

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

COPY

HONORABLE A. HOWARD MATZ, JUDGE PRESIDING

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

No. CR 02-350-AHM

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Thursday, November 21, 2002

HEARING FOR REVIEW OF ORDER SETTING
CONDITIONS OF RELEASE/DETENTION PENDING TRIAL

EMMA LESTRO, RPR, CSR 2901
Official Federal Reporter.
453 United States Courthouse
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Los Angeles, California 90012
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1 LOS ANGELES, CALIFORNIA; THURSDAY, NOVEMBER 21, 2002; 3:00 P.M.

2 THE CLERK: Calling Item number 3, CR 02-350, U.S.A.
3 vs. STEVEN WILLIAM SUTCLIFFE.

4 Counsel, state your appearances, please.

5 MS. DUARTE: Good afternoon, your Honor. Elena Duarte
6 for the Government.

7 THE COURT: Good afternoon.

8 MR. HARRIS: Good afternoon, your Honor. Bill Harris
9 on behalf of Mr. Sutcliffe. He is present, in custody.

10 THE COURT: Okay. And good afternoon to both of you.

11 We're here, of course, on the Application that
12 Mr. Harris filed on behalf of Mr. Sutcliffe to set different
13 terms of bail, and I regret having to cause you to wait, but
14 the issues are interesting enough and important enough to
15 warrant careful review, and I was reading several cases that I
16 wanted to double check on.

17 I have read the papers carefully. I think, Mr.
18 Sutcliffe, you will be inclined to agree that Mr. Harris has
19 pursued your defense as vigorously as I assured you he would,
20 and the arguments he makes are interesting.

21 But let's keep the issues in clear focus.

22 This is not a motion to dismiss the indictment.

23 And the findings I'm going to make may later have to
24 be evaluated, maybe recited, if those were the real issues.

25 But I don't want anybody to construe this findings and

1 these rulings to be a definitive valuation of the propriety of
2 the charges in the first place, although I do think that there
3 is no constitutional impediment in principle to this statute,
4 and I doubt if there is an application to these particular
5 facts to these two statutes.

6 I'm going to deny the application.

7 I don't think that it would be necessary to have
8 further argument, although I will permit it, particularly from
9 you, Mr. Harris, in light of the findings I'm going to make, if
10 you think there is some specific point or focus that you wish
11 to address.

12 In case I would otherwise forget, with respect to the
13 basis for my previous decision to remand Mr. Sutcliffe, I
14 incorporate by reference the findings I made and the reasons I
15 stated at the April hearing.

16 I will note that -- have you read the updated Pretrial
17 Services Report, Mr. Harris?

18 MR. HARRIS: Yes, your Honor.

19 THE COURT: Okay. There's very little that's new in
20 that report, but the little that is new would warrant
21 reaffirming and reaching the same conclusions I reached last
22 April. And I'm specifically referring to the fact that after
23 that hearing in April, although not long after, a Final Order
24 was issued -- a domestic violence Final Order was issued in New
25 Hampshire. It seems to be in effect, does not expire until

1 April 26th of next year, and it reinforces the concerns that
2 I express in the findings that I made about a danger to the
3 community.

4 The interview with Gateways Hospital, which I had
5 authorized, confirms that they perceive Mr. Sutcliffe, as I
6 have always perceived him, as professional and pleasant and
7 cooperative here in these proceedings, but nevertheless, for
8 different reasons, a potential threat particularly with respect
9 to access to computers, and they made the findings they did
10 about whether he's eligible or ineligible.

11 So putting aside the legal issues, which are the core
12 of Mr. Harris' motion -- and I'm referring to the claim that
13 there's a high probability that Mr. Sutcliffe would not be
14 found guilty of these charges, putting those aside for just a
15 second, I want the record to reflect that I do find that the
16 reasons for remanding Mr. Sutcliffe previously remain
17 applicable and, if anything, have been reinforced or enhanced
18 by the two particular later developments which I just recited.

19 Now, I also want the record to reflect my view that
20 although the lawyers have gone through the charges in the
21 indictment on a count-by-count basis and assessed their
22 constitutionality or likelihood of success on a separate count-
23 by-count basis, I don't think that's necessary, because even if
24 there were some counts that are invidious and which I might
25 later grant a motion to dismiss -- not that I'm necessarily

1 suggesting I would -- but if there are any that counts that
2 would warrant, on a bail review hearing, a finding of
3 likelihood of conviction or seriousness of the possibility of
4 conviction, in other words, that would refute the core
5 arguments that Mr. Harris is making, that would be sufficient
6 to make the findings I previously made which I am reiterating.

7 So those are background general observations that I
8 wanted to recite.

9 Let's talk about the particular arguments. And I
10 think the starting place to go, because there could be some
11 interesting colloquies and lots of analyses about the different
12 cases, but I don't have, I don't think, the need for that, and
13 I don't think any of us has the time for that -- and there are
14 many other requirements on my calendar and a trial that has
15 long since been under way, which I'll get back to, we do have
16 to talk about the trial date for this case -- I start with the
17 Ninth Circuit's recent decision, the *en bank* decision in the
18 *Planned Parenthood* case at 290 F.3d. And as the lawyers know
19 and perhaps Mr. Sutcliffe knows, in that case a large panel of
20 the Ninth Circuit reached a conclusion different than the
21 initial three-judge panel and found that, in the civil action
22 that resulted in a judgment for the plaintiffs, application of
23 the Freedom of Access to Clinic Entrances Act permitted the
24 finding of liability based upon various kinds of threats. At
25 issue in that case is what is a threat. I think that the

1 analysis and the language that the Court of Appeals used in
2 that case, which involved anti-abortion activists posting on
3 the Internet posters of physicians and coupling the pictures or
4 the graphics with text that was inflammatory, was a sufficient
5 basis for finding that there were threats that interfere with
6 the rights of the physicians and, indeed, indirectly of the
7 patients.

8 At page 1075 of 290 F.3d, the Ninth Circuit cited
9 several cases that led it to reiterate its previous definition
10 of what a threat is.

11 And I think that what the prosecutor said in her brief
12 is unquestionably the case: The standard is whether or not a
13 reasonable person would have the basis to conclude that what
14 the speaker said would be perceived by the listener or the
15 recipient or the person as to whom it's directed as a threat.
16 And threats are not inherently protected under the
17 Constitution. If coupled with [threats of] violence and the
18 other elements, they can be proscribed, and they definitely can
19 be the basis for a criminal prosecution.

20 So I want the lawyers to understand that without
21 reciting everything that's already clearly Ninth Circuit
22 precedent that's at page 1075, I am applying the Ninth
23 Circuit's test and, in a nutshell, the only intent requirement
24 for a true threat is that the defendant intentionally and
25 knowingly communicate the threat once it's been defined to be a

1 threat.

2 The counts in question here, in my view, aren't even
3 close. We're talking about, first of all -- and this is one
4 reason why I think the cases you cite, particularly the labor
5 cases, the NAACP case, the anti-draft cases, the flag cases,
6 they're really very, very different.

7 The particular message was directed to particular
8 recipients who had an existing, ongoing specific dispute with
9 your client, with the defendant here.

10 To tell someone that she'll be "sent back to hell" is
11 very different than an abstract statement of "going to hell."
12 "You'll be sent back" is something far more focused and
13 specific than an invitation to "get lost," which is what "go to
14 hell" commonly is understood to mean.

15 A statement that "I will kill you," a statement to
16 "keep your dogs at bay now I'm armed," a statement that "I'm
17 coming to collect from you personally" when coupled with
18 pictures of the recipients, of their children, information
19 about their homes and addresses, is a direct threat that a
20 reasonable person would perceive to be likely to be perceived
21 by the recipient -- and these were specific recipients as well
22 as the public generally -- to provide a risk of violence and a
23 risk of injury.

24 The protection that Mr. Harris claims would arise out
25 of the various cases he cited just simply doesn't apply, I

1 find, at least not at this stage, to these particular
2 allegations in these particular counts.

3 If you look at *McCoy vs. Stewart*, that was a habeas
4 case, you had a person convicted under Arizona state law of
5 making abstract statements at a barbecue and at a party to a
6 friendly audience, the Court found and, I think, for good
7 reason, that the statements were general, they weren't
8 particularized; totally different from the findings I've
9 already made. At most, they advocated lawlessness at an
10 indefinite and uncertain future time, and this was, in the
11 *McCoy* case, speech that was directed at a friendly audience
12 that may or may not have been construed as an invitation or a
13 solicitation to engage in gang activity.

14 But that's not what Mr. Sutcliffe was doing; these
15 were messages and communications directed at specific people as
16 well as others who chose to log on to the *evilgx.com* website.

17 In the *Landham* case, in Count 3 -- there are only two
18 counts in that case that were at issue -- in Count 3, the Court
19 found the defendant could not be legally charged with
20 kidnapping, so he couldn't have been properly convicted of
21 threatening to kidnap because he was the natural parent of the
22 child in question.

23 In Count 4 they threw out the conviction because,
24 although again this, I think, was on a habeas case -- no, this
25 wasn't a habeas case, this was a Title 18 case -- but that

1 count was thrown out because the threatening content or
2 communication referred to past conduct. It really wasn't a
3 threat because it wasn't directed at something that might
4 happen in the future or the present.

5 I think that the context -- the factual context, the
6 Court is very clear, the law is settled on this, that whether
7 something is a threat and can properly be the basis for
8 criminal prosecution and conviction has to be assessed in the
9 context in which it's made -- I keep coming back to that in the
10 context of Mr. Sutcliffe's alleged conduct, and in the context
11 in which Charles Evers' comments were made in the NAACP case,
12 in the absence of actual links of direct violence to what Evers
13 said, which was years before the finding of damage liability
14 that the Mississippi Supreme Court awarded, it's an entirely
15 different situation. I don't think the NAACP case has any real
16 bearing here.

17 It's true that it's a First Amendment case, and I am
18 not at all indifferent, oblivious or unwilling to fully protect
19 any citizen's rights of expression under the First Amendment;
20 but that is not good authority for this case.

21 I already told you what my view is about the *Planned*
22 *Parenthood* case. I think not only because it's probably the
23 most recent case, but it's also because it's the most
24 considered. And, of course, because it's binding on me as a
25 lowly trial judge in the Ninth Circuit, I think that case

1 prompts the rather clear conclusion that the arguments that
2 Mr. Harris made in his motion are really unpersuasive.

3 So for all those reasons, I deny the application.

4 Would you like to be heard about what I've said so
5 far, Mr. Harris?

6 MR. HARRIS: Yes. Briefly, your Honor.

7 THE COURT: Go right ahead.

8 MR. HARRIS: My main point on the motion here is -- as
9 your Honor pointed out, it's not a motion to dismiss, it's a
10 bail motion. My point was that I think it's impossible to read
11 the *Planned Parenthood* dissent and the *McCoy vs. Stewart* case
12 with the denial of cert. and conclude that there are not
13 substantial First Amendment issues at least raised by this,
14 substantial First Amendment issues that need to be sorted out.

15 And my premise is that if that is the case, that's an
16 argument for bail just out of an abundance of caution, because
17 we're dealing with the First Amendment here, and that's
18 paramount, seems to be even of greater import than some of the
19 other amendments in the Bill of Rights. So that is the context
20 of the arguments.

21 I submit that if the First Amendment has to be sorted
22 out through the context of trial, that at least raises the
23 theoretical possibility that that context will show that these
24 were protected communications. And we're going to be bringing
25 out that context. So --

1 THE COURT: And that will be your right. In the
2 *Planned Parenthood* case, the Ninth Circuit reiterated it was
3 for the jury to make the ultimate determination.

4 MR. HARRIS: Right. But as the Court may recall from
5 the *Planned Parenthood* case, they said that the website was
6 protected speech. *The Nuremberg Files*, even the majority
7 agreed that *The Nuremberg Files* themselves, that is protected
8 speech. It was only with the "wanted" posters in the context
9 of the extrinsic violence of the three murders that stripped it
10 of the First Amendment protection. So --

11 THE COURT: Mr. Harris, I think it's helpful to
12 distinguish between the medium, which is what a website is, and
13 the content, which is what this case is about. The Ninth
14 Circuit, in *Planned Parenthood*, did not say, and I don't know
15 of any court that has said, that a website is protected speech.

16 MR. HARRIS: Oh, no.

17 THE COURT: What's really at issue is what is
18 disseminated on a website. That's what speech is. And then
19 the question arises whether it's protected.

20 MR. HARRIS: Well, the point was that the content of
21 *The Nuremberg Files* with the lines crossed out and the implicit
22 argument that this is somehow an invitation to murder these
23 abortion providers, the Court will note that the Ninth Circuit
24 said *The Nuremberg Files*, that's protected speech. If they
25 were limited to that, judgment for the defendant under the

1 First Amendment. It was only when they brought in the "wanted"
2 posters that they said that, in context with the three murders,
3 took it outside the First Amendment. And that's how they
4 inferred a threat. But on the face of *The Nuremberg Files*,
5 they said no threat. So --

6 THE COURT: Do you think that no reasonable person
7 could construe Mr. Sutcliffe's postings on this website in the
8 context in which they are posted and came about as a threat?
9 As it would likely be perceived by the recipient?

10 MR. HARRIS: I don't know if I would go that far,
11 because on some of them, there's a spectrum. Some of them,
12 yes; others, no. And, you know, some are closer questions than
13 others. But I think all of them present a First Amendment
14 issue.

15 So it's -- I mean the Court has made its ruling on the
16 First Amendment and I respect that. There's one other -- I'm
17 just bringing out the practicalities of it that if it's the
18 case that the context shows that some or all of this speech was
19 protected, we would have been in a better position if he's
20 outside on bail. That's a better First Amendment position to
21 be in. If he's convicted, there will be plenty of time for him
22 to serve his sentence after he's convicted.

23 But there's one other practical argument that I didn't
24 really put in the papers that I'd like the Court at least to
25 consider.

1 This is a computer case where counsel for Mr.
2 Sutcliffe is like a child learning the scales and Mr. Sutcliffe
3 is playing Beethoven piano sonatas. And that's about where
4 it's at. And in MDC we cannot even have a computer unless I'm
5 there, sitting there, with all my other cases, to allow
6 Mr. Sutcliffe to have a computer. So with him --

7 THE COURT: Please explain to me why your ability
8 effectively to represent him is dependent upon some level of
9 insight or prowess concerning computer technology that you
10 currently lack?

11 MR. HARRIS: Because these websites are on disks, it's
12 a matter of manipulating the disks, going back and forth,
13 pulling this out, pulling that out, cross-checking. If this
14 second website is allowed to come in, the task is doubled.

15 THE COURT: Would your ability effectively to
16 represent him be enhanced if, at Government expense, at public
17 expense, you were allowed to retain an expert?

18 MR. HARRIS: You know, what it would really be -- an
19 easier solution would be to direct MDC to let Mr. Sutcliffe
20 have access to that computer in the visiting room without me
21 being there.

22 THE COURT: That I will not do.

23 MR. HARRIS: I mean it's not an Internet where he can
24 go to the outside; it's just a computer plugged into the wall.

25 THE COURT: But I thought you're the one who needs to

1 get the -- I don't mean to minimize what I think you're telling
2 me because I'm in the same boat as you, but I construed you to
3 tell me that you need some kind of tutelage about the niceties
4 of computer technology and Internet usage; and I don't see how
5 you'll get that when Mr. Sutcliffe has access to an MDC
6 computer.

7 MR. HARRIS: If he was out, he could sit in my office
8 and we could prepare for trial with the computer sitting on my
9 desk, and he could go back and forth, and we would have some
10 time to do that.

11 Now, the only way that we can actually -- I mean we've
12 got a box of computer disks and floppies that -- there's not
13 enough time if I did it 24 hours between now and December 3
14 that I'd be able to do this thing adequately.

15 But he knows what's there. And the only way to get
16 Mr. Sutcliffe on a computer is for me to go down to MDC to the
17 visiting room hoping --

18 THE COURT: In other words, what you're saying is that
19 the evidence that has been turned over to you, you need your
20 client to evaluate?

21 MR. HARRIS: Right. It's like if he spoke -- if it
22 was in Chinese and he spoke Chinese and I didn't, and we're
23 trying to go over and find the gems and uncover them.

24 THE COURT: Have you raised this issue with
25 Ms. Duarte?

1 MR. HARRIS: No.

2 THE COURT: I don't know exactly what kind of access
3 to mischief -- I'll put it in a neutral term -- might be
4 feasible through use of that computer; but assuming there's
5 none or the risk can be minimized, I would be inclined to let
6 him have access. But I don't know enough about it to issue
7 some kind of oral order now.

8 Why don't you and Ms. Duarte speak to the Warden?

9 MR. HARRIS: Okay.

10 MS. DUARTE: Your Honor, if I could just add
11 something?

12 I did -- Mr. Harris may not be remembering this right
13 now, but my expert, who I retained, has offered to sit down and
14 have a meeting with Mr. Harris and go over all of his
15 findings -- he's in the process of making them now -- and
16 explain what --

17 THE COURT: Is he going to put them in a report?

18 MS. DUARTE: We've already turned over the report, and
19 he's preparing spreadsheets. And as well today I have some
20 disks that he prepared.

21 All they are is evidence that's been pulled off the
22 electronic evidence that was turned over a long time ago, but
23 it's what we're going to use in trial being pulled off. And
24 he's happy --

25 THE COURT: Being pulled off of what?

1 MS. DUARTE: I'm sorry; pulled off of the original
2 electronic copies. So in other words, it would be like if we
3 turned over a thousand documents a long time ago, and the
4 expert's pulled out 20 of them, he's offered now to sit down
5 with Mr. Harris and go through the 20 that he pulled and
6 explain to him what they are and why he pulled them. So we
7 also have that available.

8 THE COURT: Well, it may be a generous gesture, and
9 I'm not ruling out acceptance by Mr. Harris, but I wouldn't be
10 surprised if Mr. Harris is thinking that if he asks questions
11 to your investigator, then you're going to see where he's
12 coming from when he propounds a defense to Mr. Sutcliffe.

13 Is that your concern?

14 MR. HARRIS: No, I mean I'm happy to talk to their
15 investigator, and I don't think that's as big of a concern as
16 the fact that -- the bigger concern is that it's tough enough
17 to try represent a client and get ready for trial when they're
18 in custody anyway, other things being equal; in a computer case
19 where you've got all sorts of computer evidence coupled with
20 the problem that the client has technical expertise that the
21 lawyer doesn't, it just compounds the issue. And all I'm
22 saying is if there's a way that we can address flight and
23 danger where --

24 THE COURT: Well, *[Interrupt.]* that would be my ruling on it.

25 MR. HARRIS: -- where we can have Mr. Sutcliffe out,

1 he's got a better chance of defending himself in these charges.
2 That's all I'm saying.

3 THE COURT: Look, it's inherently the case in every
4 case that a client who's in custody finds it harder to
5 communicate with his lawyer to that extent and makes it tougher
6 for the lawyer. And there may be additional factors here, but
7 that doesn't change my ruling on the issues relating to bail.

8 I'm reaching out for ways to make sure that you, who I
9 know to be a very dedicated, skillful lawyer, will be able to
10 get ready for trial and mount an effective defense.

11 So if you find that there is some kind of benefit that
12 could accrue to your client if an expert were appointed, and
13 you can locate one, and set forth standard information about
14 why and what kind of expertise the individual has and what his
15 hourly rate would be, I would be very inclined to grant that
16 application and, as you know, that application doesn't have to
17 be made available to the prosecution.

18 If you can meet with the prosecution's expert as an
19 additional measure or an alternative measure, fine. If you can
20 stipulate through intervention with the Warden about access to
21 the computer, I have no objection in principle to that,
22 although I want to make sure that it doesn't create some kind
23 of unintended and very adverse precedent.

24 So there are three specific ways, and maybe you can
25 exploit all three. It's up to you. But it doesn't change my

1 ruling today on the bail.

2 Now, if you're wondering whether it's an idle offer,
3 given that the current trial date is December 3rd, that's a
4 good segue into what the problem is with the December 3rd
5 trial.

6 And the problem is I'm going to be in trial. And I've
7 been in trial. And it's a criminal trial on a case that was
8 indicted before this case, and that is taking a lot longer,
9 despite my best efforts, to complete. The jury has been told
10 that they're coming back on December 3rd, I'm not even sure
11 we're going to finish that week, I kind of doubt it, but I may
12 not know for sure.

13 So I think you need to consult with Mr. Sutcliffe and
14 with my court clerk, and see what dates are available to you
15 and to the prosecution.

16 How long do you anticipate the trial in this case will
17 be?

18 MS. DUARTE: The Government's case, four to five court
19 days, your Honor. At the most.

20 THE COURT: Really? Four to five court days?

21 MS. DUARTE: I can't anticipate cross; I can tell you
22 that my case will be --

23 THE COURT: Let's see the trial schedule.

24 MS. DUARTE: -- relatively short.

25 THE COURT: Well, this case is my next trial. And I

1 committed to Mr. Sutcliffe today, and I could try it before
2 Christmas and push back a number of other cases, a whole lot of
3 them. But I think it's not going to be feasible to explore
4 specific alternatives now. I think you should talk to the
5 clerk afterward, talk to your client while he's here.

6 I'm prepared, if it's a -- Mr. Harris, give me a
7 realistic estimate. Could this be a --

8 MR. HARRIS: This is a -- [Interrupt]

9 THE COURT: -- seven-day trial?

10 MR. HARRIS: Yeah. I would be surprised if it goes
11 more than that.

12 THE COURT: Yes, I would too.

13 MR. HARRIS: We could probably get this whole thing
14 done in a week.

15 THE COURT: Yes. I think so.

16 MR. HARRIS: Although it's a four-day -- yes, so -- I
17 mean five court days.

18 MS. DUARTE: Well, your Honor, along those lines --
19 I'm sorry -- do you have a truncated schedule? Do you have
20 a --

21 THE COURT: [Interrupt]
I don't consider it truncated, my court
22 reporter doesn't consider it truncated. My court clerk --

23 MS. DUARTE: A more difficult. I'm sorry. [Interrupt]

24 THE COURT: I go from 8:00 to 1:30 with two 15-minute
25 breaks.

1 MS. DUARTE: Yes, I don't think that that changes my
2 assessment.

3 THE COURT: And that's the way we've been going for a
4 long time. So you talk -- those are my rulings. Anything else
5 that needs to be addressed now?

6 MS. DUARTE: No, your Honor. Thank you.

7 MR. HARRIS: Thank you.

8 THE COURT: Okay. We're adjourned.

9 (Proceedings concluded.)

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CERTIFICATE

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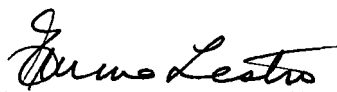
I hereby certify that pursuant to Section 753, Title
28, United States Code, the foregoing is a true and correct
transcript of the stenographically reported proceedings held in
the above-entitled matter.

18

Date:

2-1-05

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Emma Lestro, U.S. Court Reporter
CSR No. 2901

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