

1 the second page of the instruction specifies which instructions
2 are not included.

3 I have some questions about some of the instructions,
4 myself; one of them, in particular.

5 So before I hear from the parties, I'm directing you
6 to turn to page 24, Instruction 23A. Tell me when you have it
7 before you, please.

8 MR. SUTCLIFFE: Yes, Your Honor.

9 MS. DUARTE: I have it.

10 THE COURT: I don't see any aiding and abetting
11 allegation in the indictment on the first four counts. It's a
12 straightforward charge of willfully transmitting the threats.

13 Why do we need and what would be the basis for
14 including an aiding and abetting instruction as to that?

15 MS. DUARTE: Your Honor, I usually include aiding and
16 abetting even if it's not in the indictment. In this case, I
17 believe the reason would be if, for some reason, someone on the
18 jury would think that the defendant himself didn't actually
19 transmit the threats, but they were transmitted by virtue of
20 their being on the Internet, passing from computer to computer,
21 host to host, in and of itself the fact that he didn't transmit
22 them physically, but actually, by putting them on there, making
23 them available and all that, aided and abetted the actual
24 transmission, that would kind of catch that argument.

25 THE COURT: I knew that's what you were going to say.

1 What I really should have asked is, what's the
2 authority for including the instruction? I think there is a
3 right that you have as an advocate for your client. That's
4 something I remember from past practice. But what is the
5 basis, legally? Can you cite me any authority for including an
6 aiding and abetting instruction even though the indictment
7 doesn't specifically allege aiding and abetting?

8 MS. DUARTE: Not off the top of my head. I know that
9 there are cases that say that aiding and abetting of Section 2
10 is a component of every indictment whether or not it's
11 explicitly there.

12 THE COURT: I think you are right, but here is what
13 I'm going to direct you to do. I'm not going to delete it
14 right now because I think it's a correct way to proceed, and
15 there hasn't even been an objection by the defendant.

16 However, call up to your office and have them prepare
17 a bench memo or a trial memo, a two-sentence memo, that can be
18 filed, so at least the record will be complete, setting forth
19 whatever authority has been recognized or used to incorporate
20 that kind of aiding and abetting allegation, even in the
21 absence of a specific reference in the indictment.

22 I'm confident it's there because I remember from
23 decades ago that it used to be commonly done, but I want to
24 make sure, in fairness to the defendant.

25 That's the first thing I want to raise about the ones

1 that I've circulated.

2 Next, do you have any objections to the ones I've
3 circulated?

4 MS. DUARTE: No, Your Honor.

5 THE COURT: Okay. Do you, Mr. Sutcliffe?

6 I've given you many opportunities to object, but
7 these are the rulings I've made. Don't repeat any things that
8 you said at prior occasions, such as last Wednesday.

9 In terms of being consistent with the rulings I've
10 made at the previous occasion -- I think it was last
11 Wednesday -- do you agree that these do represent what I
12 previously ruled on? I'll get to the ones you circulated this
13 morning in a minute.

14 MR. SUTCLIFFE: Yes, I do, Your Honor.

15 THE COURT: As to the ones you circulated this
16 morning, do you have a copy, Ms. Duarte?

17 MS. DUARTE: Yes, Your Honor.

18 THE COURT: When I say "circulated," I was handed
19 three instructions, which are somewhat overlapping, and all of
20 those instructions apply to Counts One through Four. They are
21 numbered pages 1 through 3.

22 So, to save time, I'll state my take on the propriety
23 of these proposed instructions.

24 Turning to the one that is numbered page 1, at the
25 bottom, I don't think that that instruction is necessary, and

1 it's slightly different than the guidance that the Ninth
2 Circuit gave in the Planned Parenthood case. In any event,
3 instruction 23C, currently on page 26 of the set that I've
4 circulated to the parties this morning, is a correct statement
5 of what a true threat is, and it sets forth part of what
6 Mr. Sutcliffe's proposed instruction 1 sets forth; namely, the
7 reasonable objective person test. So I don't think that I
8 should give No. 1.

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

10 MR. SUTCLIFFE: Yes, Your Honor. Thank you.

11 Your Honor, I think what we have here is -- the issue
12 is that the Court and other parties are trying to define what
13 is "true."

14 And I'm sure Your Honor is wise enough to know that
15 that's like trying to define "common." There is nothing so
16 uncommon as common sense.

17 The issue here is a "threat," not what's "true."
18 That's for the jury to decide.

19 The case law, which goes back for almost a hundred
20 years, nobody has been able to define -- the Supreme Court, to
21 my knowledge, has never defined a "threat."

22 This is the standing case law for the Ninth Circuit,
23 Your Honor: The Kelner case, the Roy -- this is what the
24 instruction --

25 THE COURT: Kelner is Second Circuit. I've looked at

1 these cases. They are old cases and they are not cases that
2 define "threat" in the careful manner, in the more recent
3 manner, than the Ninth Circuit did in 1999.

4 But I can't understand -- I want to make sure I do
5 understand. If you look at 23C in the set that I've
6 circulated, what is your real objection? Are you simply
7 proposing that the word "true" be deleted, on line 3 and on
8 line 4?

9 MR. SUTCLIFFE: No. I object to the whole thing.
10 It's full of adjectives, Your Honor. It's very confusing.
11 It's like the word "common." It's reasonable person, true
12 threat.

13 It goes to -- it doesn't really define who gets to
14 define what the threat is. It says, "A statement is a true
15 threat where a reasonable person would foresee that the
16 listener," so that's the speaker test; is that correct? It's
17 not the listener test? Because I know that some circuits
18 define it as to what the "reasonable listener" would interpret
19 and the other circuits have the "reasonable speaker."

20 Once we start splitting hairs, using adjectives, as I
21 tried to demonstrate with Agent Cugno, when he first took the
22 stand, you get lost on a tangent. You lose sight of the fact
23 as to what is a threat.

24 I mean, you could say, is it a cute threat? a funny
25 threat? a false threat? a happy threat? I mean, it never ends.

1 THE COURT: Okay. Well, I don't accept that
2 reasoning. It's not correct reasoning or persuasive reasoning.
3 I'm not going to change Instruction 23C on that basis, as you
4 know from my previous rulings.

5 Even the Lovell case that you cite from the Ninth
6 Circuit, in 1996, doesn't require the change, and the language
7 makes it clear that threats are protected by the First
8 Amendment and uses the phrase "true threat" and says that we
9 have set forth an objective test. So some of your premises are
10 just simply unfounded, Mr. Sutcliffe.

11 And the case you cite says, "And, thus, falls outside
12 the protection of the First Amendment: 'Whether a reasonable
13 person would foresee that the statement would be interpreted by
14 those to whom the maker communicates the statement as a serious
15 expression of intent to harm or assault.'" And that's
16 consistent with 23C.

17 MR. SUTCLIFFE: Which page are you on, Your Honor?

18 THE COURT: That's from Lovell. It's page 372.

19 So I don't want to have a lengthy debate about this.
20 I've looked into the appropriate definition of a "threat" many
21 times, and the authorities you've cited don't require a change
22 in instruction 23C.

23 But I think you have a right to have them separately
24 addressed, so let me turn to the one on page 2. Page 2 is a
25 series of factors that you want me to instruct the jurors to

1 consider.

2 And 23C, as I have proposed it, specifically says
3 "Alleged threats should be considered in light of their entire
4 factual context, including the surrounding events and the
5 reaction of listeners."

6 It is unnecessary, and I think at risk of being very,
7 very skewed and incomplete, to specify some specific threats to
8 the exclusion of others.

9 The seven that you've mentioned may be perfectly
10 legitimate factors a jury can consider, but they needn't be
11 directed to consider those and have those singled out to the
12 exclusion of others.

13 You will be entitled, Mr. Sutcliffe, when you deliver
14 your closing argument, to argue these things. You can, if you
15 find it helpful to yourself, have this list, or checklist,
16 available to you to go down. And as long as you do it linked
17 to the evidence or to reasonable inferences from the evidence,
18 you can argue all of these points because 23C, as I've proposed
19 it, would entitle you to do that, because the jury will be
20 instructed to consider the threats in light of their entire
21 context.

22 So if you want to ask them to consider any of
23 these -- or all of these seven factors, you'll be entitled to
24 do so. But you are not entitled to have an instruction that
25 singles those out to the exclusion of others. So I'm not going