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UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

- - -
~~HONORABLE~~ A. HOWARD MATZ
UNITED STATES DISTRICT JUDGE, PRESIDING
- - -

UNITED STATES OF AMERICA,)
)
 PLAINTIFF,)
)
 VS.)
)
 STEVEN WILLIAM SUTCLIFFE,)
)
 DEFENDANT.)
 _____)

NO. CR 02-350(A)



SENTENCING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THURSDAY, APRIL 15, 2004

LOS ANGELES, CALIFORNIA

02837 -047

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1 LOS ANGELES, CALIFORNIA; THURSDAY, APRIL 15, 2004

2 - - -

3 (COURT IN SESSION AT 3:18 P.M.)

4 THE CLERK: All rise. This court is now in
5 session, the Honorable A. Howard Matz presiding.

6 THE COURT: Good afternoon and welcome. Please be
7 seated.

8 THE CLERK: Calling Item Number 1, CR02-350(A),
9 U.S.A. versus Steven William Sutcliffe.

10 Counsel, state your appearances, please.

11 MS. DUARTE: Good afternoon, Your Honor. Elena
12 Duarte with case agent Jeffrey Cugno on behalf of the United
13 States.

14 THE COURT: Good afternoon.

15 MR. SUTCLIFFE: Good afternoon, Your Honor. Steven
16 Sutcliffe present.

17 THE COURT: Good afternoon.

18 MR. REED: Good afternoon, Your Honor. David Reed,
19 standby counsel.

20 THE COURT: And good afternoon to you.

21 All right. We're here for the pronouncement of
22 judgment and the imposition of sentence on Mr. Sutcliffe.

23 Let me explain how I think we need to proceed here.
24 First of all, I will do what I do in every sentence and that
25 is recite the materials that have been made available to me

1 that I have considered for purposes of this sentencing or
2 that were sent to me for purposes of the sentencing.

3 After I do that, I will address the question of
4 whether there's been sufficient notice for any departures I
5 may make and I intend to make some because I don't think
6 there's any legal or procedural barrier to that.

7 I want to make sure that at the conclusion of the
8 proceedings, if Mr. Sutcliffe wishes to appeal his conviction
9 and/or his sentence, he has the necessary paperwork to file a
10 timely notice of appeal and to request the appointment of
11 counsel if he wants counsel to represent him on appeal.

12 There are a couple of preliminary housekeeping
13 matters that I want to make sure are disposed of before I
14 turn to what I've just said. And I should mention that I've
15 been informed that Tracy Hall, who is one of the witnesses at
16 trial and who was one of the individuals identified as a
17 victim in the first superseding indictment, is here and
18 wishes to be heard, and she will be given that opportunity.

19 Now, in the housekeeping department, I received
20 some time ago, not very long ago, a request by Mr. Sutcliffe
21 for the various competency reports that were submitted to me
22 long before the trial and Mr. Sutcliffe represented that he
23 needed those for purposes of appeal. I have always believed,
24 and went through considerable efforts to make sure, that
25 those reports were timely made available to Mr. Sutcliffe

1 very shortly after I received those.

2 But in the event for some reason, I know there's
3 been a great deal of back and forth about what happened to
4 information Mr. Sutcliffe's requested or was entitled to and
5 whether it got to him in MDC or not, in an excess of caution
6 and in a continuing desire on my part to give Mr. Sutcliffe
7 all to which he's entitled and that he needs, including for
8 purposes of an appeal, I have asked the clerk to make extra
9 copies.

10 So I would ask the clerk to hand those to
11 Mr. Sutcliffe. And for the record, in the sequence in which
12 I got those -- and some of these, as I'm going to hand them
13 to you, Mr. Sutcliffe, reflect actual minute orders and file
14 stamped copies showing that they were sent to you. But in
15 the event for some reason something happened, I have a report
16 Dr. Becker completed on -- or signed on February 24th; I have
17 his second report from March 21st; and I have Dr. Patenaude's
18 -- that's P-A-T-E-N-A-U-D-E -- from August 14th. All three
19 of those reports were from 2003 directing the clerk to give
20 those to Mr. Sutcliffe, and you can keep those in your
21 possession.

22 MR. SUTCLIFFE: Thank you, Your Honor. Your Honor,
23 is the requested --

24 THE COURT: Could you move the microphone close to
25 you. We have a new court reporter. She's not familiar with

1 your voice or with any of the names in the case so try to be
2 clear as you can.

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

4 Um, does this packet I've just been handed contain
5 the certificate pursuant to 4241D that's required by the law?

6 THE COURT: It does not.

7 MR. SUTCLIFFE: It does not? Is there any
8 explanation that the Court can give that this was not
9 provided to the clerk of court? It's my understanding it's
10 supposed to be provided to the clerk and that the clerk was
11 then to provide it to the attorneys.

12 THE COURT: Okay. I'm not going to comment on the
13 accuracy or correctness of your understanding. It may, in
14 fact, be correct and I know what statute you have in mind in
15 pointing that out. So far as I know, we never got a
16 certificate and that's why I don't have anything to give to
17 you.

18 MR. SUTCLIFFE: So for the record, none -- none
19 exists?

20 THE COURT: So far as I know, none exists in this
21 court.

22 MR. SUTCLIFFE: Thank you, Your Honor.

23 THE COURT: All right. Now, having taken care of
24 that housekeeping matter, let me recite what I have read.

25 I read the presentence -- this is not necessarily

1 in the order in which they were received. I read the
2 presentence report and a number of different letters that
3 were sent to me at different times by different people. One
4 of those is a letter from Mr. McAfee that I wasn't sure
5 counsel had so I asked the clerk to make it available before
6 I came out on the bench.

7 In addition to Mr. McAfee, I received letters and
8 poems sent by Mr. Sutcliffe's mother, by Sarah Ritts, and
9 those triggered a series of filings requiring that Mr. Reed
10 and Mr. Nicolaysen be given an opportunity to respond and
11 then make their responses available to her, and that was
12 done.

13 I have a letter from Carol Sutcliffe, who is
14 Mr. Sutcliffe's sister-in-law, I believe.

15 I have a letter from Michael Sutcliffe, who is his
16 brother.

17 And those are the only letters that I received.

18 In addition to the letters, which I did read,
19 following the filing of the initial presentence report, I
20 read a document that was filed on March 8th entitled,
21 "Position re sentencing factor brief" filed by standby
22 counsel on behalf Mr. Sutcliffe. That, of course, is
23 Mr. Reed.

24 I also read the government's sentencing memorandum
25 and objections to the presentence report along with the

1 declaration of Agent Harrill that was filed on February 27th.

2 I read the government's response to standby counsel
3 David Reed's sentencing position paper that was filed on
4 March 15th.

5 I read the addendum to the presentence report.

6 I read the statement -- and I don't know exactly
7 how it was entitled, but I think I have it here somewhere --
8 that Mr. Sutcliffe filed directly. Yes, I have it. It's
9 called "Declaration of Steven W. Sutcliffe re Adoption of
10 Position re Presentencing Factor Brief Filed by Advisory
11 Counsel." He crossed out the words -- he, I think, somebody
12 crossed out the word "standby" and substituted in writing
13 "advisory." And that's referring to what Mr. Reed had filed.
14 That document, the declaration of Mr. Sutcliffe, was filed on
15 March 30th. And the important provision in that document,
16 although I may mention a couple of others, is that without
17 waiving any objections and while neither adopting Mr. Reed's
18 claim that his memorandum was filed on behalf of
19 Mr. Sutcliffe nor adopting, authorizing, recognizing or in
20 any other way waiving any objections to my previous order
21 that Mr. Reed prepared and filed a document, with all those
22 qualifications having been noted, Mr. Sutcliffe went on to
23 say, quote, "I hereby adopt the document and, in particular,
24 its conclusions stated therein as though fully set forth
25 hereat." That's the end of that quote.

1 Those are all of the items that I read for purposes
2 of the sentence. Is there anything that either counsel for
3 government, Mr. Reed or Mr. Sutcliffe as it were that I did
4 not recite?

5 MS. DUARTE: Your Honor, there's nothing I'm aware
6 of that you did not recite. However, I did not receive any
7 of the letters that the Court enumerated except for the
8 letter from Mr. McAfee which the deputy clerk gave me a copy
9 of today.

10 THE COURT: Didn't you receive Ms. Ritts' letter?

11 MS. DUARTE: I did not.

12 THE COURT: Well, do you want to see all those
13 letters?

14 MS. DUARTE: Yes. Please.

15 THE COURT: Okay.

16 MS. DUARTE: Miss Ritts' letter, Your Honor, it was
17 my understanding that it was filed under seal so it --

18 THE COURT: Yeah, it was.

19 MS. DUARTE: But if the Court has unsealed it or
20 will permit me to have a copy, I would very much --

21 THE COURT: Well, I'll permit you to look at it
22 now. It's been my consistent practice in all cases to make
23 sure that both sides have access to the same information
24 unless there's an attorney/client privilege issue or
25 something like that, and there have been in this case, where

1 I've excused you. So let me find those documents.

2 McAfee's letter you've got?

3 MS. DUARTE: I did, Your Honor. And, Your Honor,
4 in the interest of saving time, unless the Court is relying
5 on information in the letters, I can get a copy at a later
6 time. I don't need to see it right before the Court imposes
7 sentence.

8 THE COURT: Well, that will help things.

9 MS. DUARTE: Perhaps I can --

10 THE COURT: I can tell you in general that I pay a
11 lot of attention to letters and I did in this case. The
12 letters from Mr. Sutcliffe's mother, his brother, and his
13 sister-in-law all attest to his being a loyal family member,
14 a good son, a good brother. They talk a little bit about his
15 relationship with his father, particularly when he was a
16 young man or an adolescent. They assert that he is not a
17 violent person and that he is trustworthy. They go beyond
18 that but I think those are the most important points that I
19 recall seeing in those letters.

20 And the letter from Ms. Ritts basically placed in
21 question from her perspective, and I'm not going to make any
22 findings, and I don't think I have to make any findings one
23 way or the other, they provided information about what she
24 thought were claimed were the manner in which Mr. Nicolaysen
25 and later Mr. Reed dealt with Mr. Sutcliffe, and what

1 concerns she thought they either expressed or had in trying
2 to represent Mr. Sutcliffe at the times they were his
3 lawyers.

4 So I'll make those available at the conclusion of
5 the hearing.

6 MS. DUARTE: Thank you, Your Honor.

7 THE COURT: Just remind the clerk to get them from
8 me.

9 MS. DUARTE: I will. Thank you.

10 THE COURT: All right. Now, before I hear from
11 Miss Hall, let me just acknowledge that both the prosecutor
12 and Mr. Reed cited the Sanders decision and seemed to suggest
13 or state that it required that before this hearing begin, I
14 actually issue some kind of written notice as to how I was
15 going to rule on the various requests for departure of
16 modifications that each side made. That was a 1994 decision
17 of the Court of Appeals for this circuit. And in that
18 decision, which is not the actual correct state of the law
19 any more, the defendant was found to have ample notice as to
20 the Court's rulings on the actual sentence, even though the
21 Court did not disclose what it was planning to do until the
22 close of sentencing, because the parties had actually filed
23 briefs on the issues and had argued the issues to the Court.

24 The only rulings I'm going to make and the only
25 considerations that I'm going to address, other than

1 explaining where I came out on what I ultimately conclude is
2 the applicable Guideline Range are in response to positions
3 that one or the other side made. And when I say side, for
4 ease of clarity, I'm going to include Mr. Reed on
5 Mr. Sutcliffe's side since Mr. Sutcliffe adopted his
6 position. But I respect and understand that Mr. Sutcliffe is
7 his own lawyer or acting in his own right here. And, of
8 course, you will have a chance to act as lawyer as well as to
9 allocute it's called, to give me your views at sentencing.

10 Now, the Burnes case, which the Sanders case cited,
11 was a Supreme Court case from '91. And that noted that under
12 Rule 32 in the ordinary case, the presentence report and the
13 government's own recommendation will notify the defendant
14 that an upward departure will be at issue and what facts,
15 allegedly support it, and that was done here. The only
16 notice required under Rule 32 is that it be reasonable.

17 Counsel need to be aware that in 2001, in the case
18 called United States versus Hernandez, the Court ruled that
19 when the trial court, at the outset of the hearing, gave
20 notice that he intended to depart upward on a basis that
21 neither side had actually asked for or cited or addressed in
22 its brief, the defendant and his lawyer still had a
23 meaningful opportunity to comment, and there was no plain
24 error, even when that departure was based on entirely new
25 grounds. So that's not going to be the situation here for

1 the reason I already eluded to.

2 After Lopez -- after Hernandez was decided, the
3 Lopez case in this circuit citing it declined to extend the
4 general notice requirement in the Burnes case to the
5 imposition of a condition for supervised release that neither
6 side had addressed. It said no advance notice was necessary.

7 There is a further acknowledgment of the ruling
8 that wound up being applied by the Ninth Circuit in
9 Hernandez, which is still the law of this circuit, in a case
10 called Williams, which is slightly before Hernandez, that
11 notice to the parties, either side, can come from the
12 district court itself or from the PSR or from a prehearing
13 submission from the government.

14 And as I've said now probably for the third time,
15 those requests, those objections, each side had requested
16 objections of its own, are going to be the ones that affect
17 my sentence and that I will rule on. I'm not going to come
18 up with anything new or different as I did in the Hernandez
19 case. So I don't think there's any issue of notice.

20 Before I go any further, do you want to be heard
21 about what I just said, Miss Duarte?

22 MS. DUARTE: No, Your Honor.

23 THE COURT: Do you, Mr. Sutcliffe?

24 MR. SUTCLIFFE: No, Your Honor.

25 THE COURT: Okay. Now, I will, after hearing from

1 Miss Hall, because I think we all, the Court and both sides,
2 need to hear from all entitled or available or requesting
3 witnesses, after I do hear from Ms. Hall, I'll tell you what
4 my tentative, but I will say very considered, rulings are on
5 the various legal issues and factual issues and other
6 requests submitted by the parties.

7 Miss Hall, will you please step forward to the
8 lectern. Just for the record, state your name and then feel
9 free to state whatever it is that you would like to be heard
10 about or for me to take into account.

11 MS. HALL: Thank you, Your Honor. My name is Tracy
12 Hall, H-A-L-L.

13 THE COURT: Go ahead.

14 MS. HALL: Mr. Sutcliffe, the pain and the
15 grievance and the chaos that you caused in my life and my
16 family's life is reprehensible. But in my heart, I will
17 forgive you. I don't have a problem with that. I'm a human
18 being just like you are and I was doing my job.

19 I can only wish the absolute best for you in your
20 life and I hope that when this is over, you will find a way
21 to turn this anger that you have into something very positive
22 because one thing that I do know about you, Mr. Sutcliffe, is
23 you have the brains to do it. You're a very smart man. And
24 I hope that you will use that in the right direction and
25 maybe help other people eventually down the road.

1 Whatever sentence you receive, however, is
2 relatively light in comparison to the lifetime sentence that
3 you were giving me because no matter what happens,
4 Mr. Sutcliffe, I will always have to look over my shoulder
5 for you. I hope your anger goes away but I don't know if it
6 ever will.

7 In terms of the Court, I don't know what your
8 procedures are to make a decision. Two things that come to
9 my mind would be please allow no access to the internet or
10 any access to find myself. If I can speak for the other
11 victims, I would hope that Mr. Sutcliffe would not be allowed
12 to hire an investigator or somebody to go on the computer to
13 try and locate us. As it is, the minute Mr. Sutcliffe is let
14 out, it is my plan to move out of state and basically have to
15 go into hiding until I feel safe enough in my own heart that
16 I'm not going to be in any danger any more.

17 I also ask if the Court can consider possible anger
18 management or counseling for his own sake. I know that just
19 being behind bars probably is punishment but it's certainly
20 not a solution. And I can only ask the Court to take those
21 two things into consideration.

22 And I thank you for your time.

23 THE COURT: Okay. Thank you, Ms. Hall. Is there
24 any other person who has an interest in the case that this is
25 part of who wishes to be heard? Okay.

1 MS. DUARTE: I don't think --

2 THE COURT: Hearing no response -- did you want to
3 say something, Ms. Duarte?

4 MS. DUARTE: I don't believe there is, Your Honor.

5 THE COURT: Okay. Okay. Let me turn then to the
6 issues that have been raised in the various filings because I
7 think there's a fundamental need to make it very clear at the
8 outset what I am pretty confident is the correct way to reach
9 the applicable Guideline Range.

10 In the process of doing that, I will rule on the
11 various requests that the parties made.

12 First of all, as the addendum notes, in its initial
13 response, the government asks that certain paragraphs 12, 20A
14 and 37, be corrected for minor factual inaccuracies. That
15 has been done. So there's no need to comment on those. They
16 don't really have a bearing on my sentence.

17 The government has moved as to Counts 5 through 9,
18 the violations arising out of the posting of the Social
19 Security numbers for a two level increase in the applicable
20 offense level under either or both of Sections 2B1.1(b)(8),
21 and I intend to grant that request. I think both of the
22 grounds apply, the so-called relocation ground under
23 Subsection (a), and the sophistication ground under
24 Subsection (c). They warrant the two level increase that the
25 Guideline speaks about. Here are my findings on that

1 request, although it's not a two level increase times two.
2 It's only a single two level increase and it's only
3 applicable, I want this to be clear, to Counts 5 through 9,
4 and the calculation for the offense level there.

5 I think as to Subsection (c), the evidence in this
6 case, which I remember very, very well -- it was an extremely
7 memorable trial and it wasn't that long ago -- clearly and
8 convincingly demonstrated that defendant, as I already had
9 reason to know, possessed at the time he committed these
10 crimes, a technological prowess relating to computer skills
11 and computer software, computer hardware, the internet, and
12 various unusual and sophisticated applications of those
13 skills over the internet that go way beyond what is the usual
14 manner in which crimes of these nature -- of this nature
15 typically are committed.

16 And even if the defendant had not been representing
17 himself and hadn't through his rather impressive questioning
18 displayed indeed at times, I think enjoyed displaying to the
19 point of showing off, that technological brilliance, I
20 probably would have been able to make that finding. But in
21 his questioning, particularly of the numerous witnesses who
22 authenticated the creation of various web sites as part of
23 the spider webbing pattern, the FBI agents, there was more
24 than one who were on the trail and trying to figure out how
25 to locate him and how to stop the criminal conduct that led

1 to the indictment. The means that he used to carry out the
2 scheme reflected remarkable sophistication, not just slight
3 or incremental or marginal.

4 The case the government cited, the Aragbaye case,
5 which upheld the application of the two level enhancement,
6 did not even involve anything close to this degree of
7 sophistication. It included creating web sites, switching
8 them around, relocating them, having multiple access to other
9 sites -- this is part of the spider webbing context which it
10 took me awhile to understand but I think I do and I think the
11 jury did, in the various web sites that he created and
12 manipulated, he incorporated audio features and visual
13 images. And this was a capacity that he displayed, not only
14 for purposes of communicating the threats that are the
15 subject of other counts, but carrying out the scheme to
16 violate the privacy rights of those individuals who were
17 affected by the Social Security violations under 1028, 1028
18 referring to the section.

19 In addition, as to Subsection (a) of 2B1.1(b)(8),
20 as I already indirectly eluded to, it's a strange concept,
21 this issue of relocation to avoid detection or perpetuate the
22 fraud or make it more difficult to bring it down. These
23 multiple web site locations and multiple web hosts were
24 accompanied by, as the government pointed out, the equivalent
25 of taunts. Exhibit 21 is an adequate example of that, where

1 Mr. Sutcliffe warned those on his trail that for every site
2 they managed to take down, he would put up two others. And
3 at times it appeared that he was doing that.

4 This was a pervasive attempt by Mr. Sutcliffe to
5 avoid detection by taking advantage of means that only he or
6 few others, I can't say only he, but he and very few others
7 could display in order to appear to be what I think he wanted
8 to be, or at least seemed to be in the eyes of others, which
9 was invulnerable and indomitable. He's a man of strong will
10 and I think he enjoys being in the position of one against
11 the odds or one against many. And this was a very available
12 and carefully constructed means for him to do that.

13 So I think the government's position is correct on
14 that enhancement and that would add two levels to the base
15 offense level for Counts 5 through 9.

16 Now, the government has requested an upward
17 departure under a different section, 2A6.1, asserting that
18 the defendant's conduct involves substantially more than two
19 communications to the same victim and a prolonged period of
20 making harassing communications to the same victim.

21 Now, the application of this enhancement is
22 addressed at paragraphs -- I think sufficiently addressed at
23 perhaps 38 and 39 and 46 as to Hall only. There is not a
24 dispute in the case that as to Hall, although only two
25 communications were issued, three -- that were indicted,

1 three were made. There have to be a greater showing -- I am
 2 going to adopt the two level enhancement that is recommended
 3 by the probation office in paragraphs 38, 39 and also 46, but
 4 I'm not going to go beyond that. So to the extent the
 5 government was asking then an additional two levels be added,
 6 I deny that request.

+2

gov. request

7 The government's requested an upward departure
 8 pursuant to 5K2.0, and I am not going to grant that because I
 9 think most of the factors that the government cites go either
 10 to the fact that the defendant's criminal history is grossly
 11 understated, and I agree with the government on that, and I
 12 do intend to enhance the criminal history category but no
 13 offense level, and I'll explain why later, or to where I
 14 should come out on whatever I conclude is the ultimate
 15 Guideline Range. Factors such as intensity and persistence
 16 and absence of remorse are aggravating but they're otherwise
 17 accounted for in different applications, fair-minded
 18 applications of the Guidelines. And to apply them more than
 19 once or to book it away would be unfair to the defendant.

20 The Bell case and the Hines case, which I looked at
 21 carefully, involve, in the case of Bell, a very long and
 22 troubled history with the IRS; in the case of Hines, a real
 23 psychopath. And those are very factually different. The
 24 language might permit it but the facts here don't warrant it,
 25 and I'm not going to do the 5K2.0 upward departure that the

1 government requested.

2 As to Count 4, the challenge to the six level
3 increase for conduct that evidenced an intent to carry out
4 the threat to Miss Greenwood, I know that that's been
5 challenged by the defense side. But I think the challenge is
6 unpersuasive and unwarranted. And I intend to enhance the
7 applicable offense level for Count 4 accordingly. I do so on
8 the basis of the following findings and rulings.

9 The language of the Guidelines talks about conduct
10 that evidences an intent to carry out the threat. And think
11 about what that means. It means that the person determining,
12 and in this case, of course, the judge, whether or not the
13 enhancement is applicable has to look at the evidence to see
14 whether there's conduct that is consistent with or suggests
15 in a -- and I'll find it on a clear and convincing basis --
16 that there was an actual intent. It doesn't require proof
17 that there was subjective intent reflected in the most
18 unequivocal, direct and unassailable fashion, such as an
19 admission at the trial or at the sentencing or in connection
20 with presentence reports. It doesn't say that the
21 enhancement isn't bookable when the defendant actually and
22 subjectively did intend to carry out the threat. It talks
23 about evidence that -- conduct that evidenced such an intent.

24 And here, in the case of Greenwood, um, when the
25 defendant who knew her specifically referred to her, posted

1 her address, attached a map, included a picture, added to the
2 level of objectively indisputable and subjectively apparent,
3 because she did testify at the trial, fear, he had dealt
4 directly with her, unlike some of the cases that Mr. Reed
5 cited, where the enhancement was applied, even though the
6 speaker didn't actually know the victim, such as the would-be
7 presidential assassins, he said that he was coming to collect
8 personally and the fact that he was armed is not in question.

9 The evidence would prove beyond a reasonable doubt
10 that the weapon that was seized in New Hampshire he had had
11 for some time while he was in California. It was a rifle
12 with a bayonet capacity. He told Winnick, a different
13 victim, but he had -- but there was evidence shown that he --
14 this is conduct that shows an actual intent that he was
15 armed. I know he said, and I'll refer to this later on, that
16 he meant that he was armed with information. I don't find
17 that that was his actual state of mind. He was armed. And
18 the Hines case, which the government cited, supports this
19 finding.

20 I want to go back because I want to make sure that
21 to the maximum extent I can, I know the facts before I
22 disclose where I intend to come out, after I hear from both
23 sides about these rulings.

24 When I was making finding as to the applicability
25 of 2B1.1(b)(a), I forgot to incorporate by reference the

1 evidence submitted by Agent Harrill in his declaration, which
2 was part of the government's memorandum, as to the level of
3 sophistication that was inherent and a necessary part of
4 Mr. Sutcliffe's crimes.

5 Now, there was a statement in Mr. Harrill's
6 declaration that raised an issue that I never asked about at
7 trial, I probably wouldn't ask about now, but it cries out
8 for clarification. At paragraph three, Frank Harrill says,
9 quote, "During the trial I saw a man I recognized as Richard
10 Lee Weatherman in court nearly every day. During the course
11 of the investigation, I learned that Weatherman is an
12 acquaintance of Sutcliffe's."

13 What is that about? And I think that
14 Mr. Weatherman's here again today, right?

15 MS. DUARTE: That's -- that's correct, Your Honor.

16 THE COURT: Okay. Are you Mr. Weatherman in the
17 green shirt?

18 MR. WEATHERMAN: I am.

19 THE COURT: Okay. Well, I saw you at the trial day
20 after day. I had no idea who you were and now I know who you
21 are. Who is he?

22 MS. DUARTE: The reason that was in there, Your
23 Honor, is I believe that a portion of my brief that talks
24 about how Mr. Sutcliffe put his web site in names of
25 acquaintances cited to that paragraph. And I didn't know --

1 I didn't have a factual basis for that in the trial record
2 because who Richard Weatherman was, although his name was
3 mentioned a lot at trial, it was all over the records --

4 THE COURT: It sure was.

5 MS. DUARTE: -- It was never established that he,
6 rather than being some other nefarious, unknown character who
7 perhaps was perpetuating this whole thing, was actually known
8 by the government to be an acquaintance of Mr. Sutcliffe.
9 Um, and because I had wanted to put that in my papers, I
10 needed a factual basis. I knew that Frank Carol knew that.
11 I asked him to put it in the declaration.

12 THE COURT: Okay. Moving on. I already indicated
13 that I intend to grant the government's motion to increase
14 the applicable criminal history classification from one to
15 two under Section 4A1.3. Um, and that was probably the
16 easiest of these rulings for me to make. But I looked into
17 it very carefully.

18 The government is correct in noting that according
19 to the undisputed facts that are set forth beginning at
20 paragraph 75 of the presentence report -- and when I refer to
21 the presentence report, I'll just make it clear that I'm
22 including the report as revised and submitted as part of the
23 addendum -- there are five actual convictions that
24 Mr. Sutcliffe sustained that are not accounted for. There
25 were at least six arrests that were not accounted for.

1 The behavior that neither resulted in a conviction
2 nor even an arrest but that was facially unlawful, and in any
3 event a very chilling indication of the consideration as to
4 how likely it is that he would commit further crimes is that
5 he undoubtedly and indisputably set up this killercop.com web
6 site; tried to arrest via citizen's arrest a law enforcement
7 officer carrying out his duties in a courthouse; the
8 indication that his wife has made, I'm not making any
9 findings but it's in the record, and it resulted in an
10 issuance of a domestic restraining order in New Hampshire
11 that he was prone to violence or at least she claimed; and
12 the demeanor that she displayed when she testified at the
13 trial I find to be not only consistent with that but probably
14 the result of that. It was a demeanor combining both
15 profound fear and embarrassment as well as enmity.

16 The Martin case, the Goshea case, the Hines case, I
17 read them all, warrant this change in the applicable criminal
18 history category. And I stress that the change under 4A1.3
19 is warranted either where there is an understatement or an
20 underrepresentation of the previous criminal history and its
21 seriousness, which I find indisputably the case here; or an
22 underrepresentation of the likelihood as to whether the
23 defendant will commit further crimes.

24 Now, I'm no prophet and it's hard to make
25 predictions. And the many -- and the people who did write to

1 me about Mr. Sutcliffe, although I got no letter from him,
2 have stated that he has actually expressed remorse, there's
3 nothing in the record that I see that is consistent with
4 that. It could be that he actually feels it and maybe we'll
5 hear from him.

6 But these bizarre acts undertaken by a man who is
7 found to be competent to go to trial and, as Tracy Hall
8 indicated, is possessed with an extremely acute mind, cause
9 me very real concern that the criminal history classification
10 of one totally ignores both aspects that warrant an increase
11 under 4A1.3.

12 Now, I sentence lots of people and I'm frequently
13 asked and I not infrequently agree that a criminal history
14 category overrepresents the seriousness of a person's past
15 criminal behavior or the likelihood that he'll commit crimes
16 in the future. And when I reach that conclusion, I depart
17 downward or I reduce the criminal history classification.

18 This case is so beyond the heartland of category
19 one criminal history offenders who I have the responsibility
20 to sentence that I have no doubt that increasing it is the
21 appropriate and warranted thing to do. So that's what I'm
22 going to do.

23 Now, there is one provision in the presentence
24 report applicable to Counts 5 through 9 that Mr. Reed on
25 behalf of -- I won't say on behalf of, I want to be

1 careful -- that Mr. Reed has challenged, Mr. Sutcliffe has
2 joined in, as to whether or not that enhancement for
3 violation of the TRO is warranted. Now, that was addressed
4 in paragraph 53 of the presentence report I believe. Let me
5 get my notes and see if I'm right. Yeah. I don't think that
6 that enhancement has been proven, not even by a preponderance
7 of the evidence. And I'm inclined to agree with Mr. Reed and
8 Mr. Sutcliffe about that. And I thought so at the trial.

9 It is undoubtedly the case that the TRO was issued
10 and there's no dispute that it came about because
11 Mr. Sutcliffe had previously worked at Global Crossing.
12 That's the genesis of this whole series of criminal acts.

13 But there was no evidence that the Social Security
14 numbers were -- only by remote inference that they were
15 obtained after that TRO was issued which was after his
16 employment had been terminated.

17 And I sat in the course of the trial, and I don't
18 think this was raised in the defense briefs, but I sat there
19 wondering whether with his phenomenal skills, he had simply
20 hacked onto some site. After or before wasn't clear. But
21 even hacking, I don't think, would have violated the TRO.
22 That's arguable. It would have violated the spirit of it.
23 It may not have violated the letter of it.

24 But there was evidence of the record -- in the
25 record that suggested that other people had access to these

1 web sites and responded to his invitation to send information
2 and that's how he got their names. Maybe Mr. Weatherman
3 helped him out. Who knows? Who knows who Mr. Weatherman
4 worked for? Who knows how he got this information? But I
5 don't find that the evidence is sufficient to warrant the
6 enhancement so I'm not going to do that unless I'm talked out
7 of it. Each side will have a chance to address these
8 rulings.

9 Now, I think that chance is now upon us because
10 after I hear from the responses to my preliminary rulings, I
11 will then walk you through what I think is the required
12 calculation because I think that the presentence report, even
13 as amended, was erroneous in the way it was structured and
14 the way the offense levels were determined.

15 I reach that conclusion and I am quick to
16 acknowledge this in part as a result of an analysis given to
17 me by a special probation officer who works with certain
18 judges in connection with actual sentences. And I'll tell
19 you what I'm eluding to later. But whatever I conclude will
20 depend upon whether I stick to these rulings. So let's hear
21 from both sides first.

22 Do you want to be heard on anything I've said?

23 MS. DUARTE: Yes, Your Honor. Um, in regards to
24 the Court's last, um, tentative on the TRO application of the
25 four point enhancement, I -- for some reason, I'm unable to

1 locate that paragraph in the PSR. But the way that I
2 remember the trial exhibit, it spoke to the -- to the fact
3 that Mr. Sutcliffe was precluded from publishing any
4 information obtained from him while at Global Crossing.

5 As I argued in my papers and as I continue to
6 believe was shown at trial, the documents that were posted on
7 the web site were in close to or in exactly the same
8 condition as they appeared on the individual's computers that
9 Mr. Sutcliffe had worked on previously. There was no other
10 apparent way for these documents to have ended up on the
11 internet. And not only did they end up on the internet, Your
12 Honor, in a manner where the Court has referenced possibly
13 someone else could have provided them but, as I said in my
14 papers, they ended up, at least some of them, on the internet
15 very close in time to Mr. Sutcliffe's inception of his web
16 site. As a matter of fact, the long one --

17 THE COURT: Do you have the TRO here?

18 MS. DUARTE: I don't.

19 THE COURT: Yeah. Well, I didn't --

20 MS. DUARTE: I have it in my office and I didn't
21 think to bring it.

22 THE COURT: Okay.

23 MS. DUARTE: I think it was spelled out, Your
24 Honor, in the PSR but for some reason, I'm just not
25 finding --

1 THE COURT: I can tell you --

2 MS. DUARTE: It is a trial exhibit. It's in the
3 record. Unfortunately, I just do not have a copy.

4 We can go get a copy, Your Honor, if the Court has
5 a question about --

6 THE COURT: Well, you can send your agent up to get
7 the copy. I'm not going to --

8 MS. DUARTE: Well --

9 THE COURT: -- Delay things further. But I had
10 understood, and maybe Mr. Reed quoted it, I'm looking for
11 what he said about the language of that TRO. But on page 7
12 of Mr. Reed's filing, beginning at line 6, it says, the TRO
13 obtained by Global Crossing only prohibited Mr. Sutcliffe
14 from disseminating information on his web site, quote, "to
15 the extent that such information was obtained from Global
16 Crossing while defendant was employed at Global Crossing."
17 And he cites the presentence report number 12 --
18 paragraph 12.

19 MS. DUARTE: Your Honor, that is correct. I have
20 just looked at paragraph 12 and I don't take issue but that
21 that was the language of the restraining order. And I didn't
22 mean to quote it otherwise just now in my argument. But to
23 the extent that that is the language, because this
24 information was published so shortly after the time that the
25 web site was put up, defendant could not con -- could not

1 have gotten it from anywhere other than his employment.

2 There's -- there's --

3 THE COURT: Yes, he could have. I mean, I don't
4 think I can be dissuaded by that kind of argument,
5 Ms. Duarte, because pretty sure that if I were the lawyer for
6 him, I would say, look, Global Crossing was beginning to show
7 signs of trouble, there were a lot of disgruntled employees,
8 Sutcliffe had become known to several by picketing in front
9 of the premises. Maybe they sent it to him. Maybe he hacked
10 onto it after he was fired. It would -- it's a temporal
11 analysis and to say it happened not long afterward so,
12 therefore, it had to have been material information that he
13 stole while he was working there makes some practical sense
14 but I don't find that it's been proven.

15 MS. DUARTE: Let me just clarify, Your Honor. I
16 say it not only to show that it had to have been information
17 that he obtained while he was working there but also to show
18 that that greatly diminishes, if not completely takes away,
19 the likelihood that someone responding to the solicitation on
20 his web site to send information could have obtained those
21 documents in their complete and current form as they were on
22 the laptops and sent it to him within -- I believe it was
23 less than a week from the inception of the web site. I'm not
24 even sure if the solicitation to send documents was even up
25 yet.

1 THE COURT: The problem I have, Miss Duarte, is
2 that I don't have specific factual precise dates in mind.
3 I'm not questioning the good faith and the accuracy in which
4 you make these representations but before me, on the material
5 that I've submitted, I don't think that I have the basis to
6 make the finding you're asking.

7 MS. DUARTE: Could I have just one moment, Your
8 Honor?

9 THE COURT: Yes.

10 MS. DUARTE: Your Honor, I was handed a copy of the
11 restraining order, which was defense Exhibit 202 at trial, by
12 the probation officer. And if I could just have just one
13 second to review it. But I believe his quote is correct,
14 Your Honor.

15 And, um, that's all I have on that, Your Honor, so
16 I'll submit that.

17 THE COURT: Okay. Anything else that you want to
18 be heard about? Any other ruling?

19 MS. DUARTE: No, Your Honor. I'll submit those on
20 the paperwork.

21 THE COURT: Okay. Mr. Sutcliffe?

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

23 THE COURT: What you now should address is your
24 response to my rulings. I'll give you a chance to be heard
25 about your take on the case and what the sentence should be a

1 little later on in the hearing.

2 MR. SUTCLIFFE: Thank you, Your Honor. May I sit?

3 THE COURT: You can sit if you want.

4 MR. SUTCLIFFE: Thank you, Your Honor. As I
5 understand what Your Honor has just ruled on, um, there's
6 been a six level increase, um, regarding the conduct under --

7 THE COURT: Count 4.

8 MR. SUTCLIFFE: Yeah, it's Count 4, the Hall count.

9 THE COURT: No, the Greenwood count.

10 MR. SUTCLIFFE: Yeah, the Greenwood. Greenwood.

11 And that's under 2A6.1(b)(2)?

12 Um, Your Honor, I would object to that.

13 THE COURT: (b)(1)

14 MR. SUTCLIFFE: (b)(1)?

15 THE COURT: Yeah.

16 MR. SUTCLIFFE: Oh, you're correct. I'm sorry,
17 Your Honor.

18 Um, Your Honor, the defense would object to that.
19 Um, the reasonable person standard, as you're well aware, is
20 a general intent, um, standard. Um, somebody who is going to
21 be a reasonable person making this finding, um, there's no
22 standard by which it can be judged. The reasonable person,
23 there's nothing so unreasonable as a reasonable person. Um,
24 the factors that -- that the Court considered, um, the coming
25 to collect, that was a -- that was in reference, Your Honor

1 I'm sure is aware, to a lawsuit. And no overt -- no overt --
2 overtones of any physical violence. Um, the arm with the
3 rifle, that's -- I would argue that's totally irrelevant.
4 That rifle was made in 1950.

5 Wife testified that rifle had been in the home for
6 many, many years. The defendant cross-examined Mr. Greenwood
7 extensively. Did she take out a restraining order? Did she
8 take out any protection? Did she change her phone number?
9 Did she prevent -- take any steps at all to prevent me from
10 coming to her home to this very day? And she said no. She
11 obviously had no fear. And it was well-grounded she had no
12 fear because I was 3,500 miles away. That's where I live. I
13 had no intentions of hopping on a plane with a 50-year-old
14 rifle and flying clear across the country. It's just not
15 reasonable nor practical. It would be very -- one of the
16 stupidest things I could have ever done. It never even
17 crossed my mind.

18 Um, as far as the sophistication of this web site
19 based on Mr. Harrill's statement, um, I asked the Court to
20 present, um, the defense with a Front Page application
21 software, as you, I'm sure, recall. That was originally
22 granted and then it was originally denied. Had I been able
23 to demonstrate with Front Page, I could have shown the Court
24 how, in today's modern technology -- I have -- I have a GED,
25 Your Honor, okay? I didn't even graduate high school. I

1 went to GED night school to get my, um, high school
2 equivalency because of my parents were having a -- a breakup
3 at the time and it was emotionally trying on me and I did not
4 finish school. So I'm by no means the smartest kid on the
5 block.

6 However, in today's technology, um, anybody with a
7 basic education and a fundamental understanding, um, who can
8 read can sit down and take these applications that come off
9 the shelf for \$20, \$40, \$100, whatever, and they're basically
10 cooky cutter. They are point, click, done. Um, there is
11 nothing sophisticated about this web site. Although I
12 appreciate the accolades everybody seems to be heaping upon
13 me about how brilliant I am, okay, but I'm not that brilliant
14 man. I'm just a guy who can read a book and go okay, click
15 and drag. Ooh, well, that was cool. That's all it was, Your
16 Honor. The style is probably a better description of what --
17 what I did, not sophistication. Um --

18 THE COURT: What do you mean by the style?

19 MR. SUTCLIFFE: Well, for instance, the maps to the
20 house. Um, I'm reading the LA Times today; you can go to
21 wwfundraise.org (sic) and you can find detailed maps of your
22 friends, your neighbors and celebrities who make political
23 contributions. These are to their houses. This is a style
24 that's been going on since the government proposed the total
25 information awareness where they find out all the information

1 about all the citizens of the country and people got really
2 upset.

3 Well, the first thing the people did on the
4 internet was -- the netizens posted a satellite photo of
5 Mr. Poindexter's home. Detailed. It's a style. You can --
6 any -- any kid on the internet knows you go -- you want to
7 find directions to your friend's house, you go to maps.com.
8 You want to bake a cake, you go to cake.com. Um --

9 THE COURT: And if you want to tell somebody you
10 know where you can find her, you E-mail her and you put her
11 on the internet --

12 MR. SUTCLIFFE: You go to maps.com.

13 THE COURT: But if the idea is to suggest that you
14 have the means and the purpose. This wasn't just an
15 anonymous victim. It certainly wasn't a friend. You can
16 keep going, Mr. Sutcliffe, but you're missing the point.

17 MR. SUTCLIFFE: I -- I -- I'd like the Court to --
18 to note that, um, as of last month, Global Crossing's owner,
19 Mr. Gary Winnick and, quote, "other executives of the
20 company," admitted civil fraud and agreed to pay a
21 \$325,000,000, um, fine. That's just one of many suits that
22 are pending and, um, that just pretty much shows that -- see,
23 the reason this web site went up was to expose -- it became
24 to expose the fraud that was being rampantly talked about
25 within the company.

1 These executives -- Mrs. Greenwood is not the only,
2 um, executive that was placed upon this web site that had a
3 map to her house, although I'm sure that she'd like to
4 disclaim that, but that's not the truth. Um, every board of
5 director, um, who was alleged in this article that just came
6 out that these other executives, quote, unquote, they all had
7 a map to their house too. She was not singled out. There
8 was no specific intent or even a general intent to single her
9 out as specific conduct, evidencing any type of threat to
10 follow through on the -- on the, quote, unquote, general
11 threats that were made to her.

12 Um, I submit to Your Honor that that map is a
13 stretch by far. The government's grasping for straws,
14 looking for a quote like they put in the thing, any -- well,
15 yeah, you'd have to -- if -- I might as well stop reading
16 that because I could find any conduct if I looked hard
17 enough. It's just not reasonable that six points should be
18 added based on a map, based on a 50-year-old gun that never
19 -- that was an antique. There is absolutely no evidence at
20 all that I intended any conduct to Mrs. Green (sic).

21 I was in that area, LA, for months before I left --
22 and I only left to go back to New Hampshire, the testimony
23 showed, was because I was out of money because I couldn't
24 find work. I had no -- no support. I had to go back to my
25 family. I had to beg them for money so I could support my

1 wife and my daughter. I'm living in a cold water flat in
2 New Hampshire. I've got a job on a third shift, driving a
3 street sweeping truck so I can feed my family. Believe me, I
4 was not scheming and planning on taking what little money I
5 had and flying back and wasting my time with these people any
6 more. I'm sorry, Your Honor, it's just not true and I object
7 to it. That's -- that's -- that's that account.

8 As to the other, the TRO, I concur with that, that
9 I never violated the TRO.

10 Um, one second, Your Honor.

11 The two level base increase for the relocation, I
12 reiterate what I just stated as my objection to that. I
13 relocated, um, solely just to support my family. I relocated
14 not to hide from law enforcement authorities. I never
15 believed I was being sought by law enforcement authorities.
16 I thought I was simply exercising my first amendment rights
17 of freedom of speech. Had I known I was being sought, um, I
18 would have turned myself in. Um, they -- it's not my problem
19 that they didn't seek me a little harder. As the testimony
20 showed, they had -- they knew -- they knew way back in
21 December where I was if they wanted to find me, Your Honor.
22 It wasn't like I was hiding. There was my driver's license,
23 utility bills in my name. So, you know, as far as -- I
24 object to that I was relocating for -- to evade law
25 enforcement authorities.

1 And sophistication was -- again I would state that
2 it's -- it's cooky cutter so I would object to the two point
3 base level increase on that.

4 Um, that's it, I guess, Your Honor.

5 THE COURT: Okay.

6 MR. SUTCLIFFE: Oh, criminal history. Excuse me,
7 Your Honor. I forgot criminal history.

8 Um, I would suggest, Your Honor, that, um, criminal
9 history should stay exactly where it is at level one and zero
10 points, as the probation officer calculated.

11 Um, the nearest thing to a criminal history that
12 can be shown by the PSR's calculation is zero. That's
13 because every time that the defendant has had any type of
14 brush with the law, um, the defendant's taken responsibility,
15 if he was responsible; has challenged it and been vindicated
16 if he was not. Um, and then the Courts, um, judicially
17 decided the punishment.

18 And as the Court can see from the record, there's
19 been no -- very little to no punishment required for the
20 actions.

21 THE COURT: I wonder if we'd have been here if
22 you'd have actually been timely and in a responsive, measured
23 way punished. The record will speak for itself and I won't
24 incorporate the various numerous convictions. One of them
25 arose out of -- it's described as assault and battery for

1 loan collection larceny from a person, assault and battery
2 with a dangerous weapon. It's a long time ago. It was 1986
3 that the judgment was entered and you were given an 18 month
4 suspended sentence and probation for about 2 years. All
5 three counts resulted in convictions. So that would only
6 speculate what, if any, lesson may have been learned but --

7 MR. SUTCLIFFE: Well, I'll enlighten the Court then
8 since the Court seems to have concerns about that. That
9 involved a case, um -- and the answer to your question was,
10 yes, we would still be here, unfortunately. I would like to
11 think that I would have a different, um, set of circumstances
12 that -- I can't speculate with Your Honor. I'm sorry. You
13 want me to --

14 THE COURT: You don't have to.

15 MR. SUTCLIFFE: Well, Your Honor --

16 THE COURT: I didn't ask for a response.

17 MR. SUTCLIFFE: You're saying that maybe I wouldn't
18 be here if somebody had been more forceful in punishing me
19 15, 16, 17 years ago. Well, if you want to take it to
20 Draconian measures, well, you could have just locked him up
21 back then for a long, long time. Maybe he'd have been --
22 maybe he'd have been raped by somebody in his cell and maybe
23 his life would have gone a different way. He'd be someone's
24 bitch somewhere else, you know. I don't want to play that
25 game, Your Honor. It offends me that you even would go down

1 that road.

2 I see the -- the prosecutor's objecting, getting
3 ready to object.

4 THE COURT: She's standing. I'll call on you
5 later.

6 MR. SUTCLIFFE: Your Honor, you're insulting the
7 judge who -- who adjudicated that case and you're insulting
8 me by that ruling. The judge was a very competent judge, um,
9 he sorted through all the facts of the case. There's two
10 sides to every coin, as Your Honor's, I'm sure, well aware.

11 The recommendation was probation. Um, basically,
12 walk out the door. That's what I did. And I never looked
13 back. And I kept my nose clean. Um, for -- to have that
14 thrown in my face now offends me. Um, the -- the gentleman
15 who that case involved, was involved with me, is a whole
16 'nother story too. I'm not going to get into it, Your Honor,
17 but I'm going to object.

18 THE COURT: Okay. You've made your objection to my
19 finding on criminal history and it's very clear that you
20 disagree.

21 What did you want to say?

22 MS. DUARTE: Your Honor, I'm sorry. I have one
23 additional point -- I was thinking it was close to my turn --
24 that I would be remiss if I didn't bring up.

25 In regards to my argument about the TRO, Special

1 Agent Cugno had reminded me while we were sitting here that
2 there was testimony from Miss Troxell at trial that the
3 payment computer, which she oversaw, was a stand-alone
4 computer which was kept in a locked room.

5 She also testified that she had recognized some of
6 the material on the web site from that computer. And she
7 testified that Mr. Sutcliffe had come and picked up the
8 computer and brought it back. And that computer, because it
9 was a stand-alone in a locked room, would not have been
10 connected to the internet. Therefore, it would not have
11 been -- the Court -- the Court I believe used the term
12 hacking, and it's my understanding that that computer would
13 not have been able to have been hacked in the manner that I
14 believe the Court was -- was commenting on and I wanted to
15 bring that to the Court's attention.

16 THE COURT: Okay. Thank you.

17 MR. SUTCLIFFE: May I respond to the
18 prosecutor's --

19 THE COURT: You really don't have to because I'm
20 not going to change my finding on that.

21 MR. SUTCLIFFE: Okay. Thank you, Your Honor.

22 THE COURT: All right. Here's the way I think the
23 calculations shake out.

24 As to Count 4, which will drive the applicable
25 sentence, along with whatever I conclude on Counts 5 through

1 9, the adjusted offense level, before we take into account
2 factors arising out of multiple counts and grouping, is 18,
3 consisting of a base offense level of 12 and a 6 level
4 enhancement for conduct evidence in the intent to carry out
5 the threat.

6 For Counts 1 and 2, it's 14. Those are the Hall
7 counts. Base offense level 12, enhancement of 2 for multiple
8 threats to the single victim.

9 For Counts 5 through 9, it's 8, consisting of a
10 base offense level of 6, and an enhancement of 2, for either
11 or both but only a single increase of 2, under 2B101(b)(8)
12 for the reasons I said before.

13 So you have an adjusted offense level of 18 for
14 Counts 1, 2 and 4; and 8 for Counts 5 through 9.

15 If you go to the applicable principles of grouping
16 under 3D1.2 and 3D1.4, you wind up with two units and a two
17 level increase in the bottom line offense level. So that
18 would mean a total offense level of 20; a criminal history
19 category of 2 for the reasons I already noted; and although
20 it was not my intention to come out with any particular
21 Guideline Range, it turns out that under these changes and
22 rulings, the Guideline Range works out to be the same that
23 the probation office originally concluded under an entirely
24 different set of calculations, namely 37 months at the low
25 end and 46 months at the high end.

1 Before we go any further, do you want to be heard
2 about those calculations?

3 MS. DUARTE: Briefly, Your Honor, and perhaps I
4 misunderstood.

5 The Court's calculation for Count 4 was a total of
6 18, I believe the Court said?

7 THE COURT: Yeah.

8 MS. DUARTE: The probation officer in paragraph 50
9 recommended 20 and I might have missed it --

10 THE COURT: Yeah, there were multiple counts.
11 Yeah, I forgot to include that.

12 MS. DUARTE: Okay.

13 THE COURT: But that comes in -- let me see about
14 that.

15 The multiple count, Mr. Yung?

16 MR. YUNG: Yes, Your Honor.

17 THE COURT: The 2 level that goes beyond 18 results
18 from the grouping under 3D1, doesn't it?

19 MR. YUNG: Yes, Your Honor. I believe the --
20 Miss Duarte is referring to a plus-2 adjustment for multiple
21 threats against Miss Greenwood; is that -- or the multiple
22 threats under Count 4; is that what you're referring to?

23 MS. DUARTE: That's correct, paragraph 46.

24 THE COURT: Yeah. And I meant to make a ruling on
25 that. You need to tell me how many threats there were

1 against Greenwood and what the evidence is to show that there
2 were three or more.

3 MS. DUARTE: Well, first --

4 THE COURT: I know about the one that was charged
5 in Count 4.

6 MS. DUARTE: I -- I think the confusion is, Your
7 Honor, is that -- and it's probably mine -- I didn't think
8 that for this enhancement, and it doesn't look from paragraph
9 46 like it does, I didn't think it had to be against the
10 same --

11 THE COURT: It does. That's where the -- that's to
12 what I was eluding when I said there was an error pointed out
13 to me by the supervising probation officer, that's not quite
14 his title, in the calculation.

15 MS. DUARTE: If I could just look for a moment at
16 what I was looking at then on the applicable provision.

17 THE COURT: You're looking at 2A6.1(b?)

18 MS. DUARTE: 2A6.1. I am -- I will be in just a
19 minute, Your Honor.

20 If the offense involved more than two threats and
21 it was not --

22 THE COURT: It's the offense -- the -- Greenwood is
23 grouped differently than Hall because this is the kind of
24 situation we have separate individual victims.

25 MS. DUARTE: Okay.

1 THE COURT: So the offense, the way I now
2 understand it and the way that term is used in 2A6.1(b),
3 Subsection 2, means the offense involving Greenwood, not all
4 of the offenses of a comparable type which would have
5 included those involving Hall or the threats to Labaton and
6 Block.

7 MS. DUARTE: I understand, Your Honor, that it
8 would not include, because that would be double counting,
9 multiple threats involving Hall for which there were and for
10 which the adjustment was already made.

11 However, since there were excess threats not
12 counted in the Hall computation, and it does not say to the
13 same victim, I was under the impression --

14 THE COURT: But if you added two for Hall, you
15 would come out with a lower offense level because you don't
16 have the six applicable to Hall arising out of evidence --
17 conduct evidencing a specific intent to carry out the threat.

18 MS. DUARTE: You didn't find the six as to Hall,
19 Your Honor. You found it as to Greenwood.

20 THE COURT: I know it. And now you're asking me to
21 take into account Hall there with three or more threats.
22 You're asking me to --

23 MS. DUARTE: No, two or more, Your Honor.

24 THE COURT: Even two or more. If you could
25 establish in the record that there were 2 or more as to

1 Greenwood, then the bottom line total offense level for the
2 875 counts could be increased by an additional 2 levels the
3 way the probation officer originally suggested. But I'm
4 looking for the evidence that would support that as to
5 Greenwood. Because if you look at the language of 2A6.1,
6 although it doesn't go through this analysis quite as
7 painstakingly as I've just tried to, it refers to the same
8 victim in determining the application of Subsection (b)(1),
9 (b)(2) and (b)(3). You're talking about the same victim.
10 You're talking about Greenwood. She has the six level --
11 it's as to Greenwood that the six level enhancement for the
12 conduct evidencing an actual threat and actual intent to
13 carry out the threat applies.

14 MS. DUARTE: I understand. I now see that the
15 Court is looking at the commentary of the application now.

16 THE COURT: Yeah. That's exactly what I'm looking
17 at.

18 MS. DUARTE: And I thought I had looked at it but
19 it does appear to indicate that it's -- by saying the victim,
20 it looks like it is the victim. I didn't realize that.

21 Could I have just a moment?

22 THE COURT: Yes.

23 (Discussion had off the record.)

24 MS. DUARTE: Um, Your Honor, after conferring with
25 the FBI agent, the dedicated comment that is in the record

1 that came out at trial and was displayed at trial for the web
2 page that was dedicated to Ms. Greenwood is also a threat.
3 Other than that, I can't think of anything right now that's
4 in the record.

5 THE COURT: Yeah, but it has to involve more than
6 two. Just two isn't enough under (b)(1) -- or I mean (b)(2).

7 MS. DUARTE: So you're counting the dedicated as
8 part of the whole and coming to collect from you personally
9 and --

10 THE COURT: How many different communications did
11 this defendant make as to Greenwood that you can point me to
12 in the record? You need to have three to get that additional
13 two levels as to Greenwood.

14 MS. DUARTE: Understood. Within Exhibit 20, which
15 was the web page and subsequent pages exhibited at trial, he
16 made a number of separate and distinct communications to her.
17 We charged a number of those together in the indictment as a
18 single threatening communication. I don't recall offhand
19 whether the dedicated was in there. But if it was, then
20 certainly the I am coming to collect from you personally, I
21 don't believe, was charged.

22 THE COURT: Okay. Let me tell you what. After the
23 trial was over, I kept with me for purposes of showing up my
24 very vulnerable memory a printout of the document you used on
25 your closing statement. It's this item that summarized the

1 evidence. And in the evidence of threats concerning Count 4,
2 you spelled out Exhibit 231, that's where I think dedicated
3 refers to, this is all far from over, the picture of the
4 victim and her daughter, I'm coming to collect the map, the
5 music.

6 Now, do you have that document before you
7 because --

8 MS. DUARTE: That Exhibit 231, Your Honor, is
9 probably -- I do not have that document that you're looking
10 at. I have some -- those are the notes from my closing
11 argument. I do have a memory of it. Exhibit 231 is a
12 reference to a defense exhibit which I probably discussed to
13 corroborate my argument. However, what you just described,
14 Your Honor, I probably would have referenced as Exhibit 20
15 which was actually the web page -- series of web pages
16 containing the threat charged in Count 4. But every single
17 threatening line in there that I displayed at trial and that
18 I probably argued as -- as connection and -- excuse me -- as,
19 um, surrounding evidence of the intent to threaten -- because
20 remember, Your Honor, I didn't just have to prove the threat
21 that I charged in Count 4 was articulated. I had to prove
22 that surrounding circumstances indicated --

23 THE COURT: Yes, I do remember.

24 MS. DUARTE: And so I probably --

25 THE COURT: And you proved it very, very clearly

1 and beyond a reasonable doubt.

2 MS. DUARTE: Thank you, Your Honor. But I
3 probably, in doing that, I'm certain that I referenced
4 phrases and things that Mr. Sutcliffe communicated in that
5 series of web pages that were not charged.

6 THE COURT: Okay. Do you have Exhibit 64 here?

7 MS. DUARTE: I -- I do not, Your Honor.

8 THE COURT: Do you have exhibit --

9 MS. DUARTE: I can tell you what Exhibit 64 is.

10 THE COURT: Is it a document that says this has now
11 become very personal?

12 MS. DUARTE: Correct.

13 THE COURT: Was that sent to Greenwood?

14 MS. DUARTE: That was on the web site. Whether or
15 not it was actually physically sent, and she did --

16 THE COURT: Well, okay.

17 MS. DUARTE: Yeah.

18 THE COURT: Well, what about Exhibit 19, I'm coming
19 to collect from you personally?

20 MS. DUARTE: Exhibit 19 and 20 were the same, Your
21 Honor. Those were seen by Greenwood and identified by her at
22 trial. And again, those were a series of web pages that
23 Count 4 came out of. However, they did contain language that
24 wasn't specifically charged in Count 4.

25 THE COURT: So?

1 MS. DUARTE: And I --

2 THE COURT: Even assuming that I have the basis to
3 find that 19 and 64 were separate communications, you need
4 one more as to Greenwood.

5 MS. DUARTE: Because it's more than two?

6 THE COURT: Yes.

7 MS. DUARTE: Two or more. If I could just have one
8 moment.

9 Your Honor, I can't think offhand of anything other
10 than is in the trial exhibits. And I apologize. I -- I
11 didn't know that this was an issue. I --

12 THE COURT: Well, look, I have to know --

13 MS. DUARTE: It was an oversight on my part. It
14 was my fault.

15 THE COURT: Well, if it's an oversight, it's a very
16 understandable one because these Guidelines are incredibly
17 difficult to apply. And were it not for the assistance I
18 sometimes get from the probation office, I would undoubtedly
19 make lots of mistakes.

20 MS. DUARTE: Well, paragraph 46 --

21 THE COURT: And lawyers frequently do. So don't
22 lash out at yourself.

23 MS. DUARTE: Paragraph 46 did seem to indicate that
24 it could be different than I briefed it and I -- I didn't --

25 THE COURT: Yeah, but I think paragraph 46 is

1 wrong.

2 MS. DUARTE: I think that that's correct, Your
3 Honor. And I don't have any --

4 THE COURT: So I have to tell you that I'm going to
5 stick to the calculations and that leaves me with a Guideline
6 Range of 37 to 46.

7 Yes, Mr. Sutcliffe?

8 MR. SUTCLIFFE: Thank you, Your Honor. Your Honor,
9 before you conclude, could you just, um -- I was trying to
10 write as fast as I could to keep up with you earlier. Could
11 you just kind of walk me real quickly through the grouping
12 analysis that you came to? You said --

13 THE COURT: Counts 1, 2 and 4 are grouped. And of
14 those counts, the one that drives the analysis is Count 4.
15 And the adjusted offense level for that is 18, consisting of
16 base offense level 12 and 6 level enhancement for the conduct
17 evidencing an intent to carry out the threat.

18 MR. SUTCLIFFE: Right.

19 THE COURT: All of Counts 5 through 9 are grouped.
20 They have an adjusted offense level of 8.

21 If you apply the very unusual grouping requirements
22 of Section 3D1, you increase the higher level of those two
23 different sets of group, the 18, by 2 when you take into
24 account the total number of units that --

25 MR. SUTCLIFFE: Are you sure that's not one, Your

1 Honor?

2 THE COURT: I am. It was one in the old -- it was
3 one the way the presentence report read but the presentence
4 report was based on the wrong calculations.

5 MR. SUTCLIFFE: Ah. I'll object to it.

6 THE COURT: Okay.

7 MR. SUTCLIFFE: Thank you, Your Honor.

8 THE COURT: All right. Now let's -- it's very late
9 in the afternoon and we've been going a long time. I'm at
10 the point now where I've made my rulings and made my findings
11 and so it's up to each side to address where they think I
12 should come out on the Guidelines, on the sentence 'cause I'm
13 not going to make any other changes in the findings.

14 You go first, please.

15 MS. DUARTE: Government's asking for a sentence at
16 the top of the applicable Guideline Range which, given the
17 Court's rulings, I believe would be 46 months.

18 THE COURT: All right.

19 MS. DUARTE: And I'll submit it on my papers.

20 THE COURT: Mr. Sutcliffe?

21 MR. SUTCLIFFE: Thank you, Your Honor.

22 THE COURT: You might as well take this opportunity
23 now to exercise your right, not only in addressing where in
24 the Guideline Range but anything else you'd like to be heard
25 about.

1 MR. SUTCLIFFE: Thank you, Your Honor.

2 THE COURT: And by the way, before you do that, do
3 you want Mr. Reed to say anything?

4 MR. SUTCLIFFE: No, I don't think so.

5 THE COURT: Okay.

6 MR. SUTCLIFFE: Um, may I sit down, Your Honor?

7 THE COURT: Yeah.

8 MR. SUTCLIFFE: Thank you, Your Honor. Needless to
9 say, the defense is asking for the low end, um, of the
10 raised-up levels that has been applied to him. Um, I would
11 like to -- is this my allocution, Your Honor?

12 THE COURT: Yes, it is, exactly.

13 MR. SUTCLIFFE: Okay. Thank you, Your Honor.
14 Yeah, I would like to just put some notes that I've jotted
15 down onto the record or on sentence.

16 Um, since it is the ruling of this Court that I am
17 to serve a further sentence than the two years, um, plus two
18 years that I've been incarcerated, um, I would respectfully
19 request that the Court stay my sentence and release the
20 defendant on bail pursuant to the recent decision of
21 U.S. versus Raymond Twine which was decided September 19th,
22 2003 in the Ninth Circuit, um, while the defendant appeals,
23 um, under 18 USC 3742 and other constitutional first
24 amendment and due process and sixth amendment grounds.

25 Further, um, I would like to respectfully request

1 Your Honor, um, to request the Bureau of Prisons, if I am
2 denied bail, to house me at the closest facility to this
3 courthouse while I file my appeals to minimize any future
4 loss of discovery and any transfers by the BOP, um, and to
5 provide closer access to the district court's jurisdiction
6 while I appeal.

7 Um, while the Court has no jurisdiction to select
8 the place or the sentence I will be served, since the Court
9 has decided that, um, two years of punishment has not served
10 the ends of justice, the defendant is aware that the Bureau
11 of Prisons will generally honor the Court's recommendation
12 unless completely inappropriate.

13 I would also respectfully request the honorable
14 court -- excuse me, the honorable clerk of this Court assist
15 the defendant in preparation of the Court's record and all
16 transcripts necessary for the appeal.

17 And I would also like to take this time to thank
18 the clerk of the court for his invaluable patience,
19 assistance and understanding that he has provided me over the
20 last six months while I've been proceeding and deemed pro se.
21 Thank you, sir. I appreciate your help.

22 THE CLERK: You're welcome.

23 MR. SUTCLIFFE: And the Court's indulgence.

24 I assure the Court also that if he does grant bail
25 while I make my appeal, that it is not -- I assure the Court

1 I'm not likely to flee. Um, I know I possess a danger to the
2 community. Um, and if I do file and when I do file the
3 appeal, it will not be for purposes of delay. Um, it will be
4 only to raise a substantial question of law and fact -- or
5 fact or to argue for a reduced sentence which will total less
6 than the amount served or equal to, pursuant to 18 USC 3143.

7 Www.evilgx.com, all lower case, um -- well, I think
8 I'm going to stop and I'm going to back up. I'm going to
9 touch upon killercop.com before we go any further.

10 Www.killercop.com, that's K-I-L-L-E-R-C-O-P, all
11 lower case, was a web site that I created, um, a fantasy
12 fiction akin to a book to detail certain factual events, um.
13 It was heavily censored by the FBI, the LAPD, the Sheriff's
14 Department of Sacramento and numerous other law enforcement
15 agencies. Um, it was clearly disclaimed within that web site
16 what the intent and the purpose of that web site was. I was
17 never charged with a crime. But I've sat back in amazement
18 since my arrest and I've watched how Agent Cugno has taken
19 the stand in New Hampshire and grossly distorted the facts
20 related to that web cite.

21 Um, I've watched as the police officers as I was
22 arrested choked me while Agent Cugno stood by and smiled.
23 I've watched as killercop.com has been touted as fact, um, of
24 criminal activity.

25 I've heard numerous lies disseminated about me, how

1 I went into a courtroom in LA which -- to arrest an officer
2 and the judge there had to have me forcibly removed. This is
3 just legal fiction being spun by the agents and the police
4 officers involved in this case to cover up what crimes were
5 detailed within that web site. Um, the judge who they're
6 referring to is Judge Larry Fiddler who I referred to in the
7 web site as fiddler on the roof. Um, I don't know who the
8 officers were who choked me. I've been trying to ascertain
9 that for quite awhile.

10 Um, but the -- the U. S. Attorney Debra Yang was
11 clearly identified within this web site as violating the
12 Privacy Act of 1980, um, to cover up crimes that was being
13 committed by the city attorney at the time. She was
14 identified by name. Her -- her criminal act was identified
15 within the web site as well as certain other parties within
16 law enforcement agencies.

17 There's been a political -- my belief is there has
18 been a political effort to silence that web site and myself,
19 and they've gotten very creative and, um, hence here I am, at
20 least in this jurisdiction. I raised those issues up and I
21 raise them up again now.

22 The evidence has clearly shown that police
23 officers, FBI agents and other law enforcement authorities
24 sent me directly numerous E-mails which were posted within
25 that web site that clearly, under the standard to which I've

1 been tried today, is the same standard. We're going to kill
2 you, we're going to smash your computer, we're going to bust
3 your face, we're going to kill your family. Nobody seemed to
4 care. Mrs. Debra Yang didn't seem to care. FBI Agent Cugno
5 didn't seem to care.

6 Um, I've heard the -- I've heard the prosecutor
7 over there falsely represent to this Court that there's only
8 a little tiny piece of script that the FBI agent knew about
9 over at the headquarters. That little tiny piece of code
10 script turned into two reports but then there seems to be no
11 other reports. I know personally for a fact that I forwarded
12 numerous E-mails to the FBI agents in that building, saying,
13 hey, you might -- you guys might want to check out this
14 police officer, the one who said, hey, fucking nigger, we're
15 gonna -- we're gonna kill you, shoot you in the head. I
16 thought if he was a police officer, he needed to be examined
17 by the FBI. But they seem to have no record of that at all.
18 I believe there's been a gross misrepresentation to this
19 Court and the hood has been pulled over its eyes as to the
20 truth.

21 I was never charged with any crime related to that
22 web site. However, I've had it thrown in my face from day
23 one. So if some people can't seem to tell the difference
24 between fact and fiction, I can't -- I can't do anything
25 about that. I can only talk about it. But some people don't

1 seem to want me to talk very much in this country, although I
2 can understand that with an attorney general of this
3 administration who seems to treat the constitution and the
4 first amendment like it was written on like Charmin toilet
5 paper.

6 Evilgx.com was a work of fact and fiction as well,
7 as disclaimed on the web site. The stories and the documents
8 were used as products of my imagination or were used
9 fictitiously and were not to have been construed as real
10 unless specifically identified as such as disclaimed. The
11 names of some persons and the situation and circumstantial
12 events and elements of others were used and intended to be
13 only for similitude.

14 As to Counts 5 through 9, I have found no case law
15 to date nor have I heard the government cite any case which
16 makes illegal the publishing of Social Security numbers.
17 However, had anyone taken the stand and shown that they had
18 been a victim of any crime related to those counts, I would
19 not hesitate to accept responsibility. But there was none.
20 Nobody took the stand and pointed a finger at me and said
21 that they suffered any crime or were a victim of having any
22 numbers published on this web cite.

23 I believe that I was exercising lawfully my first
24 amendment rights in the publication of the web site, as with
25 all of my web sites I create. However, given the vague and

1 broad -- overbroad nature of the law as applied to Counts 1
2 through 4, specifically 18 USC 875, which was created in
3 1933, prior to -- way prior to the internet, specifically to
4 deal with the kidnapping of the Lindbergh baby, in hindsight,
5 after spending two years in prison and suffering through
6 countless hours of researching thousands of pages of
7 discovery and researching case after case after case law, I
8 can clearly see now how someone could have construed my words
9 to be a threat.

10 And in an arbitrary manner, since the record
11 clearly reflects that even after I identified 875(c) as a
12 specific intent crime, and I notified the government that
13 875(c) was a specific intent crime, even though my public
14 pretenders had told me it was a general intent crime for
15 almost a year, um, the government then agreed with me,
16 amended my indictment to reflect the specific intent, yet
17 they failed to correct the jury instructions and instead
18 tried me under a general intent jury instruction. This has
19 just reinforced in my mind that 875(c) is unconstitutional
20 because it is so vague and so overbroad that they don't even
21 know how to apply it themselves.

22 Further, the fact that, as was demonstrated during
23 the trial, Joe Schmo at yahoo.com clearly committed the same
24 conduct, um, as the police officers had done to me in
25 killercop.com since his transmission arrived directly in my

1 E-mail box. I did not have to go to a web site or do
2 anything to locate his threat. It showed up like a piece of
3 mail which my arresting officer clearly admitted during the
4 trial was a threat directed to me. This again served only to
5 reinforce my belief that I could not plead guilty to 875(c)
6 because this law is too vague under the first amendment
7 standard that it not be implied -- that the law not be
8 applied with uneven hand. That's not -- that's not American.

9 Um, 875(c) allows this. Especially, and I
10 emphasize especially, if somebody has an agenda. This web
11 site was first and foremost to expose fraud which I was
12 informed was being committed within the company, Global
13 Crossing, by the person or persons providing much of the
14 information and documentation I received. Or was posted on
15 the web site within by myself or others.

16 This belief has been vindicated by the recent last
17 month decision by the owner, Gary Winnick, and other, quote,
18 "former executives of the company," end quote, to plead
19 guilty recently to charges of security fraud and pay a fine
20 of \$324,000,000. This is but a drop in the bucket of the
21 \$40,000,000 that was lost from this company. And the
22 millions -- excuse me -- the thousands of lives that were
23 devastated. But not one of those executives has done a day
24 in prison like I have and has been taken apart from their
25 family and their sons and their daughters like I have.

1 Looking in hindsight, under the standard of
2 vagueness and other constitutional deficiencies that are
3 inherent in 875(c), I would have clearly modified the words I
4 used and the way I used them to avoid the confusion as to my
5 intent. And I accept responsibility for being ignorant of
6 this law that was made in 1933. I understand that ignorance
7 of the law is no excuse. But given the width of 875(c), had
8 I known how broadly the prosecutors can paint with it, I
9 would clearly have been much more circumspect and careful in
10 explaining my words and especially in the choice of my words.
11 I accept responsibility fully for my failure to do as such.

12 And, given the chance, I want this Court to know if
13 I could go back in time, I would make the choice and just
14 walk away. The web site would have never been created.
15 Justice was served by the exposure of the company's fraud as
16 they've recently admitted and would have been without my web
17 site or my assistance. The loss of the liberty, the
18 emotional impact on my family and the impact the time in
19 prison has had on my mind and the social stigma of being a
20 convicted felon now has taken and will continue to take a
21 toll on my life and the ways in which I conduct my future
22 paths that I take.

23 I want to assure this Court and the government that
24 I have learned from my mistakes and I have no intention of
25 repeating my mistakes. They say that those who do not learn

1 from the past are doomed to repeat it. I assure Your Honor
2 and the United States that I'm not a slow learner and I have
3 no intention of repeating the past in the future. Period.

4 I would ask the Court, um, to consider, um, my
5 acceptance of responsibility, um, and I would cite U.S.
6 versus LaPierre, that's L-A-P-I-E-R-R-E, um, the cite is
7 998 F.2d 1460, it's a Ninth Circuit 1993 case, um, and
8 consider a two point downward departure.

9 Um, and I wish to make a statement to Mrs. Hall
10 that, Mrs. Hall, if I caused you any emotional, um, or mental
11 distress, I am deeply sorry. I cried when you cried. I
12 don't like to see a woman cry. I don't like to see anybody
13 cry. I assure you, you have nothing to fear from me, ma'am.
14 Um, this has been a profound -- profound learning experience
15 and a reality check for me, um, in the way I express myself.
16 And if the way I express myself caused you, um, any pain, I
17 apologize. And I want you to know that I'm deeply sorry. It
18 was never my intent to -- to -- to cause you any pain at all.

19 And -- and as far as the future, ma'am, you'll
20 never see me again. You'll never hear from me again. I have
21 no intentions of -- hopefully, we will never see each other
22 after you walk out of this courtroom, God willing. I'm sorry
23 you felt the way that you feel but I want to assure you that
24 I have no intention of ever contacting you, looking you up,
25 um, and I hope you believe me. And I apologize. I'm sorry.

1 Um, as to anybody else, um, whose numbers were
2 published on that web site, Social Security numbers, all I
3 can say is, um, stop using those numbers. They're out there.
4 They're floating out there. Um, I was the messenger that
5 it's dangerous to use those numbers but I did not ever put
6 those numbers up there with the intent, Your Honor, to -- to
7 -- for anybody to use these is criminal. I did not know if
8 these numbers were real or not. And I clearly disclosed that
9 on that web site.

10 In fact, the trial, if you'll remember, showed that
11 it was a series of 10,000 or 8,000 numbers that were posted
12 at one specific posting and those were incorrect. All those
13 numbers were not actually real, while another posting of 1900
14 actually were real. It's catch-as-catch-can. And I think
15 that -- that -- that example there clearly showed that had I
16 had a specific intent to do damage, there wouldn't have been
17 inaccurate numbers.

18 THE COURT: Excuse me one second. Steve.

19 (Discussion had off the record.)

20 THE COURT: Go ahead.

21 MR. SUTCLIFFE: Thank you, Your Honor. Um, the
22 problem with, um, I believe that we find ourselves here,
23 and it's not to -- to -- to negate what I've said as far
24 as my acceptance of responsibility, um, but it's just to
25 reinforce it for Your Honor's own edification and anybody

1 who reads this case. Um, the basic problem with -- with
2 -- with -- with this law, as far as it goes to first
3 amendment grounds, is that specific intent generally
4 requires an intent to do some future act or achieve some
5 consequence beyond the conduct that constitutes the actus
6 reus element of a crime.

7 This is the requirement -- excuse me -- this
8 requirement is lacking or all that is required is some
9 showing of an attempt to do the actus reus usually
10 committed, and that is a general intent requirement. The
11 problem with applying this to a true, quote, unquote,
12 threat is that the elements of a true threat are then
13 themselves debated. Additionally, there is confusion over
14 whether specific intent is meant by a mere intent to
15 threaten or whether specific intent instead requires an
16 intent to actually carry out the threat.

17 Because of this confusion, the language of the
18 general and specific intent often used in the true threat
19 cases I believe should be evaluated with extreme caution.
20 Um, this -- this case is a classic example, um, of the
21 government applying a standard of general intent,
22 admitting a year later, well, it was specific intent but
23 then the trial going forward and the original general
24 intent jury instructions being applied to a specific
25 intent case. And it is only for that reason, Your Honor,

1 that I, um, did not take a plea in this case, um, and save
2 any emotional pain to any of the alleged victims because I
3 can't. The first amendment needs breathing room.

4 I cannot -- as much as I wish I could say guilty,
5 okay, and put this behind me a long time ago, I think if
6 the Court looks at my criminal history, which it spoke
7 about before, it will see a clear pattern that whenever
8 I'm accused of something, I admit my responsibility. I
9 take acceptance of responsibility for my actions. I don't
10 deny, I don't hide, I don't lie about it. Um, that's part
11 of who I am. That's who my -- that's how my father raised
12 me.

13 Um, I could not plead guilty to this case for the
14 very, very same reasons that I'm appealing it because the
15 first amendment gives me the right to say what I've said.
16 I understand that you can't yell fire in a -- in a -- in a
17 movie theater. However, I'm sure the Court also
18 recognizes if I own the movie theater and I tell
19 everybody, hey, before you come in my movie theater, I'm
20 going to yell fire so if you don't want to hear me yell
21 fire, don't come in, then that's perfectly lawful and
22 that's well within my right.

23 Um, this law is unconstitutional as far as I'm
24 concerned and, um, if I have to do the max, if that's the
25 Court's judgment, to protect the first amendment, I'm

1 willing to do that. That's how important the first
2 amendment is to me. It's -- it's unfortunately being
3 eroded in this country. Um, so I hope the Court will take
4 that into consideration as the reason why I did not plead
5 guilty, um, but I also accept my responsibility for being
6 ignorant of the law but the law is partially at fault.

7 And thank you, Your Honor. That's all I want to
8 say.

9 THE COURT: Okay. Now, I -- to the extent that you
10 were making a formal motion, and I think you were, for
11 bail pending appeal and for immediate release, I deny that
12 motion. You don't qualify for that.

13 To the extent you were -- not to the extent because
14 you clearly were asking for change in the offense level
15 calculations because of decrease attributable to
16 acceptance of responsibility, you don't qualify for that
17 either and I deny that motion.

18 I will recommend in the judgment and commitment
19 order that you be confined in a penal institution in Southern
20 California and we'll see whether the Bureau of Prisons honors
21 that. But I will leave -- not that I think it has much
22 difference but I'll try -- add the verb -- adverb "strongly"
23 to it.

24 Now, please turn to the recommendation letter
25 because before I recite the sentence, I want to point out

1 a couple of things to both sides. Do you have it before
2 you, Mr. Sutcliffe?

3 MR. SUTCLIFFE: What is it?

4 THE COURT: The recommendation letter.

5 MR. SUTCLIFFE: Recommendation letter? From?

6 THE COURT: It's from the probation office. It has
7 the date March 22nd on it.

8 MR. SUTCLIFFE: The amended one?

9 THE COURT: No.

10 MR. SUTCLIFFE: Oh.

11 THE COURT: Would you show him what it looks like,
12 Mr. Reed?

13 MR. REED: I don't think I brought it with me, Your
14 Honor.

15 THE COURT: All right. Now, while the clerk is
16 making a copy and given the very late hour, I'll make a
17 couple of statements.

18 Mr. Sutcliffe, in his declaration, provided an
19 adequate basis for me to find that he lacks the capacity
20 to pay a fine. I am not going to require a fine. I think
21 it would be an unnecessary and unfounded thing.

22 He has clearly continued his attitude and behavior
23 by refusing to cooperate with the probation office but he
24 submitted this declaration. And all the facts and all the
25 circumstances permit me to make the finding, require me to

1 make the finding that he can't pay the fine. And I don't
2 want to set him up for further altercations with law
3 enforcement officers when he does get out.

4 MR. REED: Your Honor, I just found the
5 recommendation letter.

6 THE COURT: Okay. Now, I don't see any basis
7 whatsoever to include paragraphs 3 and 4 of the
8 recommendation. Mr. Sutcliffe doesn't have a substance
9 abuse problem, doesn't need to be subjected to drug and
10 alcohol testing, doesn't need to be treated for a narcotic
11 addiction or drug dependency. I'm not going to
12 incorporate those into the judgment and commitment order.

13 As to the government's request for an employer
14 disclosure provision, I don't know exactly what you're
15 talking about so what do you mean?

16 MS. DUARTE: I was talking about that would require
17 him, upon being hired by an employer, to disclose his
18 criminal conviction. I've actually seen them in other
19 sentencings so that's why I asked for it.

20 THE COURT: And what's the reason for that?

21 MS. DUARTE: Such that the employer can make the
22 necessary adjustments as needed in order to protect
23 itself.

24 THE COURT: Well, the other provisions in this
25 recommendation which do address the concerns that Tracy

1 Hall expressed about computer access and the like I think
2 provide sufficient protection for prospective employers.
3 If prospective employers have other concerns relating to
4 felony or other criminal backgrounds, they can ask about
5 those in the ordinary course, and typically they do, and
6 he will have the obligation to respond honestly. So I'm
7 not going to grant that additional protection. I don't
8 think it's warranted under the circumstances.

9 I am going to change and clarify and make precise
10 paragraph 13 to incorporate the names of particular people
11 including Miss Hall.

12 I'm going to impose the sentence at the high end.
13 After I finish reciting it, which is a technical
14 requirement, I will explain why. Here is the sentence.
15 It's based upon a Guideline Sentencing Range of 37 to 46
16 months. That's based upon an offense level of 20 and a
17 criminal history category of 2.

18 It is ordered that the defendant shall pay the
19 United States a special assessment of \$800 which is due
20 immediately. I find that the defendant lacks adequate
21 resources to pay a fine and so I waive the requirement
22 that he do so.

23 The defendant shall comply with General Order
24 Number 0105. Pursuant to the Sentencing Reform Act of
25 1984, it's the judgment of the Court that the defendant,

1 Steven William Sutcliffe, is hereby committed on Counts 1,
2 2 and 4 through 9 of the 9-count first superseding
3 indictment to the custody of the Bureau of Prisons to be
4 imprisoned for a term of 46 months. The term consists of
5 46 months on each of Counts 1, 2 and 4 and 36 months on
6 each of Counts 5 through 9 of the first superseding
7 indictment, all to be served concurrently.

8 Upon release from imprisonment, he shall be placed
9 on supervised release for a term of three years. That
10 term consists of three years on each of Counts 1, 2 and 4,
11 and one year on each of Counts 5 through 9, all those
12 terms to run concurrently under the following terms and
13 conditions.

14 First, he shall comply with the rules and
15 regulations of the U.S. Probation Office and General
16 Order 318.

17 Next, during the period of community supervision,
18 he shall pay the special assessment in accordance with
19 this judgment's orders pertaining to that payment.

20 Next, he shall participate in mental health
21 treatment which may include evaluation and counseling
22 until discharged from the treatment by the treatment
23 provider with the approval of the probation officer.

24 Next, he shall grant a limited waiver of his right
25 of confidentiality and any records of mental health

1 treatment imposed as a consequence of this judgment to
2 allow the treatment provider to provide information to the
3 probation officer and sign all necessary release forms to
4 enable the probation officer to monitor the defendant's
5 progress.

6 Next, the probation officer shall disclose the
7 presentence report, enter any previous mental health
8 evaluations or reports to the treatment provider. The
9 treatment provider may provide information, excluding the
10 presentence report, to state or local social services
11 agencies, such as the State of California Department of
12 Social Services, for the purpose of the defendant's
13 rehabilitation.

14 Next, as directed by the probation officer, the
15 defendant shall pay all or part of the costs of treating
16 any psychiatric disorder to the aftercare contractor
17 during the period of community supervision pursuant to
18 18 USC 3672. The defendant shall provide payment and
19 proof of payment as directed by the probation office.

20 Now come a number of restrictions applicable to
21 computer access and use. The defendant shall use only
22 those computers and computer-related devices, screen user
23 names, passwords, E-mail accounts and internet service
24 providers or ISPs as approved by the probation officer.
25 Computers and computer-related devices include, but are

1 not limited to, personal computers, personal data
2 assistants or PDAs, internet appliances, electronic games
3 and cellular telephones, as well as their peripheral
4 equipment, that can access or can be modified to access
5 the internet, electronic bulletin boards and other
6 computers or similar media.

7 Next, all computers, computer-related devices and
8 their peripheral equipment used by the defendant shall be
9 subject to search and seizure, and the installation of
10 search and/or monitoring software and/or hardware,
11 including unannounced seizure for the purpose of search.
12 The defendant shall not add, remove, upgrade, update,
13 reinstall, repair or otherwise modify the hardware or
14 software on the computers, computer-related devices or
15 their peripheral equipment; nor shall he hide or encrypt
16 files or data without prior approval of the probation
17 officers. And he shall provide all billing records,
18 including telephone, cable, internet, satellite, and the
19 like as requested by the probation officer.

20 Next, the defendant shall use computers and
21 comparable computer devices only within the scope of his
22 employment and shall not access a computer for any other
23 purpose. He shall immediately report any changes at his
24 place of employment or of his employer, not just his
25 location but his employer in regard to his internet access

1 and computer use.

2 The defendant shall not possess or use a computer
3 with access to any online service at any location,
4 including his place of employment, without prior approval
5 of the probation officer. This includes access through
6 any internet service provider, bulletin board system or
7 any public or private computer network system.

8 The next few words I've changed from what you may
9 have before you. The defendant shall not request, cause
10 or allow another individual access to the internet on his
11 behalf to obtain files or information which he has been
12 restricted from accessing himself or accepting restricted
13 files or information from any other person.

14 Next, the defendant shall not contact the victims
15 individually identified in the first superseding
16 indictment, Gary Winnick, Tracy Hall and Elizabeth
17 Greenwood, by any means, including in person, by mail or
18 electronic means or via third parties. The same
19 restriction shall apply to Mr. Labaton, L-A-B-A-T-O-N, and
20 Mr. Block. Similarly, he shall not contact any of the
21 witnesses except for Leslie McAfee whom he may contact and
22 his wife whom he may contact, subject to whatever other
23 court orders may apply concerning the wife.

24 Further, he shall remain at least a hundred yards
25 from such victims and witnesses at all times. If any

1 contact occurs, the defendant shall immediately leave the
2 area of contact and report the contact to the probation
3 officer.

4 The Court strongly recommends that Mr. Sutcliffe be
5 confined in a penal institution in Southern California.

6 As to my decision to sentence him to the high end
7 of the Guideline Range, it's a reflection of my very
8 considered view that the offenses that Mr. Sutcliffe
9 committed warrant very firm punishment and that he, even
10 through this afternoon, continues to display a refusal to
11 acknowledge that, like every other citizen in this
12 country, he is subject to the evenhanded application of
13 all of the laws.

14 If there were a crime, Mr. Sutcliffe, that
15 consisted of arrogance, I would depart upward to sentence
16 you to a much longer sentence. Just today, you continued
17 to refer to your prior lawyers as the public pretenders.
18 You displayed that view that you were above everyone
19 else's authority and they are beneath your contempt, to
20 witnesses, to lawyers, to landlords, to the LAPD, to this
21 Court.

22 You are indeed very clever. You're a terrific
23 wordsmith. For you to sit here today and say what you
24 heard is not understanding how your words could have been
25 construed by other people is a joke. For you to come up

1 with the notion that armed meant armed with information is
2 simply a reflection of how you like to manipulate the
3 situation and the words that got you here to your own
4 advantage.

5 The acceptance of responsibility that you requested
6 is absent. The sentence that you serve I hope will
7 reinforce what your words were and reach or help you reach
8 the point where you really mean them and can act on them.

9 The fact is, Mr. Sutcliffe, that as a result of the
10 supervised release terms I've just recited, you are going
11 to be subject, far more than most of us, most citizens, to
12 continuing supervision and authority. And if you have a
13 problem with authority, as your whole life seems to
14 exemplify, you will be digging a huge hole for yourself,
15 one that will undoubtedly result or could result in
16 additional lengthy period of incarceration.

17 If you rebel at these provisions, if you refuse to
18 comply with them, if you bait or antagonize or obstruct
19 the work of whoever is the probation officer, I hope you
20 won't do it, I hope so for a lot of reasons but I have my
21 doubts. So please take into account these considerations.

22 Now, Mr. Reed, what did you bring in terms of a
23 notice of appeal?

24 MR. REED: Your Honor, what I brought the Court
25 today were a notice of appeal, an original and a copy.

1 THE COURT: Has it been signed?

2 MR. REED: No, they haven't been signed, Your
3 Honor, yet.

4 THE COURT: You give them to Mr. Sutcliffe.

5 MR. REED: And I also -- they're all --

6 THE COURT: Now, let me just say that you have a
7 right -- I'm going to be formalistic but I know you
8 understand this already, Mr. Sutcliffe, you have a right
9 to appeal both the findings of guilt and the sentence.
10 And the piece of paper that I instructed Mr. Reed to
11 prepare, which does not contain a lawyer's name but is
12 prepared for you -- am I right about that --

13 MR. REED: Yes, Your Honor.

14 THE COURT: Okay.

15 MR. REED: Can I approach your clerk?

16 THE COURT: -- Will enable you timely, and you have
17 to make sure it's timely, it has to be done within ten
18 days of this judgment, to prosecute an appeal.

19 Did you also bring the document requesting the
20 appointment of counsel on appeal?

21 MR. REED: Yes, Your Honor, I have.

22 THE COURT: Okay. Am I supposed to sign either of
23 these?

24 MR. REED: No, no. I just wanted the Court to have
25 a copy so --

1 THE COURT: Okay.

2 MR. REED: -- You can see what it looks like, Your
3 Honor.

4 THE COURT: All right. Please give those to
5 Mr. Sutcliffe if he wishes to appeal, and if he wishes to
6 have the benefit of counsel to represent him on appeal so
7 he has the opportunity to so arrange.

8 MR. REED: And I'm handing the documents to him,
9 Your Honor. I've prepared that as well.

10 THE COURT: Okay. The reasons for the sentence are
11 reflected in my statement on the transcript. I
12 incorporate them by reference and they will be part of the
13 file in this case.

14 Anything further, counsel?

15 MS. DUARTE: Nothing further, Your Honor.

16 THE COURT: All right. We're adjourned.

17 MS. DUARTE: Thank you, Your Honor.

18 THE COURT: I just want -- can I speak? The record
19 will reflect that the copies of the letters that
20 Ms. Duarte requested that I referred to that people have
21 sent me will also be made available to Mr. Sutcliffe.

22 Thank you.

23 (Proceedings concluded at 5:18 p.m.)

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CERTIFICATE OF REPORTER

COUNTY OF LOS ANGELES)
) SS.
STATE OF CALIFORNIA)

I, KATHLEEN L. MECHANIC, OFFICIAL REGISTERED PROFESSIONAL
REPORTER IN AND FOR THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT
I REPORTED, STENOGRAPHICALLY, THE FOREGOING PROCEEDINGS AT
THE TIME AND PLACE HEREINBEFORE SET FORTH; THAT THE SAME
WAS THEREAFTER REDUCED TO TYPEWRITTEN FORM BY MEANS OF
COMPUTER-AIDED TRANSCRIPTION; AND I DO FURTHER CERTIFY
THAT THIS IS A TRUE AND CORRECT TRANSCRIPTION OF MY
STENOGRAPHIC NOTES.

DATE: 5/13/04

Kathleen L. Mechanic
KATHLEEN L. MECHANIC, RPR
FEDERAL OFFICIAL COURT REPORTER