honor.

21 THE COURT: I intend to delete the references to
22 "causing" because they are no longer in the model instruction.
23 That's all I intend to change in that one.

24 MR. SUTCLIFFE: Which line is that, Your Honor, you
25 are referring to?

1 THE COURT: It's on line 5. It's on line 7. It's on
2 line 12.

3 Any objection to that?

4 MR. SUTCLIFFE: Only maybe that a supplemental be
5 added to what constitutes -- is there -- maybe there is
6 already. Is there a supplemental to the jury to inform them as
7 to what is -- what is the definition of "knowingly and
8 intentionally"?

9 THE COURT: Yes, there is. It's already been
10 approved by you. It's in the standard ones that we already
11 went through.

12 MR. SUTCLIFFE: Unfortunately, my previous
13 lawyers did not --

14 THE COURT: I circulated it to you today. You said
15 it was okay.

16 MR. SUTCLIFFE: Thank you, Your Honor.

17 THE COURT: Anything else on this one?

18 MR. SUTCLIFFE: No, Your Honor.

19 THE COURT: Okay. Turning to Joint Proposed
20 Instruction No. 2, if you get what was filed last January, it
21 will help us all, Mr. Sutcliffe, on the Joint Instructions.
22 Are you with me?

23 MR. SUTCLIFFE: I'm with you.

24 THE COURT: Joint Proposed 2, I'm going to give.
25 No, I'm not because I already have it in the other set. It's

1 No. 4 from the other set, I think it is.

2 Joint Proposed No. 3, I'm not going to give because
3 that's No. 10 in the other set. It's the same thing, but I had
4 already assembled it on my system.

5 Turning to Joint Proposed No. 4, I am going to give
6 that, relating to the elements of the crimes charged in Counts
7 Five through Nine.

8 Do you want to be heard about that, Mr. Sutcliffe?

9 MR. SUTCLIFFE: Yes, Your Honor.

10 Give me a minute here to digest this.

11 This is fine, Your Honor.

12 THE COURT: Okay. Turning to Joint 5, defining
13 "transfer," I am going to give that. It comes right out of the
14 statute.

15 Turning to Joint 6, "false representation of a social
16 security number," the elements of that, I am going to give
17 that.

18 Turning to Joint 7 --

19 MR. SUTCLIFFE: Can I be heard on any of these, Your
20 Honor?

21 THE COURT: Oh, yes. Sure.

22 MR. SUTCLIFFE: You are moving kind of quickly for
23 me.

24 THE COURT: Which one do you want to be heard on?

25 MR. SUTCLIFFE: I'm trying to digest them now as we

1 are moving along here.

2 I would object to this. It's very vague as far as
3 the wording on this page as to the "perpetrator" -- that
4 appears to show a bias or a prejudice -- as opposed to the word
5 "defendant," or whatever else it's trying to describe.

6 It almost appears that a crime has been committed and
7 the "perp," which is a common police name, is inferred in the
8 first, second, and third paragraphs, from 9 to 16.

9 THE COURT: Anything else?

10 MR. SUTCLIFFE: It doesn't mention anything about
11 unlawful -- unlawful authority and it fails to state most of
12 the elements of the crime.

13 THE COURT: Okay. I overrule your objections. I'm
14 going to give No. 6.

15 Did you have some objection to No. 7?

16 MR. SUTCLIFFE: Yes. I would object to this quite a
17 bit, Your Honor.

18 In interstate or foreign commerce, when it utilizes
19 instrumentalities of interstate or foreign commerce, it does
20 not set forth the true nature of the Internet and the elements
21 that surround what the Internet consists of.

22 The Internet is comprised of more than just what is
23 vaguely called "instrumentalities." It's a very complex
24 system. It's a very in-depth system. And one can utilize the
25 Internet and it can appear to be an interstate transfer, but,

1 in reality, it's not. This instruction is vague and overbroad
2 and very misleading and it's prejudicial to the defense.

3 THE COURT: Okay. I'm going to overrule the
4 objection to No. 7, but I should tell you now so things will be
5 clear, that the government filed supplemental proposed
6 instructions. It did so in September. I mentioned those this
7 morning. They filed one instruction.

8 That instruction says, in a single sentence, the
9 following: "The Internet is an instrumentality of interstate
10 and foreign commerce."

11 I intend to give that instruction. It is a correct
12 statement of the law. The cases that the government cited
13 supporting that proposed supplemental instruction stand for the
14 propositions for which they are cited. And I will give that
15 instruction, once this material is all assembled in a coherent
16 sequence, immediately after what currently is being referred to
17 as Joint Proposed No. 7.

18 MR. SUTCLIFFE: Correct me if I'm wrong, Your Honor,
19 one of the elements of the crimes to which the defendant is
20 charged is that the threat was transmitted in interstate
21 commerce; correct?

22 THE COURT: In or affecting.

23 MR. SUTCLIFFE: "Including of an instrumentality."
24 Instrumentalities has nothing to do with "in or affecting."
25 Instrumentalities is going to lead the broad inference to the

1 jury that a cable modem connected to the Internet must
2 automatically mean that the transmission went in or is
3 affecting interstate commerce, when it's common knowledge among
4 computer people that, in the portable world, in the virtual
5 world of the Internet, I can easily step from one state into
6 another and make a communication which never leaves the state,
7 though, to a layman, it would appear that I did; or to a real
8 layman, just the mention of the instrumentality, a cable modem,
9 makes an inference that it crossed interstate lines.

10 There is no way for the jury, as laypeople, to
11 understand the technical difference. And by including "the
12 instrumentalities" part in this, it's going to lead to
13 confusion to the jury, Your Honor.

14 THE COURT: Okay. I overrule your objection to both
15 7 in the joint and 7A in the proposed supplemental, and I'll
16 give both.

17 Okay. Continuing with the joint ones, then, No. 8, I
18 will not give. It's already included in the Court's own set
19 that I've circulated, to which both sides have agreed, as
20 No. 15.

21 MS. DUARTE: Your Honor, if I may be heard on that?

22 THE COURT: Yes.

23 MS. DUARTE: It is, however, the approximate amount,
24 which I also included in the second half of this instruction,
25 starting at line 10. That is actually not included, that I

1 found, Your Honor, anywhere in the Court's --

2 THE COURT: You are right about that.

3 MS. DUARTE: -- and I would ask for that.

4 THE COURT: Yes. All right. Lines 10 through 15 do
5 correctly reflect what the applicable law is. That's lines 10
6 through 15 on Joint Proposed Instruction No. 8, Mr. Sutcliffe,
7 which has the page No. 11 at the bottom.

8 Do you see those?

9 MR. SUTCLIFFE: Yes, Your Honor.

10 THE COURT: I'm going to give those. Do you want to
11 be heard?

12 MR. SUTCLIFFE: I would just like to object to them
13 on the record.

14 THE COURT: Okay. Your objection is noted.

15 But No. 9 I'm not going to give because it's in the
16 other set as No. 17. No. 10 I'm not going to give because it's
17 in the other set as No. 22. And No. 11 I'm not going to give
18 because it's in the other set as 24.

19 Another way of putting it more accurately is, I am
20 giving all of those, but not out of the joint instructions.

21 Those are my rulings on the Joint Proposed Jury
22 Instructions. I've already given my rulings on the
23 government's September 2003 Supplemental Proposed Jury
24 Instructions that will be given.

25 Now I would like you both to turn to the document

1 filed last January entitled "Government's Proposed Jury
2 Instructions."

3 The government proposed, at that time, in January,
4 without defendant agreeing to them, four instructions. Let's
5 go through those one by one.

6 To assist the parties, what I'm asking you to look at
7 is the document which would say at the top, "Court's
8 Instruction No..." blank, and immediately after that,
9 "Government's Proposed Instruction No..." and I'm starting with
10 No. 1. It happens to be about the first four counts.

11 Are both sides with me?

12 MR. SUTCLIFFE: Yes, Your Honor.

13 MS. DUARTE: Yes, Your Honor.

14 THE COURT: Okay. I intend to give that instruction.
15 But, as the annotated changes that I've circulated for your
16 review before I came out reflect, there'll be slight changes
17 between lines 15 through 18.

18 To clarify what the elements are and avoid confusion,
19 lines 15 through 18 will read, "The government is not required
20 to prove that the defendant intended to carry out the threat,
21 or had the ability to do so, but it must prove that the
22 defendant intended the communication to threaten."

23 Do you want to be heard, Ms. Duarte?

24 MS. DUARTE: No, Your Honor. No objection to that.

25 THE COURT: Do you want to be heard, Mr. Sutcliffe?

1 MR. SUTCLIFFE: Yes, Your Honor.

2 I would like that line changed to, "The government is
3 not required to prove that the defendant intended to carry out
4 the threat, or had the ability to do so, but it must prove that
5 the defendant had the specific intent that the communication
6 would threaten."

7 THE COURT: Do you have a problem with that,
8 Ms. Duarte?

9 MS. DUARTE: Could he say it one more time, Your
10 Honor?

11 THE COURT: Please repeat it, Mr. Sutcliffe.

12 MR. SUTCLIFFE: Thank you, Your Honor.

13 Right after where you've marked in, "but it must
14 prove that the defendant," and then I would insert the words
15 "had the specific intent that" in place of the word "intended,"
16 and then continuing on with "the communication," and then I
17 would add the word "would" and then "threaten."

18 THE COURT: Ms. Duarte?

19 MS. DUARTE: I don't have an objection to that, Your
20 Honor.

21 THE COURT: I think it's a correct statement of law
22 and I'll do it.

23 MR. SUTCLIFFE: Thank you. And --

24 THE COURT: Hold on a minute.

25 MR. SUTCLIFFE: Yes, Your Honor.

1 THE COURT: Anything else on that one?

2 MR. SUTCLIFFE: No, Your Honor. Thank you.

3 THE COURT: That instruction, as we've just agreed
4 would be modified, will be given.

5 Turning to Government's Proposed Instruction No. 2,
6 I'm going to add the words "or 'expression.'" to the end of
7 line 10.

8 Do you want to be heard, Ms. Duarte?

9 MS. DUARTE: Your Honor, I don't have any objection
10 to the Court's adding that, but I would propose one thing.

11 Now that the Court has added its stand-alone
12 instruction on the First Amendment, I think it might read more
13 smoothly, assuming the Court is intending to give the
14 stand-alone on the First Amendment, followed immediately by the
15 "true threats" definition.

16 THE COURT: I'm not sure what the sequence is yet.

17 MS. DUARTE: Okay. I think it would just read better
18 if that last sentence of the Government's Proposed No. 2, as
19 modified by the Court, on the "true threats," were actually
20 raised up to the top and came first. It just seems to read
21 better because --

22 THE COURT: I think that's true. I think the jury
23 will be able to follow it better.

24 MS. DUARTE: So I would ask, with that modification,
25 that that be given.

1 THE COURT: I'll do that.

2 MS. DUARTE: Thank you.

3 THE COURT: Anything else, Ms. Duarte?

4 MS. DUARTE: No, Your Honor. Thank you.

5 THE COURT: Anything from you, Mr. Sutcliffe, on
6 Government's Proposed No. 2?

7 MR. SUTCLIFFE: Yes, Your Honor.

8 I would again bring the Court's attention to the
9 standard that's being applied here is a -- one which would be
10 applicable to the President of the United States or a
11 statutorily congressional created entity, such as the -- and I
12 find it really poetic and ironic that the Orozco-Santillan,
13 903 F.2d 1262, case is incorporated in there, when that case
14 specifically deals with the words which were made to the
15 officer, under Title 18, Section 115, "I'm going to kick your
16 ass."

17 We've seen that statement bantered around. It was
18 made to the defendant at his website and posted thereon. But
19 I've yet, to date, seen anybody from the government approach
20 me -- even though I specifically requested that the same
21 standard be applied to Joe Shmoe, the government has failed to
22 ever come to me and say, "You know what? Under the equal
23 protection due process clause of the Constitution, we're going
24 to go get Joe Shmoe for you because one day, you know, you
25 might win this case and he's probably still out there wanting

1 to kick your ass."

2 So I would object to this subjective "true threat"
3 type national interest standard that's being applied to me
4 here.

5 THE COURT: Okay. Your objection is noted and
6 overruled.

7 MR. SUTCLIFFE: Thank you, Your Honor.

8 THE COURT: Let's turn to Government's Proposed
9 Instruction No. 3. I've made the same changes to that "aiding
10 and abetting" instruction.

11 This one applies to the posting of the social
12 security numbers, Counts Five through Nine. The changes I'm
13 going to make are the same as to the other "aiding and
14 abetting" instruction that we discussed previously relating to
15 the threats.

16 Anybody want to be heard?

17 MS. DUARTE: No, Your Honor.

18 MR. SUTCLIFFE: Yes, Your Honor.

19 Specifically, on line 4, I would like, after the word
20 "persons," the words "with a specific intent to defraud"
21 inserted there.

22 On line 9, I would like the words "these elements"
23 inserted after the word "prove."

24 Line 7, I would like -- after the word "of," I would
25 like "causing the act or acts to be done," I would like that to

1 be stricken.

2 THE COURT: It is going to be stricken.

3 MR. SUTCLIFFE: Okay. On line 8, after the words
4 "abetting in their commission," I would like that to be
5 stricken.

6 Also, I would object to lines -- the word
7 "transferring" on line 14 without the element to be included
8 "without lawful authority." Because under 1028(a)(7), every
9 time they use the word "transfers," there is always a comma,
10 and it says "without lawful authority."

11 I would like -- anytime that the word "transfers" is
12 used in any of these instructions, I would like the words -- a
13 comma followed by "without lawful authority" because, as I've
14 already raised to the Court, if I lawfully own something, I
15 could transfer it and do whatever I want with it, if it's mine.
16 If I didn't steal it and I lawfully own it, I can do whatever I
17 want with it.

18 And so there is an inference, as I've raised, that's
19 been brought up by Global Crossing, that I somehow stole this
20 information. And the Court -- the jury has heard it over and
21 over and over.

22 And to include the word "transfer" without the comma,
23 like in the elements of 1028(a)(7), "without lawful authority,"
24 I believe would cause a bias or a prejudice to the defense.

25 Thank you.

1 THE COURT: Your position on "without lawful
2 authority" being added, Ms. Duarte?

3 MS. DUARTE: I didn't quite get where it was going to
4 be added, Your Honor.

5 THE COURT: After the word "transferring" that
6 appears on line 14.

7 MS. DUARTE: That's fine, Your Honor.

8 MR. SUTCLIFFE: I'd also like the record to reflect
9 that I also said that any instructions that are given to this
10 jury related to 1028 and includes the word "transfers," I would
11 like the following words, "from the elements of the crime,
12 without lawful authority," to follow the word "transfers" at
13 some point.

14 MS. DUARTE: Your Honor, to the extent that he has
15 objections to other instructions, we should take those one by
16 one as the Court has been doing.

17 THE COURT: I'll add "without lawful authority" on
18 line 14. Okay.

19 Now, on Government's Proposed Instruction No. 4, that
20 is already part of the Court's standard instruction, No. 18, so
21 it will be given, but that's already been incorporated into
22 what I discussed with you.

23 So that covers all of the government's proposed jury
24 instructions. There are none others that the government is
25 proposing; correct, Ms. Duarte?

1 MS. DUARTE: That's correct, Your Honor.

2 THE COURT: Now let's turn to Mr. Sutcliffe's.

3 By the way, just so I can clear out some of the
4 documents that are up here with me, the government should know,
5 although it's no longer an issue in this case and there'll be
6 no need for any jury instruction at all, that there is now a
7 model criminal jury instruction on advice of counsel.

8 MS. DUARTE: In the March 2002 revised?

9 THE COURT: In the December 2002.

10 MS. DUARTE: There is a December 2002?

11 THE COURT: Yes. You have to go online. You should
12 tell this to your office --

13 MS. DUARTE: I will.

14 THE COURT: -- especially if they are going to be
15 litigating in my court.

16 The Ninth Circuit jury instructions are frequently
17 updated. And when they are, they are online and notices go out
18 to subscribers and to the lawyers.

19 5.9 is a new standard instruction, and your office
20 should know about it.

21 MS. DUARTE: Thank you, Your Honor.

22 THE COURT: It's hard to keep up, I know. I work on
23 these instructions. That's why I was out of town last week,
24 but you should let them know about that.

25 MS. DUARTE: I'll let them know, Your Honor. Thank

1 you.

2 THE COURT: Now, Mr. Sutcliffe proposed some
3 instructions through Mr. Harris to which the government
4 objected. Let's go over those.

5 I'm looking now at a document entitled "Defendant
6 Steven William Sutcliffe's Proposed Jury Instructions Annotated
7 Set." It was filed on or about January 8, 2003.

8 The government objected to that on or about January
9 10th. Mr. Harris filed a response to that objection on or
10 about January 13th. Those are the ones we're looking at now.

11 And then I'll rule on the ones that Mr. Sutcliffe
12 gave me this morning.

13 "Defendant Sutcliffe's Proposed Instruction No. 1,"
14 I'm not going to give.

15 MR. SUTCLIFFE: Your Honor, I don't have a copy of
16 these that we're working on here. Excuse me. I found a copy.

17 THE COURT: I'm not going to give Instruction No. 1
18 You are deemed to object to my rulings if I decline to give
19 them.

20 The record will reflect, and does reflect, that you
21 proposed these instructions, and the instructions, as I've
22 already gone over them with both sides, correctly state what is
23 and is not a true threat, and that a true threat is a required
24 element. Watts v. United States is good law, but it is not the
25 law applicable to this precise issue and itself was applied in

1 the Planned Parenthood case, which specifically deals with the
2 question of true threats. So I'm not giving No. 1.

3 MR. SUTCLIFFE: May I object, then, and state why I'm
4 objecting?

5 THE COURT: Yes, you can state why.

6 MR. SUTCLIFFE: I'm objecting because what is a "true
7 threat" must be distinguished from what is constitutionally
8 protected speech because, as was quoted in the Kelner case, the
9 way you distinguish between what is, quote/unquote, a "true
10 threat," which is the standard which is applied to the
11 government's national -- substantially national interest, which
12 is to protect, such as the President and members of Congress
13 and agents of the Marshal's Office -- which they have a right
14 to do because they belong to the government. That's their
15 property. They have the right to protect it and apply any
16 standard they wish to protect what is theirs.

17 However, speech belongs to the people, Your Honor,
18 and it must be distinguished.

19 What is constitutionally protected speech is speech
20 that can be fraught with danger, that can be anything so long
21 as the danger that is perceived is not imminent, it's not
22 specific. It must be specific. It must be imminent. It must
23 be unconditional. And it must be unequivocal.

24 If it does not meet those four criteria, as the
25 Kelner case clearly stated, it is constitutionally protected

1 speech.

2 Just as Your Honor has qualified, after he said he
3 would come off the bench and punch me in the head and kick me
4 in the shins, then you qualified it as, "This was a figure of
5 speech," I could apply a subjective true threat test to that
6 speech, too.

7 The fact that I put a qualifier in the front of my
8 speech, on my website, the Court doesn't seem to give that any
9 credence at all. The fact that I was 3,000 miles away, and the
10 victims knew I was 3,000 miles away, the Court has refused to
11 acknowledge that fact.

12 That's hardly specific that the -- the so-called
13 threats were definitely conditional, you know. If you stay
14 away from me, I'm staying away from you.

15 They were not -- they were not even close to being
16 what is called equivocal. They were unequivocal -- excuse me.
17 They were equivocal, not unequivocal. "I'm armed."

18 You bet I'm armed, with tons of information.

19 If I say, "I'm armed with a knife and I'm coming to
20 hunt you down," yeah, that's a threat. But I never said that.

21 And the true threat test is only for national
22 government interests. I hardly see how this woman, Tracy, or
23 any of these other people, are substantially national interests
24 which should be protected by the entire resources of the
25 federal government, for words that I said 3,000 miles away from

1 these so-called victims, who had a real big ax to grind.

2 That's all I have to say on that matter.

3 THE COURT: Okay. I reject your analysis of the law
4 and note that the Planned Parenthood case involved abortion
5 clinics, which were not government officers, and the standard
6 was applied in that case.

7 I think you are misstating what the applicable law
8 is. In any event, I have made my ruling.

9 I'm not going to give Defendant Sutcliffe's Proposed
10 Instruction No. 2, but I am going to give the First Amendment
11 instruction, as slightly modified this morning here in court.

12 Do you want to be heard about that?

13 MR. SUTCLIFFE: We are on page 3 of the proposed
14 instructions?

15 THE COURT: Right.

16 MR. SUTCLIFFE: And you are speaking of lines 8
17 through 10?

18 THE COURT: I'm not going to give any part of that
19 instruction, but I've already said I am going to give the First
20 Amendment instruction that I've circulated.

21 MR. SUTCLIFFE: Are you asking me to comment on
22 Instruction No. 2?

23 THE COURT: I'm not asking you to. I'm giving you
24 the right to object to my ruling.

25 MR. SUTCLIFFE: I object.

1 THE COURT: Okay. You are deemed to object, anybody
2 would be, if you submit something that the Court declines to
3 give, but you can say it anyway. I don't mind.

4 MR. SUTCLIFFE: Thank you, Your Honor.

5 THE COURT: Sutcliffe's Proposed Instruction No. 3, I
6 will not give.

7 An instruction about context being something that the
8 jury must take into account will be incorporated into the true
9 threats and 875 instructions. And the defendant will be
10 permitted to argue that the specific intent to have the
11 communication threaten was absent because what the
12 communication said was a figure of speech or hyperbole, or
13 anything else that's a fair inference from the evidence, he
14 will be permitted to argue, but this is not a correct statement
15 of the law, and certainly is not applicable to this case. So
16 I'm not going to give No. 3.

17 I know you object. Is there anything else you want
18 to add, Mr. Sutcliffe?

19 MR. SUTCLIFFE: No, Your Honor.

20 THE COURT: Defendant Sutcliffe's Proposed
21 Instruction No. 4 is an incorrect statement of the law. I will
22 not give it. Civil Code Section 47 does not preempt federal
23 law, in general. It doesn't preempt federal criminal law, in
24 particular. And it doesn't preempt or prevent criminal
25 prosecutions, even under state law. So it's a totally

1 incorrect statement of the law, and I'm not going to give
2 Defendant Sutcliffe's Proposed Instruction No. 4.

3 Do you want to do anything -- do you want to say
4 anything more than "I object" as to that ruling, Mr. Sutcliffe?

5 MR. SUTCLIFFE: No. Just I object.

6 THE COURT: Okay. No. 5, I'm going to modify. And
7 I've circulated a proposed modification. I will give part of
8 Defendant Sutcliffe's Proposed Instruction No. 5.

9 In case my writing isn't clear, what I propose to
10 instruct the jury is as follows: "The mere fact that a
11 communication actually induces or coerces action in the person
12 to whom it is directed does not remove it from First Amendment
13 protection, so long as the speaker does not threaten that he,
14 or someone acting in concert with him, will resort to violence
15 if the warning is not heeded." That's what I am contemplating
16 giving.

17 Do you want to be heard, Ms. Duarte?

18 MS. DUARTE: I don't have any objection to that, Your
19 Honor.

20 THE COURT: Do you want to be heard, Mr. Sutcliffe?

21 MR. SUTCLIFFE: Yes, Your Honor.

22 While I do appreciate Your Honor including some of
23 my -- one of my instructions, I just want the record to reflect
24 that I object to the statements being taken out of context from
25 the law from which they came.

1 THE COURT: Okay. Your objection is noted.

2 No. 6, I'm not going to give. It's inapplicable,
3 incomplete, and could be very misleading.

4 Do you want to be heard further, Mr. Sutcliffe?

5 MR. SUTCLIFFE: Just that it was produced by
6 incompetent counsel, Your Honor.

7 THE COURT: Okay. Those are my rulings on the
8 proposed instructions that were submitted on behalf of
9 Mr. Sutcliffe last January.

10 Now, this morning, Mr. Sutcliffe submitted two
11 additional proposed instructions, which have now been filed,
12 with a cover sheet that says "Pro Se Defendant Supplemental
13 Instructions," and I'm not going to give either of those.

14 The first of those -- I'm not sure where it comes
15 from, although there is a reference to Devon and Blackmore.
16 It's specific intent and that I have already covered.

17 And the specific intent requirement, the jury has
18 been, or will at least be, under the instructions that I've
19 already ruled on, instructed about.

20 So this is a different and discouraged distinction
21 and would be extremely confusing and unnecessary. So I decline
22 to give it.

23 Would you like to be heard, Mr. Sutcliffe?

24 MR. SUTCLIFFE: Only to note my objection, Your
25 Honor.

1 THE COURT: Okay. Then the second one that
2 Mr. Sutcliffe filed this morning is "intent defined fraud," and
3 I decline to give that. The intent to deceive is built into
4 the instructions. I forget which number it is, but they'll be
5 in the set that each of you will get.

6 As to the elements of the offenses involving alleged
7 transmission of the social security information with the
8 intent -- aiding and abetting with the intent to misrepresent
9 the true owners or possessors or persons to whom those numbers
10 were assigned, the word "deceive" has clear meaning and it
11 doesn't require, and even in this proposed instruction, it
12 doesn't receive further definition.

13 This is not a case of a fraud allegation, such as in
14 mail fraud, where additional language is necessary. So I
15 decline to give it.

16 Do you want to be heard, Mr. Sutcliffe?

17 MR. SUTCLIFFE: Just at the end of Your Honor's
18 rulings. Thank you.

19 THE COURT: I'm finished now. That's the final
20 ruling.

21 MR. SUTCLIFFE: Can we go back to the adding of the
22 words "without lawful authority" to every instance where the
23 government alleges there is some transfer, in any of the jury
24 instructions, as per the elements of 1028(a)(7) of Title 18?

25 THE COURT: I, notwithstanding --

1 MR. SUTCLIFFE: I'm looking at Title 18, 1028. It
2 starts off with the word "fraud."

3 THE COURT: Okay. I know what you are driving at. I
4 think I can save you some effort.

5 The government's proposed -- the Joint Proposed
6 Instruction No. 4.

7 MS. DUARTE: Joint Proposed No. 4, Your Honor?

8 THE COURT: Yes. It already has "without lawful
9 authority." It's on line 16. So it's already in where it's
10 supposed to be, Mr. Sutcliffe. I'm going to add it to the
11 other aiding and abetting.

12 MS. DUARTE: Your Honor, I'm sorry. Which number was
13 the aiding and abetting that the Court is looking at that you
14 are adding it to?

15 THE COURT: No. I already ruled on that. You didn't
16 object.

17 MS. DUARTE: All right.

18 THE COURT: I think that's the only one where there
19 was a parallel reference that required "without unlawful
20 authority" to be included.

21 Don't you agree, Ms. Duarte?

22 MS. DUARTE: I do, Your Honor.

23 THE COURT: Don't you agree, Mr. Sutcliffe?

24 MR. SUTCLIFFE: One minute, Your Honor.

25 Just so I understand, for clarification, my request

1 that any instruction given to the jury related to 1028 that
2 uses the word "transfer," I request that the words "without
3 lawful authority" is only being applied to the joint proposed
4 and not any or all of the government's instructions?

5 THE COURT: No. Where the element of transfer is an
6 element in the specific instruction -- and it is in two
7 places -- the reference to it being "unlawful" or "without
8 authorization" -- I should say "without lawful authority" will
9 be made. That's already been made on the Joint Proposed
10 Instruction No. 4, and I agreed to make it on one other one. I
11 forget which one, but it will be made.

12 So that's my ruling. Anything else?

13 MS. DUARTE: Nothing from the government, Your Honor.

14 THE COURT: Anything else, Mr. Sutcliffe?

15 MR. SUTCLIFFE: Nothing from the defense, Your Honor.

16 THE COURT: Okay. We'll see you on Tuesday. Have a
17 good holiday.

18 I'll have, in your respective places, a cleaned-up,
19 complete, I hope, correctly paginated and numbered series of
20 proposed instructions before argument. I'll give you a chance
21 to be heard about those one more time.

22 We're adjourned.


23 (Adjournment at 1:50 p.m., to resume on
24 Tuesday, December 2, 2003, at 8:00 a.m.)

25

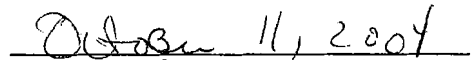
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I certify that the foregoing is a true and correct transcript from the stenographic record of the jury trial proceedings in the foregoing matter.



Karen R. Pinn, RPR, CSR 5574
Court Reporter



October 11, 2004