CERTIFIED COPY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA,	
PLAINTIFF,	
VS.	CASE NO. CR 02-00350-AHM 02-643M
STEVEN WILLIAM SUTCLIFFE,	
	LOS ANGELES, CALIFORNIA APRIL 9, 2002
DEFENDANT.	

ARRAIGNMENT
BEFORE THE HONORABLE CARLA WOEHRLE
UNITED STATES MAGISTRATE JUDGE

FOR THE PLAINTIFF:

JOHN S. GORDON
UNITED STATES ATTORNEY
RONALD CHENG
CHIEF, CRIMINAL DIVISION
ASSISTANT UNITED STATES ATTORNEY
BY: ELENA J. DUARTE
ASSISTANT UNITED STATES ATTORNEY
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

FOR THE DEFENDANT:

MARIA E. STRATTON
FEDERAL PUBLIC DEFENDER
BY: HILARY POTASHNER
DEPUTY FEDERAL PUBLIC DEFENDER
321 EAST 2ND STREET
LOS ANGELES, CALIFORNIA 90012

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING;
TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE.

APPEARANCES: (CONTINUED)

COURTROOM DEPUTY/ RECORDER: JANET ARGARIN

TRANSCRIBER:

DOROTHY BABYKIN
COURT HOUSE SERVICES
1218 VALEBROOK PLACE
GLENDORA, CALIFORNIA 91740
(626) 963-0566

I N D E X

CASE NO. CR 02-00350-AHM
02-643M

APRIL 9, 2002

PROCEEDINGS: ARRAIGNMENT.

LOS ANGELES, CALIFORNIA; APRIL 9, 2002

THE COURT: AS TO ALL OF THE OTHER DEFENDANTS, YOU ARE HERE BECAUSE YOU HAVE BEEN CHARGED WITH A CRIMINAL OFFENSE AGAINST THE UNITED STATES.

THE NATURE OF THE OFFENSE IS DESCRIBED IN THE INDICTMENT OR COMPLAINT AND THE ATTACHED AFFIDAVIT THAT YOU HAVE RECEIVED OR WILL RECEIVE.

YOU HAVE THE FOLLOWING RIGHTS:

YOU HAVE THE RIGHT TO BE REPRESENTED BY A LAWYER AT ALL STAGES OF THESE PROCEEDINGS.

YOU ALSO HAVE THE RIGHT TO HAVE A LAWYER PRESENT WITH YOU ANY TIME THAT YOU ARE QUESTIONED BY A LAW ENFORCEMENT OFFICER.

IF YOU WISH TO HIRE A LAWYER, OR IF YOU WISH TO TALK FURTHER WITH A LAWYER BEFORE I PROCEED WITH YOUR CASE, I WILL GIVE YOU TIME TO DO SO.

IF YOU DON'T HAVE THE MONEY TO HIRE A LAWYER, I WILL APPOINT AN ATTORNEY TO REPRESENT YOU AT NO COST OR EXPENSE TO YOU. HOWEVER, YOU MUST SUBMIT A FINANCIAL AFFIDAVIT TO THE COURT BEFORE I WILL APPOINT COUNSEL TO REPRESENT YOU.

IF YOU MAKE A FALSE STATEMENT IN THAT AFFIDAVIT, YOU MAY BE PROSECUTED FOR A SEPARATE VIOLATION OF FEDERAL LAW.

YOU HAVE THE RIGHT TO REMAIN SILENT. YOU CANNOT BE

REQUIRED TO MAKE A STATEMENT TO ANYONE.

IF YOU WAIVE THAT RIGHT AND MAKE A STATEMENT, THE CONTENTS OF THE STATEMENT MAY BE USED AGAINST YOU IN FUTURE PROCEEDINGS.

IF A CRIMINAL COMPLAINT HAS BEEN FILED AGAINST YOU, YOU HAVE THE RIGHT TO A PRELIMINARY HEARING WITHIN 10 DAYS IF YOU REMAIN IN CUSTODY AND WITHIN 20 DAYS IF YOU ARE RELEASED FROM CUSTODY.

A PRELIMINARY HEARING IS A COURT PROCEEDING IN WHICH THE GOVERNMENT MUST SHOW PROBABLE CAUSE TO BELIEVE THAT YOU COMMITTED THE OFFENSE YOU ARE CHARGED WITH.

HOWEVER, IF YOU ARE INDICTED BY A FEDERAL GRAND JURY BEFORE THE DATE AND TIME SET FOR YOUR PRELIMINARY HEARING, THEN, NO SUCH HEARING IS REQUIRED.

IF THE CHARGES AGAINST YOU HAVE BEEN FILED IN A DISTRICT OTHER THAN THE CENTRAL DISTRICT OF CALIFORNIA, AND IN ADDITION TO THE RIGHTS I HAVE PREVIOUSLY EXPLAINED, YOU HAVE THE RIGHT TO AN IDENTITY HEARING IN WHICH THE GOVERNMENT MUST PRESENT EVIDENCE DEMONSTRATING THAT YOU ARE THE PERSON NAMED IN THE OUT-OF-DISTRICT COMPLAINT OR INDICTMENT.

ALSO, IF THE COMPLAINT OR INDICTMENT IN WHICH YOU ARE CHARGED HAS NOT YET BEEN FILED IN THIS COURT, YOU HAVE THE RIGHT TO REQUEST A CONTINUANCE FOR ARRIVAL OF PROCESS.

IN ADDITION, YOU SHOULD BE AWARE OF RULE 20 OF

FEDERAL RULES OF CRIMINAL PROCEDURE, WHICH PROVIDES THAT IF YOU WISH TO PLEAD GUILTY OR NO CONTEST, IT MAY BE POSSIBLE TO DO THAT HERE IN THIS DISTRICT WITHOUT YOUR BEING RETURNED TO THE DISTRICT WHERE THE CHARGES AGAINST YOU WERE FILED. THIS IS SOMETHING FOR YOU TO DISCUSS FURTHER WITH YOUR LAWYER.

IF YOU ARE BEFORE THE COURT ON AN ALLEGED VIOLATION OF PROBATION OR AN ALLEGED VIOLATION OF RELEASE CONDITIONS FILED IN ANOTHER DISTRICT, YOU ALSO HAVE THE RIGHT TO AN IDENTITY HEARING BEFORE YOU ARE REMOVED TO THAT DISTRICT TO ANSWER THE ALLEGATIONS.

YOU HAVE THE RIGHT IF YOU ARE CHARGED WITH AN OFFENSE AGAINST THE UNITED STATES TO HAVE BAIL DETERMINED IN ACCORDANCE WITH THE BAIL REFORM ACT OF 1984.

UNDER THE PROVISIONS OF THAT ACT YOU MAY BE DETAINED IN CUSTODY PENDING FURTHER COURT PROCEEDINGS, OR YOU MAY BE RELEASED ON BAIL, OR BY SETTING OTHER CONDITIONS -- OR BY SATISFYING OTHER CONDITIONS SET BY THE COURT.

THE QUESTION OF WHETHER OR NOT YOU WILL BE RELEASED FROM CUSTODY AND ON WHAT CONDITIONS DEPENDS ON MANY FACTORS, SUCH AS:

THE NATURE AND CIRCUMSTANCES OF THE OFFENSE CHARGED, YOUR FAMILY TIES, AND LENGTH OF RESIDENCE IN THE COMMUNITY, YOUR EMPLOYMENT STATUS, YOUR PAST HISTORY OF CRIMINAL CONVICTIONS, AND WHETHER OR NOT YOU POSE A DANGER TO

ANY PERSON OR TO THE COMMUNITY.

IF THE GOVERNMENT SEEKS TO DETAIN YOU IN CUSTODY, YOU HAVE THE RIGHT TO A HEARING ON THE DATE OF YOUR FIRST APPEARANCE OR WITHIN THREE TO FIVE DAYS OF YOUR FIRST APPEARANCE IF A CONTINUANCE IS REQUESTED AND GRANTED.

IN THE EVENT THAT YOU ARE ORDERED DETAINED IN CUSTODY, YOU HAVE A RIGHT UPON APPLICATION OF YOUR COUNSEL TO HAVE THE MATTER REVIEWED BY THE CRIMINAL DUTY JUDGE OR OTHER DISTRICT COURT JUDGE WHO MAY BE ASSIGNED.

YOU HAVE THE RIGHT TO BE PRESENT AT ANY SUBSEQUENT HEARING WHERE FURTHER ARGUMENT OR EVIDENCE WILL BE PRESENTED REGARDING YOUR DETENTION OR REGARDING CONDITIONS OF YOUR RELEASE.

THE CLERK WILL NOW CALL THE CALENDAR.

(PROCEEDINGS HELD IN UNRELATED MATTERS.)

THE CLERK: 02-643M, UNITED STATES OF AMERICA VERSUS STEVEN WILLIAM SUTCLIFFE.

MS. DUARTE: GOOD AFTERNOON, YOUR HONOR.

ELENA DUARTE FOR THE UNITED STATES.

THE COURT: GOOD AFTERNOON.

MS. POTASHNER: GOOD AFTERNOON, YOUR HONOR.

HILARY POTASHNER FOR MR. SUTCLIFFE, WHO'S PRESENT BEFORE YOUR HONOR.

THE COURT: GOOD AFTERNOON, COUNSEL.

IS STEVEN SUTCLIFFE, YOUR TRUE AND CORRECT NAME --

STEVEN WILLIAM SUTCLIFFE?

THE DEFENDANT: I AM STEVEN OF THE SUTCLIFFES.

THE COURT: PARDON ME?

THE DEFENDANT: I AM STEVEN OF THE SUTCLIFFES.

THE COURT: OKAY. MR. SUTCLIFFE, I HAVE A FINANCIAL AFFIDAVIT ASKING THAT COUNSEL BE APPOINTED TO REPRESENT YOU.

DID YOU COMPLETE AND SIGN THAT AFFIDAVIT?

THE DEFENDANT: CORRECT.

THE COURT: AND DID YOU UNDERSTAND THE WARNING ABOUT NOT MAKING ANY FALSE STATEMENT IN THE AFFIDAVIT?

THE DEFENDANT: CORRECT.

THE COURT: OKAY. I'LL APPOINT COUNSEL TO REPRESENT YOU.

HAVE YOU RECEIVED A COPY OF THE COMPLAINT THAT'S BEEN FILED IN THIS CASE?

MS. DUARTE: YOUR HONOR, I'M SORRY TO INTERRUPT.

BUT IF I MAY, THE DEFENDANT ACTUALLY WAS INDICTED ON FRIDAY. I HAVE A COPY OF THE INDICTMENT. IT DOESN'T HAVE THE CASE NUMBER, BUT I DO HAVE THE CASE NUMBER FOR THE COURT.

THE COURT: OH, OKAY. HAS THE DEFENDANT BEEN PROVIDED A COPY OF THE INDICTMENT?

MS. DUARTE: HE HAS EARLIER.

THE COURT: OKAY. THANK YOU.

MS. DUARTE: I WAS NOT AWARE THAT THAT WAS NOT IN THE CASE FILE. I'M SORRY, YOUR HONOR.

THE COURT: OH, OKAY. THANK YOU.

MS. DUARTE: AND THE NUMBER IS 02-350. IT IS NOT YET ASSIGNED. AND, OF COURSE, WE'RE GOING TO ASK FOR A PIA ON MONDAY.

THE COURT: ALL RIGHT. THEN, YOU'VE RECEIVED THE INDICTMENT.

IS THAT CORRECT?

THE DEFENDANT: I'VE RECEIVED A COPY OF SOMETHING CLAIMING TO BE AN INDICTMENT. I DON'T RECOGNIZE THE INDICTMENT.

THE COURT: OKAY. BUT THE DOCUMENT THAT'S BEEN FILED WITH THE COURT, THE INDICTMENT, YOU HAVE A COPY OF THAT.

IS THAT CORRECT?

THE DEFENDANT: I HAVE A COPY OF SOMETHING CLAIMING TO BE OF THAT FORM, YES.

THE COURT: AND DO YOU WANT ME TO READ THE CHARGE OUT IN COURT THIS AFTERNOON?

THE DEFENDANT: THAT'S NOT NECESSARY.

THE COURT: DO YOU UNDERSTAND THE NATURE OF THE CHARGE THAT'S MADE IN THAT DOCUMENT?

THE DEFENDANT: NO. I UNDERSTAND THE CAUSE, BUT I'M RESERVING MY RIGHT TO CHALLENGE SUBJECT MATTER

JURISDICTION AND THE NATURE OF THE CLAIM.

THE COURT: CERTAINLY ALL YOUR RIGHTS ARE RESERVED.

THE DEFENDANT: THANK YOU.

THE COURT: IT'S SIMPLY A QUESTION OF WHETHER YOU UNDERSTAND THE NATURE OF WHAT THE DOCUMENT SAYS.

THE DEFENDANT: I DO NOT RECOGNIZE THE NATURE OF THIS CHARGE. I UNDERSTAND THE CAUSE --

THE COURT: OKAY.

THE DEFENDANT: -- BECAUSE I CAN READ, BUT.

THE COURT: I THINK THAT'S THE SAME THING. I UNDERSTAND THE DISTINCTION YOU'RE DRAWING. AND FOR MY PURPOSES --

THE DEFENDANT: THANK YOU.

THE COURT: -- I'M SATISFIED THAT YOU UNDERSTAND THE CAUSE THERE.

THE DEFENDANT: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT. THERE IS NOW IN THIS CASE AS WELL, AS I UNDERSTAND IT, A DETENTION ORDER THAT'S BEEN ISSUED IN THE DISTRICT OF NEW HAMPSHIRE; IS THAT CORRECT?

MS. POTASHNER: I BELIEVE --

MS. DUARTE: THAT IS CORRECT, YOUR HONOR.

MS. POTASHNER: YES, YOUR HONOR. I BELIEVE IT WAS ISSUED WITHOUT PREJUDICE.

THE COURT: YES. AND I SAW THE ORDER, AND IT IS WITHOUT PREJUDICE. AND SINCE THIS CASE IS NOT YET ASSIGNED

TO A DISTRICT COURT JUDGE, THERE WOULD BE -- IT WOULD TECHNICALLY BE A MOTION FOR RECONSIDERATION OF THE PRIOR ORDER, BUT IT WOULD BE PROPERLY MADE TO THIS COURT.

SO, LET ME UNDERSTAND. THE GOVERNMENT, I TAKE IT, IS REQUESTING A CONTINUANCE OF THE DETENTION ORDER?

MS. DUARTE: CONTINUANCE OF THE ORDER, YOUR HONOR.

I DID NOT FILE A SEPARATE ORDER BECAUSE IT WAS MY UNDERSTANDING THAT PROCEDURALLY THAT ORDER WOULD CONTINUE UNLESS THERE WAS A MOTION.

THE COURT: YES. THAT'S MY UNDERSTANDING AS WELL.

MS. POTASHNER: THAT'S FINE, YOUR HONOR.

THE COURT: COUNSEL, WHAT IS YOUR POSITION WITH RESPECT TO THE ORDER AT THIS STAGE?

MS. POTASHNER: YOUR HONOR, I WOULD SUBMIT TO THE COURT. I AGREE --

THE COURT: OKAY.

MS. POTASHNER: -- THAT IT WOULD REMAIN IN EFFECT.

WE'D ASK THAT IT BE SET FOR FRIDAY, A DETENTION HEARING SET FOR FRIDAY.

THE COURT: A MOTION FOR RECONSIDERATION --

MS. POTASHNER: YES, YOUR HONOR.

THE COURT: -- OF THE DETENTION ORDER?

MS. POTASHNER: YES, YOUR HONOR.

MS. DUARTE: YOUR HONOR, IF I MAY, BEFORE THE COURT SETS, JUST ASK IF THE COURT IS INCLINED TO ASK FOR A PROFFER

GIVEN THAT IT'S MY UNDERSTANDING, AT LEAST OF THE PROCEDURE, THAT THE MOTION FOR RECONSIDERATION REQUIRES EVIDENCE NOT PREVIOUSLY KNOWN TO THE MOVANT AT THE TIME OF THE EARLIER DETENTION HEARING TO BE SET FORTH.

THE COURT: WELL, IN THIS CASE IT WAS EXPRESSLY AN ORDER WITHOUT PREJUDICE. AND IT WAS SUBJECT TO THE POSSIBILITY OF ADDITIONAL INFORMATION. WE DON'T HAVE A NEW PRETRIAL REPORT. AND, SO, IT'S KIND OF A CATCH-22.

I THINK COUNSEL MIGHT PROFFER MORE INFORMATION IF THERE WERE A PRETRIAL SERVICES REPORT. IF I DON'T HAVE ANY ADDITIONAL INFORMATION, THEN THE MOTION FOR RECONSIDERATION IS NOT GOING TO GO VERY FAR.

BUT I WOULD EXPECT THAT IF IT'S GOING TO BE A SUBSTANTIVE MOTION, THAT IT WOULD NEED SOME FURTHER INPUT FROM OUR PRETRIAL SERVICES.

MS. POTASHNER: YES, YOUR HONOR. I WOULD ASK THAT THE COURT ASK PRETRIAL SERVICES TO INTERVIEW MR. SUTCLIFFE. IT APPEARS FROM WHAT I READ ANYWAY THAT THE INTERVIEW WAS VERY TRUNCATED BECAUSE THEY WERE JUST RELYING ON THE PREVIOUS INTERVIEW.

THE COURT: YES. WHICH WAS WHAT THEY WERE SUPPOSED TO DO UNTIL YOU MOVED FOR RECONSIDERATION.

MS. POTASHNER: RIGHT, EXACTLY. SO --

THE COURT: WE'VE JUST SORT OF RECENTLY CLARIFIED THESE PROCEDURES. AND IT SEEMS TO MAKE SENSE.

ALL RIGHT. NOW, THE PROBLEM IS FRIDAY IS -- FRIDAY IS GETTING A BIT CROWDED.

WHAT ABOUT FRIDAY AFTERNOON?

MS. POTASHNER: THAT'S FINE.

THE COURT: OKAY. WE SET SOMETHING FOR 1:30, RIGHT? SO, 2:00 OR 2:30?

MS. DUARTE: 2:00 IS FINE, YOUR HONOR.

MS. POTASHNER: THAT'S FINE.

MS. DUARTE: 2:00.

THE COURT: OKAY. 2:00 ON FRIDAY.

MS. DUARTE: SO, YOUR HONOR, JUST FOR CLARIFICATION. FRIDAY IS FOR HEARING OF DEFENDANT'S MOTION TO RECONSIDER.

THE COURT: TO RECONSIDER. THAT'S CORRECT.

I'M GOING TO EXCUSE THEIR NEEDING TO BE A WRITTEN MOTION AT THIS POINT.

MS. POTASHNER: THANK YOU, YOUR HONOR.

THE COURT: AGAIN, GIVEN THAT THE ORDER WAS EXPRESSLY WITHOUT PREJUDICE TO RECONSIDER THE ISSUE IN CALIFORNIA.

OKAY. AND WE'LL ASK FOR A PRETRIAL SERVICES INTERVIEW. I JUST WANT TO MAKE SURE PRETRIAL KNOWS THAT.

WE DO NEED AN INTERVIEW OF MR. SUTCLIFFE.

THE PRETRIAL SERVICES OFFICER: YES, YOUR HONOR.

THE COURT: OKAY. THANK YOU.

POST-INDICTMENT ARRAIGNMENT, THOUGH, MONDAY, APRIL 15TH AT 8:30 A.M. BEFORE THE DUTY MAGISTRATE JUDGE IN THIS COURTROOM.

OKAY. THANK YOU.

MS. POTASHNER: THANK YOU, YOUR HONOR.

MS. DUARTE: THANK YOU.

(PROCEEDINGS CONCLUDED.)

C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

Dorothy Babykin — 7/19/05

FEDERALLY CERTIFIED TRANSCRIBER
DOROTHY BABYKIN

DATED

CERTIFIED COPY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	CASE NO. CR 02-00350-AHM
	)	
	)	
STEVEN WILLIAM SUTCLIFFE,	)	
	)	LOS ANGELES, CALIFORNIA
	)	APRIL 12, 2002
	)	
DEFENDANT.	)	
	)	

BAIL REVIEW HEARING
BEFORE THE HONORABLE CARLA WOEHRLE
UNITED STATES MAGISTRATE JUDGE

FOR THE PLAINTIFF:

JOHN S. GORDON
UNITED STATES ATTORNEY
RONALD CHENG
CHIEF, CRIMINAL DIVISION
ASSISTANT UNITED STATES ATTORNEY
BY: ELENA J. DUARTE
ASSISTANT UNITED STATES ATTORNEY
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

FOR THE DEFENDANT:

MARIA E. STRATTON
FEDERAL PUBLIC DEFENDER
BY: HILARY POTASHNER
DEPUTY FEDERAL PUBLIC DEFENDER
321 EAST 2ND STREET
LOS ANGELES, CALIFORNIA 90012

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING;
TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE.

APPEARANCES: (CONTINUED)

ALSO PRESENT:	JEFF CUNEO, SPECIAL AGENT FEDERAL BUREAU OF INVESTIGATION
COURTROOM DEPUTY/ RECORDER:	DONNA THOMAS
TRANSCRIBER:	DOROTHY BABYKIN COURT HOUSE SERVICES 1218 VALEBROOK PLACE GLENDORA, CALIFORNIA 91740 (626) 963-0566

I N D E X

CASE NO. CR 02-00350-AHM APRIL 12, 2002

PROCEEDINGS: BAIL REVIEW/DETENTION HEARING.

LOS ANGELES, CALIFORNIA; FRIDAY, APRIL 12, 2002

THE CLERK: CR 02-00350, UNITED STATES OF AMERICA VERSUS STEVEN WILLIAM SUTCLIFFE.

MS. DUARTE: GOOD AFTERNOON, YOUR HONOR.

ELENA DUARTE FOR THE GOVERNMENT. AND WITH ME AT COUNSEL TABLE IS SPECIAL AGENT JEFF CUNEO FROM THE FBI, WHO WITH THE COURT'S PERMISSION WILL REMAIN AT COUNSEL TABLE WITH ME.

THE COURT: SURE.

MS. DUARTE: THANK YOU.

THE COURT: GOOD AFTERNOON.

MS. POTASHNER: GOOD AFTERNOON, YOUR HONOR.

HILARY POTASHNER FOR MR. SUTCLIFFE, WHO'S PRESENT BEFORE YOUR HONOR.

THE COURT: GOOD AFTERNOON. THANK YOU.

OKAY. WE'RE HERE FOR WHAT WE TREATED AS A MOTION FOR RECONSIDERATION OF THE DETENTION ORDER ISSUED IN -- IS IT THE DISTRICT OF NEW HAMPSHIRE?

MS. POTASHNER: YES, YOUR HONOR.

THE COURT: ALL RIGHT. SO, I'VE BEEN ABLE TO REVIEW THE PRETRIAL SERVICES REPORT AND THE FILE.

I CAN TELL YOU THAT IT APPEARS TO ME THAT I'M NOT GOING TO BE PREPARED TO CHANGE THIS ORDER, BUT I'LL HEAR FROM BOTH PARTIES.

MS. POTASHNER: WELL, IF I CAN START, YOUR HONOR?

THE COURT: YES.

MS. POTASHNER: IN TERMS OF PROCEDURALLY, I'M A LITTLE CONFUSED HOW TO HANDLE THIS SITUATION BECAUSE THERE WAS A LONG DETENTION HEARING THAT WAS HEARD BACK IN NEW HAMPSHIRE, WHERE THERE ARE A LOT -- A LOT OF INFORMATION CAME OUT DURING THE HEARING ITSELF THAT IS NOT REFLECTED IN THE FACE OF THE DOCUMENTS IN THE FILE.

SO, IF I CAN PROFFER TO YOUR HONOR WHAT CAME OUT AT THE HEARING, WHICH I THINK IS IMPORTANT TO PUT WHAT'S WRITTEN IN THE INDICTMENT AND WHAT'S WRITTEN IN THE COMPLAINT AND THE AFFIDAVIT IN SUPPORT OF THE COMPLAINT INTO CONTEXT, I THINK THAT WOULD MAKE SENSE. I'M NOT SURE IF YOUR HONOR WANTS ME TO DO IT BY WAY OF ASKING TO EXAMINE THE CASE AGENT, OR IF YOUR HONOR JUST WANTS ME TO EXPLAIN IN MY OPINION WHAT HAPPENED AT THAT HEARING THAT IS IMPORTANT FOR YOUR HONOR TO KNOW.

THE COURT: OKAY.

MS. DUARTE: IF I MAY, YOUR HONOR.

THE COURT: YES.

MS. DUARTE: MY OBJECTION TO THAT HAS NOTHING TO DO WITH THE CONTENTS OF THE HEARING BECAUSE I'M HAPPY TO HAVE THE COURT REVIEW THAT. HOWEVER, THAT SAID, I THINK THAT THAT'S -- THE CONTEXT OF THAT HEARING IS IRRELEVANT TO OUR PURPOSES HERE TODAY. BECAUSE OUR PURPOSE HERE TODAY IS WHAT DOES SHE HAVE -- WHAT DOES THE DEFENDANT HAVE TO PRESENT TO

THE COURT THAT WAS NOT PRODUCED OR AVAILABLE AT THE TIME OF THE ORIGINAL DETENTION ORDER. THAT MAGISTRATE JUDGE HEARD EVERYTHING THAT CAME OUT AT THE HEARING THAT DEFENDANT IS NOW PROFFERING AND HELD THE DEFENDANT TO ANSWER IN CUSTODY.

SO, THAT SAID, THAT'S WHY I THINK THAT THAT WHOLE TRANSCRIPT AT THIS JUNCTION FOR THIS COURT IS IRRELEVANT. I DID PROVIDE COUNSEL WITH THE COPY. I HAVE NOTHING TO HIDE IN THE TRANSCRIPT. HOWEVER, I REALLY DON'T THINK THAT THAT IS RELEVANT TO THIS PROCEEDING BECAUSE OF THE NATURE OF THIS PARTICULAR PROCEEDING.

MS. POTASHNER: WELL, I WOULD PROBABLY AGREE WITH COUNSEL IF IT WERE NOT FOR THE BASIS OF THE RECOMMENDATION IN TODAY'S REPORT FROM PRETRIAL SERVICES. TODAY'S REPORT INCLUDES AS A BASIS FOR CONTINUED DETENTION IN THIS CASE THE ALLEGATIONS IN THE INSTANT CASE. AND THE SUMMARY, AS REFLECTED ON PAGE 9, SAYS THAT THE ALLEGATION IS THAT THE DEFENDANT IS ALLEGED TO HAVE USED THE INTERNET TO POST THREATS TO INJURE OR KILL GLOBAL CROSSING COMPANY EXECUTIVES AND TO DISPLAY PERSONAL INFORMATION.

IF THE COURT IS TO CONSIDER WHAT HAPPENED AS THREATS OF DEATH, THEN, I THINK IT'S IMPORTANT TO UNDERSTAND THE CONTEXT. AND ALL OF THAT INFORMATION BECAUSE WE'RE IN DIFFERENT JURISDICTIONS YOUR HONOR DOESN'T HAVE THAT INFORMATION UNLESS I PROVIDE THAT INFORMATION.

I WOULD AGREE IF THIS WAS A STANDARD MOTION FOR

RECONSIDERATION WHERE IT WAS THE SAME DISTRICT, AND THAT INFORMATION WAS READILY AVAILABLE. THEN, I WOULDN'T NEED TO REITERATE WHAT HAPPENED.

BUT UNDER THESE CIRCUMSTANCES, I THINK IT'S IMPORTANT.

AND FOR COUNSEL'S INFORMATION AND YOUR HONOR'S INFORMATION, I DO HAVE ADDITIONAL INFORMATION.

SPECIFICALLY, IN THE --

THE COURT: WELL, OKAY. JUST TO PUT THIS IN CONTEXT.

MS. POTASHNER: OKAY.

THE COURT: YES, I THINK THAT THE WAY THIS LOGICALLY WORKS -- I MEAN, ANYTIME THERE'S A DETENTION ORDER, IT'S ALWAYS WITHOUT PREJUDICE SO THAT IF ANYTHING CHANGES, IT CAN BE REVISITED. AND IT'S ALWAYS A BIT TRICKY WHEN IT'S MULTIPLE JURISDICTIONS BECAUSE THERE MAY BE THINGS THAT THEY KNOW ABOUT THE DEFENDANT AND HAVE ACCESSIBLE IN ONE DISTRICT THAT YOU DON'T HAVE IN THE OTHER.

I COULDN'T REALLY EVEN TELL -- I DON'T THINK WE DISAGREE THAT IT'S RECONSIDERATION BECAUSE WE ARE LOOKING TO SEE WHETHER THERE'S SOMETHING NEW THAT CHANGES THE ASSESSMENT THAT WAS MADE. BUT I COULDN'T EVEN TELL IF THERE WAS SOMETHING NEW WITHOUT KNOWING WHAT THERE WAS BEFORE. SO, IT SEEMS TO ME THAT A SUMMARY OF WHAT WAS PRESENTED BEFORE IS NOT AT ALL ILLOGICAL. AND THE FACT THAT I WANT TO KNOW WHAT

WAS BEFORE THE JUDGE IN NEW HAMPSHIRE DOESN'T MEAN THAT I'M REVISITING AN ASSESSMENT THAT'S ALREADY BEEN MADE. BUT IT CERTAINLY PUTS INTO CONTEXT WHAT, IF ANYTHING, THERE IS THAT'S NEW.

INESCAPABLY, FOR ME, AND IT APPEARS WAS TRUE FOR THE JUDGE IN NEW HAMPSHIRE, THE ALLEGATIONS OF THE COMPLAINT IN THIS CASE -- I DO HAVE THE COMPLAINT AND NOT JUST THE INDICTMENT -- ARE CERTAINLY AN IMPORTANT FACTOR IN THIS CASE.

MS. DUARTE: MY ONLY CONCERN, YOUR HONOR, IS THAT IF THE COURT IS INCLINED TO CONSIDER THE CONTENTS OF THE TRANSCRIPT, I OBJECT TO THE DEFENSE COUNSEL SUMMARIZING IT. BECAUSE AS THE COURT WILL SEE IF THE COURT TAKES A LOOK AT THIS TRANSCRIPT, THERE'S A LOT TO SUMMARIZE, AND A LOT OF BACK AND FORTH THAT WENT ON BETWEEN THE PARTIES. THIS WAS A VERY INVOLVED ACTIVE HEARING ON EVERYONE'S PART. AND IT ALSO INVOLVED LOOKING AT THE CURRENT CONTENTS OF THE WEBSITE ON THE COMPUTER. PRESS WERE PRESENT. IT WAS OBVIOUS THERE WERE PRESS IN THE COURTROOM.

WHAT I WOULD SUGGEST IF THE COURT IS INCLINED TO CONSIDER THE TRANSCRIPT, AGAIN, TO WHICH IN AND OF ITSELF I HAVE NO OBJECTION, IS THAT WE GIVE THE COURT A COPY OF THE TRANSCRIPT, HAVE THE COURT PERUSE IT. AND IF WE NEED TO PUT THIS OVER FOR THE COURT TO BE ABLE TO DO THAT, WE WOULD ASK FOR THAT RATHER THAN JUST RELY ON A SUMMARY THAT THEN I HAVE TO GET UP AND REBUT AND, POTENTIALLY, MS. POTASHNER AND I END

UP IN A WAR OF THE WORDS WHEN IT'S BETTER FOR THE COURT TO JUST SEE WHAT HAPPENED.

THE COURT: ALL RIGHT.

MS. POTASHNER: I AGREE THE COURT SHOULD LOOK AT THAT. I WOULD ASK THE COURT NOT TO PUT IT OVER. I THINK IF I'M ABLE TO BRIEFLY SAY WHAT I WANT TO SAY ABOUT THE TRANSCRIPT, I DON'T THINK IT WILL BE A MAJOR POINT OF CONTENTION.

SO, I AGREE THAT THE COURT SHOULD HAVE A COPY OF THE TRANSCRIPT, BUT I WOULD LIKE TO BE HEARD TODAY BECAUSE THIS IS A REAL PERSON WHO IS IN CUSTODY RIGHT NOW --

THE COURT: SURE.

MS. POTASHNER: -- AND PUTTING IT OVER LEAVES HIM IN CUSTODY.

THE COURT: NO, I -- THAT'S FINE.

AND IF I DECIDE THAT I WANT TO READ THE TRANSCRIPT BEFORE I DECIDE, THEN, I'LL CERTAINLY DO THAT.

SO, WHY DON'T YOU SAY WHAT YOU BRIEFLY WANT TO SAY.

MS. POTASHNER: OKAY. WHAT I'D LIKE TO SAY IS ON THE FACE OF THE -- FIRST OF ALL, ON THE FACE OF THE INDICTMENT, I'M ASSUMING, AND THE COURT SHOULD CORRECT IF I'M WRONG, I'M ASSUMING THAT THE ISSUE OF DANGEROUSNESS GOES TO THE THREATS THAT WERE MADE IN COUNTS -- ALLEGEDLY IN COUNTS ONE THROUGH FOUR. I'M ASSUMING THAT WE'RE NOT TALKING ABOUT THE BALANCE OF THE INDICTMENT. BECAUSE THAT HAS TO DO WITH

THE SOCIAL SECURITY NUMBERS. SO, I'M ASSUMING THAT I SHOULD FOCUS MY ARGUMENT ON THOSE FOUR COUNTS.

THE COURT: WELL, THAT'S PROBABLY THE FOCUS, BUT THE ALLEGATIONS WITH THE RESPECT TO THE SOCIAL SECURITY NUMBERS AND THAT ALLEGED USE OF THE INTERNET IS A CONCERN TO ME --

MS. POTASHNER: OKAY.

THE COURT: -- IN ASSESSING THE DANGER TO THE COMMUNITY AS WELL AS SEEING ALL THAT IN LIGHT OF SOME PRIOR CRIMINAL ACTIVITY -- CONVICTIONS THAT ARE NOT FELONY CONVICTIONS, BUT THE PRIOR CONVICTIONS. THE ALLEGATIONS OF THE COMPLAINT WITH RESPECT TO OTHER THREATENING CONDUCT. YOU KNOW, THESE ARE OF, YOU KNOW, RELATIVELY LESSER SIGNIFICANCE. BUT THEN THE DOMESTIC VIOLENCE COMPLAINT IS ALSO A CONCERN.

MS. POTASHNER: OKAY. IF I COULD FIRST ADDRESS, I THINK THAT THERE WERE THREE FOCAL POINTS IN THE PRELIMINARY HEARING THAT WAS HELD IN NEW HAMPSHIRE IN CONJUNCTION WITH THE DETENTION HEARING.

THERE WAS A FOCAL POINT OF KILLERCOP.COM. AND THERE'S A MENTION OF THAT IN THE AFFIDAVIT SUPPORTING THE COMPLAINT IN THIS CASE.

I THINK WHAT WAS IMPORTANT THAT CAME OUT IN THE HEARING THAT'S NOT ON THE FACE OF THE AFFIDAVIT IS THAT IN THAT CASE ON THE BOTTOM OF EVERY WEB PAGE, WITH THE EXCEPTION OF THE OPENING WEB PAGE, THERE WAS A CLEAR STATEMENT THAT

SAID -- THAT NOTED, QUOTE, UNQUOTE, FICTION A.D. AND/OR PERSONALITY PARODY.

AND IT WAS PRESENT THE -- COPIES OF THE WEB PAGE WERE PRESENTED TO HIS HONOR BACK IN NEW HAMPSHIRE TO SEE THAT THE VERY BOTTOM SAID THIS IS A PARODY.

THE OTHER SIGNIFICANT THING I BELIEVE THAT CAME OUT IN THAT HEARING WAS WITH RESPECT TO KILLERCOP.COM, THAT THE AFFIDAVIT ONLY SPEAKS TO PART OF WHAT'S ON THAT -- WAS ON THAT WEBSITE. IT DOESN'T SPEAK TO EVERYTHING. IT TAKES IT OUT OF CONTEXT AND MAKES IT SEEM LIKE A MUCH MORE DANGEROUS WEBSITE THAN WHAT IT WAS.

THE AFFIDAVIT DOESN'T MENTION THE FACT THAT IT SAYS THAT IT'S A PARODY. THE AFFIDAVIT DOESN'T MENTION THE FACT THAT ON THE FIRST PAGE WHEN THE WEBSITE IS OPENED, IT SAYS -- THERE'S A DISCLAIMER THAT SAYS:

"WHILE THIS SITE OFFERS REWARDS AND BENEFITS TO PEOPLE WHO ENGAGE IN LAWFUL CONDUCT TO SUPPORT THIS SITE, THIS SITE DOES NOT ADVOCATE, ENCOURAGE OR CONDONE ANY CONDUCT THAT IS ILLEGAL AT ANY TIME BY ANY PERSON OR ENTITY AGAINST ANY OTHER PERSON OR ENTITY."

AND THAT IS REFLECTED ON PAGE APPROXIMATELY 76 OF THE TRANSCRIPT OF THE HEARING. SO, THERE WAS A CLEAR MESSAGE ON KILLERCOP.COM THAT THIS WAS NOT -- THIS WAS NOT A SITE THAT WAS INTENDED TO INCITE PEOPLE TO DO UNLAWFUL THINGS.

FURTHER, ON EVERY PAGE ONCE YOU GET PAST THAT DISCLAIMER, IT SAYS ON THE BOTTOM THIS IS A PARODY, BASICALLY.

THE LAST THING ABOUT KILLERCOP.COM THAT I THINK IS IMPORTANT THAT I REVIEWED IN THE TRANSCRIPT IS THAT IT DOES TALK ABOUT -- APPARENTLY. I HAVEN'T BEEN ABLE TO OPEN IT MYSELF -- BUT IT MAKES REFERENCE TO SALES OF VARIOUS WEAPONS. BUT WHAT THE AFFIDAVIT DOES NOT SAY OR LIST WERE THE MORE OUTRAGEOUS OBVIOUSLY SARCASTIC, NON-REALITY BASED WEAPONS THAT SUPPOSEDLY WERE AVAILABLE FOR SALE, WHICH INCLUDED WHAT WAS CALLED A "BEE KILLER," WHICH APPARENTLY WAS A DEVICE --

THE DEFENDANT: "BEE STINGER."

MS. POTASHNER: "BEE STINGER." THANK YOU.

-- APPARENTLY WAS A DEVICE WHERE YOU COULD SHOOT BEES TOWARDS A POLICE OFFICER AND HAVE THE POLICE OFFICER STUNG BY BEES.

SO, IT WAS OBVIOUSLY A RIDICULOUS WEAPON THAT DOESN'T EXIST.

MS. DUARTE: I'M SORRY, YOUR HONOR. COULD WE HAVE A PAGE CITE ON THAT, THE BEE STINGER REFERENCE.

MS. POTASHNER: I BELIEVE THAT'S ON PAGE 65, LINE 25.

MS. DUARTE: THANK YOU.

(DEFENDANT SPEAKING.)

MS. POTASHNER: HOLD ON. HOLD ON.

LASTLY, WHAT I THINK IS ALSO IMPORTANT THAT -- WELL, TWO THINGS, AND THEN I'LL MOVE OFF OF KILLERCOP.COM.

IT WAS BROUGHT TO LIGHT IN THE HEARING, AND IT'S NOT APPARENT FROM THE AFFIDAVIT ITSELF THAT THERE WAS NEVER ANY ACTUAL SALES FROM KILLERCOP.COM. THERE WAS NO EVIDENCE THAT ANYONE EVER ATTEMPTED TO BUY A WEAPON THROUGH KILLERCOP. COM OR THAT ANY WEAPONS WERE EVEN AVAILABLE THROUGH KILLERCOP.COM. IT WAS SIMPLY A SITE THAT WAS A PARODY. AND THAT CAME OUT IN THE HEARING.

AND, LASTLY, WHAT'S SIGNIFICANT FROM THE HEARING WAS THAT THE LAPD HAD BEEN INVESTIGATING THIS SITE, KILLERCOP. COM, AND DID NOT -- AND THE D.A.'S OFFICE DID NOT PROSECUTE IN ANY REGARDS TO THIS SITE. AND THIS WAS JUST INFORMATION THAT WAS BEING PROVIDED. IT WAS NOT THE BASIS OF ANY CRIME, INCLUDING WHAT MR. SUTCLIFFE IS CURRENTLY CHARGED WITH.

SO, THAT'S IN TERMS OF KILLERCOP. COM.

TURNING TO WHAT APPEARS TO BE A CONCERN IN THE PRETRIAL SERVICES REPORT AS WELL AS IN YOUR HONOR'S MIND, THE DOMESTIC VIOLENCE ISSUE.

THERE WAS TESTIMONY TAKEN ABOUT THE TEMPORARY RESTRAINING ORDER AND THE BASIS OF THE TEMPORARY RESTRAINING ORDER IN THAT HEARING. I APOLOGIZE. I DON'T THINK I HAVE A CITE FOR THAT -- OH, I DO. I WOULD LIKE TO HIGHLIGHT WHAT'S ON PAGE 120, LINE 7.

APPARENTLY, AND I'M SPEAKING THROUGH -- I HAVE NOT SEEN A COPY OF THE TRO. I'M SPEAKING THROUGH MY UNDERSTANDING OF WHAT IT WAS. THE BASIS OF THE TRO WAS A STATEMENT THAT WAS SUPPOSEDLY MADE TO MR. SUTCLIFFE'S THREE YEAR OLD DAUGHTER REGARDING HER MOTHER, HIS WIFE, WHICH WAS, "I'M GOING TO KILL YOUR MOTHER."

APPARENTLY, THE BASIS OF THE TRO WAS THAT THAT WAS MADE AT THE DINNER TABLE, AND SHE FOUND THAT TO BE THREATENING. AND THAT'S WHY THE TRO WAS OBTAINED.

WHAT WAS IMPORTANT IN THE TRANSCRIPT WAS THAT THERE WAS A PROBATION OFFICER WHO INTERVIEWED ORLY MANN REGARDING THIS UNDERLYING ACTIVITY THAT IS THE BASIS OF THE RESTRAINING ORDER. AND ACCORDING TO THE PROBATION OFFICER, SHE TOLD HIM THAT THIS STATEMENT WAS MADE IN A PLAYFUL OR JOKING MANNER, OR, I GUESS TO PUT IT AS ACCURATELY AS I CAN, THAT HE PERCEIVED THAT IT WAS A PLAYFUL OR JOKING MANNER AS OPPOSED TO AN ACTUAL THREAT.

SO, IN TERMS OF THE DOMESTIC VIOLENCE, I THINK THAT THE PROBATION OFFICER'S ASSESSMENT OF THE ACTUAL PERSON WHO TOOK OUT THE RESTRAINING ORDER I THINK IS HIGHLY SIGNIFICANT AND SHOULD BE TAKEN INTO ACCOUNT WHEN THE COURT LOOKS AT WHETHER THAT SHOULD BE A FACTOR IN TERMS OF DANGEROUSNESS IN THIS CASE.

THE COURT: THE TESTIMONY AT THE HEARING WAS BY THE PROBATION OFFICER?

MS. POTASHNER: YES, YOUR HONOR. AND I APOLOGIZE. I DON'T REMEMBER HIS NAME. BUT I KNOW THAT WHAT I'M HIGHLIGHTING WAS ON PAGE 120. AND THAT'S IN THE MIDDLE OF HIS TESTIMONY.

THE COURT: OKAY.

MS. DUARTE: IT WAS MR. GILDEA, G-I-L-D-E-A, CALLED BY THE DEFENSE.

THE COURT: THANK YOU.

MS. POTASHNER: LASTLY, IN TERMS OF THE ALLEGATIONS THAT ARE REFLECTED IN THE INDICTMENT, I BELIEVE THAT THE PRELIM -- THE PRELIMINARY HEARING AND THE DETENTION HEARING DID GIVE CONTEXT TO IT IN THAT IT HIGHLIGHTED THAT THERE WAS ONLY ONE --

EXCUSE ME.

(DEFENDANT TALKING TO MS. POTASHNER.)

MS. POTASHNER: YES. THERE WAS ONLY ONE EMAIL THAT ACTUALLY WENT OUT TO ANYONE WHO WAS REMOTELY ASSOCIATED TO THE COMPANY IN QUESTION HERE.

BASICALLY WHAT WAS BROUGHT TO LIGHT IN THE PRELIMINARY HEARING WAS THAT THIS WAS A SITE THAT WAS CREATED. AND IN ORDER TO -- THE DEFENSE ATTORNEY AT THE TIME WAS CALLING IT A PASSIVE STATEMENT BECAUSE IT WAS A STATEMENT THAT WAS ON THE COMPUTER, THAT IN ORDER FOR THE THREAT TO EVEN BE -- OR ALLEGED THREAT TO EVEN BE CONVEYED, THE PERSON WOULD HAVE TO GO TO THE SITE AND READ THE SITE AS OPPOSED TO

IT BEING PUT TO THAT PERSON, IT BEING CONVEYED IN ANY WAY TO THAT PERSON. IT WAS SOMETHING THAT THE PERSON WOULD NEED TO LOOK ON THE SITE IN ORDER TO FIND WHERE THAT PERSON WOULD BE PERCEIVING AS A THREAT.

SO, I THOUGHT THAT WAS A SIGNIFICANT POINT BROUGHT OUT.

MS. DUARTE: I'M SORRY. WAS THERE A PAGE NUMBER? IT'S MY FAULT. I THINK I MISSED IT.

MS. POTASHNER: NO, THERE WAS NO PAGE NUMBER. I APOLOGIZE. I READ IT REALLY QUICKLY THIS MORNING, AND I GOT ALL THE PAGE NUMBERS I COULD, BUT.

MS. DUARTE: OKAY.

THE COURT: WAS THERE A SINGLE HEARING THAT WAS BOTH A PROBABLE CAUSE DETERMINATION AND THE DETENTION HEARING?

MS. POTASHNER: YES, YOUR HONOR.

AND, LASTLY, ON PAGE 163, LINE 11, THE COURT IN MAKING ITS RULING AND ULTIMATELY DETAINING MR. SUTCLIFFE DID NOTE THAT THE COURT WOULD NOT FIND HIM A DANGER TO THIS COMMUNITY, MEANING THE COMMUNITY IN NEW HAMPSHIRE.

AND I THINK THAT'S SIGNIFICANT BECAUSE HIS HONOR BACK IN NEW HAMPSHIRE WAS ABLE TO SEE ALL OF THE PEOPLE, SEE HIS FAMILY, HEAR FROM THE PROBATION OFFICER, ASSESS THE SITUATION WITH HIS WIFE, AND BASED ON THAT THE COURT DID NOT BELIEVE THAT HE POSED A THREAT TO THAT LOCAL COMMUNITY.

BUT THE ISSUE REMAINED IN THAT HEARING, AND THE REASON THAT HE WAS ULTIMATELY DETAINED, ACCORDING TO THE ORDER, WAS THAT IT WAS UNCLEAR WHAT HIS SITUATION WOULD BE WHEN HE GOT TO CALIFORNIA -- WHETHER OR NOT HE WOULD POSE A THREAT TO THIS COMMUNITY.

AND THAT WAS MY UNDERSTANDING FROM THE HEARING.

NOW, TURNING TO -- THAT'S WHAT I'D LIKE THE COURT TO NOTE IN THE HEARING.

TURNING TO WHETHER OR NOT HE'S A DANGER RELATING TO THE FOUR -- RELATING TO THE FOUR THREATS, COUNTS ONE THROUGH FOUR. I THINK IT'S IMPORTANT, AND THE COURT CAN COMPARE, WHAT IS REFLECTED ON THE INDICTMENT IN COUNT ONE TO WHAT'S REFLECTED IN THE SUPPORTING AFFIDAVIT OF THE COMPLAINT, WHICH IS ON PAGE 9.

I THINK IT'S IMPORTANT THAT -- IT APPEARS ON THE INDICTMENT THAT HE SIMPLY STATED, "I WILL PERSONALLY SEND YOU BACK TO THE HELL FROM WHERE YOU CAME."

THAT IS TAKEN OUT OF CONTEXT. WHEN YOU LOOK AT WHAT THE FULL CONTEXT IS, IT'S REALLY NOT AN UNCONDITIONAL IMMEDIATE TYPE OF THREAT. WHAT IT DOES SAY IN FULL ACCORDING TO THE AFFIDAVIT IS, "TO CLOSE, IF YOU CALL MY HOUSE AGAIN OR THREATEN ME OR MY FAMILY OR EVER APPEAR NEAR ME OR MY FAMILY, I WILL PERSONALLY SEND YOU BACK."

AND, THEN, THAT'S WHERE THE STATEMENT COMES. I THINK IT'S IMPORTANT NOT TO TAKE IT OUT OF CONTEXT.

I THINK THAT IF THE COURT WENT THROUGH EACH AND EVERY ONE OF THESE STATEMENTS -- FOR EXAMPLE, THE STATEMENT REFLECTED IN COUNT THREE, "KEEP YOUR DOGS AT BAY ... I AM NOW ARMED."

IF THE COURT WERE TO LOOK AT PAGE 14 OF THE AFFIDAVIT, THAT AGAIN IS A STATEMENT TAKEN OUT OF CONTEXT. THE STATEMENT THERE, IF YOU LOOK AT THE WHOLE STATEMENT, WHAT HE'S ARMED WITH IS INFORMATION REGARDING THE COMPANY. HE'S ARMED WITH SECURITY REGIONS IN CLASS I AND II AND INFORMATION ABOUT THE EMPLOYEES OF THE COMPANY. HE'S NOT SAYING HE'S PHYSICALLY ARMED. HE'S NOT SAYING THAT HE'S PHYSICALLY THREATENING THIS PERSON. IT'S AN ARMING OF INFORMATION.

AND I THINK THAT TAKES IT-- I THINK IT'S TAKEN OUT OF CONTEXT WHEN YOU LOOK AT JUST THE LANGUAGE OF COUNT THREE OF THE INDICTMENT.

SO, IT TERMS OF WHETHER OR NOT MR. SUTCLIFFE IS A DANGER, I THINK IT'S IMPORTANT TO NOTE THAT THESE STATEMENTS, WHETHER OR NOT THEY ARE ULTIMATELY CONSTRUED AS THREATS, THAT THEY WERE PUT ON AN INTERNET SITE THAT PEOPLE HAD TO GO TO IN ORDER TO EVEN READ IT. IT'S A CYBER WORLD. IT'S NOT A REAL WORLD. MR. SUTCLIFFE DID NOT THREATEN, DID NOT WALK UP TO ANYONE, DID NOT CALL ANYONE, DID NOT GET IN ANYONE'S FACE AND THREATEN THEM. THIS WAS STUFF THAT WAS SIMPLY BEING POSTED ON THE INTERNET. IT'S A FANTASY WORLD. IT IS NOT A REAL WORLD.

IF YOU LOOK AT HIS BACKGROUND, IF YOU LOOK AT HIS HISTORY, IF YOU LOOK AT HIS CRIMINAL RECORD, APART FROM ONE MISDEMEANOR CONVICTION IN 1997, THERE'S NOTHING ON HIS RECORD FOR 13 YEARS. HE'S NOT A PERSON WHO HAS A HISTORY OF REPEATED VIOLENCE THROUGHOUT HIS LIFE.

AND THAT'S NOT WHO WE HAVE HERE. WE HAVE A PROFESSIONAL, A COMPUTER PERSON HERE WHO WAS VENTING ON HIS COMPUTER. HE WAS NOT POSING, AND CONTINUES NOT TO POSE A REAL THREAT TO ANYONE.

IN FACT, IN THE MIDST OF THESE CONVERSATIONS OR COMMENTS THAT WERE BEING PUT ON THE COMPUTER, MR. SUTCLIFFE HIMSELF GOT SCARED, GOT SCARED OF GLOBAL COMPANY. AND HE REMOVED FROM LOS ANGELES AND TOOK HIMSELF ALL THE WAY ACROSS THE COUNTRY TO NEW HAMPSHIRE TO GET AWAY FROM THEM.

THIS IS WHAT HIS ACTION WAS. HIS ACTION WAS NOT TO GO FIND THEM. HIS ACTION WAS NOT TO GO THREATEN THEM PERSONALLY BUT TO REMOVE HIMSELF FROM THE SITUATION.

I THINK WHEN YOU LOOK AT THE FACT THAT HE WAS MAKING THESE STATEMENTS AS HE WAS LEAVING TO GET AS FAR AWAY FROM THESE PEOPLE AS POSSIBLE, THAT HE IS NOT ACTUALLY POSING A REAL THREAT TO ANYONE. HE'S SIMPLY VENTING AND VOICING HIS FEELING OF BEING UPSET. AND THAT IS VERY DIFFERENT THAN A PHYSICAL THREAT OF VIOLENCE.

AND WHEN YOU LOOK AT THE WHOLE CONTEXT, THAT'S NOT WHAT YOU HAVE HERE. YOU DON'T HAVE PHYSICAL THREAT OF

VIOLENCE. WHAT YOU HAVE IS A THREAT OF DISSEMINATION OF PUBLIC INFORMATION. AND THAT'S IT. SO, I THINK THAT'S IMPORTANT.

NOW, IN TERMS OF WHAT IS DIFFERENT NOW THAN WHAT WAS DIFFERENT WHEN THIS WAS HEARD IN NEW HAMPSHIRE IS THAT I HAVE INFORMATION ABOUT WHAT MR. SUTCLIFFE'S SITUATION WOULD BE IF THE COURT WERE TO RELEASE HIM TO L.A. -- TO LIVE IN L.A.

HE HAS THREE PEOPLE WHO ARE HERE TODAY IN COURT, ATTORNEY LESLIE MC AFFEE, ED HOVER, AND RICHARD WETHERMAN.

MR. MC AFFEE HAS PRACTICED LAW FOR, I BELIEVE, 13 YEARS IN OUR COMMUNITY. HE IS WILLING TO PERSONALLY SIGN AN APPEARANCE BOND ON BEHALF OF MR. SUTCLIFFE. AND HE IS ALSO WILLING TO ALLOW MR. SUTCLIFFE TO LIVE IN HIS HOME.

NOW, HE KNOWS MR. SUTCLIFFE WELL. HE REPRESENTS MR. SUTCLIFFE IN THE CIVIL MATTER THAT IS ALSO, I BELIEVE, PENDING CURRENTLY BETWEEN MR. SUTCLIFFE AND GLOBAL.

AND, SO, HE IS INTIMATELY FAMILIAR WITH WHAT'S BEEN GOING ON BACK AND FORTH. AND I THINK IT'S IMPORTANT TO NOTE THAT HE'S NOT SCARED OF MR. SUTCLIFFE. IN FACT, HE THINKS THAT MR. SUTCLIFFE IS A REASONABLE PERSON. HE DOESN'T THINK HE'S A VIOLENT PERSON. AND HE'S WILLING TO ALLOW HIM INTO HIS OWN HOME TO LIVE WITH HIMSELF, HIS WIFE, AND HIS FAMILY. I THINK THAT SPEAKS VOLUMES BECAUSE HE REALLY KNOWS MR. SUTCLIFFE.

NOW, BACK IN NEW HAMPSHIRE, THE COURT DIDN'T KNOW THAT MR. SUTCLIFFE WOULD HAVE A PLACE TO LIVE HERE, LET ALONE A PLACE WITH AN ATTORNEY, WITH HIS FAMILY, THE PERSON WHO'S WILLING AS AN OFFICER OF THE COURT TO VOUCH FOR MR. SUTCLIFFE AND, EVEN IF THE COURT WANTED HIM TO, TO ACT AS A CUSTODIAN TO MR. SUTCLIFFE.

SO, WE HAVE THAT PERSON. AND HE IS SITTING IN THE BACK ROW.

WE ALSO HAVE TWO PEOPLE WHO ARE PROFESSIONALS IN THE COMPUTER WORLD, WHO ARE WILLING TO TAKE TIME OUT OF THEIR BUSY DAY TO COME DOWN HERE TO SAY, I KNOW STEVEN SUTCLIFFE. I DON'T FIND HIM TO BE DANGEROUS. AND, IN FACT, I'M WILLING TO SIGN APPEARANCE BONDS ON HIS BEHALF.

UNFORTUNATELY, THEY DON'T OWN PROPERTY. BUT I DON'T THINK THE ISSUE REALLY IS A FLIGHT ISSUE HERE. I THINK AN APPEARANCE -- THE FACT THAT THREE PEOPLE FROM OUR COMMUNITY, WELL-RESPECTED PEOPLE, ARE WILLING TO STEP UP TO THE PLATE FOR MR. SUTCLIFFE SPEAKS VOLUMES ABOUT WHETHER OR NOT HE'S ACTUALLY A DANGER TO THIS COMMUNITY.

THAT WAS NOT INFORMATION THAT THE COURT HAD BEFORE.

IF I COULD JUST BRIEFLY RESPOND TO -- I ALSO THINK IT'S IMPORTANT TO NOTE THAT THE EVALUATION HAS CHANGED IN TERMS OF PRETRIAL SERVICES. IT'S CLEAR FROM THE FIRST -- BACK IN NEW HAMPSHIRE -- NOW, WHILE THIS OBVIOUSLY DOES NOT TRUMP THE COURT'S RULING, THEY DID BELIEVE THAT THERE WERE

CONDITIONS THAT COULD BE SET TO ALLOW MR. SUTCLIFFE TO RESIDE IN THE COMMUNITY WHILE THIS CASE WAS PENDING. AND THEY RECOMMENDED RELEASE PENDING CERTAIN CONDITIONS.

ULTIMATELY, THAT WASN'T FOLLOWED. BUT THAT WAS THE RECOMMENDATION INITIALLY.

NOW THE RECOMMENDATION APPEARS TO BE FOR DETENTION. I THINK IF YOU LOOKED DOWN THE FACTORS, I DON'T BELIEVE THE INITIAL -- THE COURT IN NEW HAMPSHIRE FOUND THAT THERE WAS A RISK OF FLIGHT.

I DON'T KNOW IF YOUR HONOR WANTS ME TO ADDRESS THAT ISSUE BECAUSE I DON'T BELIEVE THAT WAS THE BASIS OF THE DETENTION IN THE FIRST PLACE.

BUT LOOKING THROUGH THE REASONS THAT -- THE FACTORS THAT THEY INDICATE RISK OF NON-APPEARANCE:

FOREIGN TRAVEL EXPERIENCE. I THINK THAT -- I DON'T THINK THAT'S A FAIR BASIS. AND I THINK IF IT'S A CONCERN, IF HE HAS A PASSPORT, HE CAN TURN HIS PASSPORT IN.

THE COURT: WELL, I DON'T THINK -- I THINK YOU'RE RIGHT. I DON'T THINK RISK OF FLIGHT WAS A BASIS FOR THE -- WELL, IT WAS THE LACK OF TIES TO CALIFORNIA. IT SEEMS TO HAVE BEEN A DECISION BASED ON DANGER TO THE COMMUNITY. BUT FACTORED INTO THAT WAS THE COURT'S CONCERN THAT THE LACK OF TIES TO CALIFORNIA SEEMED TO SUPPORT THE VIEW THAT THERE MIGHT BE A DANGER HERE.

MS. POTASHNER: YES, YOUR HONOR.

THE COURT: SO, I DON'T THINK I WOULD BE REVISITING THE RISK OF FLIGHT.

MS. POTASHNER: OKAY. AND, THEN, I WILL SKIP THE RISK THAT THEY'RE NOTING.

THE COURT: I'LL LET THE GOVERNMENT ADDRESS THAT IF THEY HAVE A DIFFERENT VIEW.

MS. POTASHNER: SO, DROPPING DOWN TO THE FACTORS THAT INDICATE A DANGER, IN TERMS OF THE PRESENT ALLEGATIONS, I THINK WHEN THE COURT HAS A CHANCE TO LOOK AT THE TRANSCRIPT AND LOOK AT THIS CASE IN ITS ENTIRETY, I DO NOT BELIEVE THAT THE THREATS ARE OF SUCH A NATURE THAT THERE ARE NO CONDITIONS THAT COULD BE IMPOSED TO ALLOW MR. SUTCLIFFE TO BE RELEASED FROM CUSTODY PENDING TRIAL.

I BELIEVE THERE ARE CONDITIONS. AND I CAN SUGGEST TO YOUR HONOR, NUMBER ONE, OBVIOUSLY, A COMPUTER IS NOT A GOOD THING FOR MR. SUTCLIFFE, AND THAT MR. SUTCLIFFE SHOULD BE BARRED FROM USING THE COMPUTER DURING THE PENDENCY OF THIS CASE. I DON'T HAVE A PROBLEM WITH THAT. I THINK THAT'S VERY REASONABLE.

NUMBER TWO, MR. SUTCLIFFE SHOULD, ALTHOUGH I DON'T THINK THERE'S ANY HISTORY OF IT, HE SHOULD NOT BE ALLOWED TO GO ANYWHERE WHERE ANY OF THESE INDIVIDUALS LIVE OR WORK. I THINK THAT'S A REASONABLE CONDITION.

NUMBER THREE, I THINK THAT IF THE COURT WANTED TO IN AN ABUNDANCE OF CAUTION COULD APPOINT MR. MC AFFEE AS A

CUSTODIAN TO HAVE THE AFFIRMATIVE DUTY TO KEEP AN EYE ON MR. SUTCLIFFE AND TO REPORT TO THE COURT IMMEDIATELY IF MR. SUTCLIFFE IS NOT CONFORMING TO ALL THE CONDITIONS OF SUPERVISION.

AND, LASTLY, INTENSIVE SUPERVISION. I THINK THAT THAT WOULD BE A REASONABLE CONDITION IN THIS CASE.

I THINK I'VE ADDRESSED WHY I DON'T THINK THAT THE PRESENT ALLEGATIONS SUPPORT DISTENTION IN THIS CASE.

IN TERMS OF THE PRIOR CRIMINAL HISTORY, IF YOU TAKE A MINUTE TO LOOK AT WHAT THEY'RE TALKING ABOUT, IT'S ANCIENT HISTORY. HE'S A 40-YEAR MAN, AND THERE IS REFERENCE TO JUVENILE HISTORY THAT OCCURRED IN 1978.

I THINK THAT ANYTHING THAT'S AT ALL SIGNIFICANT -- I MEAN, BASICALLY, THERE'S SOME THEFT, THERE'S SOME DVD STUFF ON HERE. THERE'S SOMETHING IN 1987 THAT HAS TO DO WITH VIOLENCE. IT'S UNCLEAR. I DON'T KNOW WHAT SPLIT SENTENCE MEANS IN MASSACHUSETTS. BUT NO MATTER WHAT, THAT'S A 1985 CONVICTION. AND IT'S NOW 2002. THAT'S -- WHAT IS THAT? -- 17 YEARS OLD.

THE ONLY THING HE HAS ON HIS RECORD CURRENTLY -- I MEAN, THAT'S, I BELIEVE, AT ALL RELEVANT IS SOMETHING FROM 1997, WHICH IS A DISTURBING THE PEACE. I DON'T THINK THAT A MISDEMEANOR DISTURBING THE PEACE SHOULD BE A BASIS FOR DETAINING SOMEBODY IN CUSTODY PENDING THIS TRIAL.

IN TERMS OF THE TEMPORARY DOMESTIC VIOLENCE ORDER,

I'VE ADDRESSED IT ALREADY. AND WHAT WAS SAID IN COURT, I HAVE NOT HAD THE OPPORTUNITY TO SPEAK TO HIS WIFE. BUT WHAT I DO KNOW IS THAT SHE'S BACK IN NEW HAMPSHIRE. IF THE COURT WANTS MR. SUTCLIFFE TO REMAIN IN CALIFORNIA, HE WILL REMAIN IN CALIFORNIA DURING THE ENTIRE PENDENCY OF THIS TRIAL. SO, I DON'T THINK THAT THERE'S A REAL ISSUE OF DOMESTIC VIOLENCE BECAUSE SHE IS NOT HERE AND IS NOT INTENDING TO COME HERE.

THAT BEING SAID, I DO HAVE SUGGESTIONS FOR THE COURT IN TERMS OF ALTERNATIVES. I'VE SPOKEN TO MR. SUTCLIFFE'S BROTHER WHO DOES LIVE BACK IN NEW HAMPSHIRE, AND HE ALSO TELLS ME THAT HE'S WILLING TO SIGN AN APPEARANCE BOND AND HAVE MR. SUTCLIFFE LIVE WITH HIM BACK IN NEW HAMPSHIRE. THAT WOULD REQUIRE MR. SUTCLIFFE TO COME BACK TO CALIFORNIA FOR COURT APPEARANCES, WHICH HE DOES NOT HAVE THE FUNDS TO DO. HOWEVER, I KNOW THAT THERE IS AUTHORITY THAT THE MARSHAL'S DEPARTMENT COULD PAY FOR TRANSPORTATION IF THE COURT ORDERED THAT.

SO, ONE ALTERNATIVE IS TO PUT MR. SUTCLIFFE BACK IN HIS HOMETOWN WITH HIS EXTENDED FAMILY AROUND HIM, LIVING AT HIS BROTHER'S HOUSE.

IF THE COURT'S NOT COMFORTABLE WITH THAT, THEN, THE OTHER ALTERNATIVE IS TO PUT MR. SUTCLIFFE IN TO THE CUSTODY OF ATTORNEY LESLIE MC AFFEE.

I THINK EITHER SITUATION, COUPLED WITH THE OTHER TERMS THAT I'VE SUGGESTED, WOULD CREATE A SITUATION WHERE MR.

SUTCLIFFE COULD SAFELY BE RELEASED TO THE COMMUNITY TO FIGHT THIS CASE WHILE NOT INCARCERATED.

MS. DUARTE: THAT'S A LOT TO ANSWER, YOUR HONOR.

THE COURT: YOU CAN FOCUS ON --

MS. DUARTE: YES. DOES THE COURT HAVE ANY PARTICULAR FOCUS? AND THEN I CAN --

THE COURT: WELL, IT'S APPARENT TO ME JUST FROM LOOKING AT WHAT YOU HAVE THERE IN THE TRANSCRIPT AND THE NUMBER OF CITATIONS THAT THERE ARE, THAT THIS IS NOT A CASE WHERE YOU HAD SORT OF A CURSORY PROCEEDING IN THE RULE 40 DISTRICT AND, THEN, YOU KNOW, REALLY IT WAS LEFT TO THIS COURT. I MEAN, THERE WAS OBVIOUSLY -- OBVIOUSLY A FAIRLY HARD-FOUGHT PROBABLE CAUSE DETERMINATION AND THEN THE DETENTION HEARING ON TOP OF THAT.

SO, FOR PURPOSES OF ASSESSING THE INFORMATION ABOUT THE SCOPE OF THE THREATS AND THE INTERPRETATION AND WHAT, IF ANYTHING, THE DOMESTIC VIOLENCE IMPACT WOULD BE IN THE PRIOR RECORD, ALL THAT -- YOU KNOW, I WOULD DEFER TO THE MAGISTRATE JUDGE THERE.

BUT IT DOES SEEM THAT JUST FROM THE RULING -- THAT'S ALL I'VE SEEN THUS FAR -- THAT THERE WAS REALLY A DEARTH OF INFORMATION ABOUT THE DEFENDANT'S CALIFORNIA SITUATION. AND I CAN CERTAINLY UNDERSTAND IF I WERE MAKING THAT DETERMINATION ABOUT WHAT WAS GOING TO HAPPEN TO SOMEONE IN NEW HAMPSHIRE, I WOULD ERR ON THE SIDE OF BEING CONCERNED

ABOUT POTENTIAL DANGER, PARTICULARLY, IN LIGHT OF THIS COMPLAINT. THE COMPLAINT IS VERY TROUBLING. AND THESE KINDS OF ALLEGATIONS ARE VERY TROUBLING, AND THEY PRESENT A REAL DANGER. EVEN IF IT'S NOT ACTUALLY GOING UP TO SOMEONE PHYSICALLY AND MAKING A THREAT, THERE'S A REAL CONCERN OF DANGER.

I'M SIGNIFICANTLY INFLUENCED, I THINK, BY THE FACT THAT THERE'S SOMEONE HERE WHO IS PREPARED TO TAKE MR. SUTCLIFFE INTO HIS HOME. A RESPONSIBLE MEMBER OF THE COMMUNITY. THAT SEEMS TO ME TO BE A PRETTY IMPORTANT FACTOR. AND IF I WERE TO SAY WHAT IT IS THAT ANYTHING THAT COUNSEL HAS SAID THAT COULD PERSUADE ME TO REVISIT IT, IT WOULD BE THE POSSIBILITY OF SETTING CONDITIONS THAT INCLUDE HAVING MR. MC AFFEE ACT AS A THIRD-PARTY CUSTODIAN COUPLED WITH OTHER FORMS OF MONITORING.

SO, THAT COULD FOCUS YOU. IN TERMS OF REEVALUATING WHAT WAS SAID AT THE HEARING, I TAKE IT THAT THAT WAS DONE VERY CAREFULLY AND VERY EXTENSIVELY THERE.

MS. DUARTE: RIGHT. AND IF I MAY, YOUR HONOR.

THE COURT: YES.

MS. DUARTE: I CAN JUST SPEAK TO THAT BRIEFLY, AND THEN YOU CAN TELL ME IF THERE'S ADDITIONAL QUESTIONS.

THE COURT: MM-HMM.

MS. DUARTE: I TEND TO BE BRIEF, BUT.

ADDRESSING THE COURT'S CONCERN IN A MINUTE. BUT

JUST ABOUT THE HEARING, I JUST WANT TO POINT OUT THAT THE HEARING, AS THE COURT NOTED, WAS EXTENSIVE AND WAS VERY -- AND I DON'T THINK MS. POTASHNER DISAGREES WITH THIS -- WAS VERY WELL FLUSHED OUT. I MEAN, ALL THE BAD THINGS ABOUT THE GOVERNMENT'S CASE IN TERMS OF THE PARODIES -- WHICH, BY THE WAY, WERE ON ALL THE PAGES EXCEPT FOR THE MAIN ONE THAT THE SPECIAL AGENT TESTIFIED ABOUT AND THE ONE WE PUT IN THE COMPLAINT BECAUSE TO US IT WAS SIGNIFICANT THAT THAT WAS NOT PARODY. MR. SUTCLIFFE WAS OBVIOUSLY VERY CAREFUL WITH WHAT HE PUT "PARODY" ON AND WHAT HE DIDN'T. SO, THAT'S SIGNIFICANT THAT IT WASN'T PARODY.

BUT THERE WAS NOTHING HIDDEN. EVERYTHING WAS VERY WELL FLUSHED OUT. AND ALL THE WEAKNESSES IN THE GOVERNMENT'S CASE WERE ABUNDANTLY CLEAR.

PLUS -- AND I DON'T UNDERSTAND THIS, YOUR HONOR, SO I'M NOT GOING TO TRY TO JUSTIFY IT BECAUSE FRANKLY I DON'T UNDERSTAND IT -- PRETRIAL THERE DID RECOMMEND RELEASE ON CONDITIONS. AND THE PROBATION OFFICER TOOK THE STAND ON BEHALF OF DEFENSE -- ALTHOUGH IN A MINUTE I WOULD LIKE TO PROFFER ADDITIONAL TESTIMONY THAT I THINK IS EXTREMELY RELEVANT TO ADD TO WHAT COUNSEL PROFFERED THAT CAME OUT OF THAT.

BUT THE PROBATION OFFICER DID TAKE THE STAND AND BASICALLY SAID AS PART OF A LOT OF OTHER TESTIMONY, WELL, SHE INDICATED THAT THE THREAT TO KILL WAS IN A JOKING TONE. AND,

OF COURSE, THIS THREAT IS ANCILLARY. THIS IS NOT ONE OF THE THREATS ALLEGED IN THE COMPLAINT.

SO, I DO WANT TO POINT OUT THAT THE FACT THAT IT WAS ALL FLUSHED OUT, PRETRIAL RECOMMENDED RELEASE. PROBATION TAKES THE STAND ON DEFENSE'S SIDE. AND THE JUDGE STILL HELD MR. SUTCLIFFE OVER AND DETAINED HIM. I KNOW IT WAS WITHOUT PREJUDICE.

BUT I'M SAYING THAT THAT'S ACTUALLY -- I'M GOING TO PRESENT THAT, YOUR HONOR, ALL THOSE THINGS, AS A POINT IN THE GOVERNMENT'S -- POINTS IN THE GOVERNMENT'S FAVOR, IN FAVOR OF THE GOVERNMENT'S ARGUMENT FOR DETENTION. BECAUSE DESPITE THE FACT THAT ALL THESE THINGS OCCURRED, AS MS. POTASHNER DESCRIBES PRETTY MUCH ACCURATELY -- WE BOTH JUST GOT THE TRANSCRIPT SO IT'S HARD FOR BOTH OF US. BUT ALL THESE THINGS DID OCCUR, AND HE WAS STILL HELD OVER.

SO, THAT SAID, LET ME ADDRESS THE COURT'S PRIMARY CONCERN HERE.

MY READING OF THE TRANSCRIPT, AND I COULD FIND THE CITE IF WE NEED IT, BUT MS. POTASHNER PROBABLY KNOWS IT BETTER THAN I DO, I THINK THAT TOWARD THE END IT WAS BROUGHT UP BY THE DEFENSE ATTORNEY -- AND I CAN LOOK THIS UP IF I NEED TO -- THAT MR. -- MC AFFEE?

MS. POTASHNER: YES.

MS. DUARTE: -- MR. MC AFFEE HERE IN CALIFORNIA, THE ATTORNEY, WAS AVAILABLE IF THE COURT WOULD CONSIDER

LETTING MR. SUTCLIFFE LIVE WITH MR. MC AFFEE.

AND ONE OF THE THINGS THE COURT IN NEW HAMPSHIRE INSINUATED WAS THAT I DON'T HAVE ENOUGH INFORMATION. THAT'S ACCURATE. HOWEVER, THAT POINT WAS BROUGHT UP. AND AT THE TIME IT WAS PROFFERED THAT MR. MC AFFEE WAS MR. SUTCLIFFE'S ATTORNEY, AND WOULD BE REPRESENTING HIM IN THE CASE OUT HERE.

WELL, YOUR HONOR, MR. MC AFFEE MAY BE HERE IN THE COURTROOM, AND HE MAY WANT TO ADDRESS THIS, I DON'T KNOW, BUT HE'S CERTAINLY NOT REPRESENTING HIM IN THE CRIMINAL CASE HERE. I DON'T KNOW WHY. I DO KNOW THAT APPARENTLY MR. MC AFFEE TOLD THE PRETRIAL SERVICES OFFICER -- IF I COULD HAVE JUST A MOMENT.

(PAUSE IN PROCEEDINGS.)

MS. DUARTE: -- EARLY ON IN THE REPORT THAT HE WAS NOT WILLING TO POST PROPERTY OR A CASH DEPOSIT IN DEFENDANT'S FAVOR. ALTHOUGH HE DID SAY APPARENTLY THAT HE WAS WILLING TO HAVE HIM STAY WITH HIM, THAT IS ACTUALLY NOT IN THE PRETRIAL SERVICES REPORT.

THE COURT: RIGHT.

MS. DUARTE: SO, IN THE EVENT THAT THE COURT IS EVEN INCLINED AFTER ARGUMENT TO CONSIDER THAT, I WOULD, OF COURSE, ASK THAT THIS REQUEST BE EVALUATED BY PRETRIAL SERVICES BEFORE THE COURT ACTUALLY ORDERS IT.

BUT LET ME PROCEED, YOUR HONOR. SO, THAT FACT IS NOT IN THE PRETRIAL SERVICES REPORT. THE OTHER TWO SURETIES

PROPOSED BY DEFENDANT RICHARD WETHERMAN TOLD THE PRETRIAL OFFICER THAT HE FELT THE COURT WAS COMMITTING EXTORTION BY DEMANDING BAIL. THAT'S AN INTERESTING PHILOSOPHY. I DON'T REALLY NEED TO COMMENT ON IT. BUT I SUGGEST TO THE COURT THAT PERHAPS SOMEONE WHO FEELS THAT WAY IS POSSIBLY NOT THE BEST PERSON TO VOUCH FOR THE DEFENDANT'S RESPECT FOR THIS COURT AND THIS COURT'S RULES TO THIS COURT.

AND, ALSO, WE HAVE MR. OBER, WHO AT THE TIME THE PRETRIAL REPORT WAS WRITTEN WASN'T REALLY CLEAR WHAT HE WAS GOING TO DO BUT, APPARENTLY, HAS DECIDED THAT HE WANTS TO SPEAK IN FAVOR OF MR. SUTCLIFFE.

SO, THOSE ARE THE THREE PEOPLE THAT ARE HERE THAT WE'RE TALKING ABOUT.

AND I WOULD ALSO NOTE THAT APPARENTLY, ALTHOUGH THIS WOULD NEED TO BE FLUSHED OUT, MR. MC AFFEE TOLD THE PRETRIAL SERVICES OFFICER THAT HE HAD EMPLOYED DEFENDANT AS AN INDEPENDENT CONTRACTOR WITH COMPUTER NEEDS, WHICH, OF COURSE, I DON'T KNOW WHETHER OR NOT THAT'S ACCURATE. IT MAY WELL BE. BUT THERE'S NO MENTION IN HERE OF THE FACT THAT MR. MC AFFEE IS OR IS NOT REPRESENTING MR. SUTCLIFFE IN CRIMINAL OR CIVIL MATTERS.

AND THE COURT WILL NOTE FROM THE COMPLAINT, IF THE COURT DOESN'T REMEMBER THIS, THAT IT IS MR. MC AFFEE'S LAW OFFICES ADDRESS IN BURBANK THAT WAS ACTUALLY USED BY MR. SUTCLIFFE TO REGISTER NOT ONLY THE EVILGX.COM WEBSITE, BUT AT

LEAST ONE, IF I'M RIGHT, OF THE EMAIL ACCOUNTS THAT WAS USED TO DISSEMINATE THIS INFORMATION.

AND THAT LEAVES ME TO ONE MORE POINT THAT I WANT TO MAKE -- SO MUCH WAS SAID -- ABOUT THE PASSIVE NATURE OF THESE THREATS. YOUR HONOR, AS WAS STATED IN THE COMPLAINT, AND THIS WAS NEVER CHALLENGED AT THE HEARING -- UNLESS MS. POTASHNER WANTS TO CORRECT ME. I DON'T BELIEVE IT WAS -- THE EMAIL THAT WAS SENT OUT BY MR. SUTCLIFFE, ONE OF THE EMAILS WHICH ENABLED THE GOVERNMENT TO FIND OUT WHERE HE WAS, WAS SENT OUT UNDER THE NAME OF GARY WINNICK, WHO IS CHAIRMAN OF THE BOARD OF GLOBAL CROSSING. AND IT WAS SENT UNDER HIS NAME TO GLOBAL CROSSING EMPLOYEES.

AND IT SAID, TAKE A LOOK AT THIS, LOOK AT MY SITE. SOMETHING ALONG THOSE LINES. AND THE ONLY THING IN THE EMAIL WAS A HYPERTECH LINK TO WWW.EVILGX.COM., SOLICITING THROUGH THE NAME OF THE CHAIRMAN OF THE BOARD AN EMAIL SENT BY MR. SUTCLIFFE SOLICITING THE EMPLOYEES OF THE COMPANY, HEY, COME TO THIS WEBSITE.

HE ALSO PICKETED WITH THE WEBSITE ON A PICKET SIGN IN FRONT OF THE COMPANY FOR A MONTH.

SO, IT MAY BE PASSIVE, YOUR HONOR, BUT HE'S ACTIVELY ENCOURAGING EVERYBODY INVOLVED AND EVERYBODY WHOSE INFORMATION, WHOSE HOME ADDRESS, WHO'S LINKED TO A YAHOO MAP THAT SHOWS THE WAY TO THEIR HOUSE AND, IN ONE CASE, THEIR PICTURE IS ON THIS WEBSITE, HE'S ENCOURAGING THEM TO CHECK IT

OUT.

SO, THE NATURE MAY BE PASSIVE, BUT THE INTERSTATE TRANSMISSION IS THERE AS WELL AS THE FACT THAT THIS WAS NOT MEANT TO BE SOMETHING THAT JUST SAT ON THE WEBSITE. IT WAS MEANT TO BE LOOKED AT. IT WAS MEANT TO BE READ.

SO, I WANTED TO SAY THAT ABOUT THAT.

MAY I JUST CHECK MY NOTES FOR JUST A MINUTE?

THE COURT: MM-HMM.

MS. DUARTE: I THINK I'M ABOUT DONE.

(PAUSE IN PROCEEDINGS.)

MS. DUARTE: I JUST WANT TO MENTION, YOUR HONOR, AND THIS IS IN THE COMPLAINT, AND IT WAS NOT CHALLENGED AS FAR AS I KNOW, WAS THAT MR. SUTCLIFFE, ALTHOUGH HE MAY HAVE A MINIMAL -- ALTHOUGH I SUBMIT IT'S ALARMING, BUT A MINIMAL CRIMINAL HISTORY IN THAT MOST OF HIS INFRACTIONS AND MISDEMEANORS ARE MINOR THINGS.

BUT IT DOES SHOW AN OPEN FLOUTING OF THE LAW. IN ADDITION, IT'S NOT JUST THESE '90 AND '97 MISDEMEANORS THAT ARE FAIRLY RECENT, BUT IT'S ALSO HIS ACTIVITY AS ALLEGED IN THE COMPLAINT IN ACTUALLY APPROACHING THE LAPD OFFICERS AND VERBALLY TANGLING WITH THEM, WHICH RESULTED IN YET ANOTHER ARREST. AND THESE WERE THE SAME OFFICERS THAT HE HAD UP ON HIS WEBSITE. AND HE WAS HARASSING --

THE COURT: THIS IS THE 1997 ARREST?

MS. DUARTE: YES.

THE COURT: YES.

MS. DUARTE: SO, YOUR HONOR, WHAT WE SEE IS AN ESCALATION. THERE MAY BE A PASSIVE THREAT ON THE WEBSITE AT FIRST, JUST AS THERE WAS IN THE CASE OF THE LAPD OFFICERS. BUT THEN WE ESCALATE TO AGGRESSIVE BEHAVIOR.

SO, I SUBMIT TO YOU THAT IT IS NOT AT ALL A LONG SHOT TO SAY THAT THIS KIND OF BEHAVIOR, ALTHOUGH PASSIVE, MAY AGGRESS. LOOK AT THE DOMESTIC VIOLENCE SITUATION THAT APPARENTLY IS GOING ON. I KNOW MS. POTASHNER TOLD THE PRETRIAL SERVICES OFFICER -- AND SHE PROBABLY GOT THE INFORMATION FROM HER CLIENT. SO, THAT'S QUITE REASONABLE.

MS. POTASHNER: WELL, IF I CAN INTERRUPT BEFORE YOU CHARACTERIZE THAT. THAT'S A MISSTATEMENT. I SAID I WASN'T UNCLEAR ABOUT WHAT THIS CURRENT SITUATION WAS, BUT I BELIEVE IT WAS IN THE PROCESS OF BEING RESCINDED.

MS. DUARTE: OKAY. AND THAT TURNS OUT THAT'S NOT ACCURATE. JUST TO LET THE COURT KNOW AND THAT'S IN THE PRETRIAL SERVICES REPORT. AND, AGAIN, I'M SURE IT WAS NOT INTENTIONAL, AND I DIDN'T MEAN TO SAY THAT IT WAS.

BUT ALSO, YOUR HONOR, I WANT TO PROFFER THE FOLLOWING FACTS IN ADDITION TO THE COMPLAINT AND THE INDICTMENT VERY BRIEFLY. ONLY THAT AT THE TIME THAT MR. SUTCLIFFE WAS ARRESTED, HE INDICATED TO THE ARRESTING OFFICERS -- LET'S SEE IF I CAN GET IT RIGHT HERE -- HE DID NOT RECOGNIZE THE AUTHORITY OF THE MANCHESTER POLICE. HE DID

NOT RECOGNIZE THE AUTHORITY OF THE FBI. AT HIS INITIAL APPEARANCE BEFORE THIS COURT HE INDICATED THAT HE DID NOT RECOGNIZE THE COURT'S JURISDICTION, AND HE WOULD CHALLENGE SUBJECT MATTER JURISDICTION.

AND EVEN THOUGH THE COURT HAS DECIDED OR HAS INDICATED IT'S LEANING TOWARD FLIGHT RISK, SUBMITTING ON THE NEW HAMPSHIRE COURT, ACTUALLY THE GOVERNMENT IS ARGUING, AND WILL CONTINUE TO ARGUE, ALTHOUGH I'LL SUBMIT, FLIGHT RISK IN THIS CASE AS WELL FOR THE SAME REASONS PRETRIAL SERVICES FOUND, FOR THE SAME REASONS WE ARGUED BEFORE, AND FOR THE SAME REASONS, PLUS, THIS ADDITIONAL INFORMATION THAT I ARGUE NOW, IN THAT DEFENDANT DOES NOT HAVE TIES.

HE DOES NOT RECOGNIZE THE AUTHORITY. HE HAS A LONG HISTORY OF NOT RECOGNIZING THE AUTHORITY OF LAW ENFORCEMENT. HE DOES NOT RECOGNIZE THE AUTHORITY OF THE FEDERAL GOVERNMENT OR, QUITE PROBABLY, THIS COURT. HE HAS FAILURES TO APPEAR IN HIS PAST. THE BEHAVIOR HAS ESCALATED. HE HAS -- THERE'S JUST TOO MANY THINGS OUT THERE, YOUR HONOR.

AND THE THREE SURETIES, I'M SURE THEY'RE FINE PEOPLE. I'M SURE THEY'RE HERE TODAY TO REPRESENT THEIR FRIEND. BUT, YOUR HONOR, THEIR NAMES AND HOME ADDRESSES AND PICTURES AND PICTURES OF THEIR KIDS AND LINKS TO MAPS TO THEIR HOUSE ARE NOT ON MR. SUTCLIFFE'S WEBSITE. IT'S THE PEOPLE THAT AREN'T HERE THAT ARE SCARED OF HIM, THAT ARE LIVING RIGHT AROUND HERE THAT ARE ON HIS WEBSITE.

AND AS FAR AS I KNOW, AND SHE CAN CORRECT ME IF I'M WRONG, IT DID NOT TAKE PARODY UNDER THOSE THREATS ON THE WEBSITE WHEN IT WENT TO THOSE PEOPLE IN CALIFORNIA RECENTLY. AND THOSE ARE THE RECENT THREATS THAT ARE CHARGED.

SO, YOUR HONOR, I'LL ANSWER ANY QUESTIONS. AND I'M SORRY TO TAKE SO LONG, BUT I'LL SUBMIT IT ON THAT.

THE COURT: WELL, LET ME JUST ASK. THE POINT ABOUT MR. MC AFFEE'S ADDRESS BEING USED TO REGISTER THE WEBSITES, THAT'S MR. MC AFFEE'S LAW OFFICE ADDRESS?

MS. DUARTE: YES, YOUR HONOR.

THE COURT: OKAY. AND OTHER THAN THAT, DOES THE GOVERNMENT HAVE ANY INFORMATION ABOUT MR. MC AFFEE'S INVOLVEMENT IN ANY OF THE ACTIVITIES THAT'S ALLEGED IN THE COMPLAINT?

MS. DUARTE: NO, YOUR HONOR. WE DO NOT HAVE ANY INFORMATION. OF COURSE, IT'S VERY DIFFICULT FOR US TO GET INFORMATION BECAUSE WE OBVIOUSLY DON'T LOOK AT ATTORNEY-CLIENT PRIVILEGE MATERIALS. AND WE HAVE NOT LOOKED AT ANY THAT HAVE PRESENTED THEMSELVES IN THIS CASE, ALTHOUGH THERE HAVE BEEN CERTAIN ONES THAT HAVE BEEN NOTED AND LEFT ALONE.

I'M NOT INSINUATING FOR PURPOSES OF THE HEARING TODAY BY ANY MEANS THAT MR. MC AFFEE IS INVOLVED IN ANY CRIMINAL ACTIVITY. THAT IS ACCURATE. I DO NOT HAVE ANY INFORMATION, ANY ADDITIONAL INFORMATION ON HIS INVOLVEMENT.

MY ONLY POINT TO THE COURT, AND I PERHAPS COULD HAVE MADE IT BETTER, SO I DIDN'T MEAN TO MAKE ANY IMPROPER INSINUATIONS. MY ONLY POINT TO THE COURT IS THAT WE DON'T REALLY KNOW A LOT ABOUT WHO THIS GENTLEMAN IS AND WHAT IT IS TO MR. SUTCLIFFE, HIS BELIEF SYSTEMS. HE'S HIS LAWYER. MAYBE. CERTAINLY CIVIL. POSSIBLY CRIMINAL. HE EMPLOYED HIM WE JUST LEARNED. BUT HE EMPLOYED HIM AT SOME TIME. HE WON'T PUT MONEY OR PROPERTY. IT DOESN'T SAY HE DOESN'T HAVE ANY. BECAUSE HE WON'T. SO, WE WOULD NEED TO FLUSH THAT OUT.

AND HE MUST KNOW HE'S IN THE COMPLAINT. SO, I JUST AM UNCERTAIN OF THE STATUS OF ALL THIS. AND I'M POINTING OUT TO THE COURT THE UNCERTAINTY, AND I'M NOT DOING ANYTHING ELSE.

THE COURT: OKAY.

MS. POTASHNER: IN RESPONSE, I THINK IT'S PRETTY CLEAR THAT MR. MC AFFEE IS NOT REPRESENTING MR. SUTCLIFFE IN HIS CRIMINAL OFFENSE, BECAUSE I AM.

THE COURT: WHAT -- WHAT --

MS. POTASHNER: HE'S A CIVIL LAWYER.

THE COURT: WHAT IS THE STATUS OF CIVIL LITIGATION? WHAT'S THAT ABOUT?

MS. POTASHNER: PERHAPS, THE COURT WANTS TO HEAR FROM MR. MC AFFEE BECAUSE I REALLY COULDN'T ANSWER THAT QUESTION WELL.

THE COURT: OKAY.

MS. POTASHNER: MR. MC AFFEE.

THE COURT: ACTUALLY, MR. MC AFFEE, WHY DON'T YOU WAIT JUST A SECOND AND LET ME JUST -- THANK YOU. LET ME JUST LET MS. PRETRIAL SERVICES FINISH WHAT OTHER RESPONSES YOU WANT TO MAKE.

MS. POTASHNER: OKAY. SO, IN TERMS OF MR. -- WHAT I WOULD SAY ABOUT MR. MC AFFEE IS THAT HIS ADDRESS IS ON WEBSITE AS HIS LEGAL COUNSEL, AND I DON'T THINK THERE'S ANYTHING IMPROPER ABOUT THAT. HE REPRESENTS MR. SUTCLIFFE CIVILLY. SO, I DON'T THINK THERE'S ANYTHING IMPROPER.

AND AS THE GOVERNMENT HAS SAID, I DON'T THINK THERE'S ANY -- THEY'RE INTENDING TO INSINUATE THAT HE'S DOING SOMETHING IMPROPERLY. I DON'T RECALL WHAT EXACTLY WAS SAID ABOUT HIM IN NEW HAMPSHIRE IN TERMS OF WHETHER HE COULD ACT AS A SURETY. I DO NOT BELIEVE THAT IT WAS BROUGHT UP THAT HE COULD -- THAT MR. SUTCLIFFE COULD LIVE AT HIS HOME, AND THAT HE WOULD BE A CUSTODIAN TO MR. SUTCLIFFE. I DO NOT BELIEVE THAT WAS BROUGHT UP.

IN ANY EVENT, I AM QUITE SURE THAT HE WAS NOT PRESENT BEFORE THE COURT IN NEW HAMPSHIRE TO ADDRESS THE COURT AND TO EXPLAIN HIS SITUATION AND HIS OWN HISTORY AND WHY HE WOULD BE A REASONABLE THIRD-PARTY SURETY. SO, I DON'T THINK THE COURT HAD SUFFICIENT INFORMATION.

I THINK IT'S QUITE CLEAR, FROM BOTH THE TRANSCRIPT AND THE ORDER, THAT THE COURT WAS NOT SAYING THAT THEY'RE

ASSUMING THAT, YOU KNOW, IT'S THE WORST CASE SCENARIO FOR MR. SUTCLIFFE IN CALIFORNIA, BUT THEY'RE JUST SORT OF LEAVING IT OPEN BY LEAVING IT WITHOUT PREJUDICE.

I THINK THAT THERE WAS A TRUE INQUIRY AS TO WHAT THE SITUATION WOULD BE IN CALIFORNIA, AND THEY DID NOT HAVE FULL INFORMATION. AND THEY CERTAINLY DID NOT HAVE FULL INFORMATION ABOUT MR. MC AFFEE.

IN TERMS OF -- THE OTHER THING THAT I WANTED TO POINT OUT THAT I THINK IS SIGNIFICANT IS AFTER THIS WHOLE CASE WAS FLUSHED OUT IN FRONT OF A COURT IN NEW HAMPSHIRE, THE ALLEGATIONS REGARDING SOCIAL SECURITY NUMBERS BEING PUBLISHED, NAMES BEING PUBLISHED, ADDRESSES BEING PUBLISHED, THAT WAS ALL THROWN OUT OF COURT. IT WAS FOUND THAT THERE WAS NO PROBABLE CAUSE TO HOLD HIM TO ANSWER FOR A CRIME IN RELATION TO THAT. HE WAS MERELY PUBLISHING ON THE INTERNET INFORMATION THAT HE HAD WITHOUT ANY SORT OF CRIMINAL INTENT ASSOCIATED TO IT. AND THAT WAS ADDRESSED IN THE COURT'S CLOSING REMARKS AND IN THE FINAL ORDER DISMISSING THAT COUNT.

UNFORTUNATELY, SIMULTANEOUSLY OR AFTERWARDS, I'M NOT QUITE SURE OF THE ORDER, IT WAS PRESENTED TO A GRAND JURY IN CALIFORNIA. AND, NOW, HE'S INDICTED ON WHAT HAS ALREADY BEEN DISMISSED.

BUT I THINK IT IS SIGNIFICANT TO KNOW THAT A COURT LISTENED TO THE EVIDENCE IN RELATION TO THAT WHOLE COUNT AND WAS GOING ON WITH THE SOCIAL SECURITY NUMBERS, THE NAMES AND

ADDRESSES AND DISMISSED IT. SO, I THINK THE COURT SHOULD TAKE THAT INTO ACCOUNT.

AND IN TERMS OF MR. SUTCLIFFE NOT REPRESENTING -- NOT RECOGNIZING AUTHORITY, I THINK WE'VE ALL HAD EXPERIENCES IN THIS COURTROOM WITH PEOPLE WHO FLOUT THE LAW. THEY HAVE LONG CRIMINAL HISTORIES. THEY HAVE REPEATED ARRESTS, REPEATED CONTACTS WITH LAW ENFORCEMENT, REPEATED DISTURBING THE PEACES, REPEATING 148S, REPEATED ASSAULTS.

HE DOESN'T HAVE THAT ON HIS RECORD. HE'S GOT ONE THING ON HIS RECORD IN THE LAST 13 YEARS. AND FROM WHAT I UNDERSTAND, AND, AGAIN, I HAVE NOT LOOKED AT THE RECORD, BUT I UNDERSTAND THAT THIS DISTURBING THE PEACE WAS EVEN REDUCED TO AN INFRACTION. IT'S NOT EVEN A MISDEMEANOR LIKE I THOUGHT IT'S SIMPLY AN INFRACTION. AND THAT MAKES SENSE WHEN YOU LOOK AT WHAT THE SENTENCE WAS, WHICH WAS SIMPLY A FINE.

AND MY PRIOR EXPERIENCE TELLS ME THAT IF IT'S A MISDEMEANOR, A PERSON GETS PROBATION OF SOME SORT. AS AN INFRACTION, THEY DO NOT. SO, I THINK THAT THAT'S SIGNIFICANT, THAT THE ONLY THING THAT HE'S HAD SINCE 1989 IS MERELY ONE INFRACTION. THIS IS A PERSON WHO IS NOT GOING TO FLOUT THE LAW. THIS IS A PERSON WHO'S NOT GOING TO BE, YOU KNOW, DOING ANYTHING VIOLENT. IF HE WAS GOING TO, IF HE HAD THOSE EXTREME THOUGHTS, IF HE HAD THE THOUGHTS THAT HE COULD DO WHATEVER HE WANTED TO DO PHYSICALLY, WE'D SEE A MUCH LONGER RAP SHEET. SO, I REALLY DO NOT THINK THAT HE'S POSING

THAT TYPE OF DANGER.

YES, HE DID SAY THAT HE -- IN THE INITIAL APPEARANCE THAT HE QUESTIONED THE JURISDICTION OF THIS COURT, I THINK THAT'S WITHIN HIS RIGHTS. I THINK IT'S WITHIN HIS RIGHTS TO LOOK AT PERSONAL JURISDICTION AND SUBJECT MATTER JURISDICTION TO SEE IF THIS COURT HAS JURISDICTION. I DON'T THINK THAT'S FLOUTING THE LAW.

THE COURT: YES. HE'S CERTAINLY ENTITLED TO HIS VIEWS.

MS. POTASHNER: NOW, IF THE COURT COULD HEAR FROM MR. MC AFFEE, HE COULD EXPLAIN WHAT THE SITUATION WOULD BE.

MS. DUARTE: YOUR HONOR --

THE COURT: YES? COUNSEL.

MS. DUARTE: IF MR. MC AFFEE IS GOING TO BE HEARD FROM, I WOULD BE ASK THAT HE SUBJECT TO CROSS-EXAMINATION UNLESS THE COURT IS JUST GOING TO CONDUCT THE LIMITED INQUIRY ON THE CIVIL MATTER.

THE COURT: WELL, I WAS GOING TO ALSO ASK HIM ABOUT THE STANDARD QUESTIONS THAT I ASK SURETIES. AND I WOULD PLACE HIM UNDER OATH.

MS. DUARTE: OKAY.

THE COURT: IF MR. MC AFFEE IS WILLING. THAT'S HIS -- HE CERTAINLY HAS NO OBLIGATION TO DO THAT.

MS. DUARTE: I JUST MISUNDERSTOOD. I DIDN'T KNOW IF THE COURT WAS PLANNING ON PLACING HIM UNDER OATH AND THEN

SUBJECTING HIM TO CROSS-EXAMINATION, IF NEEDED.

THE COURT: I DON'T CONSIDER IT A PROFFER IN TERMS OF THE SUBSTANCE OF THE OFFENSE AT ALL.

MS. DUARTE: OKAY. JUST THE ABILITY TO SERVE AS A SURETY.

THE COURT: YES.

MS. DUARTE: ALL RIGHT. I UNDERSTAND.

THE COURT: YES. BUT IF THE GOVERNMENT HAS QUESTIONS, THEN, YOU'LL CERTAINLY BE ENTITLED TO ASK THEM. YES.

MS. DUARTE: OKAY.

YOUR HONOR, BEFORE WE HEAR FROM MR. MC AFFEE, COULD I JUST MAKE ONE POINT --

THE COURT: YES, SURE.

MS. DUARTE: -- IN ANSWER TO MS. POTASHNER'S ARGUMENT. IS THAT AS IT DOES SAY IN THE DETENTION HEARING, DEFENDANT WAS ONLY -- DETENTION ORDER, DEFENDANT WAS ONLY HELD TO ANSWER UNDER THE 875(C). THAT'S ACCURATE.

HOWEVER, WHEN THE COURT LOOKS AT THE TRANSCRIPT, THE COURT WILL SEE THAT THE CHARGE WAS NOT THROWN OUT. NONE OF THE -- PER SE. NONE OF THOSE ALLEGATIONS WERE FOUND NOT TO BE ACCURATE.

WHAT THE MAGISTRATE COURT IN NEW HAMPSHIRE DID NOT SEE -- AND I MEAN ARGUABLY, AND I CAN OBVIOUSLY ARGUE THIS LATER IN FRONT OF A DISTRICT COURT IN A RULE 29 MOTION IF I

NEED TO, BUT MY POINT TO THE COURT IS THAT EVERYTHING THAT CAME OUT THAT'S IN THE COMPLAINT WAS NOT FOUND TO BE INACCURATE IN ANY WAY.

WHAT HAPPENED IS THE ACTUAL CONNECT ON 1028(A)7 REQUIRES ALL THIS PUBLICATION TRANSFER, WHATEVER YOU HAVE, WITH THE INTENT TO COMMIT OR AID AND ABET ANOTHER FELONY. WE CHARGED THAT AS 42408(A)(7)(B), WHICH IS MISUSE -- UNLAWFUL USE OF A SOCIAL SECURITY NUMBER. THE REASON WE DID THAT WAS BECAUSE THERE WERE VARIOUS HYPERTECH -- TECH LINKS ON THE WEBSITE. IN ONE PARTICULAR CASE IT PUBLISHED THE YOUNG, PROCESS SERVER'S LICENSE PLATE NUMBER. AND IT SAID SOMETHING ALONG THE LINES OF, SO, YOU'RE UPSET, YOU'RE ANGRY AT HAVING THIS NUMBER PUBLISHED. TRUST ME WHEN I SAY IT CAN GET MUCH, MUCH WORSE. THE HYPERTECH LINK WENT TO AN ARTICLE ON THIS VERY TOPIC.

THAT'S THE GOVERNMENT'S THEORY OF THE CASE. IT'S MY UNDERSTANDING, AND THE COURT CAN TAKE A LOOK AT THE TRANSCRIPT, BUT IT'S QUITE CLEAR THAT IT WAS THAT EXTRA LINK, IF YOU WILL, THAT THE JUDGE DIDN'T QUITE SEE -- AGAIN, WHICH IS FINE. BUT JUST SO THE COURT IS AWARE, IT HAD NOTHING TO DO WITH THE VERACITY OF THE ALLEGATION AT ALL. IT ONLY HAD TO DO WITH THAT TECHNICAL LINK TO THE FELONY.

THE COURT: YES. I THINK IT'S FAIR TO SAY -- PROBABLY NEITHER OF YOU ARGUED -- IT'S A CASE THAT THE GOVERNMENT CERTAINLY MAY WIN, AND CLEARLY HAS A VERY

CAREFULLY THOUGHT OUT THEORY OF CRIMINALITY IN THIS CONDUCT, BOTH WHAT MAKES, YOU KNOW, AN ARGUABLY PASSIVE WEBSITE AN ACTIVE THREAT. AND I CAN SEE THAT THOSE ARE ARGUMENTS THAT YOU LARGELY PREVAILED ON IN NEW HAMPSHIRE AND, AGAIN, MAY VERY WELL PREVAIL ON IN THIS CASE.

IT'S PROBABLY FAIR TO SAY, THOUGH, THAT IT'S NOT -- IT'S A CASE WHERE -- IT'S POTENTIALLY DEFENSIBLE. I MEAN, IT'S PROBABLY NOT THE MOST CLEAR CUT STRONG CASE THAT THE DEFENDANT -- THAT THE GOVERNMENT HAS EVER BROUGHT. OBVIOUSLY, IT REQUIRED SOME THOUGHT AND SOME PROOF.

MS. DUARTE: IT DID, YOUR HONOR.

THE COURT: OKAY. AND THAT'S YOUR JOB.

MS. DUARTE: RIGHT.

THE COURT: AND YOU'VE DONE IT WELL.

FOR MY PURPOSES IN TERMS OF ASSESSING A DETENTION ORDER IN A CASE WHERE THERE'S NOT A PRESUMPTION, AND WHERE OBVIOUSLY A LOT OF THOUGHT WENT INTO IT BEFORE THE COURT IN NEW HAMPSHIRE -- BUT I THINK I CAN READILY PUT MYSELF IN THE POSITION OF THE COURT IN NEW HAMPSHIRE AND MAKE THE KINDS OF CALLS THAT WERE PROBABLY MADE THERE, ABOUT WHERE INFORMATION COULD BE BETTER ASSESSED.

MS. DUARTE: AND MY ONLY POINT WITH THAT, YOUR HONOR, ISN'T ARGUING MY THEORY OBVIOUSLY. MY ONLY POINT IS UNLIKE -- FOR INSTANCE, SOMETIMES IN A DETENTION HEARING WE APPEAR, AND IT'S A BANK ROBBERY. AND THE COMPLAINT SAYS, THE

FOUR DEFENDANTS DID THIS AND THIS.

THE COURT: AND IT TURNS OUT THEY DIDN'T --

MS. DUARTE: AND, THEN, YOU HEAR THAT MAYBE SOMEBODY WAS THE DRIVER, AND IT WASN'T EVEN HIS CAR. THAT IN THIS PARTICULAR CASE --

THE COURT: THAT'S NOT WHAT -- THIS WAS A LEGAL POINT.

MS. DUARTE: IT'S NOT THE FACTS. IT'S A LEGAL POINT. AND, OF COURSE, I'M NOT ASKING THE COURT TO CONSIDER THE LEGAL POINTS. IT'S THE FACTS -- THAT I WANT TO MAKE SURE THE COURT IS AWARE THAT THE FACTS ARE STILL THERE.

THE COURT: YES.

MS. POTASHNER: WELL --

THE COURT: AND THEY SAID THE FACTS ARE TROUBLING.

MS. DUARTE: RIGHT. WITH THE MODIFICATIONS --

THE COURT: BUT WHAT I HAVE TO DECIDE IS WHETHER THERE ARE ANY CONDITIONS OR COMBINATION OF CONDITIONS THAT WILL REASONABLY ASSURE THE SAFETY OF ANY PERSON OR THE COMMUNITY.

SO, THAT'S WHAT I'M STRUGGLING WITH. AND, QUITE HONESTLY, MR. MC AFFEE IS IMPORTANT TO ME ON THAT POINT.

SO, MR. MC AFFEE, THANK YOU FOR COMING FORWARD. AND I REALLY DO WANT YOU TO UNDERSTAND THAT I APPRECIATE THAT YOU HAVE NO OBLIGATION TO BE HERE AND NO OBLIGATION TO ANSWER MY QUESTIONS. BUT I DO TYPICALLY ASK QUESTIONS OF PEOPLE WHO

ARE OFFERING TO SERVE AS SURETIES.

WE HAVE A SITUATION HERE WHERE I THINK FAIRLY IT'S NOT COMPLETELY CLEAR TO ME FROM THE PRETRIAL REPORT WHAT YOUR RELATIONSHIP TO MR. SUTCLIFFE IS AND YOU'RE WILLINGNESS TO STAND AS A SURETY.

SO, I WOULD WANT TO ASK YOU SOMETHING ABOUT THE BACKGROUND OF YOUR RELATIONSHIP WITH MR. SUTCLIFFE IF YOU'RE WILLING TO DO THAT. AND, THEN, AT ANY TIME IF YOU DON'T WANT, THEN, YOU KNOW, YOU'RE FREE TO STOP.

I'D ASK MY CLERK TO PLACE YOU UNDER OATH.

THE CLERK: PLEASE RAISE YOUR RIGHT HAND.

LESLIE SCOTT MC AFFEE, SWORN:

THE WITNESS: I DO.

THE CLERK: PLEASE STATE YOUR NAME FOR THE RECORD.

THE WITNESS: LESLIE SCOTT MC AFFEE.

THE COURT: AND, MR. MC AFFEE, YOU'RE A MEMBER OF THE STATE BAR OF CALIFORNIA?

THE WITNESS: I AM, YOUR HONOR. SINCE 1988.

THE COURT: HAVE YOU BEEN A RESIDENT OF LOS ANGELES -- WELL, FOR HOW LONG HAVE YOU BEEN A RESIDENT OF LOS ANGELES?

THE WITNESS: APPROXIMATELY 46 YEARS.

THE COURT: YOU'VE NEVER BEEN CONVICTED OF A FELONY?

THE WITNESS: I'VE NEVER BEEN CONVICTED OF

ANYTHING.

THE COURT: AND WHERE DO YOU RESIDE?

THE WITNESS: I RESIDE IN SYLMAR IN CALIFORNIA.

THE COURT: AND COULD I HAVE THE ADDRESS.

THE WITNESS: SURE. IT'S 13311 SYLMAR AVENUE -- I'M SORRY -- NORRIS AVENUE, N-O-R-R-I-S, IN SYLMAR, CALIFORNIA.

THE COURT: AND YOU'RE MARRIED?

THE WITNESS: I AM.

THE COURT: AND YOUR WIFE LIVES THERE WITH YOU?

THE WITNESS: SHE DOES.

THE COURT: AND YOU HAVE CHILDREN?

THE WITNESS: I HAVE ONE 20-YEAR-OLD CHILD STILL REMAINING IN THE HOUSE. THE OTHER TWO ARE ADULTS LIVING OUTSIDE THE HOUSE.

THE COURT: AND YOU OWN THE HOME?

THE WITNESS: I DO -- OR WE DO.

THE COURT: AND WHERE DO YOU PRACTICE LAW?

THE WITNESS: IN BURBANK, CALIFORNIA.

THE COURT: AND WHAT CAN YOU TELL ME ABOUT YOUR REPRESENTATION OF MR. SUTCLIFFE, JUST THE GENERAL SCOPE AND SUBJECT MATTER AND WHAT THE STATUS OF THE CASE IS.

THE WITNESS: ALL RIGHT. I PRESENTLY REPRESENT MR. SUTCLIFFE AS HIS COUNSEL IN A CASE CALLED GLOBAL CROSSING DEVELOPMENT COMPANY VERSUS STEVEN SUTCLIFFE, WHICH IS PENDING

IN THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, DEPARTMENT 49 IN THE CENTRAL DISTRICT OF LOS ANGELES.

THAT CASE IS PRESENTLY SET FOR A STATUS CONFERENCE ON MONDAY. THE CASE HAS BEEN STAYED BECAUSE OF THE BANKRUPTCY FILING OF GLOBAL CROSSING.

PRIOR TO THE FILING OF THE GLOBAL CROSSING BANKRUPTCY, MR. SUTCLIFFE HAD INTENDED TO FILE AN ANSWER IN THAT MATTER. AND I HAD PREPARED AND AM PREPARED TO FILE A CROSS-COMPLAINT AGAINST GLOBAL CROSSING TO SUE THEM FOR VIOLATION -- FOR A NUMBER OF VIOLATIONS OF CIVIL RIGHTS. HOWEVER, THAT ACTION IS STAYED BECAUSE OF THE BANKRUPTCY FILING.

I PREVIOUSLY REPRESENTED MR. SUTCLIFFE IN HIS -- HE'LL PROBABLY HAVE TO HELP ME WITH THIS -- IN HIS CIVIL LAWSUIT AGAINST THE LAPD AND THE CITY OF LOS ANGELES FOR THE ALLEGED WRONGFUL ARREST OF MR. SUTCLIFFE BY THE LAPD. DURING WHICH TIME A NUMBER OF DEPOSITIONS OCCURRED INVOLVING LAPD OFFICERS, FOR WHICH I COULD TESTIFY TO IF THE COURT WAS INTERESTED, AS TO MR. SUTCLIFFE'S DEMEANOR AGAINST THE OFFICERS THAT HE CLAIMED HAD WRONGFULLY ARRESTED HIM AND WHETHER HE POSED ANY THREAT OF HARM TO THEM.

THE COURT: WHAT WAS THE OUTCOME OR THE CURRENT STATUS OF THAT CASE?

MR. MC AFFEE: THAT CASE WAS DISMISSED BY THE COURT ON A LEGAL BASIS THAT WE SOUGHT TO APPEAL AND THEN DID NOT

APPEAL.

THE COURT: AND WAS THAT A SUPERIOR COURT CASE?

MR. MC AFFEE: IT WAS, YOUR HONOR.

THE COURT: AND WHAT'S THE SUBJECT MATTER OF THE GLOBAL CROSSING LAWSUIT?

MR. MC AFFEE: GLOBAL CROSSING HAS ALLEGED THAT MR. SUTCLIFFE HAS STOLEN PERSONAL INFORMATION OF THE EMPLOYEES OF THE COMPANY AND VIOLATED HIS CONTRACT BY BREACHING A PRIVACY AGREEMENT. I THINK I'M PARAPHRASING THAT ACCURATELY.

I WOULD ADVISE THE COURT GLOBAL CROSSING SOUGHT A TEMPORARY RESTRAINING ORDER AND, IN FACT, OBTAINED AN INJUNCTION THAT PREVENTS MR. SUTCLIFFE OR ANY OF HIS AGENTS, INCLUDING MYSELF, OR ANY WEBSITE FROM PUBLISHING ANY INFORMATION THAT MR. SUTCLIFFE OBTAINED WHILE EMPLOYED. THAT ORDER WAS ISSUED PROBABLY IN SEPTEMBER, OCTOBER OF 1991. THERE'S BEEN NO EFFORT TO BRING ANY ORDERS OF CONTEMPT FOR VIOLATING THAT ORDER. THE EVILGX WEBSITE HAS BEEN ON LINE FAR LONGER THAN THAT ORDER. BUT AS FAR AS I KNOW, THAT RESTRAINING ORDER IS STILL IN EFFECT.

THE COURT: AND HOW LONG HAVE YOU KNOWN MR. SUTCLIFFE?

MR. MC AFFEE: AT LEAST THREE YEARS. I HAVE TO GO BACK IN MY RECORDS BUT AT LEAST THREE YEARS.

THE COURT: YOU UNDERSTAND WHAT THE RESPONSIBILITIES OF A SURETY WOULD BE?

MR. MC AFFEE: I DO, YOUR HONOR.

THE COURT: AND YOU'RE PREPARED TO SIGN AN APPEARANCE BOND?

MR. MC AFFEE: I AM, YOUR HONOR.

THE COURT: OKAY. AND I DON'T KNOW IF YOU'VE DONE FEDERAL COURT CRIMINAL WORK AT ALL --

MR. MC AFFEE: NOT CRIMINAL, BUT I AM LICENSED TO APPEAR IN EVERY FEDERAL DISTRICT COURT IN THE STATE OF CALIFORNIA. AND I HAVE APPEARED IN EVERY FEDERAL DISTRICT COURT, INCLUDING THE NINTH CIRCUIT COURT OF APPEAL.

THE COURT: AND YOU DO UNDERSTAND THAT THE EFFECT OF THE APPEARANCE BOND WOULD -- JUST TO CUT THROUGH IT -- IF HE VIOLATED THE CONDITIONS OF THE RELEASE, IT WOULD BE A SLAM DUNK SUMMARY JUDGMENT AGAINST YOU IN THE AMOUNT -- I MEAN, THEY DON'T EVEN HAVE TO FILE A LAWSUIT. THEY TAKE THE APPEARANCE BOND DOWN, AND THEY HAVE A JUDGMENT AGAINST YOU AND YOUR PROPERTY.

IS YOUR PROPERTY OWNED IN YOUR NAME?

MR. MC AFFEE: IN MY AND MY WIFE'S NAME.

THE COURT: OKAY. AND YOUR LAW PRACTICE IS -- IS IT A SOLE PRACTITIONER'S?

MR. MC AFFEE: IT IS, YOUR HONOR.

THE COURT: OKAY. WHAT KIND OF AN INCOME DO YOU MAKE?

MR. MC AFFEE: WELL, IT'S OVER SIX FIGURES. DOES

THAT HELP? DO YOU WANT ME TO GO ANY MORE SPECIFIC THAN THAT?

THE COURT: NO, THAT'S ALL RIGHT.

SO, YOU UNDERSTAND THAT IT'S AUTOMATICALLY AT RISK IF --

MR. MC AFFEE: I DO UNDERSTAND THE NATURE AND THE SEVERITY OF THE OBLIGATION THAT I WOULD UNDERTAKE.

THE COURT: SO, WHY ARE YOU WILLING TO DO IT?

MR. MC AFFEE: WELL, I CAN GIVE YOU A LONG EXPLANATION. I'LL GIVE YOU THE SHORT EXPLANATION. I KNOW MR. SUTCLIFFE. I DON'T KNOW ANYBODY WHO HAS A GREATER RESPECT FOR THE LAW THAN MR. SUTCLIFFE, NOTWITHSTANDING WHAT THE FEDERAL PROSECUTOR HAS IMPLIED.

I HAVE BEEN MR. SUTCLIFFE'S ATTORNEY FOR THE PURPOSE OF HELPING HIM UNDERSTAND THE LAW SO THAT HE COULD CHALLENGE IT WITHOUT GOING OVER THE LINE. I THINK THAT'S BEEN MY FUNCTION. I'VE NEVER KNOWN HIM TO BE PHYSICALLY VIOLENT, THREATENING, EVEN IN SITUATIONS WHERE WE HAVE BEEN THREATENED BY A GUN BY A POLICE OFFICER FOR NO REASON.

MR. SUTCLIFFE CERTAINLY HAS HAD MANY OPPORTUNITIES TO BE UPSET OVER WHAT'S HAPPENED TO HIM, AND HE'S NEVER EXHIBITED THEM IN A PHYSICAL MANIFESTATION WHATSOEVER.

I HAVE NO QUALMS THAT HE WILL MAKE ALL THE APPOINTMENTS THAT THE COURT SETS FOR HIM, COMPLY WITH ALL THE RULES AND REGULATIONS OR THE TERMS AND CONDITIONS THE COURT SETS FOR HIM. AND I HAVE NO HESITATION WHATSOEVER TO PUT HIM

IN MY HOME. NONE WHATSOEVER.

THE COURT: OKAY. DOES THE GOVERNMENT HAVE SPECIFIC QUESTIONS YOU NEED ME TO ASK.

MS. DUARTE: I DO, YOUR HONOR. IF THE COURT COULD JUST INQUIRE OF MR."MA CAFE" ON WHAT DATE --

MR. MC AFFEE: MC AFFEE.

MS. DUARTE: I'M SORRY?

MR. MC AFFEE: MC AFFEE.

MS. DUARTE: -- MC AFFEE, ON WHAT DATE THAT PRELIMINARY INJUNCTION WAS ACTUALLY SERVED ON MR. SUTCLIFFE?

MR. MC AFFEE: WELL, SINCE IT'S NOT MY OBLIGATION TO SERVE IT, I HAVE NO IDEA. YOU HAVE TO ASK THE PARTIES WHOSE OBLIGATION IT IS TO SERVE.

MS. DUARTE: WELL, THE PARTIES WHOSE OBLIGATION TO SERVE HAVE INDICATED TO THE BEST OF MY AND THE CASE AGENT'S KNOWLEDGE THAT THEY WERE UNABLE TO LOCATE MR. SUTCLIFFE TO SERVE IT. AND WE DID DETERMINE THAT IT WAS RIGHT AROUND THAT TIME THAT HE DID MOVE TO NEW HAMPSHIRE FROM CALIFORNIA WHEN SERVICE WAS ATTEMPTED. SO, THAT'S WHY -- BECAUSE THAT'S MY UNDERSTANDING. THAT'S WHY I WAS WONDERING IF MR. MC AFFEE HAD A BETTER UNDERSTANDING.

MR. MC AFFEE: I CAN ADDRESS AT LEAST -- WE DID HAVE A COURT APPEARANCE BEFORE THE JUDGE WHO ISSUED THE INJUNCTION AT WHICH THE PLAINTIFF'S COUNSEL ARGUED AN INABILITY TO LOCATE MR. SUTCLIFFE. AND THE COURT APPRISED

THAT COUNSEL THAT THERE WERE OTHER MEANS OF OBTAINING SERVICE BY THE COURT IF THEY COULD NOT LOCATE MR. SUTCLIFFE. AND TO MY KNOWLEDGE, SINCE I'M THE ATTORNEY OF RECORD FOR MR. SUTCLIFFE FOR THE DEFENSE, NO EFFORTS HAVE BEEN MADE TO OBTAIN ANY KIND OF SERVICE OR AN ALTERNATE FORM OF SERVICE. AND THAT'S BEEN AT LEAST SINCE OCTOBER OF LAST YEAR.

THE COURT: BUT THE COURT ISSUED AN INJUNCTION. AND I TAKE IT THAT ONE OF THE CONDITIONS OF RELEASE WAS THAT MR. SUTCLIFFE COMPLY WITH THE TERMS OF THAT INJUNCTION, THAT THAT WOULD BE SPECIFIC ENOUGH THAT EVERYONE COULD UNDERSTAND WHAT THOSE TERMS ARE.

MR. MC AFFEE: I BELIEVE THEY WOULD BE, YOUR HONOR.

THE COURT: OKAY. SO, IF THERE'S A DOUBT ABOUT WHETHER MR. SUTCLIFFE REGARDS HIMSELF AS BEING SUBJECT TO THAT INJUNCTION BECAUSE IT WASN'T SERVED, WE COULD GET PAST THAT?

MR. MC AFFEE: SURE. BECAUSE THE INJUNCTION PREVENTS HIM FROM PUBLISHING INFORMATION THAT HE OBTAINED WHILE EMPLOYED.

SINCE I PRESUME ONE OF THE CONDITIONS THE COURT WOULD ENJOIN HERE IF THE COURT WERE INCLINED TO RELEASE HIM WOULD BE THAT HE WOULD HAVE NO ACCESS TO OR RIGHT TO USE A COMPUTER OR ACCESS TO THE INTERNET. SO, THAT WOULD SEEM TO ASSUAGE THAT PROBLEM.

THE COURT: COUNSEL, DID YOU HAVE SOMETHING YOU

WANTED --

MS. DUARTE: I WAS JUST GOING TO ADDRESS THE FACT THAT -- TO REMIND THE COURT THERE'S ACTUALLY NO ALLEGATION THAT THE NUMBERS WERE OBTAINED DURING THE COURSE OF -- NECESSARILY DURING THE TIME MR. SUTCLIFFE WAS EMPLOYED. IN OTHER WORDS, THERE'S THE ALLEGATION, BUT THERE'S NO CHARGE THAT INVOLVES UNLAWFUL INTRUSION INTO GLOBAL CROSSINGS' SYSTEMS OR ANYTHING OF THAT NATURE.

THE COURT: RIGHT. WELL, THIS WOULDN'T BE -- I THOUGHT, PERHAPS, YOU WERE CONCERNED THAT THERE WAS A REPRESENTATION THAT THERE WAS AN INJUNCTION ISSUED, BUT HE'S NOT REALLY SUBJECT TO THE INJUNCTION BECAUSE HE EVADED --

MS. DUARTE: THAT WAS MY --

THE COURT: -- SERVICE OR WHATEVER.

MS. DUARTE: THAT WAS MY CONCERN WAS THAT IT'S MY UNDERSTANDING THAT HE WAS NEVER SERVED AND THAT HE LEFT THE STATE. BUT YOU'VE ADDRESSED THAT, AND I APPRECIATE THAT.

YOUR HONOR, JUST SO I UNDERSTAND, THIS IS CONTEMPLATING FOR MR. MC AFFEE AN UNSECURED APPEARANCE BOND; IS THAT RIGHT?

THE COURT: IT WOULD BE A JUSTIFIED AFFIDAVIT OF SURETY, WHICH REQUIRES THAT THE PROPERTY BE IDENTIFIED.

I THINK THAT MR. MC AFFEE IS AN APPROPRIATE SURETY AND A RESPONSIBLE SURETY FROM WHAT'S BEFORE ME. AND I DON'T THINK THAT A DEEDING OF PROPERTY WHEN THERE'S AN AFFIDAVIT OF

SURETY IS A NECESSARY CONDITION TO ASSURE -- REASONABLY ASSURE APPEARANCE.

I MEAN, I WOULD HAVE A NUMBER OF CONDITIONS, INCLUDING HAVING MR. MC AFFEE ACT AS A THIRD-PARTY CUSTODIAN, WHICH DOES IMPOSE AN OBLIGATION OF REPORTING TO THE COURT WITH RESPECT TO ANY VIOLATION OF THE CONDITIONS OF RELEASE. AND THE CONDITIONS OF RELEASE WOULD INCLUDE THE INTENSIVE PRETRIAL SERVICES MONITORING AND A CURFEW ON MR. SUTCLIFFE, AND ANY NUMBER OF -- NO USE OF THE COMPUTER, AND, YOU KNOW, KEEP-AWAY ORDERS FROM ANYONE WHO IS LISTED IN THE COMPLAINT AS A POTENTIAL VICTIM. WE COULD GO THROUGH THE LIST OF THEM. BUT THE SECURITY FOR THE BOND IS NOT A CRITICAL FACTOR TO ME.

MS. DUARTE: I WAS JUST TRYING TO CLARIFY IT.

THE COURT: YES.

MS. DUARTE: SO, I -- WELL, I DON'T HAVE ANY MORE FURTHER QUESTIONS OF MR. MC AFFEE, YOUR HONOR. I REMAIN OPPOSED TO RELEASE.

AND, AGAIN, IF THE COURT -- I DON'T KNOW HOW CLOSE THE COURT IS TO MAKING ITS DECISION. IF THE COURT IS INCLINED TO RELEASE MR. MC AFFEE, I WOULD -- EXCUSE ME -- RELEASE MR. SUTCLIFFE TO MR. MC AFFEE, I WOULD REITERATE MY REQUEST THAT THIS BE SUBJECT TO FURTHER INTERVIEW BY PRETRIAL SERVICES, TO BE FOLLOWED BY ANOTHER HEARING IF PRETRIAL SERVICES HAS ANY QUESTION WHATSOEVER ABOUT MR. MC AFFEE'S

FITNESS.

AND I WOULD ALSO ASK THE COURT ULTIMATELY TO STAY THE ORDER UNTIL -- Interupt

THE COURT: WELL, I WOULD CERTAINLY STAY THE ORDER --

MS. DUARTE: THANK YOU. Interupt

THE COURT: -- TO ALLOW YOU TO APPEAL IT. Interupt

I'M SATISFIED BASED ON MY OWN INQUIRY OF MR. MC AFFEE THAT -- YOU KNOW, COUPLED WITH THE RESIDENCE OF THE THIRD-PARTY CUSTODIAN.

MS. DUARTE: WELL, OBVIOUSLY, YOUR HONOR, THERE ARE A NUMBER OF QUESTIONS I WOULD LIKE TO ASK MR. MC AFFEE. IT WAS MY UNDERSTANDING FROM WHAT WE DISCUSSED EARLIER THAT THAT WASN'T THE COURT'S INTENTION. I WOULD LIKE TO ASK HIM IF HE KNEW WHAT MR. SUTCLIFFE WAS DOING WITH THE WEBSITE, WHY HE ALLOWED HIS LAW PRACTICE TO BE USED AS MR. SUTCLIFFE'S ADDRESS, WHY HE ALLOWED MR. SUTCLIFFE TO ACTUALLY USE HIS ADDRESS WHEN HE WAS SOLICITING MONEY TO CRACK, IF YOU WILL, OR TO GET INTO THE PASSWORD PROTECTION ELEMENT OF HIS WEBSITE. AND THAT'S ALL IN THE COMPLAINT.

I WOULD BE VERY INTERESTED IN ALL THAT. AGAIN, I'M NOT CHALLENGING SPECIFICALLY MR. MC AFFEE'S FITNESS NOR CERTAINLY HIS RESPECT OF THE LAW, BUT THERE ARE A NUMBER OF VERY TROUBLING AND INTERESTING ASPECTS THAT I WOULD WANT TO INQUIRE ABOUT.

HOWEVER, I UNDERSTAND THAT THE COURT HAS LIMITED INQUIRIES INTO THE SURETIES. BUT JUST SO IT'S CLEAR, OBVIOUSLY I HAVE A NUMBER OF THINGS I WOULD LIKE TO --

THE COURT: AND I DO UNDERSTAND THAT. Interupt

MS. DUARTE: -- TO DISCUSS. BUT JUST SO THE COURT UNDERSTAND THAT, THEN, I DON'T CHALLENGE THE COURT'S PROCESSES. I HAVE GREAT RESPECT FOR THAT.

BUT BECAUSE I'VE NEVER HAD A HEARING -- A DETENTION HEARING BEFORE THIS COURT, I'M NOT AT WHAT STAGE OF THE PROCESS THE COURT IS IN, AND THAT'S WHY I WAS JUST CAREFUL TO LAY OUT WHAT MY REQUEST WOULD BE.

THE COURT: WELL, WHAT I DON'T WANT TO LOSE SIGHT OF IS WHAT THE PURPOSE OF THE DETENTION HEARING IS.

AND I UNDERSTAND THE GOVERNMENT'S QUESTIONS WITH RESPECT TO -- WHICH, I TAKE IT, ARE ISSUES THAT THE GOVERNMENT WOULD CONSIDER TO AFFECT MR. MC AFFEE'S APPROPRIATENESS AS A SURETY AND A THIRD-PARTY CUSTODIAN.

I AM TAKING INTO CONSIDERATION THE FACT THAT THE GOVERNMENT IS NOT A HUNDRED PERCENT COMFORTABLE WITH MR. MC AFFEE'S ROLE. BUT A THIRD-PARTY SURETY IS JUST ONE OF THE CONDITIONS THAT I'M LOOKING AT TO AFFECT -- TO DETERMINE WHETHER THERE ARE -- YOU KNOW, MY ALTERNATIVE IS, ARE THERE ANY TERMS AND CONDITIONS THAT I CAN SET THAT WILL REASONABLY ASSURE ME THAT THERE'S NOT A DANGER TO THE COMMUNITY VERSUS MAKING A DETERMINATION THAT THE DETENTION ORDER WITHOUT

PREJUDICE WOULD NOT BE REVISITED. AND THAT WAS A DETENTION ORDER THAT THE JUDGE DID NOT SEE ANY TERMS AND CONDITIONS.

I DO APPRECIATE THE GOVERNMENT'S CONCERNS. I DON'T THINK IT'S GOING TO BE APPROPRIATE FOR THE SCOPE OF THIS PROCEEDING TO PUT MR. MC AFFEE IN A POSITION WHERE HE'S ANSWERING ESSENTIALLY POTENTIALLY INCRIMINATING --

MS. DUARTE: DIFFICULT QUESTIONS, YOUR HONOR.

THE COURT: OKAY. RIGHT.

MS. DUARTE: I UNDERSTAND.

THE COURT: BUT I CERTAINLY -- I CERTAINLY UNDERSTAND THAT THE GOVERNMENT HAS THOSE CONCERNS. AND I'M FACTORING THAT IN.

MS. DUARTE: AND AS IS OBVIOUS, YOUR HONOR, FROM THE COMPLAINT AND FROM THE TRANSCRIPT OF THE HEARING AND FROM A VARIETY OF OTHER SOURCES, MR. SUTCLIFFE HAS WHAT SOME MIGHT CONSIDER SOME UNORTHODOX BELIEFS -- WHICH IS FINE. THAT'S HIS RIGHT. THAT'S NO PROBLEM.

BUT, AGAIN, AS TO THE APPROPRIATENESS OF THE SURETY, IF THESE BELIEFS ARE PERHAPS SHARED BY MR. MC AFFEE, WHO MAY AS WELL -- I MEAN, IT'S MY UNDERSTANDING, AND PLEASE TELL ME IF I'M WRONG, THAT HE'S THE ONE THAT THE COURT IS BASICALLY COUNTING ON TO NOT JUST PUT UP HIS REPUTATION AND, I UNDERSTAND, HIS MONEY, BUT ALSO TO -- HE'S THE ONE IN A POSITION TO REPORT BASICALLY BESIDES PRETRIAL SERVICES -- TO REPORT PROBLEMS AND VIOLATIONS.

AGAIN, THE COURT UNDERSTANDS MY CONCERN. I JUST WANT TO STATE IT FOR THE RECORD.

THE COURT: YES. AND YOU'RE ABSOLUTELY RIGHT. IT'S IN ADDITION TO PRETRIAL SERVICES.

MS. DUARTE: AND THAT'S SOMETHING THAT THE GOVERNMENT --

Interrupt

THE COURT: YOU KNOW, WE REALLY -- YOU'VE PUT YOUR FINGER ON SOMETHING THAT IS A CONCERN. WE REALLY HAVE TO BE CAREFUL -- I MEAN, EVEN WHEN YOU START OUT WITH A CASE THAT'S BASED ON SPEECH OVER THE INTERNET, YOU OBVIOUSLY GAVE A LOT OF THOUGHT, AND THE LEGISLATURE HAS GIVEN A LOT OF THOUGHT TO CRAFTING LAWS THAT BALANCE FREE SPEECH AGAINST THREATS TO SOCIETY.

I'M NOT QUESTIONING AT ALL THAT THIS IS AN APPROPRIATE CASE TO BRING. AND AS I SAID, THESE ARE WHAT I CONSIDER TO BE SERIOUS CHARGES. BUT THE FIRST AMENDMENT IS LOOMING THERE AS A GLOBAL CONTEXT FOR THE ENTIRE PROSECUTION. AND, THEN, YOU'RE RIGHT, IT DOES APPEAR, AT LEAST THERE'S SOME SUGGESTION, THAT MR. SUTCLIFFE WOULD HOLD SOME UNCONVENTIONAL VIEWS.

BUT NEITHER IS THAT CRIMINAL -- WHICH NO ONE IS SUGGESTING AT ALL -- NOR IS IT DANGEROUS.

MS. DUARTE: NOT NECESSARILY DANGEROUS, YOUR HONOR.

THE COURT: NOT NECESSARILY DANGEROUS.

MS. DUARTE: BUT IN THIS CONTEXT, THESE THREATS --

I MEAN, I DON'T KNOW IF I BROUGHT IT UP EARLIER, BUT, YOU KNOW, EVEN THE "I AM NOW ARMED," YES, THERE'S A CONTEXT AROUND IT, WHICH, PERHAPS, SUGGESTS THAT IT ALSO IS BUSINESS CONNECTED --

THE COURT: BUT EVEN IF IT'S ARMED WITH INFORMATION, IF IT'S INFORMATION THAT COULD BE ABUSED, THAT'S A -- I'M NOT QUESTIONING THAT THE PEOPLE --

MS. DUARTE: BUT HE WAS ARMED AS WELL. I MEAN, A RIFLE WAS FOUND IN HIS HOUSE AT THE TIME OF THE WARRANT.

THE COURT: YES.

MS. DUARTE: I MEAN, I'M NOT JUST TALKING ABOUT SPEECH. I JUST WANT THE COURT TO BE CLEAR ON THAT.

THE COURT: NO, NO, I UNDERSTAND THAT. AND I UNDERSTAND THE CONCERN THAT THIS COULD ESCALATE. AND BELIEVE ME, IF THERE WERE -- IF THERE WERE REAL INDICIA OF THAT, THAT I DIDN'T -- YOU KNOW, IF THERE WAS ANYTHING ABOUT USING THAT RIFLE, OR ANYTHING IN HIS PAST CONDUCT -- I MEAN, YOU HAVE SOME CRIMINAL RECORD, BUT IT'S NOT -- IT REALLY WOULD NOT RISE TO THE LEVEL, I DON'T THINK, IN AND OF ITSELF CERTAINLY, OF POSING A REALISTIC THREAT OF VIOLENCE.

MS. DUARTE: BUT CERTAINLY, YOUR HONOR, THAT IS NOT PART OF THE 875(C), AND I KNOW THE COURT'S NOT SAYING IT IS. BUT 875(C) DOESN'T EVEN NECESSARILY REQUIRE AN INTENT TO CARRY OUT OR ANY OF THOSE THINGS.

THE COURT: NO, NO. I'M NOT SUGGESTING THAT IT'S

AN ELEMENT OF THE OFFENSE AT ALL.

MS. DUARTE: AND WE HAVE VERY REAL FEAR HERE ON THE PART OF THE PEOPLE WHO HAVE TO LOOK AT THEMSELVES IN THEIR HOUSES AND MR. SUTCLIFFE'S THREATS AND LISTEN TO SOUND WAVE FILES SAYING -- CALLING THEM, FORGIVE MY LANGUAGE, YOUR HONOR, "BITCH" AND ALL KINDS OF OTHER THINGS, AND KNOW THAT THIS MAN BASICALLY HAS IT IN FOR THEM.

AND WHETHER OR NOT IT'S PART OF HIS, IF YOU WILL, FREE SPEECH, I MEAN, THAT'S SOMETHING THAT 875 -- IN 875 CHARGES, THEY'RE REGULARLY EMAILS, THINGS OF THAT NATURE. WHERE YOU DON'T HAVE TO BE STANDING RIGHT THERE WITH THE GUN TO SOMEBODY'S HEAD FOR IT TO BE THREATENING.

THE COURT: CLEARLY. CLEARLY NOT. CLEARLY YOU COULD PROVE THIS CASE WITHOUT ANY THREAT OF VIOLENCE AT ALL.

AGAIN, I JUST -- I DON'T WANT TO LOSE SIGHT -- AND I APPRECIATE THAT THIS MUST HAVE BEEN FLUSHED OUT IN TERMS OF THE CHARGES MUCH MORE IN NEW HAMPSHIRE.

BUT WHAT CAME OUT OF THAT WAS A FINDING THAT THE DEFENDANT'S LACK OF TIES IN CALIFORNIA IN A SPECIFIC DIRECTION -- IF THERE WERE MORE INFORMATION THAT ESTABLISHED HIS TIES IN CALIFORNIA, THAT THAT WOULD MAKE A DIFFERENCE. AND I THINK IT'S INESCAPABLE THAT THERE IS THAT INFORMATION.

MS. DUARTE: BUT HOW DO HIS TIES NEGATE THE DANGER, YOUR HONOR? I MEAN, THE COURT DIDN'T FIND THAT IT WAS A FLIGHT RISK, WHICH --

THE COURT: NO, BUT HIS TIES -- BUT THAT WAS A CONSIDERATION FOR THE COURT, AND IN A WAY THAT MAKES SENSE TO ME. AS I SAID, I COULD REALLY PUT MYSELF IN THE POSITION OF THE JUDGE THERE, WHO'S LOOKING AT THESE ALLEGATIONS THAT ARE SERIOUS ALLEGATIONS OF CONDUCT THAT ANY OF US WOULD FIND FRIGHTENING IF IT WERE DIRECTED TO US. I COULDN'T UNDERSTAND THAT MORE.

AND NOT KNOWING WHAT MR. SUTCLIFFE'S SITUATION WOULD BE IN TERMS OF TIES IN CALIFORNIA. KNOWING THAT, OBVIOUSLY, HE HAD SOME TIES HERE, BUT THEY DIDN'T APPEAR TO BE VERY COMMENDABLE TIES. THEY APPEARED TO RELATE TO A DISPUTE THAT HAD LED TO THIS CONDUCT.

THE AVAILABILITY OF A MEMBER OF THE BAR WITHOUT ANY CRIMINAL RECORD OF HIS OWN, WHO IS CERTAINLY ECONOMICALLY A RESPONSIBLE SURETY, AS AN ADDITIONAL FACTOR TO PRETRIAL SERVICES' SUPERVISION, WHICH I WOULD ALWAYS CONSIDER VERY SERIOUSLY IN THIS KIND OF A CASE, IS A FACTOR THAT'S -- I'M FINDING IT HARD TO SAY THAT IN LIGHT OF THAT PROFFER, IN LIGHT OF MR. MC AFFEE'S AVAILABILITY, AND ALL OF THE OTHER CONDITIONS THAT WE'RE TALKING ABOUT BEING ABLE TO CRAFT, THAT THESE ARE NOT CONDITIONS THAT COULD REASONABLY ASSURE THE SAFETY OF THE COMMUNITY.

MS. POTASHNER: YOUR HONOR, COULD I --

THE COURT: I'LL CONSIDER ADDING ELECTRONIC MONITORING TO IT.

MS. DUARTE: I WAS JUST GOING TO ASK IF THE COURT WOULD CONSIDER THAT.

THE COURT: BECAUSE THAT WOULD ADDRESS AN ADDITIONAL ISSUE.

MS. DUARTE: BECAUSE WE WOULD -- OBVIOUSLY WE WOULD REQUEST THAT IF THE COURT IS INCLINED TO --

THE COURT: YES.

I'M SORRY. GO AHEAD, COUNSEL.

MS. POTASHNER: THANK YOU, YOUR HONOR.

I JUST WANTED TO PUT A COUPLE OF THINGS ON THE RECORD BECAUSE APPARENTLY THIS IS -- THEY'RE GOING TO BE ASKING FOR A STAY.

I THINK IT'S IMPORTANT -- THE FACT THAT MR. MC AFFEE IS HERE BEFORE THE COURT, I THINK THAT DOES SPEAK TO HIS -- TO THE LEVEL OF DANGEROUSNESS THAT THE COMMUNITY WOULD HAVE WITH MR. SUTCLIFFE OUT THERE IN THE COMMUNITY. WHEN HE WAS IN NEW HAMPSHIRE, IT WAS PROBABLY ENVISIONED THAT HE WOULD JUST BE WANDERING THE STREETS OF LOS ANGELES. AND THAT WOULD MAKE HIM A MUCH MORE DANGEROUS PERSON THAN SOMEBODY WHO'S UNDER THE WING OF A PERSON WHO IS A MEMBER OF THE CALIFORNIA STATE BAR.

AND I ALSO THINK IN TERMS OF MR. MC AFFEE'S REPUTATION AND IN TERMS OF HIM BEING APPROPRIATE, IT'S VERY SIGNIFICANT TO REMEMBER THAT HE IS A MEMBER OF THE BAR. AND THAT MEANS SOMETHING. HE'S GONE THROUGH RIGOROUS TESTING OF

HIS MORAL TURPITUDE. HE WAS DEEMED TO BE APPROPRIATE TO BE A MEMBER OF THE BAR. THAT IS NOT SOMETHING THAT SHOULD BE TAKEN LIGHTLY. THAT'S SOMETHING THAT THERE ARE COMMITTEES AND THERE ARE INTERVIEWS. AND THERE'S HISTORY. ALL OF THAT IS LOOKED AT WHEN SOMEBODY BECOMES A MEMBER OF THE BAR.

IN ADDITION, IT'S IMPORTANT TO KNOW THAT HE IS IN GOOD STANDING WITH THE BAR. THAT WASN'T BROUGHT UP BEFORE. THAT HE DOESN'T HAVE ANY DISCIPLINARY RECORD. SO, HE IS A SOLID MEMBER OF THE BAR. I THINK THAT IS EXTREMELY SIGNIFICANT, AND IT SPEAKS DIRECTLY TO WHETHER OR NOT STEVEN SUTCLIFFE WOULD BE DANGEROUS IF HE WAS IN THE COMMUNITY.

I WOULD ASK THE COURT TO CONSIDER -- I UNDERSTAND THE COURT IS CONSIDERING ELECTRONIC MONITORING. I'D ASK THE COURT TO CONSIDER NOT IMPOSING ELECTRONIC MONITORING AT THIS TIME, BUT ALLOWING INTENSIVE SUPERVISION, ALLOWING MR. MC AFFEE TO REPORT ANY SORT OF DISCREPANCY.

A CURFEW IS APPROPRIATE. NO USE OF THE COMPUTER IS APPROPRIATE. A KEEP-AWAY ORDER IS APPROPRIATE AS WELL.

BUT I DON'T THINK THAT ELECTRONIC MONITORING IS NECESSARY WHEN YOU HAVE SOMEONE BEING APPOINTED AS A CUSTODIAN ON TOP OF INTENSIVE SUPERVISION.

AND I'D SUBMIT ON THOSE POINTS.

THE COURT: ALL RIGHT.

DO YOU WANT TO BE HEARD FURTHER?

MS. DUARTE: I DO WANT TO REITERATE MY REQUEST FOR

ELECTRONIC MONITORING AND NOTE THAT MR. MC CATHY MAY BE A --

MR. MC AFFEE: MC AFFEE.

MS. DUARTE: MC AFFEE, EXCUSE ME.

-- MAY BE A CUSTODIAN. HOWEVER, IT'S CLEAR FROM HIS SIX-FIGURE INCOME THAT HE DOES WORK AND HE DOES COME AND GO FROM THE HOUSE. AND HE'S NOT GOING TO BE THERE WATCHING MR. SUTCLIFFE ALL THE TIME BY ANY MEANS.

SO, WE WOULD ASK FOR THE MONITORING CONDITION AGAIN IF THE COURT IS INCLINED, OVER OUR OBJECTION, TO RELEASE MR. SUTCLIFFE.

THE COURT: OKAY. I THINK I WOULD IMPOSE THE ELECTRONIC MONITORING.

ALL RIGHT. I'M GOING TO SET THE BOND IN THE AMOUNT OF A 75,000-DOLLAR APPEARANCE BOND WITH A JUSTIFIED AFFIDAVIT OF SURETY TO BE SIGNED BY MR. MC AFFEE.

THE DEFENDANT IS TO BE SUBJECT TO INTENSIVE PRETRIAL SERVICES' SUPERVISION. HE'S TO SURRENDER PASSPORT, IF HE HAS ONE, TO THE CLERK OF THE COURT. NO PASSPORT, THEN, I NEED A DECLARATION THAT HE DOESN'T HAVE A PASSPORT.

TRAVEL IS RESTRICTED TO THE CENTRAL DISTRICT OF CALIFORNIA WITHOUT COURT PERMISSION.

I HAVE ONE OTHER SURETY REQUIREMENT. I'M GOING TO REQUIRE THAT HIS BROTHER SIGN A 10,000-DOLLAR AFFIDAVIT OF SURETY AS WELL. THAT DOES NOT NEED TO BE JUSTIFIED, BUT I WANT A FAMILY MEMBER ALSO TO BE A SURETY.

THE DEFENDANT IS NOT TO ENTER THE PREMISES OF ANY AIRPORT, SEAPORT, RAILROAD OR BUS TERMINAL THAT PERMITS EXIT FROM THE CONTINENTAL UNITED STATES OR THE AREA OF RESTRICTED TRAVEL WITHOUT COURT PERMISSION.

THE DEFENDANT IS TO RESIDE WITH MR. MC AFFEE.

THE DEFENDANT IS TO AVOID ALL CONTACT, DIRECTLY OR INDIRECTLY, WITH ANY PERSON WHO IS IDENTIFIED AS A VICTIM IN THE COMPLAINT. AND THAT WOULD INCLUDE ANY OF THE GLOBAL CROSSING EMPLOYEES, ANY PAST OR CURRENT GLOBAL CROSSING EMPLOYEE, WHOSE INFORMATION IS AT ISSUE THERE IN THE COMPLAINT.

THE DEFENDANT IS NOT TO POSSESS ANY FIREARM, AMMUNITION, DESTRUCTIVE DEVICE, OR ANY OTHER DANGEROUS WEAPON. AND IN ORDER TO DETERMINE COMPLIANCE WITH THAT PROVISION, THE DEFENDANT IS TO AGREE TO SUBMIT TO A SEARCH OF HIS PERSON OR PROPERTY BY PRETRIAL SERVICES IN CONNECTION WITH THE UNITED STATES MARSHAL.

ALL RIGHT. THE DEFENDANT IS TO PARTICIPATE IN A HOME-CONFINEMENT PROGRAM AND TO ABIDE BY THE REQUIREMENTS OF THE PROGRAM, INCLUDING ELECTRONIC MONITORING OR OTHER LOCATION VERIFICATION SYSTEM, AS DETERMINED BY PRETRIAL SERVICES. AND IF PRETRIAL DETERMINES THAT THE DEFENDANT IS ABLE TO PAY ALL OR PART OF THE COSTS OF THAT MONITORING, THEN, HE'S ORDERED TO PAY THE COSTS.

ALL RIGHT. AND IT'S A HOME DETENTION REQUIREMENT,

WHICH IS THAT THE DEFENDANT IS RESTRICTED TO HIS RESIDENCE AT ALL TIMES, EXCEPT FOR EMPLOYMENT, EDUCATION, RELIGIOUS SERVICES, MEDICAL, SUBSTANCE ABUSE OR MENTAL HEALTH TREATMENT, ATTORNEY VISITS AND COURT OBLIGATIONS, EXCEPT AS APPROVED -- THOSE ALL HAVE TO BE PREAPPROVED BY PRETRIAL SERVICES.

ALL RIGHT. THE DEFENDANT IS NOT TO POSSESS OR BE AFFORDED ACCESS, EITHER IN THE HOME OR THE WORK PLACE OR TO ANY OTHER LOCATION -- OR IN ANY OTHER LOCATION TO ANY DEVICE THAT ALLOWS INTERNET ACCESS EXCEPT AS APPROVED BY PRETRIAL SERVICES.

AND TO INSURE COMPLIANCE WITH THAT CONDITION, THE DEFENDANT IS TO AGREE TO A SEARCH OF HIS PERSON OR PROPERTY BY PRETRIAL SERVICES IN CONJUNCTION WITH THE MARSHAL.

ALL RIGHT -- OH. AND, THEN, IN ADDITION, THE DEFENDANT IS TO COMPLY WITH ALL TERMS OF THE PRELIMINARY INJUNCTION ISSUED IN THE STATE COURT GLOBAL CROSSING VERSUS SUTCLIFFE ACTION.

MS. DUARTE: YOUR HONOR, JUST ONE CLARIFICATION. THE COURT INDICATED THAT HE WAS NOT TO HAVE ANY CONTACT WITH ANY DEVICE PERMITTING INTERNET ACCESS.

IS THE COURT ALSO RESTRICTING, AND WE ASK THAT THE COURT ALSO RESTRICT HIS ACCESS TO COMPUTERS IN GENERAL. BECAUSE THERE ARE A VARIETY OF WAYS FOR SOMEONE WHO'S VERY SKILLED TO CIRCUMVENT ACCESS, AND THAT'S WHY WE ASK FOR THAT

PROVISION.

MS. POTASHNER: WELL, IF I COULD JUST BE HEARD ON THAT.

THE COURT: YES.

MS. POTASHNER: I THINK THAT IT IS OBVIOUSLY APPROPRIATE NOT TO HAVE ANY INTERNET ACCESS. HOWEVER, IF HE IS GOING TO BE CONFINED TO HIS HOME, AND IF HE'S INTERESTED IN LOOKING AND HELPING IN HIS LEGAL DEFENSE, HE MAY BE WANTING TO LOOK AT CD ROMS WITH LAW ON IT. AND THAT WOULD BE REALLY THE ONLY WAY THAT HE WOULD HAVE ANY ACCESS TO LEGAL MATERIALS.

SO, I THINK THAT -- UNLESS HE HAS ACCESS TO HARD BOOKS, THAT'S THE ONLY WAY HE CAN LOOK AT LAW. AND I EXPECT THAT HE'S GOING TO WANT TO PARTICIPATE VIGOROUSLY IN HIS DEFENSE. SO, I WOULD -- I THINK THAT KEEPING SOMEONE OFF THE INTERNET IS SUFFICIENT BECAUSE IT'S CONTAINED THEN.

THE COURT: YES. I THINK THAT THE COMPUTER -- I MEAN, IF YOU HAD IT ON A LAPTOP WITHOUT A MODEM OR SOMETHING LIKE THAT, I DON'T --

MS. DUARTE: PERHAPS IF YOU --

THE COURT: I MEAN, GRANTED I DON'T UNDERSTAND IT. IT'S SORT OF MAGICAL TO ME. BUT I CAN'T SEE HOW YOU COULD ACCESS ANYTHING.

MS. DUARTE: DOES MR. MC AFFEE HAVE INTERNET ACCESS ON HIS COMPUTER AT HOME? -- MAY I ASK? ON THE COMPUTER THAT

MR. SUTCLIFFE WOULD BE USING, IS THERE A STATIC OR DYNAMIC IP ADDRESS ASSOCIATED WITH THAT? DOES HE HAVE ACCESS?

MR. MC AFFEE: IF I MAY ADDRESS THE COURT?

THE COURT: MM-HMM.

MR. MC AFFEE: I HAVE A PORTABLE COMPUTER THAT MR. SUTCLIFFE CAN HAVE ACCESS TO THAT. ALSO, IT HAS A PROGRAM LOADED FOR THE USE OF CD ROM LIBRARY -- LEGAL LIBRARY. IT'S PORTABLE. SO, IT'S NOT HOOKED UP TO THE INTERNET.

THE COURT: OKAY. WHAT IF WE RESTRICT HIS COMPUTER USE TO A LAPTOP PORTABLE COMPUTER.

MS. DUARTE: MAY I HAVE JUST A MOMENT, YOUR HONOR.

(PAUSE IN PROCEEDINGS.)

MS. POTASHNER: WHAT MR. MC AFFEE IS SAYING TO ME, AND TO JUST THE COURT EVEN MORE INFORMATION, WHAT HE'S SAYING IS HE BELIEVES THAT FOR HIM TO BE A CUSTODIAN -- A GOOD CUSTODIAN TO STEVEN SUTCLIFFE, HE WOULD WANT TO BRING HIM TO HIS LAW OFFICE EVERYDAY SO HE COULD PHYSICALLY BE IN HIS PRESENCE. LEAVING HIM AT HOME, PERHAPS ALONE, HE'S A LITTLE MORE WORRIED.

I DON'T KNOW WHAT THE COURT WANTS TO DO WITH THAT INFORMATION, BUT THERE IS SOME LOGIC TO THAT.

MR. MC AFFEE: MAY I? I'M SORRY, YOUR HONOR.

THE COURT: MM-HMM.

MR. MC AFFEE: HAVING HIM IN MY OFFICE ALSO GIVES HIM ACCESS TO THE LEGAL LIBRARY IN MY OFFICE. I COULD PUT

HIM TO WORK AND MAKE HIM USEFUL. HE WON'T BE SITTING AT HOME STEWING AS IT WERE. AND I HAVE A BETTER CONTROL. I HAVE A SOLO PRACTICE. IT'S A SMALL OFFICE. HE CAN'T HIDE IN MY OFFICE. AND I HAVE JUST BETTER ABILITY TO CONTROL WHAT HE DOES, YOU KNOW, WHEN I COULD PHYSICALLY BE THERE WITH HIM.

WHEN I GO TO COURT, HE CAN COME TO COURT WITH ME AND SIT IN THE BACK OF THE COURT WHILE I DO MY THING.

IT SEEMS TO ME THAT I CAN BE A MUCH BETTER AND EFFECTIVE CUSTODIAN OVER HIM IF I AM TRULY BEING HIS CUSTODIAN AND NOT BEING A BABYSITTER THAT LEAVES HIM FOR EIGHT OR NINE OR TEN HOURS A DAY TO HIS OWN DEVICES.

THE COURT: WELL --

MS. DUARTE: WE OBJECT TO THAT, YOUR HONOR.

THE COURT: I'M GOING TO LEAVE IT RIGHT NOW WITH THE HOME DETENTION AND THE ELECTRONIC MONITORING AND THE LACK OF COMPUTER ACCESS.

BY BEING HIS CUSTODIAN -- I MEAN, I UNDERSTAND, AND I APPRECIATE THE DILIGENCE, BUT I DON'T EXPECT IT'S POSSIBLE FOR YOU TO KEEP MR. SUTCLIFFE PHYSICALLY IN YOUR CONTROL 24 HOURS A DAY.

MR. SUTCLIFFE, YOU HAVE TO BE RESPONSIBLE FOR YOURSELF IN A LOT OF WAYS.

YOU UNDERSTAND THAT, CORRECT?

OKAY. I'M GOING TO LIMIT THE COMPUTER ACCESS TO A LAPTOP WITH NO CONNECTIONS. AND THE NO INTERNET ACCESS

APPLIES TO THINGS OTHER THAN THE COMPUTER TOO. I KNOW YOU CAN DO THAT ON YOUR PALM PILOT NOW.

NOTHING THAT ALLOWS INTERNET ACCESS. AND THE HOME DETENTION ORDER WILL STAND WITH THE ELECTRONIC MONITORING BECAUSE I'M GOING TO BE RELYING ON PRETRIAL SERVICES A LOT TOO.

ALL RIGHT.

MS. POTASHNER: TWO OTHER BRIEF THINGS, YOUR HONOR.

THE COURT: YES.

MS. POTASHNER: NUMBER ONE, APPARENTLY THERE ARE REGISTERED FIREARMS THAT ARE LOCKED UP APPROPRIATELY IN MR. MC AFFEE'S HOUSE. I WANTED TO ALERT THE COURT TO THAT. BECAUSE YOU SAID NO ACCESS TO FIREARMS. I DON'T BELIEVE HE'S GOT ACCESS, BUT I JUST WANT YOU TO KNOW THEY ARE IN THE HOUSE.

MS. DUARTE: WE ASK THAT THOSE BE REMOVED.

MR. MC AFFEE: YOUR HONOR, LET ME JUST -- AGAIN, MY WIFE AND I ARE LICENSED FOSTER PARENTS. THE GUNS -- FIRST OF ALL, MR. SUTCLIFFE DOES NOT AND WOULD NOT HAVE ACCESS TO THEM. AND AS REQUIRED BY THE COUNTY OF LOS ANGELES, THEY ARE LOCKED SECURELY IN A CABINET THAT HE CANNOT GAIN ACCESS TO. IT WOULD BE VERY DIFFICULT TO REMOVE THEM. THERE ARE A NUMBER OF FIREARMS IN THAT CABINET. HE DOESN'T KNOW WHERE THE CABINET IS. THERE'S SIMPLY NO WAY HE COULD HAVE ACCESS TO IT. BECAUSE WE HAVE CHILDREN IN THE HOME ON OCCASION

THROUGH THE FOSTER CARE SYSTEM. SO, THAT'S ALREADY BEEN ADDRESSED BY THE COUNTY OF LOS ANGELES.

MS. DUARTE: YOUR HONOR, I THINK UNLESS THE COURT IS INCLINED TO ORDER OTHERWISE, I THINK THAT EVEN IF THE COURT WERE INCLINED TO ALLOW THAT, THAT PRETRIAL SERVICES WOULD HAVE A SERIOUS PROBLEM WITH THAT. I THINK THAT THEY REGULARLY REQUIRE THAT THERE BE NO FIREARMS IN THE HOME.

BUT I WOULD, AGAIN, RENEW MY REQUEST THAT THAT -- THOSE FIREARMS BE TAKEN OUT OF THAT HOME AND PUT SOMEWHERE SAFE AND AWAY FROM MR. SUTCLIFFE AS SOON AS POSSIBLE BEFORE HE'S ACTUALLY RELEASED TO MONITORING IN THAT SITUATION.

THE COURT: YOU KNOW, MR. MC AFFEE, I'LL JUST TELL YOU, I COULDN'T HAVE HIM LIVE IN THE HOME IF THE FIREARMS ARE THERE. AND I APPRECIATE YOU FULLY PROTECT THEM. AND YOU HAVE A LOT OF MOTIVATION WITH THE CHILDREN NOT TO HAVE THEM.

BUT IT'S A PERSONAL THING AS MUCH AS ANYTHING, THAT THAT WOULD BE A REQUIREMENT THAT THERE NOT BE FIREARMS IN THE HOME.

MR. MC AFFEE: YOUR HONOR, I'LL HAVE TO TALK TO COUNSEL ABOUT THIS. THE TWO CONDITIONS THAT THE COURT IS IMPOSING, WHICH I THINK ARE IMPRACTICAL FOR MY ACTING AS A SURETY, HAVE TO BE ADDRESSED.

I DON'T BELIEVE THAT I'M COMFORTABLE ACTING AS A SURETY, THE CUSTODIAN FOR A PERSON OVER WHOM I DON'T HAVE THE RIGHT TO PHYSICALLY CONTROL THEIR ACTIONS.

THE COURT: MM-HMM.

MR. MC AFFEE: I'M CONCERNED ABOUT THAT.

THE ISSUE OF THE FIREARMS ALSO CONCERNS ME. THERE'S ABSOLUTELY NO HISTORY OF MR. SUTCLIFFE OF EVER USING A FIREARM OR THREATENING WITH A FIREARM OR EVER PHYSICALLY THREATENING ANYBODY WITHOUT A FIREARM. AND TO IMPOSE THAT KIND OF AN OBLIGATION ON ME AND MY FAMILY AND ON HIM, I'D HAVE TO GIVE THIS SERIOUS CONSIDERATION. BECAUSE I DO -- I AM A COLLECTOR. I DO HAVE A VERY LARGE COLLECTION OF FIREARMS. IT WOULD BE AN INCREDIBLY DIFFICULT THING TO TRANSPORT THAT THREE-TON CABINET SOMEWHERE ELSE. I DON'T KNOW IF I COULD PHYSICALLY MOVE IT WITHOUT HIRING A SERVICE TO MOVE IT.

THOSE WEAPONS COULDN'T BE MORE SECURE IF THEY WERE IN YOUR JUDGE'S CHAMBERS.

BUT THAT CONCERNS ME LESS THAN NOT BEING ABLE TO BE PHYSICALLY ABLE TO WATCH OVER HIM. I'M NOT COMFORTABLE WITH HIM BEING ALONE IN MY HOUSE, EIGHT, NINE HOURS A DAY, WITHOUT ANYBODY BEING THERE AND GUARANTEEING TO THE COURT THAT HE CANNOT GET ACCESS TO THE INTERNET. I HAVE COMPUTERS AT MY HOME. THEY ALL HAVE COMPUTER INTERNET ACCESS ABILITY. IF I'M NOT THERE TO WATCH HIM, OR MY WIFE ISN'T THERE TO WATCH HIM, AND I DO TRUST MR. SUTCLIFFE TO BE RESPONSIBLE FOR HIMSELF, BUT YOU'RE ASKING MY FAMILY TO PUT UP A SECURITY FOR A PERSON OVER WHOM I DON'T HAVE CONTROL OVER.

SO, IF YOU GIVE ME CONTROL OVER HIM, I'D BE HAPPY TO DO THAT. IF YOU'RE NOT GOING TO GIVE ME CONTROL OVER HIM, I'M NOT SURE I'M WILLING TO DO THAT. AND I WOULD THEN HAVE TO TALK TO MY FAMILY ABOUT THAT.

THE COURT: WELL, I UNDERSTAND THAT. YOU KNOW, I'M NOT ASKING YOU TO DO IT. I'M REALLY NOT. I CAN UNDERSTAND YOUR HAVING GREAT RESERVATIONS.

WELL, I SUPPOSE IT'S CONCEIVABLE THAT THE FIREARMS ARE VERY SAFE. AND I HAVE NO REASON TO DOUBT YOUR SCRUPULOUS CONTROL OVER THEM. BUT THE CONDITIONS THAT I'VE IMPOSED ARE THE CONDITIONS THAT ALLOW ME TO SET THIS BOND. THEY DO NOT REQUIRE THAT YOU UNDERTAKE THAT OBLIGATION BY ANY MEANS. AND IT'S POSSIBLE THAT THERE ARE ALTERNATIVE SITUATIONS THAT COULD BE PRESENTED TO ME THAT WOULD SATISFY ME JUST AS WELL.

BUT, YOU KNOW, YOU'VE BEEN HERE THROUGH THIS WHOLE PROCESS, AND IT OBVIOUSLY FOLLOWS ON A LONG PROCESS THAT HAPPENED A COUPLE OF DAYS AGO. THIS IS NOT AN EASY CALL.

SO, I'M DRAWING A LINE WHERE I'M COMFORTABLE DRAWING THE LINE. YOU ARE CERTAINLY UNDER NO OBLIGATION. AND I WOULD UNDERSTAND IT. AND I WOULD EXPECT MR. SUTCLIFFE WOULD UNDERSTAND IF YOU WERE NOT COMFORTABLE UNDERTAKING THOSE RESPONSIBILITIES.

BUT I HAVE TO -- I'M PREPARED TO ACCEPT YOUR ASSESSMENT OF YOUR WILLINGNESS TO ACT AS A RESPONSIBLE PARTY.

BUT YOU WOULD NEVER BE THE PRIMARY RESPONSIBLE

PARTY. THE PRIMARY RESPONSIBLE PARTY IS SITTING RIGHT THERE. AND NEITHER YOU NOR I CAN ASSURE HIS COMPLIANCE.

I'VE SET THE CONDITIONS THAT DEFINE MY COMFORT LEVEL. AND THAT'S ALL I CAN DO.

MS. POTASHNER: YOUR HONOR, IS HE BEING ORDERED RELEASED UPON FILING OF BOTH OF THE AFFIDAVITS?

MS. DUARTE: WE ASK FOR A STAY, YOUR HONOR.

THE COURT: WELL, I WILL -- YES, I WILL. I'LL STAY IT UNTIL --

MS. DUARTE: TUESDAY CLOSE OF BUSINESS, YOUR HONOR.

THE COURT: TUESDAY, CLOSE OF BUSINESS?

MS. DUARTE: PIA IS MONDAY MORNING.

THE COURT: UNTIL MONDAY CLOSE OF BUSINESS.

BECAUSE IF YOU WANT TO --

MS. DUARTE: CAN I HAVE TUESDAY, 10 O'CLOCK. ONLY BECAUSE THE CLERK'S OFFICE, CLOSING SO EARLY, AND SOMETIMES PIA GOES LATE. AND I WOULD HAVE TO DETERMINE THE JUDGE AND THEN FILL OUT THE APPROPRIATE FORMS AND GET THEM SUBMITTED. SO, I HAVE TUESDAY, TEN O'CLOCK, I HAVE AN HOUR AND A HALF AFTER THE CLERK'S OFFICE OPENS.

THE COURT: THAT'S FINE. BECAUSE IT'S GOING TO BE RELEASED TO PRETRIAL ONLY ANYWAY BECAUSE THEY'RE GOING TO HAVE TO SET UP THE --

MS. DUARTE: I WAS GOING TO SAY, I DON'T ENVISION

IT ACTUALLY HAPPENING ANY SOONER THAN THAT.

THE COURT: NO, YOU'RE RIGHT. YOU'RE RIGHT.

MS. DUARTE: I'M NOT TRYING TO BE OBSTRUCTIONISTIC.

THE COURT: NO, NO, I UNDERSTAND. I UNDERSTAND.

OKAY. ALL RIGHT. ANYTHING FURTHER?

MS. POTASHNER: NO, I DON'T THINK SO, YOUR HONOR.

THE COURT: OKAY. THANK YOU.

MS. DUARTE: CAN I JUST HAVE A MOMENT, YOUR HONOR?

THE COURT: OH, DID YOU -- DID YOU HAVE --

MS. POTASHNER: SHE ASKED FOR A MOMENT.

(GOVERNMENT COUNSEL CONFERRING WITH AGENT.)

MS. DUARTE: NO, YOUR HONOR. THANK YOU.

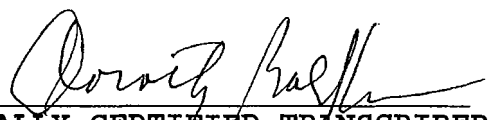
THE COURT: ALL RIGHT. THANK YOU.

MS. POTASHNER: THANK YOU, YOUR HONOR.

(PROCEEDINGS CONCLUDED.)

C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



FEDERALLY CERTIFIED TRANSCRIBER
DOROTHY BABYKIN

2/19/05
DATED

CERTIFIED COPY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	CASE NO. CR 02-350-AHM
	)	
	)	LOS ANGELES, CALIFORNIA
	)	MONDAY, APRIL 15, 2002
STEVEN WILLIAM SUTCLIFFE,	)	
	)	
DEFENDANT.	)	
	)	

HEARING
BEFORE MAGISTRATE JUDGE PATRICK J. WALSH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
JOHN S. GORDON
UNITED STATES ATTORNEY
GEORGE CARDONA
ASSISTANT UNITED STATES ATTORNEY
CHIEF, CRIMINAL DIVISION
BY: ELENA J. DUARTE
ASSISTANT UNITED STATES ATTORNEY
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

FOR THE DEFENDANT:
MARIA E. STRATTON
FEDERAL PUBLIC DEFENDER
BY: HILARY POTASHNER
DEPUTY FEDERAL PUBLIC DEFENDER
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING;
TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE.

COURTROOM DEPUTY/ RECORDER:	ISABEL MARTINEZ
TRANSCRIBER:	DOROTHY BABYKIN COURT HOUSE SERVICES 1218 VALEBROOK PLACE GLENDORA, CALIFORNIA 91740 (626) 963-0566

I N D E X

CASE NO. CR 02-350-AHM APRIL 15, 2002

PROCEEDINGS: POST-INDICTMENT ARRAIGNMENT HEARING.

LOS ANGELES, CALIFORNIA; MONDAY, APRIL 15, 2002

THE COURT: BEFORE WE CALL THE CALENDAR, I WANT TO ADVISE ALL DEFENDANTS OF THEIR CONSTITUTIONAL RIGHTS AND TO EXPLAIN THE PROCEDURES FOLLOWED IN THIS COURT.

ARE YOU THE ONLY INTERPRETER TODAY?

THE INTERPRETER: YES, YOUR HONOR.

THE COURT: WILL YOU STATE FOR THE RECORD WHAT YOUR NAME IS, AND THE LANGUAGE YOU'RE INTERPRETING, AND WHO YOU'RE INTERPRETING FOR.

THE INTERPRETER: ELSA VASQUEZ, SPANISH INTERPRETER.

I'M INTERPRETING FOR RAPHAEL NUNEZ HERNANDEZ AND JAVIER ZABALLA.

THE COURT: MR. NUNEZ HERNANDEZ, ARE YOU ABLE TO UNDERSTAND WHAT'S HAPPENING HERE TODAY, SIR?

DEFENDANT NUNEZ HERNANDEZ: (INAUDIBLE.)

THE COURT: ALL RIGHT. IF YOU HAVE ANY QUESTIONS AND YOU NEED FOR US TO STOP, PLEASE LET US KNOW.

OKAY. WHO ELSE?

THE INTERPRETER: RAPHAEL HERNANDEZ, YOUR HONOR.

THE COURT: MR. HERNANDEZ. RAPHAEL HERNANDEZ.

DEFENDANT HERNANDEZ: I'M HERNANDEZ.

THE COURT: YOU ARE HERNANDEZ.

THEN, WHO IS THIS? NUNEZ HERNANDEZ IS NEXT TO HIM?

THE INTERPRETER: JAVIER ZABALLA.

THE COURT: MR. ZABALLA, DO YOU UNDERSTAND, SIR, WHAT'S HAPPENING?

DEFENDANT ZABALLA: YES, YOUR HONOR.

THE COURT: ALL RIGHT. AND I KNOW THAT SHE'S NOT TRANSLATING. YOU MUST UNDERSTAND SOME ENGLISH. BUT IF YOU HAVE ANY QUESTIONS TODAY, LET'S US KNOW SO WE CAN STOP AND START OVER.

DEFENDANT ZABALLA: ALL RIGHT.

THE COURT: BEFORE WE CALL THE CALENDAR, I WANT TO ADVISE ALL DEFENDANTS OF THEIR CONSTITUTIONAL RIGHTS AND TO EXPLAIN THE PROCEDURES FOLLOWED IN THIS COURT.

EACH DEFENDANT IS HERE THIS MORNING BECAUSE HE OR SHE HAS BEEN CHARGED WITH A VIOLATION OF FEDERAL LAW.

THE CHARGE AGAINST YOU IS CONTAINED IN AN INDICTMENT OR INFORMATION. A COPY OF THE CHARGE HAS BEEN GIVEN TO YOU OR WILL BE GIVEN TO YOU THIS MORNING. LATER TODAY YOU WILL BE CALLED UPON TO PLEAD EITHER GUILTY OR NOT GUILTY TO EACH CHARGE.

THESE ARE YOU CONSTITUTIONAL AND STATUTORY ~~RIGHTS~~. PLEASE LISTEN CAREFULLY.

YOU ARE ENTITLED TO A SPEEDY AND PUBLIC TRIAL BY JURY OR BY A JUDGE ALONE IF JURY IS WAIVED.

YOU ARE ENTITLED TO BE REPRESENTED BY COUNSEL AT ALL STAGES OF THE PROCEEDINGS.

IF YOU DO NOT HAVE THE MONEY OR MEANS TO HIRE AN

ATTORNEY, I WILL APPOINT AN ATTORNEY TO REPRESENT YOU WITHOUT COST OR EXPENSE TO YOU. HOWEVER, YOU MUST FIRST SUBMIT A FINANCIAL AFFIDAVIT FORM WHICH I MUST APPROVE.

YOU ARE ENTITLED TO SEE AND HEAR THE EVIDENCE AND WITNESSES AGAINST YOU AND TO CROSS-EXAMINE THOSE WITNESSES.

YOU ARE ENTITLED TO SUBPOENA WITNESSES AND COMPEL THE PRODUCTION OF OTHER EVIDENCE ON YOUR OWN BEHALF.

YOU HAVE THE RIGHT TO HAVE THE COURT CONSIDER THE CONDITIONS OF YOUR BAIL RELEASE IN ACCORDANCE WITH THE BAIL REFORM ACT OF 1984.

IF THE GOVERNMENT SEEKS TO HOLD YOU IN CUSTODY, YOU HAVE THE RIGHT TO A HEARING ON THE FIRST DATE OF YOUR APPEARANCE, OR WITHIN THREE TO FIVE DAYS OF YOUR APPEARANCE IF A CONTINUANCE IS REQUESTED BY EITHER THE DEFENSE OR THE PROSECUTION AND IT'S GRANTED BY THE COURT.

IT IS NOT NECESSARY TO PROVE YOUR INNOCENCE.

IT IS THE BURDEN OF THE GOVERNMENT TO PROVE YOUR GUILT BEYOND A REASONABLE DOUBT.

AFTER THIS MORNING'S PROCEEDINGS YOUR CASE WILL BE TRANSFERRED TO A DISTRICT JUDGE OF THIS COURT. THE PARTICULAR JUDGE FOR YOUR CASE WILL BE SELECTED BY LOT AFTER YOU ARE ARRAIGNED.

ALL MOTIONS ARE RESERVED AND MUST BE MADE BEFORE THE JUDGE TO WHOM THE CASE IS TRANSFERRED.

WHERE A PARTICULAR CASE INVOLVES MORE THAN ONE

DEFENDANT, ALL DEFENDANTS ARE REQUIRED TO APPEAR BEFORE THE JUDGE TO WHOM THAT CASE IS TRANSFERRED.

IF THE DISTRICT JUDGE HAS REQUESTED THAT I RECEIVE A NOT GUILTY PLEA, YOU'LL BE ASKED TO PLEAD AND THE TRIAL DATE SHALL BE SET.

THE CLERK HAS DESIGNATED THE FEDERAL PUBLIC DEFENDANT AND MEMBERS OF THE INDIGENT PANEL TO REPRESENT CERTAIN DEFENDANTS THIS MORNING.

IF FINANCIAL AFFIDAVITS ARE ALREADY ON FILE, THE ATTORNEY SO DESIGNATED ARE HEREBY APPOINTED IN THEIR RESPECTIVE CASES TO WHICH THEY HAVE BEEN ASSIGNED.

IF PRIVATE COUNSEL IS APPEARING FOR ANY DEFENDANT FOR WHOM A COURT-APPOINTED ATTORNEY HAS PREVIOUSLY DESIGNATED -- WAS PREVIOUSLY DESIGNATED, PRIVATE COUNSEL SHOULD MAKE HIS OR HER PRESENCE KNOWN AND FILE HIS OR HER PRAECIPE. THE COURT-APPOINTED ATTORNEY WILL THEN BE RELIEVED.

WHEN I TRANSFER A CASE TO A JUDGE OF THIS COURT AND ANNOUNCE THE TIME FOR APPEARANCE, DEFENDANT AND COUNSEL OF RECORD ARE ORDERED TO APPEAR BEFORE THAT JUDGE AT THAT TIME I SPECIFY.

IF COUNSEL HAS AN APPEARANCE THIS MORNING OR AFTERNOON AT THE SAME TIME IN MORE THAN ONE COURT, COUNSEL IS DIRECTED TO APPEAR FIRST IN THE COURT OF THE JUDGE WHO HAS SENIOR STATUS OF THE COURT.

HOWEVER, IF COUNSEL IS DIRECTED TO APPEAR IN TWO OR

MORE COURTS AT DIFFERENT TIMES, COUNSEL SHALL FIRST ATTEND THE COURT WHICH HAS FIXED THE EARLIER HOURS OF CONVENING.

AND, OF COURSE, THAT RULE -- THE CHIEF JUDGE, JUDGE MARSHALL, YOU WOULD APPEAR IN FRONT OF HER FIRST.

THE CLERK WILL CALL ANY PRIORITY MATTERS FIRST.

(PROCEEDINGS HELD IN UNRELATED MATTERS.)

THE CLERK: CALLING ITEM NUMBER 29, CR 02-350, U.S.A. VERSUS STEVEN WILLIAM SUTCLIFFE.

MS. DUARTE: GOOD MORNING, YOUR HONOR.

ELENA DUARTE APPEARING FOR THE GOVERNMENT.

THE COURT: GOOD MORNING.

MS. POTASHNER: GOOD MORNING, YOUR HONOR.

HILARY POTASHNER APPEARING ON BEHALF OF MR. SUTCLIFFE. I'VE BEEN PREVIOUSLY APPOINTED.

THE COURT: OKAY.

THE CLERK: HILARY, CAN YOU MAKE ON THE RECORD THAT MR. SUTCLIFFE REFUSED TO SIGN HIS STATEMENTS.

MS. POTASHNER: YES, YOUR HONOR. MR. SUTCLIFFE DOES NOT BELIEVE HE UNDERSTANDS THAT FORM WELL ENOUGH TO SIGN, THE CONSTITUTIONAL RIGHTS FORM.

THE COURT: ALL RIGHT. YOU'VE BEEN THROUGH HIS CONSTITUTIONAL RIGHTS WITH HIM THIS MORNING?

MS. POTASHNER: HE HAS READ THE FORM THIS MORNING.

THE COURT: OKAY. WELL, TELL ME WHAT WE CAN DO HERE. HE'S READ THE FORM THIS MORNING.

WERE YOU THERE WITH HIM WHEN HE READ IT?

MS. POTASHNER: NO, I WAS NOT THERE WITH HIM WHEN HE READ IT. HE STARTED AT THE TOP OF THE FORM TELLING ME THAT HE DIDN'T UNDERSTAND EXACTLY WHO THE PLAINTIFF WAS. AND I THOUGHT IT WOULD TAKE A PROLONGED PERIOD OF TIME TO GO THROUGH THE FORM POINT BY POINT.

ANOTHER THING THAT CONFUSED MR. SUTCLIFFE WAS THE DIFFERENCE BETWEEN AN ENTITLEMENT AND A RIGHT. AND I SAID THAT HE WAS ENTITLED TO COUNSEL AS OPPOSED TO HAVING A RIGHT TO COUNSEL.

SO, IT WAS ON THAT LEVEL THAT THERE WAS A NON UNDERSTANDING OF THE FORM. SO, I DID NOT BELIEVE THAT IT WOULD BE FRUITFUL TO GO THROUGH IT LINE BY LINE.

THE COURT: HOW FAR DID YOU GO IN SCHOOL, MR. SUTCLIFFE?

THE DEFENDANT: I COMPLETED HIGH SCHOOL AND COLLEGE, SOME COLLEGE.

THE COURT: WHERE DID YOU GO TO COLLEGE?

THE DEFENDANT: MT. SIERRA COLLEGE IN PASADENA.

THE COURT: AND WHAT DID YOU STUDY?

THE DEFENDANT: COMPUTER SCIENCE.

THE COURT: HOW FAR DID YOU GO?

THE DEFENDANT: I GRADUATED.

THE COURT: ALL RIGHT. SO, YOU'RE A COLLEGE GRADUATE, AND YOU READ AND UNDERSTAND THE ENGLISH LANGUAGE?

THE DEFENDANT: I HAVE AN UNDERSTANDING OF THE LANGUAGE.

THE COURT: DO YOU READ ENGLISH?

THE DEFENDANT: I READ ENGLISH.

THE COURT: OKAY. ALL RIGHT. DO YOU WANT TO ADD ANYTHING, MS. DUARTE?

MS. DUARTE: NO, YOUR HONOR.

THE COURT: ALL RIGHT. I'M GOING TO FIND THAT THE DEFENDANT IS COMPETENT AND CAPABLE OF UNDERSTANDING HIS RIGHTS.

THAT HE'S HAD ACCESS TO AN ATTORNEY IN THIS CASE.

THAT HIS CONSTITUTIONAL RIGHTS WERE READ TO HIM BY ME THIS MORNING. THAT HE'S BEEN GIVEN A FORM OF HIS CONSTITUTIONAL RIGHTS.

AND THAT'S GOING TO BE WHERE THE RECORD IS GOING TO STAND TODAY.

THANK YOU.

THE DEFENDANT: I'M SORRY, YOUR HONOR. THIS IS A COURT OF RECORD?

THE COURT: YES. THIS IS A COURT OF RECORD.

THE DEFENDANT: I WOULD LIKE THE COURT TO NOTE THAT I'M PROCEEDING WITH ALL OF MY RIGHTS RESERVED WITH THE LACK OF PREJUDICE.

THE COURT: THAT'S -- THAT'S GRANTED.

YOU DON'T HAVE TO WORRY ABOUT THAT. ALL YOUR

RIGHTS ARE RESERVED.

THIS IS A PROFORMA PROCEEDING THIS MORNING. YOU'RE HERE TO GET A JUDGE APPOINTED TO YOUR CASE AND TO ENTER A PLEA OF NOT GUILTY.

THE DEFENDANT: I CANNOT ENTER A PLEA OF NOT GUILTY UNTIL I KNOW THE NATURE OF THE CRIME OF WHICH I'M ACCUSED.

THE COURT: ALL RIGHT. I WILL ENTER A PLEA OF NOT GUILTY FOR YOU.

THE DEFENDANT: I DON'T DELEGATE OR AUTHORIZE ANYBODY TO ENTER ANY PLEA ON MY BEHALF FROM --

THE COURT: I'M NOT ASKING FOR YOUR AUTHORITY OR YOUR DELEGATION. YOU'LL BE QUIET. YOU JUST LISTEN TO WHAT'S HAPPENING HERE TODAY. THIS IS NOT YOUR TIME TO MAKE YOUR POINT. ALL RIGHT?

YOU ARE GOING TO BE ABLE TO GO IN FRONT OF A DISTRICT COURT JUDGE AND EXPLAIN TO HIM THAT THE MAGISTRATE JUDGE ENTERED A NOT GUILTY PLEA FOR YOU, AND YOU WERE NOT READY TO ENTER THAT PLEA.

THE DEFENDANT: THANK YOU.

THE COURT: YOU'RE NOT GIVING UP ANY RIGHTS AS FAR AS THAT GOES.

WHEN DEFENDANTS REFUSE TO ENTER A PLEA, WE ENTER IT FOR THEM.

DO YOU UNDERSTAND THAT?

THE DEFENDANT: I UNDERSTAND THAT THAT'S PRACTICING LAW FROM A BENCH.

THE COURT: OKAY.

MS. DUARTE, DO YOU HAVE ANYTHING YOU WANT TO ADD?

MS. DUARTE: I DO NOT, YOUR HONOR.

THE DEFENDANT HAS ALREADY -- BOND HAS BEEN SET. THAT ORDER HAS BEEN STAYED BY MAGISTRATE JUDGE WOEHRLE PENDING ISSUANCE OF A JUDGE THIS MORNING.

THE COURT: OKAY. ALL RIGHT. WHY DON'T WE PROCEED.

THE CLERK: YES, YOUR HONOR.

IS STEVEN WILLIAM SUTCLIFFE YOUR TRUE NAME?

THE DEFENDANT: I AM STEVEN OF THE SUTCLIFFES.

THE COURT: GO AHEAD.

THE CLERK: DID YOU HEAR AND UNDERSTAND THE STATEMENTS OF THIS COURT PERTAINING TO YOUR RIGHTS AND THE APPOINTMENT OF COUNSEL?

THE DEFENDANT: SOME. NOT ALL.

THE COURT: GO AHEAD.

THE CLERK: DID YOU SEE AND SIGN A STATEMENT OF YOUR RIGHTS?

THE DEFENDANT: NO.

THE COURT: GO AHEAD.

THE CLERK: DID YOU RECEIVE A COPY OF THE INDICTMENT?

THE DEFENDANT: NO.

MS. DUARTE: YOUR HONOR, I'M SORRY, I BELIEVE THAT HE DID RECEIVE A COPY.

THE COURT: COUNSEL, DID YOU GET A COPY OF THE INDICTMENT?

MS. POTASHNER: YOUR HONOR, I HAVE A COPY. I CAN PROVIDE IT TO HIM. HE'S READ IT.

THE COURT: WERE YOU THERE WHEN HE READ IT, COUNSEL?

MS. POTASHNER: YES, WE WENT OVER IT LAST WEEK.

THE COURT: OKAY.

THE CLERK: DO YOU WANT THE INDICTMENT READ TO YOU AT THIS TIME?

THE DEFENDANT: NO.

THE COURT: YOU'VE BEEN ASSIGNED TO -- JUDGE MATZ HAS BEEN ASSIGNED TO YOUR CASE.

THE CLERK: OKAY. I NEED TO INQUIRE IF JUDGE MATZ'S SON JEREMY MATZ, ASSISTANT U.S. ATTORNEY, WAS INVOLVED IN ANY WAY WITH THIS CASE?

MS. DUARTE: YOUR HONOR, I BELIEVE NOT.

THE COURT: I'M GOING TO TAKE A NOT GUILTY PLEA FROM YOU.

BUT DO YOU WANT TO ENTER A NOT GUILTY PLEA THIS MORNING, SIR?

THE DEFENDANT: I CAN'T ANSWER A CLAIM UNTIL I KNOW

THE NATURE OF THE CRIME WHICH I'M ACCUSED.

THE COURT: ALL RIGHT. THE COURT WILL ENTER A NOT GUILTY PLEA ON BEHALF OF MR. SUTCLIFFE WITHOUT WAIVER OF ANY RIGHTS HE MAY HAVE IN NOT ENTERING A NOT GUILTY PLEA.

THE CLERK: YES, YOUR HONOR.

A TRIAL IS SET FOR JUNE 4, 2002 AT 8:00 A.M.

I NEED TO OBTAIN A TRIAL ESTIMATE FROM THE GOVERNMENT.

MS. DUARTE: APPROXIMATELY SEVEN COURT DAYS.

THE CLERK: THANK YOU.

AND THE COURT SHALL ISSUE A DISCOVERY ORDER.

MS. DUARTE: I RECEIVED ONE.

MS. POTASHNER: AS HAVE I FOR MR. SUTCLIFFE.

THE COURT: OKAY. MR. SUTCLIFFE, YOU'RE GOING TO HAVE REPRESENTATION THROUGHOUT THIS CASE. THE PUBLIC DEFENDER'S OFFICE IS GOING TO DO A GOOD JOB FOR YOU.

IF YOU HAVE ISSUES THAT YOU WANT TO RAISE ABOUT THE FACT THAT THE COURT ENTERED A NOT GUILTY PLEA FOR YOU, WHEN YOU GET IN FRONT OF JUDGE MATZ, YOU CAN ASK YOUR COUNSEL TO RAISE THOSE ISSUES.

YOU CAN DO SOME RESEARCH IN THE LIBRARY AND SEE IF THERE'S SOME RIGHTS YOU MAY HAVE WAIVED. AND YOU CAN TALK TO JUDGE MATZ. MAYBE HE'LL LET YOU WITHDRAW YOUR NOT GUILTY PLEA AND START OVER. I DON'T KNOW. ALL RIGHT.

THE DEFENDANT: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU, SIR.

(PROCEEDINGS COMPLETE.)

C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

FEDERALLY CERTIFIED TRANSCRIBER
DOROTHY BABYKIN

5/6/05
DATED

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

THE ~~HONORABLE~~ A. HOWARD MATZ, JUDGE PRESIDING

- - -

UNITED STATES OF AMERICA, PLAINTIFF,	)	
-v-	)	CASE NO. CR 02-350-AHM
STEVEN WILLIAM SUTCLIFFE, DEFENDANT.	)	

COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
APRIL 16, 2002

LYNNE SMITH
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

APPEARANCES:

ON BEHALF OF PLAINTIFF:
OFFICE OF THE UNITED STATES ATTORNEY
BY: ELENA DUARTE
JASON GONZALEZ
ASSISTANT UNITED STATES ATTORNEY
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

ON BEHALF OF DEFENDANT:
FEDERAL PUBLIC DEFENDERS OFFICE
BY: HILLARY POTASHNER
DEPUTY FEDERAL PUBLIC DEFENDER
321 NORTH SECOND STREET
LOS ANGELES, CALIFORNIA 90012

TUESDAY, APRIL 16, 2002; LOS ANGELES, CALIFORNIA

-000-

THE CLERK: Item Number 4, CR 02-320-AHM, United States of America versus Steven William Sutcliffe. Counsel, please state your appearances.

MS. DUARTE: Good afternoon, Your Honor. Elena Duarte on behalf of the government.

MS. POTASHNER: Hillary Potashner for Mr. Sutcliffe who is present.

THE COURT: We're here on the government's application for review of the terms of at we're previously accepted or proposed by Judge Woehrle. I have read the government's memorandum, the indictments, pretrial services report which I think was virtually identical to the one previously submitted to Judge Woehrle who cover page says there's no new information and contains the same recommendation that pretrial services previously reached which is that there no circumstances six that secure the defendants appearance at future court proceeding for safety of people in the community. I have also read the complaint. That was before the indictment was filed, declaration of FBI agent Jeffrey Cutrow. And finally the indictment, if I didn't previously mention that.

Are there any additional papers that are applicable to this particular motion that I haven't recited

already?

MS. POTASHNER: The preliminary hearing transcript that was considered but I'm not sure if Your Honor has a copy.

THE COURT: I don't have a copy. I saw there was a 171 page transcript that Judge Woehrle allowed each of you, I'm not sure who was at the hearing before her, allowed both sides to present a proffer of their effort to summarize what that transcript reflected. Is that correct?

MS. DUARTE: That's correct.

THE COURT: Do you either of you think that would be helpful to me?

MS. POTASHNER: I do think that would be helpful.

MS. DUARTE: The proffer or the transcript?

THE COURT: The proffer. I don't have time to read a 171 page transcript.

MS. DUARTE: Your Honor, the government set forth its proffer in its memorandum which the court indicates it's read. To the extent -- I tried to set forth the defense proffer.

THE COURT: I saw that footnote where you apologized in advance. I doubt if there is anything to apologize for. You have right to be heard about your proffer. Let's start with that. Why don't you address me from the lectern, please.

MS. POTASHNER: Yes, Your Honor. Your Honor, if the court just wants me to address exactly what I took out or explained to Judge Woehrle from the preliminary examination I will limit my comments to that. What I tried to --

THE COURT: Start there. I don't know if I need to limit you there but feel free to start with that.

MS. POTASHNER: I proffered that if the court looks at the indictment and compares it to the complaint and then compares it to the preliminary hearing where the allegations of threats and the comments that were made on the Internet were explored in the greatest depth, I think the court can see that the indictment puts in it the worst possible light. What I went through previously, and it did take some time, was comparing the three documents.

When you look at the indictment, Counts 1 through 4, the list four alleged threats. When you compare Count 1 which appears that it's being alleged that Mr. Sutcliffe stated on the Internet: I will personally send you back to hell from where you came.

When you compare that to the affidavit supporting the initial complaints you will see that's taken out of context. That's on page nine of the complaint. When you look at the context what it says is there's two paragraphs and in the second paragraph it says: To close Tracy Hall,

if you call my house again if you threaten me or my family or I will -- and then that quote follows. So really --

THE COURT: Why do you think it's either out of context or somehow that even though it was proceeded by the conditional word "if" it mitigates the seriousness of the allegation?

MS. POTASHNER: When you take that in context with what Mr. Sutcliffe did at the time. What was going in this case, Your Honor was there was a civil case proceeding.

THE COURT: Hall was trying to serve him with a subpoena.

MS. POTASHNER: Yes. At that time, during that time period rather than Mr. Sutcliffe trying to contact or get close to anyone connected to the Global Corporation he did exactly the opposite. He moved to New Hampshire to get away from them because he perceived they were a danger to him.

THE COURT: You know, danger takes on more than one form. Danger can consist of violence and can consist of other kinds of incredibly disruptive intrusions. Getting the way in this world of computers and the Internet also has more than one meaning. I get your point that he was no longer in California. And no longer, for example, picketing or demonstrating as was his right probably in front of Global Crossing headquarters. But getting away is something

of an allusion when the form or mechanics that someone chooses to engage in to either issue threats or engage in other forms of non-immediately physical assault is the computer and the Internet. You are not away from anybody. Being in New Hampshire is not different than being next door.

I don't really see that it's being taken out of context, nor do I think it's a mitigating consideration that it happened while he was maybe trying to build a new or different life for himself in New Hampshire.

MS. POTASHNER: My point, Your Honor, was that if the court is looking at whether he is a physical dangers to the persons in this community, I think it's important to put it in context to what he was doing at the time, rather than physically threatening them or trying to get closer to them or post some sort of immediate danger of the level where detention would be required in this case.

I think it's important to look at what his actions were, that he was not on the Internet just spuing these threat. That he was in a responsive position saying stay away from me.

On top of his position being a responsive position that he was physically removing himself from the local environments because that to me speaks to how dangerous he is, physically dangerous. I would think that would be an

important consideration when detaining someone if they're actually posing a physical danger. Otherwise, if it's more a threat where it's not of such a physical nature I believe the conditions previously set could be conditions that adequately insure the safety of the community.

My point was that that sentence truncated the way it is, makes it, puts it in a different light than what was actually going on. I also highlighted that Count 3, when you look at keep your dogs at bay, I'm now armed. If you look at the affidavit, page 14, what he's referring to being armed with is information. It makes it appear that he's armed, physically armed and physically threatening with a weapon.

I don't read that, when you look at the context I don't read that that way. It appears to me he's armed with information about Class 1 security regions, Class 2 security regions. That's information and maybe that's information that could be used against someone but it's not the same sort of immediate physical threats.

THE COURT: Well, I agree with that proposition that it's a different kind of threat and there may not be a physical threat if indeed that's what armed refers. You may be right, that's what it refers to. It's not entirely clear from the context. But it's an inherently threatening communication.

MS. POTASHNER: Yes, Your Honor. I'm not saying that there's not an issue that the government can say that that's threatening. I agree with that. But again, what I'm trying to say --

THE COURT: Isn't that correct -- I'm going to interrupt you because there's so much on my calendar that I want to make sure I give you a chance but I have to be focused on this. Am I not correct that at the time that Mr. Sutcliffe was arrested weapons were in fact found in his residence?

MS. POTASHNER: When he was arrested in New Hampshire I believe there was a rifle of some sort in his residence, yes.

THE COURT: And ammunition.

MS. DUARTE: Yes, Your Honor, found together behind his bedroom door.

THE COURT: That's what I thought.

MS. DUARTE: It was an SKS rifle, Your Honor.

MS. POTASHNER: Your Honor, if I could have a moment.

(BRIEF PAUSE)

MS. POTASHNER: I think it's also important to note, yes, there was a weapon, apparently it was boxed and there was ammunition in a different box. But in the hearing that took place in New Hampshire, the full day hearing, the

court did make a finding. Of course this court is not bound by that court's finding but by looking at whether Mr. Sutcliffe posed a danger to the people in New Hampshire, knowing that information and reviewing and listening to the witnesses the court did find that he would ot pose a threat to New Hampshire. The quote is on page 163 of the preliminary hearing, line 11, says, I wouldn't find him a danger to this community. That's where the rifle was found, that was where the ammunition was found.

So I think yes, it's true that he did have a weapon but there's no indication that he ever physically threatened anyone with that weapon or there was a problem of a prior use of that weapon.

THE COURT: You know, I'm not sure of where that argument takes you or takes me. I'm looking at the written order that the magistrate judge issued that said at the end of the complaint apparently was filed in the district New Hampshire March 29, it states very clearly that the magistrate judge there after this apparently unusually lengthy hearing concluded by clear and convincing evidence, or found by clear and convincing evidence that Mr. Sutcliffe is a danger to those in California to whom he has posted threats and there is no combination of conditions which can assure the safety of the California community.

Why would it be appropriate for me to disregard

that danger, if it does exist, to people in this community. The indictment has been returned here. And the issue of flight or appearance, which we haven't yet addressed, would make it extremely ill-advised I think and it wasn't within Judge Woehrle's contemplation either that your client would, pending trial, be situated anywhere else.

So this is the community that I really need to evaluate.

MS. POTASHNER: I agree. And I believe in Judge Woehrle's evaluation -- of course it's Your Honor's evaluation that counts, but in Judge Woehrle's evaluation she had a lengthy conversation with Leslie McAfee who is an attorney in this community, who is willing to act as a custodian and a surety. And in terms of the papers that were filed by the government, I received a copy a few minutes before this hearing, for whatever reason I just got it. I would disagree.

THE COURT: Got what?

MS. POTASHNER: The paper.

THE COURT: The memorandum?

MS. POTASHNER: Yes.

THE COURT: Did you have a chance to review it?

MS. POTASHNER: I did review it right before the hearing. What I would like to say about that is that I disagree with the characterization of what Leslie McAfee

said to the court.

THE COURT: Tell me, in what respect you disagree. I think her characterization begins on Page 6.

MS. POTASHNER: Thank you, Your Honor. I disagree of the characterization of his fitness as a surety. I would respectfully submit I think he's a good surety, that he's a good custodian. He's been in our community practicing law with no discipline and good standing with the bar. He's been evaluated as a person of good moral turpitude to the level where he can practice law in our community. I believe that he would act as a good surety.

THE COURT: Turn to Page 7.

MS. POTASHNER: Yes.

THE COURT: Is it correct that at the hearing before Judge Woehrle Mr. McAfee disclosed that he has many guns at his home and is himself a collector?

MS. POTASHNER: Yes. He also stated he would remove all the guns from his home prior to Mr. Sutcliffe being put into his home.

THE COURT: That's not in here. The gist of what I construed this account to reflect was that he was opposed to removing them because it says he argued against their removal.

MS. DUARTE: He did argue against their removal and Then he told the judge that it was a 3,000-pound safe

and he didn't know how he could move it. And then the judge said, Mr. McAfee I understand your concerns and I'm not asking you serve as a surety. But I all telling you that if you're going to serve as a surety you're going to have to get rid of those guns, to which he replied he wasn't sure he felt comfortable.

That's when they went into the conversation about the second thing he didn't feel comfortable about, which Ms. Potashner may degree with me on as well.

THE COURT: Having Mr. Sutcliffe be confined to his home?

MS. DUARTE: Correct.

THE COURT: Were there any other people living at that home?

MS. POTASHNER: Yes. His wife lives with him and their 20 year old child, adult child. What, I have had many conversations with Mr. McAfee, unfortunately because he had a family emergency on such short notice he was not able to be here today.

What he advised me and what he would like me to advise Your Honor, is that he is 100 percent willing to remove the weapons from his home. He is a gun collector which is within in his rights but he understands and respects the court's order.

So the court made it very clear last week that he

could not have guns in his home and that's not a problem.

In terms of his characterization of whether we feel comfortable with him remaining at his home, what Mr. McAfee was trying to advise the court and ask the court, as posed to object to the court's conclusion was he thought it would be a more constructive use of Mr. Sutcliffe's time to come with him to his office every day and work at his office, rather than just be left under electronic monitoring at his home. That would be a more constructive positive use of Mr. Sutcliffe's time.

He did not mean that to imply that he could not stay at his home. Of did not want him to stay at his home. He was merely as an officer of the court engaging in a pretty long conversation with the court, trying to come up with suggestions for the court.

THE COURT: Did Mr. McAfee refuse to provide justification as a surety?

MS. POTASHNER: There was a justified bond ordered and he signed it. The court did not order a full deeding of the house but it is a justified property.

THE COURT: In the amount of $10,000?

MS. POTASHNER: No. That's Mike Sutcliffe was ordered a $10,000 appearance bond, unjustified. Leslie McAfee, the order was a $75,000 justified bond, which I have the signed bond.

MS. DUARTE: That's on here.

THE COURT: I see that. The only account I have in writing of what Judge Woehrle ordered is on the first and second pages of the government's memorandum. Is there a bail order or form that she signed?

MS. DUARTE: Not that I have seen, Your Honor. I did make a couple calls trying to get the tape so at least I could provide it where we may disagree. I was unable to that today again.

MS. POTASHNER: There was a bond filled out and Mr. Sutcliffe signed the bond. And then it was returned to the court's clerk. So I would think it would be in the court file.

THE COURT: Well, I don't really have to address the question of flight and terms of release if I conclude that there's a danger to the community, correct?

MS. POTASHNER: That is correct.

THE COURT: Have you given me all of the arguments that you want me to consider as to why there is not a danger to the community?

MS. POTASHNER: Your Honor, I didn't have a chance to thoroughly read the government's papers. I can tell you that previously in addressing the court I went through talking about the -- there were three things. The first one was the KILLERCOP.com. I know that was an issue previously.

I don't know if it's an issue for the court. But what I thought was important at the preliminary hearing, that came out in the preliminary hearing, on the bottom of every single page, except for the opening page it said this is a fiction, and I'm paraphrasing. I believe the quote was, Fiction and/or personality parody, on every single page.

I also pointed out that that the quote/unquote weapons that were available for, apparently available to purchase, that there was no indication that they were actually ever available. No one every tried to buy any of them. And the weapons were ridiculous and obvious a parody in and of themselves.

Of the final one being The Bee Stinger, which is on Page 65, preliminary hearing, which purports to be a weapon where you can shoot bees at somebody. It's obviously a parody, obviously ridiculous.

The other thing I pointed out on that site, there was an opening legal statement talking about how this offer, this site does not advocate, encourage or condone any conduct that is illegal at any time. I thought that was significant and that came out in the preliminary hearing. I also thought it was significant --

THE COURT: Ms. Potashner, if you have an intelligent, sophisticated, deliberately functioning individual who can incorporate those kinds of qualifying

terms and disclaimers into anything that's posed. And the mere fact that they are included and incorporated would be on its face sufficient to take away the potential and otherwise clear significance of the threats or the invitations or the means of communicating danger to other people or subjecting other people to invasions of their security and privacy.

Then what would be the capacity of law enforcement and of the courts to prevent this kind of conduct? One could be an open invitation to simply put the disclaimers in every single time.

MS. POTASHNER: Of course. The disclaimers in and of themselves does not make something that is dangerous not dangerous. But I think the disclaimers in connection with the site itself, which is obviously a parody, which is obviously, I don't think that a weapon could be created to shoot bees across a space, to train bees to go after a particular target. It's a ridiculous weapon. It's not a weapon that exists.

I also think it's important that looking at that site that these weapons were not actually -- there was no evidence that anything was ever means or way to buy these weapons. And lastly, that he was never prosecuted. That it was something that was investigated and apparently deemed not a serious threat because he could have prosecuted and

was not prosecuted.

THE COURT: Where is the information about the investigation of that, where in the record is that?

MS. POTASHNER: I don't have a cite for where it is.

MS. DUARTE: Your Honor, you mean in the preliminary hearing?

THE COURT: Before me.

MS. DUARTE: In the complaint about the Killercop.com investigation.

THE COURT: Where?

MS. DUARTE: Toward the end, Page 20 of the complaint, Paragraph 28, previous threatening activity.

THE COURT: And KILLERCOP.com is on Page 21. Top of page 21.

MS. DUARTE: Yes, Your Honor. Begins on Page 21.

THE COURT: It's consistent with what you say, Ms. Potashner because it looks like the LAPD was successful in having the KILLERCOP website removed from the host site. Is that correct?

MS. POTASHNER: I believe so, yes.

MS. DUARTE: I believe that's correct, Your Honor. I don't know details about if and why the case was reviewed or declined by the DA'S office.

THE COURT: Anything further, Ms. Potashner?

MS. POTASHNER: Not in comparing these different records. I did make a statement as to Mr. Sutcliffe's prior criminal record and what I extracted from that, if the court wants to hear that.

THE COURT: I do because I was quite concerned about that. Let me look at the portion of the pretrial services report where that's set forth. It's beginning on Page 6. And what did you want to tell me about those various convictions, many of which were violent crimes.

MS. POTASHNER: If I can have a moment to find it, Your Honor.

THE COURT: It's on Page 6 on the report that was submitted to Judge Woehrle.

MS. POTASHNER: Thank you, Your Honor. The first thing I wanted to tell Your Honor is in the last 13 years it appears that he's been convicted of one crime and one crime only, infraction of disturbing the peace.

Any record, I think it's fair to say is nearly ancient. It's over 13 years old.

THE COURT: Was Mr. McAfee part the scene on the occasion where he was arrested for that offense; was he physically there?

MS. POTASHNER: I don't know the answer to that, Your Honor.

THE COURT: Do you?

MS. DUARTE: I don't know either, Your Honor. Mr. McAfee did indicate in the hearing yesterday that he'd known Mr. Sutcliffe for approximately three years, which seems to indicate that any conduct he spoke about would have happened within the past three years.

THE COURT: But I think you told me that he made some kind of cryptic statement.

MS. DUARTE: Yes, he did. That was a concern. That is on page --

THE COURT: It's on your Page 6. He commented that he had never known the defendant to be violent, even when both he and the defendant were faced by LAPD officers pointing guns at them.

MS. DUARTE: He did make that comment, Your Honor. And the case agent who was present remembers it as well. I couldn't offer it verbatim to the court. But I remember that very vividly because that's one of the occasions where I asked for cross-examination.

THE COURT: Okay. Please wait.

(DEFENDANT AND MS. POTASHNER CONFER)

THE COURT: Do you know anything about that, Ms. Potashner?

MS. POTASHNER: About which one?

THE COURT: About McAfee being present when LAPD had an encounter?

MS. POTASHNER: I believe there was a question of making a civilian arrest. And when Mr. Sutcliffe was in court he attempted, in court, to place the LAPD officers under citizens arrest.

THE COURT: That was the offense when he was thrown out of the criminal courts building?

MS. POTASHNER: I don't know if he was thrown out. What I'm being told is that it was at the city attorney's office during a deposition and at that point, upon him trying to make a citizens arrest guns were drawn.

It does not sound like Mr. McAfee was in the streets and in a position where he was being stopped at gun point by the police.

THE COURT: Was that the offense that occurred on March 2nd of 1997?

MS. POTASHNER: I don't believe so.

THE COURT: That was sometime later.

MS. POTASHNER: No, it was a different occasion. Apparently the 1997 was at a beach at Venice Beach.

THE COURT: Okay. So relatively remote convictions is one point you're making, except for the '97 one.

MS. POTASHNER: It's my understanding it was resolved with a fine as an infraction.

THE COURT: I didn't have the time to do the

research but under 3142(e) what the convictions that he incurred for assault and battery with a dangerous weapon, for robbery, for assault and battery in 1985 and 1987, for assault and battery in '86, would those constitute violent crimes within the meaning of 3142(f(1), sub section A?

MS. POTASHNER: I don't know the answer to that, Your Honor.

MS. DUARTE: I don't have any specific information but just looking at 3156 which contains the definitions, that would be (a(4) A and B, defining a crime of violence. Would the court like --

THE COURT: I see it here. Your answer would be yes.

MS. DUARTE: It does appear to be, Your Honor.

THE COURT: That's what I thought. I couldn't find that definition section.

MS. DUARTE: It does not appear to require a felony, Your Honor.

THE COURT: There are others I haven't mentioned which apparently are not felonies.

All right. Well, is there anything further you want to add, Ms. Duarte, that you didn't submit in your memorandum?

MS. DUARTE: Your Honor, I'm prepared to submit it on the memorandum unless the court has questions. I'm

prepared to proffer an answer to Ms. Potashner's answer if the court is interested. But otherwise I will submit.

THE COURT: To which concerns?

MS. DUARTE: Any the court might have questions. For instance, the comparison that she made with Count 1. The answer to her argument that because defendant moved the danger is abated. It's seemed though the court was quite active in the discussion and didn't need to hear --

THE COURT: I think those questions have been addressed. I don't think you need to address those yourself.

MS. DUARTE: I have nothing but submitting on the record as it is.

THE COURT: One question to you, Ms. Potashner. Is the GX and the website identified the indictment EvilGX.com, does GX stand for Global Crossing?

MS. POTASHNER: I believe so.

MS. DUARTE: That's the ticker symbol in the financial world.

MS. POTASHNER: Your Honor, if the court is inclined to detain Mr. Sutcliffe pending trial in this case I would ask the court to at least, prior to making that order, have an opportunity to hear from Mr. McAfee. I think Mr. McAfee is an important component to this question of whether or not there can be a situation where the court

could find that the community was not at danger.

I think Mr. McAfee's situation is significant, how he lives, where he lives, how he could be a custodian. I think that's important. I would ask the court, before the court detained Mr. Sutcliffe to give Mr. McAfee a chance to come to court and explain why he is reasonable custodian and a reasonable surety.

THE COURT: Well, I'm going to detain Mr. Sutcliffe. At the conclusion of my recital I will tell you certain things I would want to have probably asked Mr. McAfee. You can go back and you can explore those things with Mr. McAfee. If you think that the answers that he would give me, that he would give under oath and subject to cross-examination would cause me to reconsider my ruling then ask for a hearing and I will probably grant it.

But the ruling I'm about to make and now in the process of making is not based only on the adequacy of Mr. McAfee's surety to provide for Mr. Sutcliffe's presence. It's based on both aspects of the considerations that I'm required to address in ruling on an application for bail or review of a prior ruling on bail.

So to start with, I do find that in agreement with the pretrial services agency, there are no conditions, even if he were to be released under changed circumstances involving a surety that are reasonably likely to assure the

safety of people and institutions but individuals really in this community.

For the reasons that were set forth in the pretrial services report I will recite a few. In doing so this is not meant to be an all-inclusive recital and I incorporate by reference some of the points made in government's memorandum as well as the complaint.

But we do have here to start with a pattern, although you're right that much of it is relatively long ago, of crimes of violence, and more than one. The propensity to engage in violence has been established. The capacity to engage in violence is current with the weapons that were found in the defendant's home within the last month or so at the point when he was first detained on these charges.

The motive to engage in violence is sufficiently established by the behavior that's the subject of the complaint and that led to the charges in the indictment. That's without finding that it has been proven. But assuming that there is a factual basis in this very clear one that's set forth in the FBI agent's complaint, it is obvious that Mr. Sutcliffe believes that he's involved in some kind of a pitched battle, to say the lest, with people acting on behalf of Global Crossing or previously associated with Global Crossing.

I do not accept his attempts to minimize the contents of the web sites by saying that they were parodies or somehow not to be taken seriously. Because under these circumstances and in this world one would have to be remarkably naive and foolish to discount the possibility, I think the likelihood, the clear and convincing likelihood that they had some real bite and purpose to them.

In addition, the behavior that Mr. Sutcliffe engaged in in connection with this particular series of charges and his conduct after he was placed in custody suggests that he has a strong view that these charges are bogus and that his rights and dignity as an individual have been compromised and invaded wrongfully.

That being the case, and he may be right, it may be these charge are never successfully established, there is a reinforced view on his part, at least I find that there is, that he has to and is inclined to take whatever steps he thinks are appropriate or necessary to protect his interest. Those can include further assaults or threats of violence.

I don't know what to make of the allegation of domestic violence. I realize that he told Judge Woehrle that according to what he told you that charge or that complaint by his current wife was withdraw; is that correct?

MS. POTASHNER: No, that's not correct. What I told Judge Woehrle was that there was information proffered

at the preliminary hearing, there was a probation officer who testified that the threat that was supposedly made to his wife was made in a joking manner. There was testimony from what I hear and what I told pretrial, and what I told Judge Woehrle was I not sure of the current status of the restraining order.

THE COURT: Are you sure now?

MS. POTASHNER: No. I still have no idea.

THE COURT: That reinforces what I had in mind in incorporating by reference that developed. Even to someone very close to him, a threat of violence was deemed sufficiently real, despite the claim that it was a joke as to warrant the issuance of a TRO, how far she would go under these circumstances here.

Putting aside all the issues relating to flight in terms of release, I find that by clear and convincing standard the government has established that he is a danger to the community. I'm going to supplement that finding with certain comments about the terms and conditions that were contemplated concerning sureties.

I would have, and if -- I'm at the point of reconsidering my findings about danger, almost certainly this would be my view as to issues of flight. I don't think the terms and conditions that Judge Woehrle set are sufficiently strong to assure that defendant's presence.

They include the unjustified surety for the appearance bond of the brother. I would not have accepted that. And I don't think on the current record that Mr. McAfee is an appropriate surety. If he is an appropriate surety I would tighten the terms and conditions.

I would require physical proof, not just a sworn declaration but physical proof that every single weapon, whether in the safe or otherwise, was removed from the household. And that might deprive them of bread knives, for all I know. But certainly the rifles.

I think that Mr. McAfee's capacity to function as current counsel for Mr. Sutcliffe would be compromised. I think that he may not have thought through sufficiently the difficult position he would be placing himself in an effort to be loyal to his client. That's commendable, in the view that his client is worthy of that loyalty, and maybe his client is. Mr. McAfee put himself in a position which is very dubious at best.

The terms and conditions would have to involve the most heightened degree of restraint. Usually -- I forget what the enhanced form of monitoring is. It's not the bracelet but it's a second and relatively recent monitoring device that I have been informed of by the pretrial services office. What is it called?

THE AGENT: Global position unit.

THE COURT: That would have to be a term and condition.

I'm telling you these things so you can explore with Mr. McAfee, if you wish to, Ms. Potashner, the issues and concerns that I have.

And I want the surety, the bond to be increased beyond 75,000.

So those are my findings. Anything further, Counsel?

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

THE COURT: The defendant is remanded to the continued custody of the U.S. Marshal and Bureau of Prisons.

(PROCEEDINGS ADJOURNED)

-oOo-

CERTIFICATE

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

Date: FEBRUARY 28, 2005

Lynne Smith

LYNNE SMITH
OFFICIAL COURT REPORTER

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

THE HONORABLE A. HOWARD MATZ, JUDGE PRESIDING

- - -

UNITED STATES OF AMERICA, PLAINTIFF, -v- STEVEN WILLIAM SUTCLIFFE, DEFENDANT.	)	CASE NO. CR 20002-350-AHM

COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
THURSDAY, AUGUST 22, 2002

LYNNE SMITH
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

APPEARANCES:

ON BEHALF OF PLAINTIFF:
OFFICE OF THE UNITED STATES ATTORNEY
BY: ELENA DUARTE
ASSISTANT UNITED STATES ATTORNEY
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

ON BEHALF OF DEFENDANT:
MARIA E. STRATTON
FEDERAL PUBLIC DEFENDER
BY: HILARY POTASHNER
DEPUTY FEDERAL PUBLIC DEFENDER
321 EAST SECOND STREET
LOS ANGELES, CALIFORNIA 90012

THURSDAY, AUGUST 22, 2002; LOS ANGELES, CALIFORNIA

-000-

THE CLERK: Item Number 2, CR 2002-350-AHM, United States versus Steven William Sutcliffe. Counsel, please state your appearances for the record.

MS. DUARTE: Good morning, Your Honor. Elena Duarte for the government.

THE COURT: Good morning.

MS. POTASHNER: Good morning, Your Honor. Hilary Potashner for Mr. Sutcliffe.

THE COURT: Good morning and welcome to both of you. We're here because I received a request to conduct a status conference. And there are a number of issues that are intertwined, some of which require me to meet only with Ms. Potashner and Mr. Sutcliffe and outside your presence, Ms. Duarte. Some of the material I intend to explore may well be confidential and protected by attorney-client privilege.

I'm going to have to excuse from the courtroom all people other than appropriate and recognized representatives of the marshals office, the Bureau of Prisons, Mr. Sutcliffe and his lawyer.

And I think I will turn to those matters because they could affect how we approach the issue of calendaring first. So I'm going to ask you to excuse yourself. Please wait outside.

Who else is in the courtroom?

MS. POTASHNER: Your Honor, there are two people from the public defenders office who are working on the defense for Mr. Sutcliffe. I would ask the court if the court is inclined to allow them to stay in court.

THE COURT: Who are they? Say their names for the record.

MR. ETNER: Jacob Etner.

MS. BELLER: Barbara Beller, paralegal for the public defenders office.

THE COURT: I think it would be appropriate for them to stay.

Are there any other members of the public or people not affiliated with Mr. Sutcliffe or his defense who are in the courtroom, other than representatives of the marshals office or the court security officers?

MS. POTASHNER: Not to my knowledge.

(GOVERNMENT COUNSEL AND MEMBERS OF THE PUBLIC EXCUSED)

THE COURT: I think it would be most helpful for you to remain at counsel table and Mr. Sutcliffe as well, instead of going to the lectern.

First of all, before I inquire into Paragraph 3 of your declaration concerning Mr. Sutcliffe's concerns, and I will hear from Mr. Sutcliffe, I want to know whether the order that I issued in July authorizing an examination at Gateways was carried out.

MS. POTASHNER: Your Honor, it's my understanding, and I learned this from Ms. Bednarski, I didn't talk personally to pretrial services. It's my understanding that Gateways did in fact meet with Mr. Sutcliffe. However, Gateways required that Mr. Sutcliffe allow them to administer a blood test and Mr. Sutcliffe did not want his blood drawn in this case. And therefore, based on that I don't believe Gateways found that he was suitable. He was unable to comply with that part of the requirement.

THE COURT: Suitable for what?

MS. POTASHNER: Potential placement in their program.

THE COURT: What did you perceive to be, you and/or your co-counsel, who I realize cannot be here at this time, what did you perceive to be the purpose of that examination?

MS. POTASHNER: Your Honor, we were hoping that if he were found suitable that perhaps we could, and based on their evaluations, perhaps that would be new information for Your Honor in order to consider alternative bail conditions.

THE COURT: Was there any issue concerning Mr. Sutcliffe's competency to prepare for trial and stand trial and his capacity to cooperate and assist his own lawyers?

MS. POTASHNER: Your Honor, at this point I do not see a competency issue.

THE COURT: Was there concern at that point? Before we turn to the present time.

MS. POTASHNER: No, Your Honor.

THE COURT: Keep going. What were you about to say?

MS. POTASHNER: I was about to say, Your Honor, that the only concern I have in terms of representing Mr. Sutcliffe in this proceeding is that Mr. Sutcliffe has enunciated to me a number a very serious concerns with my representation, including his belief that I'm attempting to obstruct justice in his case, and a number of things that I think Mr. Sutcliffe may be more appropriate to address the court on. That was my only concern.

THE COURT: Okay. I will hear from Mr. Sutcliffe in just a minute. I'm checking on something in the file.

Mr. Sutcliffe, would you like to explain to me what your concerns are?

THE DEFENDANT: Yes, Your Honor, I would. I have several.

THE COURT: If it would help you, you can sit down. You may find it easier to look at your notes.

MS. POTASHNER: Your Honor, Mr. Sutcliffe has expressed great difficulty in going through his notes with handcuffs as they are right now. Is it possible that they be altered in another manner where he can go through his paperwork?

THE COURT: Do you see any problem with that, representatives of security?

THE MARSHAL: Is he able to move his papers like that (INDICATING)?

THE COURT: I'm not sure how extensive your need is, going through the notes. I want to make sure you have the opportunity to state on the record --

THE DEFENDANT: I'm stating on the record that last night I had taken the time to go through all the discovery, had to put it like in a little context so I could go through it. I will do it like this if Your Honor likes.

THE COURT: Talk to me start forward. Then look at the notes. Tell me what is bothering you.

THE DEFENDANT: As Ms. Potashner has conveyed to the court, I do have serious concerns at this point that there might be obstruction of justice. I raised that to her supervisor. I was told, don't stir things up.

THE COURT: Obstruction of justice by the lawyers who are representing you?

THE DEFENDANT: By Ms. Potashner.

THE COURT: What do you mean?

THE DEFENDANT: When I was first brought into the system I let everybody know that I considered myself a political prisoner. I believe that their malicious prosecution and arbitrary prosecution about to take place against myself, by the government, specifically the FBI, I believe they have been targeting me for the -- since 1998, along with a certain branch of police departments, based on my speech that I have expressed in the past which was directed at those members of law

enforcement. I believe that they've misrepresented facts, they have omitted facts. They have tampered with a document.

THE COURT: Which document; do you know?

THE DEFENDANT: Yes, sir. I have the document right here. It will take me a minute to get it.

THE COURT: Go ahead.

THE DEFENDANT: Discovery page 65 and discovery page 66.

THE COURT: Are those references to Bates numbers?

THE DEFENDANT: Yes, Your Honor. I would draw Your Honor's attention to the upper right-hand corner of Bates 66, page 2 of 2. And note that date to the left of page 2 of 66, that was the night I was arrested. That's the night I was tortured in the police department. I have the --

THE COURT: That's in the year 2002.

THE DEFENDANT: That's correct.

THE COURT: Arrested by whom, the police?

THE DEFENDANT: Manchester. One officer in there tortured me while the other officers and members of the FBI stood by and watched.

THE COURT: Okay. Now I don't have those documents before me. This isn't the appropriate time to find out what happened relating to those documents or on March 26. What is of importance, it's in your interest for you to tell me what it is about your lawyers and their response to your claim that this

document was tampered with.

THE DEFENDANT: I have been a victim. When I first arrived I first met with the public defender in New Hampshire, Mr. Sax, a very honorable man, gave me a good defense. I expressed to him I was tortured in the police department. He told me to let him know when I got here what happened. I expressed that to Ms. Potashner, that while I was being tortured, my head was being forced, I saw in the upper left hand corner behind, a video tape, a camera pointing down directly at me while I was tortured.

I said, "Ms. Potashner, get that tape. I want that tape. It will show everybody standing around watching this happen."

She said she would. Months went by. Then I again asked her about the tape. I said did you get the tape. Not yet. I wrote her a letter. I said please tell me why you haven't gotten the tape if you're going to get the tape. If you are not going to, tell me why. That letter was ignored.

When I finally went to her boss, over her head, I was told don't stir things up. I was told the next day the subpoena had been issued.

THE COURT: I don't know if you're aware, that's just actually what I was about to tell you, the subpoena was issued. It was issued August 9th. And it was directed to the Manchester Police Department. I authorized the issuance of it, commanded

the production of the video tape and arrest reports pertaining to the booking and detention of you.

THE DEFENDANT: Here is my concern, Your Honor. I met with Ms. Potashner that day in the BOP and she -- the first thing she said to me was that the tape doesn't exist. I said, my question was, how do you know that if you just filed the subpoena today. She said that she had conducted a secret investigation of the police department to see if the tape existed.

Well, my limited knowledge of law, for what I have studied, I do have great respect for the law, I have studied law for the past seven years, is that when there's potential exculpatory material the safest thing, to keep it from being destroyed or obstructed, is to put the people on notice that you intend to seek that discovery.

Waiting as long as she did and not informing me that that tape was not being sought, I felt misled. I felt misled and I felt betrayed. I have no doubt that tape is no longer there.

THE COURT: So then what it comes down to is you think she took too long to try to get it. If she had gotten it whenever that was, maybe it would have been produced.

THE DEFENDANT: Or maybe preserved. I still think that the truth can be obtained and justice can be obtained as to what really happened that day and that there was a civilian witness

in that room.

THE COURT: Well, right now you seem to be acknowledging that as to that particular piece of evidence, which I have to tell you, I'm not sure what the relevance would be. It's my job, I'm going to make sure you get a fair trial. The tape of what happened when you were booked by a local police force New Hampshire, I don't know the tape exists. Where does that leave us now?

THE DEFENDANT: That leaves me with a lawyer that I basically don't trust. It's not the only -- there's been other misrepresentations to me from my counsel. I asked her to do certain things and at the 11th hour she's changed them without consulting with me. She's told me -- I don't want to crucify her.

MS. POTASHNER: Tell him everything.

THE COURT: You have a right to be heard about that.

THE DEFENDANT: I do not consider myself a threat to the community or the people involved here. I got as far away from those people as I could possibly get from them. I have no intention of ever coming back to California or ever seeing these people again.

I asked Ms. Potashner after my bail as denied, I told her I'm not a threat to anybody. I have been charged, I was charged with more serious stuff than this in the past and I represented myself because my lawyer took all my money and

didn't show up. I showed up, I made my appearances on the kidnapping charge, which I'm sure Your Honor has seen in my criminal history.

I pled guilty to, I took responsibility for what I did. I never -- I'm not a threat to the community. I asked Ms. Potashner to help me prove that. And she obtained a psychiatric evaluation to be conducted, for purposes of new discovery as she told me, we need new discovery which I understand the case law which I also confirmed.

At the 11th hour though she told me that she was waiting on the report, she was waiting on the report. At the 11th hour she told me we're not going to use that. I'm going to save it for the trial. I'm like, you're kidding me. Today she tells me there is no report, that it was an oral report. These are all these little new surprises that I can't --

THE COURT: Let me tell you before we follow through further, that I don't know Ms. Potashner, except to the limited extent she's been before me. I know a great deal about her office, which I have tremendously high regard for. I used to litigate against them a long time ago. I don't think the office has ever been in as strong a position in terms of the advocacy of its lawyers as it is now. That's very strong.

You have a right to a lawyer who provides effective assistance of counsel. That's a constitutional right you have. That doesn't mean that you have a right to have a lawyer, you or

anyone has a right to have a lawyer do whatever you think should be done or not to do things that you don't want to be done.

The lawyer has an independent duty to you and an independent duty to the profession and to the court system. So very often, maybe if you have an extensive criminal background you know this from your own experience, very often the lawyer and the client are not entirely in sync with each other about what should be done, and the way to do it, and when it should be done, and why it should be done, and a whole host of pretty basic things. Very often that happens.

And very often it is something that they work out and almost never is it evidence that the lawyer's failing to do her job. I don't know, and I will hear from Ms. Potashner what her response to this is. But so far what you have told me, Mr. Sutcliffe, the thing that is most important is that you feel betrayed. It doesn't mean you're right to feel betrayed. I don't know if you use the word betrayed but I interpret what you told me to boil down to that.

Is that the way you feel?

THE DEFENDANT: I feel I haven't had effective assistance of counsel. I have asked her to argue, for instance bail. Her response was, "Well, we're not going to win that, so I'm not going to even go there."

THE COURT: She did argue it. I'm the guy who made the decision.

THE DEFENDANT: I asked her to appeal that. She said no, I'm not going appeal it because we're not going to even win. It's like why get out of bed and go for a job because I'm not going to find one.

THE COURT: Well, it's not like that. A lawyer has the duty to advise her client what is in his interest and what isn't, to advise her client whether there's merit to a plan or to a proposal, where there isn't, what is likely to happen and what isn't likely to happen. How best to allocate the resources that the lawyer has and the client has. Where to pick the battles, how to fight them. Those are all part of a lawyer's job. And if she says we're not going to do it, I don't know what words she uses, but it's going to be a reflection of her conclusion it's not in your interest to do it.

I'm not in a position to say whether she's right or wrong. You're talking about a ruling I made. I'm the guy you ought to have the beef with. And she may or may not think somebody on appeal would review that differently. I think no one else would review it differently. I think my ruling was sound and that's why I made it.

What is your position on the matters that Mr. Sutcliffe has issued so far?

MS. POTASHNER: My biggest concern is reflected in what the court said, he feels betrayed. I have of course strategic reasons that I made the decisions I made. I'm not working in a

vacuum. I'm working with a number of people in my office, including Marilyn Bednarski, the other attorney in this case. I know that there are a number -- what I'm concerned about with this particular hearing is that there are a number of motions that Mr. Sutcliffe has raised with me that I have not filed with Your Honor.

And I know that that is a big concern of his. I would like him to have the opportunity to address the court about that issue in our case. In terms of our representation of Mr. Sutcliffe, we of course believe that we are doing everything we can do for him. And as Your Honor said, picking and choosing our battles.

It is true that I did tell him that I would not appeal Your Honor's decision regarding detention. We were hoping that Gateways would be a viable alternative that Your Honor may consider. I didn't think an appeal on the issue was really an appeal that would go anywhere. I didn't think that would have much merit because as Your Honor is well aware, there's great discretion given to the district court in that regard.

And so we did choose not to appeal. Instead, what we decided to do in terms of a bail issue is focus on new information that we could bring Your Honor to make Your Honor comfortable with the idea of possibly releasing Mr. Sutcliffe pretrial. That's what we were doing in terms of that.

In terms of the video tape, I'm very troubled by the

fact that he thinks I'm obstructing justice by delaying getting the video tape. It is true that I asked the court to issue a subpoena to get the video tape. It's also true that I asked the court to do it August 9th for a September trial date. It's my opinion and belief, and perhaps I differ with Mr. Sutcliffe, but it's my opinion and belief that if a video tape exists it still exists and subpoenaing it would bring it to this forum.

THE COURT: It's the only way you can get it.

MS. POTASHNER: The reason that I went to the local federal public defenders office was through Jonathan Sax and asked him if he knew the Manchester Police Department's routine, was I thought that would give me more information. I did not, it is not my experience coming from state court that bookings are often video taped.

So I asked him if he was aware of whether or not they video tape all bookings. He said in turn that he knew somebody, somebody in his office had very many contacts there and so he would informally find out for me.

I received information that they generally do not video tape. But because Mr. Sutcliffe was insistent that there was a video tape I didn't want not to subpoena it. It was not my intention, of course, in any way to obstruct justice or in any way to hope that by delaying somehow this video tape this would disappear. It's not my experience that that would happen.

THE COURT: Whatever is the fundamental nature of your

relationship with Mr. Sutcliffe, I'm not necessarily in a position to make findings but I do find, based on everything I've been told so far at this hearing and my prior involvement in ruling on your application for the issuance of the subpoena, that there is no basis to find that you or your office are participating in an obstruction of justice.

If by that you mean the destruction of this tape, there's absolutely no basis, Mr. Sutcliffe, to find that the public defenders office, assuming the tape ever existed, maybe it did, you were there, you presumably know, there's nothing in the record that would support any findings that the public defender is responsible for its non existence now, either actively or passively or by virtue of when they chose to seek it and how they chose. So I don't think you have a basis to be worried about that.

Now what about your relationship with Ms. Bednarski?

THE DEFENDANT: My relationship with Ms. Bednarski is okay. I wish I had more of her time. But I trust her.

THE COURT: Have you explored with your colleagues, Ms. Potashner, and with Ms. Bednarski and with Mr. Sutcliffe making sure that the primary responsibility in the day-to-day communications with Mr. Sutcliffe are carried out by Ms. Bednarski?

MS. POTASHNER: Yes, Your Honor, to some extent I have. Ms. Bednarski does meet with Mr. Sutcliffe more regularly than I

do. But in all candor, we are both on this case, Your Honor. We both would be working towards trial in this case. And I would obviously need to be able to communicate with Mr. Sutcliffe as well.

THE COURT: Well, I want to be practical about this. I want you to understand what my orientation is and what I'm about to say. This is not a basis for finding that there's any reason objectively looked at to initiate an adjustment in the team that represents Mr. Sutcliffe. I have no basis and no view and no feeling whatsoever that your work so far is in any way substandard or in any way cause for Mr. Sutcliffe's discontent.

But the practical solution that will preserve his constitutional rights and the interest that the public has in continued representation and as early a trial date as possible, because if the man is not proven guilty, then he's entitled to be released as early as possible. He has an interest in proceeding to trial as quickly as is in his interest.

That militates in favor of keeping the core team in place for him. That team would include presumably the people from your office who were assisting, Dr. Etner and the paralegal. And also Ms. Bednarski.

And if he has this view that, even though it's wrong, and even though there's no basis for it, that he cannot have that same level of confidence and trust in you that a client needs to have, then I would suggest that the team be slightly

changed and that either Ms. Bednarski handle it alone or someone else who doesn't create these issues for Mr. Sutcliffe take over your involvement.

Now I'm not trying to manage the publice defenders office but I am trying to achieve the objective that's my duty and responsibility to achieve. And that is the defense that Mr. Sutcliffe's entitled to, and the continued and efficient prosecution and defense of this case.

Would that satisfy you, Mr. Sutcliffe?

DEFENDANT: One second.

THE COURT: Go ahead.

(DEFENDANT AND MS. POTASHNER CONFER)

MS. POTASHNER: Okay. Your Honor, I understand the court's position, and I will speak to Ms. Bednarski regarding how we can alter the situation in order to make Mr. Sutcliffe more comfortable. Because it is our objective for him to be happy with his defense and for him to feel that he's being defended.

That's important to me, regardless of what Mr. Sutcliffe perceives is important to me, that is important to me. So I will go back and speak with Ms. Bednarski regarding that..

There was one other thing that I think the court needs to address, if I may say.

THE COURT: Before you say the other thing. Go ahead

but I have to talk to Mr. Sutcliffe too. What is the other thing?

MS. POTASHNER: He had written a few letters to us, I believe a few, and I know definitely one, talking about self representation. I don't know if that's something he's interested in but I would like this to be aired.

THE COURT: Yes, I was planning to. Because that was mentioned in your declaration. Are you trying to represent yourself; is that what your objective is?

THE DEFENDANT: I felt that certain issues needed to be brought forth to the court, and the court needed to be apprised of these issues, and that if they were not prepared to bring these issues towards the court then let me speak.

THE COURT: Well, I am letting you speak. It's important to me that I let you speak as well as, I think, in most respects your right to speak. If you had said to me judge, I want to be my own lawyer, I would have spent a half hour explaining to you why that would be an absolutely mistaken decision on your part. I could take you through all the different little and big aspects of fighting off the government at the trial and before the trial in this case, that you need a lawyer to handle.

THE DEFENDANT: I'm very aware of that, Your Honor.

THE COURT: If you are not seeking to represent yourself you're making a wise decision. What I'm trying to do,

and you probably already understand this, is continue your defense. You're in very good hands. But if, even though you're wrong, you think that the vibes between you and Ms. Potashner are interfering with the defense that you're entitled to, then that could be adjusted and that could be changed.

And that's the best outcome for you. It happens to be the best outcome for my responsibilities, which are not to pick sides in the case. I never will. But to make sure your rights are protected and the public's right, which by the way is pretty much in sync with yours, the public's right to have a speedy trial in this case. So here's the bottom line. You should --

THE DEFENDANT: I was just informed, couple days ago that my defense team is not prepared to go forth on September 3rd, which expedited my feelings of --

THE COURT: Were you informed --

THE DEFENDANT: I was told that the expert who was examining the hard discs would not be ready until October 15th. I've got a little problem with that. I have been here in jail, in prison as long as the web site has been up. They want to wait an additional two more months longer that the web site has even been alive.

THE COURT: Yes, but Mr. Sutcliffe you want it to be done right, rather than done fast and not right.

THE DEFENDANT: I agree, Your Honor.

With that thought in mind, I would like the court to,

when it gets a chance, to review United States versus Gallow, Eastern District of New York, 1986, 653 F.Sup. 320. I would plead with this court to --

THE COURT: What does that case say?

THE DEFENDANT: The blurb on it is -- I have the case here but the blurb is defendants --

THE COURT: If you have the case here, have your lawyer give it to the clerk. I'll look at it right now.

THE DEFENDANT: Under the Federal Rules of Criminal Procedure, under length of detention, and it almost parallels my case, except for they talk about four months and I'm looking at another two months. But I would ask the court to reconsider the, after reading the case, to reconsider incarceration and consider remanding to the third party custody of either Mr. McAfee as he is offered in the past.

THE COURT: I remember thinking about that. I remember this.

THE DEFENDANT: I wish to contribute to my defense. And for all of the reasons that are listed in the Gallow case, they're all applicable to me. It would, specifically in here they said it would be against defendant's interest if any harm were to come to a government's witness. That's common sense.

Danger to witness was not appreciably reduced by incarceration of the defendant. Witness may have been profiting financially from defendant's incarceration, emphasis added.

Defendant's encountered difficulties in preparing for trial during incarceration.

THE COURT: You know, Mr. Sutcliffe --

THE DEFENDANT: Yes, Your Honor.

THE COURT: I'm not going to tell you I have read the whole case. It's a pretty long case and it's a judge I respect greatly. He's one of the finest judges in this country. But I can tell you that part of my job requires me to read a zillion cases all the time. And I can scope out the relevant portions of a case pretty quickly. I may not be doing justice to this case, but Vita and Millulosi in this case you're talking to me about were charged with different crimes than you.

I don't know if you're guilty or innocent. It won't be for me to decide. But the crime you're accused of involves threats to not only possible witnesses but to other parties as well. These guys were indicted on different crimes. Then the question came whether or not their conduct vis-a-vis potential witnesses warranted being held in custody pending the trial. And this is not an unusual issue. Okay.

The question of bail has a very different meaning and, not a meaning but a very different application under the facts of this case. I found that there was sufficient basis to find by probable cause, but there's no final finding, that you did the things you were accused of and that they warranted changing the ruling of Judge Woehrle.

This decision by Judge Weinstein would not change that view.

THE DEFENDANT: I think what I was trying to get across to Your Honor is that before I was brought here and I spoke to the judge in New Hampshire, and I'd like to quote what he said about the web site, my web site. He says, (reading) "The establishment of the web site tells me two things. One, that your client is extraordinarily talented. That it's a brilliantly conceived and put together web site but it's scary. I don't know whether there's a screw loose with your client or not. That's why I asked you first thing this morning. To my mind that's what makes him dangerous."

That I might have a screw loose. Well, then half the people I have met in this world should be locked up. Because everybody's got a little -- and the web site was scary. But like I said, there was a previous web site that I created which I'm actually very proud of, called killercop.com. Which is why I said the FBI is investigating, because of that scary web site.

That was a web site I created. I made that scary like that to get people's attention because they seemed to like that. Because it dealt with something that's very scary, which is being kidnapped by the police department, specifically the LAPD.

That's what I've alleged from that web site. It was detailed, that web site. It was my learning about the system of the law and justice and the police, and certain other issues

which came along this path I had taken.

But in five years I was never arrested for anything. I will tell you this much, Your Honor, I was investigated very heavily from every branch of the government; United States Attorneys Office, FBI, Sheriffs Department, LAPD, U.S. -- State Attorney General. Pick an acronym and they were investigating me.

I have never been charged with a crime like that, Your Honor. I can be a little scary with my words, but keep in mind my spirit is -- I love above all things my speech because you, Your Honor, should know these are the tools of the law. And while yes, some people might be scared of other people's words.

Like I'm from New Hampshire. Live free or die. Someone might say that's scary. You know. It's free, this is a freedom of speech case, Your Honor. I think the facts will bear that out when proven.

THE COURT: That may be part of your defense but now I think we're going beyond where I should at this point. Your speech rights may or may not be involved by these charges.

THE DEFENDANT: Well --

THE COURT: Don't interrupt me. I have listened carefully and patiently to you. Now I want to tell you something. What is in your interest is to get this case ready for trial. And to start the trial not one day too soon. And if at all possible, not one day too late. You're going back over

the ground about detention and I don't blame you because I haven't had to be a prisoner but I know what it's like one step removed and it's awful. You want to get out of that situation.

But right now there's no motion pending before me. But when there was I found that incarceration was appropriate for the reasons I expressed. And I don't think there's any basis to change the ruling.

The real question is what comes next, Mr. Sutcliffe. And what comes next is preparation for trial. And what comes after that is trial. Now if you are relying on and if your lawyers are relying on outside experts to assist in any aspect of the defense, and it wouldn't surprise me if they have to, given the nature of these charges. And if the time necessary, because nobody in this situation is in a position to focus all of her time or all of his time only on your defense. All of us have other obligations. I have other trials, I have other defendants who have a right to a speedy trial.

But I will guarantee you that I will set this down for trial and stick to the date, unless there are absolutely compelling conflicts that I can't get out of, to get you to trial as quickly as possible. But I don't want you to start the trial before you're ready. That means your lawyers are ready. And that means the experts are lined up.

Now what I'm trying to do, I'm spending a lot of time on this this morning and I don't have unlimited time at all, is

to protect your rights. So I will go back and I will look at Gallow and I will return this to you. I put some writing on it. I shouldn't have done it. It's your copy.

THE DEFENDANT: It's all right, Your Honor.

THE COURT: I don't think that's the issue before us. The issue is whether the continuance of the trial should be granted, and until when. Because you're going to have a team of lawyers that may or may not include Ms. Potashner. Definitely include Ms. Bednarski and others from her office, which is devoting, I can see already, a lot of effort to this. They're going to be helping you out as best they can. I don't know of anybody else who can do it better.

Now the question is when do you want to go to trial. And you don't have final say on that. But September 3rd makes no sense at all.

THE DEFENDANT: I sent Your Honor a letter. I don't know if you have received it yet. You're probably getting it today or tomorrow.

THE COURT: What did you say in the letter?

THE DEFENDANT: I said in the letter that I wanted you to order the public defenders office to stop everything they're doing and meet with me immediately and sit down and bring all the discovery, all of the witnesses they intend to produce, everything, A to Z, the whole kitchen sink so that I can figure out what is going to happen on my trial September 3rd. Because

at this point in the game, I'm in the dark. I don't know.

THE COURT: September 3rd is less than two weeks. And the declaration that Ms. Potashner filed relating to her assessment and that of her office as to what they have to do to complete their analysis of the evidence that the government got and gave to them, approximately ten hard drives, four zip drives, 29 floppy discs, approximately 1500 pages of written discovery. And she mentioned an expert, I don't know who it is, who's already begun to analyze this evidence but won't complete it. Now you say he won't complete his analysis by the middle of October.

That strikes me as surprising, Ms. Potashner. If I set a trial date in October, not some time after he completes his analysis in mid October, that ought to be doable.

MS. POTASHNER: Your Honor, I was going to suggest to the court an October 29th trial date. That would give us a little bit of time to discuss his analysis with him as well as I know that Mr. Sutcliffe has pretrial motions, unusual pretrial motions that he may want to file or that we may want to file.

THE COURT: I'm not going to permit him to file motions on his own. He's going to be dealt with as all defendants. If he's being represented by counsel it's the counsel's duty to file the motions. He has a right to be heard first in terms of his communications with his lawyers and secondly, at the hearings. Not necessarily to argue to the court like this, but

that would be heard through lawyers.

You work it out and Ms. Bednarski will be primarily responsible for working out what motions should be filed and what they should say and what they should seek.

MS. POTASHNER: Of course. I misspoke. What I intended was there are some issues that he's raised that we may want to litigate pretrial. I was going to suggest an October 29th trial date with a motions date the previous week. That would give us enough time to file and have a motion schedule set out.

THE COURT: Supposedly -- you are talking about written motions, about approximately how many?

MS. POTASHNER: At this point Mr. Sutcliffe has raised and we are investigating a possible commerce clause motion, interstate federal jurisdiction motion as well as a possible suppression motion. What we -- another --

THE COURT: That will require an evidentiary hearing?

MS. POTASHNER: At this point it may or may not. I don't know if the court would find an evidentiary hearing was necessary. But it may.

The other issue was that Mr. Sutcliffe was interested in, and if there is merit we too would be interested, is he's concerned with the grand jury and the way the grand jury was convened, as well as the testimony that was given at the grand jury.

We are getting the transcript of the grand jury. I know Your Honor has ordered and -- the order for that. Once we review that there may be a motion from that jury transcript.

THE COURT: Okay. You know, Mr. Sutcliffe, if things go bad for you and there is a trial, I don't throw the case out before then and you get convicted, you will have a right to appeal. But hear me out now because I want to make sure you understand this.

You want to make sure that all bases available to you, to have a higher court review whether what was done was fair and correct are in the record. So if things need to be done that can't be done at a faster pace, and that would require a delay in this trial, it's in your interest to have them done or have them sought at least, like these motions before me, which is a little bit unusual, than to rush to trial, not have them heard or not have them heard on the basis that you need, which is the strongest basis that you can muster up. Because if you don't prevail on those motions, at least the record is complete and a higher court can consider whether or not what happened at this level was right or wrong.

That means that you're going to need to have more time. September 3rd is out of the question. Can't be done.

THE DEFENDANT: Does that mean I can also appeal Your Honor's ruling for, to apply least restrictive conditions on the bail?

THE COURT: You can. I don't know of any procedural, it's not up to me to say yes or no. Whether you choose to is different. I happen to think that the resources of your lawyers, which cannot be devoted only to you. Please accept that. Can't happen. They have too many other responsibilities.

Those resources have got to be applied in a way that makes sense for you. If doing something in the nature of a bail appeal, which I'm not ruling on, they can move for reconsideration to me. They could try to get appellate relief by the Ninth Circuit.

But if they're doing that it could have an impact on the other things they're trying to do for you and that you want them to do for you. Just take that into account. I'm not saying at all what my ruling would be if the matter of bail comes back to me. And I'm not saying what, whether they should appeal that or move for reconsideration.

It will be opposed. And that will involve a lot of skirmishing and trial time and their time and your time. If that happens it's going to probably delay the trial even further. I don't know. So you make the decision after you think about it and after you talk to your lawyers about it.

But the question is how much of a continuance. And I would be willing to put some pressure on the government. The material you sent me included a letter from the lawyer for the government that says that earlier she would be available, would

be October 22nd.

Now I can set this down for October 22nd. I mean I wouldn't want to spend seven days in jail I didn't wind up having to spend. So I can understand why that might be little preferable to Mr. Sutcliffe than October 29th. But it can't be done before October 22nd.

And Ms. Potashner, if you could do, if you could be ready to, your office and his team could be ready for a full defense on the 29th they could be ready on the 22nd.

MS. POTASHNER: I agree with Your Honor on that. That's fine. With a motion date the week before, that's fine with me.

THE COURT: What about you, Mr. Sutcliffe?

THE DEFENDANT: I'm just a cog in the wheel at this point.

THE COURT: No, you're not. I've been listening to you.

THE DEFENDANT: I would request the least restrictive conditions be applied so I can vigorously defend myself on the outside. I'm very limited. I actively want to participate in my defense, which I think I did a pretty good job working with a heck of a public defender in New Hampshire, Mr. Sax. But my hands are totally tied here, as to my access to the law, to study.

THE COURT: Go over whether there are any changes in

circumstances concerning conditions of confinement and release. And if it's appropriate to make a motion they will make it. If it's appropriate to appeal and they're not procedurally barred from appeal, they can do that and they can just devote the necessary resources to also prepare for trial.

I'm going to call back in the prosecutor. And there will need to be findings and a stipulation but I'm going to set it down for trial October 22nd. And I'm making a specific finding that Mr. Sutcliffe has the right to have his lawyers review again with him, whether there's any basis to seek a change in the conditions of his confinement, as well as all of the others things that are necessary to prepare for trial.

(GOVERNMENT COUNSEL PRESENT)

THE COURT: Ms. Duarte, I have been pursuing and exploring various matters with the defendant and with Ms. Potashner, including the request for a continuance of the trial. I have taken into account a whole host of factors, including what was set forth in your letter dated August 20th. And I am going to order that the trial is continued until October 22nd.

But I want that to be, even though I know I have other things on my calendar then. I brought my calendar into the courtroom. I want that be a firm date. So if you get, your schedule changes then line up somebody else from your office because I don't want to have a continuance brought by the

government. We're going to go to trial on October 22nd.

MS. DUARTE: Understood. And Your Honor, I appreciate the consideration very much.

THE COURT: Now I want you, it's not entirely clear how the defense team will be structured. Please consider that your initial effort to communicate with counsel for Mr. Sutcliffe should be directed to Ms. Bednarski.

MS. DUARTE: Ms. Bednarski or Ms. Potashner?

THE COURT: Ms. Bednarski. That doesn't mean Ms. Potashner is not part of this team doing their best to help him, but Ms. Bednarski is going to be the primary lawyer responsible for the representation of Mr. Sutcliffe.

Okay. Is there anything else that needs to be addressed at this hearing?

(NO RESPONSE)

THE COURT: I want a stipulation and order on the continuance with all the necessary recitals with findings, on the speedy trial act.

MS. DUARTE: Exclusion of time, yes, Your Honor.

MS. POTASHNER: Your Honor, one thing that was just raised with me, as I'm looking at my calendar, I know October 22nd works for my calendar. Ms. Bednarski is obviously not here and could not be here today. I'm assuming that will work for her.

THE COURT: So am I. You talk to Maria Stratton and

Bednarski and tell them that I'm intent on getting this case to trial on the 22nd. And whatever adjustments and other responsibilities Bednarski has, I want them to be made. In case there's a conflict.

MS. POTASHNER: I was not intending to say that I think there is a conflict. I wanted you to be aware that I did not have her calendar. Does Your Honor want to set a tentative motions date?

THE COURT: We will have a date for hearing all motions and that would be the 21st.

How do we look on the afternoon of the 21st? That's a Monday.

(COURT AND CLERK CONFER)

You speak to the clerk, Ms. Potashner. Or if you're making motions because if there's going to be a need for an evidentiary hearing, such as there could be on a motion to suppress, set it for earlier than 4:00.

Set it for 3:00 on the 21st. File your papers accordingly.

Okay. Anything else?

MS. DUARTE: No, Your Honor.

THE COURT: We're adjourned.

MS. POTASHNER: Your Honor, I assume that this proceeding is, the record is sealed.

THE COURT: Yes. Except for the portions that

Ms. Duarte was permitted to be present for.

(PROCEEDINGS ADJOURNED)

C E R T I F I C A T E

I HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT OF THE ABOVE-ENTITLED PROCEEDINGS, PAGES 1-36. DATED SEPTEMBER 20, 2003; LOS ANGELES, CALIFORNIA.

Lynne Smith

LYNNE SMITH
OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

THE HONORABLE A. HOWARD MATZ, JUDGE PRESIDING

- - -

U.S.A.,

Plaintiff(s),

vs.

STEVEN WILLIAM SUTCLIFFE,

Defendant(s).

CR2002-350-AHM

ORIGINAL

COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, SEPTEMBER 23, 2002

GAIL PEEPLES,CSR
Contract Court Reporter
100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 894-3013

APPEARANCES

In behalf of the Plaintiff:

DEPARTMENT OF JUSTICE
ASSISTANT UNITED STATES ATTORNEY
BY: ELENA J. DUARTE
312 North Spring Street
Los Angeles, California 90012

In behalf of the Defendant:

FEDERAL PUBLIC DEFENDER
BY: MARILYN BEDNARSKI
BY: HILARY POTASHNER
321 East 2nd Street
Los Angeles, California 90012

LOS ANGELES, CALIFORNIA; MONDAY, SEPTEMBER 23, 2002; 4:08 P.M.

- - -

THE CLERK: Calling calendar item number 11, case number CR 02-350, United States of America versus Steven William Sutcliffe.

Counsel, please state your appearances.

MS. DUARTE: Good afternoon, Your Honor. Elena Duarte for the Government.

THE COURT: Good afternoon.

MS. BEDNARSKI: Good afternoon, Your Honor. Marilyn Bednarski and Hilary Potashner present with Steven Sutcliffe.

THE COURT: Good afternoon.

You all may be seated.

I've received an ex-parte application for certain relief that requires me to review the status of this matter only with Mr. Sutcliffe and his current lawyers. And I know what they have said, but I still think I need to review certain things.

That requires me to require everyone else in the courtroom to be excused and to be required to wait outside of the courtroom. And the marshals should take Mr. Maiben into their custody and remove him there as well. Everybody including the prosecutor shall wait outside until further notice and the doors shall be closed.

MS. BEDNARSKI: Your Honor, I would request the court

allow Mr. Landin to remain.

THE COURT: Yeah. He can remain. He's part of your firm.

MS. BEDNARSKI: We also have a Mr. Nishi here.

THE COURT: I can't have Mr. Nishi yet.

We're going to permit the representative of the marshal's office.

What's your name, sir?

MR. SHAPIRO: Deputy Ben Shapiro.

THE COURT: Deputy Shapiro to remain.

And I think you should wait outside.

(The following proceedings held under seal.)

THE COURT: And I instruct you, Deputy Shapiro, whatever is discussed at this proceeding you are absolutely obligated to keep confidential and to disclose to no one.

Do you understand that?

MR. SHAPIRO: Yes, I do.

May I say I think one of the deputies is going to come back after he finishes transporting one of the other defendants --

THE COURT: I will deal with that when that happens.

Now Mr. Sutcliffe and Ms. Bednarski, I've got this application which consists of a request by your current lawyers to be relieved of their responsibilities to you as lawyers and to be relieved of their status as counsel of record. And it

states without explanation there is an actual conflict of interest that I could only be told about if you were to waive your attorney-client privilege, which your lawyers think you should not do, and that this conflict of interest is distinct.

That's the term that's been incorporated into the application.

From the issues I reviewed with Mr. Sutcliffe and with his lawyer the last time we were here -- which I think was on August 22, you need to provide me with additional background information.

Most of the time when I am encountered -- when I am presented with a request to be relieved because of a conflict, your office tells me about an association with some other individual, often a defendant to whom they owe potentially conflicting or actually conflicting duties of confidentiality or loyalty.

Is that the situation here?

MS. BEDNARSKI: No, sir.

THE COURT: I'm sure you can explain what this is about so that Mr. Sutcliffe certainly has an opportunity to know what is before me as a ruling without waiving attorney-client privileges. So please do so.

MS. BEDNARSKI: We're -- we feel that the events that have passed we would not disclose to anyone hearing in this case, to anyone ruling on potential motions --

THE COURT: Hold on one minute.

Who is entering the courtroom, sir?

MR. GROSSMAN: U. S. Marshal Service, sir.

THE COURT: What's your name?

MS. JOHNSON: Monica Johnson, sir.

THE COURT: Your name?

MR. GROSSMAN: Robert Grossman.

THE COURT: You'll be permitted to stay here for purposes of ensuring court services. But everything that you hear each of you is obligated not to disclose to anyone else under any circumstances, no matter what the reason, nor to discuss with each other or with Deputy Shapiro.

Do do you understand that?

MR. GROSSMAN: Yes, sir.

Robert Grossman. Yes, sir.

MS. JOHNSON: Yes, sir.

THE COURT: State your name again please.

MS. JOHNSON: Monica Johnson.

THE COURT: When you refer to the events that have transpired, do you mean the events that are the subject of investigation under the indictment?

MS. BEDNARSKI: No.

THE COURT: The events involving your communications with Mr. Sutcliffe as a lawyer?

MS. BEDNARSKI: Yes.

THE COURT: And what those communications and events have done to your ability to maintain mutual respect and confidence?

MS. BEDNARSKI: Yes.

THE COURT: Without telling me anything about the communications as such or the actual events, are you here today because you think that the lawyers' ability and right to have confidence in the representations and positions of the client have been irrevocably impaired?

MS. BEDNARSKI: No. We're here because our ability to do our best, to zealously represent him and to effectively represent him have been impaired. We don't believe we can do that and we believe he's entitled to that.

THE COURT: What could possibly happen that would change things if a new lawyer were appointed?

MS. BEDNARSKI: The -- well, the past events or the past communications may not occur. A new lawyer -- even if a new lawyer had been -- experienced those same things that new lawyer may indeed not end up in the same position.

In other words, that new lawyer's ability to effectively represent someone may not be so damaged, so affected or so infected or so compromised.

THE COURT: Ms. Bednarski, are you telling me in plain language that the communications between your office or any member of your office on the one hand and Mr. Sutcliffe on

the other hand have been so impaired that the ability to maintain mutual trust and respect and confidence in each other's respective obligations and positions has been shattered?

MS. BEDNARSKI: Yes.

THE COURT: Is that a result of things that were said by one side or the other side in this existing attorney-client relationship?

MS. BEDNARSKI: In part.

THE COURT: Have you discussed up until this afternoon your -- before this afternoon, before this proceeding began here in court, your office's view that it cannot adequately represent Mr. Sutcliffe? Have you discussed that with him?

MS. BEDNARSKI: No. We communicated to him the same position we communicated to you. We gave him the papers. We do not believe that his position or his feelings or his ability can repair where we are. In other words, it's our motion to be relieved and it's not, in our view, something that can be fixed by inquiry, explanation.

We served him -- not served. But we had somebody meet with him and give him the papers as --

THE COURT: When was that?

MS. BEDNARSKI: On Thursday.

THE COURT: Keep going.

MS. BEDNARSKI: And we did so, I think -- and we did that for the reasons that any, I think, professional person would, which it is obviously a matter that concerns him greatly. We've obviously gave -- I'm not going to say obviously.

We've given it a lot of thought. It's something I've never done. It's something that my office has rarely asked for. And I can't think of a circumstance that I can draw upon that gives me an experience of similar quality. It's not done lightly. I actually believe it's in Mr. Sutcliffe's best interests regardless of what he may believe. And he's entitled to someone who can fight effectively and zealously for him.

THE COURT: That's true. There's no doubt about the latter conviction.

Let me speak to Mr. Sutcliffe. You may be seated, Ms. Bednarski.

Do you know -- without telling me what it is she's referring to, do you think you know in your own mind what it is she's referring to?

THE WITNESS: Good afternoon, Your Honor. Steve Edward Sutcliffe present.

I wish to proceed with all rights reserved without prejudice. I wish to enter into the record a record I prepared in response to Ms. Bednarski serving me these papers last Thursday.

If I may be permitted to freely speak on the record?

THE COURT: Yeah. Go ahead. You can do so while you're sitting there.

THE WITNESS: Last month this court permitted me to speak openly and directly about my concerns that my attorneys were not competently working on my behalf. And in particular that Ms. Potashner had obstructed justice. This Court gave me a questioning period and solicited information regarding communications and the lack of with my attorney and even directed questions to my attorney, Ms. Potashner, that necessarily involved attorney-client communications.

Neither this Court nor my attorney -- I mentioned attorney-client privilege. And it would seem to me that if this was any concern about attorney-client privilege, at that point it was then waived --

THE COURT: Only you can waive the attorney-client privilege. The lawyer cannot waive it for you unless you authorize a lawyer to do so.

THE WITNESS: This court can and I hereby request it conduct another sealed hearing at which time it can again direct an inquiry without concern for or about the issue of attorney-client privilege.

I believe in such an event the Court will see for itself the complete and utter lack of any basis for this motion, which is nothing more than a tacit admission of the

incompetence and failure to comply with their professional responsibilities as attorneys and that this motion lacks both merit and foundation.

I will never waive attorney-client privilege in open court. And I'm glad this Court has kept this sealed, as it did on August 22.

I am willing to waive attorney-client privilege regarding the limited events of the recent telephone conversations involving myself, Ms. Potashner, and Ms. Bednarski that occurred August 23, 2002, August 29, and September 6 and September 17, 2002 only.

It is my belief that the telephone conversations on August 23 and September 17 as well as the 6th were or might have been recorded. If this is so, I request that these tapes be entered into evidence at any hearing held after this day.

I'm willing to waive attorney-client privilege in regards to the alleged secret investigations by Ms. Potashner and the public defender's office as I would like more details on this events. I stand on all my other rights with the lack of the prejudice.

Lastly, I would respectfully request this Court consider having a very brief in camera hearing with the accused prior to the requested hearing in the prayer that this case might be able to be resolved to the benefit of all parties once and for all.

I thank you, Your Honor, for your time and consideration.

THE COURT: Okay, Mr. Sutcliffe, you did the right thing by approaching it the way you have. And thus far, nothing that has been disclosed today would in any way constitute a waiver of your attorney-client privilege.

But I think what we all have to do is get to the real issue that's before me today. Your lawyers don't want to be your lawyers. Whatever their reasons are, I can only guess at. It's not entirely a wild guess. But the record is the record and I only have the record to rely upon.

They don't want to be your lawyers and they're telling me as officers of the court that it's not in your interest for them to be your lawyers, that they cannot properly represent you.

And you I want to make sure and I think you want to make sure that regardless of what you choose to do, regardless of what your last statement about resolving the case to the satisfaction of all the parties may refer to, you want to make sure that at all times you have lawyers who are in a position to represent you effectively and zealously. And these lawyers are saying that they're not.

When you hear that being told to me by these lawyers, as you just heard, do you still want them to be your lawyers?

THE WITNESS: Again, I prepared a statement

anticipating that question. If I may enter that into the record?

THE COURT: Go ahead.

THE WITNESS: Thank you, Your Honor.

I previously voiced my concern to this Court that my court appointed federal public defender had failed to secure and obtain evidence of my physical torture and abuse by the Manchester Police Department in full view of the -- and apparent consent of the FBI, who were present and who observed the incident.

This Court permitted me to speak about this, conducted a brief inquiry, and then announced that it found no evidence the Public Defender's Office had engaged in obstruction of justice.

The day after the court hearing, I called Hilary Potashner. She told me that after reviewing the evidence she had received by subpoena and that comparing that evidence to the facts I had previously provided her and then reiterated in this phone call -- she stated that she believed me and my description of police brutality and torture had in fact occurred.

I asked her to request a hearing before this Court where all participants would be present, by subpoena if necessary, so this Court could determine what -- if it in fact had occurred --

THE COURT: Let me just interrupt you. Interrupt

The record will reflect that you are reading from a statement, which is fine with me. But I just want you to tell me how many pages that statement comprises. How many more pages?

THE WITNESS: Approximately five single-side.

THE COURT: All right. Go ahead and continue. I don't want to cut you off. But remember, the only question I'm asking you -- and I would really expect an answer that's going to be yes or no -- is whether you want these people to be your lawyers in light of what they've just told me.

THE WITNESS: It's addressed in here. I want to make a clean record of why I'm doing what I'm doing.

THE COURT: All right.

THE WITNESS: You'll understand after I --

THE COURT: All right. Make your record. Interupt

THE WITNESS: She said she would meet with me the following week to discuss this matter further. As with all of Ms. Potashner's promises, she failed to keep her promise to meet with me the following week or to provide details of the secret investigation she and the public defender's office allegedly had conducted of the torture.

I have repeatedly told both of my public defenders of my torture and physical abuse by the Manchester Police Department and FBI and I believed this conduct constituted a

felony attack on my person. I have repeatedly requested that my public defenders -- Interrupt

THE COURT: Could you speak and read that more slowly. The court reporter is probably having a very hard time.

THE WITNESS: I repeatedly told both of my public defenders of my torture and physical abuse by the Manchester Police Department and FBI and that I believed this conduct constituted a felony attack on my person. I have repeatedly requested that my public defenders report this conduct and the apparent destruction of the evidence of this incident. And they have failed to do anything.

Finally, on September 17 in a phone conversation with Hilary Potashner, I told her that she was guilty of misprision of felon and how would she like it if she was arrested for this conduct that was not so different than why I was arrested.

Ms. Potashner then put me on hold, then returned and advised me Ms. Bednarski was with her and I was on a speaker phone.

Ms. Bednarski then accused me of threatening Ms. Potashner, which I then denied.

They then hung up on me, and this motion was subsequently filed.

The Public Defender's Office has had my case since April of 2000. On two prior occasions they asked this Court

for a continuance because they were unprepared to go forward. On the last such occasion, you replaced Ms. Potashner as my lead counsel and replaced her with Ms. Bednarski. It was represented they would be ready to proceed to trial on the continued date.

This Court then advised counsel it would not entertain any further requests for a continuance of trial by the Public Defender's Office.

I have been incarcerated since March, 2002, without bail. I have repeatedly requested that my attorneys challenge this Court's denial of bail by filing a writ of habeas corpus, and they have repeatedly refused, claiming they do not want to upset this Court.

I repeatedly asked them to obtain a transcript of the hearing at which bail was denied so that I could address Your Honor's concerns. And they have continued and refused to request or obtain this transcript.

Trial is set for October 22. And to this date I have yet to be told by my attorneys what evidence the prosecution has produced to support any of their charges against me, what witnesses the prosecution intends to call, what evidence my attorneys intend to introduce in my defense, and what witnesses they intend to call and/or subpoena on my behalf.

Today my attorneys have asked me to prepare my defense arguments for my defense and to list documents

contained in the limited discovery that they have made available to me that would support the defense and argument requested of me. And I have done as requested. Even though I have provided and support for same as requested, neither attorney has discussed any of these materials with me in any expanded scope.

And now four weeks before trial they appear incompetent to proceed with, they bring this motion claiming that an actual conflict now exists which is peculiar, unusual, and quite distinct. Their words.

To the extent that my court-appointed public defenders has failed to perform their jobs as that has created a difficulty in their proceeding to trial as ordered by this Court -- I've already pointed out the problems of this Court with no relief -- to grant this request would be to further jeopardize my right to a speedy trial, representation, and/or assistance to competent counsel and right to my freedom.

As this Court advised at the last hearing, it would need at least a half an hour just to describe the dangers of my even considering to represent myself against the vast strength, wealth, and weight of the United States Government.

I agree that self-representation is not appropriate and I appreciate the counsel from Your Honor.

Furthermore, no panel attorney could come into this case now four weeks before trial and do in four weeks what the

Public Defender's Office has failed do in the past six months.

The only reasonable, appropriate, and fair result, I believe, would be to require the Federal Public Defender's Office to finish what they have started. They will further prove their incompetence or they will not. Either way, the dye has been cast.

I would therefore request respectfully this Court order the Public Defender's Office to he prepared to try the case on October 22 as so ordered and to deny any motion to be relieved.

Thank you for your time again and respect.

THE COURT: Mr. Sutcliffe, you obviously oppose their motion to be relieved as your lawyers, but in the process of opposing it, you have set forth in a very eloquent manner a lot of disagreements and objections and dissatisfaction that you have, some of which you told me about the last time we were here, none of which seems to have been cured, and some of which have been made worse since you were here. And I think it was August 22.

In other words, what you're telling me is they're not doing the job but you want them to finish the job they're not doing.

What that suggests to me is that you are inviting a huge problem that you could otherwise avoid and you're also creating the risk that I would be making a big mistake by

allowing you to do this inconsistent and, I think, prejudicial act.

If I were to require them to continue to be your lawyers, I would be disregarding what all three of you were saying. Because there is no dispute based on this record that the communications that are necessary to have a good attorney-client relationship -- and you need one. These are serious charges. And right now you're innocent. You're still in custody, but you're not convicted.

For you to go to bat and take the case to trial or even to pursue a plea, if that's what you were alluding to before, with these lawyers is going to be totally against your interest and against my duty to assure that you get effective assistance of counsel.

I have an independent obligation. That's my job. What the lawyers say and what the clients say are very important. And the record that's presented to me is necessary for me to weigh and rule upon. But I have the independent obligation to make sure that the relationship from both perspectives is salvageable and at the very minimum sufficient to make sure that the lawyers can do their job to provide effective assistance.

All three of you are making it clear that that's not the case.

Now what that really means for you is that -- what it

means for me is that I am required, against my preference but definitely as part of my obligation, to grant the motion and I'm going to grant it. And I am going to arrange for the appointment of another lawyer. But I'm going to impose certain conditions --

THE WITNESS: May I say something, Your Honor, quickly?

THE COURT: Go ahead.

THE COURT: My public defender Jonathan Sacks in New Hampshire who represented me --

THE COURT: I remember you liked him very much.

THE WITNESS: He figured this case out in one day what they have not been able to figure out in six months.

Any conflict, if it exists, between Ms. Bednarski and Ms. Potashner and not the Federal Public Defender's Office, I would suggest to Your Honor to consider two things. Let Ms. Bednarski and Potashner to pass on their opinion to fellow public defenders within their office.

THE COURT: There is one here who is their supervisor.

Is that your role, Mr. Landin? Are your their supervisor?

MR. LANDIN. That is correct, Your Honor.

THE WITNESS: Or I would gladly accept Mr. Sacks from New Hampshire as my public defender.

THE COURT: I don't have any authority to arrange for Mr. Sacks to represent you here. I'm perfectly willing to have the Public Defender's Office that your lawyers now -- in other words, the LA Public Defender's Office -- notify Mr. Sacks -- in fact, I'll require them to notify Mr. Sacks that you have requested that he be appointed to represent you. That's an order I'm issuing now.

If Mr. Sacks got permission from -- whatever permission is required, presumably from his boss -- to seek leave to be admitted on a special basis -- it's call pro hac veche -- to represent you in this case, I almost certainly would appoint him. I'm not committing to that. That would be my inclination. I don't think that's likely. But I'm willing to see whether there is any basis to arrange for Sacks to come in.

I'm not willing to require these lawyers to permit you, against your best interest, to require these lawyers to remain as your lawyers. You got too much baggage in this case. And it's not necessary for me to make any findings about who's right and who's wrong. I'm not saying you're wrong. I don't know for sure. I am saying that this is not an adequate or acceptable way for the lawyer and the clients -- for the lawyers and the client to continue to proceed.

Now I want -- I'm going to call in Mr. Nishi, who is a member of the court's alternative panel for lawyers. They

often are as experienced, sometimes more experienced, and absolutely as comfortable and conversant in federal criminal law and criminal procedures than members of the Public Defender's Office. And I'm not just blowing smoke at you and telling you this. And eight or nine times out of ten far superior to retained counsel. Any judge will tell you that.

And Sacks in New Hampshire apparently demonstrated that to you already. So the fact that these are lawyers appointed at the expense of the Government and not retained by somebody with deep pockets is usually to the advantage of the person who gets them. And I think that may well be the case for you.

Now if Nishi is appointed, as he's about to be, I will state that you are authorized to tell him and your lawyers are required to tell him that there's a possibility that Sacks will be permitted to associate in. I don't hold out a great deal of promise for that. But it could be a very fine development and I'm not resistant to it.

I won't relieve Mr. Nishi because any lawyer out of state has to have a local lawyer present. It's part of the rules. You'd have two lawyers.

It will require a continuance. You're right that somebody can't take on your defense and do the job for you in four weeks --

THE WITNESS: May I interrupt you for one second?

THE COURT: Don't interrupt. I'll give you a chance to be heard.

I will have -- I want to -- in order to determine how much of a continuance is necessary, I want the lawyers to tell me answers right now to the following questions.

Have you completed your discovery, formal discovery and informal discovery, available to you or available as right to you from the government?

MS. BEDNARSKI: We as recently as last week continued to receive discovery. I think last week we got about somewhere between 130, 160 pages, which we forwarded to Mr. Sutcliffe. I believe we've gotten almost all the discovery in the case to the extent that it exists. We've gotten whatever we know about.

I think as the Government continues to prepare, some more discovery may be provided. But --

THE COURT: This Government lawyer was planning to go out of town. I remember that being told to me. And if she were out of town, who was going to get you whatever additional discovery you think might be out there?

MS. BEDNARSKI: She didn't tell us anybody else would be in charge of that. We've always been dealing just with her.

THE COURT: Well, I'll make a certain requirement that will apply to her office when I bring her back in here.

What other things would have to be done by your

successor, assuming you turn over the entire file, all of your work product?

Do you authorize, Mr. Sutcliffe, your communications with and your rights as a client to confidentiality to be turned over to your successor lawyers?

THE WITNESS: I'm sorry. What?

THE COURT: Do you permit -- I think it's not necessarily your choice. But I want to know whether you have any objection to the lawyers who are going to be replaced, Bednarski and Potashner, turning over to the successor lawyer this week their entire file?

THE WITNESS: No.

THE COURT: I know you're very upset. Would you like to have some water?

Pour some water for your client please and assist him in --

Would you like to have a recess?

THE WITNESS: Yeah. Please.

THE COURT: How long a recess would you like?

THE WITNESS: Ten minute. Ten minutes.

THE COURT: We'll take a recess on this matter.

I am required to reiterate that you remain in the custody of the marshals.

Do you need to use the men's room?

THE WITNESS: No.

THE COURT: Do you want to go across the hall to the witness room with just the marshals and yourself?

THE WITNESS: Please.

THE COURT: Take him into the witness room. Clear out the witness room of anybody else who might be in there. Make sure there's nothing in the witness room that would create a risk. Just stay outside the witness room and give Mr. Sutcliffe a chance to collect his thoughts. Come back in ten minutes.

THE MARSHALL: Yes, Your Honor

Okay. We're adjourned.

(A recess was taken at 4:37 p.m. with proceedings resuming at 4:48 p.m.)

THE CLERK: Please remain seated.

THE COURT: Mr. Sutcliffe, did you want to be heard? Because when I said something about a continuance is when you last asked to be heard.

THE WITNESS: Thank you.

I would again like to request of whoever you seek to appoint for me that they immediately be provided a copy of the the transcript of the bail hearings in April so we may address Your Honor's concerns.

THE COURT: Is the transcript in existence?

MS. BEDNARSKI: It's not been transcribed.

THE COURT: Well, I'll order that it be transcribed.

I don't know how long that will take. I don't remember who the court reporter is.

What was the date of the hearing?

I'll find it from the docket.

THE WITNESS: I would also like the new lawyer to be provided with a partial transcript of the hearing of August 22, last month, where you agreed to hear a new hearing for bail although you reiterated you would not necessarily grant it --

THE COURT: That's not necessary. I'll get him the transcript of the bail hearing. I don't have unlimited capacity to order every transcript. He doesn't need that.

THE WITNESS: Is there any possible way we could expedite a bail hearing?

THE COURT: First, your lawyer is going to have to review the bail hearing transcript. As soon as he's ready to seek a renewed bail application, I'll grant him a hearing.

THE WITNESS: I asked my counsel for that way when you first -- after that first day.

THE COURT: You told me that. I know what your view is and how you characterize their view. But there are judgments that lawyers make which can often be very astute and very sensible and very much in the client's interest. I'm not making a finding either way. But you have a right to have me reconsider it. If there's a basis to do so, I will do so.

Anything else?

THE WITNESS: No, Your Honor.

MS. BEDNARSKI: Your Honor --

THE COURT: How long do you think you would need? If you knew exactly what you know about the status of the case and you were coming in, if were you Mr. Nishi.

Is that who we lined up?

THE CLERK: Mr. Nishi, yes.

THE COURT: How long would you need?

MS. BEDNARSKI: It's -- that's a hard thing to say because I know what has taken the time in the last six months. That's a different question --

THE COURT: Yeah. But he needs a lot less than the usual amount of time because you've done whatever you've done.

MS. BEDNARSKI: I would say at least six to eight weeks. But I think that's a determination that should be made by the other lawyer, not by me.

And I think the date of that first bail hearing was April 16.

THE COURT: I'm instructing the CRD to -- Ms. Williams to arrange with the court reporter to compile a prompt transcript of that proceeding. Whenever the date was.

We have a trial date of October 22. I think I should set the trial. What's the estimate for the duration of the trial on this?

I better ask Ms. Duarte that.

MS. BEDNARSKI: A week I think is the estimate. We think it could be slightly longer. But I would say between four and seven court days everyone would agree to.

THE COURT: Well, I want to set it for early December so this case can be tried and completed before Christmas. In the event Mr. Sutcliffe is acquitted, he can be free for the holidays. So even though I undoubtedly have a zillion trials, I am inclined to set it for December 3. I'll explore it with Mr. Nishi.

Bring in the other lawyers.

This proceeding as of this point, up until the point that the other people come in, the transcript will be sealed and closed. Filed under seal.

(The following proceedings were held in open court.)

THE COURT: Welcome back, Mr. Nishi. Will you please step forward to the lectern and be good enough to announce your appearance.

MR. NISHI: Thomas Nishi.

THE COURT: You're a member of the court's indigent defense panel?

MR. NISHI: I am.

THE COURT: I've explored certain issues and factors and considerations with Mr. Sutcliffe and his current lawyers from the Public Defenders Office, and I've made the following rulings.

I will grant the pending motion to be relieved of responsibilities as counsel of record. The Public Defenders Office has been ordered -- and I'm letting the other lawyers know that they've been ordered -- to communicate with a certain member of another Federal Public Defender's Office. The defendant's requested that individual be permitted to represent him in this proceeding.

That other office is in a different state. I don't know whether that's feasible. And I advise Mr. Sutcliffe that I think it's not a likely development but that if that lawyer were available and chose to agree to represent Mr. Sutcliffe in this case, I would be inclined -- I have not committed to do it -- to grant an application for him to do so or on a pro hac veche basis in this court without in any way relieving Mr. Nishi, whom I'm about to formally appoint as counsel of record for Mr. Sutcliffe.

MR. NISHI: Your Honor, before you do that, may I be heard?

THE COURT: Yes.

MR. NISHI: I'm aware of some of the facts and I can indicate to the Court that I have three white collar trials set back to back. I probably will not be available to the end of February.

THE COURT: You have three trials set back to back?

MR. NISHI: Yes.

THE COURT: In this district?

MR. NISHI: In this district.

THE COURT: Are you confident they're all going to go?

MR. NISHI: I'm confident two are going to go.

THE COURT: Do you know what those trial dates are?

MR. NISHI. Yes, I do. One is probably two weeks from today, October 1. And the second one that I'm sure of is December 3.

THE COURT: That's when I wanted to reset this date for trial. I don't want the continuance that's necessitated by this substitution of counsel to delay Mr. Sutcliffe's rights to a speedy trial.

MR. NISHI: That's why I wanted to bring it to the Court's attention.

THE COURT: I don't think it's fair to Mr. Sutcliffe to appoint you, Mr.Nishi. It just won't fly.

MR. NISHI: I agree. That's why I brought it to the Court's attention.

THE COURT: I wish I'd known all that before I went through all this.

All right. I'm instructing the clerk to contact the indigent defense panel and tell them I want a lawyer who will be available to represent vigorously and immediately Mr. Sutcliffe with a trial date of December 3 anticipated

for --

How long do you expect this trial to be?

MS. DUARTE: Government's evidence approximately five court days, Your Honor. Maybe less.

THE COURT: For a seven court day trial. I don't think it will take that long. They seldom do. But who knows.

And I want somebody who can commit to being available on December 3.

Until you're formally replaced, you're not out of the picture. So whatever duties a lawyer has to a client, you continue to have to a client, including the duty to contact that other lawyer we spoke about, promptly tell him about the trial date as well.

When a substitute lawyer has been identified and has made a commitment to represent Mr. Sutcliffe, we'll have to have another hearing as soon as possible this week. And the Public Defenders Office will be required to turn over all of its files and all of its otherwise privileged communications with Mr. Sutcliffe as he has agreed and authorized them to do.

There is going to be a effort, with the Court's cooperation, to obtain a transcript of the bail proceeding. And whether new counsel agreed and believes it's in Mr. Sutcliffe's interest to seek a reconsideration of my earlier ruling on bail will remain to be determined. But I have authorized the transcript to be compiled.

Pg 24 / 100

Is there anything else that needs to be addressed?

MS. DUARTE: Yes, Your Honor. You mentioned another hearing this week. Since I'll have to get this covered since I'm leaving tomorrow, would you just let me know what the person who's covering would be expected to do at that hearing.

THE COURT: Not much because I'm just assuming the Government will be ready to go on December 3.

MS. DUARTE: That's fine with the Government --

THE COURT: If we have to change that, it won't be something that I'm going to be pleased about.

MS. DUARTE: No, Your Honor. We're ready to go on the 3rd --

THE COURT: I'm not saying you weren't. I assume you were ready to go on the 27th.

I wanted to ask you about discovery. What possible discovery under the most rigorous application of your discovery requirements and Brady requirements that you could possibly know of remains to be completed that hasn't yet been done?

MS. DUARTE: The only thing I can think of, Your Honor, is there's a couple of things that were provided by witnesses that are largely duplicates, such as printouts of web sites, things like that that the witness compiled on their own, that I've been holding onto to turn over when I knew what was going to happen at this hearing. And I would say --

THE COURT: No. I want you to turn them over, your

office to turn them over this week. You get them to the public defender, the current counsel, they'll get them to Mr. Sutcliffe. He'll have it in their hands that much faster.

MS. DUARTE: I will, Your Honor. But I have everything turned over basically.

THE COURT: What else besides those additional statements or documents from witnesses?

MS. DUARTE: That's all I can think of, Your Honor, that I haven't turned over or made available.

THE COURT: I know you have this planned absence and that's fine and understandable. But I want you to arrange to in the event that -- well, I want you to tell the clerk before you leave -- go up there and take care of it now, please -- who will be looking after this case in your absence.

And tell that person, that assistant U.S. attorney, and disclose who it is to the current counsel, that I want that person promptly to contact the case agent and you should tell the case agent to contact that AUSA and make sure they start functioning in sync so that if there are any developments involving discovery or anything else that might take place in your absence there won't be any additional delay.

I want the information that is necessary for a new lawyer to take over this case and get ready for trial on December 3 to flow freely and quickly to the extent it hasn't already been given to the public defender.

MS. DUARTE: Very well, Your Honor.

Is there anything Your Honor in particular -- I wasn't here. But if there's anything in particular somebody thinks they haven't gotten --

THE COURT: No. I don't have any precise thing to point to.

MS. DUARTE: As far as I know, I've been turning everything over and I will continue to do that.

THE COURT: What about grand jury transcripts?

MS. DUARTE: They have been turned over.

THE COURT: They have?

MS. DUARTE: There was only one witness before the grand jury, and that's been turned over.

THE COURT: All right. I can't specify anything else. Those are my rulings.

Until further proceedings, I'm going to ask the clerk to contact the appropriate people about getting an available member of the indigent panel today if possible. We have another matter on the calendar. So we'll have to turn to that as well.

This case is adjourned.

(Proceedings ended at 4:57 p.m.)

//////////////////////////////

//////////////////////////////

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

Gail Peeples 9/22/03

GAIL PEEPLES
Court Reporter

DATE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

- - -

HON. A. HOWARD MATZ, U.S. DISTRICT JUDGE, PRESIDING

- - -

UNITED STATES OF AMERICA, Plaintiff, vs. STEVEN WILLIAM SUTCLIFFE, Defendant.	)	Case No. CR2002-350-AHM

Los Angeles, California

September 25, 2002

1:00 p.m.

- - -

Gary D. George, RPR
Official Court Reporter
United States Courthouse
Room 410
312 N. Spring Street
Los Angeles, CA 90012
(213) 621-3164

APPEARANCES:

On behalf of the Plaintiff:

DEBRA WANG,
United States Attorney
BY: Arif Alikhan,
Assistant United States Attorney
312 N. Spring Street
Los Angeles, CA 90012
(213) 894-2476

On behalf of the Defendant:

FEDERAL PUBLIC DEFENDER'S OFFICE
BY: Marilyn Bednarski
Hiliary Potashner
Deputy Federal Public Defenders
312 N. Spring Street
Los Angeles, CA 90012
(213) 894-

- - -

P R O C E E D I N G S

THE DEPUTY CLERK: Item 2, Criminal 2002-350-AHM, USA vs. Stephen William Sutcliffe.

Appearances, counsel.

MR. ALIKHAN: Good afternoon, Your Honor.

I am Arif Alikhan. I'm standing in for Assistant U.S. Attorney Elena Duarte.

THE COURT: Good afternoon to you.

MS. BEDNARSKI: Good afternoon, Your Honor.

Marilyn Bednarski and Hiliary Potashner, also present in court is Mr. Steven Sutcliffe.

THE COURT: Good afternoon to all three of you.

And Mr. Harris, would you please approach the lectern and make your appearance as well.

MR. HARRIS: Good afternoon, Your Honor.

Bill Harris here at the Court's request.

THE COURT: The reason I requested Mr. Harris to be here is that, as I told you I would do when you last were here, Mr. Sutcliffe, I have arranged for a lawyer to be appointed from the Court's Indigent Defense Panel to be your lawyer in this case.

Ordinarily I could have arranged for that without any court appearance, but I did something unusual in scheduling this hearing because I wanted to explain

something to you, so please listen very carefully.

I know Mr. Harris, although entirely on a professional basis, he has been before me on many occasions and coincidentally he happened to be here in court for at least part of the proceeding a couple of days ago. He's a lawyer who fights remarkably hard and vigorously, honestly and effectively for his clients.

Now I can't guarantee any particular chemistry between a lawyer and his client or a client and his lawyer, but I want you to understand that I really doubt very much whether under the circumstances that you are currently proceeding in this case that you will be able to find, no matter how difficult it may be, to have all your wishes accommodated a lawyer better equipped and more dedicated to serving your interest than Mr. Harris.

I'm not vouching for any particular thing he will do because I don't know what he will do and most of what he will do I probably won't learn about because a lot of it behind the scenes.

But you now have a lawyer. I have the authority to appoint Mr. Harris. I am appointing him and that completes the arrangements that we made on Monday pending which the substitution of counsel that was the subject of that proceeding had it yet to be completed.

Now I already made a very clear record, I believe,

as to the duties I expect the lawyers who are here from the Public Defender's office to carry out in the process of transition.

Mr. Harris, are you aware of the trial date on this case?

MR. HARRIS: Yes, December 3, Your Honor.

THE COURT: Okay. And I intend to do my best along with my staff, and I expect the lawyers will be doing the same to make sure that we are ready to go on December 3rd.

Mr. Sutcliffe has requested that a transcript be compiled of a much earlier proceeding involving an application he made to me to reconsider -- well, actually the application, I believe, was made by the U.S. Attorney's office to have the terms of bail that was set by a magistrate judge changed and I granted that and as a result, Mr. Sutcliffe is currently in custody.

That's an issue I know that he wants to have reconsidered. I have not told him that it necessarily will be. I think that's a question for you and he to explore and you will, as every lawyer, will continue to enjoy the right to form your own independent conclusions based on your best judgment as to what's in your client's interest and to discuss that with him. But I have ordered the transcript to be compiled. And as soon as it is available my staff will let you, Mr. Harris, know and you can proceed accordingly.

MR. HARRIS: Thank you.

THE COURT: Is there anything further that needs to be addressed this afternoon?

Mr. Sutcliffe.

THE DEFENDANT: Yes, Your Honor, I have two concerns, one regarding communication with my new counsel, which I appreciate you appointing for me. Currently in MDC all my phone calls are subject to monitoring and I cherish the attorney-client privilege and I waive it only in extreme circumstances.

Secondly, to call counsel would he accept collect phone calls?

MR. HARRIS: Yes.

THE COURT: All right, you got an answer from him. The answer is yes.

And as far as a means and methods that are adopted by the Bureau of Prisons in administering the facility at the MDC, which do involve the right and often the exercise of recording certain calls I'm not going to make any ruling and I'm not going to interfere with what is the ordinary practice.

I can tell you Mr. Harris is very familiar with how the MDC functions and you and he will do the best to accomplish what you need to and he will be able to assure you that whatever you discuss with each other remains

confidential unless it's authorized for disclosure.

Okay, I think that takes of care everything. We are adjourned.

(Whereupon, the hearing was concluded at 1:20 p.m.)

CERTIFICATE

I, GARY D. GEORGE, being an Official United States Court Reporter for the Central District of California, Los Angeles Division, do hereby certify that the foregoing transcript pages 1 through 7, is a true and correct transcription of my shorthand notes to the best of my skill and ability of the proceedings taken before me at the time and place stated in the caption thereof.

I further certify that I am not of counsel to either of the parties hereto, or otherwise interested in said case.

IN WITNESS WHEREOF, I hereunto set my hand this 28th day of September, 2004.

GARY D. GEORGE, RPR

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

COPY

- - -

HONORABLE A. HOWARD MATZ, JUDGE PRESIDING

- - -

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CR 02-350-AHM
	)	
STEVEN W. SUTCLIFFE,	)	
	)	
Defendant.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Thursday, November 21, 2002

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

EMMA LESTRO, RPR, CSR 2901
Official Federal Reporter.
453 United States Courthouse
312 No. Spring Street, Room 429K
Los Angeles, California 90012
(562) 863-5554

APPEARANCES OF COUNSEL:

For the Plaintiff:
UNITED STATES ATTORNEY'S OFFICE
By: ELENA J. DUARTE, AUSA
Central District of California
Criminal Division
312 North Spring Street
Los Angeles, CA 90012
(213) 894-8611

For the Defendant:
STEWART & HARRIS
By: WILLIAM S. HARRIS, ESQ.
1499 Huntington Drive, Suite 403
South Pasadena, CA 91030
(626) 441-9300

LOS ANGELES, CALIFORNIA; THURSDAY, NOVEMBER 21, 2002; 3:00 P.M.

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

Counsel, state your appearances, please.

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

THE COURT: Good afternoon.

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

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

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

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

But let's keep the issues in clear focus.

This is not a motion to dismiss the indictment.

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

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

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

I'm going to deny the application.

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

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

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

MR. HARRIS: Yes, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

threat.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So for all those reasons, I deny the application.

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

MR. HARRIS: Yes. Briefly, your Honor.

THE COURT: Go right ahead.

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

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

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

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

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

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

MR. HARRIS: Oh, no.

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: That I will not do.

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

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

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

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

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

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

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

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

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

MR. HARRIS: No.

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

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

MR. HARRIS: Okay.

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

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

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

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

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

THE COURT: Being pulled off of what?

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

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

Is that your concern?

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

[Interrupt.]

THE COURT: Well, that would be my ruling on it.

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

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

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

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

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

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

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

ruling today on the bail.

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

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

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

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

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

THE COURT: Really? Four to five court days?

MS. DUARTE: I can't anticipate cross; I can tell you that my case will be -- [Interrupt]

THE COURT: Let's see the trial schedule.

MS. DUARTE: -- relatively short.

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

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

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

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

THE COURT: -- seven-day trial?

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

THE COURT: Yes, I would too.

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

THE COURT: Yes. I think so.

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

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

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

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

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

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

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

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

MR. HARRIS: Thank you.

THE COURT: Okay. We're adjourned.

(Proceedings concluded.)

-o0o-

CERTIFICATE

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

Date: 2-1-05

Emma Lestro

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

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

THE HONORABLE A. HOWARD MATZ, JUDGE PRESIDING

- - -

UNITED STATES OF AMERICA, PLAINTIFF, -v- STEVEN WILLIAM SUTCLIFFE, DEFENDANT.	CASE NO. CR 02-350-AHM

COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
December 4 ~~APRIL 16~~, 2002

LYNNE SMITH
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

APPEARANCES:

ON BEHALF OF PLAINTIFF:
OFFICE OF THE UNITED STATES ATTORNEY
BY: ELENA DUARTE
JASON GONZALEZ
ASSISTANT UNITED STATES ATTORNEY
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

ON BEHALF OF DEFENDANT:
FEDERAL PUBLIC DEFENDERS OFFICE
BY: HILLARY POTASHNER
DEPUTY FEDERAL PUBLIC DEFENDER
321 NORTH SECOND STREET
LOS ANGELES, CALIFORNIA 90012

WEDNESDAY, DECEMBER 4, 2002; LOS ANGELES, CALIFORNIA

-000-

THE CLERK: Item Number 2, CR 02-350-AHM, U.S.A. versus Steven William Sutcliffe. Counsel, please state your appearances.

MS. DUARTE: Good afternoon, Your Honor. Elena Duarte for the government.

THE COURT: Good afternoon.

MR. HARRIS: Good afternoon, Your Honor. Bill Harris for Steven Sutcliffe. He's present and in custody.

THE COURT: Okay. We're here as a result of several motions that have been filed. And the first two were filed directly by Mr. Harris on behalf of Mr. Sutcliffe.

Mr. Sutcliffe then filed in his own behalf directly or caused to be filed or at least lodged, handwritten motions relating to the representation of Mr. Harris, and also concerning venue.

What I propose to do, unless Mr. Sutcliffe voices an objection, in which event I will have to entertain at least the objection, is to address the substantive motions first. And that means that Mr. Harris will be continuing to function as your lawyer for purposes of those motions. He may be continuing no matter what. And I would only entertain argument from him, no matter what.

And then we can turn and I will have to exclude the

prosecutor, to the issues raised at least by the motion concerning Mr. Harris' representation. Do you have any objection to that, Mr. Sutcliffe.

THE DEFENDANT: No, sir, Your Honor.

THE COURT: Let's talk about these two motions as I did last time. Excuse me. I first of all, I assure you I have read everything that's been submitted in many, many cases. The motion that is the motion to dismiss based upon the First Amendment issues obviously tracks very closely the bail motion that I considered and ruled upon last week or the week before then. I reached the same conclusion and intend to deny the motion.

Let me address some specific considerations. Again, these are not altogether new by any means. I don't consider that this qualifies remotely as a labor dispute. And certainly not as a labor dispute that is something that creates an issue of speech as opposed to and in delegation of a true threat.

Mr. Sutcliffe, one of Mr. Sutcliffe's e-mails itself noted that the antagonism which led to these inherently threatening exchanges was very personal. There's a distinction as I think I noted last time between telling somebody go to hell and telling somebody you're going to send her back to hell. It's not altogether fanciful or imaginary distinction. The text of the letters, all of those, of the communications, all of those in Counts 1 through 4 reflect inherent threats.

The Planned Parenthood case which I described at considerable length last time makes it very clear that those are beyond the pale of the First Amendment. I know, Mr. Harris, that you're going to tell me cert was granted on that case. Am I right, that's what you were going to point out?

MR. HARRIS: No, that's news to me.

THE COURT: Well I think it was. I think cert was granted just this week.

MS. DUARTE: It was, Your Honor.

THE COURT: That doesn't change my view and doesn't change the binding affect on this court of the Ninth Circuit's ruling in the Planned Parenthood case.

So I reject the notion that this pure speech. It is conduct. It's inherently threatening and there is no basis whatsoever to grant that motion to dismiss. The threats were coupled with links as to Counts 5 through 9, as the government correctly points out, this is not simply posting information. This is posting information and directing the reader in at least two of the counts the means under which the information could be misused to very great and direct detriment and injury of the victims. It's conduct, it's clearly prosecutable and that's the basis for my ruling. - US v Cassel, 2005, WL 1217387 (9th Cir May 2005) US v Brice, 926 F 2d 925, 931 (9th Cir 1991)

As to the selective prosecution motion, which is directed only in Counts 1 through 4, that's premised upon this communication, this one E-Mail that Mr. Harris brought to my

attention from Joe Schmoe sent directly to the defendant Mr. Sutcliffe. As the government I think fairly and correctly points out, pardon me, that single E-Mail which was a response to a provocative communication previously sent is not in any meaningful respect comparable or like the series of communications that underlie and that constitute Counts 1 through 4.

The fact is that Mr. Sutcliffe used not only entirely different language but was in a situation, was perceived to be in a situation, was none at the time of the indictment to be in a situation that there was no information suggesting Schmoe, whoever that is, was in. He had a domestic violence conviction or at least accusation. There was a link that he had to this killer cop web site. The number of victims was different. The nature of the communications was different.

In Armstrong and all the progeny of Armstrong and related cases that both sides cited it's very clear that the defendant has the burden to establish the existence of selective prosecution. It's a tough burden. Sometimes it's called a demanding burden. It has to be clear evidence. It has to be evidence that clearly establishes not only the discriminatory effect but a discriminatory motive. None of these things has been established. They have been mentioned. None of them has coupled with any showing remotely close to the kind of showing that would warrant throwing the cases out on that basis.

And all of the nonsense about the political affiliations of the U.S. attorneys and the changes in administration doesn't even warrant any commentary so I'm not going to do it. I also reject the basis because I don't thick the showing has been anything close to sufficient that would defer ruling on that motion as to Counts 1 through 4 pending the discovery of whatever information the government may have had about Joe Schmoe.

Okay, Mr. Harris. Those are my, that's a reflection of my thinking. You haven't yet had a chance to address me at to the selective prosecution motion. I think the hearing we had last time on the bail motion is very much involved in the first set of motions that I ruled on. Would you like address me now about the selective prosecution?

MR. HARRIS: Yes, Your Honor.

THE COURT: Please do.

MR. HARRIS: One second to confer, Your Honor.

THE COURT: Yes.

(BRIEF PAUSE IN PROCEEDINGS)

MR. HARRIS: With regard to the first element of similarity of offense, Your Honor, I think we've briefed that and if the court is not persuaded that's similar I would submit that you are not going to get more similar offenses anywhere. It's on exactly the same web site, during the same time frame. In context the same time dispute. And so if that's not

sufficient similarity I don't think you're ever going to find a situation where you do have similarity. And so I think that I would suggest that we have met our burden at least on that part of it.

As far as the backdrop where Mr. Sutcliffe had domestic violence allegations as the court pointed out, if you look at Exhibits 1 and 3 to the First Amendment issue, it's clear that Mr. Sutcliffe was reacting to prior provocation also.

THE COURT: Exhibits 1 and 3.

MR. HARRIS: Exhibits 1 and 3 contained in government's opposition to the First Amendment motion.

THE COURT: Okay. Exhibit 1 is an E-Mail, or excuse me, it's a page from the evilgx.com posting, in which it's clear that Mr. Sutcliffe asserted that Tracy Hall had been harassing his family and stalking him. So at least Mr. Sutcliffe is claiming provocation. That brings it even further into line. If you look at Exhibit 3 on the return to hell statement, it's clear from that page that Tracy Hall again was provoking Mr. Sutcliffe. At least Mr. Sutcliffe claimed that. That was his assertion.

That brings it even into closer congruence. Now whether or not that's true or not, whether she was stalking him and provoking him or not at least that was what appears on the face of the page and that is congruent with what appears on the face of the page by Schmoe.

THE COURT: I agree whether it's true or not is not relevant. But I think you're failing to acknowledge that the Schmoe E-Mail was a response to an E-Mail or to posting at least, not an E-Mail but a posting on the web site.

What Tracy Hall accused of here was not inherently inviting some kind of response. Showing up to serve papers, carrying out her job as a process server doesn't have anything close to the same kind of background or context as does the Joe Schmoe thing. They're entirely dissimilar in my view.

MR. HARRIS: Well --

THE COURT: Not only for those reasons but for the others I mentioned before which I won't repeat.

MR. HARRIS: We don't have it on the record, what Tracy Hall's background was. We may have to wait to trial for that one to come up.

THE COURT: But I also don't have in the record any indication that what Mr. Sutcliffe allegedly did in posting these communications on the web site was in response to something that also consisted of speech that Tracy Hall had engaged in and posted or otherwise disseminated using the Internet.

MR. HARRIS: Well, I think the standard is substantial similarity rather than exact.

THE COURT: I agree. You don't have it entirely alike in every possible element. Then you wouldn't have any

differences at all. But this isn't substantially similar.

MR. HARRIS: All right. Well, we assert that it is. As far, Your Honor, as far, just ask the court to consider one thing. As far as the political ramifications of this, we have posited the possibility what if Schmoe was Winnick or some other high ranking official of Global Crossing tied in closely to the upper reaches of the Democratic party.

What if, there's no way I can find that out because he's hiding behind a pseudonym. Some of the grammar I'll admit doesn't sound like and educated guy in the upper hierarchy but I don't know that. It could be. And if it was and there was a lack of prosecution on this record I think we have made out our burden. If discovery shows that Schmoe was Winnick for example, I mean the decision, it would be political dynamite to prosecute Winnick in this case. In addition to the strategic problems of having what that would do to this case. It's clear to me that a decision to prosecute --

THE COURT: This indictment was returned in the year 2002, right?

MR. HARRIS: Yes.

THE COURT: Did the Democrats control the Justice Department in the year 2002?

MR. HARRIS: No, Your Honor.

THE COURT: Where is the political dynamite, if anything?

MR. HARRIS: Because --

THE COURT: If anything, under your premise, which I don't think the record supports that Global Crossing is in bed with or in the camp of the Democratic party. And if Winnick was somebody who could be prosecuted because or would be publicly associated with the Democratic party you would expect that the Republican controlled Department of Justice would leap at the opportunity, at the very least to look into whether there's a serious basis to prosecute.

MR. HARRIS: It would -- [Interrupt]

THE COURT: Mr. Harris, I don't do this often. I don't mean it in any disrespectful way but I don't have the time to debate this idle point because it's a creative idea on your client's part, on your client's part, both of your part. It is so totally illogical and unsupported that it doesn't warrant further debate.

MR. HARRIS: All right.

THE COURT: There's nothing about the status of Global Crossing which I bet you almost anything contributed mightily to both parties and to candidates of both parties at various times, that would warrant a finding of selective prosecution here.

Do you want to add anything to the other motion?

MR. HARRIS: Yes, Your Honor. Briefly, I'd like to zero in just on the Count 3 regarding the statement to Winnick. No. Excuse me. Count 4 to the -- I'm sorry -- Count 4 about

collect from you personally.

THE COURT: Just a second. Go ahead.

MR. HARRIS: Because I think the point as to Count 4 carries over to some of the others. You're in the, this is an allegation that Mr. Sutcliffe posted a true threat on this web site when he makes the statement to the counsel for Global Crossing. In essence, you owe me $15,000 and I'm coming to collect from you personally. And then posted a picture of the lady herself, her daughter and the map to her house. I think that pretty much captures it.

THE COURT: Elizabeth Greenwood.

MR. HARRIS: Elizabeth Greenwood. This I would submit Your Honor, if that is deemed a true threat there's a lot of bear knuckles commercial litigation in this town where that kind of stuff goes on all the time. I have been on the receiving end of some of that from some very large law firms and they have --

THE COURT: Wait a minute. You're telling me that -- I don't know if you're a parent, Mr. Harris but that a picture of a minor child has been used by adversaries in some way to apply pressure on you?

MR. HARRIS: No. In terms of saying we're going to collect from you personally, threatening litigation to try to conflict out a firm and saying we know where your house is and pal, if you don't settle or drop this case we're going to come after you and we know you own a house. That kind of stuff just

goes on.

It's unpleasant but it's sort of part of the business. And the larger the money stakes are involved, I'm sure I don't have to tell the court anything the court is not aware of, the more bare knuckles it gets. And that's kind of part of the nature of the game. And basically what Mr. Sutcliffe was saying there was that you owe me some money. We know you have a house. We know how to serve a writ of execution on you. Pay up. We're going to collect from you personally. How you get --

THE COURT: And he makes a spelling pun out of the dedicated and spells it d-e-a-d.

MR. HARRIS: He also made a pun about an attorney with the Knee. There's all these puns in the middle there. I'm just worried that if that is criminalized that was would seem to sweep within the same kind of ruling. A lot of bare knuckles negotiations and back room litigation tactics go on every day.

THE COURT: Well --

MR. HARRIS: We submit it's certainly different and I will grant that the picture of the lady and her child, I wouldn't like somebody to do that to me. I don't think that's very nice. But the question is does that go over the line and suggest a threat of physical violence. That's the issue here.

I mean how different is that from saying look, we know that you have a family and you need a house over your head and madam, we're going to come take your house if you don't give

into our settlement demands.

THE COURT: I'm not going to get too far down this trail. But it's very different when the person who, as you see it is communicating pressure has a picture of your child, puts it on a web site for the whole world to see than to simply get a letter from a creditor saying you owe us money and we're going to take house if you don't pay. And we know you have a family that lives there.

That child in the second case, if were known, couldn't be detected when she steps on a school bus. At least there's no way to know the person who sent the pressuring letter would be able to do that.

When Elizabeth Greenwood sees her daughter posted on the Internet, very different thoughts go into her mind. I'm confident you're raising a legitimate point about where does it end, what could it lead to. These are constant and recurring First Amendment concerns. You're perfectly justified in raising them. In this case it's not even close in my opinion. There isn't any likelihood whatsoever that courts, prosecutors, grand jurors or others would be unable to draw principled and pinnacle distinctions.

I don't think that what you're talking about in terms of bare knuckle litigation with which I am familiar is anything comparable to what's in Count 4. I think I have heard enough and I deny the motions on that basis.

I think at this point I have to ask you to step outside, Ms. Duarte. We have representatives of the marshals here.

UNIDENTIFIED MARSHALS: Yes, Your Honor.

THE COURT: Who's in the back of the room?

UNIDENTIFIED COURT SECURITY OFFICER: CSO.

THE COURT: Okay. I'm instructing you that the portion of this proceeding which will be sealed once Ms. Duarte leaves the room, please wait outside. I will have you called back in. You are not to discuss with anybody else at any time under any circumstances. do you all understand that?

UNIDENTIFIED SPEAKERS: Yes, Your Honor.

THE COURT: What are your names please.

DEPUTY MILES: Deputy Raymond Myles, Your Honor.

OFFICER KRISCH: Officer Allen Krisch.

DEPUTY JOHNSON: Deputy Monica Johnson.

THE COURT: Thank you all. You're welcome to stay. Mr. Sutcliffe, I arranged to have the motion that you sent to me disclosed to Mr. Harris and have a copy made available to him to review.

Have you read them, Mr. Harris?

MR. HARRIS: Yes.

THE COURT: There are actually two motions. There's a change of venue motion and a motion to relieve Mr. Harris of his services and responsibilities as counsel. Have you discussed

that with each other?

MR. HARRIS: Yes. I went down and had a fairly lengthy meeting yesterday with Mr. Sutcliffe to discuss the contents of both motions.

THE COURT: What Mr. Harris -- and maybe you should go to the lectern, please. I don't know where things stand so would you be good enough to help me out please.

MR. HARRIS: As things stood yesterday, I asked, I assume by the nature of this motion I'm permitted to answer the court's questions about what I said to Mr. Sutcliffe and what Mr. Sutcliffe said to me.

THE COURT: I don't think you have get into chapter and verse but let me give you a little bit of more of helpful guidance. Is it your understanding that your client right now still wants to have you dismissed as his lawyer?

MR. HARRIS: No.

THE DEFENDANT: Correct.

THE COURT: You do.

THE DEFENDANT: I filed my motion.

THE COURT: I said right now. You filed the motion a couple days ago.

THE DEFENDANT: The motion stands as I filed it, Your Honor?

THE COURT: What are you asking for, Mr. Sutcliffe?

THE DEFENDANT: Justice.

THE COURT: What are you asking for concerning who represents you?

THE DEFENDANT: Competent counsel.

THE COURT: What are you asking for concerning what happens to Mr. Harris?

THE DEFENDANT: What happens to Mr. Harris?

THE COURT: Whether he serves as you lawyer or not. What are you asking for. Just tell me that, please.

THE DEFENDANT: He's done a great job but I think he's incompetent and infective in the instant case and he has not represented, due to the motion that I filed in fact contained in that motion --

THE COURT: You are asking that he be replaced?

THE DEFENDANT: I'm asking that my motions be granted, both of them.

THE COURT: Why don't you just answer my question.

THE DEFENDANT: I have answered you question.

THE COURT: You want another lawyer?

THE DEFENDANT: I filed my motion and you've made your ruling on it. We proceed along. Everybody is proceeding along as they want to proceed along. It doesn't matter really what I want.

THE COURT: That's not the case, Mr. Sutcliffe. What you want matters but it doesn't mean that it controls.

THE DEFENDANT: Your rulings, which to me have

illogical or unsupported by facts. I believe that to be true.

THE COURT: Okay. Mr. Harris, my view is, reading the motion carefully as I did but I want to get your assessment as well, that the factors that Mr. Sutcliffe points to as claimed evidence of your effectiveness or lack of competence and inability to properly to represent him first of all, are not established. Secondly, are wildly exaggerated. And thirdly, would be applicable to almost every lawyer I can, in fact to every lawyer I know of who would be representing Mr. Sutcliffe under these circumstances. No lawyer will be housed as an inmate in MDC.

No one will have the opportunity unilaterally to determine what access to a computer Mr. Sutcliffe has. And almost all lawyers would have the same difficulty that he thinks you're having with respect to computer technology and computer usage. I don't think, as I understand this case, and as I understand these charges that have been filed against Mr. Sutcliffe that the mechanics, the technology, the capacity in a sophisticated way to use computers is really much of an issue in this case. I don't think that's what the trial is likely to focus on at all.

So I think you could have somebody who has never seen a computer but is a d fine lawyer and a dedicated and hard working one do a perfectly competent, maybe absolutely bank-up job for this defendant. That's my view. I would like to hear what your

view is.

MR. HARRIS: The only exception to that would be Mr. Sutcliffe indicated in the motion that there may be parts of the government's evidence which were manipulated or edited somehow. That would require some technical expertise but I think Mr. Sutcliffe has that expertise. My statement last time around that I don't think I need an expert was premised on the fact I think I have the best in town, if I get access to him.

THE COURT: What has happened since the last hearing in that regard?

MR. HARRIS: I have written a letter to Warden Siefert. Could I provide the court with a copy?

THE COURT: Yes. Because I want to assist you with this. Give me a moment to read it so I will know what is before me.

(PAUSE)

THE COURT: Okay. This letter went out today.

MR. HARRIS: Yes, I have been speaking to the paralegal there. She basically said --

THE COURT: Is that Odem Rodell?

MR. HARRIS: She says the warden is a very reasonable guy in this kind of thing. She seemed to agree with my point that there certainly would be a way to do this if he were proper. So there's got to exist a way to do this.

THE COURT: Well, I hope there is. I'm just not

sufficiently informed or knowledgeable about some of some of the aspects of what the situation is at MDC. I'm going to go back into my chambers at the conclusion of this hearing assuming that I deny these motions concerning you. And I will contact directly Mr. Siefert.

At times I have arranged for certain things to be done. I'm hopeful that my additional call will help. Let me make sure I understand what you're proposing. Namely, that within reasonable limits Mr. Sutcliffe be given access to a computer into which he could insert hard drives or discs that reflect the evidence that has been turned over to I you but with which, with which computer he could not obtain access to the Internet.

MR. HARRIS: Exactly.

THE COURT: Have you discussed that with Mr. Sutcliffe?

MR. HARRIS: Yes. And I think we both believe that certainly would mitigate the situation. Mr. Sutcliffe seems to believe that if you work 20 hours a day between now and January 14 he still couldn't, there's not enough time to accomplish the task.

I'm not sure that's true. So I think it can be done. I mean there is finite, there's a substantial volume but a finite volume of evidence in this case, and some of it more relevant than others.

THE COURT: Have you made efforts thus far to get the prosecutor to specify within this large array, supposedly of

evidence on the computer based evidence at what is that she intends to seek to introduce at trial?

MR. HARRIS: Yes. And to some extent she's shown her hand on that with the what has been attached to the motions. We have some fairly discreet communications here that are subject matter. We've got four alleged threats that are definite in time and place. They're captured on paper. We know where they are. We know what dates they appeared. We have some Internet postings of social security numbers. We know what the fight is about.

A lot of it is maybe superfluous to this case.

THE COURT: Could be. I'm not going to play defense lawyer or prosecutor ever. It wouldn't surprise me if the issues that Mr. Sutcliffe chooses to emphasize at trial have to do with intent and context. And those don't depend upon the contents. Well, they could be affected by contents, some of these. If for example there were some evidence that on the next message that he posted he said just fooling or I thought that would get rise out the you. And I'm glad you realize I have a good sense of humor. I really don't mean anything personally.

That would be relevant evidence. That would be Brady evidence, that would be exculpatory evidence. The government would have had the duty to alert you about that. So I think you would have know. But sitting here making this up as I think about it, I can see why there might be some material evidence

that his defense would benefit from having a look at. So that's what I'm going to try to accomplish.

MR. HARRIS: Mr. Sutcliffe is the preeminent expert on that.

THE COURT: You don't want any other experts appointed?

MR. HARRIS: We could. I know how to apply for an expert. I know how to find it. I will do it if that's in his interest. I will do it if it's in his interest.

I believe the problems here will be largely mitigated if we can get computer access to Mr. Sutcliffe. And by way, I've run this by Ms. Duarte and she ran it by the FBI. They have no objection to computer access as long as -- he can't get on the Internet and contact the world. But just look at evidence. The FBI and Ms. Duarte have no objection to that.

Plus Ms. Duarte has been gracious about giving me access to their expert. So there's no real hide the ball going on here. It's just we have a large volume of evidence and a finite amount of time to pull this together between now and January 14. So that would help.

THE COURT: Do you want to add anything, Mr. Sutcliffe?

THE DEFENDANT: Yes. I would like to say something for the record. Regarding the evidence, Mr. Harris came to see me several weeks ago and the reported to me the entire discovery had been turned over by my previous incompetent lawyers provided by the government, and my behalf. Thank you very much. Within

that box there was approximately 25, 30 plus or minus five or ten floppy discs. There was approximately 20 CD roms of which upon examination contained approximately six CD roms, some having the word, some not have the word evilgx written on them.

THE COURT: That's one series of six letters; evilgx.com.

THE DEFENDANT: GX stands for generation X. Global Crossing is a has alluded to, which is a fact not proven. Upon examination of the discs, most of them were found to be useless. They were just secondary software discs from my own personal collection. Out of all of those discs there was approximately six that I put aside and three floppy discs I believe. Or maybe four floppy discs with the six CD roms.

I said to Mr. Harris these are the only ones I could see out of this whole box that you brought me that contain partially anything of the volume of data that's reported to be saved and to be used against me in this case, the government supposedly has.

I asked him to turn over the rest of the, give away the rest of the stuff. It means nothing to me, and bring back the other six so I can further examine them. But this far from 15. So I have yet to see --

[Interrupt]

THE COURT: What are you referring to when you say 15?

THE DEFENDANT: Discovery. I've been told there's 15 CD roms, five more as I addressed here have been reportedly

culled, to be added to that discovery. and now I just found out yesterday that there's an additional three more that they're bringing in on top of that.

So I mean, I believe orders were to turn over all your data, forthwith. I heard it very clearly. For this data keep appearing and when I asked see this data I only get a little bit of the data, if any? If that even is the original data, I don't know. Because I haven't seen discovery. I have to prepare for this trial in four weeks.

THE COURT: Okay. Mr. Sutcliffe, let me respond by telling you that it isn't a good thing and is often regrettable thing, it's seldom a reversible thing that discovery comes out in bits and pieces and drips and drabs. This isn't the first case and it won't be the last case today that in criminal cases the government turns over material in increments at different times.

And later often that the defendant or defense attorney wants it. That's an issue I can try to deal with and I'm sure Mr. Harris has tried to deal with. That has nothing to do with Mr. Harris' representation of you. What you're now describing and informing me about is no way a reflection on his commitment to you, his ability to represent you effectively, his intention to represent you effectively. This has nothing to do with the hearing today.

THE DEFENDANT: It respectfully disagree, your Honor.

Because the simple fact that when I spoke to Mr. Harris the other day I said to him are you going to attack the grand jury process for being the way it was run through, set up abused. He didn't even know we haven't received the grand jury transcripts.

So again, my ineffective previous counsel, failed to do what you told him to do, which bring -- you postpone my right to t speedy trial, at which I said I want my trial. Remember? I said give me the lawyers that you gave me and let them prove whether they're good or bad. I don't really care at this point. I have my right for a trial. I want that trial. You said I'm sorry, Mr. Sutcliffe, we'll have to postpone it for two months.

I sat here and cried. Because I knew that was just the beginning of this nightmare. This nightmare is now continuing. My rights to a speedy trial have been denied.

You said December 3, Mr. Sutcliffe, I will give you that. We need two months, deny your right to a speedy trial so that they can bring this man up to speed. This man is not up to speed. He doesn't even know I had the grand jury transcripts. Again, I submit that my paperwork is correct. And forcing me to go to trial is devastating. It deprives me of my rights, my God given right to a speedy trial.

THE COURT: Well, whoever gave them to you, they're also reflected in the constitution and the law. Now nobody has taken those away. But if you think that that's the case, and depending on what happens in the trial you will have every

opportunity to have the Court of Appeals determine that. I don't think that your understanding of the rights under the speedy I trial act are correct. But in any event, I want to bring this hearing to a proper close.

The standards in which a court is required to evaluate on a motion to replace a lawyer are not met under these circumstances. There is not a total breakdown of communication between you and Mr. Harris. I think among the first words out of your mouth today when you first addressed me were you think he's done a fantastic job. I think he's done an incredibly imaginative job. That doesn't mean I agree and it doesn't mean that I rule his way or your way. You heard me rule against you both.

But that doesn't have anything to do with the adequacy of his representation. He's got a job to do. It's not easy under these circumstances. Nobody can establish and you certainly haven't -- [Interrupt]

THE DEFENDANT: I object. He's had two months. He doesn't even know what the data is. How is he going to represent me in four weeks from now if he can't tell a CD rom from a floppy disc?

THE COURT: I think we've been through that.

THE DEFENDANT: He doesn't know what the discovery is. He's had two months to come up with to par with the discovery. He doesn't know that I have grand jury transcripts.

THE COURT: Mr. Harris, do you want to respond to that transcript issue?

MR. HARRIS: I don't recall that the transcripts that, that I got that from the federal public defenders office. Normally you get that right before the trial. And it sounds like they were previously produced. So Mr. Sutcliffe was going to bring them today and give them to me. I was going make a copy of them. Read them. If there's a grand jury motion to be made I'll make the motion.

THE COURT: You should understand, Mr. Sutcliffe, that every perceived defect in the process, including the investigative process, proceedings before the grand jury, anything else that happens afterward, the bail matters that we've been through more than once, doesn't necessarily warrant a motion. Some have been made.

Some have been carefully addressed. I could be right. I could be wrong but I've done my best to rule on them on the merits. But the right to effective assistance of counsel never means, it has never been held to mean that the client determines what happens and the lawyer is required to sacrifice or abandon or disregard his own best professional independent judgment. That would be true no matter who your lawyer is.

THE DEFENDANT: I can't expect him admit he's incompetent. I can't expect you to admit that you're violating my rights.

THE COURT: Well --

THE DEFENDANT: You guys do whatever you want to do.

THE COURT: Okay. With my efforts, which I am completing to explain to you in the context in which I am evaluating this motion, I am denying the motion.

And Mr. Harris will continue to function as your lawyer. Now there is also a motion about venue that Mr. Sutcliffe made. It's highly unusual for someone still represented by lawyer who wants to have a lawyer to file these things directly. But I looked over that motion as well. It's totally lacking in merit.

There is no defect at all about the venue here. All of the factors that govern determinations of venue are satisfied here. The state of residence of a lawyer that you do like and apparently assisted you in a way that you found to be commendable is not one of those factors. So I deny that motion as well.

Now let's bring back -- is there anything else either one of you want to address before I bring back the prosecutor?

THE DEFENDANT: Yes.

THE COURT: Something new?

THE DEFENDANT: Address my motion to dismiss this case for denial of my right to a speedy trial. You promised me a trial December 3.

THE COURT: There is no such motion as such. But I

will consider what you have side to be an oral motion and I deny it. Your rights have been protected under the speedy I trial act and they will continue to be protected.

Anything else that you want to add, Mr. Harris?

MR. HARRIS: No, Your Honor, not unless the court has any other questions.

THE COURT: I don't. Let's bring back the prosecutor. Some things I want to say to her.

(MS. DUARTE PRESENT)

THE COURT: Ms. Duarte, the trial date in this case is January 14th, right?

MS. DUARTE: Yes, sir.

THE COURT: Now Mr. Harris has communicated directly with Warden Siefert at the MDC. I have a copy of the letter that he sent. And he informed me that you and even the FBI agent have no opposition to having computer access be provided and extended to Mr. Sutcliffe, provided the Internet connections are not available; is that correct?

MS. DUARTE: That's correct.

THE COURT: I want this you afternoon, please, to FAX that assurance, even though you may spoken to Siefert or anyone else at MDC I want you on your official letterhead to reiterate that request. You should give a copy this letter, if you have another one, to Ms. Duarte. Do you have one?

MR. HARRIS: I previously provided her --

THE COURT: You have a copy. You should in your letter please refer to his letter. So that the warden knows that this is a joint request. And please tell the warden that the FBI agent or agents who are working with you on the prosecutive team concur in the request. I'm going to be doing the much the same thing.

And that was way we can assure this matter will be properly handled and everyone will be ready to proceed on January 14th. Those are my rulings.

Thank you. We're adjourned.

(PROCEEDINGS ADJOURNED)

C E R T I F I C A T E

I HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT OF THE ABOVE-ENTITLED PROCEEDINGS, PAGES 1-30. DATED DECEMBER 10, 2004; LOS ANGELES, CALIFORNIA.

Lynne Smith

LYNNE SMITH
OFFICIAL COURT REPORTER

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

THE HONORABLE A. HOWARD MATZ, JUDGE PRESIDING

- - -

UNITED STATES OF AMERICA, PLAINTIFF, -v- STEVEN WILLIAM SUTCLIFFE, DEFENDANT.	)))))	CASE NO. CR 02-350-AHM

COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
JANUARY 10, 2003

LYNNE SMITH
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

APPEARANCES:

ON BEHALF OF PLAINTIFF:
OFFICE OF THE UNITED STATES ATTORNEY
BY: ELENA DUARTE
JASON GONZALEZ
ASSISTANT UNITED STATES ATTORNEY
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

ON BEHALF OF DEFENDANT:
WILLIAM S. HARRIS
1499 HUNTINGTON DRIVE
SUITE 403
SOUTH PASADENA, CALIFORNIA 91030

JANUARY 10, 2003; LOS ANGELES, CALIFORNIA

-000-

THE CLERK: CR 02-350-AHM, United States of America versus Steven William Sutcliffe. Counsel, please state your appearances for the record.

MS. DUARTE: Good afternoon, Your Honor. Elena Duarte for the United States. And with me at counsel table is Jason Gonzalez, who is participating in the trial.

MR. HARRIS: Good afternoon, Your Honor. William Harris present with Steven Sutcliffe.

THE COURT: Good afternoon to both of you. We're here for a number of matters. And the sequence in which I intend to address them is as follows: First of all, I will handle the arraignment of what I understand is the First Superseding Indictment returned; is that correct?

MS. DUARTE: Yes, Your Honor.

THE COURT: And then I will address the motions in limine. I have read very carefully the papers that both sides submitted, all of the papers. Both sides did an excellent job in presenting their issues.

I think I know all I need to know to make an informed ruling. I'm going to announce the ruling on each of those motions. Only if there's something new that you have to add will I permit argument. Then I want to turn to the status of various matters, many of which are addressed

in the government's memorandum, concerning the parties approach toward trial and readiness for trial. Then I will address the issue related to theory, what Mr. Harris voiced.

Then we'll do what I typically do in other cases in the early morning of the first day of trial. We will do it today, which is address the way in which the trial is to be conducted and what my requirements are for handling the trial itself.

Are there any other matters, before I turn to the issue of arraignment are there any other matters that either side thinks should be addressed this afternoon?

MS. DUARTE: No, Your Honor.

MR. HARRIS: Yes, Your Honor. In that connection, Mr. Sutcliffe has brought to my attention the date of arraignment and the trial date based on the new indictment.

THE COURT: The date of arraignment, whether we're in a position to proceed?

MR. HARRIS: To cut to the chase here, Mr. Sutcliffe is asking for arraignment on Monday so that he can study the indictment and refer to his notes. And based on the new indictment, I am going to be asking for a one week continuance until the 21st or because of the holiday -- you do motions on Monday -- I will be happy to address that, the reasons for that request.

THE COURT: Why don't you do that now, please.

What are the charges in the indictment?

MS. DUARTE: If I may, Your Honor.

THE COURT: The additional allegations, and be specific.

MS. DUARTE: Appearing on Page 2, at Line 16, on or about the following dates defendant, starting with willfully, with specific intent to threaten, and ending right there, that new language inserted, lines 16 and 17.

THE COURT: Okay. Please proceed, Mr. Harris.

MR. HARRIS: Yes, Your Honor. Based on this First Superseding Indictment that was apparently returned today we're going to be asking for a one week continuance of trial from the 14th to either the 21st or 22nd, depending on the court's availability.

For three reasons: First of all, I think that it's a reasonable request, given that four days before the trial we have a new indictment which for the first time appears to be a valid indictment on the serious threats charges asserted against Mr. Sutcliffe.

So in light of the indictment being returned four days before the start of trial I think one week to study that and see what our current options are would be appropriate.

Secondly, in light of the history of this case, I want to make sure that I do the fullest most effective

possible job in representing Mr. Sutcliffe. I believe that a one week continuance would help in that regard.

Third is just I have a Ninth Circuit argument Monday afternoon. I have --

THE COURT: In Pasadena?

MR. HARRIS: In Pasadena at 1:30. If I didn't have this case I'd still be holed up this week preparing for a Ninth Circuit argument on a fairly significant case on a habeas corpus where the guy's got life in prison and it's a fairly complicated issue. That's how I will spend my weekend if we get the continuance.

In addition, I was recently drafted in by Judge King to take over for the public defenders office and I promised Judge King that I would interview this witness and give him some input by Monday at 11:00. So even without this case I've got a full plate.

THE COURT: You substituted in for somebody?

MR. HARRIS: For a sentencing. The public defenders office just discovered that they got conflicted out. I got dragged in. I don't want to say I was drafted by Judge King because it was my day to take this case. It's Monday at 11:00 and I'm supposed to tell Judge King by that time I have interviewed this witness and what we want to do about it.

So I've got to fit that in somehow this weekend

also.

I'm asking the court, if possible, to cut the defense some slack here, give us a one week continuance to either the 21st or the 22nd for the three reasons that I indicated, in addition to the fact that Mr. Sutcliffe has made it a point to me that he wants to study the indictment. He wants to go back to his cell and look at everything.

And he's indicated to me he's not ready to plead. His preference is to on Monday, normal post indictment, we do it in front of Your Honor on Monday if it's his position that he's -- [Interrupt]

THE COURT: Well, let me make a couple responses. I will talk to my clerk about whether I could be responsible as to the rest of my calendar and I will rule on your request momentarily.

If I grant the request, Mr. Harris, it's entirely because I have been where you are and I know how awful the pressures are for attorneys. It could be also sometimes the case for a prosecutor to handle so many multiple conflicting responsibilities. I also know how conscientious you are and thorough you are, and I accept everything you tell me about the burden you're dealing with.

I don't accept the notion that there is any need for anybody to study this Superseding Indictment or prepare for defense of trial in any alternative or different way.

The issue as to whether or not the Superseding Indictment specifically contains allegations of specific intent were addressed in one of your motions in limine.

The opposition that the government filed demonstrated to me that even if they chose not to supersede there would have been no impediment to proceeding. You raised the issue so you were quite aware of the elements.

Jury instructions that both sides submitted clearly reflected that Element 1 of these crimes was specific intended threats. There's no bombshell here. There's nothing new at all. There's a cosmetic change. And I'm not going to pretend to allow anyone to build a record based upon fanciful theories. What would the impact be on the government if I grant this request for a one week delay?

MS. DUARTE: This is the first I have heard of it. At this point, I haven't checked with the witnesses and I honestly don't know. I have had trouble getting witnesses together. Ten of them are from out of state.

I have done it for next week. I've got them on board and coming out. Nobody is out here yet. I don't know. In the past I have been amenable to a stipulated continuance. This is the first I have heard about it, so we oppose the defendant's request because I had no idea and I have been surprised by this, Your Honor.

If it was truly a preparation issue, I have tried

to be reasonable in the past about this. But I don't know what impact it would have.

What I could do, if the court could put this over, would allow our case agent, Mr. Gonzales and I to go back and actually make sure no one crucial to the case has such a conflict to the degree they would be unavailable. I planned for a fairly short trial.

THE COURT: Meaning how long?

MS. DUARTE: This next week and that we'd be closing around the 21st or 22nd, like we projected to the court.

THE COURT: What day is the 21st?

MS. DUARTE: The 20th is Monday, a holiday. Tuesday, next Tuesday I had planned to present my evidence, my case in chief Tuesday through Friday and I intend to be fairly quick, usually quicker than I anticipate. Because of that, I did not inquire about the following week.

Frankly, that's my biggest concern because there are stipulations, but there are a number of witnesses still.

THE COURT: All right. Thank you. Please be seated. You can be seated too.

(CLERK AND COURT CONFER)

THE COURT: Mr. Harris, and counsel for the government, what I am able to do, and I think it serves everyone's fair interest and accommodates all the legitimate

interests of the parties. I can deal with the arraignment on Monday or Tuesday. I want to pick a jury but start the evidence, opening statements and evidence Thursday of next week. That way if have your witnesses who are available next week then there's a compromise. Mr. Harris has a little bit more breathing room to get past his Monday urgency and that way we don't incur greater cost to the public with respect to the jury pool.

Finally, that way, an otherwise harried schedule can be adjusted and accommodated. Now do you want to be heard about what I'm just proposing?

MR. HARRIS: No, I appreciate the court's indulgence.

THE COURT: That's what we're going to do in terms of the trial. Now that means you're to be here Tuesday morning. And we're going to arraign Mr. Sutcliffe on Tuesday morning. And we're going to arraign him and anticipate he'll plead not guilty and we're going to do that at 8:45.

He's to be in the courtroom at 8:00 prompt. The jury panel will come down and we'll pick the jury at 9:00 o'clock. There is a high likelihood but no guarantee that we will have a jury selected by the lunch hour. Assuming that, if necessary, we postpone the lunch hour to 1:00 o'clock.

Once that is done and I will have instructed the jurors when to return, which would be on Thursday morning, counsel and Mr. Sutcliffe will be free to go about their business until the following Thursday. But beyond that, I still want to use the occasion that's upon us now to make my rulings on the motions in limine. Those are not affected by the return of the indictment, except the one you made to dismiss, and the other matters that I talked to you about. So that's what I'm about to do.

Any objection to that?

MR. HARRIS: No objection.

MS. DUARTE: No objection. May I ask for a point of clarification? At this point there will be no further motions in limine heard after -- in other words, if there are more filings are they foreclosed by the court already having decided the motions that are here today?

THE COURT: I'm not even sure I fully understand your question. Once I rule on those motions they can't be renewed. If there is some development in the future that warrants the filing of some kind of oral or even motion in limine that's different I wouldn't necessary preclude it.

MS. DUARTE: Thank you.

THE COURT: Motions in limine can come up during the course of trial and can be made orally if necessary. But you don't have any other motions in limine that you're

planning to make in writing, do you?

MR. HARRIS: No, Your Honor. Part of the problem is I don't have an exhibit list and I don't have a witness list. If I get the black binders of exhibits that I know I'm going to get on the first day of trial that would be a big help to go through. And there are possible issues, since we're talking about electronic evidence here, assuming there's anything different or new that the government has not given to us will be a matter of going through some of this stuff with our expert to see if it's the same that we had before to see if it's complete.

THE COURT: Is there any reason why you can't make your producible evidence available Monday or Tuesday?

MS. DUARTE: No, after the jury is picked. I was planning on giving counsel -- the only thing I can think of were some actual exhibits of precise web sites that are charged in this indictment that I made. And I was going to give them to him Monday already. I can make the binders available which contain things he already has Tuesday.

THE COURT: That should do it.

MR. HARRIS: Well, if it would be the possibility of having the actual electronic evidence over the web and Mr. Sutcliffe's worry is that it's not going to be a complete copy of the web site. And the only way to go over that is to have Mr. Sutcliffe and our consultant, who's in

the courtroom today, also go over this stuff.

THE COURT: Go over what stuff? Tell me what you're talking about.

MR. HARRIS: It will be -- we burned a copy of the Evil.GX.com. This is as it appears on a CD. We'll want to look at the CD and we'll be able to tell if that's complete or not. It's just going to be jamming us if we get to the first day of trial and we're picking a jury and going through every --

THE COURT: I will listen to your response.

MS. DUARTE: Counsel has all the copies of EvilGX we have. We've already given them to him.

THE COURT: Including the CD?

MS. DUARTE: Yes, Your Honor, all the copies we have. If his concern is that the individual exhibit that references it, he does not have a copy of, which again he has in another form that they have pulled, his web site, he's right. What I did for ease of entering evidence and not having arguments on this superfluous thing, I pulled the web pages that went straight to each count of the indictment, precise display. And those are the actual exhibits that I'm planning on exhibiting, not the entire site.

THE COURT: Does he have the entire site?

MS. DUARTE: Yes.

THE COURT: Do you think, in the interest of fairness and completeness or is there any tactical reason to warrant subjecting the jury to evidence and possible argument about the entire web site? You will have a right to introduce it, and you will have a right to question about it. There's no evidentiary reason why the government can't take the web site, the portions that are specifically relevant to this case and identify them and proffer them as an exhibit. I know you realize that.

Look, there's not an issue here, Mr. Harris. If I understand the crux of the thing, we may get back in, go over the government's trial memo that you have and your client has, what you need to prepare -- I'm giving you more time anyway. You will get the stuff. Work it out with the prosecution. I'm not going to micro manage what time and what day you get the stuff but this trial is not going to be -- clearly the government has not structured it as if it's trying to make many of the issues in this case are not really going to be, as I devine them, on the concrete evidence.

It's going to be on more allusive questions such as Mr. Sutcliffe's state of mind. That's really where the battle ground is going to be anyway.

So that's all I'm going to say on that. Let's go to these rulings. By the way, Ms. Duarte or Mr. Gonzales, I

would like you to prepare and file on Monday or Tuesday a pithy, accurate, balanced neutral notice of ruling on the rulings I'm about to articulate so that the rulings I make on the motions in limine will be reflected in writing. I'm not issuing a rush order. I will have them available as a trial tool as well.

Let's start with the government's motions in limine. The first motion concerns the KILLERCOP.com web site. And I don't think that the government has demonstrated, but I will give you a limited opportunity to do so, what the similarity in the web site and what the material amount is of the KILLERCOP web site. I think that when you first spoke about the issue of who prepared the EvilGX.com and whether the identity of the preparer or person responsible for creation of KILLERCOP.com and the EvilGX.com was the same. There was no question it would be relevant for that purpose.

Other than that, it isn't entirely clear to me. If I permit reference to KILLERCOP.com it would only be pursuant to a limiting instruction. What I have done to expedite the hearing here is to circulate a draft of the limiting instruction. In that draft, which I think you have -- you have it, right?

MS. DUARTE: Yes, Your Honor.

THE COURT: You can see in the portions that are

bolded, those are the areas I want you to know is your opportunity to tell me what the relevance is within the meaning of 404(b). Everyone is familiar with the provisions of 404(b) and what the elements are and standards are.

MS. DUARTE: Your Honor, may I approach with a copy of exhibits that we were planning on introducing? I will give a copy to Mr. Harris as well.

THE COURT: What are you handing now, please?

MS. DUARTE: I'm handing a copy of several documents. May I approach?

THE COURT: Give it to the clerk please.

MS. DUARTE: I would like to, if the court will permit, go through them and describe what they are at the same time. If I can find my copy.

Your Honor, Page 1 of this exhibit, continuing to Pages 2 and 3, are items found in Mr. Sutcliffe's residence at the time of the warrant. There's subscriber information.

THE COURT: Which residence, Los Angeles or New Hampshire?

MS. DUARTE: New Hampshire. There was not a warrant in Los Angeles, Your Honor. It appears to be a subscriber, subscription form for the KILLERCOP.com web site.

THE COURT: Form 14 I think.

MS. DUARTE: Yes, Form 14. And then there's also

a correspondence confirming registration on Page 2 of a FAX transmission from ValueNet. And again, these were found in the apartment. These aren't business records. These appear to be FAX confirmations. They show Mr. Sutcliffe indeed was a subscriber to, creator of the KILLERCOP.com site.

The next page, Your Honor, is copy of a newspaper article. It appears, it's Page 4 but the page number is in the middle. It was found in Mr. Sutcliffe's residence in New Hampshire at the time of the warrant.

And the newspaper article was found, in the middle there you see a picture from the web site who is KILLERCOP, followed by the script, this is not a joke. I'm serious.

THE COURT: Then it says what? I'm offering a thousand dollars reward for the first person who --

MS. DUARTE: Yes, that's what it says, Your Honor.

THE COURT: That's pretty potential, almost inflammatory stuff.

MS. DUARTE: I agree, Your Honor. "This is not a joke. I'm serious" goes directly to Mr. Sutcliffe's intent to threaten in the present case. And as to the rest, I would certainly be amenable to -- just bring that in, I would be quite willing to do that.

MR. HARRIS: Could I comment?

THE COURT: Not yet. Let her finish. Go ahead.

MS. DUARTE: Proceeding to Page 5, Your Honor. I

apologize, these pages came out -- the whole E-Mail was found -- this is Pages 5 through -- I'm sorry, Your Honor -- 5 through 20. This was a group of E-Mails which were found in Mr. Sutcliffe's apartment again in New Hampshire at the time the warrant was served. They contain correspondence between Mr. Sutcliffe and the systems administrator at the web provider he was using for KILLERCOP. And I want to point out specifically the page that I'm interested in, Your Honor, from the E-Mail.

Again, I included the whole thing in case there was an argument that I had not. Page 14 contains a section, E-Mail which indicates the system administrator has written to Mr. Sutcliffe and has insisted that he put a parody disclaimer on his web site. Now the importance of that, Your Honor, probative value is that Mr. Sutcliffe has argued, and I anticipate will argue, again quite strenuously that this whole thing was a joke and a parody.

Based on this evidence, it appears he was characterizing early on in his web site operation, and by the time he structured the current web site he would have known what was necessary to make it a parody.

THE COURT: Wait a minute. On Page 14, that's from the system administrator, SWS, Mr. Sutcliffe --

MS. DUARTE: Yes, Your Honor.

THE COURT: Addressed to Steve and in the sixth or

seventh paragraph there's a suggested disclaimer and that was something that the evidence, you say would show was suggested to Mr. Sutcliffe that he incorporate.

MS. DUARTE: Yes, Your Honor. It appears from the E-Mail that he did not have his site as a parody. It wasn't clear that KILLERCOP was a parody or any kind of a joke, if you will, which he argued in the past to this court and others.

THE COURT: The language on that page proposing the disclaimer was suggested by the system administrator, right?

MS. DUARTE: Correct.

THE COURT: What would the evidence be as to whether Mr. Sutcliffe. on KILLERCOP.com accepted and incorporated that disclaimer suggestion?

MS. DUARTE: It appears from further E-Mail that he partially incorporated it. That resulted in the site as it's exhibited. I have a few pages which follow.

THE COURT: Page 16 --

MS. DUARTE: Yes, Your Honor. And if you will notice a little bit further down, the fifth full paragraph which again as I stated, the third line reads "I want the bad cops to believe it's real." Your Honor, I believe that that goes to the intent to threaten as well.

Your Honor, on Page 17, further correspondence

indicates again that Mr. Sutcliffe kind of complied but he didn't really. That goes toward the same questions you had about page 14.

And lastly, on this E-Mail Your Honor, again, appears at Page 19. I'm sorry, Your Honor. I already -- this repeats "I want the bad cops to believe it's real." And Your Honor, on page, the next page, which bears a Bates Stamp number on the bottom, 3069, and 3070, are pages that were located that actually were downloaded from the web site KILLERCOP.com in 2001 by LAPD. Drawing the court's attention to the Bates Stamp 3069.

THE COURT: Just a second. I'm making some notes about something. Hold on, please.

So you're on Bates 3069.

MS. DUARTE: Yes, sir.

THE COURT: What do you want me to look at?

MS. DUARTE: Top of the page, we will pay $3,500 cash, no questions asked for home location of this officer. And then he's soliciting a recent picture. That is very similar, Your Honor. And I know the court spoke to identity. But this is very similar to the solicitation for address and information which was made for people on the current web site, the EvilGX web site.

THE COURT: Just give me a proffer without any documents. What do you represent the EvilGX web site would

say that's similar to this?

MS. DUARTE: Your Honor, I proffer that Mr. Sutcliffe exhibited home addresses and home locations and recent pictures. Did not actually offer money for them, but exhibited the home addresses and recent pictures.

From what I remember right now -- I apologize, I'm not sure, it didn't actually offer money for them. If I could have one second I could check with the case agent. All right.

(PAUSE)

MS. DUARTE: Your Honor, he asked that files be sent to him. I believe offered money for files but he didn't specify addresses and pictures.

THE COURT: What else?

MS. DUARTE: 3070, the next page, Your Honor. Down near the bottom, about two inches up from the bottom line, "Who is sleeping with one eye open besides Terry and Lisa. Ha, ha, ha, ha." We propose shows intent to threaten.

THE COURT: How so?

MS. DUARTE: Because he's put Terry and Lisa, they're the two LAPD officers, he's put all the information on the web. Now he's agreeing they're sleeping with one eye open, which at least is the way I read it, indicates that they're frightened. They wouldn't be frightened had they

not been threatened by him. That's the way I read it.

Then lastly, the next two pages, which are the last two pages of what I have given the court, these are two pages from, that were found in the defendant's residence in New Hampshire which contained a printout apparently of the web site back in 1998 and this is --

THE COURT: Printout of the KILLERCOP?

MS. DUARTE: Yes, found in his apartment. I can't tell you whether or not it was complete because I don't know, I haven't compared it. But it contained about 50 pages. These are only two of those pages. I pulled them for our purposes.

And Page 1, "The price is wrong, bitch" at the bottom, that is also exhibited on defendant's web site EvilGX.com.

THE COURT: In what context? That precise phrase?

MS. DUARTE: That precise phrase, and it actually appears as a sound file, multiple times on defendant's home computer and also on the web site, web pages which will be exhibited and which were charged in the government's case for EvilGX.com.

THE COURT: Assume for the moment that there's no factual dispute that Mr. Sutcliffe was at least responsible for the creation of EvilGX.com, which is what his opposition says, and I know that you would have replied and pointed out

that the statement in Mr. Harris' memo and Mr. Sutcliffe's submission to me was qualified. It didn't say every single thing was encompassed.

Assuming that issue of who was responsible is not in dispute or even that it's stipulated to, "The price is wrong, bitch" phrase no longer has any relevance, does it?

MS. DUARTE: You're correct, Your Honor. Assuming that's stipulated, including his ownership and application of the file, I believe you're correct.

Again, I prepared this before the court's ruling and comments on the identity. So I just covered everything.

The last page, Your Honor, exhibits personal information of Officer Ipolito. On his EvilGX web site he exhibited personal information of the people that he threatened. The court's comment will probably be that this goes to identity.

I agree with the court. If identify is not in dispute, this would also not be relevant.

THE COURT: Okay now --

MS. DUARTE: That's it, Your Honor.

THE COURT: Okay. Looking at this draft of the limiting instructions, you have given me several reasons, several examples, and they're pretty persuasive I think, that the evidence would fall within the scope, the permissible scope of 404(b) to show he intended to threaten.

Do you represent or argue at least that it does anything more than that? Assuming identity is not an issue. What does it show he knew, what does it show he planned over a period to do?

MS. DUARTE: Well, it shows that he had the ability, that he had the intent and knowledge on the web site itself. And how to make it, how to craft it, how to address people. Again, if identity, if he is the creator and disseminator of everything as stipulated, I think the court is correct it would not be relevant. But I certainly think that it has relevance in that area, Your Honor. Particularly with the little phrases that are similar. That would be the knowledge prong. Then the intended to threaten.

THE COURT: That you've demonstrated pretty clearly.

MS. DUARTE: The plan and preparation to communicate threats on his web site, he obviously knew how to do it. He'd done it before. He knew how to do it with parody or with some kind of qualifier, which I believe is the subject of this motion for estoppel. He knew how to get around it.

THE COURT: The estoppel filing, whatever one wants to characterize it, really addresses a different issue than parody. But anyway, thank you. That helps.

Now you want to be heard but only about this question of whether or not a rational jury could evaluate at least portions of this set of materials that Ms. Duarte has just reviewed and rationally find it is probative on the issue of Mr. Sutcliffe's intent to threaten. Why isn't it?

MR. HARRIS: Let's go back to the first -- the third of the -- the fourth page of the first document where there's the picture in the middle of the page, who is KILLERCOP. It says this is not a joke, I am serious. Do you have that, Your Honor?

THE COURT: Yes, I do.

MR. HARRIS: Well, it says "I'm offering not a thousand dollars but a thousand dollars and five cents." That's a little signal right there, what is going on.

THE COURT: What is the signal?

MR. HARRIS: That it's a spoof, that thousand dollars and five cents. He's playing with them. If it was not a joke it would be, it would be a thousand dollars. But what is the possible interpretation, that five cents, other than that he's winking at them.

THE COURT: I will tell you what. I'm not going respond to a rhetorical question. Because I don't want to be ever in the role of an advocate. But I've got to tell you, I wouldn't be surprised if the government had a response.

MR. HARRIS: It appears again on Bates 3069. It says, right after the $3500 cash, it says, for home location of officer Terry Utley, the LAPD officer and/or a thousand dollars and 27 cents for any recent picture of her. It's the same subtext here. The point on the intent is what is inferable really from the web site EvilGX.com.

THE COURT: No, that's not the law. The Planned Parenthood case makes it clear that the concept of context is not circumscribed to the particular offense that is the subject of the lawsuit that was the civil case for the prosecution. That's very clear. I know you know that, Mr. Harris.

To suggest that whether the government meets the burden of proof on intent is a question only of the evidence narrowly confined to EvilGX is to misstate the law.

MR. HARRIS: The problem here is that it is separated first of all in time. Secondly, it's separated in terms of the legality --

THE COURT: How much time, Mr. Harris?

MR. HARRIS: I believe this was 1998, '99. What we're arguing about in this case is communications between October 2001 and March of 2002. So we've got a couple of years of real estate in between these two web sites.

Secondly, it's separated in terms of legality. First of all, nobody is alleging or has ever alleged that

Mr. Sutcliffe did anything illegal on KILLERCOP.com.

THE COURT: Yes. In my limiting instruction the jury will be told that.

MR. HARRIS: But the premise here that it was a threat at time one to show that he intended to threaten at time two, if it had been a threat at time one he would have been prosecuted by either the feds or the state government for the threat of time one.

But they knew full well this was criticism of the government. And it was First Amendment activity. And they had no chance.

So you have got in terms -- if it shows anything, it shows that he was -- the First Amendment. Why wasn't he ever prosecuted for that one? So I don't think -- it's pretty clear to me that it is a scary name. It is unpopular to argue against the police and law enforcement. That's really what is going on here, Your Honor.

THE COURT: I have heard enough. I'm going to permit the -- I'm going to grant the motion with the limiting instruction. It's going to be limited to evidence within the prong of 404(b) that can be considered for purposes of the element of intent.

If you can propose and if the government can accept some kind of stipulation that would be signed by Mr. Sutcliffe and that would basically establish that along,

something along the lines that Mr. Sutcliffe previously created and communicated about a web site and described in a fair but balanced way without using the KILLERCOP.com, what the web site was about and that contained the statements about his being serious and the like, I would consider, I'm not necessarily requiring this of the government but I would consider limiting the government to introducing that stipulation. And thereby you can keep out, possibly keep out reference to the admittedly volatile and potentially explosive term KILLERCOP.com.

You said in your papers that's not the same thing as COPKILLER.com. You can argue all the things that you just argued to me. You can argue that 27 cents shows it was a joke, that they can't regard that web site as evidence of actual intent anymore than they could the EvilGX. All those things are fair grounds for you to pursue.

This is an element of evidence that it's permissible for the jury to consider and I grant the motion under those terms.

Now let's turn to the government's next motion, concerns Tracy Hall. And I'm going to deny that motion but only as to the -- if it's still the case the current pendency of the witness intimidation charge under Penal Code 136, but under certain limited conditions.

All you're going to be permitted to do,

Mr. Harris, is cross-examine Hall and establish that she's currently the subject of a proceeding that may lead to the filing of formal charges that are criminal in nature for witness intimidation. That they arise out of an allegation that she attempted to deter someone from testifying about what he charged was fraudulent conduct.

And the government, of course, on redirect could establish that there hasn't yet been a probable cause hearing and she hasn't been held to answer and there is no formal charge pending. The government would also have the right, as any advocate would, to bring this out on direct examination if it chose.

But I am not going to have either side explore anything about an 88 year old man or false information supposedly being communicated about what Hall was doing there and who she was working for and what this lawyer was all about. It's going to be two or three questions at most.

The other parts of the government's motion relating to the 1988 misdemeanor conviction for grand theft and the 1992 misdemeanor conviction for destroying evidence, by Hall, I grant.

So those I think take care of the government's motions. Now let's turn to Mr. Harris' motions.

The first motion to exclude evidence of firearms is, the statements attributed to Mary Light are excludable

in any event. To the extent there would be a need to rule on it in a motion in limine, I grant the motion. Those would be hearsay. You're representing you're not going to try to introduce that anyway, right?

MR. GONZALEZ: That's correct, Your Honor.

THE COURT: Okay. To the extent the motion addresses the rifle and ammunition seized in New Hampshire on March 26 of 2002, I intend to deny the motion subject to a limiting instruction and any clarification or modification of limiting instruction that I circulated. You have had a chance to review that, Mr. Harris. It's entitled limiting instruction re: weapons. Do you want to comment on that?

MR. HARRIS: Can I have a moment, please.

THE COURT: Sure.

(PAUSE IN PROCEEDINGS)

THE COURT: You don't have to give me your final view.

MR. HARRIS: Do you want to talk about the merits or remedy here?

THE COURT: It's not a remedy because that suggests that there was a wrong. It would not be wrong. It would be perfectly permissible and admissible to allow the government to introduce evidence of the possession of the weapons. You can -- I don't want to quibble with you. I'm willing, I think it's necessary to provide a limiting

instruction.

You don't have to fiddle with the precise language now. We could do that later on in the trial. But that's what my ruling is. I don't want to hear from either side any argument that has already been in your briefs. I read your briefs. I hope you can see I read your briefs.

So I'm familiar with your position. That's my ruling on Mr. Harris' first motion.

The next motion is his motion in limine to dismiss Counts 1 through 4 of the indictment. That's been mooted by the return of the Superseding Indictment, as to which we will arraign Mr. Sutcliffe on Tuesday morning just before we pick the jury.

The third motion that Mr. Sutcliffe made was to exclude evidence relating to domestic violence. And his disputes with his -- is she his former wife now, estranged wife?

MR. HARRIS: I think they're still married.

THE COURT: And the government has essentially in fact represented that it doesn't intend to introduce such evidence in the case in chief. But I think that the government's clear communication, I don't construe it as a warning but I think it's a heads up to Mr. Sutcliffe and his lawyer on Page 2, that to the extent and if in cross-examination of any of the witnesses, the government

puts on a claim to testify to having construed the communications to be in fact directed at them and meant to threaten them, if there's cross-examination that opens the door to why they felt that way, and what they had in their minds, if anything, other than the actual text of communications, then I think the government would be permitted on redirect to explore that information. If there are witnesses who are aware of such family violence.

MR. HARRIS: I want to make sure I understand the court's ruling here. This will be a fine line I will be walking. We can explore the text and I can point out that line. Did you see that? Come on, you didn't really take that as a threat.

That doesn't open the door. But I'm --

THE COURT: It's a little hard to conjure up every possible scenario. If you were to ask a question along the lines of what did you know about Mr. Sutcliffe that made you interpret the text of the communication in this fashion. Then an honest and responsive answer, if there's a witness who knows about some incident of domestic violence would permit that witness to answer that question.

And if you didn't ask something that frontal but through the scope of your examination, and it is a fine line, I will grant you that. But it's a fine concept too, this question of exploring what was in someone's heart and

mind when he issued or was responsible for these communications, if the evidence shows he was.

And if you open the door by suggesting that the notion that these people in fact honestly and subjectively felt threatened is ludicrous or false because their effort to point to the communication as inherently threatening is preposterous, I would have to play it by ear. But there would be a risk of your opening the door.

I want the government to advise all witnesses that they are not to volunteer, and make this very clear to them and put it in writing if you think that's the best communication, they're not to volunteer any knowledge they have about his criminal history with the police department, and his domestic violence. I'm not necessarily saying it's out of bounds.

MR. HARRIS: I want to just maybe give an example to the court. Maybe I could get a feel for what's going to open the door. Count 4 has Elizabeth Greenwood and the government has made much of the point that on Count 4 there is a picture of Elizabeth Greenwood and her daughter.

Later on the same page or the next page there's a picture of Mr. Sutcliffe and his daughter. So you have got the pictures of the alleged victim and the alleged perpetrator on the same communication.

And if the government, if Ms. Greenwood tries to

argue that I was intimidated by seeing a picture of myself and my daughter and I say madam, did you look a little bit down the page. There was a picture of Mr. Sutcliffe and his daughter on the beach. And didn't you take that as somebody, parent to parent, trying to tell you to back off on the litigation? Isn't that how you took it, ma'am?

Does that open the door? I think that's a valid, based on the on text --

THE COURT: I don't think it opens the door.

MR. HARRIS: I don't think it does either. It doesn't bring in all the extrinsic garbage.

THE COURT: I'm not trying to sandbag you at all. But I want it understood that I can't anticipate exactly what will and will not open the door. I'm not looking to have some kind of door inadvertently opened.

I'm not going to permit and I'm not suggesting this is what is suggested by the government, that they're going to make an end run around this ruling, but you're right. It's a tight line.

And if I think that an honest and responsive answer to a question necessarily involves the disclosure of information that otherwise is precluded, then before the government starts its redirect, you ask for a side bar conference and get a ruling from me as to whether or not you can ask the question.

MR. HARRIS: I think I understand the court's ruling. A purely textual analysis does not open the door.

THE COURT: Mr. Harris, you're a fine lawyer and trying to get me to enter into some kind of stipulation in effect that provides absolute guidance. I'm reluctant to do that. You have a right in the interest of fairly representing your client to try to figure out what works and what doesn't. I think a purely textual approach is a wise one to pursue. Let me stop there.

MR. HARRIS: Yes. But I just raise this point. That for example, part of evidence will be that Mr. Sutcliffe was picketing outside the Beverly Hills offices of Global Crossing in Beverly Hills. That's not text. There is a picture of him but it's saying she was --

THE COURT: That doesn't -- [Interrupt]

MR. HARRIS: I'm going beyond the text. I would hope that doesn't open the door.

THE COURT: It doesn't.

MR. HARRIS: Okay. I think I understand the court's ruling. Thank you.

THE COURT: Okay. Those are all the rulings on Mr. Sutcliffe's motions in limine.

Now do you have, counsel for both sides, do you have the government's trial memorandum?

MS. DUARTE: I do, Your Honor.

THE COURT: Do you have it, Mr. Harris?

MR. HARRIS: Yes, Your Honor.

THE COURT: Okay. I'm sort of winging it here. I want to ask where things stand. So follow quickly because I'm going to move fast.

The nine proposed stipulations that are referred to on Page 2, Line 14, have they been accepted?

MS. DUARTE: No, Your Honor.

THE COURT: Has any been accepted?

MS. DUARTE: No, Your Honor.

THE COURT: Mr. Harris, what's the problem with these stipulations?

MR. HARRIS: Mr. Sutcliffe basically wants the government to prove its case. Mr. Sutcliffe and I for example show some differing views on the law, on certain elements, such as interstate commerce.

Mr. Sutcliffe feels strongly that that is a matter subject to proof. And that he contests and he has his reasons for that. I have a somewhat different view that perhaps that's not a contested issue but I can't jam it down his throat if he says make them prove it. He's got a right to tell them to, make them prove it. I give that as an example about why we haven't gotten real far.

THE COURT: So is it the case then there will be no stipulations?

MR. HARRIS: I will go over them with Mr. Sutcliffe between now and Tuesday.

THE COURT: Tell Mr. Sutcliffe that it's been my experience both as a lawyer, tried a lot of cases, and as a judge, that when jurors make important decisions they don't tend to look sympathetically on parties who required the other side to prove things that the jurors have reason to think could not ever be subject to legitimate dispute. It's seldom in the interest of somebody to require the other side to go through the formalities of proof when the formalities are easily going to be met. You just explain that to Mr. Sutcliffe.

MR. HARRIS: Yes. I believe a number of the stipulations can be dealt with as business records, stipulations. They have a way to do that, that we may not have to bring --

THE COURT: I've got to tell you that to have to subject a jury to 23 witnesses in the government's case in chief instead of 14, is a very unpalatable prospect.

But you're right, that the government has the burden of proof and the defendant has a right to require them to meet it. But if they're going to meet it anyway I don't see what the point is.

MR. HARRIS: I will see what we can do between now and Tuesday, Your Honor. I don't know if that helps the

government at this point or not.

THE COURT: Why don't you talk to each other. You're both experienced lawyers. I don't know about Mr. Gonzales. Maybe you're an experienced lawyer. You're new to me. You work it out if you can.

Okay. On Page 5, line 13, what is spider webbing, and is that going to be a term used in the trial?

MS. DUARTE: Your Honor, if it is witness Frank Harrel will briefly explain the term. That's one of the reasons he's taking the stand. But spider webbing is just placing the web site over various hosts instead of choosing only host to place the site on.

The thing that accomplishes, particularly in this case, is that when you call one host to remove the site they end up removing only their portion of what they're hosting, which would be one or two pages of the site. And the site still remains spider webbed and on the other hosts.

THE COURT: Okay. Now Mr. Harris, look carefully at Page 6, concerning the victims' concerns. Okay. I'm not going to permit inquiry by any side or any party into personal information such as addresses, family members, and possibly even employers where there's no independent relevance, given the nature of the allegations in this case.

So if both sides have an understandable desire to put a little bit of flesh on the skeleton of a witness and a

witness is for example a private investigator or a computer programmer, questions like what do you do for a living. I work for a private investigator. And where is that? It's in Los Angeles County. That's the extent of it.

So I'm not making a formal ruling. Maybe I am. I want this to be followed as if it's an order. So if you think, Mr. Harris, that fores into that kind of data are absolutely necessary for you to effectively represent your client, you think about it. Talk to Ms. Duarte and Mr. Gonzales about which witnesses you intend or think you need to do that. And you bring that up with me on Tuesday.

MR. HARRIS: It might help -- there's only three people we're talking about here. We're talking about -- [Interrupt]

THE COURT: No, I don't construe this to be confined to just the victims. You didn't mean it to be just the victims, did you?

MS. DUARTE: No, Your Honor.

MR. HARRIS: It says victims of defendant's threats. That's three people.

MS. DUARTE: As well as those who have had various unpleasant contacts.

THE COURT: I want to tell Mr. Harris this afternoon which witnesses you're talking about.

MS. DUARTE: Okay.

THE COURT: If there's a problem about this I want

to know about it Tuesday, not Thursday when the evidence starts coming in.

Now on Page 7, the internal investigations at Global Crossing that you're talking about are ones that were conducted by Global Crossing?

MS. DUARTE: Yes, Global Crossing concerning its own employees.

THE COURT: What exactly are you referring to when you tell me that some of those witnesses are concerned about forced disclosures of details and names of affected employees. What are you talking about?

MS. DUARTE: There were some materials published on the web site.

THE COURT: Published on EvilGX?

MS. DUARTE: Yes, Your Honor. Which the government doesn't plan on introducing but the defense may. Which were taken somehow directly from memoranda written concerning a sexual harassment investigation done at Global Crossing.

I believe, although I'm sorry if I'm wrong, I believe there was also one of the employees' use, allegedly, access of pornography while they were at work. There is some internal memoranda and things written about the investigation that ended up on EvilGX.

And there were, to the extent that the witness

would be asked about it and then asked who is it at the company, who was the subject of this investigation. The witnesses were concerned that, in particular Bruce Weiseltier who was the head of the IT Department at the same time Mr. Sutcliffe was there.

Then Richard Sailey who was the head of the HR, Human Resources Department. These people had a lot of stuff on their computers, particularly Richard Sailey, that ended up on the Internet. And he was concerned about the privacy concerns of those that he spoke about.

THE COURT: All right. You are not talking about private, potentially embarrassing information about anyone who is going to be a witness but about what was on that witness's computer or otherwise a material generated by that witness about some third party who may not even be in the courtroom.

MS. DUARTE: Correct.

THE COURT: So what is the problem there, Mr. Harris?

MR. HARRIS: I don't see a problem on this sort of thing. I don't know if the government is going to try to turn this into -- I'm trying to avoid trying a wrongful termination case. If the government is going to say this guy stole information and he was canned because he was pilfering private information and redoing what they did in

the L.A. Superior Court, then --

THE COURT: Mr. Sutcliffe, when you say this guy was terminated for that, you're talking about Mr. Sutcliffe?

MR. HARRIS: Yes, Mr. Sutcliffe. We have to have a little context. He was terminated. But if we're going to get into, if we're going to get Mr. Sailey for example, the HR guy, testifying that he was a dirty employee and he was doing this and doing that, that seems to me kind of opening the door to going back to his motivations.

So if we tread lightly and just get the facts out, Mr. Sutcliffe's dates of employment, his dates of consultation, that he was he was terminated, that he didn't like it. He picketed. And we keep just on that level, that's fine.

But if we get into all the stuff where we have to -- they're trying to cast aspersions at Mr. Sutcliffe that during his employment, they're going to dissect that and say he stole this and he stole that, then it seems to me that opens up, I have to attack these people's credibility or their motivations. I would like to avoid the whole thing.

THE COURT: You always attack a witness's credibility. That doesn't mean that the identification of people that that witness wrote something about on his computer or in some business records is fair game.

I don't see any basis at all, based on what you just said, I'm not going to say what the government can provide in the way of background context. It won't be a wrongful termination case. Nobody is going to be permitted to compare whether Global Crossing's employment decisions concerning Mr. Sutcliffe were discriminatory because three other people did the exact thing, none of them got fired. He was fired because he has silver hair.

That's not what this case is about. That's not what the government is going to be doing anyway. You don't ask questions that get other people's access to pornography of whatever it is out there in a way that identifies those other people.

Okay. Now let's to go Mr. Harris' memo on estoppel. And I'm not exactly sure how to construe what you're trying to do here. But to shortcut this, Mr. Harris, if there are victim witnesses who testify you have every right to cross-examine them about what they read, and what they thought about what they read.

So if they read something that was, as you like to construe it, a contract or a provision or a condition that estops somebody from something you can explore that on cross-examination. The fact is that the language that you cite is not by any means a, either in its actual text or in its context or both consent to be threatened. There is no

notion of estoppel here. There is no preclusion of people filing a complaint with the appropriate authorities. There's no basis whatsoever to preclude the government from pursuing it's allegations. So estoppel is misplaced.

On the other hand, if you want to talk about and try to establish through anybody who read this EvilGX web site that he knew that, she knew that if she went any further that she might encounter things that were troubling or somehow discomforting and the person went ahead and did it anyway so it couldn't have really been deemed to be something that was subjectively or objectively threatening, that's fair game for you to explore. I'm not granting any motion arising out of the doctrine of estoppel.

Okay. Now on voir dire, you submitted your various voir dire things. We're talking about the kinds of things I typically discuss at the last conference. We're not going to have a last conference.

We're going to arraign Mr. Sutcliffe on Tuesday and we're going pick a jury. Then we're going to start the evidence first thing on Thursday morning. So now is when I want to tell you what to expect at the trial itself. I will do all the voir dire.

And I have a more or less a recurring array of questions I ask, which are not particularly unique. But some that you proposed, each side, I will explore maybe in

slightly different language.

If you have your voir dire before you, Mr. Harris.

MR. HARRIS: Yes, Your Honor.

THE COURT: Paragraph two, specific questions, familiarity of the Internet, one through three I will ask, six I will ask, seven I will ask, 11 I will ask, and I'm also going to ask whether perspective jurors ever did business with Global Crossing or used the services provided by Global Crossing.

Did Global Crossing have any direct ties to consumers or do they just sell equipment to telecommunications companies?

MR. HARRIS: Could I confer?

MS. DUARTE: May I as well, Your Honor?

THE COURT: Yes.

(BRIEF PAUSE)

MS. DUARTE: Your Honor, we're not quite sure. I don't think they dealt directly with the customer, although one of their subsidiaries may have. I don't know if -- I know individuals own stock in the company.

THE WITNESS: I will ask the question anyway. If they were providing -- what is it called, broad band access or something like that. Maybe somebody on the jury dealt with them. I will ask that.

As to the government's proposed voir dire, a lot

of that I ordinarily and routinely get into anyway. I will ask questions that cover most of them, including Number four, Number seven, and Number ten.

I don't know what to do about eight, belonging to -- if I ask about organizational affiliations I usually say do you contribute to, belong to or support, not just whether you're a member. But what are you getting at with Number eight and Number nine, rights of privacy and advocates of free speech.

MS. DUARTE: There are people I know that feel fairly strongly that whatever appears on the Internet should be unrestricted in any form, and that the government shouldn't even monitor or charge anything off the Internet. They're kind of fringe groups. But some of them are fairly mainstream. We know there's a group up at Stanford that has a very broad view of privacy on the Internet.

THE COURT: Meaning that there should be none?

MS. DUARTE: Very few restrictions, yes. And so there's some legitimate groups that also feel that way. In asking the question it would be my intent to get a feel, and I think I could by the person's response, for whether or not that belief and that membership, I like the way the court phrased it, membership, affiliation, support would be something that they could set aside or not.

THE COURT: Okay. I'll get into it. And do you

have a counterpart request like some organization that thinks that the Internet should be subject to the most exacting restrictions about personal disclosures? Want me to ask that too?

MR. HARRIS: Sure. If they have some opinion, strong opinion on that, one way or the other. I don't know of anybody like that, right now off the top of my head.

THE COURT: I don't know. I will probably learn a lot from this case. That's my rulings on voir dire.

Now here's how we pick jurors. Mr. Harris has tried at least one case before me. He's familiar but I will go over the procedure again. When jurors come down here on Thursday at 9:00 o'clock, and I hope that will be arranged to have them -- I mean Tuesday at 9:00 o'clock, I hope we'll have them in the back of the room when I walk out here.

They will be back there. I will explore general questions about their suitability and availability for the trial. And instruct them to answer only if they have a answer by raising their hands. I'll tell them what the case is about. You don't have to submit an agreed statement. I will draft one myself. I will have the lawyers introduce themselves and anyone else at counsel table.

Now what are we going to do about Mr. Sutcliffe's handcuffs?

MR. HARRIS: I certainly hope he wouldn't be

shackled in front of the jury.

THE COURT: That's obviously not permissible. But you're here from the marshal's office.

UNIDENTIFIED MARSHAL: Yes, Your Honor.

THE COURT: You understand that the cuffs are going to have to be removed?

UNIDENTIFIED MARSHAL: Yes, Your Honor. Absolutely.

THE COURT: He'll stand next to you and you have a change of clothes for him?

MR. HARRIS: We're working on that, Your Honor. He's been in custody since March. But he will have by Tuesday.

One other point, my consultant who is here, Mr. Zachary McCuhen, what I would ask --

THE COURT: He can sit at counsel table.

MR. HARRIS: Yes.

THE COURT: That's okay.

MR. HARRIS: Thank you.

THE COURT: But he'll have to be introduced. I will ask whether -- somebody may be his nextdoor neighbor for all I know. So have him at the conference table, counsel table at 9:00 o'clock. You should have your case agent there.

And I will explore whether the prospective jurors

know anything about the case, anything about the parties. I will tell them that it's going to be a trial that will last through Friday of the following week. We will resume the trial on Tuesday of next week. I guess that's the 21st. So we're starting Thursday but we'll have a full day Thursday because the jury will have been picked. So that gives you Thursday, Friday and four full days the following week. Is that a realistic estimate?

MS. DUARTE: It is from the government's side.

THE COURT: You know what my trial time is. It's 8:00 to 1:30.

MS. DUARTE: It is from the government's side. I don't know how long cross will be.

MR. HARRIS: I think that's realistic.

THE COURT: That's what I will tell them. Some jurors will probably have compensation problems. I will tell them about the trial schedule. I will in pretty fervent terms tell them about a presumption of innocence.

I need a witness list. I need to tell them who the witnesses are. I need that list by 8:30 on Tuesday morning. Please give me a list in alphabetical order. Before the trial begins I will need a trial witness estimate list, which is slightly different and which you have seen.

Both of you should participate in the preparation of that. If there are witnesses who regrettably, as it

would turn out, have to testify as custodians and you have a witness who is a custodian of X, Y, Z web host, is that the right term?

MS. DUARTE: Yes.

THE COURT: I want the person's name and not just custodian of X, Y, Z web host. That should be on the list of witnesses.

And after I explore all of those matters with the prospective jurors and excuse any who warrant being excused then we'll put some jurors in the box. If somebody says something to me that I think warrants excusing that prospective juror for cause, instead of having a side bar conference, I hope you will all know that I don't like side bars. I'm going to work very hard to avoid those.

What I would do, and listen carefully, you'll have heard the same thing I'll have heard, what I will do is look down, say to you Counsel, I intend to proceed accordingly. Counsel, I intend to proceed accordingly. That's my signal to you that I'm about to excuse that juror for cause. And unless you request to be heard at side bar that's what I will do. You will have no time to think about it and talk about it. But it has never proven to be an issue.

Then we get them up in the box and we put 12 people in the box. The next six people, we'll have 28 names called. First 12 sit in the box. The next six sit over in

the front row on the far side of the courtroom near the seal on the door that I'm pointing to. During the process of jury selection the monitor should not be there because I have to eyeball these prospective jurors.

The next ten names will occupy the front row in the center. The reason I call these many names is so you know who's coming up and you can eyeball them as the process is unfolding.

Then I will ask them and instruct them to look at the standard questionnaire that I have that you have seen or should have access to. And then I will question the first 18 of them, including the ones in the back. That's round two.

Then round three, will be questions that are not focused and not directed to the jurors individually but to the 18 jurors as a whole. Those will be the kind of voir dire questions I just reviewed with you. So I would say do any of you belong to an organization. I'm not going to ask that question each time for each individual juror. That's what I call round three.

When I finish round three I invite you to the side bar and give you an opportunity to propose additional questions to specific jurors among the 18 that I have already questioned. At that time you make motions to excuse jurors for cause. And I will rule on those, unless you need

some additional questions before you can determine whether you think you have a basis to excuse jurors for cause. Then the process of exercising peremptories will begin and you start out with the people in the box, not the people in the front row, not jurors 13 through 18.

And the process will be that each, one lawyer from each side will go to the lectern when it's her turn or his turn to exercise a peremptory and whisper the name and number or some easy way to let the other lawyer know who it is you're about to bounce. And if either of you think that there's a Batson problem then you ask to be heard at the side bar before the peremptory is exercised. If there's no problem, signal it to the other lawyer.

Typically these conferences at the lectern, neutral ground, take three or four seconds. Then go ahead and you exercise the peremptories.

Now with the defendant having ten and the government having six and the government going first, then the defendant having two, then the government going again and the defendant having two, it would be very helpful, Mr. Harris, if you knew at any time when it's your turn which two people you are proposing to strike, to mention them both to Ms. Duarte. It's a way to save time.

Okay. Now if you need to discuss with your clients what to do when it's your turn you don't have to ask

permission. I will know what's happening. I know a little bit about Mr. Sutcliffe's perfectly legitimate desire to have maximum input on the case. Just go over, talk to him about it. But I don't want marathon conversations. But you don't have to say may I be, have a moment with my client, Your Honor. You have that time.

Now, if Juror Number Four, randomly selecting a juror as an example has been stricken, then Juror 13 will occupy Juror Number four's seat.

And I know that we are going to have more than six jurors replaced, so that next -- when the six from the back row have sat in the seats of somebody who was stricken, then I move six more over and I go through the same process of voir diring them that I did with the first 18. Okay.

Then you come up to the side bar. I give you the opportunity to be heard as I just described and we go through the same process again.

Now, if I am questioning Jurors 13 through 18, or it could be questioning Juror 11, let's make it clear by telling you if I'm questioning Juror 13 in this very first go around with the first 18 names that are called and that juror tells me something I think warrants excusing the person for cause I will do the same thing. Counsel, I intend to proceed accordingly.

And if you have a problem with that then you ask

for a side bar. If under that hypothetical, Juror 13 has been excused, Juror 19 will immediately go over and sit in Juror 13's seat. Okay. Follow? Because we keep filling up the vacancies that way, until we have six back there and go through the process.

MS. DUARTE: Why wouldn't it be Juror 14?

THE COURT: Because we already have 14 through 18 that are in the process of being questioned but we excused a juror for cause. We need to have six in the back. The next one available would be sitting in that center row and would be Juror 19, slides over.

MS. DUARTE: Understood.

THE COURT: Okay. We'll have two alternates. And I think that's all you need to know. If you pass, not often does it happen but sometimes it does, if either side says we accept the panel as constituted, that constitutes a turn. You have used up a turn by saying accept. But if you have a turn remaining and you want to in the next turn change your mind and object or ask to have a juror excused who was already in the box when you accepted the panel you're welcome to do that.

Any questions about that?

(NO RESPONSE)

THE COURT: Okay. Mr. Harris, if you want to be able to eyeball the people on the side and you can't do it

from where you are sitting, and this is true for either of you or any of you, you can shift around where you are at at counsel table. You can come here at the end of the table and have eye contact with the people you're going to be making judgments about.

Now, opening statements, are there going to be Power Point demonstrations or some other technological equipment?

MR. GONZALEZ: No, Your Honor.

THE COURT: Mr. Harris?

MR. HARRIS: No, Your Honor. But I would inquire, does the court permit demonstrative evidence in opening statements?

THE COURT: Yes but only if it's been proposed to the other side, and disclosed in advance.

MR. HARRIS: Certain documents we all know are going to come in, the printout of the communication in question.

THE COURT: Well, as long as you have shown it to the other side and they're not asking to have a ruling before you deliver your opening you don't have to clear it with me. You can do it. And that's reciprocal.

How long will your opening statement be?

MR. GONZALEZ: Less than 15 minutes, Your Honor.

THE COURT: We'll see about that. But okay. I

get the general idea here. Are you going to deliver an opening at the beginning?

MR. HARRIS: Yes, I imagine I will.

THE COURT: All right. Now if there are witnesses that need to be taken out of order, and I know about Rule 29 but if for some reason you have a witness whose only available at a point when the government is still in the process of putting on its evidence, you propose to take that witness out of order, assuming you're going to put on that case, I will give a clarifying instruction to the jury and work it out with each other.

Accommodate each other. The clerk will give you -- if you don't already have it, Mr. Harris, I know you have seen it in other trials, my standard document that permits the lawyers and the court to conduct these side bar conferences directly with each other without the parties present, not the agent, not the defendant. That's a stipulation I want to be entered too.

I told you what my trial schedule is. If you're going to start using Elmos, Power Points, some kind of computer equipment, practice, practice, practice. Okay. Get the use of it down pat. I like to have things going quickly and smoothly, and without too many glitches.

It's never in the lawyers' interest, this happened in some recent trials, to be fumbling around. I'm a

technically challenged person so I would have that challenge myself if I were the trial lawyer. I hope you'll be familiar with whatever you're using.

Jury instructions, I don't think they're going to be difficult to settle here. In fact, I have started work on them. We won't talk about those now.

When you address the jurors, either on opening or closing you're welcome to tilt the lectern and have it diagonally facing the jurors so that you can have steady eye contact with them and not look over your shoulder. You don't have to hug the lectern, just stay within arm's reach of the lectern, and unless you're using an easel or something to demonstrate something that has to be within eyesight of the jurors.

We'll have monitors on both sides of the panel. I see those are there. Ask for side bars very judiciously, very rarely. I already gave some indications as to some that might be warranted in this case.

I think that covers everything. Any additional questions?

MS. DUARTE: Not from the government, Your Honor.

MR. HARRIS: When will we work out jury instructions? Some of them that were submitted by Ms. Duarte, I have just a problem with a few words.

THE COURT: I don't know when -- we might be able

to on Tuesday if I squeeze it in before then.

THE WITNESS: I usually don't do until after I hear the evidence and understand the case more. But this case, I'm inclined to do it early.

MR. HARRIS: All right. I would like to know what the -- for example, I submitted a United States versus Watts conditional threat instruction that I think correctly states the law. I would like to know if we're going to get that instruction or not because that might impact what I say in opening statement.

THE COURT: Okay.

MR. HARRIS: That's an example.

THE COURT: All right. Have a good weekend. We're adjourned.

(PROCEEDINGS WERE ADJOURNED.)

-oOo-

CERTIFICATE

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

Date: FEBRUARY 28, 2005

Lynne Smith

LYNNE SMITH
OFFICIAL COURT REPORTER

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

THE HONORABLE A. HOWARD MATZ, JUDGE PRESIDING

- - -

"Interupt" @ 12

UNITED STATES OF AMERICA, PLAINTIFF,	)	
-v-	)	CASE NO. CR 2002-350-AHM
STEVEN WILLIAM SUTCLIFFE, DEFENDANT.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
TUESDAY, JANUARY 14, 2003

LYNNE SMITH
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

APPEARANCES:

ON_BEHALF_OF_PLAINTIFF:

OFFICE OF THE UNITED STATES ATTORNEY
BY: ELENA J. DUARTE
JASON GONZALES
ASSISTANT UNITED STATES ATTORNEY
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

ON_BEHALF_OF_DEFENDANT:

WILLIAM S. HARRIS
150 EAST COLORADO BOULEVARD
#216
PASADENA, CALIFORNIA 91105

ALSO PRESENT: JEFF CUGNO, FBI CASE AGENT

TUESDAY, JANUARY 14, 2003; LOS ANGELES, CALIFORNIA

-000-

THE CLERK: Item Number 1, CR 2002-350-AHM, United States versus Steven William Sutcliffe. Counsel, please state your appearances for the record.

MS. DUARTE: Good morning, Your Honor. Elena Duarte for the government along with Jason Gonzales and Jeff Cugno, who I ask be designated as the case agent.

THE COURT: Cugno?

AGENT CUGNO: Yes, sir.

THE COURT: How do you spell your last name?

AGENT CUGNO: C-u-g-n-o.

THE COURT: Okay. Good morning to all of you.

MR. HARRIS: Good morning, Your Honor. Bill Harris on behalf of Mr. Sutcliffe who is present in custody.

THE COURT: Good morning to both of you. Just before I was planning to come out I was handed a document that apparently Mr. Sutcliffe prepared and gave to the clerk. It's entitled Writ of the Mandamus to Compel and numerous other items are listed on the title.

I have looked at it and read it. You have gotten a copy, Mr. Harris?

MR. HARRIS: Yes, Your Honor.

THE COURT: You have gotten a copy, Ms. Duarte?

MS. DUARTE: Yes, Your Honor.

THE COURT: The way I want to proceed, to start with is to ask you in plain language, Mr. Sutcliffe, what are you asking for.

THE DEFENDANT: I'm asking for justice, first and foremost. Secondly, I'm asking for consideration of these motions contained within this document that I have handed to everybody.

Thirdly, if this court intends to proceed any further I ask that the Attorney General himself, John Ashcroft, be brought in to investigate these charges that I brought forth through this court and to my previous counsel and all parties involved.

THE COURT: Concerning Mr. Harris or your right to proceed as your own lawyer without a lawyer, what are you asking for?

THE DEFENDANT: I have informed Mr. Harris that he is forthwith dismissed with prejudice, based upon his actions at the hearing here Friday, when as I've outlined in this document, the prosecutor stood up and told this court a bald-faced lie.

THE COURT: Just tell me whether you're --

THE DEFENDANT: If I may finish.

THE COURT: No, you may not. You answer my questions. Now are you asking for the opportunity to represent yourself at this trial?

THE DEFENDANT: (NO RESPONSE)

THE COURT: Or do you want to have a lawyer represent

you? You have one choice. Meaning, there are two things from which you can choose. It's either Mr. Harris or yourself.

THE DEFENDANT: I will stand on my paperwork.

THE COURT: I don't understand your paperwork so you need to tell me what you're asking for.

THE DEFENDANT: I will stand on my paperwork.

THE COURT: Mr. Sutcliffe, don't make this into an unnecessary tussle between you and anyone else, including me. This is not a question of who has more patience or anything like ego. I'm simply trying to understand from you, giving you the opportunity to tell me what you want concerning your representation at the trial.

If you tell me you want to represent yourself because you think Mr. Harris can no longer function as your lawyer, then I have to go through certain steps. I think you may be familiar with those steps because I did them previously when you were represented by an earlier lawyer.

Then I would have to hear from both you and Mr. Harris and we would do that. I'm perfectly willing to do that in a confidential fashion outside the presence of other people except for the security officers.

If you tell me that you want to continue with the lawyer, keeping in mind that the trial is scheduled to begin today and the jury is expected to come down here today, then there are different measures and alternatives that I will follow

and that will be your right to have me follow. You need to tell me what you want. I do not understand your papers.

THE DEFENDANT: If I begin to tell you what I want are you going summarily cut me off again?

THE COURT: Mr. Sutcliffe, just answer my question as to your issue, not of jurisdiction and of the Attorney General. I will respond to that later. I'm talking about representation at the trial.

THE DEFENDANT: I cannot have a one-way conversation with myself. If you won't answer my questions I can't answer your questions.

THE COURT: Mr. Sutcliffe, I'm not going to have a debate with you. Now here's the question.

THE DEFENDANT: I will submit on the paperwork.

THE COURT: We'll proceed to trial with Mr. Harris as your lawyer.

THE DEFENDANT: I object to that. I summarily have dismissed him with extreme prejudice.

THE COURT: Extreme prejudice?

THE DEFENDANT: Extreme prejudice.

THE COURT: Then you're prepared to proceed on your own?

THE DEFENDANT: I'm standing on my paperwork.

THE COURT: Okay.

THE DEFENDANT: I will not accept those conditions. I

will not sign a waiver. I will not represent myself. And my conditions are spelled out within this paperwork.

THE COURT: They are not spelled out. Here's what we're going to do. I'm going to ask the prosecution team and all people, including potential witness, everyone other than court security officers and members of my staff to wait outside.

(MS. DUARTE, MR. GONZALES AND AGENT CUGNO EXCUSED)

THE COURT: All right. Now there are two representatives from the marshals here. Would you state your respective names, please.

MARSHAL DANIELS: Chris Daniels from the U.S. Marshals.

MARSHAL ARREDONDO: Jason Arredondo.

THE COURT: I instruct you both that the matters that we're about to explore at this closed hearing are confidential. You're not to discuss them with anybody, and I mean anybody, outside of this courtroom. Do you understand that?

MARSHAL DANIELS: Yes, sir.

THE COURT: Do you understand that, Mr. Arredondo?

MARSHAL ARREDONDO: Yes.

THE COURT: Mr. Harris --

MR. HARRIS: Your Honor, excuse me. Is this part of the transcript sealed?

THE COURT: Yes.

MR. HARRIS: Thank you.

THE COURT: Mr. Harris, let me ask you an open ended

question at the outset. And that is how you respond to the writings in this document. By the way, I will cause the document to be filed and be made an official part of the court record, even though it was presented improperly and without authorization.

It will be part of the record and on appeal, if it gets that far, it will be available to the Court of Appeals. Mr. Harris, please tell me what your take is on the so called Writ of Mandamus.

MR. HARRIS: My take at this point is that despite my best professional efforts to help this gentleman, there has been a complete "breakdown" in attorney client relationship, which makes it impossible for me to proceed further. He's basically made it absolutely clear he does not want me to represent him.

He will not speak to me. He instructed me not to address him. He seems to be on a self destructive path that I'm not sure I want to be associated with anymore.

THE DEFENDANT: Objection.

MR. HARRIS: We lined up civilian clothes, for example, over the weekend and Mr. Sutcliffe nixed that one. I brought clothing from my own closet for Mr. Sutcliffe to wear this morning. Despite my advice, he won't put that on.

It's clear here that Mr. Sutcliffe seems to be wanting to steer this towards some sort of a train wreck. And he's accused me multiple times of incompetence.

Now he raises malpractice. There's only so much that I can do. I've given it my best shot and, you know, it's been about five or six years since the last time I came cross a client like this.

And you run into these once in a while. I don't want to say anything negative. I'm trying to be a professional here. I don't want to say anything against my client, but at the same time there's limits.

THE COURT: Do you have reason to question his competence to proceed to trial?

MR. HARRIS: You may recall that the magistrate in New Hampshire, Magistrate Muirhitz mused, he said this guy just may have a screw loose. I have thought about that a lot of times during this case. One of the things that I raised to Mr. Sutcliffe during one of the pretrial issues is there's --

THE COURT: Hold on a minute. There's another court security officer. Your name, please.

MR. MARINO: Lawrence Marino.

THE COURT: This proceeding is a closed proceeding. It' under seal and it's confidential. You're entitled to stay but you need to represent to me that you understand that what you hear you are not to discuss with anyone at all outside of this courtroom.

Do you understand that?

OFFICER MARINO: Yes, Your Honor.

THE COURT: Do you agree to that?

OFFICER MARINO: Yes.

MR. HARRIS: To answer your question, part of the discovery in this case included the fact that some years ago Mr. Sutcliffe received workers compensation benefits for a number of years for affective disorder, which I understand is a psychological dysfunction of some sort.

It apparently rose to the level of entitling him to obtain workers compensation benefits back in the eighties. I raised this issue with Mr. Sutcliffe simply because under United States versus Twine, the specific intent element of an 875C charge can be negated if there's mental problems.

And professionally I wanted to raise this and say Mr. Sutcliffe, here's the issue. You don't, I don't think there's, this is going to fly. I'm not going to present this but nevertheless, if you disagree with me on that point tell me and we'll raise a mental defense. We'll get a shrink and we'll proceed on that.

Mr. Sutcliffe didn't respond. I assume he agrees in his mind that he's competent here. I don't think "it" rises to the level of competence. Being a layman, I think having seen some of these clients in the past, I think it probably falls under the category of maybe some sort personality disorder. That's my -- not being a psychologist, that's my guess.

The problem is I'm on the receiving end of this

personality disorder. He's accused me multiple times of things that, unprofessional conduct, both unprofessional and dishonest. At some point there's limits. He's told me he won't talk to me. On a motion to substitute counsel, which at a minimum this qualifies for, one of the factors under the case law is the extent of the conflict and whether or not there's been a complete "breakdown."

THE COURT: "I'm quite familiar with them."

MR. HARRIS: I think we're there. When he won't put on court clothes I bring from my own closet, when he won't talk to me. When he stated here that I'm dismissed with extreme prejudice, it's kind of, it's kind of clear he doesn't want to deal with me anymore. He doesn't want to see me again in his lifetime, and certainly not sitting next to him at counsel table.

So I'm sort of at an impasse here. Now he's raising malpractice. I mean, what am I supposed to do with all this?

THE COURT: Mr. Harris, I think you have made a very compelling record to warrant relieving you of your responsibilities as counsel for Mr. Sutcliffe. I'm familiar with what the standards are relating to effective assistance of counsel, Sixth Amendment rights, rights of the lawyer and rights of the client to have the relationship severed based on a total breakdown of communication and absence of trust, recriminations, threats and the like. And the record --

THE DEFENDANT: Objection.

THE COURT: Don't interrupt the court.

Mr. Sutcliffe --

THE DEFENDANT: He said I threatened him. I never threatened him.

THE COURT: Don't interrupt the court. I will give you an opportunity to be heard.

THE DEFENDANT: Okay.

THE COURT: Now there are various measures that I will take at any stage --

THE DEFENDANT: I --

THE COURT: In the presence or outside the presence of other lawyer and jurors. You have a right to a fair proceeding and you will get that. But nobody has the right to interrupt the judge.

So I am going to make the finding, and I do make the finding that the basis for a further relationship between Mr. Harris and Mr. Sutcliffe has been shattered. And that it is no longer necessary for Mr. Harris to carry out any attempts at representing Mr. Sutcliffe and furthering his duties as a lawyer.

However, there are a couple of interim measures that before you're formally relieved and before you're allowed to leave the courtroom I want to explain to Mr. Sutcliffe.

You listen carefully, please, and then I will give you

a chance to respond. Your motion, this several page document, whatever it's intended to be, it's entitled Writ of Mandamus, says at page 5, "If this request" -- and it's not clear to what that refers -- "if this request, this previous request is denied the accused will stand sui juris without counsel and under the foregoing conditions. Only the accused may speak for the accused."

You then cite two cases, one of which is Veretta versus California. The accused will not sign a waiver of the counsel. Now you have already heard me relieve Mr. Harris of his duties. You have gotten part of what you came here today intending to get, Mr. Sutcliffe. The next question is what happens to you in terms of a lawyer.

And secondly, what happens to you in terms of your capacity to stay in this trial. You do not have the right, unless you have the funds available in your own right to do so, to select your own lawyer.

You do have a right to a lawyer. And I'm willing, but only one additional time, absent anything compelling. If the same syndrome occurs with any third lawyer that I appoint to represent you, then you will have been, if those facts occur, and I'm not making any finding because there's no basis to, then you will have waived your right to excuse that counsel, or to be represented by replacement counsel.

I will have to advise any new lawyer of the procedural

history of this case. The lawyer who would be appointed to represent you, if you choose to proceed with a lawyer, will be someone who is a member of this court's indigent defense panel, assuming you lack the funds to retain your own lawyer. That's the panel from whom Mr. Harris was selected. I don't know who that person will be but typically the individual is someone who has been designated to be on duty on the given day that the judge makes the decision to select somebody new.

So that's one alternative. You get another lawyer. But you get that lawyer, and it could be a man or a woman, on the basis and in the manner I just described. In principle, the alternative to you having another lawyer derived from that method is to represent yourself. I don't know whether that's what you're seeking.

I really don't understand what you're seeking. But if that's what you're seeking, then I would do my best to bang you on the head and kick you on the skins, and I'm speaking figuratively, I don't mean that literally, talk you out of that. Because it would be totally against your interests. I would have to go through certain measures to make sure you understood what you want to do, if you proceed on your own, without a lawyer.

Now you really need to tell me what you want as between those two alternatives. It's no longer a question of you or Mr. Harris. It's a question of you or some other lawyer.

Please give me guidance of what you want.

THE DEFENDANT: I just sat here and listened to my ex counsel imply that I'm not all there in the head. I take umbrage to that. I was very effectively able to assist my previous counsel in New Hampshire, which is why I previously requested he come back so we can work together as a team. I think we made short work of the FBI's testimony up in New Hampshire.

We quickly were able to dismiss the Counts 5 through 9 at the time they were raised back in New Hampshire. A good part of that was through my defense and my helping my counsel. I cannot work, as you're very well aware, to defend myself against the United States. I'm not qualified. I'm not a juris doctor. However, I can, I'm put in the position by my present counsel of doing just that.

When I asked my counsel for exculpatory material, and I have asked from the day I set foot in this California, in the State of California for certain discovery matters, and to this very day, not one hour, not a half hour ago I heard Mr. Harris sit here and talk to the U.S. attorney. And she's having to explain to him what a hard drive is. If that's incompetent, as I raised my previous time issue, that he's not computer literate. This is about computers. He doesn't even know what a hard drive is, has put me at a detriment.

Further, at the hearing on Friday, I asked him,

notwithstanding the other requests I have made to him in the past, I asked him to challenge when the U.S. attorney stood up and told this court a bald-faced lie regarding killercop.com and it's correlation between evilgx.com. This court then accepted her lie without a question. I asked him to challenge that. I said that was a lie. He shushed me. And I waited and I waited and then you ruled and you ruled in her favor, that this inflammatory irrelevant material could be brought into this case based on her lie.

So at that prejudice right there that was the last time. At that point he was in my mind summarily dismissed. I can't fight by myself. I'm not going to sit here with somebody who's incompetent and won't admit it and won't effectively assist me.

THE COURT: You want another lawyer?

THE DEFENDANT: That's not what I want. I want this case dismissed. How many lawyers do I have to go through? If Your Honor were sitting in a prison where I'm sitting right now waiting for me to find you a competent lawyer I think the shoe would be on a different foot.

I have gone through three lawyers now. How many do I have to do go through? My liberty has been deprived based on my freedom of speech for nine months now. I have not seen my four year old daughter. Her birthday just passed. I have been withheld from my family and my friends, these heinous charges

are hanging over me. I'm expected to go through another couple lawyers.

THE COURT: You won't have a couple lawyers but you would have a right to another lawyer.

THE DEFENDANT: Another one? Another one? When does it stop? When does it stop?

THE COURT: Now let me try to answer that question. It stops when you proceed to trial, if that is what you choose to do. And you subject the government to the burden of proving you guilty. One thing I can tell you, Mr. Sutcliffe, is that the first thing you asked for when I gave you the opportunity to address me this morning, you will get. That's a fair trial.

THE DEFENDANT: No.

THE COURT: I don't expect you to agree with me but that's what you will get. Now let me explain something to you. You do not have a legal right, you have not established a legal basis and there is no legal basis to have these charges thrown out at this stage. Your lawyer made very hard hitting motions to dismiss the case and I evaluated those carefully. And I denied the motions.

So that effort has been undertaken. That's the way it's done. It isn't done by you telling me what you have just told me sitting there at the table. You could make motions yourself if you were representing yourself. I have given you extra latitude by allowing things you have submitted to me

directly, which is not your right to do, to be filed, including today's document.

That's not going to end the process. You're not going to get out of prison.

THE DEFENDANT: May I respond?

THE COURT: In just a moment. If you want to have a decision made as to your fate, it's going to be made by a jury. That's means you're going to have to undergo a trial. That means you'll remain in custody. This is going to happen, no matter what. This is no longer a question of choice. We cannot proceed to trial today.

You don't think you have the ability to defend yourself against the United States of America, and you're right about that. I agree with you 100 percent. That means if you don't defend yourself, which in principle would be your right, it would be crazy to do it but it would be your right, then you're going to have to have another lawyer. That other lawyer is going to have to go through the same learning curve that all the previous lawyers went through.

There's going to be a delay in the trial. And during the period that the new lawyer gets up to speed and tries to establish a workable relationship with you and you with him or her, you will remain in prison. At some point the keys to the kingdom you will recognize are in your hand, in the sense you have reached a point where you're ready, with the assistance of

effective counsel, to proceed to trial.

You may have a view at any time, and maybe every time that whoever happens to be your lawyer is not doing the job the way you want that person to do it. But that doesn't mean that the lawyer is not doing the job that is your constitutional right to have done. It happens all the time, Mr. Sutcliffe, that clients and lawyers disagree about strategy, about tactics, about how to respond to something that's said in court, about the little picture and the big picture. That happens all the time. That doesn't surprise me. It's nothing unusual and it doesn't reflect a "breakdown" in communications.

When a client starts making allegations about a lawyer such as those you've made here in court and that Mr. Harris confirmed you made in his statements to me, that's an entirely different and much more troublesome situation. When differences arise about things which don't get necessarily to the particular crime that's alleged or what is necessary to prove the crime, but how best to help yourself win the case, such as what clothes you wear when you come to court and sit before a jury, that suggests to me that you are not thinking very clearly.

I am going to subject you to a competency exam, just to be sure. You may be right. There's no doubt in my mind you're a very smart guy. The question of whether you're competent to proceed to trial has two parts to it. I want you to understand what they are. You can think about your own assessment as to

whether you're competent.

One of them gets to the issues that I have been patiently exploring with you. You and anybody, in order to be subjected to the risks and the tensions and the possible repercussions of a trial, have to have the ability to confer with a lawyer with a reasonable degree of rational understanding. Fancy word. But you've got to be able to listen, to react, and to act most of the time in your own self interest by accepting the advice of the lawyers, such as what clothes to wear.

If a person doesn't have that ability to consult with counsel then one of two elements of competence may be lacking. And the other is that the person has a rational as well as a factual understanding, rational as well as factual understanding of the proceedings.

You know what the trial is. You know who the prosecutor is. You know who the judge is. You know what a jury does. You know what testifying is about. But if you have a rational understanding then you will understand how to make all that work to the maximum extent available in your own interest.

And I'm not convinced that you, under that standard, are competent. I am convinced you're awfully smart. Sometimes people are too smart for their own good. I have had that said about me and other people in our lives. I know you understand.

I want to make sure that if you go through a trial,

you satisfy that test. So I'm going to appoint a psychiatrist to examine you. You may within 15 minutes sail through with flying colors. But I want the record to be clear about that.

Secondly, I'm going to appoint another lawyer to represent you because I construe your comments to be a perfectly correct statement to me that basically boils down to, Judge, I want to be able to help call the shots. But I need a lawyer to do the job. And I said help call the shots. I didn't say call the shots.

The client has a right to communicate information and to communicate requests, even demands, to the lawyer. Communication is a two way thing, Mr. Sutcliffe. But the client has the duty, if he wants a lawyer, to understand that the lawyer has the ultimate responsibility to decide what happens. If the lawyer's halfway good that lawyer will listen carefully to what the client says.

It happens every day of the week, a hundred times a day that the lawyer will say to the client, you know, I can't do that. That doesn't make sense. That's against your interests or the judge won't allow it or you will look foolish, or it will backfire if we ask that question. They're going to come back with information that's going to be a bullet through our nose.

That's what lawyers do all the time. If your lawyers do that to you, don't be surprised. But I'm not going to allow you to go through the same thing you told me a moment ago, you

don't want to do, which is five lawyers and the tenth lawyer. And in the year 2010 we're still trying to figure out if you've got a lawyer that's going to be okay for you the way you see it. That's not going to happen because at some point I have the power and the obligation to find that you have waived your right to have a lawyer represent you. And then you're going to trial on your own.

But either way, you're going to trial, unless you decided that there's an alternative thing you want to do, and I'm hoping you won't, which is plead guilty. You don't see yourself as guilty and I would never accept a guilty plea. I don't want you to plead guilty. I want you to get a fair trial. These are the ground rules. I didn't make them and you can't change them.

Now you asked for the opportunity to respond. Please do.

THE DEFENDANT: Thank you, Your Honor. All right. First off, Sixth Amendment of the Bill of the Rights says I have the right to effective assistance of counsel. That key word is assistance, to assist me. When I make multiple requests for assistance and they're summarily dismissed, ignored because of the lawyer's incompetence, that's not a, that has nothing to do with strategy or tactics.

So I deny that that's the reason that him and I are not getting along. He's incompetent. He refuses to admit this. I

know he is. I don't have to prove it to anybody else. He's proven it for me. He can try to cast aspirations (sic) on my competence and my metal ability all he wants and this court can try and subject me to a mental examination, which I object to, based on his aspirations against me, but that's not the case here.

It's a very clear case through our communications have broken down because he has, he put it to me very succinctly. He said after the first time I raised the issue of his competence when you brought up does he know anything about computers and whatnot at the hearing last month or month before, when I called him the next day he had quite an attitude. And I said, "Bill, are you taking this personal?" "You bet. You bet I'm taking it person. How can I not," he says. So as far as that, that's the real reason.

It has nothing to do with strategy or tactics. His inference that I have made threats or that I have, I have not accused him of malpractice. I accused Hilary Potashner of malpractice but not him. He's a very good lawyer. He's very good. But he's not competent in this case. He's not effectively assisting me. That's all I'm going to say about that.

I want a fair trial too. I don't believe I'm getting one from this court. I brought to the attention of this court that discovery matters that were supposed to be provided to me

by my counsel were stolen by members of the BOP. Somebody inside the BOP has stolen some of this court discovery matter. I have not been able to review this matter.

My counsel wanted me to review this discovery material and compare it to newly admitted discovery material. That's kind of hard to do when some of it is missing. I brought that to the attention of this court and nothing has changed.

So I don't see how I'm going to get a fair trial. If I was going to go to trial today anyway, when this court is very well aware that I haven't seen all of the discovery and has not made inquiry into has it been replaced, have I had a chance to look at it. Notwithstanding the fact that I've had barely enough time to look at what discovery was there. And of that, what I could review because I wasn't able to review all of it because of the lack of software, which I requested my counsel request this court to provide to me, which I doubt it was even done. I don't know because he hasn't told me.

But as far as a fair trial, I don't think I was going to get one, even if it did start today. As far as my clothes, again I'll stand on my previous statement, although I don't think it really matters because I didn't think I was going to get a fair trial today anyway. While I'm in their law library I'm reading due process, Fifth Amendment, Sixth Amendment, things like that, I've seen cases, I have some where it says that a man who went to court was in his jailhouse clothes, even

with the number on his shirt and pants, the court ruled that's not prejudicial. I don't believe it is either. People take me as I am.

But the clothes do not make the man. It's the man inside, not the clothes. With that I will stand on my paperwork and request that money be provided so I choose competent counsel.

THE COURT: That request is denied.

Mr. Sutcliffe, I don't have the authority and there aren't funds available to give you money to select directly and on your own whatever lawyer you would like to have represent you. But I will arrange, as I already explained, to appoint a lawyer for you.

(PAUSE)

THE COURT: Okay. Mr. Harris, with respect to this reference that Mr. Sutcliffe just made concerning stolen discovery, is it your understanding that refers to the redacted portions of the web site as opposed to the intact ones?

MR. HARRIS: No, Your Honor. I believe what he's referring to is the fact that when I brought down all this discovery for Mr. Sutcliffe to review, there were 52 CD-Roms, and I numbered them, and dropped them off at the front desk. And by the time Mr. Sutcliffe got them three of those 52 were missing somehow. There were others in there that were apparently not numbered that I must have missed somehow. He's

talking about three of them that somehow disappeared between the front desk and the time Mr. Sutcliffe looked at them.

THE COURT: What, if any, steps have you taken or can you take, can someone take to get second or additional copies of the three missing ones from the prosecution?

MR. HARRIS: I have not done anything on that because first of all, the MDC says that we didn't steal them. We didn't do anything. So I don't know, first of all, I'm pretty sure I didn't misnumber them. There were 52 there. So how they were misplaced, I don't know. I gave it to Mr. Sutcliffe. Maybe my error, assuming they would not be mishandled. I did not make back-up copies. We got 52 CD's.

THE COURT: But the copies that you're explaining to me, the 52 were in fact duplicates of what the government had in its possession?

MR. HARRIS: Yes.

THE COURT: Can somehow the ones that evidently may not have wound up in Mr. Sutcliffe's physical custody be identified, do you know which ones are missing?

MR. HARRIS: That would be a laborious process. It would be a matter of going back and reconstructing everything that was provided. We basically got a Beacon's box full of floppies and CD's.

THE COURT: If I want to avoid consuming that amount of time for the new lawyer, I could order the government to turn

over the 52 CD's all over again, right?

MR. HARRIS: That would solve the problem. Mr. Sutcliffe has some of this stuff that he hasn't given back to me. The original concept here was to let Mr. Sutcliffe look at all this stuff.

So I've got a box here of stuff, including two new CD's and five new floppies that I just got yesterday from Ms. Duarte.

THE COURT: Why were they turned over just yesterday, as far as you know?

MR. HARRIS: I think it's reconfigurations of stuff that previous, it's like final trial exhibits, something like that.

But I haven't had a chance to look at this stuff yet. I was going to do that tomorrow or later this afternoon. I put Mr. Sutcliffe on notice we've got new discovery. We got a new video tape. We've got, I have subpoenaed MDC audio tapes with phone conversations between Steven Sutcliffe and Orley Mann in which Mr. Sutcliffe tells me that apparently Ms. Mann made statements to him that the domestic allegations are baloney. We've got that under subpoena.

I expect that to come. I've got Gary Winnick under subpoena. I'd like to tell Mr. Winnick he doesn't have to appear. That took a lot of hoops to get the CEO under subpoena. Mr. Sutcliffe wanted that.

THE COURT: I assumed that the government was going to

put him on the stand, no?

MR. HARRIS: I don't think so. This is an example, I don't know that I want Mr. Winnick. But Mr. Sutcliffe demanded it so I went through the process to get him under subpoena. He's available. So if this trial is going to be continued, one of the things that I'll want to do is somehow withdraw that in a manner that we can get Mr. Winnick again, if and when.

THE COURT: I can arrange that. He's not listed as a witness for the government. There are 24 people.

MR. HARRIS: Is he on the government's list?

THE COURT: No. I'm telling you that he's not, not the list I was just handed today. Now I want to know what happened with respect to these stipulations.

MR. HARRIS: Mr. Sutcliffe wouldn't cooperate and basically told me he didn't want to sign anything.

THE DEFENDANT: Objection.

MR. HARRIS: Some of them I think are non controversial. Probably that's better to take up with new counsel. I mean my --

THE COURT: Is Orley Mann still married to him?

MR. HARRIS: I think they're still married.

THE COURT: Have you discussed with him the marital privilege?

MR. HARRIS: I believe we did touch on that, yes. I explained to him that exists under California law. I have

discussed that with Ms. Duarte. She understands it. They're not going to be asking for any confidential communications within the marriage. My understanding is that her testimony is going to be something like he had a computer in California, we lived at this address. He had a computer in New Hampshire, we lived at that address. They may ask her to confirm he had a gun in the closet. That sort the stuff. Not going to get into communications.

THE COURT: Okay.

THE COURT: Mr. Harris, have you ever prepared papers seeking appointment of a qualified psychologist to conduct a competency exam?

MR. HARRIS: Yes.

THE COURT: I think I will probably have the government file those papers, just so that the record is complete. You understand, Mr. Sutcliffe, that as a result of these proceedings this morning your right to a speedy trial is affected. And that the date for trial, which was today, is going to have to be continued and probably indefinitely. Not for very long.

But your new lawyer has to get up to speed. We have to complete the competency exam. I'm going to do my best to make sure these things are done quickly. But you will not have the trial today. And I know at earlier times you asked for a trial as quickly as possible, and complained when we had to have a continuance.

Do you understand what I just explained to you?

Key Word

THE DEFENDANT: I understand that I've been prejudiced to an extreme amount by having a new lawyer appointed, against my objections, come in and try and get up to speed with a half million pages of discovery, 50 plus CD-Roms, ad nauseam. How is that not prejudicing me?

THE COURT: Okay. We're not going to have a debate about it. It was your choice to fire Mr. Harris and to create the circumstances where I was compelled to grant your request, And now his.

And it's your choice, a sound one, not to do battle on your own. So that's where we're at, Mr. Sutcliffe.

Let's bring in the prosecutor.

(MS. DUARTE, MR. GONZALES AND AGENT CUGNO RETURN TO COURTROOM)

THE COURT: I want the record to reflect I recognize the circumstances under which you've been doing your best to carry out your responsibilities and I think you deserve acknowledgment and credit and I'm delighted to give it to you. I think you have done an admirable job professionally.

MR. HARRIS: Thank you, Your Honor.

THE COURT: Counsel, I have explored with Mr. Sutcliffe and Mr. Harris a number of different considerations, and as a result and for sound legal reasons, Mr. Harris has been relieved of his responsibilities as counsel for Mr. Sutcliffe. The trial will not proceed today.

I want the government to file a motion, just to have paperwork available for Mr. Sutcliffe to respond to if he wants, with a proposed order calling for the appointment, at public expense, of a qualified psychologist or psychiatrist to conduct a competency examination, not an insanity examination, but a competency examination for purposes of confirming that Mr. Sutcliffe is competent to proceed to trial.

I am going to appoint, but not today, a new lawyer for Mr. Sutcliffe. That lawyer will be selected from the indigent defense panel. I have explained to Mr. Sutcliffe how that works and what the circumstances are. He's already familiar with that.

For purposes of having at least a clear record, I'm going to set the new trial date for ten weeks from today. That may not be final. But that conceivably could be sufficient to enable new counsel to get up to speed and to have a record that confirms what I think the record will ultimately establish, but I'm not sure, that Mr. Sutcliffe is competent to proceed to trial.

I have explored with Mr. Sutcliffe various potential scenarios as to what would happen with the next lawyer and I won't go into that now. The issue of the completeness of discovery has been raised again.

I'm ordering the government, as an entirely pragmatic solution to an otherwise potentially tangled supposed issue, to

make available to the new counsel, anew, each and every one of the computer drives, and apparently there were 52, but whatever was produced previously and obtained or generated or created thereafter is to be made available anew to the lawyer who will be appointed to represent Mr. Sutcliffe.

And the reason why that's necessary is that some of the material that was previously produced some many weeks ago may not have been maintained in a way that enabled Mr. Sutcliffe personally to review it. I also was informed that some additional discovery was made available to Mr. Harris yesterday. I don't know exactly what it is or why it was so late but I want, when the new lawyer is identified, and all of the discovery that has been the subject of discovery proceedings clearly must be known to the government, I want that lawyer to get it all right away.

I don't want any further incremental providing of discovery. I'm not suggesting that there's something that was improper. I really am not. But I don't want there to be anything coming in in bits and pieces.

Please prepare a speedy trial act oriented continuance with the necessary findings. You can recite in general terms the proceedings today, which in case there's any doubt, I make a finding, an explicit finding, constitute a waiver of the right to a speedy trial by Mr. Sutcliffe, even though he does not necessarily agree with that.

Mr. Harris, I know you already understand this but I want Mr. Sutcliffe to hear me say it. You have the continuing duty to cooperate completely, openly and promptly with the successor counsel to turn over not only your file but to make available to that lawyer your work product, to discuss in good faith with that lawyer your own perceptions about the issues in this case and the considerations that could affect the defense of Mr. Sutcliffe.

I think that covers everything. Ms. Duarte.

MS. DUARTE: Question, Your Honor.

THE COURT: There's one other thing, before you ask your question, before I forget. There is a subpoena that apparently has been served on Gary Winnick. I notice that Gary Winnick is not identified on the government's witness list. And I assume, correct me if I'm wrong, that the government has the ability to communicate with Mr. Winnick or with his lawyer; is that correct?

MS. DUARTE: I have that ability, Your Honor.

THE COURT: I want you to communicate to the lawyer or to Mr. Winnick or to both, that although he doesn't have to respond to the subpoena on the date or under the terms that it may have contained, he remains responsible to respond on whatever date he is later notified.

In effect, what I'm saying is that the subpoena, although it was issued and served through the auspices of

Mr. Harris, it's like a court subpoena. I don't want anybody to have to go through any protracted or new ground of efforts to subpoena him anew.

So the subpoena remains outstanding, although the trial date has been continued. Please communicate that to Mr. Winnick and his lawyer.

MS. DUARTE: I will, Your Honor. May I have a copy of that subpoena to facilitate the communication with his attorney?

MR. HARRIS: Yes, Your Honor. I might point out, the contact is Sean Riley at the Christianson Miller firm.

THE COURT: Give all that to Ms. Duarte.

MR. HARRIS: I shall.

MS. DUARTE: Your Honor, in order to facilitate regiving the electronic discovery, may we have back what we've given because I'm not sure what the issue is. There's not 52 --

THE COURT: There were three out of 52 -- were they hard drives?

MR. HARRIS: They were CD-Roms.

THE COURT: CD-Roms that apparently are missing. I'm not suggesting that it's because of the U.S. attorney's responsibility. But what is not clear, which ones they are.

MS. DUARTE: Okay. The issue about turning over the hard drives --

THE COURT: The CD-Roms.

MS. DUARTE: Okay. On the hard drives though, if I get

with Mr. Harris and find out what they think they're missing and look for it and try to find it, I understood from the court's order that you wanted a new discovery process for the electronic discovery. And I was wondering if that covers -- because there were six --

THE COURT: What I really should have said was the CD-Roms.

MS. DUARTE: CD-Roms. Just so I understand, Your Honor, there allegedly were three CD-Roms in that form, CD-Rom form, seized from Mr. Sutcliffe's home that never made its way back to him in any media.

THE COURT: No. I don't think that's quite the correct way of putting it. I don't know where the CD-Roms came from, I don't know from whom they were seized, it hasn't been told to me.

But at one point Mr. Harris obtained what he counted up to be 52 CD-Roms, arranged for them to be delivered directly to Mr. Sutcliffe for Mr. Sutcliffe's review, and only 49 wound up there. It would be an exceedingly difficult, laborious, time-consuming task for someone who has been relieved of his duties for sound reason to try to make an independent determination of which three are missing. Because there's no -- am I right?

MR. HARRIS: Correct. There's another missing piece of the puzzle. Mr. Sutcliffe has some of this stuff with him at

M.D.C. In order to do this right, Mr. Sutcliffe has to give me what he's got, so I've got the full story.

THE COURT: You'll get back 49 CD's, right?

MR. HARRIS: If he gives me what he has at M.D.C. He gave part of it back to me.

THE COURT: If you had 49 you would be rather easily able to determine which three are missing.

MS. DUARTE: Not necessarily, Your Honor. Could I have one second?

(PAUSE)

MS. DUARTE: We really don't know what he's talking about, 52 CD-Roms.

THE COURT: You don't know what the reference is to the 52 CD-Roms?

THE DEFENDANT: Your Honor, if I might, there's also another twist in this too.

THE COURT: Wait one moment, Mr. Sutcliffe.

THE DEFENDANT: There's 54.

THE COURT: Wait one moment and sit upright in your chair.

Mr. Harris, is there any further clarification you can give? I'm trying to be very pragmatic and practical about this issue to avoid any further complication in the record.

MR. HARRIS: If Mr. Sutcliffe returns to me everything that he has at M.D.C., then I will have everything I got from

the government, that I got from the public defender's office. I'll have the complete electronic data. Then I'll be happy to cooperate and show Ms. Duarte everything I have from every source. Then we can probably figure out what the three missing ones are. That might be the most pragmatic way to do it.

In order to do that I have to have Mr. Sutcliffe give me back what he kept at M.D.C.

THE COURT: Before I respond to that suggestion, what did you want to say, Mr. Sutcliffe?

THE DEFENDANT: When Mr. Harris delivered the discovery material to me at, or to somebody at the Bureau of Prisons, and brought it to me, his letter stated here is "X" amount of CD-Roms and floppy discs. It didn't categorize what was what. But it came out to approximately, I think it was 52.

When the box was given to me by the B.O.P., they produced another receipt where they had counted it out and they had counted out 54, and two floppies. There's a discrepancy of two additional CD-Roms.

THE COURT: I can't begin to make sense of the discrepancy or explain it, but here's what I'm ordering you to do, Mr. Sutcliffe. In your own interest and to cut through all this, you can go over there today because now your schedule is opening up, Mr. Harris?

MR. HARRIS: Yes, Your Honor.

THE COURT: You go over, I'm instructing the marshals

to do everything necessary to facilitate the speedy accomplishment of this order. And you give to Mr. Harris whatever he gave to you. And then you meet with Ms. Duarte, and I want you to be able to represent to whomever I appoint as successor counsel that to the best of your knowledge, relying on what the government tells you, you have gotten a complete array of discovery that the government has provided and is required to provide.

And then you turn that over, all of it, directly, to the new lawyer who will then communicate with Mr. Sutcliffe how she or he and Mr. Sutcliffe wish to work through that evidence. That's all I can say.

Do you have any other questions?

MS. DUARTE: No, Your Honor. I'll do my best to cooperate. I think there might, this might be a reference to original evidence, which we didn't even copy, so I returned.

And if that's the case, I will definitely need everything back because all did was give back the original because it was of no use to us. That's what I think this reference might be to.

THE COURT: You seem to be suggesting that some of what you turned over to Mr. Harris or to the public defender or to both, you don't even have copies back in your own possession, correct?

MS. DUARTE: That's correct. It was programs and the

like. And I told Mr. Harris we didn't copy this because we don't need it. Take it all back. We have a receipt from that. We'll go through it with him.

THE COURT: Okay. Work it out. These things happen.

MS. DUARTE: I would like to let the court know that I don't think there's any discovery issue. But if there is, we'll certainly work it out.

THE COURT: Okay. Anything further, counsel?

MS. DUARTE: Your Honor, in the proposed order, I don't quite know what to put.

THE COURT: You mean about the competency appointment?

MS. DUARTE: Yes.

THE COURT: Simply have recitals that the court, after exploring certain issues with Mr. Sutcliffe and his then counsel of record Mr. Harris, concluded that the circumstances warranted an appointment. I don't remember offhand what the applicable provision in Title 18 is. Please invoke that provision. Make it clear that the findings I made are limited only to competency to proceed to trial, not to any defenses under Rule 12, or issues of insanity. There are no such issues.

I think it's probably a standard order, but make it clear that the individual who was appointed will be compensated at the expense of the public, from public funds.

MS. DUARTE: So you want the appointment immediately or after the competency exam?

THE COURT: I want the order to arrange for the appointment so that the competency exam can be conducted thereafter. That individual will have to work out the circumstances and logistics with Mr. Sutcliffe and with M.D.C.

MS. DUARTE: Thank you.

THE COURT: Anything further, counsel?

MR. HARRIS: Nothing further. Thank you, Your Honor.

(PROCEEDINGS ADJOURNED)

C E R T I F I C A T E

I HEREBY CERTIFY THE FOREGOING IS A CORRECT TRANSCRIPT OF THE ABOVE-ENTITLED PROCEEDINGS; PAGES 1-38. DATED AUGUST 20, 2003; LOS ANGELES, CALIFORNIA.

_____

LYNNE SMITH

OFFICIAL COURT REPORTER

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

THE HONORABLE A. HOWARD MATZ, JUDGE PRESIDING

- - -

UNITED STATES OF AMERICA, PLAINTIFF,	)	
-v-	)	CASE NO. CR 2002-350-AHM
STEVEN WILLIAM SUTCLIFFE, DEFENDANT.	)	

COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
FRIDAY, JANUARY 17, 2003

LYNNE SMITH
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

APPEARANCES:

ON BEHALF OF PLAINTIFF:
OFFICE OF THE UNITED STATES ATTORNEY
BY: ELENA J. DUARTE
JASON GONZALEZ
ASSISTANT UNITED STATES ATTORNEY
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

ON BEHALF OF DEFENDANT:
GREG NICOLAYSEN
8530 WILSHIRE BOULEVARD
SUITE 404
BEVERLY HILLS, CALIFORNIA 90211

ALSO PRESENT: JEFF CUGNO, FBI CASE AGENT

FRIDAY, JANUARY 17, 2003; LOS ANGELES, CALIFORNIA

-000-

Item Number 1, CR 2002-350-AHM, United States versus Steven William Sutcliffe. Counsel, state appearances, please.

MS. DUARTE: Good morning, Your Honor. Elena Duarte and Jason Gonzalez on behalf of the United States.

MR. GONZALES: Good morning, Your Honor. Jason Gonzales on behalf of the United States.

THE COURT: Good morning.

MR. NICOLAYSEN: Good morning, Your Honor. Greg Nicolaysen from the CJA indigent defense panel here at the request of the court to consider the possibility of appointment.

THE DEFENDANT: Steven Sutcliffe present.

THE COURT: Okay. Mr. Nicolaysen, you were contacted, I think, by the court clerk because of your membership on the CJA panel, and especially because of what I have been informed is your unusually extensive experience with computer law, computer usage and computer technology.

I already reviewed very carefully and at a previous proceeding issues relating to representation by counsel by Mr. Sutcliffe. I don't intend to do that again today. I made a specific finding that he sensibly declined to exercise his right to proceed on his own under the Ferreta doctrine and to represent himself. I explained that was a wise choice but that he had no authority or power and neither did I to arrange for

funds to be provided to him personally to select successor counsel.

You are now appointed as counsel. You will be serving as counsel for Mr. Sutcliffe and we will proceed on that basis.

I think you may already know, Mr. Nicolaysen, but you're free to discuss this with Mr. Sutcliffe as you are everything relating to his situation, that there are two sets of prior counsel in this case. Initially the Federal Public Defenders Office represented Mr. Sutcliffe. And until the hearing on, I think it was Tuesday, Mr. William Harris represented him.

I have explored with Mr. Sutcliffe certain things relating to who would succeed Mr. Harris and what would happen with respect to that relationship. I explored those things outside the presence of the government. I anticipate but would encourage both of you to discuss what I explained to Mr. Sutcliffe when you have an opportunity to confer with each other. You may have learned that after exploring a number of issues at considerable length, acting on my own and exercising my inherent authority as well as my authority under Title 18, I determined that a competency examination would be not only be warranted but necessary.

The prosecutor has submitted a proposed order which we'll turn to later. But I think the first order of business is to arraign Mr. Sutcliffe on the First Superseding Indictment.

Let's do that, please.

THE DEFENDANT: I want to object to these proceedings. I have not authorized this man to speak for me. If anybody in the courtroom thinks they have authority to speak for me I want to see their authority right now.

THE COURT: Mr. Nicolaysen -- sit down, Mr. Sutcliffe.

THE DEFENDANT: I will proceed with my arraignment, if you wish. No man --

THE COURT: Sit down, Mr. Sutcliffe.

THE DEFENDANT: No man speaks for me unless he can show me his authority that I signed over and delegated him to speak for me.

THE COURT: Mr. Nicolaysen is your lawyer and he's proceeding under the authority of the court.

THE DEFENDANT: No, he's not my lawyer. He's your lawyer. He's not my lawyer. He's your lawyer.

THE COURT: Mr. Sutcliffe, you will be arraigned on the Superseding Indictment.

MR. NICOLAYSEN: Does Your Honor wish us to remain at counsel table?

THE COURT: You should go to the lectern.

MR. NICOLAYSEN: Fine. Come on, Steve.

THE DEFENDANT: I object. I object. I want to see your authority to speak for me before you attempt to speak for me.

THE COURT: Mr. Sutcliffe, you will be addressed directly by the clerk.

THE DEFENDANT: I want to see your delegation of authority that I have given you to speak for me.

THE COURT: Mr. Sutcliffe --

THE DEFENDANT: Acknowledge that, sir. You do not speak for me. Acknowledge that, sir.

THE COURT: He has no duty to acknowledge that and you have no authority to interfere with that.

THE DEFENDANT: I have not given you authority to speak for me. Your silence acknowledges that.

Would this court like to arraign me now?

THE COURT: Yes.

THE DEFENDANT: Fine.

THE CLERK: Is Steven William Sutcliffe your true and correct name?

THE DEFENDANT: No.

THE COURT: What is your true and correct name?

THE DEFENDANT: Steven of the Sutcliffes.

The correct spelling is upper case S, lower case t, lower case e, lower case v, lower case e, lower case n, hyphen, upper case W, lower case i, lower case l, lower case l, lower case i, lower case a, lower case m, colon, space, upper case S, lower case u, lower case t, lower case c, lower case l, lower case i, lower case f, lower case f, lower case e.

Pronounced Steven of the Sutcliffes, not Mr. Sutcliffe or any variation. I will be addressed as Steven of the Sutcliffes. That's it.

THE COURT: Proceed to arraign the defendant, please.

THE CLERK: You're advised that you're in the United States District Court for the Central District of California and that a First Superseding Indictment has been filed against you in this court charging you with violating the laws of the United States.

Have you received a copy of this First Superseding Indictment?

THE DEFENDANT: No, I have not. Now I have.

THE CLERK: Do you need to have the First Superseding Indictment read to you?

THE DEFENDANT: Yes, I would.

THE COURT: May I have the -- here you go, Steve.

THE CLERK: United States District Court for the Central District of California, October 2000 Grand Jury.

United States of America, plaintiff, versus Steve William Sutcliffe, defendant. CR 02-350(A)-AHM, First Superseding Indictment. 18 USC Section 875(c), Threats To Injure In Interstate Commerce; 18 USC Section 1028(a)(7), Fraud And Related Activity In Connection With Identification Information; 18 USC Section 2: Aiding and Abetting, Causing An Act To Be Done.

THE DEFENDANT: Motion to dismiss, misnomer on this indictment.

THE COURT: Denied. Keep reading the indictment.

THE CLERK: The grand jury charges Counts 1 through 4, 18 USC Sections 875(c), introduction, one, at all times relevant to this indictment the defendant Steven William Sutcliffe ("defendant") was a former employee of the Global Crossing Development Company --

THE COURT: You can just read the words.

THE CLERK: Global Crossing, located in Beverly Hills, California. Defendant's employment at Global Crossing ceased in approximately September of 2001.

Two, at some point after defendant's employment terminated but not later than on or about October 18, 2001 defendant created a web site known as evilgx.com and posted text and photographs on this web site.

In addition, defendant's web site contained electronic links to various pages located on other web sites.

Three, during the course of these postings defendant threatened various individuals associated with Global Crossing including process server Tracy Hall, chairman of the Board of Directors Gary Winnick and Assistant General Counsel Elizabeth Greenwood with bodily harm and also published numerous social security numbers of individuals associated with Global Crossing.

THE COURT: Does the prosecutor need to address the

court?

MS. DUARTE: I'm sorry, Your Honor. May I give a copy to the court reporter? I have a copy.

THE COURT: Sure.

THE CLERK: Interstate threats. Four, on or about the following dates defendant willfully, knowingly and with specific intent to threaten transmitted, caused to be transmitted and aided and abetted the transmission of the following communications in interstate commerce which communications were threats to injure the person of another.

Count 1, date 10/24/01, victim Tracy Hall, nature of threat posting on web site evilgx.com, stating I will personally send you back to hell from where you --

THE DEFENDANT: Objection; misstatement.

THE COURT: Back to the hell is the correct way it reads. You inadvertently deleted the word "the". Keep going.

THE CLERK: Count 2, date 1/31/02, victim Tracy Hall, nature of the threat, posting on web site evilgx.com stating I will kill you.

Count, 3, date 2/13/02, victim Gary Winnick. Nature of threat. Posting on web site evilgx.com stating keep your dogs at bay. I am now armed.

Count 4, date 3/17/02, victim, Elizabeth Greenwood, nature of threat. Posting on web site evilgx.com stating dead-dedicated to Elizabeth Greenwood and accompanied by sound file

of voice stating this is all far from over. And link to a photograph of Green and and her young daughter.

Counts 5 through 9, 18 USC Sections 1028(a)(7), 2. Five, the grand jury re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 3 above.

6, on or about the following dates, defendant knowingly transferred, caused to be transferred and aided and abetted the transfer without lawful authority and in a manner affecting interstate commerce social security numbers which are means of identification issued by and under the authority of the United States belonging to other persons with the intent to aid and abet any unlawful activity that constitutes a violation of federal law, namely false representation of social security numbers for any purpose with intent to deceive in violation of Title 42, United States Code Section 408(a)(7)(B) as follows:

Count 5, date 10/24/01, items transferred. Approximately 15 social security numbers assigned to other individuals.

Count 6, date 11/12/01, items transferred. Approximately 100 social security numbers assigned to other individuals.

Count 7, date 10/3/01, items transferred approximately 1,900 social security numbers assigned to other individuals.

Count 8, date 2/13/02, items transferred. The social security number assigned to Gary Winnick.

Count 9, date, 3/17/02, items transferred. The social security number assigned to Elizabeth Greenwood.

A true bill and there's a place for the signature of the foreperson. To the left is Deborah Y. Yang, United States Attorney, signature of Jacqueline Chooljian, Assistant United States Attorney, Chief Criminal Division. Below that Arif Alarcon, Assistant United States attorney, Chief, Computer Crime Section.

THE COURT: Thank you for the reading of the First Superseding indictment. Please proceed.

THE DEFENDANT: Motion to dismiss as vague, fails to state a crime against the United States, it fails to list specific victims on Counts 5 through 7. Further, that this law is being improperly applied, unconstitutionally.

THE COURT: Denied.

THE DEFENDANT: All?

THE COURT: All.

THE CLERK: How do you now plead to Count 1 of the First Superseding Indictment, guilty or not guilty?

THE DEFENDANT: I cannot make a plea at this time until I know the nature of this crime, as that, the nature has seemed, has seemed to have changed in the past. So if this court could answer a question or two I might be able to make a plea at this point.

Will this court answer a question or two so I can

ascertain the nature of the crime so I can prepare a proper defense?

THE COURT: No. The court will construe the response to be a plea of not guilty. The plea is applicable to each of nine counts of the First Superseding Indictment. So Mr. Sutcliffe will be deemed to have plead not guilty to the charges in the First Superseding Indictment. That concludes the arraignment of the charges.

THE DEFENDANT: Let the record --

THE COURT: You and Mr. --

THE DEFENDANT: Secret jurisdiction. I will not tell the court --

THE COURT: Sit down at the table.

THE DEFENDANT: Nature of this crime.

THE COURT: Sit down. This is not going to be a debate.

THE DEFENDANT: You changed the nature once. You going to change it again?

THE COURT: Mr. Sutcliffe, there's much less to accomplish today than you my realize.

THE DEFENDANT: How can I prepare a defense here, if you won't even tell me the nature of the crime?

THE COURT: The first order of business --

THE DEFENDANT: They told me the nature was something once. Now they have changed the nature after almost a year.

Are they going to change it again? How many --

THE COURT: Now I am ordering you to be quiet. The first order of business is to complete the competency examination. I have received the motion and will grant the motion, although I'm going to change slightly the language in the proposed order that the government has lodged with the court and filed.

And Mr. Nicolaysen, I don't know if you have seen it yet but it's a recently filed document and you will have an opportunity to review it today, although there won't be a need for you to do anything more than assist with the representation much Mr. Sutcliffe for purposes of that competency examination.

MR. NICOLAYSEN: Is Your Honor signing the proposed order submitted by the government?

THE COURT: With very slight changes.

MR. NICOLAYSEN: Thank you.

THE COURT: Those changes will be to add the words "or psychological" on line 18 of page 3 after the word "psychiatric." And to contain a recital on page 4 referring to 18 USC 3161(h)(8)(A).

MR. NICOLAYSEN: Deleting one and replacing --

THE COURT: No, no. Adding the reference to (h)(8) which is the all purpose interest of justice provision.

MR. NICOLAYSEN: Thank you.

THE COURT: Those will be the only changes in the

proposed order.

MR. NICOLAYSEN: May I inquire of Your Honor whether or not the court is planning to make any factual findings in regard to the reasonable cause standard under the statute since there are no findings that have been submitted by the government.

THE COURT: Reasonable cause standard for the requirement of the competency exam?

MR. NICOLAYSEN: Yes, Your Honor. Under 4241, Subsection A, as the court very well knows, there's a reasonable cause requirement. Is the court inclined to make any findings to support its determination that reasonable cause --

THE COURT: I already did but I will repeat them. You were not here. The findings are focused primarily on the prong of competence that inquires into whether or not the defendant has the capacity and willingness to assist counsel in his own defense.

Those findings in turn arise out of and refer to and include findings that Mr. Sutcliffe has displayed apparent confusion about the proper roles of any counsel and all counsel, at least those counsel who have represented him thus far in this case, vis-a-vis the client and in particular vis-a-vis him.

Mr. Sutcliffe has displayed some apparent confusion as to the actual charges and what they consist of and what the elements are. Mr. Sutcliffe has refused to provide answers to very clear and simple questions, including some focused on what

his requests are or were, especially concerning whether he wished to have counsel or not have counsel and proceed to represent himself.

There is a sufficient and lengthy course of history in this case reflected in unauthorized filings that I chose to deem authorized or allow to be filed that reflect at least a tendency, if not a concerted plan to disregard the role and evidently the advice and the assistance of his prior counsel.

For all these reasons I think there is an existing question as to whether or not under the standards in 18 USC 4241 the defendant, Mr. Sutcliffe, has the competency to proceed to trial. For that reason on my own and before the government submitted its written motion I made the determination that a competency exam was warranted.

The motion itself in the order itself contains the necessary recitals relating to speedy trial considerations and I adopt those as well.

Mr. Nicolaysen, I have explored previously, in the last hearing especially, with prior counsel and with counsel for the government the status of discovery. And my understanding is that both Mr. Harris and Ms. Duarte are prepared to, if they have not already done so, assist in the transition.

So that in the event that the finding of the authorized examiner is that Mr. Sutcliffe is competent to proceed to trial we can set a date for trial at the next hearing or at least the

first available opportunity consistent with your schedule, the schedule of the other parties and to assist in making sure that the date is not a day longer than would otherwise would be necessary.

I'm expecting you in the interim to review the discovery, take what other steps you in your own professional view think are appropriate to prepare in the eventuality that there is a trial in this case.

Any further questions, counsel?

MS. DUARTE: Yes, Your Honor. The court has set a date at the previous appearance of March 25, ten weeks out. Is that a status date or is that date --

THE COURT: For the time being we will consider it the trial date. But my expectation is that may not be either feasible or convenient to some or all of the lawyers in this case. I think that first we have to determine what the status and the pace of the competency exam is, what the outcome of the exam is. At the very least there will be a status conference before then.

Either side is welcome to submit a request for an earlier status conference or for written clarification about the schedule before that March date.

MR. NICOLEYSEN: Your Honor, the proposed order from the government leaves it to the discretion of MDC to decide whether the evaluation is done by them or some other facility.

I would respectfully ask the court to consider designating a facility. For example, if it were Rochester, Minnesota which in my experience is very well suited for these evaluations, I would vote for that. I think it's a superior environment, provides the district court with much better guidance.

THE COURT: What about bringing in a competent, experienced, respected physician or psychologist to conduct the examination here in Los Angeles at the facility the MDC but not someone who has been designated by the MDC.

MR. NICOLAYSEN: I have done that too over the years on the CJA panel. For example, Dr. Saul Fehrstein comes to mind. The reason I'm not recommending that now, and again I just speak from experience is this. There tends to be an evaluation made on a one time interview basis as opposed to a continuum of interviews which a facility is better suited to do.

Secondly, I think Mr. Sutcliffe might be an actual candidate for some type of profile testing. I notice for example, Your Honor expanded the options, not just psychiatric by psychological. Possibly the court had in mind a battery of psychological tests.

THE DEFENDANT: I object. I object.

THE COURT: Sit down and be quiet.

THE DEFENDANT: No, I will not be quiet.

THE COURT: You may continue.

THE DEFENDANT: I will not be quiet. I will not be

quiet.

THE COURT: If you disregard my orders I will order that you be removed.

THE DEFENDANT: I want it on the record that this man is not speaking for me. You ordered originally a competency hearing only. Now you're adding additional psychological and additional conditions based on your evaluation. That man sat up there and said well, he might have a screw loose. He might be a child molester, too. Where is the proof? Where is evidence I want to hear?

THE COURT: I deny your motion. Be quiet.

THE DEFENDANT: I object to this whole proceeding. It's a farce.

THE COURT: Your objection is noted.

THE DEFENDANT: It's a kangaroo court.

THE COURT: Your objection is noted and denied. Please continue, Mr. Nicolaysen.

MR. NICOLAYSEN: Thank you, Your Honor. My experience has taught me that it's not as meaningful in terms of clinical feedback to the district court to have the outside forensic psychiatrist come in and do a single session. I would respectfully ask Your Honor to consider having Mr. Sutcliffe have the benefit of a better clinical environment than can-do testing.

I think it's much more advantageous to him since we're

trying to give this our best shot. We want to get the best feedback possible.

MDC staff does not typically have experienced psychologists other than Dr. Ralph Healy who's been there for many years. Whereas, Rochester is a formal clinical environment. I have seen that to be a better resource. So I just offer that to Your Honor as an option at this stage.

THE COURT: Okay. What I think would be the prudent thing to do would be to permit you to make any related or additional requests. For example, I don't know enough about Rochester or about alternatives to Rochester, including alternatives outside of Los Angeles and outside the MDC.

Do you wish to respond initially to Mr. Nicolaysen's proposal?

MS. DUARTE: Yes, Your Honor. I actually think that's probably a very good idea. The reason I didn't propose it is there is a provision in the rule which indicates that if at all possible the defendant should remain as close to home, as close to where he is being detained as possible. I couldn't think of another word to use.

And so because of that provision, unless there's some kind of a waiver I thought it was probably safer to ask for MDC first and a federal medical facility second. But I think that the Minnesota and also SCI Springfield are excellent facilities where based on my limited experience with them --

THE COURT: What is the precise name of the facility in Rochester, Minnesota?

MS. DUARTE: It's just escaping my mind right now. Mr. Nicolaysen may know.

MR. NICOLAYSEN: The initials are FMC for Federal Medical Center Rochester. I will be happy to pull that off the web site.

THE COURT: I can find it myself.

MR. NICOLAYSEN: Your Honor, it's wwwbop.gov as the web address and they have all the facilities listed. There's a link on the home page to the facilities.

THE COURT: Okay. I will consider Mr. Nicolaysen's oral request. And if I conclude that the initial proposal referring to MDC and decisions or alternatives being considered and chosen from by MDC is not well advised I will substitute an appropriate facility.

It's highly likely to be the one in Minnesota. I think it's important for me to understand more what that entails, so I will look into it.

Either way, this order will go out today. I will make that determination today.

Anything further, counsel?

MR. NICOLAYSEN: Not at this time, Your Honor.

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

THE COURT: We're adjourned.

(PROCEEDINGS ADJOURNED)

C E R T I F I C A T E

I HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT OF THE ABOVE-ENTITLED PROCEEDINGS, PAGES 1-21. DATED DECEMBER 10, 2004; LOS ANGELES, CALIFORNIA.

Lynne Smith

LYNNE SMITH
OFFICIAL COURT REPORTER

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.	)	CR-02-350 AHM
STEVEN WILLIAM SUTCLIFFE,	)	(UNDER SEAL)
DEFENDANT.	)	
_____	)	

STATUS CONFERENCE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FRIDAY, MARCH 14, 2003

LOS ANGELES, CALIFORNIA

HOPE I. GOLDSMITH, RPR
FEDERAL OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURTHOUSE
312 NORTH SPRING STREET, ROOM 442
LOS ANGELES, CALIFORNIA 90012
PH: (213)625-1607
FX: (213)625-0056
HOPE_GOLDSMITH@HOTMAIL.COM

APPEARANCES OF COUNSEL:

ON BEHALF OF PLAINTIFF, UNITED STATES OF AMERICA:

ELENA DUARTE, AUSA
U.S. DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY
CENTRAL DISTRICT OF CALIFORNIA
UNITED STATES COURTHOUSE
312 N. SPRING STREET
LOS ANGELES, CA 90012
PH: (213)894-8611
FX: (213)894-3713

ON BEHALF OF DEFENDANT, STEVEN WILLIAM SUTCLIFFE:

GREGORY NICOLAYSEN, ESQ.
16000 VENTURA BOULEVARD
SUITE 500
ENCINO, CA 91436

INDEX

DIRECT EXAMINATION BY MR. NICOLAYSEN:	PG. 12, LN. 04
CROSS-EXAMINATION BY MS. DUARTE:	PG. 49, LN. 03

LOS ANGELES, CALIFORNIA, FRIDAY, MARCH 14, 2003

- - -

(COURT IN SESSION AT 11:00 A.M.)

THE CLERK: CALLING ITEM NUMBER 1, CR-02-350, UNITED STATES VERSUS STEVEN WILLIAM SUTCLIFFE.

COUNSEL, STATE YOUR APPEARANCES, PLEASE.

MS. DUARTE: GOOD MORNING, YOUR HONOR. ELENA DUARTE FOR THE UNITED STATES.

THE COURT: GOOD MORNING.

MR. NICOLAYSEN: GOOD MORNING, YOUR HONOR. GREG NICOLAYSEN FOR THE DEFENDANT, WHO IS PRESENT.

THE COURT: GOOD MORNING TO BOTH OF YOU. ALL RIGHT. EVERYONE MAY BE SEATED.

THE DEFENDANT: YOUR HONOR, MAY I STAY OUTSIDE OF THE BAR. COURT APPOINTED COUNSEL HAS HAD ME FORCEFULLY REMOVED OUTSIDE OF THE BAR. I WILL STAY OUTSIDE OF THE BAR.

THE COURT: YOU CAN STAY THERE, MR. SUTCLIFFE.

THE DEFENDANT: THANK YOU, YOUR HONOR.

THE COURT: WE'RE HERE FOR A NUMBER OF REASONS, AND I THINK THE SEQUENCE IN WHICH WE SHOULD TAKE THEM FIRST IS THE FOLLOW UP.

THIS WAS CALLED AS A STATUS CONFERENCE, BUT WHAT TRIGGERED IT WAS THE RECEIPT OF DR. RUSHTON BACKER'S REPORT, AND SO, I WANT TO DEAL WITH THE ISSUE OF MR. SUTCLIFFE'S COMPETENCE TO PROCEED TO TRIAL FIRST.

THERE IS ALSO A NEED TO CONFIRM THE ARRANGEMENTS FOR THE TRIAL, BECAUSE I THINK IT'S LIKELY TO BE, THAT I WILL ADOPT THE FINDINGS OF DR. BACKER, THAT MR. SUTCLIFFE IS COMPETENT TO PROCEED.

AND THE THIRD ITEM, ACTUALLY, I CAN TAKE CARE OF NOW. I'M NOT SURE IF COUNSEL KNOW THIS, BUT IT WAS HANDED TO ME TODAY, A PETITION FOR WRIT OF HABEAS CORPUS THAT WAS FILED, I GUESS, YESTERDAY, BY MR. SUTCLIFFE DIRECTLY, AND ASSIGNED TO ME AS IT NEEDED TO BE. NEITHER SIDE --

THE DEFENDANT: I WOULD MOVE THAT THE JUDGE RECUSE HIMSELF FROM RULING ON THAT HABEAS CORPUS.

THE COURT: OKAY. WELL, I DENY THAT MOTION TO RECUSE MYSELF, AND I DENY THE MOTION FOR HABEAS CORPUS, AND NO FURTHER BRIEFING IS NECESSARY. THE PETITION IS FACTUALLY DEFECTIVE ON ITS FACE.

THE DEFENDANT: I OBJECT TO THAT. — later upheld - admitted unlawful ruling

THE COURT: NOW, TURNING TO THE FIRST QUESTION RELATING TO THE ISSUE OF COMPETENCE; DID YOU RECEIVE, DR. BACKER'S REPORT, MS. DUARTE?

MS. DUARTE: I DID, YOUR HONOR.

THE COURT: DID YOU RECEIVE IT?

MR. NICOLAYSEN: I DID, YOUR HONOR. THANK YOU.

THE DEFENDANT: YOUR HONOR, I MOVE AT THIS POINT, TO REMOVE THIS MAN AS MY COUNSEL, AS HE NO LONGER SPEAKS FOR ME.

THE COURT: ALL RIGHT. SIT DOWN, AND I'LL DEAL WITH

THAT MOTION LATER.

THE DEFENDANT: EXCUSE ME, YOUR HONOR.

THE COURT: YESTERDAY I CONTACTED DR. BACKER, AND HE'S PRESENT IN COURT.

WHICH ONE OF YOU IS DR. BACKER?

DR BACKER: (NO VERBAL RESPONSE.)

THE COURT: ALL RIGHT. HE HAS SIGNALED THAT HE IS PRESENT HERE IN COURT. AND WITH YOU IS SOMEONE ELSE FROM YOUR UNIT?

DR. BACKER: (NO VERBAL RESPONSE.)

THE COURT: WHAT'S YOUR NAME, SIR?

DR. IHLE: DR. IHLE, YOUR HONOR. CHIEF PSYCHOLOGIST UP AT METROPOLITAN --

THE COURT: ALL RIGHT. THANK YOU FOR COMING AS WELL. DR. BACKER, I REQUESTED IN A VERY BRIEF CONVERSATION WITH YOU YESTERDAY, THAT YOU PROVIDE A COPY OF YOUR REPORT TO MR. SUTCLIFFE YESTERDAY; DID YOU DO SO?

DR. BACKER: I DID, SIR.

THE DEFENDANT: OBJECTION.

THE COURT: ALL RIGHT.

THE DEFENDANT: YOUR HONOR, IF THIS MAN IS GOING TO BE TESTIFYING, I DEMAND MY RIGHT UNDER THE CONSTITUTION CLAUSE THAT HE BE SWORN IN, UNDER OATH, BEFORE ANYTHING IS ENTERED INTO THE RECORD.

THE COURT: IF HE TESTIFIES, THAT MOTION WILL BE

GRANTED.

THE DEFENDANT: I ALSO WANT TO ADD TO THE RECORD, THAT PRIOR TO THIS JUDGE ENTERING INTO THE COURTROOM, HIS CLERK APPROACHED THE JUDGE'S COURT APPOINTED COUNSEL AND THEY HAD AN EX PARTE COMMUNICATION OUTSIDE MY PRESENCE, WHICH WAS WHISPERED. THE COUNSEL CONFIRMED TO ME THAT THE CLERK HAD ASKED HIM CERTAIN QUESTIONS REGARDING CONVERSATIONS THAT HE AND I HAD DOWNSTAIRS REGARDING THIS CASE; FURTHERMORE, THAT AFTER DR. BACKER ENTERED INTO THE COURTROOM AND THE U.S. ATTORNEY ENTERED INTO THE COURTROOM, ALL THREE PARTIES THEN EXITED INTO THE HALLWAY AND HAD ANOTHER LITTLE COMMUNICATION, EX PARTE.

I ALSO WANT TO MAKE IT ON THE RECORD, THAT I BELIEVE THAT PREVIOUS COUNSEL ALSO HAD EX PARTE COMMUNICATIONS WITH THIS COURTROOM, AND I INTEND TO PROVE THAT.

THE COURT: OKAY. NOW, MS. DUARTE, DO YOU THINK THERE'S ANY NEED FOR ANY FURTHER TESTIMONY FOR PURPOSES OF MAKING A RULING ON THE ISSUE OF COMPETENCE?

MS. DUARTE: YOUR HONOR, FROM WHAT I'VE READ IN THE REPORT, AND FROM WHAT I KNOW ABOUT THE CASE, I DO NOT FEEL THE NEED.

THE COURT: OKAY. MR. NICOLAYSEN, DO YOU?

THE DEFENDANT: OBJECTION. HE DOES NOT SPEAK FOR THE ACCUSED.

THE COURT: YOUR MOTION --

THE DEFENDANT: HE DOES NOT SPEAK FOR THE ACCUSED.

THE COURT: BE QUIET.

THE DEFENDANT: HE HAS STIPULATED TO THAT. HE HAS STIPULATED TO THAT.

THE COURT: MR. SUTCLIFFE, SIT DOWN FOR ONE MINUTE.

THE DEFENDANT: HE DOES NOT SPEAK FOR THE ACCUSED. HE IS DISMISSED WITH EXTREME PREJUDICE.

THE U.S. MARSHALL: IS IT OKAY IF HE'S REMOVED?

THE COURT: YES. ALL RIGHT. I'M GOING TO MAKE A FINDING AND A STATEMENT FIRST.

THE DEFENDANT: YOUR HONOR?

THE COURT: MR. SUTCLIFFE, IF YOU HAVE ONE MORE OUTBURST, YOU WILL BE REMOVED FROM THIS COURTROOM.

THE DEFENDANT: DEFINE OUTBURST. DEFINE OUTBURST. I'M TRYING TO MAKE A RECORD HERE.

THE COURT: IF YOU SPEAK --

THE DEFENDANT: IF I RAISE MY VOICE, I'M SORRY. THAT'S JUST THE WAY I MAKE MY RECORD.

THE COURT: IF YOU SPEAK BEFORE YOU'RE CALLED UPON -- AND I'LL GIVE YOU A CHANCE TO SPEAK -- AND IF YOU INTERRUPT ANYBODY ELSE, THAT IS AN OUTBURST. ONE MORE OUTBURST, ONE MORE ATTEMPT TO CONTROL THE PROCEEDING TODAY, IN WHICH YOUR RIGHTS WILL BE FULLY RESPECTED, WITHOUT PERMISSION TO DO SO, AND IN A WAY THAT INTERRUPTS THE PROCEEDINGS OR ANY OTHER PERSON WHO'S SPEAKING IS AN OUTBURST. ONE MORE OUTBURST AND YOU WILL BE REMOVED.

THE DEFENDANT: MAY I RESPOND?

THE COURT: YOU MAY RESPOND NOW.

THE DEFENDANT: IF I UNDERSTAND YOUR HONOR CORRECTLY, WHAT YOU'VE JUST EXPLAINED TO ME WAS THAT I CAN MAKE A FULL RECORD. I CAN SPEAK. NOBODY WILL INTERRUPT ME, AND SO LONG AS I DON'T INTERRUPT ANYBODY ELSE. AND I DIDN'T QUITE GET THE PART ABOUT PERMISSION.

THE COURT: I'M NOT GOING TO, MR. SUTCLIFFE, REITERATE WHAT I SAID OR EXPLAIN IT. THE LANGUAGE IS CLEAR. YOU PROCEED UNDER THOSE INSTRUCTIONS, AND IF YOU DON'T, YOU WILL BE REMOVED; AND WE WILL CONTINUE THE HEARING, AND I WILL MAKE CERTAIN FINDINGS.

NOW, UNTIL AND UNLESS I RULE UPON YOUR MOTION, WHICH I INTEND TO DO AT SOME POINT IN THIS MORNING'S PROCEEDINGS, BUT AFTER FURTHER INFORMATION.

MR. NICOLAYSEN IS YOUR LAWYER. I AM GOING TO BE CALLING UPON MR. NICOLAYSEN. I'M GOING TO BE HEARING FROM MR. NICOLAYSEN. YOU WILL SIT THERE QUIETLY WHILE HE ADDRESSES ME. I WILL GIVE YOU AN OPPORTUNITY TO ADD TO THE RECORD AND RESPOND TO WHAT HE SAYS, BUT YOU WILL NOT PREVENT HIM. AND IF YOU TRY TO PREVENT HIM, IT WILL BE CAUSE FOR EXPULSION FOR RESPONDING TO MY QUESTIONS AND FROM FUNCTIONING AS YOUR LAWYER, UNTIL AND UNLESS I RELIEVE HIM OF HIS DUTIES; DO YOU UNDERSTAND THAT?

THE DEFENDANT: YES. BUT I WOULD JUST LIKE TO MAKE IT ON THE RECORD, THAT IF HE'S GOING TO BE A WITNESS AGAINST ME,

OR IF HE'S GOING TO TALK ABOUT ANY COMMUNICATIONS BETWEEN HIM AND I AND ATTORNEYS -- I ALSO WANTED TO MAKE ON THE RECORD, SPEAKING OF WHICH, THAT I BELIEVE THIS COURT HAS VIOLATED ITS OWN COURT ORDER AND HAS RELEASED TO THE U.S. ATTORNEY, CONFIDENTIAL, PRIVATE ATTORNEY/CLIENT COMMUNICATIONS OUTSIDE OF THE SEAL, ITS OWN SEALED ORDER.

AND THAT IF THIS COURT APPOINTED COUNSEL, MR. NICOLAYSEN IS GOING TO SPEAK IN ANY WAY, SHAPE, OR FORM ABOUT ANY COMMUNICATIONS, I WILL NOT ALLOW -- I DO NOT ALLOW THAT; AND IF HE'S GOING TO SAY ANYTHING AGAINST ME, I DEMAND THAT HE BE SWORN IN, UNDER OATH, PUT ON THE STAND, AND I HAVE THE RIGHT TO CONFRONT HIM, AND CROSS-EXAMINE HIM TO ANYTHING HE SAYS, WHICH CAN BE USED AGAINST ME IN ANY WAY, SHAPE, OR FORM, AS TO EITHER MY COMPETENCY OR ANY COMMUNICATIONS WE'VE HAD BETWEEN OURSELVES.

THANK YOU VERY MUCH FOR ALLOWING ME TO SPEAK.

THE COURT: ALL RIGHT. NOW, MR. SUTCLIFFE, THERE'S A DIFFERENCE BETWEEN AN ATTORNEY ADDRESSING A JUDGE OR OTHER PERSON ADDRESSING A JUDGE AND TESTIMONY. IF AND WHEN THERE'S TESTIMONY, THERE WILL BE SWORN TESTIMONY.

YOU NEED TO UNDERSTAND THE DIFFERENCE, BUT I'M NOT GOING TO HIGHLIGHT IT ANY FURTHER.

NOW, MR. NICOLAYSEN, RESPOND, PLEASE, TO MY QUESTION, IF YOU CAN REMEMBER WHAT IT WAS.

MR. NICOLAYSEN: I THINK I DO, YOUR HONOR. THANK YOU.

I WOULD APPRECIATE THE OPPORTUNITY TO EXAMINE DR. BACKER SO THAT WE FLUSH OUT SOME OF THE ASPECT OF HIS REPORT, IF THE COURT PLEASE.

I'M NOT PREPARED TO SIMPLY ACCEPT, AT FACE VALUE, THE CONCLUSION IN THE REPORT, THAT MY CLIENT IS COMPETENT.

THE COURT: ALL RIGHT. DR. BACKER, WILL YOU APPROACH, TO PLEASE BE SWORN.

(WITNESS SWORN.)

THE CLERK: PLEASE BE SEATED.

MR. NICOLAYSEN: YOUR HONOR, MAY I ASK THE COURT TO DIRECT THE WITNESS TO BRING A COPY OF HIS REPORT TO THE STAND.

THE COURT: DO YOU HAVE ONE WITH YOU?

DR. BACKER: I HAVE ONE.

THE DEFENDANT: YOUR HONOR, I WOULD LIKE TO MAKE ON THE RECORD THAT 4247(B), THAT THIS REPORT AND ALL TESTIMONY SHOULD BE STRICKEN AND NOT BE ALLOWED INTO THE RECORD AS IT SURPASSES WHAT THE LAW AUTHORIZES; AND IT WOULD BE BEYOND THE 30-DAY SCOPE; THEREFORE, IT'S INADMISSIBLE AND SHOULD BE SUPPRESSED.

THE COURT: OKAY. THAT MOTION IS DENIED.

THE CLERK: PLEASE STATE YOUR FULL NAME FOR THE RECORD, AND SPELL YOUR LAST NAME.

DR. BACKER: IT IS RUSHTON A. BACKER. B A C K E R.

THE COURT: YOU MAY PROCEED, MR. NICOLAYSEN.

MR. NICOLAYSEN: YOUR HONOR, THANK YOU.

BEING FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. NICOLAYSEN:

Q. GOOD MORNING, DR. BACKER.

A. GOOD MORNING.

Q. DR. BACKER, YOU AND I HAVE SPOKEN PRIOR TO TODAY'S PROCEEDINGS, HAVE WE NOT?

A. YES, WE HAVE.

Q. WE SPOKE ON THE TELEPHONE FOR, I BELIEVE, AN HOUR TO AN HOUR AND A HALF AT ONE POINT, DIDN'T WE?

A. I DON'T REMEMBER IT BEING THAT LONG, BUT IT WAS A LONG CONVERSATION, YES.

Q. AND WE SPOKE BRIEFLY OUT IN THE HALLWAY BEFORE TODAY'S PROCEEDINGS, CORRECT?

A. YES, WE DID.

Q. ALL RIGHT. AND, DR. BACKER, OUR DISCUSSION OVER THE PHONE WAS FACTORED INTO YOUR --

THE DEFENDANT: THEY'RE DOING THEIR OWN SHOW. LET ME OUT OF HERE. YOU'RE NOT LISTENING TO ME.

THE COURT: ALL RIGHT. REMOVE MR. SUTCLIFFE FROM THE COURTROOM. BRING HIM DOWN AND HOLD HIM IN THE CELL.

MR. NICOLAYSEN: YOUR HONOR, MAY I HAVE THE COURT'S PERMISSION TO HAVE HIM KEPT IN THE WITNESS ROOM, SO HE'S AVAILABLE TO THE COURT?

THE COURT: YES. PLEASE KEEP HIM ACROSS THE HALLWAY IN

THE WITNESS ROOM. MAKE SURE NO ONE ELSE IS IN THERE.

YOU MAY PROCEED, MR. NICOLAYSEN.

MR. NICOLAYSEN: THANK YOU, YOUR HONOR.

Q. DR. BACKER, OUR DISCUSSIONS -- OUR DISCUSSION OVER THE PHONE WAS ONE OF THE SOURCES THAT YOU DREW FROM IN PUTTING THIS REPORT TOGETHER AND IN REACHING THE CONCLUSION THAT YOU DID, WAS IT NOT?

A. PARTIALLY IT WAS.

Q. YES. AND AS YOU REFLECTED IN THE REPORT, YOU'VE OBSERVED TWO FACETS TO MR. SUTCLIFFE. ONE FACET BEING, THAT HE HAS THE ABILITY, IN FACT, EVEN DEMONSTRATED TO YOU, A RATIONAL, COHERENT, ATTENTIVE ABILITY TO DISCUSS, BOTH HIMSELF AND THE ISSUES; AND ANOTHER FACET, WHICH YOU CHARACTERIZE AS INDICATIVE OF A PARANOID CONDITION; IS THAT FAIR?

A. I THINK --

THE COURT: ANOTHER FACET OF WHAT, MR. NICOLAYSEN? I DIDN'T FOLLOW YOU.

Q. ANOTHER FACET OF HIS PERSONALITY, WHICH YOU CHARACTERIZE IN THE REPORT AS BEING INDICATIVE OF A PERSONALITY DISORDER, OR I SHOULD SAY, A PARANOID CONDITION?

A. YEAH. IF I CAN ELABORATE ON THAT, WHAT I CONCLUDED WAS, I FELT, BASED ON ALL THE INFORMATION, THAT HE MET THE CRITERIA FOR A PARANOID PERSONALITY DISORDER, AND THAT HAS CERTAIN FEATURES, WHICH I THINK HE DEMONSTRATES -- HE DEMONSTRATED MOST OF THE TIMES WHEN I WAS INTERACTING WITH HIM.

BUT HE ALSO -- OUR INTERACTIONS WERE NOT CONFRONTATIONAL; AND AT THOSE TIMES, HE COULD BE VERY RATIONAL. HE COULD DESCRIBE WHAT HIS INTENTION WAS AS FAR AS HIS APPROACH. HOW HE WAS GOING TO APPROACH WORKING WITH YOU. HOW HE WANTED TO APPROACH WORKING WITH THE COURT.

AND AGAIN, I'M NOT AN ATTORNEY, SO I'M NOT ABLE TO COMMENT ON HOW SOUND HIS LEGAL ARGUMENTS WERE, BUT HE SEEMED TO, AT LEAST, BE ABLE TO PRESENT A PRETTY RATIONAL APPROACH.

Q. WOULD YOU AGREE, THAT ONE OF THE THINGS WE CAN GLEAN FROM YOUR REPORT IS THAT A PARANOID PERSONALITY DISORDER CAN EXIST COEXTENSIVELY; THAT IS, TOGETHER WITH A RATIONAL AND COHERENT AND ARTICULATE PERSONALITY AS WELL, FAIR ENOUGH?

A. AGAIN, I THINK A BETTER WAY TO PUT IS THAT A -- IF A SOMEBODY HAS A PERSONALITY DISORDER, IT IS THERE ALL THE TIME. IT'S THE PERSON'S MAKEUP. SOMETIMES IT INTERFERES WITH HOW THEY'RE ABLE TO HANDLE CERTAIN TASKS, AND SOMETIMES IT DOESN'T.

SO IF, AGAIN, AT TIMES WHEN WE INTERACTED, IF CERTAIN THINGS WEREN'T TRIGGERED FOR HIM, HE COULD BE QUITE RATIONAL AND UNDERSTANDING AND COOPERATIVE.

Q. YOU USED THE WORD, TRIGGER. THE TERM, TRIGGER, IN FACT, IS AN EXCEPTED TERM IN THE PSYCHOLOGY FIELD IN DESCRIBING THE TYPES OF EVENTS OR CIRCUMSTANCES, POSSIBLY REMARKS, THAT MIGHT CAUSE A MANIFESTATION OF A CERTAIN DISORDER SUCH AS A PARANOID DISORDER, TRUE?

A. WELL, FIRST OF ALL, YOU KEEP CALLING IT A PARANOID

DISORDER, AND THAT TYPICALLY REFERS TO A PARANOID DELUSIONAL DISORDER, WHICH I DID NOT FIND.

SO A PARANOID PERSON -- AND, UNFORTUNATELY, THE TERMINOLOGY GETS CONFUSING. BUT LIKE I SAID, THE PARANOID PERSONALITY DISORDER IS THERE ALL THE TIME. THOSE FEATURES ARE THERE ALL THE TIME. IT JUST DEPENDS ON WHETHER THE SUBJECT MATTER, I GUESS, ELICITS A CERTAIN RESPONSE FROM THE PERSON.

Q. IF YOU WOULD, PLEASE TURN --

THE COURT: LET ME INTERRUPT FOR A SECOND, MR. NICOLAYSEN.

MR. NICOLAYSEN: YES.

THE COURT: I THINK FOR PURPOSES OF MAKING SURE WE HAVE AN ADEQUATE RECORD -- BECAUSE I THINK, IN THIS CASE ESPECIALLY, WE WILL NEED ONE.

I PROPOSE TO IDENTIFY AND MARK AS COURT'S EXHIBIT 1 TO BE FILED, BUT UNDER SEAL, DR. BACKER'S REPORT. SO IT WILL BE PART OF THE PERMANENT FILE IN THIS CASE. ANY OBJECTION?

MR. NICOLAYSEN: NO OBJECTION, YOUR HONOR. THANK YOU.

THE COURT: ANY OBJECTION, MS. DUARTE?

MS. DUARTE: NO OBJECTION.

(COURT'S EXHIBIT 1 WAS MARKED FOR IDENTIFICATION.)

THE COURT: ALL RIGHT. THAT WILL BE DONE AFTER THE CONCLUSION OF THE HEARING.

MR. NICOLAYSEN: THANK YOU.

Q. DR. BACKER, IF YOU WOULD, PLEASE, TURN TO YOUR REPORT,

WHICH IS EXHIBIT 1 IN EVIDENCE FOR PURPOSES OF TODAY'S PROCEEDINGS, AND PAGE 13 OF THAT REPORT, AND TELL US, PLEASE, WHEN YOU'RE THERE.

A. I'M THERE.

Q. ALL RIGHT. IN THE MIDDLE OF PAGE 13, WE SEE THE THREE ACCESS DELINEATIONS. AND THIS IS FROM THE DSM-4 MANUAL, IS IT NOT?

A. CORRECT.

Q. AND ACCESS TWO, YOU REFERRED TO IN THIS CASE, BY THE TERM, PARANOID PERSONALITY DISORDER; DO YOU SEE WHERE I'M REFERRING?

A. YES, I DO.

Q. IS THAT A DIAGNOSTIC CONCLUSION THAT YOU REACHED IN REGARD TO MR. SUTCLIFFE?

A. YES, IT IS.

Q. SO AS FAR AS YOU'RE CONCERNED, BASED ON YOUR ANALYSIS AND OBSERVATIONS, YOU'RE SATISFIED THAT HE HAS, AS REFLECTED IN ACCESS TWO, A PARANOID PERSONALITY DISORDER; ARE YOU, SIR?

A. YES.

Q. NOW, YOU SPOKE OF TRIGGERS. WOULD IT BE FAIR TO SAY THAT THERE ARE CERTAIN CIRCUMSTANCES OR EVENTS OR, PERHAPS, EVEN REMARKS THAT PEOPLE CAN MAKE THAT MIGHT TRIGGER THE PARANOID PERSONALITY DISORDER?

A. I THINK IF YOU -- LET ME SEE IF I CAN EXPLAIN THIS. IF YOU READ A LITTLE FURTHER IN ON PAGE 13 -- AND ACTUALLY, I

BELIEVE IT'S IN PAGE 14.

Q. THE BOTTOM OF PAGE 14. LAST PARAGRAPH ON THE TOP OF 14, BY ANY CHANCE?

A. YES. AND, ALSO ACTUALLY, THE SECOND PARAGRAPH ON 14.

Q. HMM-HMM.

A. I TRY TO DESCRIBE WHAT A PARANOID PERSONALITY DISORDER IS LIKE; AND THEY TYPICALLY CAN BE PRETTY ABRASIVE. THEY CAN BE --

THE COURT: DR. BACKER, I THINK --

THE WITNESS: YES.

THE COURT: -- WHILE YOUR REPORT IS VERY HELPFUL, AND I THINK GIFTED WITH GOOD PLAIN LANGUAGE, I THINK I CAN UNDERSTAND WHAT IS IN THE REPORT, AT LEAST IN TERMS OF THE LANGUAGE, SO I DON'T THINK YOU NEED TO REFER TO THAT AGAIN.

THE SIMPLE QUESTION IS, WHAT ARE THE TRIGGERS? ARE THERE SUCH A THING AS TRIGGERS WHICH WOULD CAUSE SOMEONE WITH A PARANOID PERSONALITY DISORDER TO ACT OUT? AND IF SO, WHAT ARE SOME OF THOSE TRIGGERS; IS THAT WHAT YOU'RE TRYING TO ESTABLISH?

MR. NICOLAYSEN: THAT IS IT, YOUR HONOR. THANK YOU.

A. AGAIN, BECAUSE I THINK A PERSONALITY IS SO PERVASIVE. I DON'T THINK IT'S NECESSARILY A PARTICULAR ITEM. IT'S IF SOMETHING CLASHES WITH THEIR PERSONALITY.

SO MR. SUTCLIFFE IS PRETTY OMNIPOTENT AT TIMES. HE --

THE COURT: HE THINKS HE'S OMNIPOTENT.

THE WITNESS: YES. IN HIS MIND, HE'S OMNIPOTENT.

THE COURT: I DON'T KNOW OF ANYONE WHO IS.

A. AND SO, IF HE'S NOT TREATED IN A WAY THAT HE WANTS TO BE TREATED, HE GETS UPSET. AND AS I TRIED TO MENTION IN THE REPORT, I THINK THAT'S NOT JUST IN THESE PROCEEDINGS. I THINK THAT'S HOW HE IS OUT IN THE WORLD AT ALL TIMES.

SO I THINK, IF HE PERCEIVES THAT PEOPLE AREN'T LISTENING TO HIM, AREN'T DOING WHAT HE THINKS IS CORRECT, THEN HE DOES GET UPSET.

Q. ARE YOU IN A POSITION TO OFFER ANY GUIDANCE TO THIS COURT AS TO WHETHER OR -- TO WHAT EXTENT THE PARANOID PERSONALITY DISORDER IN MR. SUTCLIFFE'S CASE WOULD INTERFERE WITH AN ATTORNEY/CLIENT RELATIONSHIP?

A. (PAUSE.) AS I STATED IN THE REPORT, I THINK HE HAS THE CAPACITY; OR I FELT, BASED ON MY INTERACTIONS WITH HIM, THAT HE HAD THE CAPACITY TO WORK WITH AN ATTORNEY. I FELT THAT THE ATTORNEY, AND PROBABLY EVERYBODY INVOLVED, WOULD HAVE TO TAKE INTO ACCOUNT THE DESCRIPTIONS OF HIS PERSONALITY AND HOW HE TENDS TO REACT.

I GUESS THE ULTIMATE PROOF WOULD BE -- WELL, AND ONE OTHER THING I'LL SAY IS, I DID SPEND A GOOD DEAL OF TIME WITH HIM TALKING ABOUT APPROPRIATE BEHAVIOR.

THE COURT: LET'S HAVE THE RECORD REFLECT HOW MUCH TIME THAT GOOD DEAL WAS, AND I DON'T THINK IT'S CLEAR IN THE WRITTEN REPORT.

A. I DIDN'T KEEP EXACT TIMES, BUT I WOULD ESTIMATE BETWEEN TWELVE AND FIFTEEN HOURS. WE MET TOGETHER ON ABOUT FIVE OCCASIONS FOR ABOUT THREE HOURS EACH TIME, LENGTHY SESSIONS.

AND AGAIN, IN MY INTERACTIONS WITH HIM, HE DEMONSTRATED THE CAPACITY TO BE VERY RELATIVELY CALM. WHEN HE DID GET UPSET, HE COULD CALM HIMSELF DOWN, AND HE, AT LEAST, ACKNOWLEDGED APPROPRIATE COURTROOM BEHAVIOR. I THINK THE -- PROBABLY THE ULTIMATE PROOF IS HOW HE IS ABLE TO INTERACT WITH YOU NOW.

AND AGAIN, IF EVERYBODY TAKES INTO ACCOUNT THE FACT THAT THIS MAN IS GOING TO REACT IN CERTAIN WAYS, NOT NECESSARILY THE WAY WE SAW JUST NOW, BUT IN LET'S SAY, LESS -- IN A MORE COOPERATIVE WAY THAN WE SAW TODAY. I WOULD THINK HE'D BE ABLE TO WORK WITH AN ATTORNEY.

THE COURT: BUT WHAT IF HE ENCOUNTERED SOMETHING IN THE COURSE OF ANY STAGE OF THE TRIAL, SUCH AS JURY SELECTION, AND ANYTHING ELSE THAT HE THOUGHT WAS UNACCEPTABLE AS HE PERCEIVED THINGS THE WAY THINGS SHOULD BE, AND HE REACTED IN A FASHION THAT YOU'VE JUST OBSERVED, WHICH IS TO INTERRUPT WHOEVER IS SPEAKING; TO RAISE HIS VOICE; TO, IN OBVIOUS WAYS, THAT I HAVEN'T RESPONDED TO THIS MORNING, DISPLAY A FORM OF CONTEMPT IN THE LEGAL SENSE OF THE TERM, BY NOT ENGAGING IN CUSTOMARY AND APPROPRIATE BEHAVIOR, SUCH AS RISING, SUCH AS SITTING WHERE HE'S SUPPOSED TO. AND, IN PARTICULAR, IF HE ENGAGES IN THAT BEHAVIOR BY LASHING OUT AT ANYONE, WHO IS, AT THAT POINT,

FUNCTIONING, PROPERLY FUNCTIONING, ESPECIALLY AS HIS LAWYER, HOW WOULD THAT AFFECT YOUR VIEW AS TO HIS COMPETENCE TO ASSIST COUNSEL?

THE WITNESS: I THINK BASED ON WHAT I SAW TODAY, I'M MORE CONCERNED ABOUT HIS ABILITY TO BE -- TO COOPERATE WITH HIS COUNSEL. AND WHAT I MEAN BY THAT IS, BASED ON THE INFORMATION I HAD, I FEEL PRETTY COMFORTABLE. ACTUARY, I FEEL PRETTY COMFORTABLE WITH THE DIAGNOSIS.

AND I FELT, GIVEN THE AMOUNT OF TIME WE SPOKE, AND THE TYPES OF THINGS WE DISCUSSED, ALMOST COACHING AT TIMES, THAT HE EXPRESSED A WILLINGNESS TO TRY TO COOPERATE.

I GUESS WHAT CONCERNS ME TODAY AND WHAT I JUST SAW, IS THAT IN SPITE OF THAT, HE STILL REACTED THE WAY THAT HE DID.

THE COURT: WELL, AGAIN, FOR PURPOSES, BOTH OF UNDERSTANDING YOU, DR. BACKER, AND HAVING A RECORD THAT IS USEFUL AND COMPLETE, PLEASE DESCRIBE WHAT YOU THINK IS THE WAY HE REACTED IN YOUR WORDS.

IN OTHER WORDS, TELL US, FOR THE RECORD, WHAT IT IS THAT YOU SAW THAT PLACES -- THAT CAUSED YOU TO HAVE GREATER CONCERN, AS YOU PUT IT.

A. HE WAS EXTREMELY ANGRY AND WAS UNWILLING TO LISTEN TO YOUR INSTRUCTIONS, IN SPITE OF THEM BEING PRESENTED IN A VERY PROFESSIONAL AND TOLERANT WAY.

SO I THINK HE SHOWED A -- MAYBE TO A DEGREE THAT WAS STRONGER THAT -- CERTAINLY, TO A DEGREE STRONGER THAN WHAT I

SAW WHEN I INTERACTED WITH HIM. TOTAL DISREGARD FOR THE AUTHORITY OF THE COURT AND FOR THE PROCESS.

THE COURT: AND YOU CAN CONTINUE, IF YOU LIKE.

MR. NICOLAYSEN: YES. THANK YOU, YOUR HONOR.

Q. LET ME DIRECT YOUR ATTENTION TO THE SETTING IN WHICH YOUR DISCUSSIONS WITH MR. SUTCLIFFE TOOK PLACE.

IT IS WITHIN THAT SETTING THAT YOU OBSERVED THE RATIONAL AND ARTICULATE AND ATTENTIVE PART OF MR. SUTCLIFFE THAT IS REFLECTED IN THE REPORT, TRUE?

A. CORRECT.

Q. ALL RIGHT. NOW, THAT SETTING WAS A MEETING ROOM ENVIRONMENT, WAS IT? TELL US. IF YOU WOULD DESCRIBE IT.

A. IT WAS AN OFFICE ON THE PSYCHOLOGY UNIT, OR THE PSYCHOLOGY DEPARTMENT AREA.

Q. CONFERENCE ROOM SETTING, GENERALLY?

A. JUST A REGULAR OFFICE.

Q. ALL RIGHT.

A. DESK. COUCH.

Q. AND WAS THE NATURE OF THE INTERACTION IN THE FORM OF AN INTERVIEW?

A. YES.

Q. AN INTERVIEW IS DIFFERENT FROM A THERAPY SESSION, PER SE, IS IT NOT?

A. CORRECT.

Q. YOU WERE NOT ENGAGING MR. SUTCLIFFE IN A THERAPY TYPE OF

DIALOGUE AS IF HE WAS A CLIENT AND YOU WERE A THERAPIST; AM I CORRECT?

A. I'D SAY, FOR THE MOST PART, THAT'S CORRECT. I THINK AT TIMES, I CLEARLY WASN'T CONDUCTING THERAPY WITH HIM. THERE WERE TIMES WHEN, I THINK, I USED THE WORD, COACHING, BUT I WAS TRYING TO, PERHAPS, REASON WITH HIM AS TO WHAT'S APPROPRIATE BEHAVIOR; SO I THINK THAT CALLS UPON SOME CLINICAL TYPES OF CLINICAL TONE, PERHAPS, BUT IT CLEARLY WASN'T THERAPY.

Q. ARE YOU, YOURSELF A LICENSED PSYCHOLOGIST?

A. YES, I AM.

Q. SO YOU'RE AUTHORIZED BY LAW TO CONDUCT THERAPY?

A. I AM.

Q. IN PROFESSIONAL BACKGROUND, HAVE YOU, IN FACT, CONDUCTED THERAPY WITH CLIENTS?

A. YES.

Q. SO YOU ARE FAMILIAR WITH THE TYPE OF DYNAMIC BETWEEN A THERAPIST AND A PATIENT?

THE COURT: DR. BACKER, AGAIN, I NEED TO INTERRUPT. COULD YOU JUST QUICKLY TELL US AS IF YOU WERE TESTIFYING AS AN EXPERT, IN LAYING OUT THE CORE ASPECTS OF YOUR CV. TELL US WHAT YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND IS.

THE WITNESS: CERTAINLY. I HAVE A PH.D. IN CLINICAL PSYCHOLOGY FROM THE CALIFORNIA SCHOOL OF PROFESSIONAL PSYCHOLOGY IN SAN DIEGO. I RECEIVED THAT IN 1986.

I'VE BEEN LICENSED BY THE STATE OF CALIFORNIA SINCE

1989. I'VE BEEN EMPLOYED BY THE BUREAU OF PRISONS SINCE 1987. I'M CURRENTLY THE CHIEF PSYCHOLOGIST AT THE METROPOLITAN CORRECTIONAL CENTER IN SAN DIEGO; AND I'VE BEEN IN THAT POSITION SINCE 1996.

THE COURT: IS IT CORRECT, THAT AT LEAST, SINCE 1987, YOUR ENTIRE PROFESSIONAL CAREER AS A FUNCTIONING PSYCHOLOGIST, AND AFTER '89 AS A LICENSED PSYCHOLOGIST, HAS BEEN WITH THE BUREAU OF PRISONS?

THE WITNESS: THAT IS CORRECT.

THE COURT: OKAY. SO YOU'VE NOT BEEN PRACTICING PRIVATELY?

THE WITNESS: NO, I HAVE NOT.

THE COURT: AND COULD YOU TELL US WHAT KIND OF RESPONSIBILITIES YOU HAVE DISCHARGED SINCE 1987 FOR THE BUREAU OF PRISONS.

THE WITNESS: CERTAINLY. THE FIRST YEAR AND A HALF, I WAS A STAFF PSYCHOLOGIST AT THE UNITED STATES PENITENTIARY IN LOMPOC, CALIFORNIA DOING GENERAL PSYCHOLOGY ASSESSMENTS, CRISIS INTERVENTION.

FROM 1989 THROUGH 1990, I WAS THE CHIEF PSYCHOLOGIST AT THE METROPOLITAN DETENTION CENTER HERE IN LOS ANGELES. AT THAT TIME, I DID SEVERAL FORENSIC EVALUATIONS FOR THE LOCAL COURTS HERE.

FROM 1990 THROUGH 1994, I WAS A PSYCHOLOGIST AT THE FEDERAL CORRECTIONAL INSTITUTION IN BUTNER, NORTH CAROLINA ON

THE FORENSIC UNIT; SO MY JOB WAS TO -- IT WAS AT A PSYCHIATRIC HOSPITALS, SO I WORKED WITH IN-PATIENTS AND CONDUCTED FORENSIC EVALUATIONS.

FROM 1994 THROUGH 1996, I WAS THE RESIDENTIAL DRUG ABUSE PROGRAM COORDINATOR AT THE FEDERAL CORRECTIONAL INSTITUTION IN TERMINAL ISLAND, WHERE I OVERSAW THE PROGRAM.

AND THEN, SINCE '96, I'M THE CHIEF PSYCHOLOGIST IN SAN DIEGO. I'VE DONE FORENSIC EVALUATIONS DOWN THERE. I OVERSEE A FORENSIC EXAMINER DOWN THERE; RUN THE DEPARTMENT; DO CRISIS INTERVENTION, THAT TYPE OF STUFF.

THE COURT: HAVE YOU TAKEN ANY COURSES APART FROM THE VERY CONSIDERABLE AND IMPRESSIVE FUNCTIONING EXPERIENCE YOU'VE HAD AS A PSYCHOLOGIST? HAVE YOU GOTTEN ANY ADDITIONAL TRAINING, PARTICULARLY, IN FORENSIC PSYCHOLOGY, POST-DOC TRAINING SINCE 1986?

THE WITNESS: YES. I'VE TAKEN A NUMBER OF COURSES OVER THE YEARS. WE'RE REQUIRED TO TAKE COURSES IN ORDER TO RENEW OUR LICENSES. AND I TYPICALLY TAKE COURSES ON EITHER FORENSICS OR TESTING; AND THEN THE FOUR YEARS I WAS AT THE INSTITUTION IN BUTNER, WE HAD A LOT OF ONGOING TRAINING IN FORENSICS.

THE COURT: HAVE YOU PRESENTED ANY PAPERS OR WRITTEN ANY -- PUBLISHED ANY WRITTEN MATERIALS?

THE WITNESS: NO, I HAVE NOT.

THE COURT: HAVE YOU GOTTEN OR RECEIVED ANY SPECIAL COMMENDATIONS FOR YOUR WORK AS A PSYCHOLOGIST?

THE WITNESS: I'VE RECEIVED LETTERS FROM JUDGES IN THE PAST FOR REPORTS I'VE WRITTEN.

THE COURT: AND HAVE YOU EVER HAD OCCASION TO TESTIFY IN COURT IN SUPPORT OF A CONCLUSION YOU DREW THAT A PERSON ACCUSED OF A CRIME IN FEDERAL COURT WAS NOT COMPETENT TO PROCEED?

THE WITNESS: OH, YES, SIR.

THE COURT: AND I KNOW THAT YOU UNDERSTAND THE STANDARDS FOR COMPETENCE. THEY'RE RECITED IN YOUR REPORT; AND THEY'RE RECITED CORRECTLY; AND I WON'T BELABOR THOSE.

DO YOU SEE ANY OF THE FACTORS THAT YOU TOOK INTO ACCOUNT ON THOSE OCCASIONS WHEN YOU CONCLUDED SOMEBODY WAS NOT COMPETENT, IN MR. SUTCLIFFE?

THE WITNESS: WELL, TYPICALLY, THE PEOPLE I FOUND -- OR I OFFERED THE OPINION THAT THEY WERE NOT COMPETENT, TYPICALLY, HAD A VERY SEVERE ACCESS ONE DISORDER, SUCH AS, SCHIZOPHRENIA, SOMETIMES A DELUSIONAL DISORDER. I DID NOT SEE THOSE WITH MR. SUTCLIFFE.

HOWEVER, WHAT CONCERNS ME TODAY IS, AGAIN, HIS BEHAVIOR IN COURT. PARTICULARLY, AFTER ALL THE -- WHAT I FEEL WAS GROUNDWORK LAID WITH HIM BY MYSELF AND ALSO COMMENTS HE MADE ABOUT MR. NICOLAYSEN YESTERDAY, WHICH WERE VERY POSITIVE.

THE COURT: WELL, IN THAT REGARD, TELL US WHAT THE COMMENTS WERE THAT HE MADE YESTERDAY ABOUT MR. NICOLAYSEN.

THE WITNESS: OKAY. IF I MAY PUT IT IN CONTEXT. AFTER YOU AND I SPOKE, I BROUGHT HIM UP TO SEE ME. I PRESENTED HIM

WITH A COPY OF THE EVALUATION; HAD HIM SIT OUTSIDE AND READ IT; THEN CALLED HIM BACK IN MY OFFICE; AND DURING THAT TIME, I ASKED HIM HOW THINGS WERE GOING WITH MR. NICOLAYSEN, AND HE SAID -- HE WAS ACTUALLY QUITE REASONABLE, AND HE SAID THAT THEY WERE GOING WELL.

I WAS ACTUALLY VERY ENCOURAGED BY THE THINGS HE SAID ABOUT THE RELATIONSHIP. FOR EXAMPLE, HE STARTED TO SAY THAT MR. NICOLAYSEN HAD DONE SEVERAL THINGS HE'D ASKED HIM TO DO. I GUESS OBTAIN --

THE COURT: YOU DON'T HAVE TO TELL ME --

THE WITNESS: OKAY.

THE COURT: -- WHAT THOSE WERE.

THE WITNESS: HOWEVER, HE THEN STATED -- HE CAUGHT HIMSELF, AND HE SAID, WELL, NO. HE'S DONE ABOUT HALF OF WHAT I ASKED HIM TO. AND HE DIDN'T SEEM UPSET BY THAT. AND I SAID, WELL, HOW DO YOU FEEL ABOUT THAT? AND HE WAS -- THAT'S OKAY. I MEAN, HE APPEARED VERY REASONABLE; AND I SAID, SO YOU DON'T EXPECT HIM TO DO EVERY SINGLE THING? YOU'RE BEING PATIENT? YOU'RE WORKING WITH HIM? AND HE SAID, YEAH.

AND, AGAIN, HIS DEMEANOR WAS VERY CALM, AND HE CAME ACROSS AS VERY REASONABLE. AND SO, BASED ON THAT, AND THEN TO SEE HOW UPSET HE WAS TODAY, CONCERNS ME A BIT.

THE COURT: OKAY. GO AHEAD.

BY MR. NICOLAYSEN:

Q. DR. BACKER, I'D LIKE TO CONTINUE, IF THE COURT PLEASE,

WITH THE DISTINCTIONS, A COUPLE OF DISTINCTIONS; AND ONE WE WERE TALKING ABOUT JUST A FEW MOMENTS AGO, WAS THE DISTINCTION BETWEEN THE TYPE OF INTERVIEW SETTING IN WHICH YOU CONDUCTED YOUR DISCUSSIONS WITH MR. SUTCLIFFE, AND THE TYPE OF INTERACTION THAT A THERAPY SESSION WOULD HAVE WITH A CLIENT; AND THEN I WILL ASK YOU TO DISCUSS THE DISTINCTION BETWEEN THE TYPES OF INTERVIEWS YOU HAD WITH MR. SUTCLIFFE, AND WHAT AN ATTORNEY/CLIENT RELATIONSHIP MIGHT BE.

WOULD YOU AGREE, THAT IN THE THERAPY CONTEXT -- AND YOU'VE ALREADY TOLD US ON THE RECORD THAT YOU HAVE A PROFESSIONAL BACKGROUND IN CONDUCTING THERAPY -- THERE IS TYPICALLY MORE OF A STRUCTURE AND AN ATTEMPT TO ENGAGE THE CLIENT IN AN EFFORT TO ACHIEVE CORRECTIVE BEHAVIORS AND HIGHER LEVELS OF SELF-AWARENESS?

A. I'D SAY, GENERALLY, YES.

Q. WOULD YOU AGREE, THAT AT TIMES, A THERAPY RELATIONSHIP CAN BE CONFRONTED, THAT THAT IS PART OF THE THERAPEUTIC PROCESS?

A. YES.

Q. WOULD YOU AGREE, THAT A THERAPEUTIC RELATIONSHIP CAN, AT TIMES, DEPENDING ON THE NEEDS OF THAT RELATIONSHIP, INVOLVE THE THERAPIST CHALLENGING THE CLIENT TO MAKE DECISIONS OR TO RECOGNIZE OPTIONS?

A. IN CERTAIN TYPES OF THERAPY, YES.

Q. WOULD YOU AGREE, THAT, AGAIN, DEPENDING ON THE TYPE OF

THERAPY AT ISSUE, THE THERAPY RELATIONSHIP CAN INVOLVE THE THERAPIST CHALLENGING A CLIENT TO TAKE RESPONSIBILITY FOR CERTAIN ACTIONS OR FOR CERTAIN BEHAVIORS?

A. YES.

Q. WOULD YOU ALSO AGREE, THAT NONE OF THESE THINGS THAT I JUST OUTLINED WITH YOU IN REFERENCE TO THE THERAPY RELATIONSHIP WAS INVOLVED IN YOUR DISCUSSION WITH MR. SUTCLIFFE FOR PURPOSES OF THE COMPETENCY EVALUATION?

A. I WOULDN'T SAY THAT NONE WERE. I MEAN, WE TALKED ABOUT HIS TAKING RESPONSIBILITY FOR HIS ACTIONS IN COURT. I GAVE HIM MY OPINION ABOUT HOW I THOUGHT -- WHEN HE DESCRIBED WHAT HAPPENED IN COURT, HOW I THOUGHT A PERSON MIGHT -- A NEUTRAL PERSON WOULD REACT TO HOW HE BEHAVED, PARTICULARLY, TOWARDS THE JUDGE; SO SOME OF THAT WAS THERE.

Q. DID YOU GO SO FAR AS TO ASK MR. SUTCLIFFE TO MAKE DECISIONS ABOUT THIS CASE SPECIFICALLY?

A. WELL, HE MADE DECISIONS. I MEAN, HIS COMING BACK -- AGAIN, I DON'T KNOW IF THIS IS ANSWERING YOUR QUESTION -- BUT HE DID -- HIS WILLINGNESS TO COME BACK AND TALK TO ME, I MEAN, HE WAS MAKING DECISIONS AS TO WHETHER HE WAS GOING TO PARTICIPATE OR NOT, EVEN THOUGH IT HAD TO BE BY HIS RULES A BIT.

EVEN HIS WILLINGNESS TO SPEAK WITH YOU WAS -- THE FIRST TIME I CALLED YOU, PART OF IT WAS BECAUSE HE WAS PRETTY UPSET AT WHAT HE PERCEIVED WAS YOUR NOT HAVING COME TO SEE HIM. I'M

NOT MAKING ANY JUDGMENT ON THAT, BUT THAT'S WHAT HE WAS UPSET ABOUT. AND THAT -- WHICH IS ONE OF THE REASONS WHY I CALLED YOU, TO KIND OF GIVE YOU A HEADS UP.

BUT WE TALKED A LOT ABOUT HIS TRYING TO MEET YOU WITH AN OPEN MIND, AND TO NOT BE LYING IN WEIGHT, WHICH HE WAS PLANNING TO DO INITIALLY; AND FROM WHAT I UNDERSTOOD, HE ACTUALLY WAS ABLE TO MEET YOU ON A FAIRLY REASONABLE LEVEL, CERTAINLY, MUCH MORE SO THAN HE WAS INTENDING ON HIS OWN.

SO I THINK IN SOME SENSE, YOU KNOW, I DID ASK HIM TO -- OR ASK HIM TO DO SOMETHING RELATED TO HIS CASE AND HE SEEMED ABLE TO DO IT.

Q. YOU DIDN'T ENGAGE HIM IN DISCUSSIONS THAT A LAWYER WOULD TYPICALLY ENGAGE IN, SUCH AS, THE DECISION WHETHER TO PLEAD GUILTY OR GO TO TRIAL, DID YOU?

A. WE TALKED ABOUT THAT IN GENERAL, AS FAR AS -- THAT'S PART OF A COMPETENCY QUESTION THAT YOU WOULD ASK SOMEBODY. CLEARLY, I'M NOT HIS ATTORNEY, BUT I JUST WAS TRYING TO SEE IF HE WOULD EVEN CONSIDER CERTAIN THINGS, SO WE TALKED ABOUT THAT.

Q. YOU DIDN'T ACTUALLY ASK HIM TO MAKE A DECISION, THOUGH, DID YOU?

A. NO.

Q. AND ASKING HIM TO ACTUALLY MAKE A DECISION WOULD NOT BE AN APPROPRIATE PART OF THE PURPOSE OF YOUR DISCUSSION, WOULD IT?

A. ABSOLUTELY CORRECT.

Q. AND YOU AGREE, DO YOU NOT, THAT THERE ARE OTHER TYPES OF DECISIONS SUCH AS DECISIONS ON WHAT LEGAL OBJECTIONS TO RAISE; WHAT SENTENCING ISSUES MIGHT APPLY; WHAT MOTIONS TO FILE, ARE DECISIONS BEST LEFT TO THE ATTORNEY/CLIENT RELATIONSHIP, CORRECT?

A. ABSOLUTELY.

Q. AND YOU STEERED CLEAR OF THOSE TYPES OF ISSUES AND THOSE TYPES OF DECISIONS PURPOSELY, BECAUSE IT WAS NOT PART OF YOUR ASSIGNMENT, CORRECT?

A. CORRECT.

Q. ALL RIGHT. WOULD YOU AGREE, THAT THE INTERVIEW PROCESS THAT YOU ENGAGED MR. SUTCLIFFE IN, DID NOT CHALLENGE HIM TO MAKE KEY DECISIONS THAT A LAWYER MIGHT NEED TO ENGAGE MR. SUTCLIFFE ABOUT IN THE ATTORNEY/CLIENT RELATIONSHIP?

A. YES.

Q. WOULD YOU AGREE, THAT THERE IS A DISTINCTION BETWEEN THE LEVEL OF -- I'M JUST GOING TO USE THE WORD, PRESSURE, IF YOU WILL -- THE LEVEL OF PRESSURE THAT MR. SUTCLIFFE WAS SUBJECTED TO IN THE COURSE OF YOUR INTERVIEWS, AND THE TYPE OF PRESSURE THAT WOULD NECESSARILY ARISE IN AN ATTORNEY/CLIENT RELATIONSHIP?

A. YES.

Q. WOULD YOU ALSO AGREE, AS YOU'VE NOW TOLD US ABOUT THE PARANOID DISORDER, AND WITH REFERENCE TO SOME OF THE THINGS THAT MIGHT TRIGGER THAT BEHAVIOR, WOULD YOU AGREE, THAT THE

PRESSURES THAT ARE INHERENT IN THE ATTORNEY/CLIENT RELATIONSHIP, MIGHT TRIGGER MANIFESTATIONS OF THE PARANOID DISORDER?

A. I THINK A BETTER WAY THAT I WOULD LIKE TO PUT IT, IF I MAY.

Q. SURE.

A. IS, I THINK THAT AN ATTORNEY WOULD BE ASKING A CLIENT TO MAKE SOME DECISIONS THAT WOULD BE -- OR WOULD BE IN A POSITION TO BE IN CONFLICT WITH A PERSON MORE THAN I WOULD IN MY ROLE.

Q. LET ME USE YOUR WORD, CONFLICT. WOULD YOU AGREE THAT IN THE DYNAMIC THAT IS INHERENT IN THE ATTORNEY/CLIENT RELATIONSHIP, THERE IS A GREATER POTENTIAL FOR CONFLICT WITH AN INDIVIDUAL WHO HAS THE PARANOID DISORDER THAT YOU ENGAGE -- THAT YOU OBSERVED IN MR. SUTCLIFFE, MORE SO THAN THE TYPE OF INTERVIEW ENVIRONMENT THAT YOU HAD?

A. IT'S PROBABLY SPLITTING HAIRS. I THINK -- I DON'T KNOW IF I CAN ANSWER THAT. I THINK -- I THINK THE TASKS ARE VERY DIFFERENT. FOR EXAMPLE, RIGHT OFF THE BAT, HE DIDN'T WANT TO PARTICIPATE; AND I THINK PART OF THE REASON HE DID PARTICIPATE WAS THE WAY I WAS ABLE TO DEAL WITH HIM. AGAIN, WE HAD DIFFERENT TASKS; SO OVER TIME, HE WAS WILLING TO COOPERATE.

I WASN'T ASKING HIM TO MAKE A DECISION THAT MAYBE WAS COUNTER TO WHAT HE FELT WAS APPROPRIATE TO DO; AND I THINK HAD I BEEN PUT IN THAT POSITION, I WOULD HAVE GOTTEN A STRONGER, NEGATIVE REACTION OUT OF HIM.

Q. WOULD YOU BE WILLING TO ACKNOWLEDGE THAT IN THE ATTORNEY/CLIENT RELATIONSHIP, DEMANDS WOULD NECESSARILY BE PLACED ON MR. SUTCLIFFE IN REGARD TO HOW TO MANAGE THE LITIGATION, WHICH ARE LIKELY TO CAUSE MANIFESTATIONS OF THE PARANOID DISORDER THAT CAN INTERFERE WITH THAT RELATIONSHIP?

A. YES.

Q. AND WOULD YOU ALSO AGREE, THAT IN THE NATURE OF THE INTERVIEW ENVIRONMENT THAT YOU HAD, YOU WOULDN'T NECESSARILY HAVE OCCASION TO CAUSE THOSE TYPES OF CONFLICTS?

A. NOT TO THE SAME DEGREE, NO.

Q. SO WOULD IT ALSO BE FAIR TO SAY, THAT WHILE YOU'RE SATISFIED, BASED ON THE INTERVIEW ENVIRONMENT THAT YOU HAD, THAT MR. SUTCLIFFE IS COMPETENT, YOU'RE OPEN TO THE POSSIBILITY THAT IN A DIFFERENT SETTING, SUCH AS THE ATTORNEY/CLIENT RELATIONSHIP, WHICH HAS A DIFFERENT POTENTIAL FOR CONFLICT, GIVEN THE PARANOID DISORDER YOU'VE DISCUSSED, THERE IS, INDEED, A POSSIBILITY THAT THE RELATIONSHIP CANNOT FUNCTION? THAT THE PARANOID DISORDER WILL MANIFEST ITSELF? which q?

A. YES.

Q. AND MANIFEST ITSELF TO A MUCH GREATER DEGREE THAN WHAT YOU OBSERVED IN THE INTERVIEW SETTING THAT YOU HAD?

A. YES.

Q. YOU'VE SPOKEN IN YOUR REPORT ABOUT MR. SUTCLIFFE DECLINING TO BE INTERVIEWED ABOUT HIS PERSONAL HISTORY AND DECLINING TO TAKE CERTAIN TESTS.

A. CORRECT.

Q. AND I BELIEVE YOU'VE COMMENTED THAT, BECAUSE YOU DON'T HAVE THE PERSONAL HISTORY OR THE TESTING DATA, THAT, IDEALLY, YOU WOULD HAVE LIKED TO HAVE HAD -- YOU'RE NOT IN A POSITION TO GIVE US AN ACCESS ONE DIAGNOSIS; IS THAT SO?

A. I THINK THE WAY I'D RATHER PUT IT IS, THAT BASED ON EVERYTHING AVAILABLE TO ME, I DID NOT SEE AN ACCESS ONE DIAGNOSIS. I'M PRETTY CAUTIOUS WHEN I WRITE, SO IN THAT PARTICULAR CASE, I'M ACKNOWLEDGING THAT THERE ARE FACTS OUT THERE THAT I DIDN'T HAVE ACCESS TO. AND THERE'S A POSSIBILITY THAT HAD I HAD THOSE FACTS, I MIGHT HAVE COME TO A DIFFERENT CONCLUSION, BUT I --

THE COURT: IS AMONG THE KIND OF FACTS THAT MIGHT HAVE RESULTED IN YOUR REACHING A DIFFERENT CONCLUSION, WOULD PERFORMING AN ACCESS ONE TEST BE INCLUDED? WOULD THAT TEST, POSSIBLY HAVE CAUSED YOU TO REACH A DIFFERENT CONCLUSION?

THE WITNESS: THERE'S NOT AN ACCESS ONE TEST, PER SE. I THINK, HAD I GIVEN HIM A PERSONALITY -- THE MMPI TWO, WHICH IS ONE OF THE TESTS HE REFUSED TO TAKE; THAT WOULD HAVE GIVEN ME A LITTLE MORE INFORMATION ABOUT HIM.

I THINK IT'S -- THE TESTING DOESN'T BOTHER ME SO MUCH. IT'S THE LACK OF OBJECTIVE DATA ABOUT HIS PAST.

THE COURT: OKAY. AT PAGE TWO OF YOUR REPORT, YOU SAY THAT HE REFUSED TO TAKE THE COMPETENCY ASSESSMENT INSTRUMENT CAI 14-PART SEMISTRUCTURED INTERVIEW; IS THAT AN INTERVIEW THAT

IS CONDUCTED ACCORDING TO A PRESCRIBED PROCEDURE AND FORM IN WHICH THE EXAMINER, SUCH AS YOU, ASKS STANDARD QUESTIONS AND TAKE DOWN THE ANSWERS?

THE WITNESS: YES, BUT IT'S NOT A SCORED TEST. IT'S NOT REALLY A TEST IN THE SENSE OF LET'S SAY, IN AN MPI OR THE WECHSLER TEST WHERE THERE ARE SCALES AND NORMS.

WHAT IT IS, IS A STRUCTURED INTERVIEW. AS A MATTER OF FACT, AT OTHER PLACES I'VE WORKED, I DIDN'T EVEN USE THAT SAME FORM, BUT IT'S JUST A STRUCTURED WAY. YOU DON'T SCORE IT OUT. IT JUST GIVES YOU A WAY TO HAVE YOUR KEY QUESTIONS RELATED TO COMPETENCY LAYED OUT.

THE COURT: CAN YOU TELL ME WHETHER THERE WERE ANY QUESTIONS OR INQUIRIES INCLUDED AS PART OF THAT CAI, WHICH, IF YOU GOT A RESPONSIVE ANSWER TO, MIGHT HAVE, DEPENDING ON AN ANSWER, OF COURSE, CAUSED YOU TO REACH A DIFFERENT CONCLUSION, EVEN BEFORE YOU CAME TO COURT TODAY?

THE WITNESS: CERTAINLY.

THE COURT: WHAT ARE THE KINDS OF QUESTIONS TO WHICH YOU ACTUALLY WERE NOT PERMITTED TO RECEIVE ANSWERS THAT COULD HAVE RESULTED IN A DIFFERENT CONCLUSION?

THE WITNESS: WELL, IF I MAY BACK UP FOR A SECOND. AND I THINK I'VE DESCRIBED THIS IN THE REPORT. AT ONE POINT, HE WAS GOING TO ACTUALLY AGREE TO TAKE -- TO ANSWER THESE QUESTIONS. I THINK IT WAS IN THE EVENING. THE FOLLOWING DAY WHEN I BROUGHT HIM DOWN, HE HAD CHANGED HIS MIND. I PUT THE

FORM ASIDE. WE CONTINUED TO TALK. I ASKED HIM SEVERAL OF THE QUESTIONS; AND AS LONG AS I DIDN'T HAVE THAT PIECE OF PAPER IN FRONT OF ME, HE ANSWERED IT; SO I WAS ABLE TO ACTUALLY ANSWER OR FILL IN SEVERAL OF THOSE ANSWERS TO SEVERAL OF THOSE QUESTIONS -- ACTUALLY, THE MAJORITY OF THOSE QUESTIONS.

BUT TO GO TO YOUR QUESTION, FOR EXAMPLE, IF I'D ASKED HIM, DO YOU THINK YOU CAN WORK WITH THE JUDGE? AND HE STARTED TO GO OFF ABOUT, NO. HOW THE JUDGE WAS PART OF SOME HUGE CONSPIRACY; OR IF ALL JUDGES -- YOU KNOW, THERE WAS NO JUDGE HE COULD WORK WITH BECAUSE THEY WERE ALL PART OF A CONSPIRACY, THEN THAT WOULD LEAD ME TO BELIEVE THAT I WOULD HAVE HAD A DIFFERENT RESPONSE; BUT HE DIDN'T GIVE ME THAT KIND OF ANSWER.

HE, ACTUALLY, AGAIN, IN A LESS STRESSFUL ENVIRONMENT, APPEARED SURPRISINGLY COOPERATIVE. HE -- HE DISCUSSED HIS DISAGREEMENTS WITH CERTAIN THINGS THAT YOUR HONOR HAD DONE, BUT HE -- AGAIN, HE WAS MUCH CALMER. HE SAID HE WAS WILLING TO BE OPEN MINDED; AND HE ALSO SAID HE WAS WILLING TO -- YOU KNOW, OTHER JUDGES HE WAS WILLING TO WORK WITH.

SO HE DIDN'T SHOW THIS ABSOLUTE STANCE THAT THERE'S NO WAY HE CAN BE TREATED FAIRLY. HE SEEMED TO -- AGAIN, IN A LESS STRESSFUL ENVIRONMENT, HE WAS -- HE GAVE A REASONABLE RESPONSE.

THE COURT: WHAT KIND OF INFORMATION IS ELICITED IN AN MPI-2 TEST OR MMPI-2 TEST THAT WOULD ACTUALLY MEASURE OR PROVIDE INDICES OF MENTAL DISORDERS THAT YOU THUS FAR HAVE NOT BEEN ABLE TO OBTAIN?

THE WITNESS: WELL, THE MMPI-2 HAS -- IT'S 567 TRUE/FALSE ITEM QUESTIONS; AND YOU END UP WITH A PROFILE; AND THEN YOU COMPARE AN INDIVIDUAL'S PROFILE WITH STATISTICS THAT SHOW -- THAT PROVIDE DESCRIPTORS OF PEOPLE WITH SIMILAR TYPES OF PROFILES.

SO IN THIS PARTICULAR CASE, YOU KNOW, IT WOULD HAVE BEEN POSSIBLE FOR HIM TO COME UP WITH A PROFILE THAT SUGGESTS MORE OF AN ANTISOCIAL TYPE OF PERSON. IT COULD HAVE SHOWN A PERSON THAT'S QUITE PARANOID.

IN HIS CASE, BECAUSE I SPEND A LOT OF TIME WITH HIM, I'M NOT -- I'M NOT SO SURE THAT I WOULD HAVE SEEN SOMETHING ON THE MMPI THAT WOULD HAVE REALLY SURPRISED ME. I MEAN, I THINK HE WOULD HAVE GIVEN A REALLY GUARDED PROFILE. THERE ARE VALIDITY SCALES IN THERE THAT HELP YOU DETERMINE WHETHER A PERSON'S LIKE EXAGGERATING THEIR PATHOLOGY, OR REALLY TRYING TO HIDE IT.

MY GUESS IS, HIS PROBABLY WOULD HAVE BEEN A VERY GUARDED TYPE OF PROFILE WHERE HE DENIED MOST PROBLEMS, SO --

THE COURT: YOU KNOW, DR. BACKER, I UNDERSTAND IT'S INHERENT IN THE DIFFERENCES BETWEEN A COURTROOM SETTING AND EITHER AN EXAMINATION OR THERAPEUTIC SETTING, BUT IT SEEMS TO ME, THAT THE INQUIRIES THAT ARE THE ISSUE OF TRYING TO DETERMINE IN A FAIR FASHION CONSISTENT WITH THE LEGAL STANDARDS, WHETHER SOMEONE IS COMPETENT, INHERENTLY, ARE DEFICIENT, BECAUSE THEY DON'T PROVIDE THE EXPERT WITH THE CONTEXT AND THE FORM IN WHICH TO MAKE THE MOST CONSIDERED

EVALUATION; WOULD YOU AGREE WITH THAT?

I'M NOT SAYING THERE'S MUCH WE CAN DO ABOUT IT. WE'RE DOING IT PROCEDURALY THE WAY WE'RE EXPECTED AND AUTHORIZED TO DO, BUT DON'T YOU THINK THIS PROCEDURE IS FLAWED?

THE WITNESS: WELL, HAVING DONE THESE TYPES OF EVALUATIONS IN A NUMBER OF SETTINGS, I THINK, IN GENERAL, I DON'T BELIEVE THEY'RE FLAWED. I THINK IN CERTAIN CASES, CERTAIN VERY DIFFICULT CASES, THEY PROBABLY ARE, AND I THINK THIS IS A VERY DIFFICULT CASE.

I MEAN, IN MOST OF THE CASES I'VE BEEN INVOLVED WITH, THE BEHAVIOR THAT I'VE SEEN SEEMS TO TRANSLATE INTO WHAT HAPPENS IN THE COURTROOM, I THINK. AGAIN, WE'RE DEALING WITH A VERY DIFFICULT INDIVIDUAL HERE, AND I THINK THAT -- I DON'T KNOW IF I WOULD GENERALIZE THAT TO ALL THE EVALUATIONS.

THE COURT: OKAY.

THE WITNESS: OR THE PROCESS.

THE COURT: KEEP GOING, MR. NICOLAYSEN.

MR. NICOLAYSEN: THANK YOU, YOUR HONOR.

BY MR. NICOLAYSEN:

Q. DR. BACKER, LET ME STAY WITH THE ISSUE OF ACCESS ONE DIAGNOSES, WHICH IS WHERE WE LEFT OFF. SUCH DIAGNOSES, INCLUDE, AMONG OTHER THINGS, SCHIZOPHRENIA AND DELUSIONAL AND PSYCHOTIC DISORDERS; DO THEY NOT?

A. THEY DO.

Q. THESE TYPES OF DISORDERS THAT FALL WITHIN ACCESS ONE,

TEND TO BE THE TYPES OF DISORDERS THAT CONCERN CLINICIANS MOST FROM THE PERSPECTIVE OF COMPETENCY; DO THEY NOT?

A. I WOULD SAY, YES.

Q. I BELIEVE YOU TESTIFIED EARLIER IN THIS HEARING, THAT IN YOUR PROFESSIONAL HISTORY IN DOING COMPETENCY EVALUATIONS, IN THOSE CASES WHERE YOU CONCLUDED THAT A DEFENDANT WAS INCOMPETENT, TYPICALLY INVOLVED A CASE WHERE YOU DID FIND AN ACCESS ONE DISORDER, SUCH AS, SCHIZOPHRENIA?

A. CORRECT.

Q. NOW, BECAUSE YOU HAVE NOT BEEN ABLE TO GIVE US ANY DEFINITIVE CONCLUSION HERE AS TO AN ACCESS ONE DISORDER, AND WITHOUT, IN ANY WAY AT ALL BEING CRITICAL, BUT JUST BASED ON WHAT WAS MADE AVAILABLE TO YOU; ~~WOULDN'T IT BE FAIR TO~~ SAY, ~~THAT JUDGMENT NEEDS TO BE RESERVED~~ AS TO WHETHER MR. SUTCLIFFE IS LEGALLY COMPETENT?

AND THEN, WHEN I ASK YOU THAT QUESTION, WITH THE COURTS'S PERMISSION, I ASK -- INVITE YOU TO FACTOR INTO YOUR ASSESSMENT WHAT YOU SAW TODAY.

A. COULD YOU REPEAT QUESTION?

Q. SURE. IT'S A TYPICAL LONG QUESTION. MY FAULT.

A. YES.

Q. WE AGREE THAT YOUR HISTORY AS AN EVALUATOR OF COMPETENCY HAS GENERALLY BEEN SUCH THAT, WHERE YOU HAVE FOUND A DEFENDANT INCOMPETENT UNDER THE STATUTE HAS BEEN THOSE CASES WHERE THE DEFENDANT TYPICALLY HAD AN ACCESS ONE DISORDER SUCH AS

SCHIZOPHRENIA?

A. CORRECT.

Q. ALL RIGHT. LET'S START WITH THAT PREMISE. THE SECOND PREMISE IS IN YOUR REPORT HERE, EXHIBIT 1, AS TO MR. SUTCLIFFE. YOU HAVE NOT YET BEEN ABLE TO REACH A DEFINITIVE FINDING AS TO WHETHER AN ACCESS ONE DISORDER EXISTS OR NOT, CORRECT? BECAUSE OF THE LACK OF ADEQUATE PERSONAL HISTORY, AND THE LACK OF TESTING DATA?

A. SEE, I DON'T THINK THAT'S QUITE ACCURATE. FOR EXAMPLE, I'M -- I FEEL VERY STRONGLY HE DOESN'T HAVE SCHIZOPHRENIA. I FEEL VERY STRONGLY THERE'S CERTAIN OTHER DISORDERS THAT HE DOESN'T HAVE.

AGAIN, I PUT THAT IN THERE BECAUSE, YOU KNOW, IT'S POSSIBLE THAT THERE IS SOME HISTORICAL DATA OUT THERE THAT MAYBE -- THAT MIGHT LEAD ME TO A DIFFERENT CONCLUSION.

Q. ALL RIGHT. I'M NOT TRYING TO IMPEACH YOUR TESTIMONY. BUT FOR THE RECORD, LET ME REFER YOU TO PAGE 13 OF YOUR REPORT.

A. OKAY.

Q. IN THE MIDDLE PARAGRAPH.

MR. NICOLAYSEN: AND, IF THE COURT PLEASE, I WILL JUST READ INTO THE RECORD, TWO SENTENCES.

Q. QUOTE, BASED ON THE AVAILABLE INFORMATION AND INTERACTIONS WITH MR. SUTCLIFFE, HE DOES NOT APPEAR TO BE PRESENTLY SUFFERING FROM AN ACCESS ONE DISORDER; HOWEVER, DUE TO THE LACK OF A COMPLETE HISTORY AND TESTING DATA, THIS IS

DEFERRED. PERIOD. END QUOTE; DO YOU SEE WHERE I'M REFERRING?

A. I DON'T. WHICH PARAGRAPH IS THAT?

Q. IT'S THE MIDDLE PARAGRAPH ON PAGE 13, BEGINNING WITH THE WORD, BASED, AND ENDING WITH THE WORD, DEFERRED.

A. OKAY. I SEE WHAT YOU'RE SAYING. YES.

Q. I HAVE NOW READ THESE TWO STATEMENTS, THESE TWO SENTENCES INTO THE RECORD. WOULD YOU AGREE, THAT AS YOU TESTIFY THIS MORNING, WHAT I READ INTO THE RECORD, WHICH IS ON PAGE 13, STILL REFLECTS YOUR ASSESSMENT OF THIS CASE?

A. YES.

Q. STAYING WITH THE CONCEPT OF DEFERRAL OF AN ACCESS ONE DISORDER, AND KEEPING IN MIND, THAT IN YOUR PROFESSIONAL HISTORY, YOUR FINDINGS OF INCOMPETENCE HAVE GENERALLY INVOLVED A FINDING OF AN ACCESS ONE DISORDER; WOULDN'T IT BE FAIR TO SAY THAT WE'RE NOT REALLY READY TO REACH A DEFINITIVE CONCLUSION AS TO WHETHER MR. SUTCLIFFE IS OR IS NOT COMPETENT UNTIL WE HAVE A BETTER HANDLE ON WHETHER AN ACCESS ONE DISORDER EXISTS HERE?

A. I'D PREFER TO SAY IT THAT WAY, IF I MAY. MY CONCERNS ARE NOT SO MUCH WITH A DIAGNOSIS. BECAUSE, ACTUALLY, A PERSON CAN BE SCHIZOPHRENIC. THEY CAN HAVE A DELUSIONAL DISORDER, AND THEY CAN STILL BE COMPETENT.

AS A MATTER OF FACT, I'VE FOUND PEOPLE -- I'VE OFFERED THOSE OPINIONS IN THE PAST. SO RIGHT NOW, I'M NOT SO WORRIED ABOUT THE DIAGNOSIS SO MUCH AS THE SEVERITY OF THE SYMPTOMS I ALREADY DESCRIBED. THE SEVERITY THAT -- WITH WHICH I SAW THEM

DISPLAYED TODAY, I GUESS THAT'S A BETTER WAY TO PUT IT.

Q. WOULD YOU AGREE, THEN, THAT AN INDIVIDUAL, A DEFENDANT WITH AN ACCESS TWO DISORDER CAN, UNDER CERTAIN CIRCUMSTANCES, BE INCOMPETENT?

A. YES.

Q. WOULD YOU AGREE WITH THE ADDITIONAL VIEW, THAT A DEFENDANT WITH THE PARTICULAR ACCESS TWO DISORDER OF PARANOID PERSONALITY DISORDER, CAN, UNDER CERTAIN CIRCUMSTANCES, BE INCOMPETENT?

A. YES.

Q. WOULD YOU THEN AGREE, THAT THE QUESTION OF COMPETENCY IS NOT SO MUCH A FUNCTION OF WHICH OF THE TWO ACCESSES MR. SUTCLIFFE FALLS UNDER, WHETHER IT'S ACCESS ONE OR ACCESS TWO, BUT -- AND NOW I'M BORROWING YOUR LAST ANSWER -- THE DEGREE OF THE DISORDER AT ISSUE?

A. YES.

Q. WOULD YOU ALSO AGREE, THAT WHAT YOU OBSERVED THIS MORNING IS SOMETHING THAT YOU DID NOT OBSERVE IN THE SETTING OF YOUR INTERVIEW ENVIRONMENT?

A. YES.

Q. AND WOULD YOU AGREE, THAT WHAT YOU OBSERVED THIS MORNING, ALLOWED YOU TO OBSERVE INFORMATION ABOUT MR. SUTCLIFFE THAT BROUGHT INTO CONSIDERATION THE DEGREE OF HIS DISORDER?

A. YES.

Q. SUCH THAT, MAYBE THE DEGREE OF THE DISORDER IS GREATER

THAN WHAT YOU HAD IN MIND WHEN YOU WERE WRITING THIS REPORT; IS THAT A POSSIBILITY?

A. YES.

Q. AND NOW THAT YOU'VE HAD THE OPPORTUNITY TO MAKE THESE OBSERVATIONS HERE IN COURT THIS MORNING, ARE YOU OPEN TO THE VIEW THAT FURTHER INQUIRY OR EVALUATION IS APPROPRIATE BEFORE A DEFINITIVE CONCLUSION ON THE ISSUE OF COMPETENCY IS MADE?

A. AM I OPEN TO IT? YES.

Q. WOULD -- AGAIN, I SPEAK AS A LAY PERSON, SO I DON'T PRETEND TO USE CLINICAL TERMS; BUT WOULD FURTHER EVALUATION OR ASSESSMENT BY YOURSELF OR ANY OTHER CLINICAL ENVIRONMENT THE PRUDENT THING TO DO BEFORE A DISTRICT COURT REACHES A DEFINITIVE FINDING ON THE ISSUE OF COMPETENCE AS TO MR. SUTCLIFFE?

A. I THINK BASED ON WHAT I'VE SEEN TODAY, IT WOULD PROBABLY BE PRUDENT.

Q. LET ME -- AND I'M NOT GOING TO BELABOR THIS. I'M ALMOST DONE. IT'S WORTH TALKING. WE'VE BEEN DISCUSSING SETTING. WE'VE TALKED ABOUT THE SETTING OF THE INTERVIEW SESSIONS; THE SETTING OF A THERAPY RELATIONSHIP; AND THE SETTING, IF YOU WILL, OF AN ATTORNEY/CLIENT ENVIRONMENT.

THE LAST ENVIRONMENT I WOULD ASK YOU TO SPEAK TO IS THE SETTING OF THIS VERY COURTROOM, AND, OF COURSE, THIS MORNING AS AN EXAMPLE OF WHAT WE'RE ABOUT TO ADDRESS.

WOULD YOU AGREE, THAT THE PERSONALITY DISORDER AS A

PERSONALITY DISORDER IS A CHARACTER TRAIT, IF YOU WILL, THAT CAN REACT TO THE TYPE OF ENVIRONMENT THAT A COURTROOM SETTING PRESENTS?

A. I MEAN, IN AN ABSTRACT ANSWER TO YOUR QUESTION, YES. I'M NOT SO SURE THAT'S WHAT'S GOING ON WITH MR. SUTCLIFFE.

Q. THAT WAS MY FIRST QUESTION. THE SECOND QUESTION IS, WHAT YOU OBSERVED THIS MORNING IN MR. SUTCLIFFE'S BEHAVIOR TOWARD THIS COURT, WOULD YOU SAY THAT THAT TYPE OF BEHAVIOR IS CONSISTENT WITH THE WAY SOMEONE SUFFERING FROM A PERSONALITY DISORDER WOULD BEHAVE GIVEN THE VARIABLES INVOLVED IN A COURTROOM SETTING, SUCH AS, THE AUTHORITY OF THE COURT; THE INHERENT PRESSURES IN A PENDING LEGAL PROCEEDING; AND SO ON?

A. I -- IF I CAN ANSWER IT THIS WAY, I THINK MOST PEOPLE WITH PERSONALITY DISORDERS WOULD STILL BE ABLE TO -- WOULD STILL BE ABLE -- PARTICULARLY, AFTER THE AMOUNT OF TIME WE SPENT TOGETHER, WOULD STILL BE ABLE TO CONTROL THEIR BEHAVIOUR. I THINK THAT WAS FAIRLY EXTREME.

Q. WHEN YOU SAY, THIS IS FAIRLY EXTREME, ARE YOU, PERHAPS, SUGGESTING THAT WHAT YOU OBSERVED THIS MORNING IS NOT NECESSARILY INDICATIVE OF A PERSONALITY DISORDER PER SE, BUT THE DEGREE OF THAT DISORDER?

A. YES.

Q. AND --

A. AND THE DEGREE OF THE -- THE IMPAIRMENT IN THE ABILITY TO FUNCTION.

Q. HELP US OUT WITH THAT LAST PHRASE. IMPAIRMENT OF THE ABILITY TO FUNCTION; IS THAT A COMMENT THAT IS PART OF THE PERSONALITY DISORDER, OR DOES THAT TAKE US, PERHAPS, INTO THE REALM OF, YET, ANOTHER DISORDER?

A. NO. I THINK ONE OF THE HALLMARKS OF THE PERSONALITY DISORDER IS THAT THE PERSON'S RIGID PERSONALITY TRAITS IMPAIR THEM, IMPAIR THEIR ABILITY TO FUNCTION IN ALL KINDS OF SETTINGS; AND THERE'S A DEGREE OF SEVERITY. AND I THINK, GIVEN WHAT HE AND I'VE TALKED ABOUT, HIS APPARENT OR REPORTED POSITIVE INTERACTIONS WITH YOU PREVIOUSLY, THE FACT THAT HE WAS SO UPSET TODAY, I THINK -- I THINK THAT WAS PRETTY SEVERE.

IF I'D SEEN THAT PRIOR TO THE EVALUATION, I WOULD BE LESS CONCERNED, BECAUSE I WOULD SAY, WELL, HE HASN'T HAD A CHANCE TO REALLY COOL DOWN; TO TALK; TO SORT OF GET AN IDEA OF WHAT'S GOING ON; TO TALK TO SOMEBODY.

BUT GIVEN THE WAY HE REACTED LIKE THIS AFTER WE'VE SPENT A LOT OF TIME TOGETHER, I'M MORE CONCERNED.

Q. WOULDN'T YOU ALSO AGREE, THAT THE FACT THAT THIS CASE HAS BEEN PENDING FOR A YEAR, WHICH IS, THAT THIS CASE IS NOT NEW TO HIM. IT'S NOT PART OF AN INITIAL ANXIETY TO THE IDEA OF BEING INDICTED AND PROSECUTED, IS ALSO SOMETHING OF A CONCERN TO YOU IN ASSESSING THE FACT THAT HE DID BEHAVE THE WAY HE DID AND THE DEGREE OF HIS BEHAVIOR?

A. I GUESS I WOULD AGREE WITH THAT.

Q. YOU DEVELOPED WHAT YOU WOULD CONSIDER TO BE A GOOD

PROFESSIONAL RELATIONSHIP WITH MR. SUTCLIFFE, WOULDN'T YOU SAY?

A. YES, I BELIEVE SO.

Q. WOULD YOU ALSO AGREE THEN, THAT YOU WERE CONCERNED THAT HIS BEHAVIOUR THIS MORNING OCCURRED NOT WITHSTANDING THE FACT THAT YOU WERE PRESENT IN THE COURTROOM, AND HE KNEW YOU WERE THERE?

A. YEAH. I'M NOT SO SURE THAT THAT -- I'M JUST MORE DISTURBED THAT IT HAPPENED AT ALL. I'M NOT SURE WHAT EFFECT MY PRESENCE HERE WOULD HAVE HAD HIM ON HIM.

Q. AS I WRAP THIS UP, THE DISTINCTIONS BETWEEN THE ENVIRONMENT THIS MORNING AND WHAT WE MIGHT SEE AT TRIAL, WOULD YOU AGREE THAT THIS MORNING DID NOT PRESENT MR. SUTCLIFFE WITH ANY PRESSURES? I MEAN, YOUR HONOR WAS VERY, VERY DIPLOMATIC WITH HIM, AND THERE WAS NOTHING INHERENT IN THE PROCEEDINGS THAT HAD TAKEN PLACE TO NECESSARILY CAUSE A SPECIFIC REACTION; WOULDN'T YOU AGREE, THAT HIS REACTION DIDN'T COME -- STRIKE THAT. I'M NOT BEING CLEAR. PERMIT ME TO START OVER.

WOULD YOU AGREE, THAT YOUR CONCERNS ABOUT THE BEHAVIOUR THIS MORNING WERE BASED, IN PART, ON THE FACT THAT YOU DID NOT OBSERVE ANYTHING INHERENT IN THE PROCEEDINGS IN THIS COURTROOM THAT MIGHT TRIGGER A REACTION LIKE THIS; AND YOU WERE THERE FOR CONCERN WHEN YOU SAW THE REACTION THAT YOU DID?

A. IF I MAY. I DIDN'T SEE ANYTHING OBJECTIVELY THAT SHOULD HAVE CAUSED THAT KIND OF REACTION, IF THAT'S WHAT YOU MEAN. I THINK, KNOWING HIM, I DON'T KNOW WHAT HAPPENED EARLIER THIS

MORNING. I KNOW THERE WAS SOME KIND OF ISSUE, BUT I THINK --

THE COURT: TO WHAT DOES THAT REFER? WHAT KIND OF ISSUE DO YOU KNOW ABOUT?

THE WITNESS: WHEN WE WERE TALKING BEFORE OUTSIDE; HE MENTIONED THAT -- HE DIDN'T GO INTO DETAILS; BUT HE'D BEEN UPSET WITH SOMETHING THAT YOU HAD SPOKEN TO HIM ABOUT.

THE COURT: YOU'RE REFERRING TO SOMETHING MR. NICOLAYSEN WAS SPEAKING TO HIM ABOUT?

THE WITNESS: YES. I'M SORRY. THERE WAS A CONVERSATION BETWEEN MR. NICOLAYSEN AND MR. SUTCLIFFE, WHICH I DON'T KNOW WHAT THE CONTENT WAS, BUT --

THE COURT: OKAY.

THE WITNESS: -- OR I DON'T RECALL IF HE TOLD ME.

Q. WOULD YOU AGREE, DR. BACKER, THAT BASED ON THE ENVIRONMENT OF THE COURTROOM THIS MORNING AND THE TYPE OF REACTION THAT YOU OBSERVED, THAT YOU HAVE REAL CONCERNS; THAT IN A TRIAL ENVIRONMENT, WITH WITNESSES AND A JURY AND ALL OF THE VARIABLES INVOLVED IN A TRIAL PROCEEDING, THAT THERE IS AN EVEN GREATER LIKELIHOOD OF THE KIND OF BEHAVIOUR THAT WE OBSERVED THIS MORNING?

A. I DON'T KNOW IF I CAN SAY IT'S A GREATER LIKELIHOOD. I'M CONCERNED THAT HE WOULD ENGAGE IN THAT KIND OF BEHAVIOR AT ALL; AND I'M -- I HAVE NO REASON TO BELIEVE THAT HE WOULDN'T ENGAGE IN THAT IN THE FUTURE.

Q. AND WHEN YOU SAY YOU HAVE NO REASON TO BELIEVE HE

WOULDN'T, ARE YOU ALLUDING TO POINTS MADE IN YOUR REPORT THAT THE PARANOID DISORDER IS SOMEWHAT ROOTED IN THE CHARACTER OF THE INDIVIDUALS, PART OF WHO THEY ARE?

A. RIGHT. CORRECT.

Q. ARE YOU INCLINED TO RECOMMEND TO THIS COURT ANY CLINICAL ENVIRONMENT OR ANY SETTING IN WHICH A PRODUCTIVE UNDERTAKING CAN BE MADE AS TO WHAT THE STATUS OF MR. SUTCLIFFE'S COMPETENCY IS, OR WHETHER IT'S THE COMPLETION OF AN ACCESS ONE ASSESSMENT, OR THE FURTHEST ESTIMATE OF THE ACCESS TWO DIAGNOSIS THAT HAS ALREADY BEEN MADE?

THE COURT: DR. IHLE, I SEE -- EXCUSE ME, MR. NICOLAYSEN.

MR. NICOLAYSEN: CERTAINLY.

THE COURT: DR. IHLE, IF YOU'RE PLANNING TO LEAVE THE COURTROOM, I'D LIKE YOU TO STAY, UNLESS THERE'S SOME COMPELLING REASON YOU HAVE TO LEAVE.

MR. NICOLAYSEN: THIS IS WRAPPING IT UP.

DR. IHLE: I WANTED TO SHUT THE DOOR. IT'S KIND OF NOISY, SO --

Q. OH, OKAY. AND, DR. BACKER, THIS IS REALLY THE FINAL QUESTION.

CAN YOU RECOMMEND OR PROPOSE TO THIS COURT A CLINICAL ENVIRONMENT WITHIN THE BUREAU OF PRISONS WHERE A FURTHER EVALUATION CAN BE MADE TO GUIDE THIS COURT TO A BETTER CONCLUSION ONE WAY OR THE OTHER, AS TO WHETHER MY CLIENT IS OR

ISN'T COMPETENT; WHETHER THAT MEANS BEING ABLE TO MAKE THE ACCESS ONE ASSESSMENT OR DIAGNOSIS THAT HAS BEEN DEFERRED, OR WHETHER IT MEANS EVALUATING MORE FULLY THE DEGREE OF THE ACCESS TWO DIAGNOSIS THAT HAS ALREADY BEEN MADE; I.E., THE PARANOID DISORDER?

A. WELL, TYPICALLY, IF A PERSON -- IF AFTER A COMPETENCY EVALUATION SUCH AS THE ONE I DID -- LET ME BACK UP FOR A SECOND. I THINK MY CONTINUING TO SEE HIM, I'M NOT SURE HOW MUCH MORE I'M GOING TO GET FROM HIM.

SO TYPICALLY, IF A PERSON IS -- AFTER INITIAL EVALUATION, IF IT APPEARS THEY'RE NOT COMPETENT, THERE IS SOME CONCERN ABOUT THAT. THEN, TYPICALLY, THE NEXT STEP IS TO SEND THEM TO ONE OF THE MEDICAL CENTERS.

Q. AND DO YOU FEEL THAT THIS IS PRUDENT IN A CIRCUMSTANCE SUCH AS THIS? AND IF THE COURT PLEASE, I INVITE YOU TO FACTOR WHAT YOU OBSERVED THIS MORNING IN ANSWERING THAT QUESTION.

A. BASED ON WHAT I SAW THIS MORNING, I THINK THAT'S PROBABLY PRUDENT.

Q. THANK YOU, DR. BACKER.

MR. NICOLAYSEN: NOTHING FURTHER, YOUR HONOR.

THE COURT: OKAY. I'LL HAVE A COUPLE QUESTIONS IN A MINUTE, BUT DO YOU WANT TO ASK ANY QUESTIONS?

MS. DUARTE: I DO, YOUR HONOR.

THE COURT: GO AHEAD.

MS. DUARTE: HAVE SOME QUESTIONS.

CROSS-EXAMINATION

BY MS. DUARTE:

Q. DR. BACKER, WHEN WE'RE REFERRING TO WHAT YOU SAW THIS MORNING, WE'RE REFERRING TO MR. SUTCLIFFE'S BEHAVIOUR HERE IN THE COURT BEFORE HE WAS EXPELLED, CORRECT?

A. CORRECT.

Q. NOW, WHEN YOU AND I SPOKE ON THE PHONE ABOUT THIS CASE, DO YOU REMEMBER THAT I DESCRIBED TO YOU SEVERAL OTHER DISRUPTIVE INCIDENTS THAT I HAD WITNESSED WITH MR. SUTCLIFFE?

A. YES.

Q. AND, YOU, OBVIOUSLY, DIDN'T WITNESS THOSE INCIDENTS, THOUGH, CORRECT?

A. CORRECT.

Q. WHEN YOU CONSIDERED THOSE INCIDENTS AS PART OF YOUR KNOWLEDGE OF THE HISTORY OF HIM IN HIS CASE, DID YOU CONSIDER THEM TO BE SOMEWHAT LIKE WHAT YOU WITNESSED TODAY? OR HOW DID THEY COMPARE, IN YOUR MIND TO WHAT YOU WITNESSED TODAY?

A. IF I RECALL CORRECTLY, I THINK WE'RE TALKING ABOUT THE HEARING WHERE THE COMPETENCY EVALUATION WAS REQUESTED. I GUESS HE STOOD UP, AND THERE WAS AN OUTBURST OF SOME TYPE; SO THIS SEEMS LIKE WHAT YOU DESCRIBED TO ME.

Q. SO YOU'RE ASSUMING, WHEN YOU EXPRESS CONCERN ABOUT WHAT HAPPENED TODAY, AND TELL ME IF I'M WRONG. YOU'RE NOT ASSUMING THIS WAS THE FIRST TIME THIS HAPPENED. YOU'RE ASSUMING THIS HAS HAPPENED BEFORE?

A. CORRECT.

Q. SO YOUR CONCERN LIES WITH THE FACT THAT YOU EXPLAINED TO HIM THAT THAT WAS INAPPROPRIATE, YET, HE DID IT ANYWAY?

A. CORRECT. I MEAN, IT'S A LITTLE MORE THAN THAT, BUT IN A SIMPLE ANSWER, YES.

Q. CAN YOU JUST TELL ME BRIEFLY WHAT ELSE? WHAT AM I MISSING? BECAUSE I DIDN'T MEAN TO UNDEREMPHASIZE IT.

A. NO. I THINK THE FACT IS THAT HE -- THAT A STUDY WAS ORDERED, WHICH I THINK HE HAD SOME CONCERNS ABOUT. WE SAT DOWN. WE TALKED A LOT ABOUT THE REASON FOR THIS; THE NEED FOR HIM TO BE COMPETENT; THE KIND OF BEHAVIOR HE NEEDS TO ENGAGE IN TO DEMONSTRATE THAT HE'S COMPETENT. I'M SURPRISED THAT IN SPITE OF ALL THAT HE BLEW UP LIKE THIS, OR HE REACTED LIKE THIS.

IF I MAY DIGRESS FOR A SECOND. OFTEN WITH PEOPLE WHO, LET'S SAY, HAVE A DELUSIONAL DISORDER, OR EVEN SOME OTHER DISORDERS, WHEN YOU'RE -- PARTICULARLY, WITH COMPETENCY RESTORATION, YOU ACTUALLY ARE COACHING THEM SOMETIMES. I MEAN, YOU'RE NOT EVEN TRYING TO ARGUE WITH THEM WHETHER THEIR BELIEFS ARE TRUE OR NOT. YOU'RE TRYING TO SAY, LOOK, IF YOU WANT TO GET THROUGH THIS, DON'T TALK ABOUT THIS. FOCUS ON THIS. AND I'VE WORKED WITH PEOPLE WHO ARE PARANOID; WHO ARE ABLE TO DO THAT. MAYBE THEY DON'T DO IT RIGHT AWAY, BUT THEY GET THE MESSAGE; AND THEY'RE, FOR LACK OF A BETTER WORD, OR BETTER PHRASE, THEY'RE GOAL ORIENTED, SO THEY'LL PUT ASIDE SOME OF

THEIR BELIEFS, AND THEY'LL FOCUS ON THE TASK AT HAND. HE'S GOT THE CAPACITY TO DO THAT. I THOUGHT THAT -- I THOUGHT THROUGH MY MANY INTERACTIONS WITH HIM, THAT HE WAS GETTING THAT. SO TO HAVE HIM REACT LIKE HE DID TODAY, WHICH IS COUNTER TO EVERYTHING WE TALKED ABOUT, RAISES IN MY MIND, ANYWAY, THE CONCERN THAT -- THAT HIS ABILITY TO COOPERATE IS MORE IMPAIRED THAN I THOUGHT.

Q. BUT NOW, WE TALKED ABOUT A TRIGGER, AND YOU TALKED ABOUT IT IN YOUR TESTIMONY, TRIGGER?

A. RIGHT.

Q. AND BY TRIGGER, I TAKE IT, YOU MEAN SOMETHING THAT'S UNIQUE TO THAT PERSON THAT TRIGGERS SOME EMOTIONAL OUTBURST OR PARANOIA? IN OTHER WORDS, IT'S NOT SOMETHING LIKE, TO SOMEONE WHO'S ALLERGIC TO A FOOD, EATING THAT FOOD? IT'S SOMETHING THAT'S GOING TO MAKE HIM MISBEHAVE, BASICALLY; IS THAT CORRECT?

A. I THINK THAT'S CORRECT.

Q. OKAY. AND WHEN YOU WERE TALKING WITH MR. SUTCLIFFE, DID YOU TALK ABOUT -- I KNOW THAT YOU DISCUSSED THE CONCEPT OF PLEADING GUILTY.

A. CORRECT.

Q. DID YOU TALK WITH HIM ABOUT WHETHER OR NOT -- AND YOU DON'T HAVE TO -- PLEASE DON'T TELL ME WHAT THE ANSWER WAS -- BUT DID YOU DISCUSS WITH HIM WHETHER OR NOT HE WAS GUILTY?

THE COURT: WHAT'S THE RELEVANCE OF THAT?

MS. DUARTE: I THINK THAT A TRIGGER HAD TO DO WITH A

PLEA OFFER THAT WE DISCUSSED LAST NIGHT; AND THAT, PROBABLY ALTHOUGH I'M NOT PRIVY TO ATTORNEY/CLIENT COMMUNICATIONS, WAS DISCUSSED WITH HIM THIS MORNING BEFORE THE HEARING.

THE COURT: WHEN YOU SAY, WE DISCUSSED LAST NIGHT, WHO ARE YOU REFERRING TO?

MS. DUARTE: HIS ATTORNEY AND I.

THE COURT: ALL RIGHT. I'LL PERMIT AN ANSWER TO THE QUESTION.

A. WE DISCUSSED IT.

Q. OKAY. AND IN YOUR DISCUSSIONS, I TAKE IT, IT DID NOT OCCUR TO YOU, AND IT WOULD NOT BE YOUR PLACE TO ACTUALLY SUGGEST TO MR. SUTCLIFFE, IN ANY WAY, THAT HE WAS GUILTY?

A. CORRECT.

Q. OKAY. SO YOU DIDN'T HAVE TO DEAL WITH THAT?

A. RIGHT. IF I CAN CLARIFY ONE THING. I NEVER DIRECTLY ASKED HIM, DID YOU DO THIS OR NOT. I'M JUST SAYING, THAT IN THE CONTEXT OF ALL WE WERE TALKING ABOUT, HE DESCRIBED SOME OF THE THINGS THAT HE DID.

Q. RIGHT. NOW, THE OUTBURST THAT YOU SAW THIS MORNING, I WANT YOU TO ASSUME, JUST FOR A MINUTE, IF YOU WILL, ASSUME THAT MR. SUTCLIFFE HAD, FOR THE FIRST TIME, WITH THIS ATTORNEY, MR. NICOLAYSEN, WHO'S HIS FORTH ATTORNEY, WAS BROACHED -- THAT THE SUBJECT WAS BROACHED BY HIS ATTORNEY THIS MORNING AS TO WHETHER OR NOT MR. SUTCLIFFE WANTED TO PLEAD GUILTY; DO YOU KNOW ENOUGH ABOUT MR. SUTCLIFFE IN YOUR CONVERSATIONS YOU'VE HAD WITH HIM,

TO HAVE AN OPINION ON WHETHER THAT COULD BE A TRIGGER? AGAIN, NOTHING HAVING TO DO WITH HIS ACTUAL GUILT. BUT ON WHETHER THAT DISCUSSION COULD CAUSE HIM TO, FOR LACK OF A BETTER WORD, GO OFF?

A. WELL, HE MADE IT CLEAR THAT HE DIDN'T WANT -- AGAIN, BECAUSE ONE OF THE QUESTION YOU ASK IN COMPETENCY IS, WE TALK ABOUT PLEA BARGAIN, AND HE WAS NOT INTERESTED IN A PLEA BARGAIN. I GUESS BASED ON -- AGAIN, I DON'T KNOW WHAT WAS DISCUSSED, BUT BASED ON MY INTERACTIONS WITH HIM, I WOULD HAVE EXPECTED HE WOULD HAVE SAID, NO. I'M NOT GOING TO DO IT. AND HE WOULD HAVE BEEN FAIRLY CALM ABOUT IT. SO, AGAIN, I'M SPECULATING, BECAUSE I DON'T KNOW WHAT WAS SAID.

BUT, YOU KNOW, THIS SEEMED TO REALLY ESCALATE TODAY TO DREDGING UP A WHOLE BUNCH OF THINGS, INCLUDING RECUSING THE JUDGE, AND ALL THAT STUFF; SO I'M JUST SURPRISED. I WOULD HAVE THOUGHT AFTER HAVING SPENT A LOT OF TIME WITH HIM, THAT HE MIGHT HAVE SAID, YOU KNOW, "BLANK," NO, I'M NOT GOING TO DO THAT, BUT HE WOULD HAVE LEFT IT AT THAT.

Q. DID YOU HAVE DISCUSSIONS WITH HIM ABOUT THE TIMING OF HIS FIRING OR REFUSING TO WORK WITH HIS PRIOR ATTORNEYS IN THIS CASE, AND AS TO WHETHER OR NOT IT COINCIDED WITH SETTLEMENT OFFERS DISCUSSED BY THOSE ATTORNEYS?

A. I DIDN'T ASK HIM THAT SPECIFICALLY. I'M TRYING TO THINK IF THAT CAME UP.

(PAUSE.)

A. I DON'T REMEMBER SPECIFICALLY. I REMEMBER WHAT HE TOLD ME ABOUT THE LAST ATTORNEY, AND I DON'T REMEMBER THAT COMING UP AT ALL. I DON'T KNOW ABOUT THE FIRST ATTORNEYS.

Q. OKAY. ALL RIGHT. THE REASON I'M ASKING YOU THESE QUESTIONS IS, IS THAT IF I -- IF I WERE TO TELL YOU -- AND, AGAIN, THIS IS -- I GUESS HAS TO BE A HYPOTHETICAL QUESTION -- BUT THE BREAKDOWN OF COMMUNICATIONS BETWEEN MR. SUTCLIFFE AND HIS PRIOR THREE ATTORNEYS, AS WELL AS MR. NICOLAYSEN -- AND BY, BREAKDOWN, I DESCRIBE WHAT YOU SAW THIS MORNING.

A. HMM-HMM.

Q. DIRECTLY FOLLOWED DISCUSSIONS OF PLEADING GUILTY AND WHAT MR. SUTCLIFFE WOULD HAVE TO DO AND HAVE TO ADMIT TO IN ORDER TO RESOLVE THE CASE, IS IT POSSIBLE THAT, PERHAPS, MR. SUTCLIFFE SIMPLY GETS VERY, VERY ANGRY TO THE POINT WHERE HE REFUSES TO CONTROL HIMSELF, AND INSTEAD, EXPRESSES HIS ANGER WHEN HE'S CONFRONTED WITH THE FACT THAT IT'S MAYBE TIME TO EITHER SETTLE THE CASE OR GET READY FOR TRIAL?

MR. NICOLAYSEN: YOUR HONOR, PERMIT ME. I DON'T MEAN TO OBJECT IN THIS TYPE OF PROCEEDING, BUT I DON'T WANT THE RECORD TO SUGGEST THAT THE ASSUMPTION IS, IN FACT, CORRECT.

THE COURT: YES. I DON'T THINK THE RECORD DOES SUGGEST THAT. I DON'T CONSTRUE IT TO BE ANYTHING OTHER THAN A HYPOTHETICAL QUESTION. I DON'T HAVE ANY ASSUMPTION, AND I'M CERTAINLY NOT MAKING ANY FINDINGS.

BUT I THINK THE WAY TO REALLY GET THE QUESTION FRAMED IN

A WAY THAT I THINK WOULD ASSIST ME, IS TO ASK IT THIS WAY, DOCTOR.

TO THE EXTENT THAT IT'S AN INHERENT FUNCTION OF A CRIMINAL DEFENSE ATTORNEY IN REPRESENTING EFFECTIVELY THE BEST INTEREST OF HIS CLIENT, TO EXPLORE WITH THE PROSECUTOR, A REASONABLE PLEA AGREEMENT THAT MIGHT LIMIT SOME DOWNSIDE RISKS TO THE DEFENDANT; AND, TWO, SECONDLY, TO THE EXTENT THAT THAT ATTORNEY THEN HAS AN OBLIGATION TO DISCUSS WITH THE DEFENDANT, THE DISCUSSIONS THE ATTORNEY MAY HAVE HAD WITH THE PROSECUTOR; DO YOU THINK THAT THE COMBINATION OF THOSE TWO THINGS WOULD MAKE IT DIFFICULT FOR MR. SUTCLIFFE TO WORK WITH HIS ATTORNEY, WHOEVER THAT ATTORNEY IS?

THE WITNESS: I THINK BASED ON WHAT I SAW TODAY, YES. IF I MAY ELABORATE. WE TALKED ABOUT PLEA AGREEMENTS. I MEAN, THE CONCEPT OF IT, AND HE WAS NOT -- WHEN I SPOKE WITH HIM -- AGAIN, HE -- HE SEEMED REASONABLE THAT HE WOULD LOOK AT ALL KINDS OF OPTIONS OR WHATEVER.

SO I THINK BASED ON MY INTERACTIONS WITH HIM, IF SIMPLY TODAY A PLEA AGREEMENT WAS SUGGESTED TO HIM, I'M JUST SURPRISED THAT HE GOT THAT UPSET.

THE COURT: OKAY. WELL, WE DON'T KNOW IF ONE WAS SUGGESTED TO HIM. WE'RE NOT GOING TO MAKE ANY EFFORT TO FIND OUT.

THE WITNESS: OKAY.

THE COURT: LET'S JUST MOVE ON TO A DIFFERENT SUBJECT.

BY MS. DUARTE:

Q. MR. NICOLAYSEN MENTIONED -- I'M ALMOST DONE, YOUR HONOR. MR. NICOLAYSEN MENTIONED THE PROXIMITY OF THE CHARGING AND OF THE INDICTMENT AS SOMETHING THAT MIGHT CAUSE A DEFENDANT TO FEEL ANXIETY; DO YOU REMEMBER WHEN HE TALKED TO YOU ABOUT THAT A LITTLE BIT?

A. I WASN'T COMPLETELY CLEAR ON THAT. IF YOU COULD MAYBE -- I MEAN --

Q. I THINK THAT HE MENTIONED THAT, PERHAPS, A DEFENDANT WOULD TEND TO BE MORE ANXIOUS AROUND THE INITIATION OF THE CASE, AND THAT THIS CASE WAS ABOUT A YEAR ALONG, SO THE NOVELTY, IF YOU WILL, HAD WORN OFF; AND HE ASKED YOUR OPINION AS TO -- HE ASKED WHETHER OR NOT THAT FACTORED INTO YOUR OPINION ON MR. SUTCLIFFE, AND YOU'RE SURPRISED AT HIS OUTBURST.

A. YEAH. I'M NOT EXACTLY -- I'M NOT RECALLING EXACTLY MY RESPONSE, BUT I KNOW THAT --

THE COURT: WELL, RIGHT NOW, YOU DON'T HAVE TO ADD ANYTHING.

THE WITNESS: OKAY.

THE COURT: SHE'S JUST TRYING TO PROVIDE A CONTEXT FOR HER NEXT QUESTION. ASK THE QUESTION.

Q. WHAT I WANTED TO ASK IS, IS THE PENDENCY OF TRIAL, THE PROXIMITY OF TRIAL, THE FACT THAT TRIAL IS A WEEK AWAY, TWO WEEKS AWAY, IN YOU EXPERIENCE, IF YOU HAVE THE EXPERIENCE, IS THAT ALSO A THING THAT WOULD PROVOKE ANXIETY IN A DEFENDANT?

A. SURE. I THINK THAT -- AND -- YES.
Q. MIGHT THAT PROVOKE A DEFENDANT WHO IS, IN FACT, COMPETENT TO ACT OUT OR ACT UP IF HE WEREN'T OTHERWISE INCLINED?
A. I DON'T THINK THAT TO THE DEGREE THAT I SAW TODAY.
Q. OKAY. ALL RIGHT. AND LASTLY, JUST TO CLARIFY, YOU HAD TALKED ABOUT PARANOID DELUSIONAL VERSUS JUST PARANOID; IS THAT FAIR?
A. PARANOID DELUSIONAL DISORDER VERSUS PARANOID PERSONALITY DISORDER.
Q. OKAY. GOOD. THANK YOU. FOR PARANOID DELUSIONAL, YOU FOUND THAT MR. SUTCLIFFE YOU DID NOT FEEL WAS, IN FACT, DELUSIONAL; IS THAT RIGHT?
A. CORRECT.
Q. I WANT TO PUT IT IN LAYMAN'S TERMS AND MAKE SURE I GET IT RIGHT, BUT PLEASE DON'T ALLOW ME TO GET IT WRONG.
IS THAT BASICALLY SAYING, WHEN HE'S NOT DELUSIONAL, BUT HE DOES HAVE PARANOID PERSONALITY TRAITS, IS THAT BASICALLY SAYING THAT HE'S NOT MAKING THINGS UP, NECESSARILY, AND IMAGINING THINGS THAT AREN'T THERE; HOWEVER, HE MAY BE MAKING MORE OF THINGS THAN -- IN OTHER WORDS, HE'S NOT MAKING THINGS UP, BUT, PERHAPS, HE'S MAKING TOO MUCH OF THINGS THAT ARE REAL?
A. THAT IS MORE ALONG THE LINES OF A PARANOID PERSONALITY DISORDER.
Q. OKAY. SO THAT WOULD DESCRIBE MR. SUTCLIFFE? AGAIN, NOT

MAKING THINGS UP OUT OF THIN AIR, BUT PERHAPS, READING TOO MUCH INTO THINGS?

A. OVER REACTING. MISINTERPRETING.

Q. BUT NOT DELUSIONAL, IN THAT, HE DOESN'T UNDERSTAND REAL VERSUS NOT REAL?

A. CORRECT.

Q. OKAY. AND YOUR RECOMMENDATION AT THIS POINT -- AND PLEASE DON'T LET ME PUT WORDS IN YOUR MOUTH -- IS IT THAT HE BE FURTHER TESTED AT A FEDERAL MEDICAL FACILITY?

A. I THINK THAT'S THE PRUDENT THING TO DO.

Q. OKAY.

MS. DUARTE: I HAVE NOTHING FURTHER. THANK YOU, YOUR HONOR.

THE COURT: OKAY. YOU DON'T HAVE ANYTHING FURTHER, DO YOU?

MR. NICOLAYSEN: NOTHING. THANK YOU.

THE COURT: OKAY. DR. BACKER, A COUPLE OF THINGS. THE REPORT THAT HAS BEEN -- OR WILL BE MARKED AND PLACED IN THIS RECORD CONTAINS SOME TYPOS. AND KNOWING WHAT WE ALL KNOW ABOUT MR. SUTCLIFFE'S UNDERSTANDABLE DESIRE TO MAKE SURE EVERYTHING IS DONE RIGHT, I WANT TO CONFIRM THAT THIS ENTIRE REPORT IS ABOUT STEVEN WILLIAM SUTCLIFFE.

WHAT I'M REFERRING TO IS, THAT AT THE TOP OF PAGE 3, AND FOR SEVERAL ENSUING PAGES, THE NAME OF THE PATIENT IS INDICATED AS DAVID SUTCLIFFE.

THE WITNESS: OH.

THE COURT: AND THE CONCLUDING PAGE OR TWO, IT'S LISTED AS DAVID SNYDER; BUT THAT'S JUST SOME SECRETARY'S TYPO, RIGHT?

THE WITNESS: CORRECT, SIR.

THE COURT: AND ALL OF THE MATERIAL OF PAGES 1 THROUGH 15 IN THIS REPORT ARE ABOUT, AND DESCRIBE ONLY, STEVEN WILLIAM SUTCLIFFE, CORRECT?

THE WITNESS: THAT'S CORRECT.

THE COURT: OKAY. NOW, NEXT, I WOULD LIKE YOU TO TELL ME, ASSUMING THAT OTHER QUALIFIED EXAMINERS, INCLUDING AT A MEDICAL CENTER, AT SOME POINT CONCLUDE THAT WHATEVER MR. SUTCLIFFE'S CONDITION IS, IT IS NOT AN ACCESS ONE DISORDER; ARE THERE ANY MEASURES THAT SOMEONE LICENSED TO DO THIS KIND OF THING, NAMELY, A MEDICAL PHYSICIAN, NOT NECESSARILY A PSYCHOLOGIST, BUT SOMEONE, WHO, PERHAPS, MAY BE A PSYCHIATRIST OR SOME OTHER KIND OF MEDICAL PHYSICIAN, A DOCTOR; ARE THERE ANY MEASURES SUCH A PERSON CAN DO, PSYCHOTROPICLY OR OTHERWISE, TO ASSIST A PERSON WHO HAS EXHIBITED A CONTINUED, NOT ONLY TENDENCY, BUT A CONTINUED PATTERN OF DISRUPTIVE PROCEEDINGS, SO THAT IF THERE ARE FURTHER PROCEEDINGS, THE RISK IS MINIMIZED? ARE THERE TRANQUILIZERS? ARE THERE OTHER KINDS OF MEDICATIONS THAT CAN BE ADMINISTERED TO SOMEONE TO MAKE IT POSSIBLE FOR THE PROCEEDINGS TO BE CONDUCTED IN A FAIR AND APPROPRIATE WAY?

THE WITNESS: YES.

THE COURT: AND IN YOUR EXPERIENCE, AND WORKING WITH THE

BUREAU OF PRISONS, IS THAT SOMETHING THAT YOU OR YOUR COLLEAGUES HAVE EVER DONE?

THE WITNESS: YES.

THE COURT: TO ENHANCE THE BASIS FOR ASSURING THAT A CONCLUSION OF COMPETENCE IS ACTUALLY REENFORCED BY COMPETENT BEHAVIOUR DURING THE TRIAL?

THE WITNESS: IF I UNDERSTAND YOUR QUESTION CORRECTLY, PERHAPS, THE BEST WAY I CAN ANSWER IT IS, DESCRIBE WHAT IT'S DONE IF HE GOES TO A MEDICAL CENTER, WHERE THE MEDICATION ISSUE CAN BE ADDRESSED.

IF THEY FIRST TRY AND GET A PERSON TO VOLUNTARILY AGREE TO TAKE MEDICATION, I DOUBT HE WOULD. THEN THEY HAVE TO, IF THE TREATING CLINICIAN PHYSICIANS BELIEVE HE NEEDS MEDICATION THEN, AND IT'S INVOLUNTARY, THEY HAVE TO HOLD A HEARING, BECAUSE THERE'S A WHOLE PROCESS THAT HAS TO BE DONE.

AND THEN, IF IT'S DETERMINED THAT HE DOES MEET THE CRITERIA, AND MEDICATION IS ADMINISTERED, PARTICULARLY, WITH DELUSIONAL DISORDERS, WHETHER IT'S A -- PARTICULARLY, WITH A DELUSIONAL -- PARANOID DELUSIONAL DISORDER, THOSE TYPES OF DISORDERS TEND TO NOT BE HIGHLY RESPONSIVE TO MEDICATION.

IT DOESN'T MEAN IT CAN'T HAPPEN, BUT IT'S NOT UNCOMMON FOR A PERSON WHO HAS A PARANOID DELUSIONAL DISORDER TO BE ON MEDICATION AND THE DELUSION DOESN'T GO AWAY. MAYBE THEY DON'T TALK ABOUT IT QUITE AS MUCH OR WHATEVER. SO UNLIKE -- LET'S SAY SCHIZOPHRENIA OR SOME OTHER DISORDERS, WHICH TEND TO BE

MORE RESPONSIVE TO MEDICATION.

SO ANYWAY, IF HE WERE TO GO THERE; IF THEY FELT HE WARRANTED MEDICATION; IF THEY DID A HEARING AND INVOLUNTARILY MEDICATED HIM, IT'S POSSIBLE IT COULD HAVE SOME POSITIVE AFFECT ON HIM, BUT THERE'S NO GUARANTEE.

THE COURT: OKAY. NOW, MY NEXT QUESTION IS, HOW LONG, TYPICALLY, WOULD IT TAKE, INCLUDING TRAVEL TIME, KNOWING THAT MR. SUTCLIFFE IS HERE IN LOS ANGELES AND THE MEDICAL CENTERS ARE EITHER IN SPRINGFIELD, MISSOURI OR ROCHESTER, MINNESOTA, THOSE ARE THE ONLY TWO ALTERNATIVES, RIGHT?

THE WITNESS: THERE'S BUTNER, NORTH CAROLINA.

THE COURT: OKAY. AND POSSIBLY BUTNER. HOW LONG WOULD IT TAKE FOR THE EVALUATION TO BE COMPLETED AND A REPORT TO BE SUBMITTED TO THE COURT, INCLUDING, FOR THE SAKE OF ANSWERING THIS QUESTION, WITH A PART OF THE ENTIRE PROCEDURE CONSISTING OF THIS HEARING THAT YOU JUST DESCRIBED RELATING TO THE POSSIBLE USE OF PSYCHOTROPIC DRUGS?

THE WITNESS: I THINK THE STATUTE GIVING THEM -- IF IT'S COMPETENCY RESTORATION, A 41(D), THEY GET FOUR MONTHS IS HOW LONG THEY'RE GIVEN. I CAN'T SPEAK TO HOW QUICKLY THE MARSHALS WILL BRING THEM OR NOT.

THE COURT: OKAY. NOW, IN MY PREVIOUS ORDER, I ISSUED IN BIG, STRONG, BOLD, CAPITAL LETTERS A STRONG RECOMMENDATION, WHICH WAS NOT FOLLOWED, THAT THE EVALUATION BE CONDUCTED EITHER IN ROCHESTER OR IN SPRINGFIELD. I TAKE IT, YOU WOULD AGREE,

THAT IF I DON'T SIMPLY RECOMMEND, BUT I SIMPLY VERY CLEARLY AND WITHOUT QUALIFICATION, ORDER THAT IT BE DONE, THERE'S NOT GOING TO BE ANY IMPEDIMENT?

THE WITNESS: IF YOU ORDER A 41(D), THEY CAN ONLY BE DONE IN A MEDICAL CENTER.

THE COURT: A 41(D) IS REFERRING TO WHAT?

THE WITNESS: I'M SORRY. 4241(D), IT'S THE COMPETENCY THE COMPETENCY RESTORATION. SO, FOR EXAMPLE, IF FOLLOWING THIS HEARING YOU DETERMINE HE IS NOT COMPETENT, THEN THE NEXT STEP IS A 41(D), AND THOSE CAN ONLY BE DONE IN A MEDICAL CENTER.

THE COURT: BUT IN ORDER TO HAVE AN EXAMINATION IN A MEDICAL CENTER, DO I FIRST HAVE TO FIND HE'S NOT COMPETENT? OR CAN I ALSO FIND THAT THERE IS SUFFICIENT QUESTIONS AS TO WHETHER HE'S COMPETENT TO REQUIRE THAT?

THE WITNESS: I THINK THE LATTER IS VERY ACCEPTABLE. I'VE WRITTEN REPORTS WITH SIMILAR TYPE OF WORDING FOR OTHER JUDGES, WHERE, YOU KNOW, WE CAN'T GUARANTEE THAT THE PERSON IS COMPETENT; THEREFORE, WE RECOMMEND THEY GO FOR A PERIOD OF RESTORATION.

THE COURT: WELL, THAT'S WHAT I'M INCLINED TO DO. ALL RIGHT. DO EITHER OF YOU HAVE ANY QUESTIONS THAT ARE FOLLOW UP QUESTIONS TO THE QUESTIONS I JUST ASKED DR. BACKER?

MR. NICOLAYSEN: NO, YOUR HONOR. THANK YOU.

MS. DUARTE: NO, YOUR HONOR.

THE COURT: ALL RIGHT. YOU MAY STEP DOWN, BUT STAY IN

THE COURTROOM, PLEASE.

HERE'S WHAT I'M GOING TO DO, COUNSEL. I AM MAKING A FINDING, AND LET ME DO THAT FIRST. THE FINDING IS THAT NOT ONLY PRUDENCE, BUT THE INTEREST OF JUSTICE REQUIRE THAT MR. SUTCLIFFE BE SUBJECTED TO A THOROUGH EXAMINATION AT A BUREAU OF PRISONS FEDERAL MEDICAL CENTER UNDER 18 U.S.C. 1441(D). THE FINDING IS BASED ON A COMBINATION OF FACTORS, INCLUDING THE COMPLETE TESTIMONY OF DR. BACKER; THE REPORT HE PREPARED; AND THE RECORD IN THIS CASE.

NOW, WITH RESPECT TO THE PROCEEDS THAT OCCURRED IN THIS COURTROOM ABOUT WHICH THERE'S BEEN CONSIDERABLE QUESTIONING AND ANSWERING, I'M NOT SURE IT'S SUFFICIENTLY CLEAR, SO I WANT THE RECORD TO REFLECT THAT BEFORE MR. SUTCLIFFE DEMANDED TO BE EXCUSED, AND I SENT HIM OUT OF THE COURTROOM, HE REFUSED TO SIT WHERE THE DEFENDANT IS REQUIRED TO SIT, NAMELY, AT COUNSEL TABLE, AND NEXT TO HIS LAWYER; AND THAT THROUGHOUT THE PROCEEDINGS, THAT THE TRANSCRIPT REFLECTS HE WAS PRESENT FOR, AND SPEAKING, OFTEN INTERRUPTING, HE WAS IN A BACK ROW BENCH; NOT AT THE FURTHEST ROW, BUT BACK IN THE PORTION OF THE COURTROOM WHERE VISITORS SIT.

see p8 l4, 14-18

WHEN HE DID SPEAK, IT WAS ALMOST ALWAYS IN AN EXTREMELY LOUD VOICE. AND ON OCCASION, HIS FACE GOT NOTICEABLY RED. THE REST OF WHAT HE SAID, I'M SURE, IS GOING TO BE REFLECTED IN THE TRANSCRIPT, AND I WON'T BELABOR THAT.

SECONDLY, I AM ORDERING THAT THE U.S. ATTORNEY ORDER A

TRANSCRIPT OF THIS PROCEEDING; THAT THE TRANSCRIPT BE ORDERED UNDER THE CIRCUMSTANCES UNDER WHICH IT WOULD BE COMPLETED AND MADE AVAILABLE TO MR. SUTCLIFFE IN NOT MORE THAN ONE WEEK. I WANT HIM TO HAVE THE TRANSCRIPT OF ALL THE PROCEEDINGS THAT OCCURRED OUTSIDE OF HIS PRESENCE, AND BEFORE HE'S TRANSFERRED TO ANY ADDITIONAL OR ALTERNATIVE FACILITY.

MS. DUARTE: YOUR HONOR, I SHOULD MAKE THAT AVAILABLE TO MR. NICOLAYSEN?

THE COURT: YES.

MS. DUARTE: OKAY.

THE COURT: COUNSEL CAN HAVE IT AS WELL, AND I WANT A COPY. BUT THIS IS A WAY TO DO IT RIGHT, AND FROM THE POINT OF VIEW OF MR. SUTCLIFFE AND THE COURT REPORTER; SO YOU PREPARE THE NECESSARY REQUESTS.

THIRD, MS. DUARTE, YOU PREPARE A COUPLE OF DOCUMENTS; ONE IS AN ORDER WORKING OFF OF THE ONE THAT I FILED ON JANUARY 17TH; BUT THIS TIME, INCLUDING THE NECESSARY FINDINGS FOR PURPOSES OF COMPLIANCE WITH THE SPEEDY TRIAL ACT. THE LAST TIME I ENGAGED IN THIS PROCEDURE, I ISSUED A SEPARATE ORDER, BECAUSE IT HAD BEEN INADVERTENTLY OMITTED FROM THE ORDER ABOUT COMPETENCY.

I WANT THERE TO BE A SINGLE ORDER, AND YOU CAN INCORPORATE IT INTO THE ORDER BY SWEEPING REFERENCE, THE MATTERS THAT OCCURRED HERE IN COURT, AND THE FINDINGS THAT I MADE; BUT THE ORDER SHOULD RECITE THAT DR. BARKER HIMSELF

CONCLUDED THAT IT WAS PRUDENT THAT MR. SUTCLIFFE BE GIVEN THE OPPORTUNITY TO UNDERGO A FURTHER EXAMINATION.

NOW, ON THE ISSUE OF MR. SUTCLIFFE'S COUNSEL, AND YOUR STATUS, MR. NICOLAYSEN, WHAT I INTEND TO DO NOW IS INSTRUCT THE THE MARSHALS TO BRING MR. SUTCLIFFE BACK INTO THE COURTROOM. I'M GOING TO TELL MR. SUTCLIFFE THAT I'LL PERMIT HIM TO STAY IN THE COURTROOM, IF, AND ONLY IF, HE IS PREPARED TO LISTEN TO WHAT I HAVE TO TELL HIM, BECAUSE THERE ARE NO FURTHER PROCEEDINGS BEFORE THE COURT; AND THERE ARE NO BASES FOR ME TO HEAR ANY FURTHER INFORMATION FROM HIM OR ANY LAWYER.

AND THEN I'M GOING TO TELL HIM THAT I'M GOING TO TAKE HIS MOTION TO RELIEVE YOU UNDER CONSIDERATION; THAT YOU WILL NOT BE RELIEVED; AND THAT HE WILL GET THE TRANSCRIPT OF THIS PROCEEDING; AND THAT THE QUESTION OF YOUR STATUS WILL BE SOMETHING THAT I RULE UPON AT THE CONCLUSION OF GETTING ANY OTHER REPORT; IS THAT SATISFACTORY TO YOU?

MR. NICOLAYSEN: IT IS, YOUR HONOR. THANK YOU. I AM NOT MOVING TO BE RELIEVED.

THE COURT: I KNOW YOU'RE NOT; AND I'M NOT SUGGESTING TO YOU THAT I THINK RELIEVING YOU WOULD BE WARRANTED.

BUT MR. SUTCLIFFE WILL HAVE TO CONSIDER VARIOUS ALTERNATIVES AND CONSEQUENCES OF DOING SO THAT I ALREADY TOLD HIM ABOUT AT THE TIME THAT YOU WERE APPOINTED; BUT I DON'T WANT TO GET INTO THAT KIND OF COLLOQUY NOW.

ANYTHING FURTHER FROM YOU, MS. DUARTE?

MS. DUARTE: YOUR HONOR, JUST FOR CLARIFICATION, YOU WANT ME TO ACTUALLY SEND A COPY OF THE TRANSCRIPT DIRECTLY TO MR. SUTCLIFFE AT MDC AS WELL AS HIS ATTORNEY AND THE COURT?

THE COURT: YES. I WANT HIM TO HAVE IT.

MS. DUARTE: OKAY. SO NOT THROUGH HIS ATTORNEY?

THE COURT: WELL, I DON'T CARE EXACTLY WHAT THE ROUTE IS.

MS. DUARTE: OKAY.

THE COURT: AS LONG AS IT GETS THERE QUICKLY, BECAUSE I WANT HIM TO HAVE IT WITHIN ONE WEEK OF TODAY, AND NOT LATER, AND POSSIBLY BEFORE.

IF YOU WANT TO DO IT THROUGH MR. NICOLAYSEN, IT MIGHT, FOR COSMETIC REASONS, BE PREFERABLE.

MR. NICOLAYSEN: I THINK FOR THE APPEARANCES, IT WOULD FAVOR GOING THROUGH ME.

THE COURT: YES. YOU DON'T HAVE TO SAY ANYTHING FURTHER. THAT'S WHAT WE'LL DO.

MR. NICOLAYSEN: THANK YOU, YOUR HONOR.

MS. DUARTE: I WILL DO THAT. AND BASED ON MY PAST EXPERIENCE, I SHOULD EASILY BE ABLE TO DO THAT WITHIN TWO DAYS.

THE COURT: OKAY. ALL RIGHT. LET'S BRING IN MR. SUTCLIFFE, PLEASE.

MR. NICOLAYSEN: YOUR HONOR?

THE COURT: YOU CAN PLACE HIM, GIVEN THE CIRCUMSTANCES, WHERE HE WAS SITTING BEFORE. YOU DON'T HAVE TO BRING HIM UP TO

THE COUNSEL TABLE.

NOW, HOLD ON A SECOND, MR. NICOLAYSEN.

MR. NICOLAYSEN: YOUR HONOR, MAY I BE HEARD BRIEFLY ON THIS ISSUE?

I'M WONDERING WHETHER IT'S WISE TO HAVE GOVERNMENT COUNSEL HERE, ONLY BECAUSE I CAN'T PREDICT IF MY CLIENT WILL, SUI SPONTE, JUST VOLUNTEER ASPECTS OF ATTORNEY/CLIENT DISCUSSIONS, WHICH ARE REALLY NOT APPROPRIATE.

THE COURT: OKAY. I DON'T INTEND TO RECEIVE ANY INFORMATION FROM ANYBODY FURTHER, BUT I WILL ASK BOTH OF THE REPRESENTATIVES FROM THE BUREAU OF PRISONS AND MS. DUARTE TO WAIT OUTSIDE FOR FURTHER INSTRUCTIONS.

MR. NICOLAYSEN: YOUR HONOR, ACTUALLY, IF I MIGHT HAVE THE CLINICIANS HERE, BECAUSE IT MIGHT BE HELPFUL IF THERE IS ANY TYPE OF BEHAVIOUR THAT MAY WEIGH RELEVANTLY TO THE ASSESSMENT. I'M ONLY AFRAID OF GOVERNMENT COUNSEL AS THE PROSECUTOR.

THE COURT: ALL RIGHT. IT'S, AS THE TERM HAS BEEN USED, PRUDENT. YOU BOTH MAY STAY.

MR. NICOLAYSEN: THANK YOU.

MS. DUARTE: SHALL I WAIT UNTIL HE STEPS IN TO STEP OUT?

THE COURT: NO. YOU SHOULD STEP OUTSIDE NOW, PLEASE. PLEASE BRING MR. SUTCLIFFE INTO THE COURTROOM.

(MS. DUARTE EXITED THE COURTROOM.)

U.S. MARSHAL: YES, YOUR HONOR.

(DEFENDANT SUTCLIFFE WAS ESCORTED INTO THE COURTROOM.)

THE COURT: OKAY. MR. SUTCLIFFE, I'M PERMITTING YOU TO COME BACK INTO THE COURTROOM, BECAUSE I WANT TO EXPLAIN CERTAIN DEVELOPMENTS TO YOU.

I AM NOT GOING TO BE RECEIVING ANY ADDITIONAL INFORMATION FROM ANYBODY, INCLUDING YOU, OR MR. NICOLAYSEN OR THE PROSECUTOR, WHO'S NOT IN THE COURTROOM AT THE TIME.

FIRST OF ALL, YOU SHOULD KNOW THAT A TRANSCRIPT OF THE PROCEEDINGS THAT HAVE JUST BEEN COMPLETED WILL BE COMPILED; AND MR. NICOLAYSEN WILL GET IT TO YOU, AND WE WILL DO SO, I ANTICIPATE, DEPENDING UPON THE TIMING OF THE COURT REPORTER, NOT MORE THAN ONE WEEK FROM TODAY; SO YOU WILL HAVE A TRANSCRIPT OF EVERYTHING THAT WAS SAID, AND EVERYTHING THAT WAS SAID WAS TRANSCRIBED. IT WAS ALL DONE ON THE RECORD.

SECONDLY, I HAVE REACHED THE CONCLUSION, FOR VARIOUS REASONS, THAT WILL BE RECITED IN A WRITTEN ORDER, THAT THE INTEREST OF JUSTICE REQUIRE THAT YOU BE EXAMINED FURTHER. YOU WILL BE EXAMINED AT A FEDERAL MEDICAL CENTER OPERATED BY THE BUREAU OF PRISONS; THAT IS A FACILITY THAT IS NOT IN LOS ANGELES. IT REMAINS TO BE SEEN WHICH FACILITY IT WILL BE IN. THE EXAMINATION WILL BE DIFFERENT FROM, AND TAKE LONGER THAN THE ONE THAT HAS JUST BEEN PRELIMINARILY CONDUCTED.

AN ORDER REFLECTING THAT CONCLUSION WILL BE PREPARED AND FILED, AND THE BUREAU OF PRISONS WILL BE REQUIRED TO COMPLY WITH THAT ACCORDINGLY. AT THE CONCLUSION OF THAT PROCEEDING,

MR. SUTCLIFFE, I WILL GET ANOTHER REPORT. THE EXAMINER WILL NOT BE DR. BACKER. IT WILL BE SOMEBODY ELSE. AND AFTER I GET THAT REPORT, WE WILL HAVE ANOTHER HEARING. AT THE TIME WE HAVE THE SECOND HEARING, I WILL ALLOW YOU TO RE- -- OR I WILL REVISIT AND MAY RULE UPON, DEPENDING UPON THE STATE OF THE RECORD, YOUR PENDING MOTION TO RELIEVE MR. NICOLAYSEN. UNTIL THAT HEARING, AND UNTIL I MAKE ANY FURTHER RULING, MR. NICOLAYSEN IS NOT RELIEVED OF DUTIES AS YOUR LAWYER; AND HE WILL CONTINUE TO FUNCTION AS YOUR COUNSEL OF RECORD.

ALL OF THE OTHER ORDERS THAT I PREVIOUSLY ISSUED WILL REMAIN IN EFFECT CONCERNING YOUR RELATIONSHIP WITH COUNSEL AND WITH THE COURT; AND WITH THAT, I THINK IT COVERS EVERYTHING THAT NEEDS TO BE ADDRESSED; SO THIS MATTER IS ADJOURNED.

THE DEFENDANT: I CHALLENGE THE JURISDICTION OF THIS COURT. THIS EXAMINATION IS UNLAWFUL; AND YOU'RE HOLDING ME UNLAWFULLY; AND I FULLY SEEK TO EXERCISE EVERY REMEDY UNDER THE LAW TO MAKE SURE THAT YOU FEEL HOW YOU'RE MAKING ME FEEL. YOU HAVE NO HONOR. YOU HAVE LOST ALL SENSE OF HONOR IN THIS COURTROOM. "KANGAROO COURT."

THE COURT: ALL RIGHT. WE'RE ADJOURNED.

(OFF THE RECORD.)

THE COURT: ALL RIGHT. OFF THE RECORD MR. NICOLAYSEN ASKED WHETHER THE ORDER THAT I'VE REQUESTED MS. DUARTE TO PREPARE WILL CONFIRM THAT THE CURRENTLY OR PREVIOUSLY SET TRIAL DATE OF MARCH 25TH IS VACATED, AND IT SHOULD, AND IT WILL,

ALONG WITH THE RECITALS.

NOW, I THINK THAT YOU SHOULD, FOR PURPOSES OF -- I SUPPOSE WHAT ARE CONSIDERED TO BE STANDARD ADMINISTRATIVE PURPOSES, PICK A DIFFERENT DATE AND MAKE IT -- MAKE IT 16 WEEKS FROM THIS COMING TUESDAY.

MR. NICOLAYSEN: THAT WOULD BE FOR THE FOLLOW UP HEARING?

THE COURT: YES. THAT WOULD BE FOR THE FOLLOW UP HEARING. THE FOLLOW UP HEARING CAN BE IN THE AFTERNOON, 16 WEEKS FROM THIS COMING TUESDAY. WILL THAT GIVE THE BUREAU OF PRISONS ENOUGH TIME?

DR. IHLE: THAT'S EXACTLY FOUR MONTHS FROM NOW.

THE COURT: I DIDN'T MEAN TO SAY 16. I DON'T KNOW WHEN WE'LL GET THE REPORT FROM THE BUREAU OF PRISONS. SO, I THINK, WHAT I'LL DO IS SET A STATUS CONFERENCE FOR 18 WEEKS FROM A DATE NEXT WEEK. WHAT DAY WOULD BE BEST DURING THE WEEK? A WEDNESDAY, STEVE?

THE CLERK: YES. LET ME GIVE YOU A DATE.

THE COURT: ONE MINUTE.

(OFF THE RECORD.)

THE CLERK: HOW MANY WEEKS DID YOU SAY?

THE COURT: EIGHTEEN WEEKS FROM NEXT WEDNESDAY. MEANWHILE, WHILE YOU'RE CALENDARING THAT, STEVE, DID YOU WANT TO BE HEARD?

MS. DUARTE: YES, YOUR HONOR.

THE COURT: NO, I'M ASKING FOR A MOMENT, MS, DUARTE, THE GENTLEMAN FROM THE BUREAU OF PRISONS IS STANDING.

THE COURT: THIS IS DR. IHLE. I H L E?

DR. IHLE: YES. I H L E. I JUST WANTED TO MAKE A SUGGESTION THAT, PERHAPS, THE COURT ORDER SPECIFY A TIME FRAME FOR WHICH THE MARSHALS SHOULD PICK UP MR. SUTCLIFFE AND GET HIM TO THE MEDICAL CENTER, BECAUSE OTHERWISE, IT COULD STRETCH OUT FOR SOME TIME.

THE COURT: OKAY. THAT'S A GOOD IDEA. WE'LL DO THAT.

DR. IHLE: AND ANOTHER THING IS, I JUST WANTED TO MAKE CLEAR, YOUR HONOR, THAT IT WAS A 4241(D) AS IN DOG THAT WAS ORDERED?

THE COURT: YES.

DR. IHLE: DOES THAT ENSURE US THAT THERE'LL BE AN EVALUATION.

THE COURT: YES. AND MS. DUARTE IS GOING TO CONTAIN THE LANGUAGE. AND I DON'T WANT IT TO BE THAT I'VE MADE A FINDING THAT HE NEEDS TO BE REHABILITATED OR TREATED, BUT INSTEAD, HAVE MADE A FINDING, THAT THE INTEREST OF JUSTICE, BASED UPON THE COMPLETE RECORD, REQUIRE A FURTHER EXAMINATION.

NOW, IN TERMS OF THE DATE IN THE ORDER, I THINK I'LL PREPARE A SEPARATE ORDER AS TO THE MARSHAL PICKING UP MR. SUTCLIFFE. DON'T PUT THAT IN THE COMPETENCY ORDER.

AND HOW LONG DO YOU THINK IT'LL TAKE, HOPE, FOR A TRANSCRIPT TO BE AVAILABLE?

THE COURT REPORTER: PROBABLY BY TUESDAY.

THE COURT: TUESDAY. OKAY. SO I THINK I'LL HAVE THEM PICK HIM UP ON FRIDAY -- THURSDAY OR FRIDAY OF NEXT WEEK.

AND I DON'T KNOW WHETHER THEY CARE ABOUT WEEKEND TRAVEL, OR HOW THEY'LL GET HIM THERE; BUT WON'T A DESIGNATION HAVE TO BE MADE BY THEN? HOW DO THE MARSHALS KNOW WHERE TO TAKE HIM?

DR. IHLE: WELL, YOUR HONOR, IF THERE'S A DEFINITE TIME FRAME SPECIFIED, THAT WOULD RESULT IN THE MARSHALS IN GETTING THE PAPERWORK, THE PROPER PAPERWORK TO THE INDIVIDUALS, SPECIFICALLY, THE CCM'S OFFICE, WHERE THEY PUT TOGETHER A PACKET FOR THE PERSON TO BE DESIGNATED.

A ONE-WEEK PERIOD MIGHT NOT BE SUFFICIENT TIME FOR THAT TO ALL HAPPEN, BECAUSE WHAT HAPPENS THEN, YOUR HONOR ISSUES TO SIGN THE COURT ORDER; THE CLERK GETS IT TO THE MARSHALS; THE MARSHALS THEN GIVE IT TO OUR DESIGNATIONS OFFICE; AND THEN IT TAKES ROUGHLY, TWO TO THREE DAYS AFTER THAT PROCESS IS SET IN MOTION FOR A DESIGNATION TO COME THROUGH; SO PERHAPS, A TWO WEEK PERIOD IS BETTER.

THE COURT: TWO WEEKS FOR WHAT TO HAPPEN? I'M A LITTLE CONFUSED.

DR. IHLE: YOUR HONOR, FOR EVERYTHING TO OCCUR, FOR THE DESIGNATION TO HAPPEN, AND THAT THE MARSHALS KNOW THAT WITHIN TWO WEEKS, THEY ARE TO PICK MR. SUTCLIFFE UP AND MOVE HIM, TRANSPORT HIM TO --

THE COURT: TWO WEEKS FROM TODAY?

DR. IHLE: -- THE DESIGNATED FACILITY.

THE COURT: ARE YOU SAYING, TWO WEEKS FROM TODAY?

DR. IHLE: YES.

THE COURT: NOW, CAN'T I JUST ORDER THAT IT EITHER ROCHESTER, BUTNER, OR SPRINGFIELD? OR DOES IT DEPEND ON SOME FURTHER --

DR. IHLE: IT WILL DEPEND ON BED SPACE, YOUR HONOR. BUT GIVEN THAT IT'S A 4142(D), IT DOES GUARANTEE THAT WILL GO TO THE MEDICAL CENTER, BECAUSE IT GOES UNDER THE UMBRELLA OF TREATMENT; SO IT WILL EITHER BE SPRINGFIELD, ROCHESTER, BUTNER NORTH, CAROLINA; AND CERTAINLY YOUR HONOR CAN MAKE A RECOMMENDATION OF WHICH ONE OF THOSE FACILITIES HE WOULD LIKE HIM TO GO TO, AND THE BUREAU OF PRISONS WILL TAKE THAT INTO CONSIDERATION WHEN THEY'RE LOOKING AT WHERE TO DESIGNATE HIM.

THE COURT: WELL, I HAVE NO BASIS TO MAKE A RECOMMENDATION, ACCORDING TO ANY PROFESSIONAL CONSIDERATIONS. THE ONLY THING I CARE ABOUT IS THAT BIT DONE IS SWIFTLY, AND THAT WILL SUTCLIFFE'S INTERESTS IN COMPLETING THE PROCEDURE, AND IF HE'S COMPETENT, PROCEEDING TO TRIAL BE ACCOMMODATED.

NOW, I DON'T KNOW HOW LONG IT TAKES TO GET FROM ONE PLACE TO ANOTHER. IT'S PROBABLY AIR FRIGHT, RIGHT?

DR. IHLE: YES. BUT THEY DON'T -- UNLESS YOUR HONOR SPECIFIES IN THE COURT ORDER, OR BY SOME OTHER MEANS, FOR THE MARSHALS TO TAKE HIM DIRECTLY TO THE FEDERAL MEDICAL CENTER, MOST LIKELY, THE MARSHALS WILL TAKE HIM BY WAY OF OKLAHOMA

CITY.

HE MAY SIT IN OKLAHOMA CITY FOR A BIT OF TIME. THEY MAY TAKE HIM TO ANOTHER FACILITY, AND IT WILL BE BY FLIGHT, BUT THEY HAVE HUBS THAT THEY GO TO.

THE COURT: WELL, I'LL JUST PUT DOWN ROCHESTER. I'M JUST GOING TO PUT IT IN THE ORDER; AND I'M DIRECTING MS. DUARTE TO DO THAT.

DR. IHLE: THAT'S THE MOST LIKELY PLACE HE'LL BE DESIGNATED TO, BECAUSE SPRINGFIELD IS A HIGH SECURITY MEDICAL CENTER, AND HE'S NOT HIGH SECURITY.

THE COURT: WELL, IF THE BUREAU OF PRISONS DOESN'T LIKE IT, THEY CAN COME BACK TO ME. BUT IN ORDER TO GIVE CLEAR DIRECTION TO THE MARSHAL, THE ORDER IS TO RECITE THAT HE IS TO BE EXAMINED AT THE FEDERAL MEDICAL CENTER IN ROCHESTER, MINNESOTA. THE ADDRESS IS ALREADY IN MY PRIOR ORDER; AND I WILL ISSUE A SEPARATE ORDER DIRECTING THE MARSHALS TO DELIVER HIM TO THAT FACILITY BY NOT LATER THAN TWO WEEKS FROM THIS COMING MONDAY.

MR. NICOLAYSEN: WOULD YOUR HONOR GO SO FAR AS TO RECOMMEND A DIRECT FLIGHT? IT SOUNDS AS THOUGH THAT MIGHT BE AN OPTION, BUT IT NEEDS TO BE SO SPECIFIED IN THE COURT ORDER.

THE COURT: I'LL PUT THAT IN.

DR. IHLE: FOR THE PURPOSES OF THE INTEREST OF TIME, GIVE THE MARSHALS TWO WEEKS TO GET IT TOGETHER AND MOVE HIM, THAT'S REASONABLE. BUT THEN, IT IT'S NOT A DIRECT FLIGHT, IT

CAN TAKE UP TO TWO MORE WEEKS.

THE COURT: I'LL PUT DOWN DIRECT FLIGHT. I WANT HIM IN THAT FACILITY IN ROCHESTER BY APRIL -- BY MARCH 31ST; THAT'S TWO WEEKS FROM MONDAY.

DR. IHLE: YOUR HONOR, WHEN I -- ON MONDAY, WHEN I'M BACK AT WORK, I WILL ACTUALLY SEND THE MESSAGE TO THE MEDICAL DESIGNATORS TO ENSURE THAT HE IS DESIGNATED TO ROCHESTER.

THE COURT: OKAY.

DR. IHLE: THANK YOU.

THE COURT: ALL RIGHT. ANY FURTHER QUESTIONS, COUNSEL?

MR. NICOLAYSEN: NO, YOUR HONOR. THANK YOU.

MS. DUARTE: YES, YOUR HONOR. THE STATUS CONFERENCE --

THE COURT: YES. WE'RE ABOUT TO GIVE YOU A DATE.

THE CLERK: WEDNESDAY, JULY 23RD AT 3 P.M.

MS. DUARTE: AND, YOUR HONOR, I DON'T KNOW IF THE COURT'S DETERMINED THIS. IF IT'S NOT WITHIN THE INITIAL FOUR MONTHS THAT ARE SPECIFIED UNDER 4142(D), AND THERE IS A PROVISION FOR THEM TO ASK FOR MORE TIME -- ASK THE COURT FOR MORE TIME IF THEY'RE NOT GOING TO BE ABLE TO COMPLETE THEIR REPORT IN TIME.

IT DOESN'T LOOK LIKE IT'S UP TO ME. ALTHOUGH, I'D BE HAPPY TO FACILITATE IT. IT LOOKS LIKE IT WOULD BE UP TO THE FACILITY UNDER 4142(D)(2)(A). AND I CAN MONITOR THAT. WHAT I WANTED TO TRY TO MAKE SURE, WAS THAT OUR INITIAL STATUS HEARING WAS WITHIN THAT FOUR MONTHS, SO THAT IF WE NEED TO CONTINUE IT,

WE CAN, BUT THAT WILL BE OUR GO BY. WE'LL BE WITHIN THE STATUTE.

MR. NICOLAYSEN: AND I PREFER THAT THE FACILITY INITIATE THE REQUEST FOR MORE TIME, THAN WE JUST TAKE IT ON OURSELVES TO BUILD MORE TIME INTO OUR TIMETABLE HERE.

MS. DUARTE: RIGHT. WELL, THAT'S NOT MY REQUEST.

THE COURT: I THINK YOU MAY HAVE MISSPOKE. IT'S JUST A SLIGHT THING. IT'S 4241, NOT 4142.

MS. DUARTE: I'M SORRY, YOUR HONOR.

THE COURT: JUST FOR THE CLARITY OF THE RECORD. NOW, I DON'T FOLLOW WHAT YOU'RE SAYING.

MS. DUARTE: 4241(D) INDICATES, 1 -- I'M SORRY. 1 -- (D) (1).

THE COURT: IT'S FOR A REASONABLE PERIOD OF TIME, NOT TO EXCEED FOUR MONTHS.

MS. DUARTE: SO I WAS JUST ASKING FOR OUR STATUS ON THIS COMMITMENT -- ON THE EVAL, WITHIN THE FOUR MONTHS, OR AT THE END OF THE FOUR MONTHS, SO THAT WE'RE NOT ALREADY POTENTIALLY EXCEEDING IT EVEN BY SETTING OUR STATUS.

THE COURT: WELL, THAT FOUR MONTHS IS FOR TREATMENT.

MS. DUARTE: OKAY.

THE COURT: IT'S NOT FOR THE TIME THAT THE ORDER GOES OUT TO THE NEXT APPEARANCE IN COURT.

SO IF YOU PREPARE AN ORDER THAT SAYS HE'S GOING TO TRANSFERRED TO ROCHESTER FOR TREATMENT 4241(D) UNDER THE

FINDINGS THAT I'VE ALREADY MENTIONED, FOR A REASONABLE PERIOD NOT TO EXCEED FOUR MONTHS. IF WE SET A STATUS CONFERENCE FOR A COUPLE OF WEEKS AFTER THAT FOUR-MONTH PERIOD, WHICH FOR CURRENT PLANNING PURPOSES, WE SHOULD JUST ASSUME IS 16 WEEKS. IF WE SET IT FOR TWO WEEKS AFTER THAT, I THINK THERE'S NO RISK OF ANY UNINTENDED VIOLATION OF ANYONE'S RIGHTS, INCLUDING MR. SUTCLIFFE; DON'T YOU AGREE, MR. NICOLAYSEN?

MR. NICOLAYSEN: I CONCUR. THE FOUR MONTHS, AS I READ THE STATUTE IS FOR THE EVALUATION AND TREATMENT. IT'S NOT THAT WE HAVE TO HAVE OUR STATUS CONFERENCE WITHIN THE FOUR MONTHS; SO MY RECOMMENDATION IS, WE START WITH APRIL 1, AND ASSUME HE'LL PHYSICALLY BE IN ROCHESTER, PER YOUR ORDER, BY APRIL 1; AND AT THAT POINT, WE RUN THE 16 WEEKS, AND THEN ADD TWO WEEKS THEREAFTER; SO THAT WOULD BE APRIL, MAY, JUNE, AND JULY. AND THEN ADD TWO WEEKS, MAYBE THE MIDDLE OF AUGUST, IF THE COURT IS IN SESSION IN THE MONTH OF AUGUST; THAT MIGHT INTERFERE WITH THE JUDGE'S CONFERENCE.

BUT SOMETIME IN THE MIDDLE OR LATTER PART OF AUGUST WOULD BE MY VOTE.

THE COURT: FOR WHAT? FOR THE TRIAL?

MR. NICOLAYSEN: NO, FOR THE STATUS CONFERENCE, AND WE NEED 16 -- OR WE CAN BREAK THE FOUR MONTHS DOWN AND SEE HOW WE'RE COMING ALONG TWO AND A HALF MONTHS INTO THE FOUR-MONTH PERIOD. WE MAY, IN FACT, HAVE FEEDBACK THAT EARLY.

THE COURT: I CAN ALWAYS EXPEDITE THIS STATUS

CONFERENCE. I WANT THE STATUS CONFERENCE TO BE SET IN THE WEEKS, STEVE, THAT IS THE 18TH WEEK AFTER MARCH 31ST. HE'S TO BE PLACED AT ROCHESTER BY NOT LATER THAN MARCH 31ST. HE'S TO BE THERE FOR FOUR MONTHS, UNLESS WE GET SOME ORDER, THAT I'M HOPING WE DON'T GET. WE'LL REQUEST TO EXTEND IT. WE'LL HAVE THE REPORT, AND WE CAN SET A STATUS CONFERENCE TWO WEEKS AFTER THAT.

MR. NICOLAYSEN: I BELIEVE THAT PUTS US INTO AUGUST. AND I CONCUR WITH THAT.

THE CLERK: THE WEEK OF WEDNESDAY, AUGUST 6TH AT 3 P.M.

THE COURT: OKAY. WEDNESDAY, AUGUST 6TH FOR A STATUS CONFERENCE. AND WE WILL SET A TRIAL DATE. THIS SHOULD GO INTO THE PROVISIONAL TRIAL DATE FOR, LET'S SAY, FOUR WEEKS AFTER THAT.

BUT, MR. NICOLAYSEN, I WANT YOU TO PROCEED ON THE ASSUMPTION -- AND I'M NOT MAKING ANY FINDINGS. I HAVEN'T MADE UP MY MIND. I'LL LISTEN TO MR. SUTCLIFFE; BUT I WANT YOU TO PROCEED ON THE ASSUMPTION THAT YOU WILL BE EITHER HIS TRIAL COUNSEL, OR, IF NOT, HIS STANDBY TRIAL COUNSEL.

MR. NICOLAYSEN: NO. I APPRECIATE THAT, YOUR HONOR.

THE COURT: LET ME FINISH. I WANT YOU TO GET READY. MASTER THE DISCOVERY, AND DO WHATEVER YOU CAN TO BE READY TO TRY THE CASE ON THE DATE THAT I'M NOW ABOUT TO SET AS THE NEW TRIAL DATE, WHICH I THINK SHOULD BE THE FIRST WEEK OF SEPTEMBER, AFTER LABOR DAY.

MR. NICOLAYSEN: NOW, I THANK YOUR HONOR FOR THAT, BECAUSE I'M PLANNING TO SUBMIT AN EX PARTE APPLICATION FOR SOMEONE I FINALLY WAS ABLE TO FIND AS A LOCAL EXPERT ON THE COMPUTER ISSUE, AND I WAS HOPING YOUR HONOR WOULD BE RECEPTIVE TO SUCH AN APPLICATION, AND NOT SAY IT'S PREMATURE, AND WE HAVE A COMPETENCY ISSUE STILL PENDING.

THE COURT: NO. I WILL SIGN THE APPLICATION.

MR. NICOLAYSEN: THANK YOU. I APPRECIATE THAT.

MS. DUARTE: THE FIRST WEEK IN SEPTEMBER, THEN?

THE COURT: FOR TRIAL.

MS. DUARTE: SHOULD I PUT THAT IN THE ORDER?

THE COURT: YES. WHAT'S THE DATE, STEVE?

THE CLERK: SEPTEMBER 2ND.

THE COURT: NO. MAKE IT 9TH.

MR. NICOLAYSEN: FOR TRIAL?

THE COURT: YES.

MS. DUARTE: YOUR HONOR, I WILL ALSO SUBMIT THIS ORDER ON A DISK.

THE COURT: YES. BECAUSE I MAY FIDDLE WITH IT.

MS. DUARTE: AND ONE LAST THING, YOUR HONOR. I THINK THE RECORD SHOULD PROBABLY REFLECT, THAT AS MR. SUTCLIFFE EXITED THE COURTROOM AND SAW ME, HE TURNED AND ATTEMPTED TO COME TOWARD ME. THE MARSHALS PULLED HIM BACK SEVERAL TIMES. HE REFUSED TO TURN AROUND. HE KEPT STARING AT ME, AND THEN HE STARTED YELLING, TELL MY DAUGHTER I SAID HELLO.

MR. NICOLAYSEN: YOUR HONOR, I HAVE TO OBJECT TO THAT, BECAUSE THAT SUGGESTS THREATENING BEHAVIOR, WHICH IS THE ESSENCE OF THIS CASE; AND IT INVITES ALL SORTS OF PREJUDICIAL INTERPRETATIONS; AND I WOULD ASK YOUR HONOR NOT TO ATTRIBUTE ANY NEGATIVE INFERENCE TO WHAT WAS JUST DESCRIBED; AND I DON'T WANT TO --

THE COURT: OKAY. YOU DON'T HAVE TO BELABOR IT. I'M NOT ATTRIBUTING ANY INFERENCES AT ALL, BUT I WANT TO MAKE IT CLEAR WHAT I'M DOING. I'M NOT -- IT'S IN THE RECORD, AND IF THE JUDGE SAYS THAT SOMETHING SHOULD BE STRICKEN, IT'S NEVER STRICKEN IN THE LITERAL SENSE; BUT I'M NOT GOING TO SAY IT SHOULD BE STRICKEN; HOWEVER, I AM DIRECTING DR. BACKER TO SUPPLEMENT THE REPORT, NOT WITH ANY EVALUATIONS, NOT WITH ANY CONCLUSION, NOT WITH ANY ATTEMPT TO SUMMARIZE WHAT YOUR TESTIMONY WAS, BUT IT'S TO SUPPLEMENT YOUR WRITTEN REPORT WITH A DESCRIPTION OF WHAT YOU SAW IN THE COURTROOM, NEUTRAL AND COMPLETE AND CORRECT AS BEST AS YOU CAN, CONCERNING MR. SUTCLIFFE'S BEHAVIOUR; AND LODGE THAT WITH THIS COURT. SEND COPIES TO MR. NICOLAYSEN AND MS. DUARTE. NOW, YOUR REPORT, I'M DIRECTING THAT YOU MAKE YOUR REPORT, INCLUDING THIS ADDITIONAL SUPPLEMENTAL DESCRIPTION OF THE PROCEEDINGS TODAY, AND THE TRANSCRIPT, THOSE TWO THINGS; THE REPORT AS SUPPLEMENTED AND THE TRANSCRIPT, MAKE THOSE AVAILABLE TO THE PHYSICIANS AT ROCHESTER.

AND WHEN YOU CONTACT WHOEVER YOU'LL BE SPEAKING TO, DR.

IHLE, YOU SHOULD TELL THEM THOSE WILL BE COMING; DO YOU UNDERSTAND THAT?

MR. IHLE: YES, SIR.

THE COURT: ANYTHING FURTHER?

MS. DUARTE: YOUR HONOR, I SHOULD JUST ADD, THAT I HOPE THE COURT AND COUNSEL REALIZE, I IN NO WAY, MEAN TO PREJUDICE MR. SUTCLIFFE. I'VE LEARNED FROM EIGHT YEARS OF DOING THIS, THAT WHEN SOMETHING OCCURS OUTSIDE THE COURT, WHETHER IT'S A JURY CONTACT OR A CONTACT WITH THE DEFENDANT OR ANY KIND OF CONTACT, IT'S BETTER TO PUT IT ON THE RECORD. THAT'S WHAT I'M TRAINED TO DO.

THE COURT: ALL RIGHT. I'M SURE OF THAT. I THINK YOU'RE AN EXTREMELY PROFESSIONAL LAWYER, AND I'M VERY PLEASED WITH THE WAY YOU CONDUCT YOURSELF, SO I DIDN'T ATTACH ANY INFERENCES AT ALL.

MS. DUARTE: WELL, I APPRECIATE THAT. THANK YOU.

THE COURT: ALL RIGHT. WE'RE ADJOURNED.

MR. NICOLAYSEN: THANK YOU, YOUR HONOR.

(THE PROCEEDINGS CONCLUDED.)

CERTIFICATE OF REPORTER

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

I, HOPE IRENE GOLDSMITH, OFFICIAL REAL-TIME COURT REPORTER, 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.

/s/ Hope Irene Goldsmith DATE: 5/19/03
HOPE IRENE GOLDSMITH, RPR
FEDERAL OFFICIAL COURT REPORTER

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.	)	CR-02-350 AHM
STEVEN WILLIAM SUTCLIFFE,	)	
DEFENDANT.	)	

COPY

STATUS CONFERENCE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MONDAY, APRIL 7, 2003

LOS ANGELES, CALIFORNIA

HOPE I. GOLDSMITH, RPR, CSR
FEDERAL OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURTHOUSE
880 FRONT STREET, ROOM 4290
SAN DIEGO, CALIFORNIA 92101
PH: (619)230-0115
FX: (619)230-0125
HOPE_GOLDSMITH@HOTMAIL.COM

APPEARANCES OF COUNSEL:

ON BEHALF OF PLAINTIFF, UNITED STATES OF AMERICA:

ELENA DUARTE, AUSA
U.S. DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY
CENTRAL DISTRICT OF CALIFORNIA
UNITED STATES COURTHOUSE
312 N. SPRING STREET
LOS ANGELES, CA 90012
PH: (213)894-8611
FX: (213)894-3713

ON BEHALF OF DEFENDANT, STEVEN WILLIAM SUTCLIFFE:

GREGORY NICOLAYSEN, ESQ.
16000 VENTURA BOULEVARD
SUITE 500
ENCINO, CA 91436

LOS ANGELES, CALIFORNIA, FRIDAY, APRIL 7, 2003

- - -

(COURT IN SESSION AT 11:30 A.M.)

THE CLERK: CALLING ITEM NUMBER 7-1, CR-02-350(A), U.S.A. VERSUS STEVEN WILLIAM SUTCLIFFE.

COUNSEL, STATE YOUR APPEARANCES, PLEASE.

MS. DUARTE: GOOD, MORNING, YOUR HONOR. ELENA DUARTE FOR THE GOVERNMENT.

MR. NICOLAYSEN: GREGORY NICOLAYSEN APPEARING FOR THE DEFENDANT, WHO IS NOT PRESENT, YOUR HONOR.

THE COURT: OKAY. I ARRANGED FOR THIS STATUS CONFERENCE BECAUSE I HAD SOME QUESTIONS ABOUT THE JOINT PROPOSED AMENDED ORDER THAT WAS LODGED LAST WEEK UNDER RULE 43. THE DEFENDANT'S PERSONAL PRESENCE IS NOT NECESSARY, GIVEN THAT HE'S CURRENTLY REPRESENTED BY MR. NICOLAYSEN. THIS IS PRIMARILY AN ISSUE, AT THE VERY LEAST, A MIXED ISSUE OF FACT AND LAW, PROBABLY A LEGAL ISSUE.

HERE IS THE REASON I WANTED TO SPEAK TO YOU, COUNSEL. IN THE PROPOSED ORDER, ON PAGE 2, PAGE 1, AND PAGE 2 THERE ARE RECITALS THAT SAY, THAT I FIND BY A PREPONDERANCE OF THE EVIDENCE THAT MR. SUTCLIFF IS PRESENTLY SUFFERING FROM A MENTAL DISEASE OR DEFECT RENDERING HIM MENTALLY INCOMPETENT, AND THERE'S ADDITIONAL LANGUAGE IN THAT RECITAL.

THE RECOLLECTION I HAVE, AND IT'S CORROBORATED BY THE ORDER THAT I ISSUED ON MARCH 20TH, FOLLOWING OUR LAST HEARING, IS

THAT WHAT I CONCLUDED -- WHAT I FOUND AND CONCLUDED -- WAS THAT THERE WAS A QUESTION AS TO WHETHER MR. SUTCLIFFE IS CURRENTLY COMPETENT TO STAND TRIAL; AND IN ORDER TO RESOLVE THAT QUESTION, AND UNDER THE APPLICABLE PROVISIONS OF THE FEDERAL STATUTE INVOLVED, 18 U.S.C. 4241(D), I WAS DIRECTING THAT HE BE EXAMINED IN AN FMC FOR THE PURPOSES OF EVALUATING THAT DETERMINATION. I DID NOT MAKE A FINDING.

SO MY QUESTION IS, WHY IS IT PRESENTED AS A FINDING?

MR. NICOLAYSEN: DO YOU WANT ME TO GO FIRST?

MS. DUARTE: I CAN GO FIRST.

MR. NICOLAYSEN: ALL RIGHT.

MS. DUARTE: YOUR HONOR, IT'S BEEN -- FEEL FREE TO JUMP IN ANY TIME.

MR. NICOLAYSEN: SURE.

MS. DUARTE: IT'S PRESENTED AS A FINDING. BECAUSE IT CAME TO MY ATTENTION, ACTUALLY, AFTER TALKING TO FMC DEVINS, WHEN THEY FIRST RECEIVED THE ORDER; THAT THEY WERE OF THE OPINION THAT UNDER A 4241(D) AS IN DOG ORDER, THERE WAS A FINDING THAT PRECEDED IT AS TO THE DEFENDANT'S INCOMPETENCY. AND I CHECKED THE STATUTE; AND I DID A LITTLE BIT OF RESEARCH; AND A SPOKE WITH MR. NICOLAYSEN AT LENGTH, THAT'S TRUE, AND WE REVIEWED THE RECORD, AND EVEN THOUGH WE WERE AWARE THAT THE COURT DIDN'T MAKE THAT SPECIFIC FINDING AT THE HEARING. WE ALSO REVIEWED THE ADDENDUM THAT HAD COME IN FROM DR. BACKER, WHERE HE RECOMMENDED RESTORATION.

THE COURT: WHEN YOU SAY, RESTORATION, THAT'S A TERM THAT PUZZLES ME. WHAT DO YOU MEAN BY THAT?

MS. DUARTE: WELL, REFERRING TO HIS -- AND MAYBE WE SHOULD MAKE THIS PART OF THE RECORD UNDER SEAL, IF IT'S NOT ALREADY, THE FORENSIC EVALUATION ADDENDUM.

THE COURT: YES. I MADE IT PART OF THE COURT FILE. ISSUED AN ORDER ON FRIDAY THAT IT WOULD BE, BUT I'M NOT SURE I HAVE IT HERE BEFORE ME.

MR. NICOLAYSEN: WE HAVE IT HERE, YOUR HONOR. DR. BACKER SPEAKS SPECIFICALLY, RESTORATION AS ONE OF THE OBJECTIVES THAT WOULD BE PRUDENT IN THE CONTEXT OF THE MARCH 14TH ORDER.

MS. DUARTE: AT THE VERY END, YOUR HONOR.

THE COURT: YES. I SEE FOR RESTORATION --

MR. NICOLAYSEN: THAT IS A SUB SECTION D AS IN DOG PROCESS.

THE COURT: YES.

MS. DUARTE: HAVING REVIEWED THAT, WE ACTUALLY ARE OF THE OPINION -- AND I'LL TAKE AS MUCH RESPONSIBILITY AS I NEED TO FOR THIS -- THAT THE ORDER THAT WAS SUBMITTED AND SIGNED ON MARCH 20TH, IS A LITTLE BIT OF A HYBRID, AND IT NEEDED TO BE CLARIFIED.

IN THAT, IF IT'S GOING TO BE A 4241(D) COMMITMENT, IT APPEARS THAT THE COURT DOES NEED TO MAKE A FINDING OF INCOMPETENCY FOR THAT FOUR MONTH -- FOR THAT FOUR MONTH --

THE COURT: WHEN YOU SAY, IT APPEARS THAT, IT APPEARS FROM WHAT SOURCE, THE STATUTE? FROM CASE LAW?

MS. DUARTE: STATUTE.

THE COURT: A STATUTE FROM WHICH YOU'RE BEING TOLD BY THE OFFICIALS AT FMC?

MS. DUARTE: FROM THE STATUTE, IT APPEARS THAT, AND I COULDN'T FIND ANY CASE LAW THAT INTERPRETS THE STATUTE MORE LOOSELY. I COULDN'T FINED VERY MUCH AT ALL ON THAT SPECIFIC TOPIC.

AND MY CONCERN IS WITH THE DURATION OF THE COMMITMENT. THE FOUR MONTH COMMITMENT APPEARS TO REQUIRE A FINDING OF INCOMPETENCY. NOW, I REALIZE THAT THE COURT QUERIED DR. BACKER ON THAT EXACT POINT; AND I'M NOT GOING TO BLAME SHIFT, BUT I THINK THAT THAT'S WHERE WE ALL ENDED UP WITH THIS HYBRID KIND OF ORDER, BECAUSE IN THE MARCH 14TH TRANSCRIPT, THE COURT SPECIFICALLY ASKED DR. BACKER WHETHER OR NOT THE COURT NEEDED TO MAKE THAT FINDING OF INCOMPETENCY IN ORDER TO ORDER A 4241(D) EVALUATION. HE RESPONDED THAT YOU DID NOT. I CANNOT FIND SUPPORT RIGHT NOW FOR THAT ANSWER.

MY CONCERN, AGAIN, IS NOT THAT THE COURT SENT THE DEFENDANT TO ** FMC DEVINS. I THINK THAT'S PERFECTLY APPROPRIATE; NOT THAT THE COURT CONTEMPLATED A 4241(D) RESTORATION. I THINK THERE'S SUPPORT IN THE RECORD FOR A FINDING OF INCOMPETENCY.

THERE'S ALSO SUPPORT IN THE RECORD, SHOULD THE COURT AMEND THE ORDER A DIFFERENT WAY FOR A 4241(B), A SECOND 30-DAY EVALUATION AT ** FMC DEVINS, IF THE COURT IS NOT INCLINED TO MAKE

THE FINDING OF INCOMPETENCY.

MR. NICOLAYSEN AND I DISCUSSED THE TWO, WHAT WE FELT WERE POSSIBILITIES. WE REVIEWED THE RECORD, AND WE BASICALLY TOOK A GUESS THAT WHAT THE COURT WOULD NEED TO ORDER THAT WOULD CONFORM CLOSER WITH THE RECORD WOULD PROBABLY BE THE 4241(D). IF THAT'S INCORRECT, I DON'T THINK IT WOULD BE INAPPROPRIATE TO AMEND THE ORDER FOR THE SHORTER DURATION, TO ORDER THE 4241(B).

THE COURT: YOU WISH TO BE HEARD?

MR. NICOLAYSEN: YOUR HONOR, PERMIT ME. I WANT TO MAKE SURE THE REPORTER GOT THE LAST RECORD FOR "B" AS IN BOY. THE ONE JUST BEFORE WAS "D" AS IN DAVID?

THE COURT REPORTER: YES, I DID.

MR. NICOLAYSEN: THANK YOU SO MUCH. YOUR HONOR, GOVERNEMENT COUNSEL TRACKS MY THINKING AS WELL. I WANT TO ASSURE THE COURT. WE AGONIZED OVER THIS. WE SPENT WELL OVER AN HOUR ON THE PHONE FRIDAY. SPOKE AGAIN ON SATURDAY ANTICIPATING THAT YOUR HONOR MAY VERY WELL WANT SOME FEEDBACK ON THIS VERY POINT, SO WE'RE NOT TRYING TO PUT WORDS INTO THE COURT'S MOUTH BY ASKING YOU TO MAKE A FINDING THAT YOU DIDN'T MAKE; HOWEVER --

THE COURT: WELL, I'M A JUDGE WHO READS EVERYTHING THAT'S GIVEN TO ME.

MR. NICOLAYSEN: YEAH. IT IS A SCENARIO THAT DOES INVOLVE A HYBRID, TO BORROW THE GOVERNMENT'S WORD, AND WE USED THE WORD HYBRID WHEN WE SPOKE FRIDAY, AND AGAIN ON SATURDAY; AND WE FOUND THAT THAT WOULD BE THE INHERENT LEGAL DEFECT IN THE ORDER WHERE

WE END UP IN A SITUATION WHERE THE COURT DOES ORDER A "D" AS IN DAVID PROCEDURE AT ** DEVINS, BUT IT DOES SO IN THE CONTEXT OF A FURTHER EVALUATION, AS IF WE WERE SIMPLY CONTINUING THE DIAGNOSTIC EVALUATION PROCESS THAT WE HAD DONE FROM JANUARY THROUGH MARCH.

RATHER THAN DO THAT, I THINK THE BETTER APPROACH IS TO RECOGNIZE THAT YOUR HONOR DID REFERENCE SUBSECTION "D" AS IN DAVID AT THE MARCH 14TH HEARING. SPECIFICALLY SET A TIMETABLE FOR THE STATUS CONFERENCE IN AUGUST AND THE SEPTEMBER TRIAL DATE WITH THE FOUR MONTH TIME PERIOD THAT SUBSECTION "D" AS IN DAVID SPEAKS OF.

AND THIRD, YOUR HONOR DID, IN FACT, SPEAK IN TERMS OF RESTORATIONIONAL TREATMENT AS ONE OF THE CONSIDERATIONS FOR HAVING THIS FOUR MONTH PERIOD, WHICH IS SPECIFICALLY A SUBSECTION "D" AS IN DAVID PROCEDURE.

ONCE WE TALKED THE LANGUAGE OF RESTORATION, WE ARE NO LONGER AT THE INITIAL DIAGNOSIS EVALUATION STAGE. WE ARE NOW MAKING THE SHIFT TO SUBSECTION "D" AS IN DAVID.

WHEN THE ADDENDUM BY DR. BACKER WAS SENT SUBSEQUENT TO MARCH 14TH, IT ALSO SPOKE OF RESTORATION AND REFLECTS THAT THAT, INDEED, WAS BACKER'S VIEW AS TO WHY HE COULD NO LONGER STAND BY HIS INITIAL CONCLUSION THAT MY CLIENT WAS COMPETENT. BACKER NOW FEELS, FOR THE REASONS STATED IN THE ADDENDUM, THAT RESTORATIONAL TREATMENT IS AN APPROPRIATE AND PRUDENT CONSIDERATION. ONCE AGAIN, THAT TAKES US TO SUBSECTION "D" AS IN DAVID; AND I THINK

THAT'S PART OF THE OVERALL FRAMEWORK OF THE MARTH 14TH ASSESSMENT.

WITH THOSE CONSIDERATIONS IN MIND, THE GOVERNMENT AND I FELT THAT IT WAS APPROPRIATE FOR US TO ASK YOUR HONOR TO MAKE THE SPECIFIC PREDICATE FINDING IN SUBSECTION "D" AS IN DAVID THAT THE STATUTE SPEAKS ON, EVEN THOUGH YOUR HONOR ACTUALLY SAID ON THE RECORD, THAT YOU WERE NOT ON MARCH 14TH INCLINED TO MAKE THAT FINDING; BUT I THINK THE RECORD SUPPORTS IT, AND THE STATUTE REQUIRES IT AS A PREDICATE FOR THE SUBSECTION "D" AS IN DAVID PROCEDURES.

AND IT IS WITH THOSE VIEWS IN MIND THAT WE WENT AHEAD AND PUT THAT FINDING IN THE AMENDED ORDER.

MS. DUARTE: AND, YOUR HONOR, IF I MAY JUST ADD, THAT WE ARE VERY AWARE, AT LEAST, SPEAKING FOR MYSELF, THAT THE COURT DOES READ EVERYTHING. AND THIS WAS NOT INTENDED TO SLIDE BY. THIS WAS INTENDED TO BE SUBMITTED FOR THE COURT TO READ AND DECIDE WHETHER THE COURT WAS COMFORTABLE MAKING THAT ORDER.

THE COURT: OKAY. I WASN'T SUGGESTING THAT ANYBODY WAS LOOKING OVER ME.

MS. DUARTE: OKAY. BUT, YOUR HONOR, ALONG THE SAME LINES, AND BEFORE I FORGET. IF I COULD JUST MENTION, SO THAT THE COURT'S NOT SURPRISED OR BLINDSIDED IN ANY WAY THIS. AFTER MR. NICOLAYSEN AND I HAD THIS DISCUSSION, I RECEIVED ANOTHER FILING IN THE 9TH CIRCUIT BY MR. MACAFEE, WHO PURPORTS TO REPRESENT THE DEFENDANT THERE.

THE COURT: YES.

MS. DUARTE: AND IT WAS A PETITION FOR REHEARING. THE COURT'S ALREADY BEEN AFFIRMED ON THE ORDER; AND I SKIMMED IT. AND THE GROUNDS FOR THE PETITION FOR REHEARING WERE THE LACK OF THIS FINDING THAT WE'RE DISCUSSING.

IT'S PURELY A COINCEDENCE; AND IT CAME UP AFTER HE AND I NOTICED IT, DISCUSSED IT, AND CAME UP WITH --

THE COURT: HE MEANING, MR. NICOLAYSEN?

MS. DUARTE: MR. NICOLAYSEN AND I NOTICED IT AND DISCUSSED IT.

BUT THE 9TH CIRCUIT HAS NOT ORDERED ANY ACTIONS. FRANKLY, I DON'T EXPECT THEM TO, BUT I WANTED TO MAKE SURE THE COURT WAS AWARE OF THIS.

THE COURT: OKAY. WELL, HERE ARE MY FINDINGS. I THINK THAT, PARTICULARLY, IN LIGHT OF WHAT HAPPENED AT THE HEARING, AND THE LANGUAGE IN DR. BACKER'S SUPPLEMENTAL REPORT, THERE IS A SUFFICIENT BASIS TO FIND THAT MR. SUTCLIFF ALREADY IS AFFLICTED WITH A DISEASE OR A DEFECT THAT MAKES HIM INCOMPETENT FOR PURPOSES OF STANDING TRIAL.

THE REASON I DIDN'T WANT TO MAKE THAT FINDING AND DECLINED TO MAKE THAT FINDING WAS PRIMARILY BECAUSE I DIDN'T WANT TO INFLAME HIM; NOT BECAUSE I HAD ANY DOUBTS ABOUT APPLYING THE APPLICABLE STANDARDS TO WHAT I PERCEIVED TO BE HIS THEN CONDITION.

MY PERCEPTION HAS BEEN REINFORCED BY DR. BACKER'S

SUPPLEMENTAL CONCLUSION. AND GIVEN THAT THE TWOFOLD PURPOSE OF ALL THAT'S GOING ON, IS TO DETERMINE WHETHER, IF NOT CURRENTLY, TO GIVE MR. SUTCLIFF A BASIS TO PROCEED PROPERLY TO TRIAL, AS IS HIS RIGHT.

AND, SECONDLY, TO ASSURE THAT HE GETS THE FULL BENEFIT OF ALL APPLICABLE PROCEDURES, DIAGNOSES, AND TREATMENT THAT THE BUREAU OF PRISONS CAN PROVIDE. IT'S ACTUALLY FOR THAT TWOFOLD REASON THAT I'LL FEEL COMFORTABLE IN INCORPORATING THIS DIFFERENT LANGUAGE IN THE ORDER THAT I'LL ISSUE NOW.

MS. DUARTE GAVE ME A DISK. I MAY FIDDLE WITH SOME OF THE RECITALS, WORKING OFF OF THE DISK; BUT NOW THAT I UNDERSTAND WHAT YOUR THINKING WAS, I'M PREPARED TO ACCEPT IT. I WILL ISSUE EITHER THIS PRECISE ORDER, OR ONE SUBSTANTIALLY SIMILAR, LATER TODAY.

MR. NICOLAYSEN: THANK YOU, YOUR HONOR. WE APPRECIATE THE COURT'S TIME.

WOULD YOUR HONOR ALSO ALLOW A TRANSCRIPT OF THIS MORNING'S STATUS CONFERENCE, SO WE WOULD HAVE IT?

THE COURT: YES. THE U.S. ATTORNEY SHOULD ORDER THE TRANSCRIPT. AND THE TRANSCRIPT SHOULD BE SENT TO -- WHERE IS MR. SUTCLIFFE NOW?

MS. DUARTE: HE IS IN TRANSIT. ACCORDING TO MDC, HE IS GONE FROM THERE. AND ACCORDING TO ** DEVINS, I CHECKED BOTH THIS MORNING. DEVINS EXPECTS HIM TO ARRIVE WEDNESDAY OR THURSDAY, APRIL 9TH OR 10TH OF THIS WEEK.

MR. NICOLAYSEN: IF YOUR HONOR LOOKED AT THE PROPOSED ORDER, WE HAVE ADJUSTED THE AUGUST TIME, WITH THAT IN MIND.

THE COURT: YES. I SAW THAT. WELL, I WANT IT TO BE SENT BOTH TO THE WARDEN WITH SPECIFIC -- "IT" BEING THE TRANSCRIPT -- WITH SPECIFIC DIRECTTIONS THAT IT BE MADE AVAILABLE TO THOSE RESPONSIBLE, NOT ONLY FOR MR. SUTCLIFFE'S TREATMENT -- DIAGNOSIS AND TREATMENT, BUT ALSO TO THOSE RESPONSIBLE FOR HIS CUSTODY; SO THAT IF HE, FOR SOME REASON, RESPONDS TO THIS, THEY'LL, AT LEAST, BE AWARE OF WHAT MAY HAVE BEEN IN HIS MIND.

I ALSO WANT IT TO BE SENT BY MR. NICOLAYSEN DIRECTLY TO MR. SUTCLIFF.

MR. NICOLAYSEN: I WILL DO SO, YOUR HONOR, AS I DID THE MARCH 14TH TRANSCRIPT.

THE COURT: AND PROMPTLY SO, AT DEVINS, PLEASE.

MR. NICOLAYSEN: I WILL DO THAT.

(OFF THE RECORD.)

THE COURT: IN CASE THE RECORD ISN'T CLEAR, I THINK I ARRANGED LAST WEEK TO HAVE DR. BACKER'S SUPPLEMENTAL REPORT. YES. IT WAS FILED ON APRIL 1ST. IT ACTUALLY WASN'T FILED.

THE CLERK: NO, IT WASN'T FILED.

THE COURT: WELL, IT SHOULD BE PLACED IN THE FILE. WE SENT OUT A MINUTE ORDER ON APRIL 1ST. IT SAYS, ON APRIL 1ST, 2003 THE COURT RECEIVED DR. RUSHTON BACKER'S FORENSIC EVALUATION ADDENDUM DATED MARCH 21ST, 2003, AND HAVE FAXED A COPY OF THIS ADDENDUM UNDER SEPARATE COVER DIRECTLY TO COUNSEL. FILE

THAT ADDENDUM UNDER SEAL IN THE FILE OF THIS CASE, AND MAKE SURE, MR. NICOLAYSEN, THAT MR. SUTCLIFF RECEIVES A COPY OF THAT SUPPLEMENTAL REPORT.

MR. NICOLAYSEN: I WILL DO SO, THEN. YES, SIR.

THE COURT: OKAY. AND YOU SHOULD MAKE SURE THAT THE REPORT GOES TO THE PEOPLE AT ** FMC DEVINS. I THINK IT WAS ALREADY MY RULING THAT IT SHOULD.

MS. DUARTE: I WILL DO THAT, YOUR HONOR.

THE COURT: ALL RIGHT. THANK YOU. WE'RE ADJOURNED.

MR. NICOLAYSEN: THANK YOU, VERY MUCH, YOUR HONOR.

MS. DUARTE: THANK YOU, YOUR HONOR.

(THE PROCEEDINGS CONCLUDED AT 12:05 P.M.)

CERTIFICATE OF REPORTER

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

I, HOPE IRENE GOLDSMITH, OFFICIAL REAL-TIME COURT REPORTER, 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.

Hope Irene Goldsmith DATE: 8-2-04

HOPE IRENE GOLDSMITH, RPR
FEDERAL OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - - - -

THE HONORABLE A. HOWARD MATZ, U.S. DISTRICT JUDGE PRESIDING

THE UNITED STATES OF AMERICA, Plaintiff, vs. STEVEN WILLIAM SUTCLIFFE, Defendant.	COPY No. CR 03-350(A)-AAH

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, August 27, 2003

A.M. Session

DEBORAH K. GACKLE, CSR, RPR
United States Courthouse
312 North Spring Street, Room 402A
Los Angeles, California 90012
(213) 620-1149

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFF:

DEBRA W. YANG
UNITED STATES ATTORNEY
BY: ELENA J. DUARTE
BY: JASON GONZALEZ
ASSISTANT UNITED STATES ATTORNEYS
312 North Spring Street
Los Angeles, California 90012

FOR THE DEFENDANT:

STEVEN WILLIAM SUTCLIFFE, IN PRO SE

LAW OFFICE OF LESLIE McAFEE
BY: LESLIE S. McAFEE
146 North San Fernando Boulevard
Suite 216
Burbank, California 91502

LAW OFFICES OF GREG NICOLAYSEN
BY: GREG NICOLAYSEN
16000 Ventura Boulevard
Suite 500
Encino, California 91436

LOS ANGELES, CALIFORNIA; WEDNESDAY, AUGUST 27, 2003;

A.M. SESSION

- - - - -

THE CLERK: Calling item No. 1, CR 02-350(A), USA versus Steven William Sutcliffe.

THE COURT: Before anyone begins to make an appearance of counsel, let me explain how I think we should and will proceed this morning.

First, I need to recite for the record the fact that I think on August 25th, which I guess was two days ago, Judge Phillips denied the then-last pending -- or so far as I know last pending motion to recuse me. So I am authorized to carry out my responsibilities, and I intend to do so.

There are essentially four matters that we need to address today on the calendar. The first -- and I'm choosing it first because I think it's practical to do so, and Mr. Sutcliffe requested that it be done this way -- is the issue of whether he has now returned to, or is at least in the status of, competence sufficient to proceed to trial.

The second question is who will represent him. And that, obviously, relates to Mr. Nicolaysen's motion to withdraw. The third, depending on how I rule on that motion, will be what options remain available to Mr. Sutcliffe. And the fourth will be the trial date.

So I hope that everyone will understand that it is

important to follow this order and to comply with all of the appropriate procedures.

If appearances are made by Mr. Nicolaysen on behalf of Mr. Sutcliffe, I don't want that to trigger any initial reaction, because he currently is properly constituted as counsel. I will not have Mr. Nicolaysen address any of the merits except to confirm that he filed a certain position on the issue of competence. So this is how we'll proceed. And, with that, let's have the appearances of counsel.

MS. DUARTE: Good morning, Your Honor. Elena Duarte and Jason Gonzalez on behalf of the United States.

MR. GONZALEZ: Good morning.

MR. NICOLAYSEN: Good morning, Your Honor. Greg Nicolaysen, defense counsel, appearing.

MR. McAFEE: Good morning, Your Honor. Leslie McAfee appearing on behalf of Mr. Sutcliffe, who has been specially retained for the purposes of competency hearing only.

THE COURT: Mr. McAfee, we'll deal with your status. I'm not necessarily accepting that you have any right, or any lawyer would have a right, to appear for a special limited purpose. At this time, I'll ask you to sit in one of the benches and not at counsel table, and we'll proceed accordingly.

MR. McAFEE: Very well, Your Honor. Lodge my objection for the record both to your sitting on the bench in

this matter and to the court's indication that it has not yet recognized my right to represent Mr. Sutcliffe.

THE COURT: All right. Now please be seated.

Okay. Let's turn first to the issue of competence. I think and hope that, consistent with the order I issued earlier this month, Dr. Patenaude is currently on the telephone and listening to these proceedings; is that correct?

Are you there, Dr. Patenaude?

THE CLERK: Dr. Patenaude?

THE COURT: We'll take a temporary hiatus while we plug him in. He was on the phone, I was told before. I have not personally spoken to him, ever, but I understand he is available, if necessary, for purposes of the first issue on today's agenda.

Can you hear us here at this end? Can you hear us, Dr. Patenaude?

DR. PATENAUDE: Yes, I can, Your Honor.

THE COURT: Okay. I also directed the U.S. attorney to make available Dr. Backer.

Is he present?

DR. BACKER: Present, Your Honor.

THE COURT: Dr. Backer is here.

And is the chief psychologist at the local MDC also available?

DR. IHLE. Yes.

THE COURT: What's your name, sir?

DR. IHLE: Dr. Ihle.

THE COURT: Dr. Ihle. Okay.

I think the parties and the counsel are familiar with the lengthy procedural background that preceded the order that was issued -- that I issued on April 7th that led to the transfer of Mr. Sutcliffe to the facility in Massachusetts -- it's known as Devens -- for purposes of further examination and diagnoses.

Skipping ahead to what really is relevant for purposes of today's proceeding, on -- not before August 18th. I'm not sure when it came in. But sometime after August 18th, I received a forensic report that is dated August 14th. It was transmitted with a cover letter dated August 18th. It is the report that Dr. Patenaude prepared.

The bottom line, consistent with all of the previous analyses, is that Dr. Patenaude concluded that Mr. Sutcliffe is competent to stand trial at this time. I have given a copy of that report to the clerk. I am going to order that it be filed as part of the official record in this case. So that will be part of the official proceedings.

On about August 20th, Mr. Nicolaysen, as currently designated official counsel for Mr. Sutcliffe, filed a position paper in which he concurred with Dr. Patenaude's conclusion and indicated that he did not anticipate any questioning.

On August 20th, the government filed a comparable memorandum in which it stated, through Ms. Duarte, that the government expects to ask that the court find that the defendant's competent.

I see nothing in the record before me that would prompt me to reach any conclusion other than that Mr. Sutcliffe is competent to proceed to trial, but I think it's particularly, given the history of this case, important to establish what the appropriate standards are and deal with some of the procedural rights that Mr. Sutcliffe has.

The issue is whether or not -- and there are two different ways the law has formulated this, but the statute and the applicable case law are fundamentally comparable. Whether he, Mr. Sutcliffe, has the sufficient present ability to consult with his lawyer, or with a lawyer, in a reasonable degree, with a reasonable degree of rational understanding. The statute refers to assisting properly in his defense.

The second part or second prong of this issue or this standard for determining competency is whether he has a rational and factual understanding of the proceeding against him, or of the nature and consequences of the proceeding against him, if you use the language from the statute. Dr. Patenaude dealt with both standards, both elements, and made certain findings and reached the conclusion that he, Mr. Sutcliffe, is competent.

If there were a contested issue as to that question, it would be the government's burden of proof to prove that Mr. Sutcliffe is competent. If Mr. Sutcliffe were arguing that he is not competent, which is clearly not the case, then he would have the burden of proving that condition by a preponderance of evidence.

Mr. Sutcliffe has the right to counsel, although, as with all rights to counsel, that can be waived, by conduct or by choice. He has the right to testify; he has the right to present evidence; he has the right to subpoena witnesses; he has the right to cross-examine. Those are the general contours of what this kind of hearing entails. Now, let's start with counsel for the government.

Do you wish to question Dr. Patenaude?

MS. DUARTE: Your Honor, at this point I'll submit on the report with no additional questions.

THE COURT: Mr. Nicolaysen, am I correct in having characterized the position paper that you filed?

MR. NICOLAYSEN: That's correct, Your Honor.

THE COURT: And you do not wish to question Dr. Patenaude?

MR. NICOLAYSEN: I do not.

THE COURT: Mr. Sutcliffe, I'll give you the opportunity to be heard directly. Do you wish to question Dr. Patenaude?

THE DEFENDANT: Thank you, Your Honor, for giving me the opportunity to speak. I want to state, first off, that I object to your sitting on the bench, ruling against me in any way, shape or form under the due process clause of the Fifth Amendment. I would like you to recuse yourself forthwith and assign another judge to rule on any further matters.

Furthermore, I want the court to take judicial notice, which it has failed to do on numerous occasions, to my challenge to the jurisdiction on the subject matter in this courtroom.

Will you take jurisdictional notice of that now?

THE COURT: Mr. Sutcliffe, those are matters which are not appropriate to raise. I deny your motion to recuse myself. I deny your contention that the court lacks jurisdiction.

Now, please answer my question. Do you wish to question Dr. Patenaude, through counsel?

THE DEFENDANT: The answer to your question is yes. I object to the court ruling on my competency without a full hearing under 4247 of Title 18, as well as all rights reserved on the Bill of Rights of rights, because I received no treatments, no psychiatric or psychological interventions since being ruled incompetent on April 7.

In the absence of such interventions or treatment, and with my conduct being exactly the same and consistent

throughout my hearings and every proceeding that I've been in this courtroom, this entire case, I believe I'm entitled to a hearing to determine on what basis I was deemed incompetent on the first and second instances so that I can determine what criteria I can now be deemed incompetent.

I don't know how I'm not incompetent since nothing has changed since the court first found me to be incompetent. I am not saying I believe I'm incompetent, but I'm not sure of the criteria based on this court's findings previously decided. I have yet to even be provided with a copy of Dr. Patenaude's report. If nothing has changed, then how I can be anything different than what I was originally?

Furthermore, I frankly don't understand why my presence is needed here today because, as the conduct of the government, the defense counsel, and this court's own action on April 7 clearly prove, all of you believe that the accused need not be present in the courtroom or, for that matter, not present in the same state to make a finding -- a judicial finding of fact that the accused is or is not incompetent as required by the law.

A finding of competency is one of a fact, not law. United States versus Shepard, 538 F.2d 107 at 110; United States versus Fratus -- F-r-a-t-u-s -- 530 F.2d 644 at page 647; U.S. versus Winn, 577 F.2d 86 at note 14 on page 88; Dusky v. United States, 362 U.S. 402, annotations at

paragraph 8 on page 2083.

Rule 43, which you used to explain my absence obviously does not apply. And since a finding of incompetence is one of clearly a fact, not law -- I am not a corporation -- under the first part of Rule 43. And under the right of due process afforded to an accused in a court, the court could not abridge that right by that rule. Pursuant to Title 18, section 2072(b), no rule shall abridge, modify or enlarge a substantive right. Rights trump rules.

Further, this court never found me incompetent at the March 14th hearing, so the hearing on April 7th should have been conducted pursuant to the protections afforded to an accused under the Fifth Amendment, due process, and the Sixth Amendment, compulsory process, of the Bill of Rights of rights, as well as U.S.C. 4247(d) as in Delta.

Bottom line is why my presence was not required April 17th, the hearing of my incompetence decision, but it's required today. I'd like the court to please explain these two differences that I've raised.

THE COURT: Are you finished, Mr. Sutcliffe?

THE DEFENDANT: Sure.

THE COURT: Okay.

Dr. Patenaude, have you heard what Mr. Sutcliffe stated?

DR. PATENAUDE: Yes, I have.

THE COURT: I know that you're not physically present to evaluate demeanor, but I will tell you that Mr. Sutcliffe's demeanor was not inappropriate, he was calm in setting forth his position, and he was reading from some notes that he clearly had prepared.

With that information before you, does that statement that Mr. Sutcliffe just completed in any way affect your opinion?

DR. PATENAUDE: No, it does not.

THE COURT: And what relevance, if any, do you think -- relevance to the question of Mr. Sutcliffe's competence, do you think Mr. Sutcliffe's statement has?

DR. PATENAUDE: I don't think it has any. I don't -- you know, I didn't find any evidence for a mental disease or defect with him, and it sounds that he's controlling himself in court there.

THE COURT: And would your opinion have been affected if the same precise statement had been articulated with the exact same words but under circumstances displaying an absence or unwillingness to manifest self-control appropriate for the requirements of a court of law?

DR. PATENAUDE: I'm sorry, Your Honor. I missed part of that. There is a rustling noise.

THE COURT: Okay. The question I was trying to ask you is whether what you just told me would have been in any way

affected or changed if instead of delivering his position and stating it in the manner I already told you he did, Mr. Sutcliffe had done so as part of an uncontrollable outburst, inappropriate and unwarranted in a court of law?

DR. PATENAUDE: Would that change my opinion in any way?

THE COURT: Right.

DR. PATENAUDE: No.

THE COURT: Could you explain that, please.

DR. PATENAUDE: Why that wouldn't change -- well --

THE COURT: Yes. I know I'm asking you about a hypothetical, which is not inappropriate. But please explain to me why that would not change your opinion.

DR. PATENAUDE: Sure, sure. Well, I think ultimately, regarding the issue of competency, as I understand it, is that, you know, we're looking for whether or not a defendant may presently be suffering from a mental disease or defect that renders him mentally incompetent, speaking from the statute, and found no evidence for that in him.

I believe that Mr. Sutcliffe's behavior is willful, volitional, goal directed. He certainly -- terms of rationality, he certainly understands, you know, what he is doing. He has reasoned that out; he's demonstrated insight and an ability to introspect regarding his behavior and his subsequent actions.

And regarding just maintaining reasonable behavior, again, I think that he chooses not to sometimes. I think he just gets real angry, and that's just a part of who he is. But I don't think it's, again, due to mental illness.

THE COURT: Dr. Patenaude, I didn't arrange telephonically to have you sworn in. I don't think it's unwarranted to do that. And after I swear you in, through the clerk, I will ask you questions about what you've just already stated for the court.

So let's, through the clerk, telephonically swear Dr. Patenaude in.

THE CLERK: Please raise your right hand.

DR. PATENAUDE: Okay. It's raised.

(Witness sworn)

THE COURT: Dr. Patenaude, I know what you've told us, and it preceded the oath that you've just sworn.

Do you confirm that everything you've said thus far, before you were sworn in, you would have said under oath and is subject to the same obligation you had to testify truthfully?

DR. PATENAUDE: Yes, that is true.

THE COURT: Now, Dr. Patenaude, in any of your discussions with Mr. Sutcliffe -- how many total discussions did you have, by the way?

DR. PATENAUDE: Let me grab my record here.

We had, I'd say, eight or nine pretty lengthy --

well, no -- eight or nine discussions. Many of them were pretty lengthy, and then there's general informal discussion.

THE COURT: The eight or nine are in some manner, as you see them, distinctive or distinct from and different from the informal discussions?

DR. PATENAUDE: Yeah. The informal discussions were just passings on the compound here in the hospital. Just -- they were just general pleasantries about how he was doing, things like that.

THE COURT: Now, Dr. Patenaude, would you please tell me what your training and professional background is.

DR. PATENAUDE: Yeah. I have a doctorate in clinical psychology, and I've been trained as a forensic psychologist in -- both while in graduate school, and then my internship training was in forensic psychology.

THE COURT: Where did you receive your doctorate?

DR. PATENAUDE: The Illinois School of Professional Psychology.

THE COURT: When did you receive it?

DR. PATENAUDE: I received that on -- gosh, when did I receive that? I believe it was October of '97.

THE COURT: October of '97?

DR. PATENAUDE: Yes.

THE COURT: And did you write a thesis that had something to do with issues related to mental competency or

mental illness in the context of court proceedings?

DR. PATENAUDE: Actually, no. My thesis dealt with children and behavior problems.

THE COURT: What experience, training, course work or otherwise have you had that qualified you to be functioning as a forensic psychologist?

DR. PATENAUDE: Sure. During my clinical training, before I was awarded my degree, I did a full year internship at the Northeast Florida State Hospital, which is a combined civil/forensic hospital and received a year of training in competency and other evaluations.

I also, while in school, did some therapy practicum and a diagnostic practicum that were in the forensics areas, and then I've been functioning as a forensic psychologist since August 2000 with the Federal Bureau of Prisons.

THE COURT: And throughout that time, have you been in the institution you're currently working at?

DR. PATENAUDE: Yes, I have, at the Federal Medical Center at Devens.

THE COURT: And how many evaluations have you conducted to determine whether or not an individual is competent to proceed to trial?

DR. PATENAUDE: I haven't -- I don't have the exact number, but I would say probably close to 250 to 300.

THE COURT: Are you able to tell me with some level

of accuracy whether, and, if so, on how many occasions, you've concluded that an individual was not competent?

DR. PATENAUDE: Not with accuracy, but I would say that maybe one out of 15 or 20 possibly, one out of 15 evaluations that I do.

THE COURT: All right. And was there anything distinctive about the evaluation of -- and the experience that you had in working with Mr. Sutcliffe that affected your conclusion?

DR. PATENAUDE: Yeah, I think so.

THE COURT: That is not -- let me just complete my question. I know we may have some difficulty speaking over each other since you're not physically present, but I'll try to limit that.

I just wanted to have you answer that question without regard to, and without reiterating, what you already wrote down in your very detailed report.

DR. PATENAUDE: Okay. No, I would say that I think that Mr. -- you know, within my evaluation, I guess I -- there wasn't anything real surprising in it. But, you know, he -- other than -- than his -- his demonstrative behavior in court, that I think led to the finding of incompetency, and then his demonstrated behavior here at the hospital, which was nondisruptive, and then his -- again, his insight into that behavior. And then just trying to figure out with him why

exactly he behaved that way in court.

THE COURT: To what extent do you attach any significance on the issue of Mr. Sutcliffe's competency to the fact that, thus far, including Mr. Nicolaysen, there have been four experienced criminal defense lawyers who have attempted to represent him, or have represented him, in the course of this proceeding, three of whom, at either his or their request, but without any opposition by him, I relieved of their representation. And I don't know if you have seen the -- have you seen the motion to withdraw -- to be permitted to withdraw that Mr. Nicolaysen filed?

DR. PATENAUDE: I have. I have not read the entire motion yet.

THE COURT: So you're aware there's pending before me, as I indicated at the outset of this hearing, a motion to withdraw brought by the fourth lawyer. And are you aware that a lawsuit has been filed against him?

DR. PATENAUDE: I am.

THE COURT: Filed by Mr. Sutcliffe?

DR. PATENAUDE: Yes, I'm aware.

THE COURT: Have you seen the allegations in that lawsuit?

DR. PATENAUDE: I perused them. I don't have them in memory.

THE COURT: To what extent, if any, does the

background concerning Mr. Sutcliffe's relationship with these four different lawyers affect your opinion as to his competence, particularly, Dr. Patenaude, under the first prong relating to whether or not the individual is able to consult with his attorney and assist properly in his defense with a reasonable degree of rational understanding?

DR. PATENAUDE: Well, Mr. Sutcliffe certainly possesses a factual and rational understanding of the whole idea of assisting his attorney in developing legal strategies and things like that.

And I think based on what he said to me, you know, his reason for wanting to change attorneys is what he terms -- I guess it's a legal term -- "ineffective assistance," and also that he believes his rights are being violated.

Also my opinion that I think part of the difficulty that he has had in working with his attorneys has been just a general factor or feature of his personality.

Now, in terms of being rational, he's demonstrated this ability with me and others, you know, to have meaningful and intelligent conversations and to reason and understand what is being said to him and weigh consequences, weigh decisions.

Yet, again, I think that he, you know, again, due to his belief that he's not being effectively represented is interfering with his ability to assist or get along with his attorneys. And I've seen -- spoken to Mr. Nicolaysen at

length, and he seems to me to be, you know, really working hard to work with Mr. Sutcliffe. So I don't know what the problem is.

THE COURT: The question I would like you to answer, more succinctly, if possible, in any event, more directly, is to what extent, if any, is your opinion affected by the procedural history that I already summarily summarized -- I already summarized concerning Mr. Sutcliffe and his four counsel thus far.

DR. PATENAUDE: No, no, my opinion was not affected by that.

THE COURT: And please explain why not.

DR. PATENAUDE: Well, again, I think that, you know, I was looking at his present functioning. And it just seems that what is going on with his present function has -- and if you focus that in on his relationship with his attorneys, there is a pattern there. And I believe that his behavior that he presents with when working with his attorney is willful and under his control, and it's not the product of a mental disease or mental defect.

THE COURT: Would another way of putting it be that it would be at least consistent with a desire that has at least two components, one is to assert and maintain control of the world and circumstances in which he is functioning, and the second being to manipulate the proceedings?

DR. PATENAUDE: That is correct. That would be my opinion, yes. I agree with that.

THE COURT: As to both prongs?

DR. PATENAUDE: Yes, I do.

THE COURT: All right.

Ms. Duarte, are there any questions in light of what Dr. Patenaude has now stated since I began to question him that trigger -- that you wish to ask in the form of any follow-up?

MS. DUARTE: No, Your Honor. I don't have any follow-up questions.

THE COURT: Mr. Nicolaysen, do you have any questions you wish to ask?

MR. NICOLAYSEN: No, nothing, Your Honor.

THE COURT: Mr. Sutcliffe, do you have any questions you wish to ask Dr. Patenaude?

THE DEFENDANT: Reading my mind, Your Honor. I'd like my retained counsel to come forward and question the witness.

THE COURT: Do you have any questions you want to ask Dr. Patenaude?

DR. PATENAUDE: No, I don't.

THE COURT: No, no, no. That was a question directed to Mr. Sutcliffe.

Do you personally, Mr. Sutcliffe, have any questions you want to ask Dr. Patenaude?

THE DEFENDANT: Until I'm found competent, I don't see how that is relevant. I have retained counsel. I would like counsel to come forward and represent me, Mr. McAfee in the background.

THE COURT: All right. Well, Mr. McAfee has no right -- no individual lawyer has a right, no individual litigant has a right, to have counsel represent that individual for limited purposes. But I also have the authority to permit it, and I, for pragmatic reasons, will permit it without in any way making any finding as to Mr. McAfee's competence to function in that capacity.

But since you've asked him to do so, since he's a member of the court, he says, and since he's here, I'll permit him to ask questions, but only about Mr. Sutcliffe's current mental condition for purposes of the finding that I'm required to make at this hearing and not about any findings that anybody else made, I or any prior psychologist or therapist at an earlier stage in these proceedings.

Now, step forward, Mr. McAfee, to speak into the microphone here at the lectern. And with that limitation and, particularly, the scope of relevance that you would be required to adhere to is the same as any lawyer. It's triggered by the contents of Dr. Patenaude's report.

You got that report, right?

MR. McAFEE: No, Your Honor, I did not, and I would

request a few moments to peruse it.

THE DEFENDANT: I would like a few minutes to consult with my lawyer.

THE COURT: Mr. Nicolaysen, I had issued an order that Dr. Patenaude's report be made physically delivered to Mr. Sutcliffe.

Did you attempt to comply with that order?

MR. NICOLAYSEN: Yes, Your Honor. I went down in person on August 21st and attempted to meet with Mr. Sutcliffe. I had the report. I didn't mail it to him when I got it on August the 20th. I went in person, and the visit was refused.

THE COURT: Did you leave the report with anybody to hand over to Mr. Sutcliffe?

MR. NICOLAYSEN: I did not, specifically because of the nature of the report. Typically, I will mail documents to Mr. Sutcliffe, I have done so, and I have done so recently, including my pleadings, things of that nature.

Something of this nature, which is very confidential, I wanted to personally deliver to my client. He refused the visit. I anticipated we would be seeing each other on the 25th, the following Monday. And so I did not follow up.

THE DEFENDANT: I'd also like the record to reflect that this court, on April 7, ordered the transcript of the hearing of April 7 to be provided to Dr. Patenaude and Mr. Sutcliffe quote, unquote, promptly. I did not receive a

copy of that secret hearing of April 7, where my presence was not, supposedly, required for almost eight weeks.

THE COURT: All right. Now, Mr. Sutcliffe, I'm not going to be open to repeated or maybe to any additional gratuitous volunteered statements which are not relevant to whatever is being discussed at a particular time. Your gripe about Mr. Nicolaysen will be addressed very shortly because of the fact that on the agenda for this morning's hearing, that motion is one of the items.

Now, Mr. McAfee, this report, although detailed, is not that long. I want Mr. Nicolaysen -- do you have an extra copy, Mr. Montes?

Do you have an extra copy, Ms. Duarte?

MS. DUARTE: I may have an additional copy, Your Honor. Actually, he can look at the one attached to my motion that I submitted to the court.

THE COURT: Show it to Mr. McAfee.

Mr. McAfee, you can sit over at the side of the courtroom. I will give you not more than 20 minutes to go over the report and discuss it with Mr. Sutcliffe. Hearing will be adjourned in the interim. You will be required to discuss it in the courtroom but without anyone else being within earshot of you. The clerk will come and get me. We'll resume the hearing.

Now I'm telling you right now, Mr. McAfee, that your

right, which is -- your permission that I'm granting you, the exercise of my discretion, will be immediately revoked if you do not comply with the requirements and the guidelines that I already told you.

Do you understand that?

MR. McAFEE: I do understand what you have articulated, Your Honor.

THE COURT: And do you agree to comply?

MR. McAFEE: I will comply with it to the best degree of my professional skill.

THE COURT: We're adjourned for the purposes I've already articulated.

Dr. Patenaude, you don't have to stay on the line right now. I want you to call back in 15 minutes, using the same procedures and facilities you already knew about, so that you'll be ready and available to go promptly, without any further glitch, in 20 minutes from now.

DR. PATENAUDE: Yes, Your Honor.

THE COURT: All right. We're adjourned.

(Recess)

THE COURT: Welcome back, and please be seated.

Dr. Patenaude, are you there?

DR. PATENAUDE: I am, sir.

THE COURT: All right. Mr. McAfee has been given special permission to ask you a few questions.

You may proceed, Mr. McAfee.

MR. McAFEE: Thank you very much, Your Honor.

EXAMINATION

BY MR. McAFEE:

Q. Good morning, Dr. Patenaude -- good afternoon, I guess, where you are.

A. Yes. Thank you.

Q. You've made some conclusions that were articulated by the court, and I want to make sure I understand those as related to his present condition.

Did you indicate on -- and I'm sorry, I don't have the report in front of me, and it is 13 pages long, and I was given 20 minutes to look at it. So --

THE COURT: You now have it in front of you. Please proceed, Mr. McAfee. We don't need speeches.

MR. McAFEE: If I misinterpret something, I apologize, Dr. Patenaude.

Q. Did you indicate that Steven Sutcliffe attempted or demonstrated a character trait that he wished to manipulate the proceedings?

A. I'm sorry. I didn't quite hear the last part of that question.

Q. All right. Was it your opinion the defendant, Mr. Sutcliffe, demonstrated a character consistent with someone who wished to manipulate the proceedings around him?

A. Yeah, he does present with control and power issues, and it does seem that, from my discussion with him, that he does want to control his legal proceedings in terms of legal strategies and how things are done.

Q. All right. And would this issue or element of control be part of the element of his ability to cooperate with counsel?

A. I'm sorry. Could you restate that.

Q. Sure. Would this desire to exercise the control that you've articulated, would that affect his ability to cooperate with counsel?

A. I'm sorry. So what you're asking is does he have an ability to cooperate with counsel?

Q. Well, no. If I understand you correctly, you've indicated your belief that Mr. Sutcliffe shows a desire to try to control the legal proceedings around him?

A. Yes.

Q. And if he has an attorney that's appointed to work with him, would Mr. Sutcliffe's desire to exercise control interfere with his ability to cooperate with that attorney?

A. Well, again, I think that Mr. Sutcliffe has a particular way he wants things to run, and I think that he feels his past attorneys have not represented him well because of that.

He does believe that you could represent him well, and -- I couldn't say, you know, with a hundred percent certainty whether or not, you know, he does work with an

attorney who he believes will represent him well, whether or not he'll try to control that situation.

Q. Okay. So was there ever any discussions between yourself and Mr. Sutcliffe about how he felt his participation in the proceedings should be observed by the court or should -- in other words, his interactions with counsel, did he ever articulate how he saw himself participating in those proceedings?

A. How he felt he was participating in those proceedings?

Q. No, how he should --

A. I'm sorry. I'm having a little trouble hearing you.

Q. I don't know what to do to help you.

THE COURT: Just maybe move the microphone closer to you and speak louder.

MR. McAFEE: I'm almost swallowing it.

Q. Did Mr. Sutcliffe ever articulate to you how he perceived his role in the legal proceedings?

A. Yes, he did.

Q. And what did he tell you in that regard?

A. Well, he discussed wanting to take an active role in devising his legal strategies. At one point, he talked about just wanting to go pro se. And then at another point, he also talked about having you represent him. So...

Q. All right. But that's a little different than what you've just told me, so I want to understand.

You told me that he wanted to be an active participant. Is that the same thing as wanting to control the proceedings?

A. Well, I think that, you know, he says active. He didn't use that exact term, but that is the way he verbalized it. But based on what I'm also hearing from him, and what I've seen in the record and talking with other people, that there is an element where he is, I believe, is trying to control his legal proceedings, yes.

Q. All right. If Mr. Sutcliffe were in a relationship with any attorney, whether that's with me or anybody else, in which he perceived that that attorney was not permitting him an active participant role, how would that affect Mr. Sutcliffe's ability to cooperate with counsel?

A. I'm sorry. If -- I didn't hear you on the first part of that.

Q. If Mr. Sutcliffe perceived that he was not being allowed to be an active participant with his attorney, whoever that attorney might be, how would that affect his ability to cooperate with counsel?

A. Well, he'll probably -- he'll act out.

Q. All right. And so if, in fact, Mr. Sutcliffe is not being given -- I'm not saying this is true -- but if, in fact, Mr. Sutcliffe is not being given an opportunity to be an active participant with whatever attorney is representing him, would

you expect him then to act out, given your knowledge of his personality?

A. Yeah, yes, I would.

THE COURT: Mr. McAfee, please characterize or define what you mean by "active participant" in the context of real-world case where somebody's on trial.

MR. McAFEE: Sure. Well, actually, Your Honor, if I may, I'd rather, if Dr. Patenaude has a definition of that based on what Mr. Sutcliffe told him. Because I think it's Mr. Sutcliffe's perception that is important here and not mine.

THE COURT: No, Mr. McAfee. You used the term in the question you asked. Just explain to the witness, as I would ask any lawyer to do, how you define that term.

MR. McAFEE: Okay. Well, I would define that term, Your Honor, with -- to Dr. Patenaude as an attorney that --

THE COURT: No. Come on. Active participant on the part of the client.

MR. McAFEE: Yes, Okay. An active participant is a person who is permitted to participate in their case. That means they have communications with their attorney; they are asked by their attorney, questions; they are listened to by their attorney; they are asked their opinions about either legal defenses or facts of the case; and they are allowed to render their opinion.

Q. Dr. Patenaude, would you think that would be consistent

with Steven's perception of how he saw active participation?
A. Well, I think there's a difference between when you're talking about assist issues. He -- I don't think he is allowing -- again, this is my opinion, and I'm not a legal expert -- but I don't see him -- I've never seen him, really, to allow Mr. Nicolaysen to function as his attorney, really.

And in terms of being an active participant, I think that if Mr. Sutcliffe were that -- with an attorney he liked, I think that "active participant" to him means that he has control over what is going on.

Q. All right. But you've never observed Mr. Sutcliffe in the presence of Mr. Nicolaysen, have you?
A. I have witnessed -- yeah, I heard a telephone conversation between them.
Q. Okay. And that was a single telephone conversation?
A. I'm sorry?
Q. That was a single telephone conversation?
A. Yes.
Q. How long did that last, sir?
A. That -- I think they've spoken a few times when I was here. But I don't recall how long that telephone conversation lasted.
Q. Were you on the telephone, or could you hear the communication that was going on, or were you just observing Mr. Sutcliffe?

A. I was actually standing outside of my office, and I heard Mr. Sutcliffe yelling at Mr. Nicolaysen and being very argumentative and devaluing of him.

Q. You don't know what Mr. Nicolaysen was saying to Mr. Sutcliffe that elicited that response?

A. No, I don't.

Q. So you don't know whether what was being spoken to by Mr. Nicolaysen was appropriate for that kind of response, or whether Mr. Sutcliffe's response was inappropriate?

A. Okay.

Q. Is that fair?

A. Sure, sure.

Q. If the term that was spoken to by Mr. Nicolaysen was appropriate for the response that Mr. Sutcliffe was giving, how would that affect your opinion?

A. Regarding his ability -- his competency?

Q. No, regarding your opinion of his interactions and not letting Mr. Nicolaysen have a chance to represent him.

A. Well, again, based on my discussions with Mr. Nicolaysen and also with the -- with Mr. Sutcliffe, again, you know, I will fall back on my opinion that I believe that Mr. Sutcliffe is trying to control the situation because Mr. -- you know, as I gathered from Mr. Sutcliffe, Mr. Nicolaysen won't do what he wants him to do.

I also think that another factor in this is

Mr. Sutcliffe's thoughts about Judge Matz.

Q. I don't know if that's gris for the mill here, unless Judge Matz wants to go into that.

A. Well, I think that -- I think -- If I may, Your Honor. I think that that --

THE COURT: Dr. Patenaude, there's no question pending. This lawyer has a right to have you function as a witness like any lawyer would. So if he doesn't want to follow up, then you shouldn't volunteer the information.

THE WITNESS: Yes, Your Honor.

BY MR. McAFEE:

Q. As regards -- I'm sorry. I have to put my glasses on.

As regards to the issue of control and his interaction with Mr. Nicolaysen, at least as you have opined, did you make any -- was there any discussion about Mr. Sutcliffe's opinions on Mr. Nicolaysen when he first arrived at FMC-Devens?

A. Yeah. He made it very clear to me that Mr. Nicolaysen was not his attorney.

Q. So from the very outset, you were aware that Mr. Sutcliffe's relationship with Mr. Nicolaysen was, at best, strained?

A. Well, I didn't know the nature of the relationship. I knew that Mr. Sutcliffe said that Mr. Nicolaysen was not his attorney, and he seemed unhappy with him.

Q. That was from the very beginning of your relationship with Mr. Sutcliffe?

A. Yes.

Q. So would be fair to state that those feelings that Mr. Sutcliffe articulated existed before he got to FMC-Devens?

A. Yes.

Q. Do you have any idea how many times Mr. Nicolaysen has actually visited his client?

MS. DUARTE: Objection, irrelevant, Your Honor.

THE COURT: Sustained.

BY MR. McAFEE:

Q. I'm trying to get to the number of interactions between Mr. Sutcliffe and Mr. Nicolaysen upon which you can base your opinion.

Do you have any idea as to how many interactions occurred prior to Mr. Sutcliffe's going to FMC-Devens?

THE COURT: Wait, wait, wait. "Interactions" is not a clear term. Why don't you reframe the question, please.

BY MR. McAFEE:

Q. Do you know how many times --

I did and I got objections sustained.

THE COURT: Why don't you ask him whether Mr. Sutcliffe told him how many times he met with Mr. Nicolaysen or whether Mr. Sutcliffe told him how many times Mr. Nicolaysen attempted to meet with Mr. Sutcliffe but was

rebuffed. Then you can have a foundation for what you want to pursue.

MR. McAFEE: Fair enough. Thank you, Your Honor.

Q. During your discussions with Mr. Sutcliffe, did he, Mr. Sutcliffe, indicate on how many occasions he had been visited by his attorney, Mr. Nicolaysen?

A. Well, there weren't any personal visits.

Q. Thank you, Doctor.

THE COURT: No, was your question about visits in Massachusetts or visits in California?

MR. McAFEE: No, sir. Visits in California.

THE COURT: Did you understand that?

THE WITNESS: I didn't know it was in California. I was talking about Massachusetts.

THE COURT: That is what I thought.

BY MR. McAFEE:

Q. Did Mr. Sutcliffe indicate on how many occasions while he was incarcerated in California, and while Mr. Nicolaysen was acting as his court-appointed attorney, that Mr. Nicolaysen actually came and visited Mr. Sutcliffe during his term of incarceration?

A. I don't know.

Q. It was never discussed between you and Mr. Sutcliffe?

A. I'm sorry?

Q. That was never discussed between you and Mr. Sutcliffe?

A. I'm sure it was. I just don't recall.
Q. Do you recall whether Mr. Sutcliffe articulated his pleasure or displeasure at the number of times that he was visited by his court-appointed attorney while he was in California incarcerated?
A. I don't recall.
Q. Do you have an impression that Mr. Sutcliffe was happy or unhappy about the number of visits he had had by Mr. Nicolaysen, in California?
MS. DUARTE: Same objection to this line.
THE COURT: Overruled.
THE WITNESS: I really don't recall. That was probably something that was just peripheral in passing. I wasn't focusing in on that, but I don't remember.
BY MR. McAFEE:
Q. Well, all right. So if you don't have a recollection of the visits, how about any other types of communications between Mr. Nicolaysen and Mr. Sutcliffe while he was in California?
Do you have an impression as to how many other types of communications may have occurred between Mr. Nicolaysen and Mr. Sutcliffe, other than personal?
THE COURT: Okay, Mr. McAfee, you need to ask your questions in an appropriate manner. Asking him about impressions is not the appropriate way. Ask him about whether -- what he was told.

We all know that Dr. Patenaude has never been in California during the course of this case. So ask him what -- then what he knows is, evidently, primary from, maybe exclusively from, the reports that he recited and from your client. Ask him what your client told him.

MR. McAFEE: Thank you, Your Honor.

Q. Dr. Patenaude, did Mr. Sutcliffe tell you anything about any other types of communications, other than personal visits, that he had had with Mr. Nicolaysen before he came to Devens.

A. You know, I really don't remember. I know that Mr. Sutcliffe spoke about it, but I was not focusing on that. I didn't see it. You know, I was more focusing on other issues at the time. That might be a better question for Dr. Backer or Dr. Ihle.

Q. I'm just trying to get an idea of how you came to your opinion that it appeared that Mr. Sutcliffe was not letting Mr. Nicolaysen provide a defense for him.

I mean if you're not aware of the number of visits, not aware of the communications other than the one single phone call that you overheard Mr. Sutcliffe talk, over which you had no idea of what the content was, what do you draw -- upon what do you draw your conclusion that Mr. Nicolaysen was not being afforded the opportunity that you expressed?

A. Oh, that -- I'm drawing my conclusions from -- that Mr. Sutcliffe is not allowing this because he believes that

Mr. -- again, legal term -- Mr. Nicolaysen is providing ineffective assistance, and he doesn't want to have anything to do with him.

Q. All right. And do you have any basis for evaluating whether or not, in fact, Mr. Nicolaysen has or is rendering effective assistance of counsel?

A. Well, I've had many conversations with Mr. Nicolaysen. He's requested to speak with Mr. Sutcliffe since he's been here, and I brought those requests to Mr. Sutcliffe, which he refused to speak with Mr. Nicolaysen, citing that Mr. Nicolaysen wasn't his attorney. And Mr. Nicolaysen has supplied me with recall records and everything I need. He's been very available.

Q. But what I'm trying to get at is the opinion that you drew regarding the relationship between Mr. Sutcliffe and Mr. Nicolaysen, not your relationship with Mr. Nicolaysen.

Upon what did you use to draw your conclusion that Mr. Sutcliffe was not giving or affording Mr. Nicolaysen an opportunity?

A. That he said that Mr. Sutcliffe indicated that, one, Mr. Nicolaysen -- he refused to knowledge Mr. Nicolaysen as his attorney because he sees him as not representing him well and, again, providing ineffective assistance.

Q. All right. Let me just tackle one more area if I might.

During the time that Mr. Sutcliffe was at Devens, did

he ever -- did he speak to you about his dissatisfaction with the length of time this matter was taking to get to trial?

A. Yes, he did.

Q. Did it appear to you that Mr. Sutcliffe was unhappy about the length of time it was taking for this matter to get to trial?

A. Yes, he was unhappy about it.

Q. Did Mr. Sutcliffe articulate frustrations about delays that he perceived were occurring?

A. Yes, he was frustrated over his evaluation.

Q. I'm more concerned about the issue of delay than I am about the evaluation.

A. Well, I had a court order, so I wouldn't say it was necessarily delay. I mean it was something that was indicated by the court.

But, yes, he was frustrated that he had to come out here for possibly 120 days.

Q. I'm sorry. Maybe my question was too narrow.

I'm talking delays, in general, from the date of his arrest, until today, as opposed to just the delay -- if that is the right term -- that occurred while he was at Devens.

Did he articulate to you his frustration over the delay, in general, as to how long it was taking him to get to trial?

A. Yes, he was frustrated about that, yes.

Q. Did it appear to you that Mr. Sutcliffe had a rational understanding about what a delay meant and how long he had been incarcerated?

A. Well, I didn't -- you know, I didn't ask him, but I didn't assess for his understanding of delay. But he indicated that he felt that his legal proceedings were going slower than he had hoped.

Q. Do you have an opinion, Doctor, as to whether or not Mr. Sutcliffe would do anything knowingly to create a delay in his proceedings?

A. Well, it seems that he, again -- you know, I kind of want to stay out of -- I don't want to get into the legal aspects of this because I wasn't evaluating that. But I know that he certainly spends quite a bit of time writing motions and things of that nature.

Q. Is it your understanding that motions cause delays in the date a trial will occur?

A. Again, I'm not -- you know, I'm not a legal expert. I don't really understand the totality of everything that's gone on in his legal proceedings. I've just been assessing the competency.

Q. Again, I'm only interested in the competency issues. I'm not interested in trying to derive legal opinion from you.

But I'd like you to consider this hypothetical: If Mr. Sutcliffe knew that writing motions would necessarily

result in a delay in his coming to trial, based on your observations of Mr. Sutcliffe, do you believe Mr. Sutcliffe would engage in that conduct?

A. I'm sorry? Hello?

Q. Yeah, we're still here.

A. He would engage -- do I believe he would engage in that conduct?

Q. Right. Would he knowingly do something, in your view, that would result in a further delay or additional delay in his coming to trial?

A. I never asked him if that was his purpose.

Q. Do you have an opinion based on your observations and report that you've created here?

A. Well, I think -- you know, my opinion is that I think that Mr. Sutcliffe, on one level, has been manipulating his proceedings, particularly through his disruptive outbursts in court.

Q. Okay. Let me ask you about that because you've said that a couple times now. Let's talk about manipulating.

I need to know what you mean by manipulating so the record is clear as to what that term, as you are using it, means.

A. Controlling.

Q. So when you say "manipulating," what you're articulating is that by his outbursts -- and I'll ask you what you mean by

that in a moment -- by his outbursts, he is trying to control the proceedings; is that correct?

A. I think that his outbursts serve a number of different purposes. One is to, obviously, let the court know his dissatisfaction over what's going on. I also think that it's a part of his way of necessarily taking kind of an offensive maneuver -- excuse me -- in delaying things.

Now -- but then, again, that is just kind of a side opinion. I didn't evaluate for that with him. I didn't specifically speak to him about that.

Q. I appreciate that.

If -- however, you did ask him about his relationship with his attorney, and you have given your opinion about that. If Mr. Sutcliffe believed that his attorney was not rendering effective assistance or protecting his rights, that is, Mr. Sutcliffe's rights, would you expect Mr. Sutcliffe to assert his own rights in a court proceeding?

A. He has said that to me, yes.

Q. All right. And would that include -- or do you know whether that would include outbursts or -- that is, interrupting court proceedings in order to be sure that his rights, as he perceived them, were being protected?

A. Would that make him engage in disruptive behavior in court if he perceived his rights were being violated? Is that what you're asking?

Q. No. I'm asking if your interpretation of disruptive conduct is an outburst and definition of an outburst is an interruption of the court proceedings? What I'm asking is if Mr. Sutcliffe believed he had to interrupt the court proceedings to assert a right, or rights, that his court-appointed attorney was not asserting for him, in Mr. Sutcliffe's perception, would that -- would that render -- would that change your opinion that he was trying to manipulate the proceedings for the purpose of delay?

A. Well, I don't know. I couldn't say whether or not, you know, again -- you know, we didn't talk about why he was doing that. He gave me -- you know, he essentially said that he just began speaking for himself because, I think, one, he didn't acknowledge Mr. Nicolaysen as his attorney and also he believed that the judge was being unfair and -- Judge Matz that is -- and that he just wanted to present his case.

Q. Okay. So would it be fair, then, based on what you've told me, that you believe that his outbursts were motivated, at least in part, by his desire to assert his rights and present his case --

A. Yeah, I would -- yeah. I'd say at least in part, yes.

Q. I'm not asking you to render an opinion whether you think it's appropriate because court proceedings, I know, are not your area of expertise.

Based on your interactions with Mr. Sutcliffe, do you

believe that Mr. Sutcliffe can have a meaningful attorney-client relationship with Mr. Nicolaysen?

A. No, I don't. I think that Mr. Sutcliffe does not respect Mr. Nicolaysen and, again, does not believe that Mr. Nicolaysen can represent him as he would like to be represented.

Q. Are you aware that these feelings go back as far as January 17, 2003?

A. I don't know the specific dates. I know that Mr. Sutcliffe has stated that he, I think, has always objected to Mr. Nicolaysen's representation.

Q. Did Mr. Sutcliffe inform you that in March -- I believe it was on March 14. I'm sorry. I don't have the motion in front of me. But at some time in March, I believe, might have been February, Mr. Sutcliffe had filed a motion with the court to have Mr. Nicolaysen relieved as his attorney for incompetency of counsel.

Were you aware of that?

A. Again, I think Mr. Sutcliffe did mention that.

MR. McAFEE: Your Honor, if I may just briefly chat with Mr. Sutcliffe to make sure there's nothing I've missed.

THE COURT: Go ahead.

MR. McAFEE: Thank you, Your Honor.

Q. Dr. Patenaude, did Mr. Sutcliffe ever tell you or relate to you his beliefs that Mr. Nicolaysen had lied to him?

A. Mr. Sutcliffe did mention, as I recall, that he felt he

was lied to.

Q. By Mr. Nicolaysen?

A. Yes.

Q. Do you believe that if Mr. Sutcliffe believed that, that that would interfere with his ability to trust Mr. Nicolaysen as his attorney?

A. Yeah, I -- again, I think Mr. Sutcliffe made it very clear that he doesn't have confidence in Mr. Nicolaysen or that he trusts him.

MR. McAFEE: Thank you very much, Your Honor.

THE COURT: All right. You don't have any further questions, do you, Ms. Duarte?

MS. DUARTE: I do not have any follow-up.

THE COURT: Nor do you, Mr. Nicolaysen?

MR. NICOLAYSEN: Nothing, Your Honor. Thank you.

THE COURT: I don't either, Dr. Patenaude.

And on this first prong of today's hearing, I find -- now, Mr. McAfee, go back to the lectern. You're counsel for this issue, and I take it your position is that your client is competent to proceed to trial, correct?

MR. McAFEE: I believe that would be my statement, Your Honor, that he is competent -- I take that back. No. It is my opinion that he is not incompetent purse to the statutory definition of 4241 (a) or (d).

THE COURT: I find that Mr. Sutcliffe is competent to

proceed to trial based upon all the testimony that's been given today, including from Dr. Patenaude in response to Mr. McAfee's questions and the report and all of the materials and records in the file. So let's turn to the second issue on the agenda, which is Mr. Nicolaysen's motion --

MR. McAFEE: Your Honor, may I be seated?

THE COURT: -- to withdraw.

You may be seated. Don't leave the room.

MR. McAFEE: I'm not.

THE COURT: I grant that motion to withdraw. It doesn't require any further evidence or information.

Let the record reflect that there's been a total breakdown in communication. It's been confirmed by the testimony of Dr. Patenaude; it's been confirmed by the questioning that elicited that testimony. According to the evidence, there were nine written communications between April 17th and June 13th that Mr. Sutcliffe did not respond to. Mr. Sutcliffe has sued his lawyer. That case is still pending before another federal judge. He refused to meet with him as recently as August 19th and refused to --

MR. NICOLAYSEN: August 21, Your Honor.

THE COURT: August 21. And it is clear from everything that I have witnessed and all that I've read that Mr. Sutcliffe, just as Dr. Patenaude said, regards Mr. Nicolaysen with contempt.

Under these circumstances, Mr. Nicolaysen is relieved of his representation. Now, Mr. Nicolaysen, please go to the lectern.

You may be seated, Mr. Sutcliffe.

THE DEFENDANT: I'm just letting the court know that I'm standing, and that is my way of not interrupting, not having an outburst, but I want the court to recognize that when I stand, I have an objection which I wish to make on the record.

First off, I object that his motion is going in front of my motion. My motion to recuse him for ineffective assistance of counsel predates his. I'd like to be heard first. First in line, first served.

THE COURT: What else is the basis for your standing?

THE DEFENDANT: Well, Your Honor, you -- on the August 12th order regarding the August 25th hearing, at paragraph 5, on page 2, line 7 through 16, the court stated that it had advised me previously against causing a breakdown in communications.

I've searched my records and reviewed all the transcripts that are available to me, and I can't find any such previous advisement, not withstanding the fact that the breakdown is not caused by me or my conduct.

So could you please direct me to the hearing or previous order to which the court referred to in the

August 12th order. I would also request a copy of that transcript or order be provided to me forthwith.

Furthermore, this court has advised me several times not to represent myself pro se, counseling me about the dangers, the pitfalls, and the perils; and I thanked this court for that counsel in the past.

I've only asked for effective assistance of counsel, nothing more, and I think I'm entitled -- not only entitled to it, I have a right to it. And justice demands that it be provided to me. You failed to protect my rights.

THE COURT: We'll deal with all those issues in a minute. Why don't you sit down now, okay?

THE DEFENDANT: Thank you.

THE COURT: Mr. Nicolaysen, before you're formally relieved of your duties, I want to remind you what I trust you already understand, and I also need to get some information about the state of the record here.

Have you received all of the required information that you may have sought from any expert that the court may have appointed to assist in your representation of this defendant, yes or no?

MR. NICOLAYSEN: Yes.

THE COURT: Is there any further work that would be required on behalf of Mr. Sutcliffe's defense by any expert the court may have previously appointed at public expense to assist

in the defense of Mr. Sutcliffe?

MR. NICOLAYSEN: No, Your Honor.

THE COURT: Did you get all of the materials that had been generated in the nature of work-product materials from the three prior counsel for Mr. Sutcliffe?

MR. NICOLAYSEN: I believe so, yes.

THE COURT: Have you issued any trial subpoenas?

MR. NICOLAYSEN: Yes, to Mr. McAfee.

THE COURT: You don't have to tell me who, but are there any other individuals -- without telling me who they are -- to whom trial subpoenas have been issued?

MR. NICOLAYSEN: No.

THE COURT: Is there any additional information that any -- that Mr. Sutcliffe -- who may be representing himself, or any standby lawyer, or Mr. McAfee, if he's hired -- would need to have that you can state on the record, without violating any duties you have as a lawyer, including attorney-client privilege, so that the state of the materials available or the preparation in trial defense available for Mr. Sutcliffe can be cleared?

Anything else that you need to set on the record?

MR. NICOLAYSEN: Probably just state that over the past six months, I have organized the file very well, very thoroughly. It is in a very good state to be transferred to any new counsel or to Mr. Sutcliffe directly, depending on the

rules and procedures at MDC for that function.

I have extensive outlines, and I'm fully prepared to assist and facilitate the transition to whoever may take over the case.

I should also state on the record that if this court is inclined to have Mr. Sutcliffe proceed in pro se, if he will meet with me, I will certainly sit with him and walk him through all of the file materials if, in fact, he is willing to do that, and I will not Bill of Rights for that time. But I'm prepared to do that so that the transfer process, by which I'm relieved and someone new comes in, possibly the defendant himself, is a transition that is smooth and effective.

THE COURT: Okay. Well, that would be appropriate. And, in general, without having to enumerate every single aspect of it, I remind you -- and I know that you already understand this and are fully committed to complying with it -- that it would be your duty to assist in the transition, to make all work product available, and to make yourself available to any successor counsel or to Mr. Sutcliffe for purposes of assisting in his defense.

MR. NICOLAYSEN: Again, I'm happy to do so, Your Honor, and I want the court and the record to reflect that I bear no ill-will or animosity. And that to the extent it is, from a transitional point of view, necessary for me to attempt to work directly with Mr. Sutcliffe, should he be in pro se, in

order to make the transition effective, I am perfectly happy to do so.

THE COURT: Okay. Now, please remain in the courtroom. Your motion is granted.

I will grant Mr. Sutcliffe's motion to recuse you but with a specific observation that I am making no finding whatsoever that you engaged in any misconduct or failed to provide effective assistance of counsel. And, indeed, I think the record clearly reflects just the opposite, and you've done a salutary job under difficult circumstances.

MR. NICOLAYSEN: Thank you. Your Honor, if the court please, I'll sit in the audience section.

THE COURT: Yeah, you can sit in the audience.

Now, in response to your request, Mr. Sutcliffe --

THE DEFENDANT: I'm standing, which means I'm objecting.

THE COURT: Yeah. I understand that. Your objection is noted.

THE DEFENDANT: I'd like to get on the record the reasons for my motion to have him fired for ineffective of --

THE COURT: He's been fired, and that's no longer --

THE DEFENDANT: -- on the record, my reasons --

THE COURT: You are declined. You set forth -- it's not permitted, and you've made your motion, and it's been granted with the qualifications that I already said.

Mr. Nicolaysen no longer is your attorney.

Before I get to the question of the earlier transcript, did you want to be heard, Ms. Duarte?

MS. DUARTE: I'm sorry, Your Honor, yes, very briefly.

I just had a procedural point while Mr. Nicolaysen was still up here. In terms of the subpoenas, early on in the case, when Mr. Harris was representing Mr. Sutcliffe, the court had ordered me to ensure that Mr. Gary Winnick, who had been subpoenaed by Mr. Harris, was made available. Mr. Nicolaysen had indicated to me that that availability was no longer necessary or required. So I have indicated that to Mr. Winnick's attorney, and he is not under my subpoena anymore.

I just wanted to make that clear because that was kind of left hanging, and I don't think there's any written communication that would be in the file between myself and Mr. Nicolaysen on that point.

THE COURT: Thank you for clarifying.

Okay. Now, in response to Mr. Sutcliffe's recent request for what the court was -- what I was referring to, in noting that I had previously given warnings to Mr. Sutcliffe that he would be deemed to have waived his Sixth Amendment right to appointed counsel, the transcript of January 14, 2003, which I will make available to Mr. Sutcliffe, which I got in

the last couple of days and I don't think has been distributed.

At that point in the proceedings, Mr. Harris, the third lawyer, was still representing Mr. Sutcliffe. There are a number of things that were addressed, some of them outside the presence of the U.S. attorney. It is not inappropriate to recite the following. On page 13, I noted that Mr. Sutcliffe had filed a writ of mandamus in which he had said that if a previous request he had made was denied, he would "stand sui juris" -- sui, new word j-u-r-i-s -- "without counsel and under the foregoing conditions. Only the accused may speak for the accused."

And then I mentioned that he had cited, Mr. Sutcliffe, in a document he had filed, the Faretta case -- which is misspelled in the transcript. It says, "V-e-r-e-t-t-a." It's F-a-r-e-t-t-a. And I noted that Mr. Sutcliffe had refused to sign a waiver of counsel.

And then I proceeded to say the following. This is a precise quote. This is on page 13:

"You do have a right to" -- this is the quote:

"You do have a right to a lawyer. And I'm willing, but only one additional time, absent anything compelling. If the same syndrome occurs with any third lawyer that I appoint to represent you, then you will have been, if those facts occur, and I'm not making any finding because there's no basis to, then you will have waived your right to excuse that

counsel, or to be represented by replacement counsel.

"I will have to advise any new lawyer of the procedural history of this case. The lawyer who would be appointed to represent you, if you choose to proceed with a lawyer, will be someone who is a member of this court's indigent defense panel...."

Later on, on page 14, I noted:

"So that's one alternative. You get another lawyer. But you get that lawyer, and it could be a man or woman, on the basis and in the manner I just described. In principle, the alternative to you of having another lawyer derived from that method is to represent yourself. I don't know whether that's what you're seeking."

And I'm digressing from the reading of the transcript to note that on more than one occasion, in my presence, Mr. Sutcliffe, in my view, played a very coy, manipulative game of refusing to waive his right to counsel, while at the same time refusing to allow the court to appoint counsel in his behalf.

So then I continued at the hearing, and I said:

"I really don't understand what you're seeking. But if that's what you're seeking, then I would do my best" -- that meaning to represent himself -- "then I would do my best to bang you on the head and kick you on the skins" -- it should say shins -- "and I'm speaking figuratively" -- that's what I

said at this hearing -- "I'm speaking figuratively, I don't mean that literally, talk you out of that. Because it would be totally against your interests. I would have to go through certain measures to make sure you understood what you want to do, if you proceed on your own, without a lawyer.

"Now you really need to tell me what you want as between those two alternatives."

The transcript continued on, and Mr. Sutcliffe was asked again:

"Do you want another lawyer?"

This is on page 16. He said:

"That's not what I want. I want this case dismissed. How many lawyers do I have to go through? If Your Honor were sitting in a prison, where I'm sitting right now, waiting for me to find you a competent lawyer, I think the shoe would be on a different foot.

"I have gone through three lawyers now. How many do I have to go through?

"I'm expected to go through another couple lawyers."

"THE COURT: You won't have a couple lawyers" -- this is on page 17 -- "but you would have a right to another lawyer."

"THE DEFENDANT: Another one? Another one? When does it stop? When does it stop?

"THE COURT: Now let me try to answer that question.

It stops when you proceed to trial, if that is what you choose to do."

And I'm skipping over some other comments that were made. I then noted to Mr. Sutcliffe that he could make motions himself, if he were representing himself. I said, "I have given you" -- this is a quote:

"I have given you extra latitude by allowing things you have submitted to me directly, which is not your right to do, to be filed, including today's document.

Then I continued on page 18 to note:

"You don't think you have the ability to defend yourself against the United States of America, and you're right about that. I agree with you 100. That means that if you don't defend yourself, which in principal would be your right, it would be crazy to do it, but it would be your right, then you're going to have to have another lawyer. That other lawyer is going to have to go through the same learning curve that all the previous lawyers went through. There's going to be a delay in the trial.

"You may have a view at any time, and may be every time, that whoever happens to be your lawyer is not doing the job the way you want that person to do it. But that doesn't mean that the lawyer is not doing the job that is your constitutional right to have done. It happens all the time, Mr. Sutcliffe, that clients and lawyers disagree about

strategy, about tactics, about how to respond to something that's said in court, about the little picture and the big picture."

A few lines later I noted:

"When differences arise about things which don't get necessarily to the particular crime that's alleged or what is necessary to prove the crime, by how best to help yourself win the case, such as what clothes you wear"-- that had been the subject of a dispute with one of the lawyers -- "when you come to court and sit before a jury, that suggests to me that you are not thinking very clearly.

"I am going to subject you to a competency exam, to be sure," I said.

And I went on to note that he has to have the ability to confer with the lawyer with a reasonable degree of rational understanding. I now find that he has the ability, but often he chooses not to display or exercise it for other devious purposes. I then noted:

"If a person doesn't have that ability to consult with counsel, then one of two elements of competence may be lacking. The other is that the person has a rational as well as a factual understanding, rational as well as factual understanding of the proceedings."

I said at the time that I wasn't convinced that under that standard he was competent. I proceeded on page 21 to

note, nevertheless, that I was going to appoint another lawyer -- and that lawyer ultimately came to be Mr. Nicolaysen -- to represent you. And here's what I said:

"Secondly, I'm going to appoint another lawyer to represent you because I construe your comments to be a perfectly correct statement to me that basically boils down to, Judge, I want to be able to help call the shots. But I need a lawyer to do the job. And I said help call the shots. I didn't say call the shots.

The client has a right to communicate information and to communicate requests, even demands, to the lawyer. Communication is a two-way thing, Mr. Sutcliffe. But the client has the duty, if he wants a lawyer, to understand that the lawyer has the ultimate responsibility to decide what happens. If the lawyer is halfway good, that lawyer will listen carefully to what the client says."

I then proceeded to tell him how often it happens that clients and lawyers get involved in differences and disputes. And I said:

"If your lawyers do that to you, don't be surprised.

And then I said -- and this, again, is a quote:

"But I'm not going to allow you to go through the same thing you told me a moment ago, you don't want to do, which is five lawyers and the tenth. And in the year 2010 we would still be trying to figure out if you've got a lawyer

that's going to be okay for you the way you see it. That's not going to happen because at some point I have the power and the obligation to find that you have waived your right to have a lawyer represent you. And then you're going to trial on your own."

A few lines later, I said:

"Now you asked for the opportunity to respond. Please do."

And Mr. Sutcliffe said he was firing Mr. Harris because he was incompetent. He explained why he accused Hilary Potashner of malpractice. And that, I think, was the relevant portions of the January 14th hearing. The transcript will be made available for the parties in this case.

And on page 30, I asked:

"Do you understand what I just explained to you?"

His response:

"I understand that I've been prejudiced to an extreme amount by having a new lawyer appointed, against my objections, come in and try to get up to a speed with a half-million pages of discovery, 50 plus CD-Roms, ad nauseam. How is that not prejudicing me?"

And I responded:

"Okay. We're not going to have a debate about it. It was your choice to fire Mr. Harris and to create the circumstances where I was compelled to grant your request, and

now his.

"And it's your choice, a sound one, not to do battle on your own. So that's where we're at, Mr. Sutcliffe."

And at that point, I said, "Let's bring in the prosecutor" because in all these prior proceedings that I've been reciting, the prosecutor had not been present. Now, in the order that I issued in writing recently in preparation for this hearing, I recited several cases -- I cited several cases: U.S. versus Moore; U.S. versus Fazzini; U.S. versus Kneeland; U.S. versus McLeod; and also a reference to U.S. Kelm, for the proposition that the defendant will be deemed to have waived his right and to have exercised his Faretta right to represent himself. If competent, he will proceed to trial pro se. Now, I'm making findings in this regard.

Mr. Sutcliffe, as the record amply demonstrates, has gone through four attorneys; he's fought with all of them; he's insisted on firing all of them. He has, in a devious and manipulative way, at the same time refused to waive the Sixth Amendment right to counsel. He has actually sued at least one lawyer, the fourth one, as the record today establishes. There is every reason to believe he would continue to do that with additional lawyers who are appointed to represent him in a conventional basis.

A defendant has no right to both self-representation and the assistance of counsel, although I do have the

pg 65, LINES 12-16

authority, and I intend to exercise it, to appoint standby counsel.

Now, I'm going to, as I've tried to do throughout this proceeding -- which, I think, by virtue of your conduct and your decision, has gone on for quite a little while -- tell you about the consequences of representing yourself in even greater detail.

Because you have one choice to representing yourself, and that is to hire a lawyer at your expense or a lawyer who will agree not to charge you for fees. You have a lawyer that you wanted to represent you today, Mr. McAfee, and he is here.

Do you want to retain him?

THE DEFENDANT: I didn't even know you were talking to me. I'm sorry.

THE COURT: Do you want to retain Mr. McAfee as your lawyer?

THE DEFENDANT: I'm indigent. The government -- I'm flat --

THE COURT: Answer my question: Do you want to retain Mr. McAfee?

THE DEFENDANT: No.

THE COURT: No.

THE DEFENDANT: I just want effective counsel, which I've asked this court to appoint me all along.

THE COURT: Mr. McAfee, are you prepared to represent

Mr. Sutcliffe at no expense?

MR. McAFEE: Your Honor, I have issues of legal, ethical problems that I think the court is aware of. And I don't believe at this state that I could make that representation to the court.

THE COURT: I'm not sure what you're talking about. You think you may be a witness?

MR. McAFEE: I don't want to discuss it in open court.

THE COURT: You have legal and ethical problems? Are you being investigated?

MR. McAFEE: Again, Your Honor, I'm not at liberty to discuss that in open court.

THE COURT: Okay. Well, I already told you, as you acknowledged earlier today, Mr. Sutcliffe, that any individual who chooses to proceed on his own was taking enormous risks and subjecting himself to a considerable disadvantage.

I've already found that you know the nature of the charges. That's been implicit and explicit in the valuation of you by Dr. Patenaude. But you will have to do your best to understand the range of the penalties, the fines, whether there's supervised release, what it is, any risks of restitution, license loss, any effect on any sentencing of you in the event that the jury convicts you.

You will have to learn and comply with the Federal

Rules of Criminal Procedure; the Federal Rules of Evidence; The local rules of the court; the U.S. Sentencing Guidelines, if it gets down to that stage; the Federal Rules of Appeals.

You need to understand that a lawyer who would otherwise have been available -- and we tried to have four -- would understand all of those rules, would understand how to impanel a jury and the tactics of picking a jury, how to conduct voir dire on a jury, how to assist the court in its conduct of voir dire.

You will have to comply with all rules from here on in relating to the form and the content of motions, any discovery you seek to undertake, any other kind of motions you want.

There are going to be limitations imposed upon you on how you ask questions, how you voice objections, how you deal with experts, what is permissible and not permissible in opening statements and closing arguments. You will be at a considerable disadvantage because, to the extent you wish to testify, you will have to determine an effective and appropriate way to ask questions of yourself that you can answer.

By assuming such a paramount role at the trial, your personality is going to be a bigger impact on the jurors than ordinarily is the case with the defendant. Maybe that will help you; maybe it won't. I'm not making any findings in that

regard.

But if experience is correct, and the personality of lawyers and of the judge and of witnesses and of parties, all the personalities that jurors perceive, have a likely impact on their evaluation of the evidence and on their verdict. So you need to be aware of that. If have you any limitations on the capacity to function physically, that could be a factor as well.

You should not think that the jury would think you were stupid or nasty if you have an attorney, but you also should not think that they're going to consider you the underdog if you don't, because experience suggests that all the jurors know that you would have a right to an attorney.

You have had four attorneys; your right has been exhausted. You were previously warned that you can't play these games. You have brought many motions, and I understand some lawsuits, claiming that your right to a speedy trial has been violated. To the extent that there has been delay, it is almost entirely attributable to the course of conduct that you systematically, right through today, have engaged in.

I have never doubted -- and I've told you many previous times -- that you have lots of smarts. Probably have more smarts than is good for you. So I make that reference because I think everything you've done has been intentional delay. Maybe you like staying at MDC because you think that

the outcome of the trial is foreordained. So you'd rather stay there than some other institution. I don't know what your underlying motive will be.

But your conduct triggers the application of all the cases I cited, and for those reasons, I deem that you are now required to proceed pro se.

Now, there is a procedure under which the court has authority to appoint what is called standby counsel. Standby counsel remains present in the courtroom, and even if not solicited by the individual indigent defendant, or other defendant, that lawyer can assist with courtroom mechanics and practical matters, would be available to assist you in some very basic and important aspects: Where to stand, how to deal with the courtroom deputy clerk, how to function appropriately in questioning witnesses and in addressing the court or addressing the jury in opening or closing arguments.

Given the circumstances of this case, I am going to appoint standby counsel. But I am advising you that the authority that the standby counsel has, and the requirement that standby counsel remain available, is also subject to your displaying reasonable efforts to enable that lawyer to carry out the advisory role.

And that is another way of saying that appointment of a standby counsel is not necessarily permanent or open-ended, but it's designed, as I've tried to make all of my rulings

designed, to make sure that you get the fair trial, that you claim to be yearning to have, as quickly as possible.

Please understand, Mr. Sutcliffe, that at the trial, that in the process of representing yourself, I will not come to your aid because I don't come to either side's aid.

You're the advocate. You have chosen to be the advocate by your conduct. You have insisted on carrying out that role even today. Now we'll see what the trial will be like as you engage in that process.

Mr. Brennan, will you approach the lectern, please. Please state your name for the record.

Mr. BRENNAN: Michael J. Brennan.

THE COURT: Good morning, Mr. Brennan. You're a member of the court's indigent defense panel?

MR. BRENNAN: Yes, I am.

THE COURT: Are you also a member of the faculty at U.S.C. Law School?

MR. BRENNAN: Yes, I am.

THE COURT: What do you teach, please?

MR. BRENNAN: I teach post-conviction remedies and trial advocacy.

THE COURT: For approximately how many years have you been engaged in the defense of criminal -- of individuals accused of crimes?

MR. BRENNAN: Since 1973.

THE COURT: Okay. Some 30 years or so?

MR. BRENNAN: Yes.

THE COURT: All right. I have arranged for your presence today through my courtroom deputy because I told him, the deputy, to arrange, in the usual and ordinary course, to have a lawyer selected from the indigent defense panel to serve in the standby capacity that I've just explained to Mr. Sutcliffe. You are that individual. And I will allow Mr. Sutcliffe and you to determine to what extent, if any, he wishes to communicate with you at points where he seeks the assistance of standby counsel in his own self-defense.

Now, do you want to be heard about something?

THE DEFENDANT: Yes, Your Honor. Thank you very much.

I'd like know, on the record, the court's authority to foist further counsel upon me after it's failed to protect and do its duty to protect my rights by making an inquiry into previous counsel when they were violating my rights. I'd like the record to clearly reflect -- where is your authority coming from to foist somebody else upon me? What statute, what law? God? I don't -- please put something on the record.

THE COURT: Okay. That's something you can look into in your own self-defense, but there's no issue and no question that I have the authority. I am not going to debate the law with you, Mr. Sutcliffe; I'm not going to trot out law books.

But I'm telling you I have the authority, and now I've exercised the authority.

THE DEFENDANT: Thank you very much, Your Honor. I appreciate that, but that didn't answer my question. And I'm just asking you to do you job and inform me where in the law you have the authority --

THE COURT: Okay. Now, Mr. Sutcliffe, I'm telling you now that henceforth -- and I've had to tell you this in the past when I've responded to some -- something I've permitted you to say or you've chosen to say, and you don't like the answer -- I am not going to involve myself, and I'm not going to permit you to try to create a circumstance where there is some kind of protracted argument or discussion, no matter how civil the voices may be, no matter how hard each of us may try to be. That's not my function, and that's not your right. So if you don't like my answer, that's just too bad.

Now, is there anything else you want to add that is different?

THE DEFENDANT: Well, yes. I appreciate that, Your Honor. Thank you for giving me the opportunity to respond. But you haven't answered my question.

THE COURT: Okay. If you continue to assert that in the form of an objection, because at this point you are representing yourself, the objection is overruled. Now please be seated.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: Okay. Mr. Brennan, Mr. Sutcliffe, as I understand it, is currently scheduled to proceed to trial -- what is trial date?

MS. DUARTE: September 9.

THE COURT: The prosecutor has come to court this morning with a status of -- the document that I'm looking at now called "Status Filing re Speedy Trial Calculations and Exclusions."

Have you served this on any lawyer?

MS. DUARTE: Your Honor, I served it on Mr. Nicolaysen this morning. I just provided a copy right now to Mr. Brennan.

THE COURT: Do you have another copy available here?

MS. DUARTE: I do not.

THE COURT: Show it to Mr. Sutcliffe. Let's not waste time.

THE DEFENDANT: Your Honor, just for the record, I'd like to note that on -- reading on page 3 -- and I see this September 23rd date, where the office of the federal defenders were removed from my motion for ineffective assistance. However, I don't see the reflection in there that I demanded speedy trial right as opposed to Speedy Trial Act. And I'd like the record to reflect that speedy trial right has been demanded in September, as well as in November of the previous

year, 2002.

THE COURT: So noted. The record will reflect your views.

THE DEFENDANT: And I renew that demand today. Thank you. Under the right, not act.

THE COURT: According to the status report that Mr. Brennan and Mr. Sutcliffe have had a chance to look at, and I've glanced at, and based upon calculations -- are these calculations that your office and only your office made, or has any other officer or jurist made these calculations?

MS. DUARTE: The calculations were made, originally, by myself and were submitted as part of a response to a habeas petition filed by Mr. Sutcliffe and/or Mr. McAfee, which has now been -- the finding -- proposed findings have been issued by the magistrate judge, wherein he concurred with the calculation.

THE COURT: Who is the magistrate judge?

MS. DUARTE: Judge Wistrich. And that is pending before Judge Morrow.

I should say, Your Honor, that he didn't actually -- Judge Wistrich's order, which is part of the public record of that case, which I believe is CV 03-1781-MMM.

But he actually didn't take it to the extent that he calculated 31 days remaining. What he said was that 38 days had passed, and then he went ahead and adopted my same

calculations as to the additional day passing. He cited the same record. So he didn't make any findings that were not in line with what I submitted.

THE COURT: Okay. Well, I propose to continue this case from the current trial date, which is September 9, I think. Is that right?

THE CLERK: Yes.

THE COURT: To October 7th, which is within the applicable requirements of the Speedy Trial Act, which I agree with Mr. Sutcliffe's right to have applied. The trial in this case will begin October 7th --

MR. MCAFEE: Excuse me. I'm sorry.

THE COURT: Yes.

DR. PATENAUDE: On October 7th, I'm acting as counsel for the University of Southern California in an administrative grievance hearing. It's a one-day hearing. I would be available on the 8th. But this is a hearing that's been set for some time. It involves quite a few witnesses and has taken quite a bit of time to get that date set just because of the schedules of the potential witnesses. But it is just a one-day hearing and will not continue onto the 8th.

THE COURT: Mr. Sutcliffe, would you like to proceed on September 30th?

THE DEFENDANT: I want to proceed last September 30th, but I guess, since I don't have much choice in

anything anymore, I'd ask for -- let me check my calendar. Nothing but free time.

Can I have moment to confer with Mr. McAfee --

THE COURT: No, he doesn't represent you for these purposes.

MS. DUARTE: After Mr. Sutcliffe, may I be heard --

THE DEFENDANT: I'd go for the September 9th date that we've already got set.

THE COURT: Yes, Mrs. Duarte.

MS. DUARTE: Your Honor, I have a teaching obligation on October 7th, which I can miss, but September 30th is better for the government because of that.

THE COURT: Let's make it September 30th. That will work with the court as well. And you'll be able to -- both of you will be able to recess for the October 7th date to carry out your respective commitments.

MS. DUARTE: Thank you.

THE COURT: Okay. The trial in this case is continued on the court's own order until September 30th.

Let the record reflect that Mr. Sutcliffe has not agreed to that, so there is no waiver of the running of time under the Speedy Trial Act. But I'm confident the Speedy Trial Act will be complied with in any event, although the additional period of time between September 9th and September 30th will count against the time requirements.

Now, Mr. Sutcliffe, one reason why I think it's wise to continue it for those three weeks is that your interest in representing yourself and your commitment to represent yourself may be slightly enhanced.

I do want the record to reflect, because I am quite familiar with the record in this case, that Mr. Sutcliffe has already demonstrated a commitment and -- I can't evaluate it -- but an apparent capacity to understand and make effective in his own defense whatever aspect of technology or the mechanics of Internet websites may be relevant in this case.

But, Mr. Nicolaysen, I want you to turn over your file to Mr. Sutcliffe. I want that -- can you do it tomorrow?

MR. NICOLAYSEN: I cannot. I can do it Friday. I'll change my weekend plans, and I will do it Friday, if that is acceptable to you.

THE COURT: Yes. I want the material brought down to the MDC. I want you to speak to the appropriate person there and, if necessary, call, because I'll get the warden there. I want you to physically turn over that file to someone --

Are you willing to go downstairs and pick up the file, Mr. Sutcliffe?

THE DEFENDANT: No, I want no further contact with this man. I'm afraid of him.

MR. NICOLAYSEN: Your Honor, may I be heard? Let me ask Your Honor for permission to go through the protocol at the

institution, which means I'll have to probably work through the legal department there.

THE COURT: You do that. You do that. But I don't need to know the details.

MR. NICOLAYSEN: I don't want to meet with Mr. Sutcliffe in the sense that the visiting room is not set up --

THE COURT: He doesn't want to meet with you. So you're not going to meet with him, okay? But you're going to turn over the file in the tip top shape that you described. Do it through the legal people. That file will be there on Friday. Let the record reflect that will be Friday, the 25th of August --

MR. NICOLAYSEN: 29th, Your Honor.

THE COURT: -- 29th of August, pardon me, and you can proceed accordingly.

Now, I want you to speak with Mr. Brennan, who is in the difficult position of having had to make a commitment where he isn't really in control, but I know he'll carry out his obligations. Brief him to whatever extent he thinks is appropriate in the manner appropriate for standby counsel. He is not going to be trial counsel, as such, for Mr. Sutcliffe. Make sure that you carry out the even continuing obligations of loyalty that every lawyer has to any client he or she once represented.

MR. NICOLAYSEN: Your Honor, I'd be very happy to do that.

One inquiry of the court, if I may. Once I turn over the file on Friday, I won't have it, and I wonder if Your Honor wants duplicates provided? It's a very voluminous file. But should it be the case that Your Honor revokes pro se status during the trial and asks standby counsel to take over, if I turn over the file as directed on Friday, Mr. Brennan --

THE COURT: No, I would like -- I should have thought that myself.

MR. NICOLAYSEN: But I can't comply with Friday if that's --

THE COURT: You make a duplicate copy; you give it to Mr. Brennan, okay? That way there is a duplicate copy.

MR. NICOLAYSEN: May I be excused from the Friday, though, because physically I can't do it to the degree and the size of this trial.

What I can do is be selective and get Mr. Sutcliffe started on the salient portions of the file, such as the witness interview reports, since I do have the government's witness list, and things that can certainly get Mr. Sutcliffe focused in terms of trial preparation --

THE COURT: All right. You have that permission, but make sure that by early next week -- and I know that Monday is a holiday -- by early next week, the complete file has been

MR. NICOLAYSEN: Your Honor, I'd be very happy to do that.

One inquiry of the court, if I may. Once I turn over the file on Friday, I won't have it, and I wonder if Your Honor wants duplicates provided? It's a very voluminous file. But should it be the case that Your Honor revokes pro se status during the trial and asks standby counsel to take over, if I turn over the file as directed on Friday, Mr. Brennan --

THE COURT: No, I would like -- I should have thought that myself.

MR. NICOLAYSEN: But I can't comply with Friday if that's --

THE COURT: You make a duplicate copy; you give it to Mr. Brennan, okay? That way there is a duplicate copy.

MR. NICOLAYSEN: May I be excused from the Friday, though, because physically I can't do it to the degree and the size of this trial.

What I can do is be selective and get Mr. Sutcliffe started on the salient portions of the file, such as the witness interview reports, since I do have the government's witness list, and things that can certainly get Mr. Sutcliffe focused in terms of trial preparation --

THE COURT: All right. You have that permission, but make sure that by early next week -- and I know that Monday is a holiday -- by early next week, the complete file has been

made available both to Mr. Sutcliffe and to Mr. Brennan.

MR. NICOLAYSEN: Complete file would include duplicates of CD-Roms and disks. Is that what Your Honor is also ordering? Because that's an enormous undertaking.

I will do whatever the court wants, but I just want to make sure I understand the scope of my obligation. It is a big file, and it involves, as I say, CD-Roms and diskettes as well. Would it be better, Your Honor --

THE COURT: Does the government have the CD-Roms and cassettes?

MS. DUARTE: Well, Your Honor, I hate to complicate things, but you'll remember at the last hearing we had a discussion over what allegedly were missing CD-Roms and --

THE COURT: Yeah, I vaguely remember that part.

MS. DUARTE: That said, I certainly to have all the evidence. I would have to also get it copied, which would take some time.

MR. NICOLAYSEN: May I make a suggestion and have my CDs and diskettes given to Mr. Brennan. He can have them available as needed by Mr. Sutcliffe.

THE COURT: No, no. I want Mr. Sutcliffe to have them. As needed, Mr. Brennan can get them from the prosecutor.

MR. NICOLAYSEN: Very good.

THE COURT: But you don't have to duplicate the CD-Roms and the diskettes.

THE DEFENDANT: Written motion?

THE COURT: Yes.

Anything else, Counsel?

MR. GONZALEZ: Thank you, Your Honor.

- - - - -

C E R T I F I C A T E

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

Deborah Gackle

Deborah K. Gackle
Official Court Reporter

7-22-04

Date

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE A. HOWARD MATZ, JUDGE PRESIDING

CERTIFIED COPY

UNITED STATES OF AMERICA,)

PLAINTIFF,)

) CASE NO.

VS.) CR 02-350(A)-AHM

STEVEN WILLIAM SUTCLIFFE,)

DEFENDANT.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

TUESDAY, SEPTEMBER 2, 2003

LAURA MILLER ELIAS, CSR 10019
UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
ROOM 453
LOS ANGELES, CALIFORNIA 90012
(213) 620-0890

APPEARANCES OF COUNSEL

ON BEHALF OF THE PLAINTIFF:

DEBRA WANG
UNITED STATES ATTORNEY

ELENA J. DUARTE
ASSISTANT UNITED STATES ATTORNEY
1300 UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

ON BEHALF OF THE DEFENDANT:
(STAND-BY COUNSEL)

MICHAEL BRENNAN, ESQ.
USC LAW CENTER
ROOM 400
LOS ANGELES, CALIFORNIA 90089

ALSO PRESENT:

DAVID REED, ESQ.

INDEX

PROCEEDINGS	PAGE
STATUS CONFERENCE RE REPRESENTATION	4

LOS ANGELES, CALIFORNIA; TUESDAY, SEPT. 2, 2003; 3:20 P.M.

THE CLERK: Calling Item No. 1. CR 02-350 (A)-AHM. United States versus Steven William Sutcliffe.

Counsel, state your appearances.

MS. DUARTE: Good afternoon, Your Honor. Elena Duarte for the government.

THE DEFENDANT: Good afternoon, Your Honor. Accused only by special appearance. All rights reserved. Object to this hearing in its entirety. Given no due process of this hearing. Fundamental element of due process. I move this hearing be adjourned and further notice be given to me.

I also notice that Mr. Michael Brennan is standing at the podium. It appears he's about to speak. I have not recognized anybody to speak for me. I also renew my original demand that this Court proffer its jurisdiction and take judicial notice of my judicial notice challenge and renew that motion.

THE COURT: Mr. Sutcliffe, to make this easier to the extent you have a right to be heard or choose to be heard, you don't have to stand up and bend over to be heard through the microphone. You're welcome to sit there and lean over and use the microphone in the way it's now situated.

MR. BRENNAN: Michael Brennan stand-by counsel for Mr. Sutcliffe.

THE COURT: Mr. Brennan, would you in the event Mr. Sutcliffe has not received the ex parte application you filed last week, please state clearly on the record what it is that you requested from the Court.

MR. BRENNAN: Yes, Your Honor. Thank you. After the last court hearing in this matter when the Court did appoint me as stand-by counsel for Mr. Sutcliffe, I reviewed my calendar again and realized that I was not fully explaining to the Court my conflict problems with the September 30th trial date. When I was initially contacted on this matter, I didn't realize there was a speedy trial time problem with respect to setting a new trial date.

Having realized my conflicts, I prepared an ex parte application explaining those in detail to the Court including the fact October 1, 2003 I'm scheduled to appear in another two parole hearings at the California Institution for Women in Corona, California. Two clients I have there have parole hearings. Those hearings have been scheduled for some six months now. It's not possible for me to reschedule those hearings at any date that would be even marginally close to the October 1 date.

I would have to ask my clients to waive their right to their parole hearings and hope that I could get them rescheduled. But realistically aware of the scheduling that's done by the California Board of Prisons, they wouldn't be able

to reschedule for some six months or so at the earliest. I think that would be a serious deprivation of their right to have a regular parole hearing. These are women who are serving life sentences and I have represented for a number of years. That hearing, those two hearings on October 1 obviously directly conflicts with the September 30th trial date that this Court set.

I also indicated in the application that due to the administrative hearing that I'm involved in on October 7th where I'm representing the University of Southern California, I had planned to spend the better part of the prior week of September 29th meeting with and preparing witnesses who are going to have to testify at that hearing. And obviously that would not be possible if I was involved as stand-by counsel on trial starting September 30th.

Unfortunately, these are witnesses who I would not be able to easily meet with in the evenings after this trial had concluded. They are professors and administrative personnel at the University. Hard for me to have them available to me in the evenings to prepare for the hearing.

I also indicated to the Court that I'm also in the process of preparing for trial in a multiple defendant case scheduled to be heard starting October 21 in front of Judge Tagasuki. That's also a trial that was scheduled some four months ago. And by all indications, my client is certainly

going to proceed to trial. I can't answer for other defendants in that case, but I think it will end up being a case in which at least three or four defendants go to trial.

For those reasons and based upon the fact that I was not able to fully explain these conflicts and problems to the Court, I did file a written application asking the Court to relieve me as stand-by counsel and requested that alternate stand-by counsel be appointed.

THE COURT: You also represented that you had been in contact with Mr. David Reed?

MR. BRENNAN: Yes.

THE COURT: State for the record now what you stated.

MR. BRENNAN: After the hearing was concluded and I realized the conflict problems I had, I contacted Mr. Reed who I have known professionally for some 20 years and inquired about his possible availability to act as stand-by counsel. I explained as best I know the circumstances surrounding Mr. Sutcliffe's case. I explained the Court's statement during the last hearing concerning the duties of stand-by counsel. I explained the length of the trial as I understood the projected length of the trial being at least a week, possibly longer.

Mr. Reed indicated that he was available for a trial beginning October -- September 30th. I'm sorry. And continuing for at least a week or longer. And I explained to

him as I said that he would, if the Court appointed him, be acting as stand-by counsel for Mr. Sutcliffe.

THE COURT: Okay. First, let me note that I note your objections to the jurisdiction and all the other matters to which you objected, Mr. Sutcliffe, and I deny those objections.

Mr. Reed, would you step forward, please. And before I speak to you and hear from you Mr. Reed, what is the government's current estimate for the case-in-chief duration?

MS. DUARTE: Four to five court days, Your Honor at the most. The problem is I can't predict cross-examination with 25 witnesses.

THE COURT: 25 witnesses?

MS. DUARTE: Some are very short, Your Honor. The defendant will not stipulate to anything. Some are quite short.

THE COURT: Does that four or five day estimate include the time incurred in picking a jury?

MS. DUARTE: Yes.

THE COURT: Well, I think it's not going to be less than five days. It wouldn't surprise me if it's more than five days. It's going to be somewhat of an unusual case given Mr. Sutcliffe is proceeding in pro per as a result of my decision to deem his prior conduct and course of conduct as a waiver of his 6th Amendment right to appointed counsel.

Now, Mr. Reed, would you step forward, please.

MR. REED: Good afternoon, Your Honor.

THE COURT: Good afternoon. As I recall if the trial does begin and I expect it to begin, I hope very much to plan to have it begin on September 30th, the day of October 7th you'll be unavailable; right?

MS. DUARTE: Actually, Your Honor, it's the 8th.

THE COURT: October 8.

MS. DUARTE: But Your Honor, I have cancelled my engagement. I'll be thrilled if I picked it back up again, but I don't need to do that if that doesn't work for the Court's calendar.

THE COURT: There's no date in the course of the ongoing trial that you'll be unavailable?

MS. DUARTE: That is correct.

THE COURT: Mr. Reed, are you for sure on a stand-by basis, which I will reiterate, available to proceed as stand-by counsel in the event Mr. Sutcliffe chooses to make himself -- to make good use of your availability for purposes of background guidance are you available for those dates?

MR. REED: Yes, I am, Your Honor.

THE COURT: Now, you understand as is inherent and understood I think by everyone in the concept of stand-by counsel that the role of stand-by counsel sometimes can result in counsel becoming actual counsel by choice of the pro per

client or for other reasons. Are you prepared to proceed with that understanding?

MR. REED: Well, that I'm not absolutely certain about. If the case is not too complex, then I certainly can be. There's one month to go before that date approximately and I intend on studying the case, analyzing it. I would like, of course, to speak with Mr. Sutcliffe.

THE COURT: And I was going to order that the marshals make him available to meet with you today if that's something that you could do and he chooses to do. Are you available today here in the courthouse?

MR. REED: Yes, I am. Very much like to talk to him.

THE COURT: Mr. Brennan, did you get any parts of the file thus far from Mr. Nicolaysen?

THE DEFENDANT: Neither have I, Your Honor. I have received nothing even though I believe the Court ordered that he was to provide it by Friday once again, which is par for the course. He has ignored the Court's order.

THE COURT: Not sure what has happened, if anything.

MS. DUARTE: If I may, Your Honor?

THE COURT: Yes.

MS. DUARTE: I don't know the specifics. I did let Mr. Nicolaysen know the matter was back on Tuesday just because he called me about a different matter and we were discussing it. He was aware that it was back on for possible

change of stand-by counsel. I don't know anything further than that.

THE COURT: I am ordering the clerk, Mr. Montes at the conclusion of this hearing to contact Mr. Nicolaysen and tell him that Mr. Reed is being substituted in place of Mr. Brennan. That's my decision. And that if he has not already provided a copy of the file to the appropriate person, I think he said it was going to the chief legal officer at MDC, he is to do so immediately, possibly today, if not tomorrow morning. And I don't want there to be any delay for any reason whatsoever. Make sure that you communicate that to him. So to start, Mr. Sutcliffe gets a copy.

Now, I'm going to ask the two of you, I assume you know Mr. Nicolaysen and you can get his number from my clerk or from Ms. Duarte. You can get on the phone with him in this courtroom and place a conference call and make arrangements for the material that was otherwise slated to go to you instead to go to Mr. Reed. Okay?

Now, Mr. Reed, there is a lengthy history to this case. Whether the case would be deemed by you or another experienced lawyer, and I know how experienced you are. I know you have been before me on many occasions and you have an excellent representation. I can't really be the best judge of that. Two crimes alleged, more than two counts, two different crimes. I assumed you spoke about it a little bit with

Mr. Brennan?

MR. REED: A little bit.

THE COURT: 25 witnesses would suggest that it's a complicated trial, but if it's correct that many of those witnesses would otherwise have been avoided if the defendant didn't exercise his right to refuse to stipulate and that is his right and he's not to be faulted for it, it may not be such a complicated case. But Mr. Sutcliffe is preceding in pro per so whether that leaves you in a difficult position remains to be seen in terms of trial preparation. But I want it to be meaningful because I am absolutely intent on doing what's feasible to assure a fair trial here and I'm sure you understand that.

MR. REED: Yes, Your Honor.

THE COURT: Okay. Is there anything else that needs to be addressed now?

THE DEFENDANT: Yes, Your Honor. First off, I'd like the record to reflect I am not proceeding pro per. If anything, I'll be proceeding sur juris on my own right not on my own behalf. I object to any other counsel be foisted over to me. I object to previous just removed counsel's substituting a man on the spot as to be his replacement.

And I further object to this Court not setting up a hearing forthwith to proffer its jurisdiction over the accused on these specific charges being transmitted in interstate

commerce. I believe I have the right to challenge the jurisdiction of those charges. It's not personal towards this Court, but it's my understanding that a court which has lawful jurisdiction is a competent court. One that lacks lawful jurisdiction is an incompetent court.

I believe that this Court is proceeding as an incompetent court if jurisdiction is proved over me. I have asked for it time and time again. I want that right. And I want notice any time I'm further brought into this courtroom. I don't like being hailed into a court without any notice about what's to take place. I wish this Court to protect that right as well. Other than that, I proceed with all rights reserved until jurisdiction is proved.

THE COURT: Would you like to meet with Mr. Reed?

THE DEFENDANT: As well as I do not recognize this Court, I do not recognize --

THE COURT: So is it your choice not to have anything in the nature of even a preliminary conversation with Mr. Reed this afternoon?

THE DEFENDANT: I believe I stated my objection very clearly.

THE COURT: Okay. Well, then I think we have reached a point where we can adjourn this hearing. You may continue to take custody of Mr. Sutcliffe. I'm addressing they appoint representatives of the marshal's office and return him to MDC.

When I leave the bench, you both can stay here and make yourself with Steve's assistance, try to patch in Mr. Nicolaysen. And I don't think it would be appropriate for you to be present at that point Ms. Duarte in terms of the logistics of transferring the file.

Mr. Sutcliffe?

THE DEFENDANT: Thank you, Your Honor. One last objection. I do seek sanctions on Mr. Nicolaysen for failing to turn over that file as ordered. My concerns one, that man has threatened me in the past if I pressured him or made him look bad or forced him to do anything, go to Court, he would make sure I lose. Now, he's got my whole hands, my whole world are in his hands right now in that file.

All weekend he might be taking out stuff. He might be loosing stuff, misplacing stuff. I don't know. All I know this man has threatened me in the past to make me lose this case. Now he's ignoring everybody doing his own thing. I want that noted for the record.

THE COURT: Okay. And it is noted.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: All right. We're adjourned.

(Proceedings were concluded at 3:40 p.m.)

CERTIFICATE

I, LAURA MILLER ELIAS, C.S.R. No. 10019, official court reporter, do hereby certify:

That the foregoing 14-page proceedings were taken down by me in shorthand at the time and place stated herein, and represent a true and correct transcript of the proceedings.

I further certify that I am not interested in the event of the action.

Witness my hand this 7th day of Dec., 2005.

Laura Elias

OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

HONORABLE A. HOWARD MATZ, UNITED STATES DISTRICT COURT JUDGE

UNITED STATES OF AMERICA, **Plaintiff,** vs. STEVEN WILLIAM SUTCLIFFE, **Defendant.**	CASE NO. CR 02-00350 AHM

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, October 21, 2003

3:00 p.m.

STATUS CONFERENCE

JOHN G. TURMAN, CSR, RMR
Official Court Reporter
255 East Temple Street
Room 181-G
Los Angeles, California 90012
213) 626-2920

APPEARANCES OF COUNSEL:

FOR THE GOVERNMENT:

OFFICE OF THE U.S. ATTORNEY
BY: ELENA J. DUARTE
ASSISTANT U.S. ATTORNEY
312 North Spring Street, 12th Floor
Los Angeles, California 90012-4700
(213) 894-8611

FOR THE DEFENDANT:

STEVEN WILLIAM SUTCLIFFE, IN PROPRIA PERSONA

STANDBY COUNSEL:

DAVID R. REED LAW OFFICES
BY: DAVID R. REED, ESQ.
3699 Wilshire Boulevard, Suite 850
Los Angeles, California 90010
(310) 854-5246

P R O C E E D I N G S

THE CLERK: Calling Item No. 1: CR 02-350 (A) U.S.A. versus Steven William Sutcliffe.

Counsel --

THE COURT: Wait a minute. Before we have appearances --

(Pause)

THE COURT: Counsel, you can go ahead and announce your appearances while we are waiting for the court.

MS. DUARTE: Good afternoon, Your Honor. Elena Duarte for the United States, with case agent Jeffrey Cunoz from the FBI.

THE COURT: Good afternoon.

MR. REED: David Reed, advisory counsel.

THE DEFENDANT: Steven Sutcliffe, accused.

THE COURT: Okay. And with the government, I assume, from looking out over the benches, there is some additional people whom I had hoped would be here. Would you identify who they are, please?

MS. DUARTE: Yes, Your Honor. Per the court's order, Ms. Amy Standifer is here from MDC, legal counsel, and also Mr. Armando Saavedra, S-a-a-v-e-d-r-a, with the computer -- I'm not sure of his title, but with computers at MDC.

THE COURT: He's responsible for the installation

and maintenance of the computers that are available to inmates there?

MS. DUARTE: Yes, he is the computer systems manager, I'm told.

THE COURT: Okay. Anyone else?

MS. DUARTE: Available by telephone, Your Honor, is Mr. Jason Weiss, Special Agent Jason Weiss, W-e-i-s-s, who is the computer analysis response team member from the FBI, who has assisted Mr. Saavedra.

THE COURT: Are you already on the telephone line, Mr. Weiss?

MR. WEISS: Yes, Your Honor, I am. Thank you.

THE COURT: All right. We have a number of things to discuss. Here's what they are and here's the sequence in which we will discuss them.

First is the status of the electronic evidence and the facilities and equipment available to Mr. Sutcliffe at the MDC. I'll be asking the government representative, primarily Ms. Duarte, questions. I'll give Mr. Sutcliffe a chance to respond.

Then I want to talk about pending motions; after that, the state of discovery; and after that, the trial date and the duration of the trial date and the impact on the other counsels' schedules, including Mr. Reed; after that, there are a number of miscellaneous items that I'll take up,

including one that, in fairness to Mr. Sutcliffe, I'll request the government and other people to temporarily leave the courtroom. So that's what we're going to cover.

Let's start with the electronic evidence. Defendant sent me a letter dated October 5th. I caused it to be filed and circulated and served on October 8th.

The government filed the following three items, all in one way or another having to do with the state of the electronic evidence and equipment: Ms. Standifer filed a declaration on October 15th, and the government filed a status filing -- I think it was filed on October 17th, and the government also filed a response to the defendant's October 5th letter. That last item was filed yesterday, October 20th.

Now, working backwards, Ms. Duarte, what's the state of the SCSI card and SCSI cable issue and the availability of those two devices to enable Mr. Sutcliffe to access those hard drives which are SCSI drives?

MS. DUARTE: Your Honor, I am informed that Mr. Weiss, Special Agent Weiss, FedEx'd those materials yesterday to Mr. Saavedra at MDC.

THE COURT: He did what to them?

MS. DUARTE: FedEx'd, that would be Federal Express. And I'm advised by Mr. Saavedra that those items in fact were received at MDC today and that he thinks he

will be able to install them, particularly with the telephonic assistance of Special Agent Weiss, and it's my understanding that he is going to attempt to install them today and tomorrow at the latest, so that that remaining drive with data on it, the one SCSI drive -- and that's spelled S-C-S-I drive -- is going to be available no later than tomorrow for defendant to view.

THE COURT: Okay. Mr. Saavedra, you can respond to me from where you're sitting.

MR. SAAVEDRA: Yes, sir.

THE COURT: I don't doubt this, but do you confirm the correctness and accuracy of what Ms. Duarte just told me?

MR. SAAVEDRA: Yes, I do.

THE COURT: And you expect to have the SCSI card and SCSI cable and any other devices necessary to access that drive or those drives, all available on the particular computer that I've already been told has been made specifically and exclusively available to Mr. Sutcliffe?

MR. SAAVEDRA: Yes, sir.

THE COURT: Okay. And Mr. Weiss, are you available to assist Mr. Saavedra tomorrow?

MR. WEISS: Yes, Your Honor.

THE COURT: Okay. And I am ordering you -- although I am sure it was your intention to do so, I'm

ordering you to assist and make sure that that task is accomplished in one day, namely, tomorrow. Is there any foreseeable technical difficulty in achieving that?

MR. WEISS: I provided everything that should be needed to attach and view the SCSI drives. SCSI hard drives can be write-protected at the hard drive levels, so there shouldn't be any problem at all.

THE COURT: Okay. Before I continue with some of these inquiries, let me acknowledge and thank Mr. James Settle for joining us in the courtroom. As everyone knows, he is the head of the district court's telecommunications operations, which is a major responsibility, and he's been helpful to the court in assuring that the technical means to guarantee a fair trial will be carried out. So thank you for coming, Mr. Settle. I may ask you some questions, I may not.

All right. Now, on the bottom of page 2 of the government's October 17th status filing, there is some language that I don't quite understand, Ms. Duarte, concerning at least one of the IDE drives, the other category of hard drives. Here's is what I want you to explain: Is there a hard drive or -- well, first answer this question. Is there a hard drive that contains what you believe -- and you're not the final determiner -- what you believe to be the, quote, relevant evidence relating to the

charges in this case that has not been accessible to anybody or to Mr. Sutcliffe or for any reason at all, defect in the drive, an inadequacy of equipment?

MS. DUARTE: If I understand the question, Your Honor, the single hard drive that currently is not accessible to defendant and has not been -- which does have evidence on it is the S-C-S-I, the SCSI drive that we have been discussing, and that should be the sole drive with anything on it that is not accessible to the defendant.

THE COURT: And when you say "anything," how literally do you mean that? Any relevant thing or anything?

MS. DUARTE: Any data whatsoever is my understanding.

THE COURT: And from what is that understanding derived or from whom?

MS. DUARTE: Well, the sources differ with the different aspects of the drive. Let me just outline it very briefly.

As I've stated in previous declarations, there appear to be two hard drives that were provided by the federal defender but that were returned unused because they were damaged. Those hard drives are not even part of the equation because they have nothing on them. We were unable to use them. My understanding of that is from the FBI technicians who made the copies, as well as my -- the FBI

technicians that made the copies. There are also two additional hard drives out of those ten which were returned empty to the federal defender because the federal defender had provided them in order to have the copies made and they were simply not needed and not used.

THE COURT: So your office returned them to the federal defender.

MS. DUARTE: The FBI returned them to to my office, who then gave them to the federal defender. That's correct, Your Honor. And it's my understanding and again from the FBI, and this is well over a year ago that it's documented, that there was nothing to them. There was nothing ever put on them.

As I said in one of my filings, I believe I noted, I don't know why those total of four drives, two damaged, two empty -- actually all four empty, two of which are damaged, has continued to make the rounds between attorneys.

THE COURT: Yes. You don't have to belabor that.

MS. DUARTE: Okay. As to the remaining six drives, it's my understanding that one is completely devoid of data and was copied that way and seized that way from Mr. Sutcliffe's house. One additional drive has a very minimal amount, traces of data, and he should be able to view that. That is an IDE drive.

The remaining four drives with what I would

consider to be relevant data, the three IDE drives are viewable, given the FBI's modifications to the computer, and then the one SCSI drive is unviewable.

THE COURT: Okay. And apart from the access that we expect will be accomplished through the installation of the SCSI equipment tomorrow, that thus far having remained inaccessible to Mr. Sutcliffe while he is attempting to use it or has the right to attempt to use it at the MDC, apart from that drive and that whatever is on it, is there any piece of evidence that at any time the government made available to any of the five prior lawyers who represented -- or to Mr. Reed, including Mr. Reed, who represented this defendant or that it intends to use that has not been made available and made available in accessible fashion at the MDC to Mr. Sutcliffe?

MS. DUARTE: Your Honor, not that I know of. However, I did not inventory the items that went between the attorneys and that went to Mr. Sutcliffe. So, frankly, that's hard for me to say, but certainly not that I know of.

THE COURT: Okay. But all the evidence that was discoverable and sought in discovery that you're aware of, have you made it available directly to Mr. Sutcliffe?

MS. DUARTE: Not the documentary evidence, no, Your Honor. Mr. Reed and Mr. Nicolaysen would have brought him that.

THE COURT: Okay. Well, I have --

MS. DUARTE: If I understand the question.

THE COURT: Yeah. My question was very broad and and all-encompassing. I already have declarations from them as to the production of the documentary evidence.

Now, Mr. Reed, you're not aware of any documentary evidence that was ever in your possessions or, to your knowledge, in any of your -- any of the prior counsel's possession that has not yet been made available to Mr. Sutcliffe, are you?

MR. REED: No, Your Honor.

THE COURT: Okay. Now, on the --

THE DEFENDANT: Your Honor, may I -- sorry, Your Honor, may I say --

THE COURT: I'll give you a chance to respond. Let me finish going through all of this information.

On the October 17th filing, this is the status filing, it's entitled, that you filed, Ms. Duarte, you seem to be seeking some kind of an order invoking Rule 16(b)(1)(A) that I don't really fully understand, but I want to make sure that this is resolved.

As I construe what you said in that document, your principal objective is to make sure that during the trial and in use here in the courtroom the evidence that Mr. Sutcliffe wishes to either review or use for any purpose

be used in the form and on and be retrieved from CDs as opposed to hard drives. Is that correct so far?

MS. DUARTE: That is correct.

THE COURT: Okay. Now, you're invoking 16(b) as if I should order Mr. Sutcliffe to specify either to me or to you or both what portions of the data on the hard drives, the IDE drives or the SCSI drives, that he intends to use at trial, and I don't think that that's the necessary or the appropriate approach. 16(b) speaks in terms of discovery obligations the defendant has for his own case-in-chief. If Mr. Sutcliffe to have available for his use in the courtroom any information that is currently on the hard drives -- could you ask the -- Mr. Weiss?

MR. WEISS: Yes, Your Honor.

THE COURT: We're getting some background noise from your telephone line.

MR. WEISS: I apologize. Very loud.

THE COURT: Yeah. Well, please make sure that no one else is speaking at your end so it doesn't distract us here.

MR. WEISS: Yes, Your Honor.

THE COURT: Okay. Now, as I starred to say, Mr. Sutcliffe doesn't have any obligation to disclose to you how and what he intends to use in cross-examining witnesses the government puts on. That's not his case-in-chief.

That's not encompassed by the language in the rule. And I did a little bit of research and there is a Seventh Circuit case which specifically says that. It's called United States versus Moore, M-o-o-r-e, 208 Fed.3rd 577. It's from the Seventh Circuit, in year 2000.

But what is the problem, provided that the necessary equipment is available on the computer that Mr. Sutcliffe uses, in having him at his own leisure load on to a CD whatever information from any of the hard drives he is now about to have complete access to that he wishes to, for use in court with those CDs that he loads up? And he doesn't have to tell anybody what he chooses to put on. What's the problem with that?

MS. DUARTE: Your Honor, without conferring with the agents who have additional problems, the problem that I see immediately is that if he does have the capacity to what we call write to CD, in other words, put data from the hard drive to the CDs, I don't think that there is a way to do that without also giving him the capacity to alter the data.

Now, understood that he always retains some capacity to alter data. We have put in place and plan to put in place more write-protect or write-block systems in his computer at MDC which at least prevents most attempts to alter data. However, if he is given the capacity to transfer data from hard drives to CDC B, that cannot be done

using these locks in place and he would then have the capacity to alter data. That would be -- that would still be okay, Your Honor, if there were a way for me to see that data ahead of time, because all we want to do is confirm with my copies and my experts that that data -- that the integrity of that data is intact.

However, just so the court knows, without that protection, if he is actually allowed, and only him, to write on those CDs, that is the issue and I would want to check these exhibits. I would not be able to agree to their authenticity even though I would have in theory provided them to the defendant, because I would not know that those were the same items I provided.

May I have a moment to confer with Special Agent Cunoz.

(Pause)

MS. DUARTE: Your Honor, that is the concern. I've confirmed that with Special Agent Cunoz, that even withn supervision, when given the ability to copy or to transfer, the ability to alter is very real and we would have a concern.

Again, if the court was inclined to give him that ability, we would just ask that then we be permitted to see in advance somehow and compare those exhibits, because I don't want to make trouble by having to object to the

authenticity of something that at least in theory I provided. I'm not going to do that; but unless I know it's what I provided, I don't know how to not do that.

THE COURT: How many CDs do you understand it would take to transfer or copy from the hard drives on to CDs all of the evidence, whatever it is, in its aggregate that are currently on hard drives, including both kinds of hard drives?

MR. WEISS: Your Honor, may I say something?

THE COURT: Yes.

MS. DUARTE: May I defer to Special Agent Weiss?

THE COURT: Go ahead, Agent Weiss.

MS. WEISS: If we're dealing with specifically text-oriented files, we can place almost 640 megabytes of date on a CD, which is thousands of text files. Unless we are dealing with like large image files or large executable type files, we shouldn't have any problem getting everything he wants on to one CD of just documents.

THE COURT: Well, how many CDs does the government intend to bring to court?

MS. DUARTE: Your Honor, may I just speak to Special Agent Weiss' response? We are dealing with large image files, and it's my understanding from speaking with the other agents already about this possibility that it would take to put -- I don't think that Special Agent Weiss

understands that this court is asking for the contents of -- the entire contents of all four hard drives and that -- it's my understanding that would take hundreds of CDs.

MR. WEISS: Yeah, that would -- if you're going to copy all files on the CD, that would be impractical, because you only --

THE COURT: You have to speak more directly and slowly into the telephone, because I can't understand what you're saying. So please try again, Agent Weiss.

MS. WEISS: Yes. If you want to copy all the files on to CD to review them, yes, that would encompass scores CDs. I thought you were only specifically referring to --

THE COURT: You thought what?

MR. WEISS: He was only dealing with selected files, Your Honor, but Ms. Duarte is correct.

THE COURT: Well, you say "scores" and I thought that the prosecutor said "hundreds." There is a big difference. Can you be more precise, Agent Weiss?

MS. WEISS: I can't because I wasn't originally involved with the case so I don't know how much data we're talking about on the hard drives, but Ms. Duarte is more likely correct.

THE DEFENDANT: I concur with that analysis.

THE COURT: Okay. That was Mr. Sutcliffe. Did

you pick that up? He concurred with that analysis. Meaning the hundreds of CDs?

THE DEFENDANT: Yes, Your Honor.

THE COURT: What's the purpose that you're trying to achieve by requiring that the retrieval base or method for the display of evidence in the use of evidence at trial be only by way of CD rather than hard drives?

MS. DUARTE: To make it more manageable, Your Honor. I think that it's going to be very difficult to manage. I also think that the four hard drives contain a great deal of elevant -- excuse me -- evidence that is not relevant to the case. And if Mr. Sutcliffe is allowed to just bring it up at will before the parties have seen it and agreed on it's admissibility, that creates another host of problems.

THE COURT: So what does it take to determine its authenticity in the sense that it hasn't been distorted or nothing has been added, nothing has been changed, nothing has been deleted? Simply take the practical electronic equivalent of lining up of two versions side by side and in an exact and scrupulous way, going through everything that's on there?

MS. DUARTE: Well, Your Honor, you wouldn't do it visually, but there is a way to do what we call "hash" or to provide a mathematical -- not formula -- if I could have

just a minute.

(Pause)

MS. DUARTE: Like an algorithm, Your Honor, in mathematics. There is a way to compare the two files that the expert that I have hired is quite capable of doing or he can run them both and he can say whether or not they are identical.

THE COURT: And how long would that take?

MS. DUARTE: It depends. For a single file, not long, Your Honor. You just have to have the ability to have both the information on both files --

THE COURT: Okay. Because I'm not about to give your expert or your office the information that you want, because I think it would interfere with Mr. Sutcliffe's rights, but I can use my inherent authority. Maybe there is additiona statutory or precedential authority to appoint my own computer expert at court expense.

Mr. Settle, do you have people who are capable of performing that task of determining that materials transferred from a hard drive to a CD hasn't been tampered with?

MR. SETTLE: If they had access to the original, to the original that the copy is made from, yes, they could do a comparison.

THE COURT: Okay. I might want to just appoint

somebody from the outside and pay for them at court expense, but that's an approach I'm likely to take, because that way the person who does the determination reports only to me.

THE DEFENDANT: Your Honor --

MS. DUARTE: And, Your Honor, if I may, depending on -- I haven't talked at length with Mr. Settle about the feasibility of bringing in all four hard drives that Mr. Sutcliffe wants access to. It sounds to me from what the court is saying that, although I would have to defer to the court and Mr. Settle on this, that it may be actually more efficient time-wise to go ahead and stick with the court's original plan, which was not allowing Mr. Sutcliffe to burn CDs, bringing in the four hard drives and just mounting those for trial and then we will deal with the relevant aspects what we get there.

THE COURT: Well, why are you changing your view?

MS. DUARTE: Because I'm thinking about accessing the original drive. First of all, if Mr. Settle means original, like very first are seized, those are still with the FBI. Those aren't even with my expert. And the feasibility of, after they possibly have been altered, then comparing them, the time to do that with an outside court expert at the FBI and this would not be an extremely workable solution. And that's why I'm backpeddling because I am trying to assist, I hope, in finding the most workable

solution to get this trial done and done fairly.

THE COURT: Okay. Mr. Sutcliffe, would you like to be heard?

THE DEFENDANT: Yes. Thank you, Your Honor.

First off, if that was her major concern to get done quickly, she would have turned over this evidence when she was ordered by this court two months ago. We wouldn't be here today. If she had any concerns about my manipulating any type of data, I will be willing to swear, to be sworn under oath right now under any pain and penalty of perjury, that I will not manipulate any data or tamper with any data or alter any data from those drives. I simply want to view that and find the data I need to defend myself.

THE COURT: Well, the access in the context of viewing has already been provided, almost all of it.

THE DEFENDANT: Mrs. Duarte has produced, I assume, to the previous defense counsels CD-ROMs like they are little baby rabbits. They are multiplying faster than I can keep count of them. I still do not have an inventory list, which I have asked for in my October 8th letter to Ms. Duarte which --

THE COURT: Let's not talk about that, Mr. Sutcliffe, and just so you're --

THE DEFENDANT: I don't know what's missing. I don't know what's here, what's not. Nobody made a list.

THE COURT: -- so you're not wondering whether there is any open issue in that regard, you don't have a right to an inventory --

THE DEFENDANT: I don't want a right to an inventory. I want to know what was available, what is supposed -- what is the count here. I still don't have my ZIP disks. The ZIP drive that you ordered them to produce for me to even look in the ZIP disk is a ZIP 100. My ZIPs are ZIP 250. ZIP 250s will not fit into a ZIP 100, if I ever get to see the disks.

You know, I've got this letter here in discovery from Mrs. Duarte back in May 6, 2000, she's quoting me 53 CD-ROMs, 102 floppies --

THE COURT: You don't mean 2000 --

THE DEFENDANT: -- six hard drives. Things are growing.

THE COURT: Just so the record is clear, Mr. Sutcliffe, you don't mean May 6 of 2003, do you?

THE DEFENDANT: 2002. Excuse me.

THE COURT: Okay.

THE DEFENDANT: I can't defend myself in this piecemeal fashion where nobody is keeping track of anything, things are getting lost, things are getting broken, things -- nobody knows what's going on. In her --

THE COURT: Okay. Now, Mr. Sutcliffe, let's talk

about this question of use in the courtroom and talk only about that. I have read it carefully, everything you've said. I have read carefully every response that has gotten to us and I'm satisfied and I'm making a finding that all of your contentions about lost, destroyed, unaccounted-for evidence are unfounded.

THE DEFENDANT: Well, then, I would point --

THE COURT: Excuse me. I'm not finished. I'll give you a chance. Do not interrupt me.

THE DEFENDANT: I didn't interrupt. I was making an objection, Your Honor.

THE COURT: Now, the court has been working very hard to make sure that under the unusual circumstances where you are representing yourself and you are under -- in custody, you have access to what there is. I am wholly satisfied that what there is has been provided to you. And once the SCSI is made available, I'm almost satisfied that you have unmitigated access to it, except now I'm learning that ZIP drives or ZIP disks.

Mr. Saavedra, what's the story on that?

MR. SAAVEDRA: Excuse me, Your Honor. He is correct. They did send him a 100-megabyte ZIP. Now, stating that his are 250, he is correct. He won't read it.

THE COURT: So how long have you known that the ZIP disk has not been useable by Mr. Sutcliffe?

MR. SAAVEDRA: When he told me that a couple weeks ago. He didn't even have a ZIP disk. And of the evidence that I was sent in to MDC, there is not one ZIP disk anywhere.

THE DEFENDANT: That's correct.

THE COURT: Now, I'm baffled here. We had considerable colloquy about getting the necessary ZIP-type equipment to Mr. Sutcliffe. And are you representing to me, Mr. Saavedra, that there is no need for it?

MR. SAAVEDRA: As of right now, he has no access to ZIP drive -- I mean disks.

THE COURT: That's not the question I asked.

Mr. Sutcliffe, what do you think you need a ZIP disks to accomplish? How will a ZIP disk assist you in defending yourself?

THE DEFENDANT: Well, it's kind of hard to day without seeing them, isn't it, Your Honor?

THE COURT: If you had the 250 that you just told me about, what would it enable you to do?

THE DEFENDANT: The ZIP 250 player, it would be able to play ZIP 250 disks.

THE COURT: Ms. Duarte, are there any ZIP 250 disks in the array of evidence that's been made available in the prison to Mr. Sutcliffe?

MS. DUARTE: Your Honor, I'm relying on memory

now, but I'm fairly certain that there were four ZIP disks that in my earlier declaration I witnessed exchanged between Mr. Nicolaysen's representative and Mr. Reed when Mr. Reed assumed responsibility. And we did the inventory and I presented the court with a declaration. That was not the October 17th, that was the prior one, Your Honor, and it should be in there. It's not in front of me right now, but I believe there are four ZIP disks.

Your Honor, I do want to emphasize that these were copies of ZIP disks seized from the defendant's residence, so to the extent there is anything in them that he needs, he would be aware of the content. However, I do remember there were four ZIP disks. And my discovery letters and my declaration should reflect that.

THE COURT: Mr. Reed, can you help me out?

MR. REED: Yes, Your Honor, there were four ZIP disks in the boxes that I sent to MDC. I basically took all the discovery, all the computer-based discovery from Mr. Nicolaysen. We took it up to the U.S. Attorney's Office. We spent a considerable period of time comparing all of the materials. There were definitely four ZIP disks in the box. I took those boxes to my office, didn't touch them and then I did transfer them, however, everything from that box into a new better box and I didn't leave anything out. And there were four ZIP disks in the boxes that I delivered to MDC, so

I don't know what happened to them, Your Honor.

THE DEFENDANT: I am still not in possession of the audiotapes either, Your Honor, that I believe he's represented have been turned over to me. And I received a letter from MDC that some audiotapes had been mailed to me last week or just slightly before last week, but they were returned to sender and it was -- his previous assistant, what's her name?

MR. REED: Sarah.

THE DEFENDANT: Sarah Ribbs, thank you. So I am still not in possessions of those either.

THE COURT: All right. Well, let the record reflect that on September 29th, Ms. Duarte filed a declaration. It was the subject of a previous hearing in part. In paragraph 3 she accounts for the material that was given to Ms. Potashner on July 29th. Among the recitals was a reference to four ZIP disks. Paragraph 10, she said that later on in this scenario she saw Mr. Nicolaysen's representative provide to Mr. Reed a number of things, including ZIP disks.

I don't know what happened between -- if anything, between the delivery by Mr. Reed of the box in which there were ZIP disks and today, and I'm not making a finding that the ZIP disks are missing just merely on the basis of what I am told, but either they are there or they are not there.

If they're not there, Mr. Sutcliffe can take appropriate action relating to whatever rights he has and whatever violations of his rights there may be from the missing ZIP disks. If he could establish what happened, that they are messing, then it's attributable to the government. But I don't really want to waste any time on that, so I'm ordering the government and you, Mr. Saavedra, to get the 250 ZIP -- what is it called the ZIP drive?

MR. SAAVEDRA: ZIP drive.

THE COURT: -- you get that over to at government expense, because this is something I've already tried to have happen before. I am very displeased that I issue orders and they don't seem to be complied with because people think that they are no longer necessary, they are moot, I was mistaken in the first place. I want the 250 ZIP drives to be made available to Mr. Sutcliffe as soon as possible. When can you do that?

MR. SAAVEDRA: I can do that tomorrow morning, sir.

THE COURT: Okay. That's an order that you do that. And I'm not going to make any other changes in how I plan for this with respect to -- in what capacity or through what methodology and equipment the evidence is displayed at trial.

I intend to speak separately and directly without

it being in a full courtroom to Mr. Settle, who can educate me about the necessary features of the different choices I have as to whether or not the evidence that Mr. Sutcliffe already has and will have either to the availability of the SCSI equipment or the ZIP drive should be accessed and will be accessed either in the form of a CD, probably a lot of them, or hard drives. I'll make that determination based upon my best understanding of what is in the interest of justice, and I will disclose my decision when I make it in a court order and the parties will have to live with it.

All right. Now, there has been some suggestion, I guess I would put it, Mr. Sutcliffe, that in your opinion at least, based upon what you currently have in your possession, evidence that would have been or is exculpatory to you, exculpatory in the sense it would enable you to establish your innocence or burdens on you to refute and defeat the government's evidence on its burden to establish your guilt, something inconsistent with guilt, something that might be helpful at sentencing even if you are found guilty. That's what exculpatory evidence is generally.

If you believe that there is exculpatory evidence that once was on the array of evidence that has been at considerable effort made available to you in prison, what you should do is make an appropriate motion. You can specify in camera and under seal so it's not reviewed by the

government what you believe that exculpatory evidence is. I'll read what ift anything you submit to me. The government will have a right to respond. I may make a determination that what you send to me needs to be unsealed.

You need to understand that if somebody is moving to dismiss an indictment based upon misconduct involving the destruction or culpable loss of exculpatory evidence, the government has a right to know what it is that they are being accused of destroying trying or losing or tampering or is otherwise making unavailable to you. So almost certainly whatever you would send me in camera I would have the obligation to disclose to the government anyway. You might just want to make a motion anyway and let's just get it out there and have the government respond to it. So I will give you that opportunity and we will talk about timing on that little bit later on when we talk about trial date.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: Okay. Now, an other thing that you've adverted to and maybe this is exactly what I was just alluding to, in one of the items you sent to me, Mr. Sutcliffe, you said that you intented to make a motion to dismiss based upon the destruction of evidence. Is that what you had in mind?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. When were you planning to make

that motion.

THE DEFENDANT: Well, in light of what's going on, I was trying to get the list -- Ms. Duarte, I believe she -- ten minutes ago she just said she made an inventory list. So I'd like someone, anyone, please, to give me some kind of definitive inventory list so I can calculate -- I know what I owned. I know what was in my house. I seem to know what she's created from these other experts, but I don't know what's missing. She's -- in November -- in the November -- excuse me -- January 14th, on page 3 of the transcript of that hearing that day, she said that there was original evidence which we didn't even copy so it should be returned.

Now, I've brought up that Mrs. Rodell from BOP brought to me discovery from Mr. Harris. Stuff was missing. I brought it to their attention. Ms. Rodell came back two days later, tried to get me -- tries to get me to antedate a receipt to reflect -- so it didn't reflect stuff was missing, and then when I said hey, (whistling), no, no, no, no, no, she flew away. Now we can add to the other mix.

I -- there is stuff missing definitely. There is stuff that's exculpatory, that's for impeachment, I could definitely use for impeachment, but I don't know everything that's been given to me.

THE COURT: Well, you know what's been given to you because it's with you now.

THE DEFENDANT: No -- I know what I have now, yes. I even have some of Mr. Nicolaysen's files.

THE COURT: That's what I arranged for.

THE DEFENDANT: No, no. I mean, Mr. Nicolaysen's files.

THE COURT: I know what you mean, Mr. Sutcliffe.

THE DEFENDANT: I don't think you grasp the meaning of what I'm saying right now.

THE COURT: The inventory to which you were referring?

MS. DUARTE: Your Honor, I don't know what he's referring to in the transcript, but I do know that in my declaration filed September 29th, that attaches the discovery letters as it goes to electronics evidence, each and every item of electronic evidence that was ever turned over is explained and categorized and the letters are attached.

THE COURT: Yeah, I do see lots of items. They are itemized.

MS. DUARTE: Yes, Your Honor.

THE COURT: Is that what you had in mind when you were referring to inventories that you had either generated or received or sent in dealing with opposing counsel?

MS. DUARTE: Without seeing the January 14th transcript, honestly --

THE COURT: No, no, forget the January -- what's said on January 14th. What you were just referring to a few minutes ago here in court, Ms. Duarte, when you said that you had generated an inventory for opposing counsel.

MS. DUARTE: Could I have just a moment, Your Honor?

(Pause)

MS. DUARTE: Your Honor, I'm sorry. I don't remember that, but to the extent that I meant inventory, that I said inventory, I'm almost certain I meant the September 29th description of everything.

THE COURT: Okay. Use that as your basis to determine what's missing, Mr. Sutcliffe. That's all we have. That's all the government --

THE DEFENDANT: Thank you.

THE COURT: -- is in a position to give you. And if you think that it reflects any incursion or violation of your rights, you should follow that up accordingly.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: Now, in the category of motions, there is one motion --

MR. WEISS: Excuse me, Your Honor?

THE COURT: Yes.

MR. WEISS: If you no longer need me, can I go?

THE COURT: We won't be very long, Mr. Weiss. And

I don't know what's going to happen at hearing, so I don't think it will be prudent to let you go right now, so please hang in there.

The motion to dismiss the threat counts, they were actually two written motions, the government responded to that and I haven't gotten a reply. I don't -- I'm pretty sure you didn't intend to reply to the government. Am I correct, Mr. Sutcliffe?

THE DEFENDANT: You lost me, Your Honor. I'm sorry. We're on previous motions now?

THE COURT: Yeah, you filed in September some motions to dismiss the threat counts. You filed them on September 25th.

THE DEFENDANT: I'm actually -- I'm looking at the February 4th, 2003 motion to dismiss counts -- or actually -- I'm sorry, wrong court -- one through 4 as unconstitutionally vague.

THE COURT: I've already ruled on that. We had a hearing on that.

THE DEFENDANT: You did?

THE COURT: Yes, I did.

THE DEFENDANT: Where was I?

THE COURT: I don't know where you were, but that has been reviewed. But now I'm asking you -- just listen to me, Mr. Sutcliffe. You made renewed motions to dismiss the

875 counts, two different motions. You prepared them. They were filed on September 26th. I gave the government --

THE DEFENDANT: Actually, Mr. Reed prepared them for me.

THE COURT: -- time to respond. The government opposed those motions and that was the October 6th. And I've gotten a reply to the government's October 16th reply. Did you want to reply?

THE DEFENDANT: I have never even seen a government reply.

THE COURT: Well, it was served upon you by hand, according to the proof of service.

THE DEFENDANT: Well, that's funny, because I never got it.

What about the motion for hearing regarding perjury by a prosecutor, Your Honor --

THE COURT: Mr. Sutcliffe --

THE DEFENDANT: -- has that been ruled on also?

THE COURT: Mr. Sutcliffe, answer my question. Do you want to reply to the government?

THE DEFENDANT: I can't reply if I haven't seen the law. How can I respond to it? I have been given no notice, no due process.

THE COURT: I have a proof of service. Now, just tell me whether you want to reply or not.

THE DEFENDANT: I can't reply, Your Honor. I have not seen the government's.

THE COURT: Okay. Well, I'm going to deny the motions. They are frivolous anyway, so I will issue an order in that regard.

THE DEFENDANT: It was your court-appointed that filed them, created them as frivolous.

THE COURT: I wouldn't say they're frivolous --

THE DEFENDANT: You said they are river lust.

THE COURT: That's really overstating it. They do lack merit and one of them is premature. It's going to be denied without prejudice to you renewing it at the completion of the government's case-in-chief. The other one I deny on the merits and you'll see an order that goes out.

You can go back and look through the file, and I will too, but I'm confident, Mr. Sutcliffe, that motions that were made so long ago as February 2003, and I remember a hearing where Mr. Harris argued very passionately about the supposed unconstitutionality of these statutes, the vagueness of these statutes --

THE DEFENDANT: Mr. Harris was removed prior to February, Your Honor.

THE COURT: -- and I denied those motions.

THE DEFENDANT: How could he argue these motions when he was removed on January 10th? How could Mr. Harris

have argued those motion? Please answer me that question, Your Honor.

THE COURT: I'm not going to debate things with you. I'm not saying --

THE DEFENDANT: I'm not asking you to debate. I'm just asking you how can a man who was removed on January 10th argue a motion for me in February, that was filed February 4th. That's physically impossible unless there has been another secret hearing. So I'd like my motions to be ruled on, Your Honor. I filed this back in February 4th, 2003. There is three of them there. There is a motion to dismiss counts 1 through 4, unconstitutionally vague; motion for rehearing regarding perjury by the prosecutor; and there is a motion to recuse the U.S. attorney general's office of Central District of California and to recuse the assistant U.S. attorney, with attached memorandum of points and authorities. These have been pending now for many, many months and one of them will -- if one of them is granted, we can all go home.

THE COURT: Now, Mr. Reed, one of the items that Mr. Sutcliffe has filed seems to suggest that he has never received any investigative reports or any witness statements. Among the material that you received from prior counsel that you and Mr. Nicolaysen put together for delivery at the MDC, do you recall whether any investigative

reports prepared by anybody acting on behalf of Mr. Sutcliffe? You don't have to say who did it.

MR. REED: On behalf of Mr. Sutcliffe --

THE COURT: Yeah.

MR. REED: No.

THE COURT: By a lawyer, by --

MR. REED: Not that I recall, Your Honor.

THE COURT: -- by an investigator for a lawyer?

MR. REED: No. No witnesses were interviewed that I remember. I don't remember anything like that.

THE COURT: Okay. Now, witness statements, meaning 302s that the government would always turn over, although sometimes at the last minute.

MR. REED: There were a significant number of witness statements that the government took 302s that are were turned over to Mr. Sutcliffe of various witnesses. In fact, I recall that the exhibit book was arranged in such a way -- which is something that I turned over to Mr. Sutcliffe -- in such a way that the witness statements that went to certain exhibits which were going to be authenticated by certain witnesses, those categories of exhibits were witnesses we called, the 302s for that particular witness would contained right within that section, so I remember it was organized that way. That's why I remember it distinctly. There was a significant

number of 302s, Your Honor,

THE COURT: Okay. I'm not going to invite or rule upon any motions related to discovery. I know what the record reflects. I'm not aware of any discovery that's been withheld or anything that's missing in the realm of discovery. Other than access issues and maybe these missing ZIP disks or ZIP drives, I think there is no reason for me to conclude that there are any discovery issues or problems in this case.

Do you agree, Ms. Duarte?

MS. DUARTE: I agree, Your Honor.

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

THE DEFENDANT: Yes, I want to -- I would like the court to give me a ruling on why it's refusing to rule on these motions I have February 4th, 2003.

THE COURT: Okay. I'm not refusing to rule on those. If I haven't ruled on those, I'll look at them again. My understanding is I have, but if I haven't, I'll look at those and I'll give you a ruling.

THE DEFENDANT: Then I would like to move this court for a hearing Friday to rule on those motions, and I would also like to incorporate the motions that I filed this morning so that we can have an evidentiary hearing for finding of fact at the same time, if that's convenient for

the court. If not, I'm open to any date, but as soon as possible I'd like --

THE COURT: I'll review the docket and the record and I will determine whether or not a hearing is warranted. and if it is, I'll give you an opportunity to argue those motions.

THE DEFENDANT: I appreciate that, Your Honor. Thank you.

MS. DUARTE: Your Honor, if I may, Ms. Standifer asked me if she could be heard on the issue of ZIP disks.

THE COURT: Yes.

MS. STANDIFER: Thank you, Your Honor. I would just like to clarify the slight misunderstanding made by Mr. Saavedra. He misstated that he has not personally seen the four ZIP disks. That does not mean they are not in Mr. Sutcliffe's possession. He just -- Mr. Sutcliffe as of present has not brought them down to computer area.

THE DEFENDANT: Objection. Objection.

MS. STANDIFER: And concerning the ZIP drive, Mr. Saavedra was not here in court when the court had ordered standby counsel to send any ZIP drives, since he wasn't aware of that issue. He just knew that they were sent in to him to connect to the computer.

Mr. Sutcliffe did say to him that it was the wrong ZIP drive, but Mr. Saavedra was not aware that it was the

government's responsibility to make sure that it was the right whatever megabytes or, I'm sorry, I don't know the lingo. But I just wanted the court to know that.

THE COURT: Okay. Well, thank you for the clarification.

Mr. Saavedra, did Ms. Standifer state correctly what I had not previously understood but now --

MR. SAAVEDRA: Yes, sir.

THE COURT: All right. Well, I'm not making a finding that you were responsible for any loss or destruction and I specifically said that I wasn't making any finding that there was any losses or destruction, so the record now would be clear.

You don't have to object. You can, if you want, but you don't have to object --

THE DEFENDANT: Yes, I'm objecting to how she just testified. I'd like her -- any time she's testifying, I would like her under oath. She's made material misrepresentations and statements in her declaration to this court, and I would point out to the court to observe on page 4 of her declaration, Government's Filing of Declaration of Amy J. Standifer Exhibits, on page 4, she said that "Mr. Sutcliffe" -- this is on line 12. Excuse me -- "Mr. Sutcliffe has not offered any assistance in this regard, nor is he attempting to mount and view the drives

again." And then again on page 6 she reiterates this and she says: Inmate Sutcliffe is not offering any assistance in mounting and viewing the hard drives."

Now, these are statements of fact. I spoke with Mr. Armando I believe it was on the 17th of this month and I specifically asked him did he remember me assisting him in setting different jumpers on these drives, different configurations, master versus slave hookups, and he remembered very clearly my assisting him in trying to get those drives to work.

So she's come in here now and told false statements to this court under penalty of perjury and I take great umbrage at that and now she's trying to spew the information again. If she's going to testify, I want her under oath.

THE COURT: Okay. I've heard what you said.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: All right. Now, let's talk about the trial date and the expected durations of the trial. In a previous order, Mr. Sutcliffe, I gave you the choice of November 12th or January 6th for the commencement of trial. What is your choice?

THE DEFENDANT: I believe -- did Your Honor receive my letter I sent dated October 16th?

THE COURT: Yes.

THE COURT: Okay. I believe right in there I said on page 3 November 12, to make sure there is no delay. Yeah, sure did. I started again on page 2 to ensure that she's available for my trial, November 12.

THE COURT: How many letters did you send on October 16th?

THE DEFENDANT: I have --

THE COURT: I only have a letter dated October 9th and was received October 16th.

THE DEFENDANT: No, I have one right here, if the court would like to look at my copy.

THE COURT: Well, it will arrive, but is your choice November 12th?

THE DEFENDANT: Oh, you bet.

THE COURT: Okay.

THE DEFENDANT: I'd like this entered into the record anyway --

THE COURT: Now, Mr. Reed, let me bring up -- you can give it to the clerk later on.

THE DEFENDANT: Yes, Your Honor.

THE COURT: I didn't get that letter. I haven't seen any choice exercised by you.

Mr. Reed, would you be good enough to let me know about potential conflict? Is there any change in your status in that trial?

MR. REED: Yes, Your Honor. We have the necessary stipulation regarding the Speedy Trial Act and a stipulation to continue that trial before Judge Morrow. We filed that approximately two days ago. I don't know if Judge Morrow has ruled on it, but in my talking about the various parties, they don't think it's going to be a problem.

THE COURT: Good.

THE DEFENDANT: So I'm going to be able to proceed with the trial.

THE COURT: Okay. While you're standing, Mr. Reed, and thank you for that, I granted a motion concerning an investigator that would be available on behalf of Mr. Sutcliffe. I assume that he would be available to serve any subpoenas. And I want you to understand that, Mr. Sutcliffe, so that whether it's Mr. McAfee or anyone else that you want to make sure is under a court order to appear at the trial, you will have access to the issuance of subpoenaes and they would be served appropriately through the investigator that's been appointed.

With the trial slated to start on November 12, can you give me an updated estimate as to the duration?

MS. DUARTE: Your Honor, under normal circumstances, I would say the government's case-in-chief would take four to five days. I'm not sure how --

THE COURT: It's going to take longer.

MS. DUARTE: I'm not sure how much additional time. I would hope to get it done within a week and a half, Your Honor, and also to remind the court the case agent has to leave town, I believe, on Friday the 21st, so I would certainly have to be done by then; but if not, I would be seeking leave of the court to substitute in an additional case agent.

THE COURT: Yeah, that will be granted.

MS. DUARTE: Okay. I hope to be done by November 21st, Your Honor.

THE COURT: Okay. We will have a status conference, at least one, before that trial. At the status conference I'll go over some of the things I intended to go over at an earlier status conference about the procedures we will follow. I'll have the marshals here to have an update on aspects of the trial management that affect them. We will talk about voir dire, about exercise of peremptories.

Mr. Sutcliffe, have you spoken to anybody about arranging sufficiently in advance of November 12th for you to have civilian garb, civilian dress that you could wear?

THE DEFENDANT: No, Your Honor. I'm more concerned right now with my stolen property that Mr. Reed has admitted to have taken from me and has yet returned to me, that I've requested this court demand that he produce a copy of it. Has he produced a copy of that yet to you, Your

Honor?

THE COURT: Okay. We'll talk about that shortly, Mr. Sutcliffe.

THE DEFENDANT: Thank you, Your Honor.

In answer to your question, no, no.

THE COURT: Okay. I will not attempt to set a status conference date at this point because I need to resolve certain issues about the equipment that will be available in court. I'll be speaking to Mr. Settle about that and issue an order, but there will be a careful opportunity to review with me the way the trial will be conducted, the hours of the trial, special arrangements to accommodate witnesses and the like. We will do all of that not the morning of the trial, which is what I typically do, but in advance of trial, so just be patient. I'll send out an order on that.

At this point I'm going to ask all people -- I want to thank Ms. Standifer and the representatives from MDC for coming. This is an unusual case and it requires careful attention and careful responses, so you're performing an important function.

You can be excused now, Mr. Weiss. Thank you for being patient.

MR. WEISS: Thank you, Your Honor. I will be available tomorrow if anybody needs my help.

THE COURT: All right. Mr. Settle, you don't have to remain. In fact, there are certain things I need to take up with Mr. Sutcliffe and his standby counsel that you would not be permitted to be present for anyway, so I will be in touch with you at the appropriate time.

All people other than representatives of the marshal's or the Bureau of Prisons and my staff need to be excused.

You should wait outside, Ms. Duarte, in case there is a need for anything else.

MS. DUARTE: Thank you, Your Honor.

(Government counsel excused)

THE COURT: Okay. Mr Sutcliffe, you had put something in a recent communications to me about the advice of counsel defense and I wanted to tell you, although I would not be surprised that already understand it, that if you in your own defense do assert advice of counsel, which would be your right and if, in essence, you try to explain that you thought you were doing things lawfully and in compliance with the law, and you thought so because the lawyer told you, you will be opening up to examination by the government communications you had with that lawyer. In other words, you would be waiving your attorney-client privilege. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: So the scope of examination or cross-examination that the government would be entitled to conduct is difficult to preview. It depends a lot on what the lawyer would say, but it's not going to be narrowly confined to just the precise questions that you elicited and answers that elicited from that lawyer. It's an elastic area that could misfire. You understand that?

THE DEFENDANT: I fully understand.

THE COURT: Okay. Now, the other thing that you wanted me to inquire into, I don't understand what you're talking about exactly, but my impression is that you gave a letter to Mr. Reed that you want him to return. Is that correct?

THE DEFENDANT: Yes. In this October 6 meeting -- I'd like to give Mr. Stephen (sic) sufficient time to enter that into evidence.

THE COURT: Well, it may not be into evidence. I will receive it as communications I sometimes -- I always keep them but they don't necessarily go into to the court file.

THE DEFENDANT: It's my only copy.

THE COURT: So --

THE DEFENDANT: Yeah.

THE COURT: So you gave Mr. Read a letter, you say, and now you want him to return it. Is that what the

gist of it is?

THE DEFENDANT: Yes. He admitted he has it in his possession. He admitted he took it that day we were in court on October 1st.

THE COURT: We may or may not have an issue here, Mr. Sutcliffe.

Mr. Reed, do you know what Mr. Sutcliffe is referring to?

MR. REED: I think I do, Your Honor.

THE COURT: And do you have that letter with you?

MR. REED: I don't have it with me here. I didn't bring my full file. I just brought a skeleton file with me.

THE COURT: Are you -- do you have any reason not to return the letter to Mr. Sutcliffe?

MR. REED: No, not at all, Your Honor.

THE COURT: Can you arrange to have the letter mailed to him promptly?

MR. REED: Yes, Your Honor.

THE DEFENDANT: I'm more concerned that Your Honor does receive a copy of it --

THE COURT: Well, he --

THE DEFENDANT: -- and entered into evidence. And I'm waiving my Fifth Amendment right of attorney-client privilege with this man right here and --

THE COURT: Okay. Mr. Reed, mail me a copy or

lodge a copy with the court as well.

MR. REED: I will, Your Honor.

THE COURT: Okay. Is there anything else that needs to be addressed?

THE DEFENDANT: Yes, Your Honor. I believe that Mr. Reed made a false statement of material fact to this tribunal October 1st and I would like a chance to address and that to prove that, because that's a very serious issue. I would like to have an evidentiary hearing, full-blown, on this issue. I'd like a copy of the transcripts from the October 1st sealed portion for use for appeal purposes. I'd like that expedited, if possible.

And like I said, I'd like that letter to be entered into evidence. It's not something I take lightly and I don't think the court should take lightly either.

THE COURT: Okay. Let me look at this letter that you sent.

THE DEFENDANT: Thank you, Your Honor.

(Pause)

THE COURT: Well, this letter doesn't tell me anything about what's in the October 1st or whatever the day the letter is. I'm not going to order Mr. Reed to respond to something that I don't know anything about. If I see the letter and I think there is any basis to have further inquiry, I will so rule. If I think there is not, I will so

rule as well so you know where it stands.

THE DEFENDANT: It's a false statement not contained in the letter. It's a false statement he made of a material fact concerning the sealed hearing that we had.

THE COURT: Okay. Well, I'm not going to have a hearing about something that almost certainly is no longer material or relevant, but I will give you the opportunity to give me your contention. You can do so now and don't expect that there is going to be any upcoming examination, but I'll consider it after you tell me what it is that you are so upset about.

So go ahead and tell me.

THE DEFENDANT: Well, you're putting me in kind of an untenable position here, Your Honor. You want me to expose how I'm going to impeach his lies in front of him? Is that what you are asking me to do?

THE COURT: No, I'm not.

THE DEFENDANT: Well, that's what it sounds like.

THE COURT: Look, Mr. Sutcliffe, this is a lot --

THE DEFENDANT: As long as he made a material misstatement of fact to this court --

THE COURT: Tell me what it was.

THE DEFENDANT: -- you totally relied upon that and then made a ruling based on that.

THE COURT: What was the misstatement of fact?

THE DEFENDANT: He said that I refused to assist him up until our August -- excuse me -- September 26. That's the first lie. The second lie was: I refused to give him the name of any files, exactly any files to help him with any discovery. That's the second miss -- second fact that he lied about. Those two statements I can refute and prove they were lies.

THE COURT: You don't want Mr. Reed to be your lawyer. Right?

THE DEFENDANT: He's not my lawyer. He's your counsel. I stressed that very closely in the letter to you and I cited U.S. versus Mills. He's not my agent. Ye's your agent.

THE COURT: Okay. Well, I think that's sufficient basis to stop right here. I don't think there is any need for Mr. Reed to respond. And the extent to which you and he had a difference of opinion as to whether and, if so, to what extent you've cooperated before, I relieved him in large measure as a result of your refusal to communicate with him.

THE DEFENDANT: That's exactly what I'm talking about. Exactly. You removed him because he said that I refused to assist him at all on October 26. That's a lie and I'd like a chance to refute that.

THE COURT: Okay. Mr. -- we're not going to go

through that hearing again, Mr. Sutcliffe. I made findings that based upon your own characterization of what any lawyer who was your lawyer could do and and would not be permitted to do and would not meet with your approval and whose efforts on your behalf you would reject, I relieved him ofhis duties. That ends it. That's my ruling. We are note going into in any further. You have the basis on the record to appeal me if you like, depending on what happens at the trial.

Okay. There is no issue as to -- and no relevance anymore and I don't think there is any basis for an issue as to the accuracy of Mr. Reed's statements. Mr. Reed enjoys a well-deserved reputation as an honorable, diligent and careful lawyer, and I'm not going to subject him or other lawyers of that nature to fishing expeditions that are no longer material or relevant to any of your rights in the trial. That's my ruling. I'm not going to hear any arguments about it.

Okay. I think we're adjourned. I don't think there is anything that you need to report to the prosecutor --

THE DEFENDANT: Your Honor, I --

THE COURT: -- I will issue --

THE DEFENDANT: -- can I leave my subpoenas here?

THE COURT: You can give your subpoenas to

Mr. Reed. I will issue --

THE DEFENDANT: I don't trust him with -- I don't even trust him with a piece of paper of mine. You understand me?

THE COURT: We will not serve your subpoenas.

THE DEFENDANT: I'm not asking you to serve my subpoenas. I'm just telling you I'm not giving this man a shred of paper. He's already stolen my paper from that day on the hearing.

THE COURT: Mr. Sutcliffe, I want you to understand something real simple. If they are third parties who you want to be subpoenaed, the one and only way that that will happen is not through me and not through my clerk. We are not process servers for anybody. You will give those subpoenas to Mr. Reed --

THE DEFENDANT: I will not give those subpoenas to Mr. Reed. He stole my copy and --

THE COURT: -- and he will give them to them to the investigator.

THE DEFENDANT: You refused to give me any kind of evidentiary hearing to investigate his material -- material misstatements to this court upon which you relied to make a ruling against me

THE COURT: Okay. Mr. Sutcliffe, by your choice, I want you to understand, these people --

THE DEFENDANT: No, he's not my choice. He's your choice of agent. You said our relationship has become untenable.

THE COURT: Don't -- okay. We're at the point, Mr. Sutcliffe, where you're interrupting me --

THE DEFENDANT: I'm sorry, Your Honor. I apologize.

THE COURT: -- and I'm not going to permit that. And I'm telling you if you want to get subpoenas served, there is one and only one way and I'm not going to repeat it. If you don't choose to give them to Mr. Reed, they won't be served.

THE DEFENDANT: Okay.

THE COURT: All right. We're adjourned.

We're going to make a copy of your letter that I will keep and give you back the copy so you will have the one you just handed to the clerk.

THE DEFENDANT: You want me to file it as part of the record?

THE COURT: And your motions that were lodged with the clerk or given to the clerk, those will be filed too.

The letter, I may or may not file as part of the official court record, but it will be part of the chamber's records.

THE DEFENDANT: As I understand, Your Honor, are

we are or are we not going to have a hearing regarding any previous motions filed?

THE COURT: I have to look and see what the status of those motions are.

THE DEFENDANT: Thank you, Your Honor.

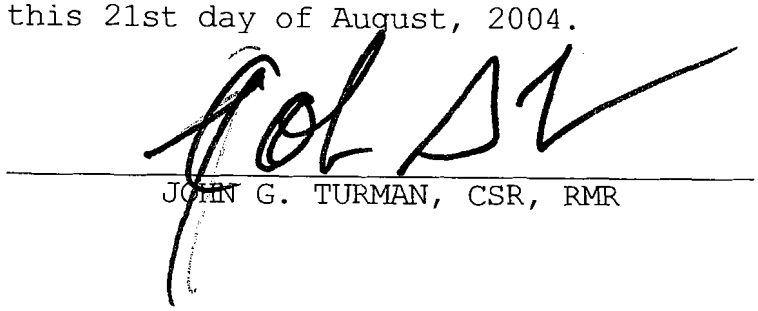
THE COURT: Okay. We're adjourned.

(Proceedings adjourned)

C E R T I F I C A T E

I, JOHN G. TURMAN, Official Court Reporter herein, do hereby certify that the foregoing transcript is a true and correct copy of the proceedings in the above-entitled case taken on the date and at the time indicated herein, all done to the best of my skill and ability.

DATED this 21st day of August, 2004.



JOHN G. TURMAN, CSR, RMR

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Pg 67- lines 15-19 ??

UNITED STATES OF AMERICA, PLAINTIFF, VS. STEVEN WILLIAM SUTCLIFFE, DEFENDANT.	DOCKET NUMBER CR-2002-350(A)-AHM LOS ANGELES, CALIFORNIA SEPTEMBER 26, 2003

TRANSCRIPT OF PROCEEDINGS
BEFORE THE ~~HONORABLE~~ A. HOWARD MATZ,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: ELENA J. DUARTE,
ASST. U.S. ATTORNEY
LOS ANGELES, CA

FOR THE DEFENDANT: STEVEN WILLIAM SUTCLIFFE,
~~PRO SE~~
DAVID R. REED, STAND-BY COUNSEL
ATTORNEY AT LAW
LOS ANGELES, CA

COURT REPORTER: NANCY SMITH-WELLS
UNITED STATES COURTHOUSE
312 N. SPRING STREET
ROOM 402
LOS ANGELES, CA 90012
(213) 621-2148

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER.

(IN LOS ANGELES, LOS ANGELES COUNTY, CALIFORNIA; FRIDAY, 9-26-03, IN OPEN COURT.)

THE DEPUTY CLERK: CALLING ITEM NUMBER ONE, CR-02-350(A), USA VS. STEPHEN WILLIAM SUTCLIFFE.

COUNSEL, STATE YOUR APPEARANCES PLEASE.

MS. DUARTE: GOOD MORNING, YOUR HONOR. ELAINE A. DUARTE FOR THE UNITED STATES. WITH ME ARE JASON GONZALEZ, A.U.S.A. AND JEFF CUGNO FROM THE F.B.I.

THE COURT: OKAY. GOOD MORNING TO ALL OF YOU.

MR. SUTCLIFFE: GOOD MORNING, YOUR HONOR. STEVEN SUTCLIFFE, PRESENT IN COURT.

THE COURT: GOOD MORNING, MR. SUTCLIFFE.

MR. REED: GOOD MORNING, YOUR HONOR. DAVID REED, STANDBY COUNSEL.

THE COURT: AND GOOD MORNING TO YOU AS WELL. WE HAVE A LOT OF ITEMS THAT WE NEED TO DISCUSS, AND IN RESPECTS TO THE FIRST AND THRESHOLD ONE SHOULD BE THE STATUS OF MR. SUTCLIFFE'S PREPARATION AND OPPORTUNITY TO PREPARE FOR TRIAL AND HIS REPRESENTATION, AND I THINK WE WILL GET TO THAT VERY SHORTLY BUT AS AN ACCOMMODATION AND INTENDED COURTESY TO A NUMBER OF OTHER PEOPLE WHO HAVE COME TO ADDRESS DIFFERENT ISSUES SO THAT THEY WON'T HAVE TO RETURN AT THE LUNCH BREAK, I'M GOING TO START WITH THOSE. SO WE WILL TALK ABOUT MR. SUTCLIFFE'S REQUESTS, INCLUDING THOSE THAT WERE SENT TO ME AND RECEIVED IN LETTER FORM. I GOT 'EM LATE LAST NIGHT CAUSED THEM TO BE FILED TODAY.

BUT BEFORE WE DO THAT, ASSUMING, AND I DON'T HAVE A FINAL VIEW ON THIS, THAT THE DEFENSE OF MR. SUTCLIFFE WILL BE PROVIDED PRIMARILY BY MR. SUTCLIFFE WITH MR. REED SERVING AS STANDBY COUNSEL AND THAT THE TRIAL WILL BEGIN NEXT WEEK. I HAVE ASKED TO COME TO COURT REPRESENTATIVES OF THE MARSHAL'S OFFICE AND THE CSO'S, AND ALSO JAMES SETTLE. IS HE HERE?

MR. SETTLE: YES, YOUR HONOR.

THE COURT: AND JAMES SETTLE WHO'S A VERY, VERY SKILLFUL AND ABLE HEAD OF THE COURT'S TELECOMMUNICATION SYSTEMS, INCLUDING COMPUTERS, BECAUSE MR. SUTCLIFFE WILL BE IN NEED OF AND WILL GET THE ACCESS TO THE -- AT LEAST THE CORE KIND OF ELECTRONIC EQUIPMENT HIS DEFENSE ENTITLES HIM TO, BUT WE NEED TO MAKE SURE THAT THERE IS CLARITY ABOUT THAT.

SO LET'S START. I'VE BEEN TOLD BY MY CLERK, JUST ON THE ASSUMPTION THAT THE TRIAL WILL BEGIN NEXT WEEK, THERE ARE A COUPLE OF CONSIDERATIONS THAT AFFECT SOME OF THE OTHER ITEMS THAT I MENTIONED IN THE NOT VERY -- IN THE EXPANSIVE BUT NOT NECESSARILY COMPLETE AGENDA THAT I CIRCULATED IN WRITING FOR PURPOSES OF ALERTING THE PARTIES TO WHAT I WANTED TO COVER IN TODAY'S STATUS CONFERENCE.

NOW, IN THIS CASE, ASSUMING THAT MR. SUTCLIFFE IS REPRESENTING HIMSELF, WE ARE GOING TO NEED, IN FAIRNESS TO HIM, AND IN THE INTEREST OF JUSTICE, TO MAKE CERTAIN CHANGES, AND WHAT I ORDINARILY ARRANGE FOR VARIOUS PROCEDURES INCLUDING, FOR EXAMPLE, SELECTION OF JURORS.

I WANT MR. SUTCLIFFE TO BE ABLE TO ADDRESS THE COURT, ADDRESS WITNESSES, AND ADDRESS THE JURORS IN A WAY AS CLOSE AS POSSIBLE TO THE NORMAL WAY A PRO SE CRIMINAL DEFENDANT WOULD DO THAT, BUT FOR REASONS REFLECTED, I THINK SUFFICIENTLY, IN THE RECORD IN THIS CASE RIGHT FROM THE BEGINNING, MY RESPONSIBILITIES WHEN THERE WAS A FIRST OF TWO BAIL APPLICATION HEARINGS I BELIEVE THAT CERTAIN RESTRICTIONS ON MR. SUTCLIFFE'S FREEDOM OF MOVEMENT ARE WARRANTED AND NEED TO BE MAINTAINED.

WHAT I CURRENTLY INTEND TO DO IS TO PERMIT MR. SUTCLIFFE TO ADDRESS ALL INDIVIDUALS; THE COURT, THE JURORS, WITNESSES FROM COUNSEL TABLE. THERE WILL BE NO CUFFS ON HIM -- NO HANDCUFFS ON HIM AND HE WILL HAVE THE OPPORTUNITY TO RISE AND SIT AND MOVE ABOUT AS IS NEEDED. GIVEN THE CONFIGURATION OF COUNSEL TABLE WHERE HE WILL BE SEATED -- AND FOR THE RECORD I WANT TO DESCRIBE THIS AS I THINK MOST JUDGES WOULD EXPECT IF THEY WERE READING THE TRANSCRIPT -- THE TABLE AT WHICH ALL THE LAWYERS AND ALL OF THE PARTIES IN CASES BEFORE THIS COURT SIT HAS A PANEL THAT PRECLUDES SOMEONE FROM SEEING BELOW THE WAIST LEVEL -- IT'S ACTUALLY HIGHER THAN THE WAIST, BUT A LITTLE BEFORE THE TOP LEVEL OF THE DESK OR TABLES.

IN SHORT, WHAT THAT MEANS IS THAT NO JURORS WOULD BE ABLE TO SEE WHETHER MR. SUTCLIFFE IS CONFINED THROUGH THE FORM OF WHAT I THINK IS APPROPRIATE HERE, WHICH WOULD BE LIMITED -- NOT THE MOST INTRUSIVE -- I'M NOT EVEN SURE WHAT THE RIGHT WORD IS. WHAT'S AN ANKLE BRACE COMMONLY CALLED? CAN SOMEONE WHO'S HERE

FROM THE MARSHALS' OFFICE TELL ME.

MARSHAL: LEG RESTRAINTS.

THE COURT: LEG RESTRAINTS. WHAT IS THE LEAST INTRUSIVE LEG RESTRAINT THAT THE MARSHAL HAS AVAILABLE?

MARSHAL: THE LEG RESTRAINTS HE'S CURRENTLY WEARING WILL WORK.

THE COURT: COULD YOU DESCRIBE THOSE FOR THE RECORD, PLEASE.

MARSHAL: BRANDY MARTIN FROM THE U.S. MARSHALS.

THE COURT: DESCRIBE THE ONES HE'S CURRENTLY WEARING. I CAN'T EVEN SEE THEM MYSELF.

MARSHAL: JUST LIKE THE SAME BRACELET HE WOULD HAVE ON HIS HAND IS AROUND HIS ANKLE. THERE'S A CANE IN BETWEEN. HOWEVER, TO CUT DOWN ON THE NOISE, WE HAVE AN ANKLE RESTRAINT LIKE THAT WHERE THE CHAIN IN BETWEEN IS COVERED WITH PLASTIC AND THAT WAY IF HE DOES RISE AND HITS THE CHAIR, WE'RE NOT MAKING ANY NOISE.

THE COURT: OKAY. WHAT WOULD BE THE NORMAL PRACTICE FOR THE MARSHALS AND/OR THE CSO'S IN TERMS OF HAVING SUFFICIENT PRESENCE IN THE COURTROOM IN A TRIAL, EVEN ASSUMING THAT MR. SUTCLIFFE WERE REPRESENTED BY COUNSEL? HOW MANY PEOPLE?

MARSHAL: IN THIS SITUATION, YOUR HONOR, WE WERE GOING TO HAVE FOUR PEOPLE IN THIS COURTROOM.

THE COURT: FOUR PEOPLE?

MARSHAL: YES. TO COVER THAT EXIT AND THAT EXIT AND FOR

HIM TOO. NO MATTER WHERE THEY'RE PLACED FOR THE COMFORT OF THE COURT AND FOR THE JURORS TO NOT BE INFLUENCED IN ANY WAY.

THE COURT: OKAY. I CAN WORK OUT THE DETAILS LATER AND GIVE MR. SUTCLIFFE AN OPPORTUNITY TO RESPOND TO THESE ISSUES AND EVERY ISSUE. I WANT YOU TO BE SURE THAT YOU WILL BE HEARD ABOUT EVERYTHING. BUT JUST PLEASE CONTINUE TO BE PATIENT AS YOU HAVE BEEN, AND I APPRECIATE THAT.

MR. SUTCLIFFE: THANK YOU.

THE COURT: NOW, WERE YOU PLANNING TO SEND FOUR PEOPLE TO COVER THE TWO DIFFERENT DOORS THAT PROVIDE ACCESS TO THE CORRIDOR WHERE JURORS OFTEN WALK, AND FOR -- WHERE WERE YOU PROPOSING THE OTHERS BE STATIONED?

MARSHAL: I WAS GOING TO HAVE ONE OVER HERE THIS END, YOUR HONOR. SITTING BACK AGAINST THE WALL. THE CLOSEST TABLE HERE USUALLY MAKES 'EM BLEND IN WITH EVERYBODY SO IT DOESN'T LOOK LIKE THEY'RE ACTUALLY WITH THE U.S. MARSHALS. THE POSITION AT THIS END WOULD ACTUALLY BE SITTING OUT IN THE PUBLIC AREA SO THAT WAY THEY WOULDN'T LOOK LIKE THEY'RE INSIDE. THE TWO INDIVIDUALS THAT NORMALLY SIT BACK HERE WITH THE PRISONER, THE INDIVIDUAL ON TRIAL. AGAIN, CLOSE TO THIS TABLE WOULD BE ONE PERSON, THIS PERSON SITTING HERE AND ONE MORE JUST BEHIND HERE SO AS NOT TO MAKE IT LOOK LIKE YOU HAVE MARSHALS ALL AROUND THE PLACE.

THE COURT: OKAY. WELL, THAT SOUNDS LIKE TO ME A SENSIBLE APPROACH. BUT IT'S VERY IMPORTANT THAT ALL FEASIBLE STEPS BE TAKEN TO PREVENT JURORS FROM SEEING THESE LEG RESTRAINTS.

SO THERE WILL BE NO SIDE BAR CONFERENCES. IF IN THE VERY RARE BUT CONCEIVABLY REAL CIRCUMSTANCE THAT A SIDE BAR IS APPROPRIATE, WHOEVER SEEKS ONE, WHETHER IT'S A LAWYER FOR THE GOVERNMENT, MR. SUTCLIFFE AND/OR HIS LAWYER SHOULD SIMPLY ASK FOR ONE, AND IF I CONSIDER THAT ONE IS WARRANTED, I WILL EXCUSE THE JURORS. THERE WILL BE NO NEED FOR COUNSEL OR MR. SUTCLIFFE OR COUNSEL FOR THE GOVERNMENT TO GO OFF TO THE CORNER OF THE COURTROOM THAT I TYPICALLY USE WHERE I BRING THE COURT REPORTER TO CONDUCT SIDE BAR CONFERENCES.

WE WILL MAKE CHANGES AS WELL IN THE PROCEDURE I OTHERWISE ORDINARILY FOLLOW FOR EXCHANGING INFORMATION ONE SIDE TO THE OTHER ABOUT PROPOSED EXERCISE OF PEREMPTORY OBJECTIONS. SO THAT IN ART TERMS IT WILL MEAN THAT THE CHANGE FUNDAMENTALLY WILL BE THAT THE DISCLOSURE TO THE OTHER SIDE OF WHO YOU WOULD TEND TO EXCUSE WILL NOT BE MADE AT THE LECTERN AND WILL NOT REQUIRE MOVEMENT AROUND THE COURTROOM.

I WILL GO OVER THOSE PROCEDURES AT A LATER TIME SO AS TO FREE UP THE VARIOUS PEOPLE THAT COME TO COURT TODAY.

NOW, THERE'S AN UNUSUAL TWIST. IF THE TRIAL STARTS ON TUESDAY, THERE'S AN UNUSUAL TWIST I WANT TO ALERT THE PARTIES TO, BECAUSE IT'S VERY IMPORTANT THAT CAREFUL THOUGHT BE GIVEN TO THIS AND THAT ALL APPROPRIATE STEPS BE TAKEN TO AVOID A PROBLEM. I HAVE BEEN INFORMED THAT THERE WILL BE SOMETIME ON WEDNESDAY OF NEXT WEEK A DRILL, AN EVACUATION DRILL, BUILDING-WIDE. BY THEN WE WILL HAVE JURORS IMPANELED AND, OF COURSE, THE PARTIES WILL BE

PRESENT. ORDINARILY AN EVACUATION DRILL, EVEN GIVEN THE NEED TO PROCEED DELIBERATELY AND CALMLY AND FOLLOWING WHATEVER INSTRUCTIONS -- AND I REALLY TRULY DON'T KNOW EXACTLY WHAT THE INSTRUCTIONS AND CIRCUMSTANCES THAT THE CSO'S WERE PLANNING TO IMPLEMENT AS TO SPECTATORS, AS TO GOVERNMENT COUNSEL; BUT I WILL BE WORKING WITH, AT LEAST THROUGH MY CLERK AND POSSIBLY DIRECTLY WITH THE MARSHALS, TO ASSURE THAT THE JURORS EXIT IN ONE DIRECTION AND ONE WAY FIRST AND THAT MR. SUTCLIFFE IS GIVEN THE OPPORTUNITY TO EXIT THE BUILDING AT A DIFFERENT EXIT, OUTSIDE THEIR VIEW AND THAT THEY'RE KEPT SEPARATE SO THAT THE LEG RESTRAINTS THAT HE WILL BE WEARING, ANY OTHER RESTRAINTS OUTSIDE THE COURTROOM, IF THE MARSHALS THOUGHT THAT HAND RESTRAINTS WERE APPROPRIATE, THAT WOULD BE THEIR RIGHT TO USE. BUT I DON'T WANT THERE TO BE ANY INADVERTENT RISK THAT THE JURORS UPON LEAVING THE COURTROOM OR RETURNING TO THE COURTROOM AT THE CONCLUSION OF THE EVACUATION DRILL, ASSUMING IT TAKES PLACE, AND I DON'T KNOW WHAT TIME IT WILL TAKE PLACE -- BUT ASSUMING IT TAKES PLACE DURING COURT HOURS, WILL SEE MR. SUTCLIFFE.

SO THAT IS EXTREMELY IMPORTANT AND I AM ORDERING -- WOULD IT BE YOU, MR. MARTIN, WHO WOULD BE RESPONSIBLE FOR IMPLEMENTING THOSE ARRANGEMENTS?

MARSHAL: I'LL MAKE THE ARRANGEMENTS. DEPUTY HESSELRODE(PHONETIC) IS THE DEPUTY IN CHARGE THAT WILL BE HERE EACH DAY FOR YOU. MR. SUTCLIFFE WILL ACTUALLY EXIT THROUGH THAT DOOR THERE NEXT TO THE JUROR BOX. AFTER THE JURY IS COMPLETELY

GONE, THAT'S WHEN HE WILL EXIT.

THE COURT: ALL RIGHT. AND AT ALL TIMES MR. SUTCLIFFE IS TO BE IN THE COURTROOM AND AT COUNSEL TABLE BEFORE THE JURORS ARE BROUGHT IN. IS THAT UNDERSTOOD, MR. HESSELRODE?

MARSHAL: YES, SIR.

THE COURT: OKAY. ARE THERE ANY QUESTIONS THAT YOU HAVE SO FAR ABOUT SECURITY CONSIDERATIONS, MR. SUTCLIFFE?

MR. SUTCLIFFE: YEAH. I JUST WONDER, YOUR HONOR. I WAS BROUGHT HERE THIS MORNING INSTEAD OF USUALLY THROUGH THE ELEVATOR AS I'VE BEEN FOR THE LAST 18 MONTHS WHILE I'VE BEEN INCARCERATED, AND TODAY I HAD A SPECIAL TRIP DOWN A LONG, WINDING TUNNEL, UP AND DOWN STAIRS; AND WHEN I ASKED THE MARSHAL WHY I WAS BEING UP AND DOWN, WHICH I CONSIDER DANGEROUS TO MY HEALTH SEEING AS I'M SHACKLED AROUND THE ANKLES AND THE WAIST AND WRIST AT THE TIME, I DON'T WANT TO FALL DOWN THE STAIRS, I WAS TOLD TO TALK TO MANAGEMENT --

THE COURT: TALK TO WHAT?

MR. SUTCLIFFE: MANAGEMENT. WHEN I INQUIRED AS TO WHO WAS MANAGEMENT? THEY SAID THAT YOU ARE MANAGEMENT. SO ERGO I'D LIKE TO KNOW WHY --

THE COURT: OKAY. I DON'T GET INVOLVED IN DETERMINING WHAT ACCESS ROUTES ARE TAKEN BY MARSHALS IN ANY CASE AND I DON'T INTEND TO INTERFERE WITH THEIR AUTHORITY AND DISCRETION IN THIS CASE, BUT I AM REQUESTING AND ORDERING THEM TO MAKE SURE THAT ANY ROUTE THAT IS TAKEN AND ANY ACCOMPANIMENT -- ANY ASSISTANCE OR ANY

PRESENCE OF MARSHALS ACCOMPANYING MR. SUTCLIFFE BE INTENDED TO MAKE SURE THAT EVERYONE, INCLUDING THE MARSHALS, TRAVEL SAFELY. I CAN'T GET INVOLVED IN FIGURING OUT WHICH OTHER ROUTES ARE AVAILABLE, BUT IN TERMS OF THE SECURITY MEASURES INSIDE THE COURTROOM THAT I JUST TALKED ABOUT, DO YOU HAVE ANY QUESTIONS OR OBJECTIONS?

MR. SUTCLIFFE: NO, YOUR HONOR.

THE COURT: OKAY. ANY RESPONSES OR QUESTIONS FROM THE GOVERNMENT?

MS. DUARTE: NONE, YOUR HONOR.

THE COURT: ALL RIGHT. NOW, LET'S TALK FOR A MINUTE -- AND I WANT TO THANK THE MARSHALS AND CSO'S FOR BRINGING THE APPROPRIATE SUPERVISORS HERE. I'M NOT POSITIVE THAT I'VE ADDRESSED EVERY CONCEIVABLE ISSUE THAT MAY ARISE IN THIS UNUSUAL CASE, BUT IF THERE ARE OTHER CONSIDERATIONS THAT THE MARSHALS HAVE ABOUT BRINGING MR. SUTCLIFFE TO COURT, REMOVING HIM FROM COURT, MAKING SURE THAT NO PROSPECTIVE JUROR OR ACTUAL JUROR -- AND THAT WILL REQUIRE, BY THE WAY -- AND I'M INSTRUCTING THE COURTROOM DEPUTY THAT ALL PROSPECTIVE JURORS WHO ARE FIRST BROUGHT DOWN TO THE COURTROOM FOR INITIAL VOIR DIRE BE KEPT ON THE LEFT SIDE OF THE COURTROOM, FACING THE BENCH.

SO AS THEY ENTER THE COURTROOM, THEY'LL BE BROUGHT LEFT SO THEY WILL NOT HAVE THE OPPORTUNITY TO -- FROM SITTING ON THE OTHER SIDE OF THE COURTROOM OBSERVE ANYTHING BELOW THE COUNSEL TABLE TOP OR DESKTOP.

NOW, ANYTHING ELSE THAT THE MARSHALS CAN THINK OF ON THE ISSUE OF SECURITY THAT I NEED TO ADDRESS?

MARSHAL: JUST ONE THING FOR -- WHEN JURY SELECTION STARTS, YOUR HONOR, IT WOULD PROBABLY BE BEST IF WE WERE CALLED AND WHEN IT'S TIME FOR HIM TO COME UP IN CASE THERE ARE SOME POTENTIAL JURORS LINGERING. SO THAT WAY, YOU KNOW, WE DON'T JUST COME RIGHT UP AT A SPECIFIC TIME AND WE COULD POSSIBLY RUN INTO SOMEBODY IN THE COURTROOM WHO WOULD SEE HIM IN RESTRAINTS. I DON'T KNOW IF YOU WANT TO BRING HIM UP A HALF-HOUR EARLIER OR CALL US?

THE COURT: I'LL TELL YOU, AND I'M NOT SURE IT WILL BE THE SAME THING EVERY DAY, BUT I DO KNOW THAT HE WILL ALWAYS BE HERE BEFORE THE JURY ARRIVES.

MARSHAL: I WAS WORRIED ABOUT JURY SELECTION.

THE COURT: I KNOW. WE'LL PROBABLY HAVE THE JURORS COME DOWN BECAUSE WE'RE GOING TO COVER A LOT OF GROUND TODAY, SOME OF WHICH WILL HAVE TO BE THIS AFTERNOON. PROBABLY HAVE THE JURORS COME DOWN, NOT BEFORE 9:00 ON TUESDAY MORNING OR POSSIBLE IMPANELMENT. SO THAT MEANS THAT I WOULD LIKE MR. SUTCLIFFE WHO WOULD NEED ACCESS TO BATHROOMS AND THE LIKE, WHO MIGHT NEED TO SET UP FILES ON THE COUNSEL TABLE, MAY NEED TO TURN ON COMPUTER EQUIPMENT, HE SHOULD BE UP IN THIS COURTROOM, UNLESS I ORDER THAT IT BE SOONER FOR ADDITIONAL CONFERENCES, HE SHOULD BE HERE IN THE COURTROOM AND AT COUNSEL TABLE BY NOT LATER THAN 8:30 ON TUESDAY MORNING.

MARSHAL: YES, YOUR HONOR.

THE COURT: ANYTHING ELSE, MR. MARTIN?

MARSHAL: NO, SIR.

THE COURT: PLEASE STAND BY AND DON'T LEAVE YET. NOW, IN TERMS OF COMPUTER EQUIPMENT, I HAVE READ YOUR SUBMISSIONS. I HAVE CAUSED THEM TO BE COPIED, FILED, AND MADE AVAILABLE TO THE GOVERNMENT AND COUNSEL FOR MR. REED. I'D LIKE TO GIVE YOU AN OPPORTUNITY, MR. SUTCLIFFE, TO STATE IN THE PRESENCE OF MR. JAMES SETTLE, THE COURT COORDINATOR FOR TELECOMMUNICATIONS EQUIPMENT, WHAT KIND OF COMPUTER EQUIPMENT YOU THINK YOU NEED TO DEFEND YOURSELF FAIRLY HERE IN THE COURTROOM AT YOUR COUNSEL TABLE.

MR. SUTCLIFFE: I CAN'T MAKE THAT REQUEST AT THIS TIME, YOUR HONOR, AS I'M NOT AWARE OF WHAT I'M TO EXPECT TO BE GIVEN TO ME AS FAR AS HARDWARE FROM THE GOVERNMENT. THEY HAVE TURNED OVER -- I'M IN RECEIPT OF NO CD ROMS. I'M IN RECEIPT OF NO ZIP DISK, I'M IN RECEIPT OF NO FLOPPY DISK, I'M IN RECEIPT OF NO OPTICAL DISK, I'M IN RECEIPT OF NO TAPES, SO I CAN'T ANSWER THAT QUESTION AT THIS POINT.

THE COURT: WELL, I'M A LITTLE PUZZLED BY THAT RESPONSE, MR. SUTCLIFFE, BECAUSE THE LETTERS I GOT LATE LAST NIGHT, WHICH ARE CAUSED TO BE FILED TODAY, AMONG OTHER THINGS, I BELIEVE IT'S YOUR HANDWRITING, I KNOW IT CAME FROM YOU, YOU HAVE STATED ON PAGE TWO --

MR. SUTCLIFFE: WHICH DOCUMENT ARE YOU REFERRING TO, YOUR HONOR?

THE COURT: IT'S ATTACHED TO MINUTE ORDER IS WHAT I GOT FROM YOU LAST NIGHT. ONE IS A LETTER TO THE CLERK OF THE COURT. THE OTHER IS A SECOND RELATED BUT DIFFERENT LETTER --

MR. SUTCLIFFE: OKAY. I SEE IT.

THE COURT: -- TO ME.

MR. SUTCLIFFE: YES. I THINK I SEE THE ONE YOU'RE TALKING ABOUT, YES.

THE COURT: PAGE TWO YOU SAY THAT YOU GOT A LETTER FROM THE PROSECUTOR ON SEPTEMBER 17TH, NINE DAYS AGO, AND IT CONTAINED A CD ROM DISK. AND YOU THEN GO ON TO TELL ME ALL KINDS OF THINGS ABOUT HOW YOU NEED TO GET COMPUTERS TO MAKE USE OF THE CD ROM DISK.

MR. SUTCLIFFE: RIGHT.

THE COURT: BEFORE I ASK YOU TO CLARIFY WHAT YOU WERE SAYING IN THE LETTER AND WHAT YOU'RE SAYING NOW, LET'S JUST MAKE SURE WE HAVE A CLEAR RECORD HERE AS TO WHAT, IF ANY, ELECTRONIC EVIDENCE AND CONCRETE TANGIBLE EVIDENCE HAS BEEN PROVIDED TO MR. SUTCLIFFE TO THE KNOWLEDGE OF THE LEAD PROSECUTOR, MS. DUARTE. AND I MEAN TO MR. SUTCLIFFE PERSONALLY AND NOT TO ANY OF HIS MANY PRIOR ATTORNEYS.

MS. DUARTE: JUST TO MR. SUTCLIFFE PERSONALLY?

THE COURT: YEAH.

MS. DUARTE: BECAUSE --

THE COURT: AND IF YOU WERE TOLD BY ONE OF THE OTHER LAWYERS THAT THEY HAD PHYSICALLY GIVEN TO HIM WHATEVER YOU'RE

ABOUT TO ACCOUNT FOR AS THE ELECTRONIC EVIDENCE, YOU CAN TELL ME ABOUT THAT.

MS. DUARTE: OKAY. YOUR HONOR, MAY I BE PERMITTED -- I WILL DO THAT. MAY I BE PERMITTED ALSO TO MAKE A RECORD AS TO WHAT HAS BEEN DISCOVERED TO MR. SUTCLIFFE'S ATTORNEYS PREVIOUSLY.

THE COURT: YES.

MS. DUARTE: IT WON'T TAKE ME VERY LONG, BUT I DID SPEND A LOT OF TIME ON IT LAST NIGHT. MAY I APPROACH THE PODIUM TO DO THAT?

THE COURT: ALL RIGHT.

MS. DUARTE: YOUR HONOR, ACCORDING TO MY RECORDS --

THE COURT: TELL YOU WHAT, MS. DUARTE, I WANT TO GET THROUGH THE QUESTION OF EQUIPMENT IN THE COURTROOM. I'LL GIVE YOU THE OPPORTUNITY TO GO THROUGH YOUR RECITALS ABOUT WHAT DISCOVERY WAS PROVIDED LATER ON IN THE DAY, BUT MR. SETTLE IS HERE NOW. I DON'T WANT TO HAVE TO BE DOING SOMETHING UNNECESSARILY. NOW, IN TERMS OF -- I THINK THE REAL QUESTION IS WHAT ARE YOU -- NOT SO MUCH WHAT MR. SUTCLIFFE HAS BEEN GIVEN SO FAR DIRECTLY OR INDIRECTLY BUT WHAT KIND OF ELECTRONIC EQUIPMENT AND EVIDENCE DO YOU INTEND TO USE AT TRIAL?

MS. DUARTE: I INTEND TO USE CD ROMS AND FLOPPY DISKS, YOUR HONOR.

THE COURT: WHAT KIND OF EQUIPMENT TO USE THOSE CD ROMS OR FLOPPY DISK ARE YOU GOING TO BE USING, EITHER AT COUNSEL TABLE OR AT THE ELECTRONIC PLATFORM NEXT TO THE LECTERN?

MS. DUARTE: BASICALLY TWO LAPTOP COMPUTERS. IF YOUR HONOR WANTS SPECIFICS AS TO CABLING AND OTHER EXTERNAL DRIVES THAT WILL BE USED, I WOULD PROBABLY HAVE TO --

THE COURT: I DON'T NEED THAT.

MS. DUARTE: LET ME THEN -- I UNDERSTAND THAT THIS COURT WANTS THIS LATER. MAY I ANSWER JUST ONE OF THE COURT'S QUESTIONS ABOUT THAT CD ROM THAT WAS VERY RECENTLY SENT TO MR. SUTCLIFFE?

THE COURT: YES.

MS. DUARTE: JUST SO I CAN CLEAR THIS UP, AND A LETTER ACCOMPANYING WHICH EXPLAINED THIS TO MR. SUTCLIFFE AND TO MR. REED. THE CD ROM THAT WAS VERY RECENTLY, I BELIEVE, ON SEPTEMBER 17TH, SENT TO MR. SUTCLIFFE, WAS A VERY RECENT DISCOVERY OF THE GOVERNMENT THAT THERE APPEARED TO BE A COPY, AT LEAST A PARTIAL COPY, OF THE WEBSITE ORIGINALLY ENTITLED EVIL GX.COM STILL ALIVE, IF YOU WILL, THROUGH THE INTERNET THROUGH A SERVER CALLED G-O CITIES. WHEN WE DISCOVERED THAT, IT STILL MIGHT BE ON THE INTERNET, I ASKED THE AGENTS TO MAKE A COPY. THEY MADE A COPY AND AS SOON AS I GOT THE COPY ON CD I PROVIDED A COPY TO MR. SUTCLIFFE. THAT IS NOT SOMETHING THAT I'M GOING TO USE IN EVIDENCE OF THIS CASE, YOUR HONOR. IT HAPPENED -- IT'S ON THE INTERNET, COULD STILL BE ON THE INTERNET NOW, I DON'T KNOW; BUT BECAUSE I HAD A COPY OF IT, I PROVIDED IT TO MR. SUTCLIFFE. IT'S NOT EVIDENCE, IT'S NOT PRIOR DISCOVERY THAT WASN'T PROVIDED, IT'S A VERY NEW DISCOVERY.

TO THE QUESTIONS OF MY PERSONAL KNOWLEDGE, I DON'T KNOW

PERSONALLY THAT HE'S RECEIVED, HIM PERSONALLY, ANY OTHER ELECTRONIC EVIDENCE IN THIS CASE. I HAVE BEEN TOLD BY BOTH MR. HARRIS AND MR. NICOLAYSEN AT VARIOUS TIMES THAT THEY HAVE GONE THROUGH WITH HIM AND DISCUSSED VARIOUS PIECES OF ELECTRONIC EVIDENCE, PARTICULARLY MR. NICOLAYSEN. MR. NICOLAYSEN AND I CONVERSED QUITE A BIT ABOUT THE MYWEBS CD -- M-Y-W-E-B-S -- WHICH WILL BE INTRODUCED AT TRIAL AS GOVERNMENT'S EXHIBIT 65, AND I DO HAVE A RECORD OF WHEN I FIRST TURNED THAT CD OVER, BUT I'LL WAIT TO LET YOU KNOW THAT.

OTHER THAN THAT, I DIDN'T KEEP SPECIFIC RECORDS AS TO WHEN I TALKED TO DEFENSE ATTORNEY ABOUT WHAT PARTICULAR EXHIBITS IN REGARD TO THEIR PROVISION DIRECTLY TO MR. SUTCLIFFE, SO I JUST DON'T KNOW.

THE COURT: OKAY. YOU CAN BE SEATED IF YOU'D LIKE. TO SPEED THINGS ALONG, IF YOU WANT TO ADDRESS ME AT COUNSEL TABLE, THAT'S OKAY TOO, AT LEAST FOR THE CURRENT TIME.

NOW, MR. SUTCLIFFE, ASSUMING THAT THE GOVERNMENT'S GOING TO BE USING CD ROMS AND FLOPPY DISKS AND TO USE THOSE AND DISPLAY THOSE, IT'S GOING TO HAVE LAPTOP COMPUTERS AND YOU WANT TO HAVE ACCESS TO WHATEVER THEY DISPLAY. WHAT YOU NEED IS A LAPTOP COMPUTER, RIGHT?

MR. SUTCLIFFE: IF I HEARD MRS. DUARTE CORRECTLY, SHE'S GOING TO BE USING TWO LAPTOPS SO LAPTOP TO BE JUST AS PREPARED. JUST LIKE A D.J. YOU SPIN ONE READY AND GET THE OTHER ONE PREPPED. YOU SHOW WHAT'S ON HERE WHILE YOU'RE RESEARCHING THE OTHER ONE.

MAKES YOU A LOT MORE EFFICIENT. I USED IT ALL THE TIME WHEN I WAS A COMPUTER CONSULTANT.

THE COURT: OKAY.

MS. DUARTE: IF I MAY, THE REASON WHY WE'RE USING TWO COMPUTERS, OR AT LEAST PLANNING TO AS OF NOW, IS BECAUSE THE COMPUTER ITSELF ONLY HAS SPACE FOR ONE DRIVE HERE TO A CD PLAYER, IF YOU WILL, OR A FLOPPY PLAYER. WE HAVE SOME EXHIBITS THAT ARE FLOPPIES AND SOME THAT ARE CD'S, ALL WHICH HAVE PREVIOUSLY BEEN PROVIDED. IN ORDER SO THAT WE DON'T HAVE TO ACTUALLY CHANGE THE INTERNAL DRIVES DURING THE PRESENTATION OF THE TESTIMONY, WE WANT ONE COMPUTER WITH CD, ONE WITH FLOPPY. IT'S NOT TO DO TWO THINGS AT ONCE. IT'S TO MAKE THINGS GO MORE QUICKLY WHEN WE HAVE TO CHANGE THE TYPE OF EXHIBIT.

THE COURT: I'LL GIVE YOU A MOMENT TO RESPOND, BUT IT MAY NOT BE NECESSARY, MR. SUTCLIFFE. THANK YOU. JUST SIT DOWN FOR A MINUTE. MR. SUTCLIFFE, CAN YOU PROVIDE FOR THE DEFENSE TEAM, AND THAT MEANS AT THE DEFENSE TABLE, TWO LAPTOPS.

MR. SETTLE: ABSOLUTELY.

THE COURT: OKAY. YOU'LL HAVE TWO LAPTOP COMPUTERS. NOW, WHAT KIND OF COMPUTERS DO YOU PROPOSE TO PROVIDE?

MR. SETTLE: IF IT'S YOUR INTENTION TO PROVIDE HIM EQUAL EQUIPMENT WITH WHAT THE U.S. ATTORNEYS ARE USING, WE'LL PROVIDE HIM WITH A PENTIUM LEVEL LAPTOP. I DON'T KNOW SPECIFICALLY WHAT SPEED IT WILL BE RIGHT OFFHAND BUT ONE WILL HAVE CD DRIVE AND ONE WILL HAVE A FLOPPY DRIVE BECAUSE THEY ALL HAVE INTERCHANGEABLE

DRIVES. WE'LL PROVIDE HIM WITH LIKE TO LIKE AND A SWITCHER TO TURN TO HAVE ONE DISPLAYED AT A TIME AND IT WILL DISPLAY JUST AS ALL YOUR EQUIPMENT DOES. YOU'LL HAVE A DISPLAY ON YOUR BENCH SO THE JURORS CAN SEE IT AND IT WILL BE UP ON COUNSEL TABLE.

THE COURT: SO IT WILL BE HOOKED UP TO THE MONITORS?

MR. SETTLE: UH-HUH.

THE COURT: THAT'S A YES?

MR. SETTLE: THAT'S A YES.

THE COURT: ALL RIGHT. IN ORDER FOR EVIDENCE TO BE USED, DEMONSTRATED, RETRIEVED, DISPLAYED, MANIPULATED FOR PURPOSES OF EITHER QUESTIONING OR ARGUMENT, WILL THE LAPTOP COMPUTERS BE HOOKED UP INTO THE SYSTEM THAT IS ALREADY AVAILABLE, ELECTRONIC MEDIA SYSTEM THAT'S FUNDAMENTALLY A ONGOING PIECE OF EQUIPMENT IN THE COURTROOM BE SUFFICIENT, MR. SETTLE?

MR. SETTLE: YES, YOUR HONOR.

THE COURT: YOU CAN'T ANTICIPATE ANY INABILITY ON THE PART OF WHOEVER IS USING THE COMPUTERS THAT YOU WILL PREPARE TO MAKE COMPLETE USE OF THEM FOR PURPOSES OF A TRIAL; IS THAT CORRECT?

MR. SETTLE: THERE'S ALWAYS A POTENTIAL FOR SOME ERROR BUT WE'LL BE HERE TO SUPPORT IT AND PRETEST IT TO MAKE SURE THAT THERE ARE NO PROBLEMS.

THE COURT: OKAY. AND WHEN WILL YOU BE ABLE TO INSTALL THAT EQUIPMENT?

MS. SETTLE: WE CAN HAVE IT INSTALLED MONDAY.

THE COURT: OKAY. WELL, I HAVE A LOT OF PEOPLE COMING THROUGHOUT MONDAY FOR OTHER MATTERS, BUT I'D LIKE IT INSTALLED BY MID TO LATE AFTERNOON ON MONDAY AT THE LATEST.

NOW, DO YOU HAVE ANY QUESTIONS SO FAR, MR. SUTCLIFFE?

MR. SUTCLIFFE: YES, THANK YOU, YOUR HONOR. I WOULD LIKE TO LODGE AN OBJECTION TO WHAT MS. DUARTE JUST SAID TO THE COURT. I BELIEVE SHE MISSPOKE OR IS TOTALLY LYING, ONE OF THE TWO. I'M NOT GOING TO SPECULATE, BUT SHE SAID THAT ALL CD ROMS AND FLOPPIES HAVE PREVIOUSLY BEEN PROVIDED TO ME. THAT IS A FALSEHOOD. I HAVE NOT RECEIVED ALL THE DISCOVERY IN THIS CASE, AND I HAVE PAPERWORK, AND THE COURT RECORD CLEARLY REFLECTS THAT.

I'D LIKE A CHANCE TO ARGUE THAT POINT AT ANY TIME THIS COURT WOULD GRANT ME THAT MOTION.

THE COURT: OKAY. MR. REED, I'D LIKE TO ADDRESS SOME QUESTIONS TO YOU, PLEASE.

MR. REED: YES, YOUR HONOR.

THE COURT: PARTICULARLY FOCUSING ON ELECTRONIC EVIDENCE OR EVIDENCE IN DOCUMENTARY FORM SUCH AS PRINTOUTS THAT WERE DOWNLOADED FROM ELECTRONIC EVIDENCE. CAN YOU TELL ME, PLEASE, WHAT, IF ANY, EVIDENCE, EITHER GENERATED BY AS PART OF THE WORK PRODUCT OF PRIOR ATTORNEYS THE LAWYERS WHO PREVIOUSLY REPRESENTED MR. SUTCLIFFE OR TURNED OVER AS PART OF DISCOVERY TO ANY LAWYER AT ANY PREVIOUS TIME BY THE GOVERNMENT, YOU PERSONALLY HAVE BEEN GIVEN? JUST DESCRIBE THAT GENERICALLY.

MR. REED: YOUR HONOR, I'VE BEEN GIVEN A SIGNIFICANT

AMOUNT OF DOWNLOADED WEB PAGES. I DON'T HAVE THEM MEMORIZED.

THE COURT: NO. I DON'T THINK YOU NEED TO GIVE ME AN INVENTORY.

MR. REED: I HAVE A SIGNIFICANT NUMBER OF WITNESS INTERVIEWS, 302'S, THINGS OF THAT NATURE. MR. NICOLAYSEN LAST WEEK GAVE ME THE CD ROM MYWEBS. I DID PICK THAT UP AND I DO HAVE THAT WITH ME TODAY. AND THAT'S THE NATURE OF THE EVIDENCE THAT I'VE BEEN GIVEN, YOUR HONOR.

THE COURT: NOW, I DON'T THINK IT IS INAPPROPRIATE FOR THE RECORD TO NOTE THAT I'VE PREVIOUSLY AUTHORIZED EXPERTS, OR AT LEAST ONE EXPERT, I DON'T GO BACK AND CHECK THE FILE BUT AT LEAST ONE EXPERT, AND I THINK COULD HAVE BEEN MORE THAN ONE, SOMEBODY WITH SPECIFIC SKILL AND ADVANCED SKILL IN COMPUTER TECHNOLOGY AND INTERNET TECHNOLOGY AS WELL TO BE APPOINTED TO REPRESENT OR ASSIST PRIOR COUNSEL. HAVE YOU SEEN ANY EXPERT REPORTS?

MR. REED: NO. NOT AT ALL, YOUR HONOR.

THE COURT: HAS ANYBODY DISCUSSED WITH YOU ANY OF MR. SUTCLIFFE'S PRIOR LAWYERS, ANY EXPERT REPORTS THAT MAY HAVE BEEN GENERATED?

MR. REED: NO, YOUR HONOR.

THE COURT: DO YOU HAVE THE EQUIPMENT AT YOUR OFFICE, MR. REED, THAT ENABLES YOU TO USE AND, IF NECESSARY, DOWNLOAD MATERIAL FROM CD ROMS AND FLOPPY DISK UNDER MYWEBS CD ROM, FOR EXAMPLE?

MR. REED: I BELIEVE I DO, YOUR HONOR.

THE COURT: OKAY. IT COULD BE THAT I AM MISTAKEN IN MY UNDERSTANDING AS TO WHETHER OR NOT PRIOR EXPERTS WERE LINED UP AND I HAVE NO IDEA ONE WAY OR THE OTHER WHETHER THEY DID ANYTHING IF THEY WERE LINED UP. BUT FOR THE RECORD, I'M GOING TO INSTRUCT MY CLERK TO CONTACT ALL OF THE PRIOR COUNSEL IN THIS CASE AND ORDER THEM TO FILE, POSSIBLY BY LATER TODAY, AND IN ANY EVENT EARLY MONDAY MORNING, UNDER SEAL AND IN CAMERA, A REPORT AS TO WHAT, IF ANY, EXPERT TESTIMONY OR EXPERT ASSISTANCE, EVEN IF IT WASN'T INTENDED TO BE TESTIMONY, THEY OBTAINED OR RECEIVED, WHAT, IF ANY, WORK PRODUCT FROM EXPERTS THEY OBTAINED OR RECEIVED.

AND IF THEY DID GET ANY, WHERE IT IS, WHAT THEY DID WITH IT, WHETHER THEY TURNED IT OVER TO ANYONE. IF SO, WHO AND THE WHEN AND THE LIKE. THAT WILL BE FILED UNDER SEAL AND IN CAMERA AND I'LL EVALUATE IT, AND DEPENDING ON WHAT I LEARN, TAKE APPROPRIATE STEPS TO ENSURE THAT MR. SUTCLIFFE'S RIGHTS ARE PROTECTED.

MEANTIME, MR. REED, I WOULD APPRECIATE IT IF YOU, OVER THE LUNCH BREAK, AND WE WILL HAVE TO TAKE A LUNCH BREAK, MAKE AN INQUIRY YOURSELF, AT LEAST OF MR. NICOLAYSEN. AND HE'S PROBABLY THE ONLY LAWYER THAT YOU -- OF THE FOUR THAT PREVIOUSLY REPRESENTED MR. SUTCLIFFE, THAT YOU'VE DEALT WITH; IS THAT CORRECT?

MR. REED: CORRECT, YOUR HONOR.

THE COURT: OKAY. SO SEE IF YOU CAN TRACK HIM DOWN, FIND OUT ABOUT THAT; ALL RIGHT, MR. REED?

NOW, MR. SETTLE, SINCE YOU'RE THE EXPERT ABOUT ALL THINGS ELECTRONIC AND VIDEO EQUIPMENT AND COURTROOM TECHNOLOGY, IS THERE ANY CONSIDERATION THAT I SHOULD HAVE ASKED ABOUT THAT I DID NOT MENTION?

MR. SETTLE: THE CONCERNS THAT I WOULD HAVE ARE I THINK THE COURT SHOULD HAVE AS FAR AS PRESENTING EXHIBITS OR EVIDENCE IN THIS MATTER IS THAT, ONE, THAT THEY ARE VIEWED BY THE COURT AND WE KNOW WHAT'S PRESENTED AND THAT IT'S VALIDATED THAT BOTH SIDES, SINCE WE'RE USING DIFFERENT MEDIUMS, ARE ACTUALLY SHOWING THE SAME -- PROJECTING THE SAME IMAGES.

IN OTHER WORDS, THAT ONE IMAGE HASN'T BEEN ALTERED TO REFLECT SOMETHING THAT ISN'T ON THE OTHER COMPUTER, BECAUSE WE'LL BE BASICALLY TRYING TO SHARE THE SAME DOCUMENTS OR EVIDENCE BUT FROM DIFFERENT COMPUTERS; SO THERE'S ALWAYS THE POTENTIAL THAT ONE HAS BEEN ALTERED OR CHANGED OR ISN'T EXACTLY AS THE OTHER. AND THAT WOULD BE THE CONCERN THAT I HAVE.

THE COURT: AND HOW COULD SOMEBODY ALLAY OR AVOID THAT CONCERN?

MR. SETTLE: BY USING THE SAME SOURCE, HAVING ONE SET OF DISKS THAT ARE POSSIBLY SHARED OR FROM THE SAME COMPUTER TO BE USED AS EXHIBITS OR EVIDENCE -- HOW THE FAIREST WAY TO DO THAT I'M NOT REAL SURE ON BUT I'M SURE WE CAN WORK OUT THE DETAILS.

THE COURT: DO YOU HAVE ANY OBJECTION, MS. DUARTE, OVER THE LUNCH BREAK OR TO UNAVOIDABLY HAVE TO BE A LITTLE BIT EXTENDED BEYOND WHAT I USUALLY TAKE TO SITTING DOWN WITH MR. SETTLE AND

MR. SUTCLIFFE AND WITH MR. REED IN A SAFE AND SECURE FASHION PURSUING THAT OBJECTIVE THAT MR. SETTLE JUST TALKED TO US ABOUT.

MS. DUARTE: YOUR HONOR, MAY MY CO-COUNSEL AND CASE AGENT BE PRESENT AS WELL?

THE COURT: YES.

MS. DUARTE: I DON'T HAVE AN OBJECTION. I CAN TELL THE COURT RIGHT NOW THAT I THINK THE -- WE CAN TALK ABOUT IT AND THEN TALK ABOUT IT WITH THE COURT AFTER LUNCH.

THE COURT: OKAY. THAT'S WHAT YOU SHOULD DO, BECAUSE I DON'T KNOW IF THAT'S AN ACTUAL CONCERN. I KNOW YOU'RE TRYING TO BE HELPFUL BY ALERTING ME TO POTENTIAL CONSIDERATIONS, BUT IT MAY NOT BE AN ACTUAL CONCERN. AND IF IT IS AN ACTUAL CONCERN AND THERE ARE ALTERNATIVE MEANS OF ADDRESSING IT BESIDES EITHER DUPLICATING OR -- THE EVIDENCE AGAIN OR ASSURING A SINGLE SOURCE, PLEASE BRING THAT UP AT THE DISCUSSIONS. ALL RIGHT, MR. SETTLE?

MR. SETTLE: YES, YOUR HONOR.

THE COURT: OKAY. NOW, MY STAFF AND I ARE GOING TO HAVE TO LEAVE THE COURTROOM, BUT I WANT TO SET THE CONTEXT FOR WHAT -- APART FROM GETTING FEEDBACK ABOUT THIS ISSUE OF THE COMPUTERS WHEN WE RESUME, WHICH WILL BE ABOUT 2:00, I WANT TO TELL YOU WHAT MY THOUGHTS ARE ABOUT THE STATUS OF REPRESENTATION HERE BECAUSE MY OBJECTIVE IS TO HAVE MR. SUTCLIFFE -- GIVE MR. SUTCLIFFE ADDITIONAL TIME TO THINK ABOUT THE SITUATION AND TO DISCUSS IT SEPARATELY AND PRIVATELY WITH MR. REED IF HE WOULD LIKE TO, AND FOR ALL SIDES TO KNOW WHAT I THINK IS THE STATE OF THE RECORD AND

THE STATE OF THE CONCERNS.

THE SOMEWHAT TORTURED HISTORY OF THIS CASE, AS REFLECTED BY TRANSCRIPTS WHICH I HAVE GOTTEN AND REVIEWED IN RECENT DAYS OR WEEKS, REFLECTS THAT ON SEVERAL OCCASIONS, THE FIRST BEING AT LEAST AUGUST 22ND OF 2002 THERE WERE COLLOQUIES THAT I HAD WITH MR. SUTCLIFFE CONCERNING BOTH HIS RIGHT AND THE PERIL HE WOULD INVITE IF HE EXERCISED HIS RIGHT TO REPRESENT HIMSELF. MR. SUTCLIFFE HAS NEVER SAID I WANT TO BE MY OWN LAWYER. I'VE NOTED THAT BEFORE AND I'M NOT GOING TO SIT UP HERE AND REVIEW EVERY SINGLE COLLOQUY WE HAD. ULTIMATELY, I FOUND THAT BY HIS CONDUCT HE HAD WAIVED HIS RIGHT TO YET ANOTHER APPOINTED COUNSEL AFTER HAVING EXHAUSTED FOUR AND DONE SO UNDER CIRCUMSTANCES WHICH, IN SEVERAL OCCASIONS TURN OUT TO BE REMARKABLY ANTAGONISTIC AND CONFRONTATIONAL.

NOW, ON VARIOUS OCCASIONS MR. SUTCLIFFE, IN FACT, ACKNOWLEDGED TO ME THAT IT WOULD BE A MISTAKE FOR HIM TO REPRESENT HIMSELF AND I ALLUDED TO SOME OF THE PERILS AND SOME OF THE DANGERS ON SEVERAL DIFFERENT OCCASIONS AND HE SAID HE UNDERSTOOD THOSE. THE FILING THAT I RECEIVED FROM MR. SUTCLIFFE LAST NIGHT, WHICH I'VE ATTACHED TO AN ORDER AND CIRCULATED TO THE PARTIES, BASICALLY PROVIDES, IF IT'S ACCURATE ACCOUNT OF THE SITUATION, A STRONG INDICATION THAT IN TRYING TO REPRESENT HIMSELF IN THE LAST FEW WEEKS MR. SUTCLIFFE HAS ENCOUNTERED A LOT OF SEVERE CHALLENGES AND OBSTACLES, WHICH I'LL GIVE HIM AN OPPORTUNITY TO SUPPLEMENT IF HE WANTS WHEN WE COME BACK HERE. AND IT'S A LITTLE HARD FOR ME TO

READ MR. SUTCLIFFE'S MIND, BUT I CAN'T BE SURE WHAT THAT LETTER, WHICH IS NOW PART OF THE FILE, WAS INTENDED TO COMMUNICATE AND WHETHER IT WAS A REQUEST TO HAVE A CONDITIONAL CHANCE TO BE REPRESENTED BY COUNSEL.

I'VE TAKEN LOTS OF MEASURES IN THE LAST FEW WEEKS TO DO WHATEVER I THOUGHT I COULD DO FEASIBLY AND COULD DO RESPONSIBLY TO ASSIST MR. SUTCLIFFE WITHOUT TAKING SIDES IN THIS CASE. I HAVE ISSUED CERTAIN ORDERS ABOUT HOW THINGS AND WHEN THINGS COULD BE SERVED UPON HIM. I TRACKED DOWN THE HEAD OF THE METROPOLITAN DETENTION CENTER IN ANOTHER STATE, NOT REALIZING HE WAS ON VACATION TO ARRANGE FOR -- ON A SPECIAL EXCEPTION BASIS MATERIALS TO BE RECEIVED THAT ARE HAND-DELIVERED TO GET -- MAKE SURE THEY GET TO MR. SUTCLIFFE SOONER THAN THEY OTHERWISE WOULD IF THEY WERE SENT BY THE MAILS, WHICH IS THE ORDINARY REQUIREMENT THAT THE MDC IMPOSES.

I HAVE TAKEN IT UPON MYSELF TO ALLOW MATERIALS WHICH ARE NOT IN COMPLIANCE WITH THE LOCAL COURT RULES CONCERNING FILING TO BE FILED. WE HAVE XEROXED THEM, WE HAVE SERVED THEM ON -- OR ARRANGED TO HAVE THEM MADE AVAILABLE TO THE PROSECUTION IN THIS CASE. I RESPONDED, ALTHOUGH MR. SUTCLIFFE THINKS IT WAS NOT ADEQUATE, TO REQUESTS CONCERNING THE ISSUANCE OF SUBPOENAS.

NOTWITHSTANDING ALL OF THAT, I AM CONCERNED THAT MR. SUTCLIFFE'S RIGHT TO A FAIR TRIAL, WHICH IS INHERENTLY AFFECTED AS IT WOULD BE FOR ANYBODY WHO CHOOSES TO REPRESENT HIMSELF, BY THE FACT THAT HE'S ON HIS OWN, IT'S COMPLICATED AND

COMPOUNDED IN WAYS THAT I DID NOT PREVIOUSLY KNOW ABOUT BY VIRTUE OF HIS CURRENT INCARCERATION.

NOW, THE RECORD IN THIS CASE REFLECTS, ON SEVERAL OCCASIONS, THAT I EXPLORED WITH MR. SUTCLIFFE THE RISKS HE WOULD TAKE IF HE, BY HIS CONDUCT; PUT HIMSELF IN A POSITION BY ALLOWING HIM NO CHOICE BUT TO DEEM THAT HE WAIVES HIS RIGHT TO COUNSEL.

I, HOWEVER, DID NOT BUILD THE NECESSARY RECORD THAT I THINK WOULD BE REQUIRED TO ASSURE THAT HE WAS INFORMED IN ADVANCE OF ALL OF THOSE RISKS. AND IN PARTICULAR, I ERRED BY NOT ARTICULATING THE ELEMENTS OF THE CASE, MEANING OF THE TWO DIFFERENT SETS OF CRIME THAT ARE ALLEGED THAT HE COMMITTED AND THE PENALTIES. I COULD HAVE BEEN MORE EXPANSIVE ABOUT SOME OF THE MECHANICAL -- NOT MECHANICAL, BUT SOME OF THE FUNCTIONAL OBSTACLES ANYBODY WOULD FACE IN REPRESENTING THEMSELF IN A CRIMINAL TRIAL. MUCH OF THAT HAS BEEN ADDRESSED AND WAS ADDRESSED BEFORE I GOT MR. SUTCLIFFE'S FILING LAST NIGHT THROUGH A FEW ORDERS THAT I'VE ISSUED, BOTH DIRECTLY BY MYSELF AND THROUGH ORDERS ISSUED BY THE PROSECUTION TO SET FORTH IN WRITING AND TO SERVE AND HANDSERVE UPON MR. SUTCLIFFE MANY DISCLOSURES ABOUT THESE CONSIDERATIONS.

WHAT I WOULD WANT YOU TO DO OVER THE LUNCH BREAK, IF YOU CHOOSE TO, MR. SUTCLIFFE, IS TO EVALUATE WHERE YOU STAND IN TERMS OF READINESS FOR TRIAL ON TUESDAY, DISCUSS WITH MR. REED WHATEVER YOU THINK WOULD BE APPROPRIATE AND HE WOULD THINK WOULD BE APPROPRIATE ABOUT REPRESENTATION ON A FULL BASIS HE COULD PROVIDE YOU, EVALUATE YOUR RIGHTS UNDER THE SPEEDY TRIAL ACT. I KNOW THAT

YOU HAVE NOT WAIVED THOSE RIGHTS AND YOU'LL HAVE TO, MS. DUARTE, DO ANOTHER CALCULATION ABOUT HOW MUCH TIME WILL BE AVAILABLE UNDER THE SPEEDY TRIAL ACT, IF THE CASE DOES NOT PROCEED ON TUESDAY.

I WILL INVITE YOU TO ADDRESS THE COURT WHEN WE RETURN, MR. SUTCLIFFE, TO TELL ME WHAT YOUR POSITION IS AFTER NOW HAVING RECEIVED IN WRITING AND ON SEVERAL OCCASIONS ORALLY FROM THE COURT AND FROM THE BENCH UNUSUAL AND DETAILED DISCLOSURES ABOUT PRO SE REPRESENTATION.

SO THAT'S SOMETHING THAT NEEDS TO BE ADDRESSED. WE'RE GOING TO BE ADJOURNED UNTIL 2:00. WE'LL RESUME THEN. MR. SETTLE IS EXCUSED AND THOSE SPECIAL REPRESENTATIVES OF THE MARSHALS AND THE CSO'S THAT CAME TO ADDRESS THE SECURITY CONCERNS NEED NOT RETURN EITHER AT 2:00.

(RECESS.)

THE COURT: I'LL JUST LET THE RECORD REFLECT THAT MR. SUTCLIFFE AND MR. REED ARE PRESENT AT THEIR COUNSEL TABLE AND SO IS THE PROSECUTION TEAM.

ALL RIGHT. FOLLOWING UP ON SOME OF THE MATTERS WE GOT TO BEFORE THE BREAK, I'D LIKE TO START BY ASKING YOU, MS. DUARTE, TO FIRST TELL ME ABOUT THE OUTCOME. YOU DON'T HAVE TO GET INTO EVERY SINGLE DETAIL, BUT THE DISCUSSION CONCERNING THE COMPUTERS.

MS. DUARTE: OH. YES, YOUR HONOR. WE DID HAVE A DISCUSSION ABOUT THE COMPUTERS AND THE PRIMARY CONCERN WAS THAT THE EVIDENCE -- IF MR. SUTCLIFFE BRINGS IN ELECTRONIC EVIDENCE AND IT'S SUBJECT TO ALTERATION, WHICH IT WOULD JUST BY ITS VERY NATURE

BE, THEN THERE WOULD BE AN EVIDENTIARY ISSUE. WHAT WE ALL SEEM TO HAVE AGREED ON IS THE NEED TO USE A CONSISTENT SET OF EXHIBITS, WHICH WOULD BE THE GOVERNMENT EXHIBITS; BUT, OF COURSE, MR. SUTCLIFFE WOULD BE ABLE TO VIEW THEM, USE THEM, AND ADD TO THEM.

IN OTHER WORDS, I HAVE TOLD MR. SUTCLIFFE AND MR. REED THAT IF THERE'S SOMETHING THAT YOU'VE GIVEN THEM IN THE PAST IN DISCOVERY, WHICH WE CAN GET INTO LATER, WHICH HE WANTS TO EXHIBIT AND HE LET'S ME KNOW ABOUT THAT, WE WILL MAKE IT AVAILABLE, HE CAN EXHIBIT IT AND EITHER THE GOVERNMENT OR THE DEFENSE CAN INTRODUCE IT.

SO I THINK THAT WE'RE OKAY THERE. AND THEN WE ALSO --

THE COURT: I'M NOT OKAY BECAUSE I DON'T THINK I UNDERSTAND IT. I SURMISE THAT THERE'S GOING TO BE A -- SOME KIND OF A DISCUSSION WITH DISCLOSURE CONCERNING JUST WHAT EVIDENCE HAS PHYSICALLY MADE ITS WAY TO THE DEFENDANT BUT --

MS. DUARTE: I DIDN'T KNOW THAT YOU WERE TALKING ABOUT THAT, YOUR HONOR. I'M SORRY.

THE COURT: NO. I'M NOT. I'M NOT TALKING ABOUT THAT SO LET ME CONTINUE. FROM WHAT YOU SAID IT STRIKES ME -- LET ME JUST ASK YOU. THIS PROPOSAL AND THIS SOLUTION THAT YOU JUST SUMMARIZED RIGHT NOW COULD NOT BE IMPLEMENTED ACCORDING TO YOUR UNDERSTANDING BECAUSE MR. SUTCLIFFE DOESN'T HAVE THAT DISCOVERY; IS THAT CORRECT?

MS. DUARTE: THAT'S MY UNDERSTANDING FROM MR. SUTCLIFFE.

THE COURT: OKAY. NOW, ASSUMING THAT HE GETS IT BEFORE, OF COURSE, THE START OF THE TRIAL, WHAT IS IT THAT HE WILL GET? WILL HE BE ABLE TO TAKE IT WITH HIM TO THE MDC? AT HIS OWN CHOICE WILL HE BE ABLE TO ACCESS IT IF SOMETHING ELSE IS BEING DISPLAYED DURING THE TRIAL? IF YOU'RE SHOWING A WEBSITE PAGE OF A WITNESS AND HE DOESN'T CARE TO FOLLOW THAT EVIDENCE AND HE WANTS TO ACCESS THE COMPUTER TO LOOK FOR SOMETHING ELSE THAT HE THINKS MIGHT BE IMPORTANT FOR HIS DEFENSE, WILL HE BE ABLE TO DO IT? WEBSITE.

MS. DUARTE: IT'S HARD TO ANSWER THAT, YOUR HONOR, BECAUSE I DON'T KNOW. I TALKED WITH MR. REED AND MR. SUTCLIFFE ABOUT THIS OVER THE BREAK. I DON'T KNOW WHAT HE WANTS, AND I CAN EXPLAIN TO YOU THE NATURE OF THE ELECTRONIC EVIDENCE AND THE WAY IT'S BEEN TURNED OVER. IF HE WANTS ANY OF WHAT WE'RE EXHIBITING PART OF WHICH IS ACTUALLY TO ADDRESS HIS CONCERN THAT THE ENTIRE WEBSITE -- YOU KNOW, HIS CONCERN IS THAT THE ENTIRE WEBSITE IS NOT GOING TO BE EXHIBITED.

WHAT I HAVE TOLD COUNSEL AND COUNSEL IN THE PAST IS THAT I'M NOT NECESSARILY GOING TO EXHIBIT THE ENTIRE WEBSITE, THAT'S A FACT. HOWEVER, I WILL MAKE IT AVAILABLE. I WILL EVEN MAKE IT A GOVERNMENT'S EXHIBIT AND I'VE ALSO TURNED OVER COPIES BUT I WILL ALSO MAKE IT AVAILABLE HERE AS AN EXHIBIT IN TRIAL SHOULD DEFENSE CARE TO SHOW SOME ADDITIONAL THAT I DON'T SHOW.

THE COURT: OKAY. THAT'S FINE AND I'M PLEASED ABOUT THAT, BUT I'M LOOKING AT THIS IN A VERY CONCRETE AND PRACTICAL WAY. DURING THE COURSE OF ANY TRIAL, THE LAWYER REPRESENTING THE

CLIENT FREQUENTLY LOOKS FOR OTHER EVIDENCE, A TRANSCRIPT PAGE, AN EXHIBIT, A PIECE OF OTHER TANGIBLE EVIDENCE WHILE SOMETHING ELSE IS UNDERWAY IN THE COURT, IN THE TRIAL. NOW, THAT COULD BE WHAT MR. SUTCLIFFE CHOOSES TO DO, AND I JUST WANT TO KNOW, SINCE SO MUCH OF THE EVIDENCE IN THIS CASE IS GOING TO BE -- IS GOING TO CONSIST OF MATERIAL THAT WAS ON THE INTERNET THAT WAS IN THE WEBSITE THAT MAY BE DOWNLOADED OR PRINTED OUT FOR VIEWING BY THE JURORS, THAT HE WILL HAVE ACCESS TO WHATEVER IS IN THE ARRAY OF EVIDENCE THAT THE GOVERNMENT WAS REQUIRED TO TURN OVER OR CHOSE TO TURN OVER AT HIS CHOICE, WHEN HE WANTS IT, AND I MEAN IN THE COURTROOM ONLY. I'M NOT PROMISING OR EVEN SUGGESTING THAT HE WOULD HAVE THIS COMPUTER MATERIAL AVAILABLE AT THE PRISON.

BUT CAN HE TROLL THROUGH THIS DISCOVERY, SITTING AT HIS COUNSEL TABLE WHEN YOU'RE PUTTING ON YOUR CASE?

MS. DUARTE: COULD I JUST HAVE A MOMENT, YOUR HONOR?

(COUNSEL CONFERRED SOTTO VOCE.)

MS. DUARTE: YOUR HONOR, SPEAKING ABOUT THE DISCOVERY NOW AND NOT JUST THE EVIDENCE THAT THE GOVERNMENT IS EXHIBITING AT TRIAL, IT'S AN ENORMOUS AMOUNT OF INFORMATION. IS IT POSSIBLE FOR ALL THAT INFORMATION TO ACTUALLY BE ACCESSIBLE TO MR. SUTCLIFFE DURING THE COURSE OF THE TRIAL? IF THAT'S THE QUESTION --

THE COURT: TO THE EXTENT THAT AT LEAST, FOR EXAMPLE, IT'S RETRIEVABLE IN PRINCIPAL THROUGH A COMPUTER. IF TO USE A BIZARRE EXAMPLE, IF A PIECE OF THE EVIDENCE WAS A HAT THAT SOMEBODY WORE ON ITS HEAD, I WOULDN'T EXPECT THAT OF COURSE. AND

IT WAS ONE SUCH HAT AND IT WAS IN THE CUSTODY OF THE GOVERNMENT, I WOULDN'T EXPECT THAT TO BE AVAILABLE FOR HIS TOUCHING AT ANY POINT THAT HE FELT LIKE IT. BUT IF IT'S SOMETHING THAT IS PART OF THE ARRAY OF ELECTRONIC EVIDENCE OR EVIDENCE TAKEN FROM ELECTRONIC MEDIA, IT SEEMS TO ME TO BE NECESSARY AND IN ANY EVENT FAIR FOR HIM TO HAVE UNFETTERED ACCESS TO IT AT LEAST WHILE THE TRIAL IS UNDERWAY HERE IN THE COURTROOM SO THAT'S WHAT I'M TRYING TO UNDERSTAND.

MS. DUARTE: I DON'T THINK WE ALONE COULD MAKE THAT POSSIBLE BECAUSE IT'S TOO MUCH INFORMATION AND IT'S MULTIPLE HARD DRIVES THAT YOU'RE TALKING ABOUT. WE'D HAVE TO -- I THINK WE'D HAVE TO CHECK WITH MR. SETTLE AS -- MR. SETTLE?

THE COURT: SETTLE. AND HE'S BEEN GOOD ENOUGH TO COME BACK HERE.

MS. DUARTE: HE HAS, AS TO WHETHER OR NOT THAT WOULD BE POSSIBLE. BUT, YOUR HONOR, TO USE A SIMILAR ANALOGY, I THINK -- MAYBE I WON'T EVEN TRY -- PART OF THE REASON WHY, AND I KNOW YOU WANT TO ADDRESS THIS LATER, BUT PART OF THE REASON WHY IN A CASE LIKE THIS IT HAS BEEN TURNED OVER SO FAR IN ADVANCE AND THE COURT MADE THIS CASE COMPLEX, I THINK RIGHTFULLY SO, BECAUSE OF THE HUGE AMOUNT OF ELECTRONIC EVIDENCE WAS SO THAT THE DEFENSE TEAM COULD WORK THROUGH THIS, PUT WHAT THEY WANTED TO DISPLAY TODAY, CUSTOMARILY RUN IT BY THE GOVERNMENT, WE COULD AGREE THAT IT'S ALL FORENSICALLY SOUND, THERE HAVE BEEN NO ALTERATIONS AND THIS WOULD BE DONE.

WHETHER OR NOT THIS CAN BE DONE WITH THIS AMOUNT OF INFORMATION BASICALLY ON THE FLY BY MR. SUTCLIFFE IS A WHOLE DIFFERENT QUESTION AND I DON'T KNOW THE ANSWER. BUT NOW THAT CUSTOMARILY THE REASON IT WOULD NEED TO BE DONE IS BECAUSE THIS ALL WOULD HAVE BEEN SORTED OUT FROM THE DISCOVERY PROVIDED.

THE COURT: WELL, I KNOW THAT YOU'VE REPRESENTED TO ME ON MORE THAN ONE OCCASION THAT YOU'VE TURNED OVER DISCOVERY TO VARIOUS LAWYERS WHO PREVIOUSLY REPRESENTED THE DEFENDANT. YOU PROPOSE STIPULATIONS, WHICH THE DEFENDANT DECLINED TO ENTER INTO, SO IF THAT'S WHAT YOU'RE REFERRING TO IN TERMS OF THE PAST HISTORY, I'M A LITTLE BIT OF AWARE OF THAT.

MR. SETTLE, DO YOU KNOW WHAT I'M DRIVING AT? CAN YOU UNDERSTAND WHAT I'M TRYING TO ASCERTAIN?

MR. SETTLE: YES, YOUR HONOR.

THE COURT: IN TERMS OF THE CAPACITY OF THE TECHNOLOGY, THOSE TWO LAPTOP COMPUTERS AND THE ACCOMPANYING EQUIPMENT THAT WOULD BE NECESSARY TO ACCOMPLISH THEIR PURPOSE IN A TRIAL, COULD THAT BE DONE? COULD MR. SUTCLIFFE, IN THE COURSE OF THE TRIAL, HAVE UNFETTERED ACCESS TO THIS BROAD ARRAY OF INFORMATION?

MR. SETTLE: YOUR HONOR, I BELIEVE THERE WOULD BE SOME LIMITATIONS. IT'S MY UNDERSTANDING THAT HE HAD SEVERAL HARD DRIVES, VERY LARGE HARD DRIVES THAT WOULD BE MUCH GREATER THAN THE CAPACITY OF THE LAPTOPS THAT WE WOULD MAKE AVAILABLE AT ANY ONE PLACE. HOWEVER, IT'S BEEN -- I'VE BEEN LED TO BELIEVE THAT THE ACTUAL AMOUNT OF WHAT'S ON THE HARD DRIVE WOULD BE USED WOULD BE

SMALL ENOUGH TO FIT ON EITHER ONE OF THE HARD DRIVES BUT WE WOULD NEED TO IDENTIFY -- HAVE SOME SORT OF FINITE IDENTIFICATION OF WHAT'S TO BE USED, THE SIZE OF THE DATA.

THE COURT: OKAY. THANK YOU. AND I MAY GET BACK TO YOU IN ONE MOMENT. MS. DUARTE, ASSUMING FOR THE MOMENT THAT THE -- BOTH SIDES AGREE ON WHAT THE UNIVERSE OF POTENTIALLY RELEVANT EVIDENCE IS AND THAT IT'S CONSIDERABLY LESS AND THE EVIDENCE IN ITS RAW FORM THAT WOULD BE ON THESE VARIOUS HARD DRIVES, SOME OF WHICH ARE PACKED WITH LOTS OF DATA, IS IT YOUR UNDERSTANDING THAT IF YOUR ASSESSMENT OF WHAT'S POTENTIALLY RELEVANT EVIDENCE WERE ACCEPTED BY THE DEFENDANT IT COULD BE PLACED ON TO TWO DISKS, EITHER ONE OF WHICH WOULD GO -- TWO HARD DRIVES, EITHER ONE OF WHICH WOULD GO INTO ONE OF THOSE LAPTOPS AND THEREFORE BE ACCESSIBLE AT WILL DURING THE COURSE OF THE TRIAL?

MS. DUARTE: I DON'T THINK THE COURT NECESSARILY MEANS HARD DRIVES BECAUSE THE HARD DRIVES WOULDN'T -- OR MAYBE IT DOES.

THE COURT: DON'T ASSUME I KNOW WHAT I'M TALKING ABOUT. SO JUST CORRECT ME IF I'M WRONG.

MS. DUARTE: DO YOU MEAN, YOUR HONOR, THAT WE COULD ACTUALLY HAVE TWO --

THE COURT: HOW ARE YOU GOING TO BRING YOUR EVIDENCE TO THE COURT IN TERMS OF THE EXTENT TO WHICH YOU SEEK TO ACCESS IF THROUGH YOUR LAPTOPS? JUST DESCRIBE THAT.

MS. DUARTE: FLOPPIES AND CD ROMS. WHAT WE HAVE DONE -- THIS HAS LL BEEN TURNED OVER. WHAT WE HAVE DONE IS FOR EACH OF

THE CHARGED ACCOUNTS. EACH OF THE CHARGED ACCOUNTS IN THE INDICTMENT, OF WHICH THERE ARE NINE, WE'VE PREPARED ANYWHERE BETWEEN THREE AND I BELIEVE THE MOST HAS 19 OR 18, VERY SMALL PAGES. IT'S EITHER A FLOPPY OR A CD ROM WHICH WE CAN JUST TAKE IN AND OUT AT WILL AS WE START TO DISCUSS THE COUNTS AND SHOW WHICH ARE DOWNLOADS, WHICH ARE PAGES THAT ARE RESTORED FROM THE WEBSITES. THE WITNESSES WILL AUTHENTICATE THEM BECAUSE THEY SAW THEM ON THE INTERNET, SUCH AS THEY WOULD PHOTOGRAPHS. AND WE ALSO HAVE PRINTED COPIES OF THOSE AVAILABLE IN CASE THERE'S AN ISSUE OR A TECHNICAL PROBLEM. THAT IS THE WAY THAT WE WERE GOING TO PUT ON OUR CASE.

THE COURT: OKAY. IF THOSE FLOPPIES AND THOSE CD ROMS CONTAINING THE EXACT CONTENTS AS YOU HAVE SAID WERE PROVIDED TO MR. SUTCLIFFE AND AVAILABLE TO HIM IN THE COURTROOM, MR. SETTLE, UNDER THAT HYPOTHETICAL, WOULD HE HAVE ACCESS TO WHATEVER HE WANTED TO LOOK FOR DURING THE ONGOING COURSE OF THE TRIAL?

MR. SETTLE: YES, YOUR HONOR.

THE COURT: OKAY. NOW, DID YOU REACH ANY KIND OF UNDERSTANDING THAT YOU THINK WAS BILATERAL DURING THE CONVERSATION OVER LUNCH AS TO THE MATERIAL THAT -- IF IT COULD BE DUPLICATED AND MADE AVAILABLE TO MR. SUTCLIFFE, WOULD BE ALL THE MATERIAL THAT HE WANTED?

MS. DUARTE: WE DID NOT REACH AN UNDERSTANDING AT ALL. I DON'T THINK IT'S THROUGH ANY FAILURE TO TRY. IT SEEMS TO BE THAT I DON'T UNDERSTAND WHAT HE'S LOOKING FOR AND HE DOESN'T -- I

DON'T THINK HE KNOWS OR UNDERSTANDS WHAT I HAVE TO OFFER BECAUSE HE HASN'T RECEIVED IT APPARENTLY. THAT'S THE PROBLEM.

THE COURT: OKAY. SO WHAT DID YOU MEAN TO THE EXTENT THAT YOU WERE INDICATED, WHEN YOU FIRST STOOD UP THIS AFTERNOON, THAT THERE HAD BEEN AN AGREEMENT ON THE NEED TO USE CONSISTENT SET OF EXHIBITS AND THE WAY TO ACCOMPLISH THAT?

MS. DUARTE: WELL, WHAT I MEANT WAS IS THAT WHAT I TALKED WITH MR. SUTCLIFFE AND MR. REED ABOUT WAS THAT IF WE CAN MAKE KNOWN TO MR. SUTCLIFFE AND MR. REED WHAT WE HAVE; AND IN ADDITION TO WHAT I DESCRIBED TO THE COURT WE ALSO HAVE SEVERAL OTHER CD'S THAT WE WERE GOING TO MAKE AVAILABLE AS EXHIBIT THAT HAVE COMPLETE DOWNLOAD OF THE WEBSITE, WHICH IS WHAT I UNDERSTOOD MR. SUTCLIFFE -- AS I UNDERSTOOD IN THE MOTION RESPONSE. AFTER TALKING WITH HIM, I'M NOT SURE HE'S SEEN THOSE.

THE COURT: YOU'RE NOT SURE HE'S SEEN WHICH?

MS. DUARTE: MY DOWNLOADS, SO I DON'T THINK HE REALLY UNDERSTANDS WHAT I HAVE. I THINK IF HE WERE TO HAVE WHAT I HAVE AND TO SEE IT I'M OPTIMISTIC THAT IT WOULD ACTUALLY BE WHAT HE NEEDS AND THAT WE COULD WORK THIS OUT.

THE COURT: OKAY. THANK YOU, MS. DUARTE.
MR. SUTCLIFFE, WHAT DO YOU THINK YOU WANT?

MR. SUTCLIFFE: JUST IN CASE YOU MISUNDERSTOOD WHAT SHE SAID. WHEN SHE SAID "MY DOWNLOADS," SHE DIDN'T MEAN "MY" MEANING "HER." THE NAME OF THE FOLDER CALLED "MY DOWNLOADS." JUST TO CLARIFY THAT. PLAY OF WORDS.

THE COURT: I'M AWARE OF THE --

MR. SUTCLIFFE: I DON'T KNOW IF YOU'VE SEEN THE CD ROMS.

THE COURT: NO. I HAVEN'T SEEN ANY OF IT.

MR. SUTCLIFFE: IT'S LABELED MY DOWNLOAD.

THE COURT: TRY TO BE PRACTICAL. PLEASE, IN LIGHT OF WHAT MS. DUARTE JUST EXPLAINED, MR. SETTLE JUST EXPLAINED. WHAT DO YOU THINK YOUR RIGHTS TO SELF-DEFENSE AND TO A FAIR TRIAL ENTITLE YOU TO GET?

MR. SUTCLIFFE: I'LL TRY TO BE FAIR. OKAY. I AGREE WITH WHAT YOU SAID, WHICH IS I SHOULD HAVE ACCESS TO THE ARRAY OF ALL ELECTRONIC HARD DATA THAT HAS BEEN GENERATED, TURNED OVER, OR SUBPOENAED TO DATE AND I SHOULD HAVE FULL UNFETTERED ACCESS TO IT DURING THE TRIAL AT ANY TIME, ANYPLACE DURING THAT TRIAL. IT SHOULD BE RETRIEVABLE TO ME. I SHOULD NOT HAVE TO SEARCH FOR IT, ASK SOMEBODY TO GO GET IT, IT SHOULD BE AVAILABLE TO ME. I THINK IT SHOULD HAVE BEEN AVAILABLE A LONG TIME AGO BUT THAT'S TO SAY THE LEAST. AND I RESERVE THE RIGHT TO AMEND THAT AS WE GO ON.

MS. DUARTE: YOUR HONOR.

THE COURT: YES.

MS. DUARTE: I GUESS I DIDN'T UNDERSTAND THAT, BUT --

THE COURT: NEITHER DID I.

MS. DUARTE: WOULD THE COURT LIKE ME JUST VERY QUICKLY TO GO THROUGH WHAT I'VE TURNED OVER? THIS IS STRICTLY --

THE COURT: I KNOW YOU'RE ANXIOUS TO DO THAT AND I TOLD YOU I WILL GIVE YOU THE CHANCE SO PLEASE BE PATIENT.

MS. DUARTE: I'M SORRY. ALL RIGHT. I APOLOGIZE.

THE COURT: ALL RIGHT. MR. REED, DID YOU REACH MR. NICOLAYSEN?

MR. REED: DIDN'T PERSONALLY BUT WE EXCHANGED VOICE MAIL MESSAGES AND I THINK I HAVE THE INFORMATION THAT THE COURT WANTED ME TO FIND OUT.

THE COURT: COULD YOU REPORT TO US PLEASE, THEN.

MR. REED: YES, YOUR HONOR. THE COURT WANTED TO FIND OUT THE HISTORY OF WHETHER EXPERTS WERE OBTAINED IN THIS CASE, AND MR. NICOLAYSEN INDICATED TO ME THAT HE DID MAKE CONTACT WITH A COMPANY IN THE BAY AREA. THE NAME OF THE COMPANY IS CALLED MOBILE --

THE COURT: YOU DON'T NECESSARILY HAVE TO TELL ME THAT NOW.

MR. REED: HE INDICATED THAT HE MADE CONTACT WITH AN EXPERT. THERE WAS LOGISTICAL PROBLEMS AS TO WHETHER OR NOT THESE EXPERTS COULD BE AVAILABLE DOWN HERE IN LOS ANGELES. THERE WERE PROBLEMS BACK AND FORTH BETWEEN MR. NICOLAYSEN AND THEIR AVAILABILITY TO DO THINGS; AND THEN EVENTUALLY, MR. NICOLAYSEN REPORTED THIS TO ME, HE INDICATED THAT THE GOVERNMENT TURNED OVER TO HIM A CD ROM ENTITLED "MYWEBS." LET ME GET THAT MORE ACCURATELY.

MYWEBS, W-E-B-S. AND THIS PARTICULAR CD ROM MR. NICOLAYSEN WAS UNDER THE IMPRESSION THAT IF CAPTURED, FOR THE GREAT PART, THE EVIL GX.COM WEBSITE, AND HE FELT THAT BECAUSE IT

DID CAPTURE IT, IT CAPTURED IT IN SUCH A WAY THAT HE COULD MANEUVER THROUGH IT FROM ONE HYPERLINK TO ANOTHER HYPERLINK, THAT HE WASN'T GOING TO NEED AN EXPERT IN THE CASE AND THAT'S BECAUSE OF A CERTAIN DEFENSE THAT HE HAD IN MIND, WHICH I PREFER TO KEEP SECRET AT THIS TIME.

THE COURT: YEAH. I DON'T WANT YOU TO GO INTO THAT.

MR. REED: AND THAT'S WHY I DIDN'T GO THROUGH WITH THE EXPERT --

THE COURT: THAT'S WHY WHAT?

MR. REED: THAT'S WHY HE DIDN'T GO THROUGH WITH ACTUALLY FOLLOWING THROUGH, GETTING THE EXPERTS, HAVING THEM COME TESTIFY; HE FELT THAT HE HAD SUFFICIENT INFORMATION WITH THAT CD ROM TO ACCOMPLISH WHAT HE NEEDED THROUGH CROSS-EXAMINATION OF WITNESSES AND THROUGH OTHER MEANS.

THE COURT: NOW, YOU TOLD ME BEFORE THE BREAK, I THINK, THAT THAT CD ROM, THE MYWEBS, IS SOMETHING THAT YOU PERSONALLY HAVE IN YOUR POSSESSION.

MR. REED: I DO. I HAVE IT RIGHT HERE.

THE COURT: TO YOUR KNOWLEDGE, DOES MR. SUTCLIFFE HAVE IT IN HIS POSSESSION?

MR. REED: I'M NOT SURE ABOUT THAT, YOUR HONOR. I HAVE IT AVAILABLE.

THE COURT: OKAY. GO AHEAD, MS. DUARTE, SINCE MAYBE IT'S GOING TO AFFECT SOME OF THE THINGS THAT I CHOOSE TO DO. IF YOU WANT TO, WITHOUT GETTING INTO EVERY SCRAP OF PAPER, JUST

ENLIGHTEN ME ABOUT WHAT IT IS THAT YOU THINK YOU'VE DONE TO FOSTER THE EXCHANGE OF INFORMATION NECESSARY TO ENABLE SOMEONE, WITH OR WITHOUT A LAWYER, TO DEFEND HIMSELF UNDER THESE CHARGES? WHAT HAVE YOU PRODUCED?

MS. DUARTE: WELL, YOUR HONOR, THIS IS JUST -- I WENT THROUGH AND DID A BRIEF CHRONOLOGY, IT'S VERY BRIEF, AS TO THE ELECTRONIC EVIDENCE, OKAY. AND I CAN DO THE REST IF YOU WANT AND I CAN FILE IT IN THE FORM OF A DECLARATION.

THE COURT: I THINK YOU SHOULD.

MS. DUARTE: ON JUNE 4TH, 2002, ACCORDING TO MY RECORDS, I TURNED OVER TO MS. POTASHNER AT THE FEDERAL DEFENDER'S OFFICE EIGHT CD'S. THEY WERE ENTITLED HOSTING SOLUTIONS, ABOVE INC., WEB GROUP, A SERIES OF PRESERVATIONS DATED OCTOBER 6TH, DECEMBER 7TH, DECEMBER 2ND, FEBRUARY 28TH, AND MARCH 5TH. THAT WAS A SINGLE CD. A PRESERVATION FOR MARCH 28TH, A CD ENTITLED GX BACKUP, A CD ENTITLED 12-12-01, AND A CD BY THE SHORT NAME OF PAUL CARPENTER.

NOW, THESE CD'S CONSISTED OF, AMONG OTHER THINGS, MULTIPLE DOWNLOADS OF THE EVIL GX WEBSITE FROM THE INTERNET IN AS COMPLETE A FORM AS POSSIBLY CAN BE CAPTURED ON THE DATES NOTED.

THE COURT: WHO HAD EXECUTED THOSE DOWNLOADS?

MS. DUARTE: THE F.B.I. AGENTS AND MEMBERS OF GLOBAL CROSSING AND THE BEVERLY HILLS POLICE DEPARTMENT.

THE COURT: OKAY. AND THAT WAS -- AND THE DOWNLOADS WERE RECORDED BY DATE SO THAT IT WAS THE VERSION OF THE WEBSITE THAT COULD BE ESTABLISHED AT LEAST ON SOME KIND OF IDENTIFYING TAG

ON THE DOWNLOAD.

MS. DUARTE: THAT IS CORRECT, YOUR HONOR. THE THREE THAT I MENTIONED, THE ONES FROM HOSTING SOLUTIONS, ABOVE INC., AND WEB GROUP, THOSE ARE ALL INTERNET SERVICE PROVIDERS, AND THOSE EITHER CONSISTED OF A COMPLETE DOWNLOAD OF THE WEBSITE FROM THE ACTUAL INTERNET SERVICE PROVIDER THAT HAD IT. I KNOW IN PARTICULAR THE ONES FROM HOSTING SOLUTIONS WAS PURSUANT TO A SEARCH WARRANT, WHICH I TURNED OVER.

THE COURT: I HAVE TO INTERRUPT YOU BECAUSE I'M NOT SURE HOW FAR DOWN THE ROAD YOU'RE GOING TO TAKE ME ON THIS. YOUR PURPOSE IS TO ESTABLISH WHAT THE GOVERNMENT DID IN GOOD FAITH THAT IS TO PROVIDE EVIDENCE AS IT'S REQUIRED TO MAYBE BEYOND WHAT IT'S REQUIRED TO DO TO SOME OF THE PRIOR LAWYERS IN THAT CASE, RIGHT?

MS. DUARTE: NOT JUST THAT, YOUR HONOR, BUT I THOUGHT IT WOULD AID IN OUR DISCUSSION OF THE VARIOUS TERMINOLOGY, FLOPPIES, CD'S, AND HARD DRIVES. IF I COULD AT LEAST GET TO THE POINT, LET THE COURT KNOW WHAT I TURNED OVER FROM DEFENDANT'S HARD DRIVE.

THE COURT: GO AHEAD.

MS. DUARTE: I WANT TO MAKE CLEAR THAT THESE EIGHT CD'S OUTSIDE FROM DEFENDANT'S COMPUTER EVIDENCE. ALL FROM INTERNET OR INTERNET HOST PROVIDERS.

THEN ON JULY THE 29TH, 2002, THIS IS WHEN I TURNED OVER TO THE FEDERAL DEFENDER'S OFFICE COPIES OF THE ENTIRE CONTENTS OF DEFENDANT'S COMPUTER THAT HAD BEEN SEIZED FROM HIS HOME. AND WHAT I TURNED OVER CONSISTED OF EIGHT I.D.E.'S, WHICH ARE A FORM OF

HARD DRIVE, I.D.E. DRIVES. IT'S IMPORTANT TO NOTE, YOUR HONOR, THAT TWO WERE DAMAGED AND TWO WERE BLANK. I WAS MERELY RETURNING THEM TO THE FEDERAL DEFENDER'S OFFICE. FOUR HAD DATA ON THEM FROM DEFENDANT'S COMPUTER. FOUR DIFFERENT I.D.E. HARD DRIVES AND TWO SCSI DRIVES KNOWN AS SCSI DRIVES. SO THAT'S A TOTAL OF SIX HARD DRIVES CONTAINING INFORMATION.

23 CD'S, FOUR ZIP DRIVES AND -- ZIP DISKS, EXCUSE ME. AND 29 FLOPPIES, FLOPPY DISKS. AND THAT WAS THE CONTENT OF THE DEFENDANT'S COMPUTER AT HOME ON JULY 29TH THAT I TURNED OVER.

THEN DURING THE REST OF THE INVESTIGATION AND THE CASE, AND I KNOW YOU DON'T WANT ME TO GO THROUGH THIS IN DETAIL RIGHT NOW, BUT I TURNED OVER AS I OBTAINED THEM, VARIOUS OTHER CD'S WHICH CONTAINED OTHER DOWNLOADS.

THE COURT: TO THE PUBLIC DEFENDER'S OFFICE OR OTHER COUNSEL?

MS. DUARTE: SO FAR THE PUBLIC DEFENDER'S OFFICE ON AUGUST THE 5TH, TWO CD'S AND AUGUST THE 9TH DUPLICATIVES. THEY APPARENTLY LOOKED AT THEM AND DETERMINED THAT THEY WERE FLAWED. THEY ASKED ME FOR DUPLICATES AND AUGUST THE 9TH I TURNED OVER DUPLICATES INCLUDING DUPLICATE OF THE BACKUP -- EXCUSE ME -- THE BACKUP OF THE WEBSITE MADE BY GLOBAL CROSSING WHICH WERE MULTIPLE, I CAN'T EVEN NAME ALL THE DATES, YOUR HONOR. THERE WERE AT LEAST -- I'D REPRESENT RIGHT NOW WITHOUT LOOKING, THERE WERE AT LEAST 20, 25 DIFFERENT DATES.

THE COURT: BACKUPS OF THE EVIL GX WEBSITE?

MS. DUARTE: YES. DOWNLOADED STRAIGHT FROM THE INTERNET BY GLOBAL CROSSING. THEN MR. HARRIS CAME IN. THERE WERE A COUPLE OF OTHER EVENTS BUT THEY'RE NOT SIGNIFICANT, YOUR HONOR. AND THEN MR. HARRIS CAME IN, AND I THINK THIS IS IMPORTANT BECAUSE THIS IS WHERE THIS PRIOR DEBATE ABOUT THE, QUOTE, UNQUOTE, MISSING CD STARTED. MR. HARRIS CAME IN ON OCTOBER 20TH, AND I RETURNED TO HIM ON THAT DATE 103 CD'S AND FLOPPIES. I HAVE A RECEIPT. I TOLD HIM THAT THESE WERE ORIGINAL EVIDENCE. THEY WERE SEIZED FROM DEFENDANT'S HOUSE BACK IN NEW HAMPSHIRE, AND WE HAD DETERMINED -- THEY DETERMINED THAT THE F.B.I., THAT THEY HAD NO EVIDENTIARY VALUE. I WAS NOT USING ANYTHING FROM THEM AND I WAS RETURNING THEM AS ORIGINAL EVIDENCE BACK TO HIM.

THE COURT: IN OTHER WORDS, WITHOUT EXPECTING IT TO BE PART OF YOUR EVIDENCE AT TRIAL?

MS. DUARTE: CORRECT.

THE COURT: DID YOU KEEP A COPY OF IT, OF THESE 103 CD'S.

MS. DUARTE: I DON'T HAVE A COPY. THE ONLY THING THAT MIGHT HAVE OCCURRED, ALTHOUGH I DON'T THINK IT DID. LET ME ASK THE CASE AGENT IF IT WAS IMAGED, YOUR HONOR? NO. IT WASN'T EVEN IMAGED BY THE F.B.I. BECAUSE IT WAS SO UNCLEAR IT DIDN'T HAVE EVIDENTIARY VALUE.

THE COURT: BASICALLY, YOU'RE SAYING WE TOOK THIS FROM THE COMPUTER, FROM THE THINGS THAT WE SEIZED WHEN WE CONDUCTED THE SEARCH AND WE DON'T NEED 'EM AND THEY'RE YOURS.

MS. DUARTE: TAKE 'EM BACK. THAT'S CORRECT, YOUR HONOR. AT THE SAME TIME, THERE WAS ALSO SOME DISCUSSION OF THE DOCUMENTARY EVIDENCE SEIZED AND THE P.D.'S OFFICE HAD GONE THROUGH IT.

THE COURT: OKAY. BUT YOU DIDN'T GIVE TO MR. HARRIS THE EIGHT CD'S AND OTHER MATERIAL THAT YOU TALKED TO ME ABOUT THAT YOU GAVE TO POTASHNER ON JUNE 4TH NOR THE CONTENTS OF HIS COMPUTER THAT YOU GAVE TO F.P.D. ON JULY 29TH.

MS. DUARTE: THAT'S CORRECT. I WAS NOT ASKED TO NOR DID I REDO THAT DISCOVERY.

THE COURT: OKAY. HAVE YOU EVER REDONE THE DISCOVERY?

MS. DUARTE: NO. AND I'VE NEVER BEEN ASKED TO. I'VE NEVER BEEN TOLD THERE WAS A PROBLEM.

THE COURT: SO YOU DIDN'T GIVE IT A NEW OR A SECOND TIME TO MR. NICOLAYSEN EITHER?

MS. DUARTE: NO. MR. NICOLAYSEN CAME ON AND BY THIS TIME I HAD TURNED OVER -- BY THE TIME MR. NICOLAYSEN CAME ON, I HAD TURNED OVER TO MR. HARRIS IN ADDITION TO WHAT I JUST SAID. ON NOVEMBER 22ND I HAD TURNED OVER SEVEN CD'S WHICH WERE PREPARED BY OUR EXPERT.

THE COURT: THIS IS TO MR. NICOLAYSEN?

MS. DUARTE: NO-NO-NO. THIS IS STILL MR. HARRIS, YOUR HONOR.

THE COURT: NOVEMBER 22ND OF 2002?

MS. DUARTE: THAT IS CORRECT, YOUR HONOR.

THE COURT: WHAT DID YOU GIVE HIM?

MS. DUARTE: SEVEN CD'S PREPARED BY THE EXPERT. NOW, THESE CD'S, AND AMONG THEM, I BELIEVE, YOUR HONOR, IT WAS MYWEBS, THE ONE THAT EVERYBODY HAS BEEN TALKING ABOUT. SO THAT WAS NOVEMBER 22ND. AND THESE CD'S CONTAINED COMPILATIONS THAT WERE CREATED BY THE EXPERT, MADE FROM THE EVIDENCE ALREADY TURNED OVER WHICH WAS A PART OF MR. SUTCLIFFE'S COMPUTER. SO WHAT MY EXPERT HAD DONE WAS GONE THROUGH ALL THOSE HARD DRIVES, FLOPPIES, THINGS I MENTIONED BEFORE THAT HAD BEEN TURNED OVER AND MADE A COMPILATION. MADE SEVEN CD'S THAT WERE COMPILATION THAT WE FELT WERE EVIDENTIARY VALUE BECAUSE THEY MIRRORED THE COUNTS IN THE INDICTMENT.

AND WE FOUND WEB PAGES ON HIS COMPUTER THAT DID THAT, SO WE COPIED THEM AND WE MADE THEM CD'S FOR LATER TO THE EXHIBITS.

THE COURT: BUT EVERYTHING THAT WERE ON THESE SEVEN CD'S -- WHEN YOU SAY THE EXPERT, YOU MEAN THE GOVERNMENT'S EXPERT.

MS. DUARTE: THE GOVERNMENT'S EXPERT.

THE COURT: EVERYTHING THAT HE DID IN THE WAY OF SYNTHESIZING FROM OTHER MATERIAL, IT WAS FROM OTHER MATERIAL THAT HAD BEEN PREVIOUSLY GIVEN TO ONE OF THE LAWYERS; RIGHT?

MS. DUARTE: THAT IS CORRECT. ON NOVEMBER 30TH I TURNED OVER THREE MORE CD'S, SAME THING. COMPILATIONS BY THE EXPERT THAT I INTEND TO POSSIBLY USE AS EVIDENCE AT TRIAL. THESE WERE ALSO EVIDENCE TURNED OVER. ON JANUARY 13, THE DAY BEFORE WE WERE SCHEDULED TO GO TO TRIAL IN HERE ON THE 14TH, I HAVE A LETTER FROM

MR. HARRIS WHERE I GAVE HIM TWO CD'S AND FIVE FLOPPIES, WHICH WERE THE GOVERNMENT'S TRIAL EXHIBITS, WHICH, AGAIN, WERE COMPILATIONS FROM THE DOWNLOADS I HAD ALREADY TURNED OVER. BUT I TOLD HIM THAT THESE HAD BEEN CREATED BY US SHOWING SPECIFIC WEB PAGES THAT MIRRORED THE COUNTS AND THIS IS WHAT WE WERE USING AT TRIAL, AND I GAVE HIM ADVANCE COPIES SO THAT IN THE EVENT THAT HE WANTED TO SHOW MORE THAN WE WERE SHOWING, WHICH I THOUGHT HE MIGHT, HE WOULD KNOW WHAT WE WERE SHOWING AND HE COULD DO IT.

THE COURT: WHAT DID HE TURN OVER ON NOVEMBER 30?

MS. DUARTE: NOVEMBER 30TH?

THE COURT: YEAH. YOU HAD MENTIONED THAT.

MS. DUARTE: THREE MORE CD'S OF THE SAME TYPE AS THOSE TURNED OVER ON NOVEMBER 22ND, AND THOSE WERE ALSO COMPILATIONS BY THE EXPERT FOR A TOTAL OF TEN I BELIEVE HE'S DONE TO DATE.

THE COURT: AND THAT WAS TO MR. HARRIS?

MS. DUARTE: THAT WAS TO MR. HARRIS, AND THAT WAS -- WE WERE GETTING READY FOR TRIAL AGAIN AND THE EXPERT HAD DONE MORE WORK AND HE HAD DONE A FEW MORE COMPILATIONS SO I TURNED THEM OVER. THE REPORT HAD BEEN TURNED OVER LONG BEFORE THAT BUT I'M ONLY TALKING ABOUT ELECTRONIC EVIDENCE.

THEN MR. NICOLAYSEN CAME ON AND ON JANUARY 28TH OF THIS YEAR I WROTE HIM A LETTER, AND I HAVE THAT, AND IN THAT LETTER I ENCLOSED HARD COPIES OF ALL PREVIOUS CORRESPONDENCE THAT HAD ANYTHING TO DO WITH DISCOVERY, INCLUDING THE LETTERS THAT I'VE BEEN QUOTING FOR THE COURT IN MAKING THIS REPRESENTATION. AND I

ASKED HIM TO GO THROUGH THEM. THIS IS WHAT HE SHOULD HAVE, PLEASE MAKE SURE THAT HE HAD IT.

THE COURT: IN OTHER WORDS, THEY ARE HARD COPIES OF ALL THE PREVIOUS CORRESPONDENCE, SO IT WAS A WAY OF GIVING HIM A WRITTEN INVENTORY OF WHAT HAD BEEN PREVIOUSLY PRODUCED TO OTHER LAWYERS.

MS. DUARTE: THAT IS CORRECT. AND I -- I MEAN, OBVIOUSLY, THIS ISN'T AN INQUIRY ABOUT MY CONDUCT AND I KNOW THAT, YOUR HONOR, BUT I'VE ALSO AS I'VE DONE WITH ALL ATTORNEYS I MADE MYSELF AVAILABLE FOR ADDITIONAL CONSULTATION BUT I THOUGHT THAT THAT WAS THE EASIEST WAY TO SHOW HIM WHAT HAD HAPPENED BECAUSE I KNEW THAT HE WAS STEPPING INTO A DIFFICULT CASE AT THIS POINT.

AND IN THAT LETTER, I ALSO TOLD HIM THAT MR. HARRIS AND I HAD HAD A MEET-AND-CONFER; THAT THE COURT HAD ORDERED WHEN MR. HARRIS WAS RELIEVED, THE ISSUE ABOUT THE MISSING -- AND I PUT THE TERM IN QUOTES, CD'S FROM BUREAU OF PRISONS HAD BEEN BROUGHT UP BY MR. SUTCLIFFE. SO MR. HARRIS AND I HAD A MEET AND CONFER ABOUT THE EVIDENCE THAT WAS TURNED OVER TO HIM AND WE HAD FIGURED OUT WHICH THREE CD'S, IF YOU WILL, HE SUPPOSEDLY NO LONGER HAD AND I LISTED THOSE FOR MR. NICOLAYSEN AND I TOLD HIM THAT THEY WERE FROM -- I'M SORRY.

THE COURT: GO AHEAD.

MS. DUARTE: THAT THEY WERE FROM THAT BATCH OF CD'S AND FLOPPIES THAT WE HAD EARLIER RETURNED DEEMING TO HAVE NO EVIDENTIARY VALUE WHATSOEVER. THEY WERE EITHER PROGRAMS, SOME

WERE GAMES, SOME WERE DAMAGED, AND THAT I DIDN'T CONSIDER THAT TO BE AN ISSUE BUT TO LET ME KNOW IF ANYBODY NEEDED ANYTHING ELSE.

THE COURT: IN OTHER WORDS, THOSE THREE SO-CALLED MISSING CD'S WERE SIMPLY FROM THE MATERIAL YOU WERE RETURNING TO HIM.

MS. DUARTE: TO THE BEST OF MR. HARRIS AND I'S DETERMINATION WHEN WE MEET, THAT'S TRUE. HE INFORMED ME WHAT NUMBERS WE WERE MISSING, I SHOWED HIM THE RECEIPT AND LOOKED UP THE NUMBERS AND FROM THAT I WAS ABLE TO ASCERTAIN WHAT WAS MISSING.

AND SINCE THEN, YOUR HONOR, I HAVE NOT CREATED ANY ADDITIONAL ELECTRONIC EVIDENCE, I HAVE NOT TURNED OVER ANY ADDITIONAL ELECTRONIC EVIDENCE, AND THAT'S A BRIEF CHRONOLOGY. AND THAT'S WHY SOMETIMES WHEN THE COURT IS TALKING ABOUT CD'S AND FLOPPIES AND HARD DRIVES, IT'S DIFFICULT BECAUSE WE DO HAVE SOME CD'S THAT ARE FROM THE HARD DRIVE WHICH IS WHAT WE CONSIDER TO HAVE EVIDENTIARY VALUE. WE TURNED OVER ALL OF IT LONG AGO FOR THE PURPOSE THAT DEFENSE COULD DO THE SAME -- OH, THE AUGUST CD, WHICH I ALREADY MENTIONED, YOUR HONOR. THE CD WHICH I SENT MR. SUTCLIFFE AT MDC LAST MONTH, I ALREADY BROUGHT THAT UP, YOUR HONOR, AND THAT JUST -- I SENT THAT OVER BECAUSE WE HAD CAPTURED IT OFF THE WEB AND I THOUGHT HE SHOULD HAVE A COPY BUT I'M NOT USING THAT. I JUST BECAME AWARE OF IT BEFORE WE COPIED IT. ASIDE FROM THAT, I HAVE NOT CREATED ANYMORE EXHIBITS OR TURNED ANYTHING ELSE OVER AND THAT'S WHY IT'S DIFFICULT SOMETIMES TO TALK ABOUT IT

BECAUSE THE HARD DRIVES WERE COPIED IN THEIR TRUE FORM, THEY WERE ALL TURNED OVER. AND SINCE THEN, OUR EXPERT HAS USED THEM AND MADE SOME CD'S OUT OF THEM BUT THE HARD DRIVES I'VE NEVER EVEN SEEN THEM SINCE. THIS IS NOT SOMETHING THAT WE WALK AROUND AND USE IN OUR COMPUTERS, WE ONLY USE THE CD'S AND FLOPPIES.

THE COURT: THANKS, VERY MUCH. I CAN SEE WHY YOU WANTED TO ARTICULATE THAT AND YOU'RE RIGHT. AT NO TIME HAD I EVER EVEN THOUGHT THAT THE GOVERNMENT OR YOU PERSONALLY DID ANYTHING INAPPROPRIATE OR UNETHICAL, NOT AT ALL. NOW, MR. REED, YOU JUST HEARD WHAT MS. DUARTE TOLD ME. HOW MUCH OF THAT MATERIAL THAT SHE JUST DESCRIBED DO YOU BELIEVE YOU HAVE IN YOUR PHYSICAL POSSESSION?

MR. REED: I HAVE NONE, YOUR HONOR. I JUST HAVE THE MYWEBS CD. THAT'S ALL I OBTAINED.

THE COURT: DO YOU KNOW WHERE IT IS NOW?

MR. REED: I DON'T, YOUR HONOR.

THE COURT: HOW MUCH OF THAT MATERIAL THAT MS. DUARTE JUST TOLD ME ABOUT, JUST THE MATERIAL THAT SHE DESCRIBED IN COURT, MR. SUTCLIFFE, DO YOU HAVE IN YOUR PHYSICAL POSSESSION?

MR. SUTCLIFFE: I HAVE THE MYWEBS CD WHICH I RECEIVED AT DEVENS. I'VE NEVER BEEN ABLE TO REVIEW AND I HAVE THE ONE SHE JUST SENT ME SHE'S SPEAKING ABOUT WHICH I RECEIVED SEVERAL DAYS AGO. THAT'S ALL I HAVE. I MIGHT HAVE ONE FLOPPY, EXCUSE ME. IT WAS SENT TO ME THE SAME TIME AS THE MYWEBS. I BELIEVE IT' DON'T KNOW. I DON'T RECALL IT. I THREW IT IN A FOLDER AN

THERE WITH MY WEB CD ROM EVER SINCE THEN.

THE COURT: SPEAK UP.

MR. SUTCLIFFE: I'VE NOT BEEN ABLE TO VIEW IT SO I REALLY DIDN'T CARE WHAT WAS ON IT.

THE COURT: ALL RIGHT. ONE REASON I TOOK THE BENCH THREE OR FOUR MINUTES LATE THIS AFTERNOON IS I WAS DRAFTING AN ORDER I WAS INTENDED AND TOLD YOU I WOULD ISSUE TO THE PRIOR LAWYERS IN THIS CASE, AND I'M GOING TO TAILOR THAT ORDER TO WHAT I BELIEVE AND NOW UNDERSTAND BASED UPON WHAT THE LAWYERS AND MR. SUTCLIFFE JUST TOLD ME. BECAUSE I AM UTTERLY ASTONISHED, BAFFLED, AND UPSET THAT DESPITE MY EFFORTS AND ORDERS THAT THE MATERIAL HAS NOT BEEN TRANSFERRED FROM ONE LAWYER TO THE SUCCESSIVE LAWYER AND IS NOT IN THE CURRENT POSSESSION OF THE STANDBY LAWYER OR THE DEFENDANT. I DON'T SEE HOW WE CAN PROCEED TO TRIAL, EVEN PUTTING ASIDE ISSUES OF WHO REPRESENTS MR. SUTCLIFFE UNDER THAT STATE OF AFFAIRS AND I DON'T INTEND TO DO SO.

WHAT IS THE CALCULATIONS ON THE SPEEDY TRIAL ACT THAT I ASKED TO YOU LOOK INTO?

MS. DUARTE: YOUR HONOR, WHEN I HAD DONE IT PREVIOUSLY, I HAD SAID THAT ACCORDING TO MY CALCULATIONS, THE LAST DAY THAT WE COULD START TRIAL WOULD BE OCTOBER 10TH. THAT HAS NOT CHANGED BECAUSE YOU DID NOT EXCLUDE TIME LAST TIME.

THE COURT: YEAH. MR. SUTCLIFFE DID NOT WAIVE TIME AND THAT WAS HIS RIGHT.

MS. DUARTE: RIGHT. SO JUST TO LET YOU KNOW, YOUR HONOR, I BELIEVE IT IS STILL THE SAME BECAUSE I HAD DONE IT OUT TILL OCTOBER 10TH.

THE COURT: OKAY. NOW, MR. SUTCLIFFE, THIS IS DIRECTED TO YOU.

MR. SUTCLIFFE: YES, SIR.

THE COURT: I ASKED YOU TO TAKE INTO ACCOUNT THE FEW COMMENTS I MADE ABOUT THIS ISSUE OF SELF-REPRESENTATION BEFORE WE HAD THE LUNCH BREAK.

MR. SUTCLIFFE: UH-HUH.

THE COURT: THE LAW IS PRETTY CLEAR, AND I DID NOT FOLLOW IT, AT LEAST IN SOME RESPECTS, I DIDN'T FOLLOW IT LITERALLY, CONCERNING THE NOTICE THAT A JUDGE IS REQUIRED TO GIVE AN INDIVIDUAL ABOUT ACTING IN HIS OWN DEFENSE. I ALREADY TOLD YOU MANY TIMES, AND I DON'T THINK WE HAVE TO CONTINUALLY BELABOR THIS, THAT I REALIZE YOU NEVER SAID TO ME I WANT TO BE MY OWN LAWYER, SO PLEASE UNDERSTAND THAT I'M NOT SITTING HERE THINKING YOU AFFIRMATIVELY EXPRESSED IN WORDS A DESIRE TO GO WITHOUT A LAWYER.

BUT I FOUND, FOR I THINK VERY AMPLE REASON, THAT YOUR CONDUCT AMOUNTED TO THAT CHOICE AND THAT YOU MADE THAT CHOICE FOR TACTICAL PURPOSES AND WILLINGLY.

HOWEVER, I ALSO THINK THAT THE PARAMOUNT OBLIGATION I HAVE IS TO FOLLOW THE LAW AND TO MAKE SURE THAT PEOPLE WHO COME TO TRIAL IN THIS COURT, NO MATTER WHAT KIND OF CASE, GET A FAIR TRIAL. SO I DO NOT INTEND TO HOLD YOU TO THAT FINDING OF WAIVER

UNLESS YOU NOW WANT TO EXPRESS A VIEW, A PREFERENCE, IN LIGHT OF ALL THE WARNINGS I'VE GIVEN YOU, INCLUDING RECENT ONES, INCLUDING ONES IN WRITING, AND ONES THAT I WILL SUPPLEMENT WITH BASICALLY REPEATED COMMENTS HERE IN COURT IN JUST A MINUTE.

IF YOU TELL ME YOU WANT TO BE YOUR OWN LAWYER AND YOU WANT TO GO TO TRIAL, THAT WILL BE YOUR CHOICE, ALTHOUGH I WILL GO THE EXTRA MILE FIGURATIVELY SPEAKING AND TELL YOU ABOUT SOME OF THE THINGS I'VE MORE THAN ONCE DISSEMINATED AND COMMUNICATED TO YOU IN WRITING JUST THIS WEEK.

THE BOTTOM LINE IS THAT I'M TELLING YOU THAT IF YOU WANT TO BE REPRESENTED BY COUNSEL, I WOULD HONOR THAT CHOICE, AND IF YOU WANT TO REPRESENT YOURSELF, I WOULD BE REQUIRED TO HONOR THAT CHOICE AND IT WOULD BE, I THINK, A VALID AND BINDING CHOICE, ALTHOUGH I WOULD GIVE YOU MORE TIME FOR THE TRIAL NO MATTER WHAT AND GO THROUGH THE ROUTINE OF TELLING YOU IN COURT WHAT YOU'VE NOW BEEN TOLD MANY TIMES IN WRITING. SO PLEASE TELL ME WHAT YOUR PREFERENCE IS.

MR. SUTCLIFFE: YOU ARE CORRECT THAT IT'S A NON SECULAR ISSUE, THAT YOU HAVE COUNSELED ME EXTENSIVELY ON THE DANGERS AND I PAID VERY CLOSE ATTENTION AND SAT UP WHEN YOU SAID YOU'D COME OFF THAT BENCH AND NOT BEAT ME IN THE HEAD AND KICK ME IN THE SHINS, SO I APPRECIATE THAT. I'M KIND OF CONFUSED THOUGH -- TO MAKE A CHOICE THE U.S. ATTORNEY HAS PROVIDED ME WITH A DOCUMENT, WHICH IS MARKED GOVERNMENT'S SPECIAL TRIAL MEMORANDUM, AND IT SPEAKS SPECIFICALLY OF BEHAVIOR, AND IN THERE IT SEEMS THAT I'M SUPPOSED

TO -- I'LL BE REMOVED IF I CONDUCT DISRUPTIVE BEHAVIOR; BUT ON PAGE FOUR OF THAT DOCUMENT IT SAYS THAT I MAY NOT INTERRUPT THE GOVERNMENT'S QUESTIONING OF WITNESSES EXCEPT TO RAISE AN OBJECTION. CORRECT ME IF I'M WRONG, BUT THAT'S WHAT GOT ME SENT OFF FOR TREATMENT, OBJECTING AND INTERRUPTING. BUT NOW I'M BEING DIRECTED TO DO THAT, SO I'VE NEVER WAIVED MY RIGHT TO ASSISTANCE OF COUNSEL. I'VE DEMANDED IT SINCE I'VE GOT HERE. I'M WHERE I AM.

THE COURT: WELL, THAT LAST SENTENCE DOESN'T MEAN ANYTHING CLEARER TO ME BECAUSE IT'S REMINISCENT OF OTHER KINDS OF ANSWERS YOU'VE GIVEN WHEN I'VE TRIED TO PIN YOU DOWN AS TO WHAT YOU WANT. BUT LET ME TRY TO EXPLAIN SOMETHING TO YOU ABOUT THE FIRST POINT YOU RAISED.

IT IS NOT CORRECT THAT YOU WOUND UP BEING SUBJECTED TO MORE THAN ONE EXAMINATION BECAUSE YOU INTERRUPTED THE GOVERNMENT LAWYER, AND IT'S NOT CORRECT THAT YOU DID THAT BECAUSE YOU INTERRUPTED ME MANY TIMES. TODAY YOU HAVEN'T AND I'M GRATEFUL THAT YOU HAVEN'T. I EXPECT THAT YOU WANT, AND IF YOU DO, YOU'LL PAY THE CONSEQUENCE. BUT IN ANY EVENT, WITHOUT GOING BACK INTO THOSE ISSUES BECAUSE THOSE ARE LONG SINCE RESOLVED, YOU'RE NOT CORRECT AS TO WHY THERE WERE SERIOUS QUESTIONS AS TO YOUR COMPETENCY THAT REQUIRED THESE EXAMINATIONS TO BE CONDUCTED. NOW, YOU'VE BEEN FOUND TO BE COMPETENT, I'VE ALWAYS KNOWN YOU'RE VERY SHARP. THAT'S NOT AN ISSUE THAT WE'RE HERE TO RECONSIDER. IN TERMS OF REPRESENTING YOURSELF AT TRIAL, YOU WOULD BE REQUIRED TO

FOLLOW THE SAME STANDARDS AND THE SAME REQUIREMENTS AS A LAWYER WOULD, AND ON THE QUESTION OF INTERRUPTION, YOU WOULD BE ENTITLED TO STAND UP, WHICH IS A PHYSICAL WAY OF SIGNALING TO ME YOU WANT TO VOICE AN OBJECTION. AND AT THE CONCLUSION OF THE QUESTION AND BEFORE ANY ANSWER IS BEGUN TO BE GIVEN TO SAY YOU OBJECT.

THERE WILL BE LIMITATIONS ON YOU LIKE THERE ARE ON EVERY LAWYER AS TO HOW YOU GO ABOUT DOING THAT. YOU CAN'T SIMPLY GIVE A LONG SPEECH AND POUND THE TABLE FIGURATIVELY OR LITERALLY ABOUT WHY IT'S UNFAIR FOR THAT QUESTION TO BE ASKED OR ANYTHING ABOUT THE MOTIVES OF THE QUESTION OR ANYTHING LIKE THAT. THAT'S WAY BEYOND BOUNDS. BUT YOU WOULD BE ENTITLED TO OBJECT AS LONG AS YOU FOLLOW THE RULES. I'M NOT GOING TO TELL YOU ALL THE RULES. MR. REED, IF HE FUNCTIONS EVEN IN THE CAPACITY ONLY OF STANDBY COUNSEL, CAN REVIEW SOME OF THOSE WITH YOU, BUT THOSE HAVE ALREADY BEEN ADVERTED TO, AT THE VERY LEAST IN SOME OF THE DISCLOSURES THAT I MADE TO YOU IN WRITING AND ORALLY.

NOW, THERE ARE FUNDAMENTAL CONCEPTS WHICH YOU'RE VERY SMART ENOUGH TO UNDERSTAND ABOUT A TRIAL, AND THAT IS THAT JURORS ARE TREATED WITH DIGNITY. THE PROCESS IS TREATED ~~WITH DIGNITY.~~ TANTRUMS ARE NOT TOLERATED. CIVILITY IS NECESSARY AND ~~RULES ARE FOLLOWED.~~

MR. SUTCLIFFE: BY EVERYBODY?

THE COURT: BY EVERYBODY. AND THAT INCLUDES THE JUDGE, AND I'M TRYING TO FOLLOW THEM RIGHT NOW BY GIVING YOU THIS SECOND OPPORTUNITY. YOU HAVE THE POWER AND -- YOU HAVE THE RIGHT TO

MAKE YOUR CHOICE. YOU NEED TO TELL ME WHAT YOUR CHOICE IS. IF YOU CHOOSE TO EXERCISE YOUR RIGHT TO SELF-REPRESENTATION, THAT WILL BE GRANTED, IT WILL BE HONORED. IF YOU CHOOSE TO HEDGE AND EQUIVOCATE, I'M NOT SURE WHAT I'LL DO. IF YOU CHOOSE TO SAY, YOU KNOW WHAT, I GOT A LOT AT STAKE HERE AND I HAVE FIGURED OUT A DEFENSE AND I DON'T KNOW WHICH ONE THAT MR. NICOLAYSEN THOUGHT MIGHT WORK, I DON'T KNOW WHAT MR. REED'S VIEWS ARE. I DON'T EXPECT HIM, AND HE'S NOT BEING ASKED TO ARTICULATE ANY. I CAN BEGIN TO SEE WHAT SOME OF YOURS ARE AND MAYBE THIS IS A VERY TRIABLE CASE, MAYBE YOUR -- MAYBE IN THIS CASE IS NOT AS FOREORDAINED OR CERTAIN AS SOME PEOPLE MIGHT THINK.

SO A PRUDENT THING TO DO FOR SOMEBODY IN YOUR SITUATION WOULD BE IS I'LL TAKE MY BEST SHOT AT IT. YOU CAN TAKE YOUR BEST SHOT AT BEING YOUR OWN LAWYER, IF YOU WANT, OR YOU CAN BE A LAWYER. BUT IF YOU DO THE SAME THING AGAIN, MR. SUTCLIFFE, OR THE SAME THING HAS BEEN ESTABLISHED ON FOUR DIFFERENT OCCASIONS WHERE YOU HAVE TRIED TO CONTROL AND DIRECT AND LIMIT THE LAWYER WHO HAS BEEN DOING HER BEST OR HIS BEST TO REPRESENT YOU AND HAVE INTERFERED WITH THE RIGHT AND THE NEED AND THE OBLIGATION AND THE DUTY OF THAT LAWYER TO EXERCISE INDEPENDENT JUDGMENT AND PROFESSIONAL CARE IN REPRESENTING YOU, AND IF AS HAPPENED FOUR PREVIOUS TIME -- AT LEAST -- I'M NOT SURE. IT'S FAIR TO SAY IT HAPPENED AD NAUSEAM. YOU TURN ON THE LAWYER AND YOU SUE THE LAWYER AND YOU REFUSE TO TALK TO THE LAWYER AND YOU THREATEN THE LAWYER, THEN THAT WILL BE A REINFORCED DEFINITIVE STATEMENT BY

CONDUCT ON YOUR PART THAT YOU DON'T WANT A LAWYER. IT WILL NOT BE A BASIS TO FIND YOU'RE INCOMPETENT. IT WILL BE A BASIS TO FIND THAT YOU MADE YOUR CHOICE AND YOUR CHOICE IS GO IT ALONE.

THOSE ARE THE ALTERNATIVES AVAILABLE TO YOU. RIGHT NOW I DON'T THINK THIS CASE IS READY FOR TRIAL AND MUCH OF THE REASON IS NOT IMMEDIATELY ATTRIBUTABLE TO YOU. SOME OF IT IS NOT ATTRIBUTABLE TO YOU AT ALL. ALL OF THIS MYSTERIOUS CONFUSION ABOUT WHAT HAPPENED TO THE EVIDENCE THAT THE GOVERNMENT LONG AGO DISCLOSED TO YOUR PRIOR LAWYERS WOULD NEVER HAVE ARISEN IF THERE NEVER HAD BEEN ALL OF THESE EFFORTS WHICH ARE TOTALLY INAPPROPRIATE OR OBSTRUCTIVE ON YOUR PART TO INTERFERE WITH THEIR WORK, BUT YOU'RE NOT RESPONSIBLE FOR THE FACT THAT ONE LAWYER DIDN'T TURN OVER TO THE NEXT LAWYER WHAT THAT LAWYER WAS ~~INSTRUCTED~~ TO TURN OVER BY ME AND AGREED TO TURN OVER. I'M GOING TO GET TO THE ROOT OF THIS ONE WAY OR ANOTHER BECAUSE IT'S ABSOLUTELY ~~UN~~ACCEPTABLE. MR. REED IS IN NO POSITION TO PROVIDE EVEN STAND BY POSITION THAT WOULD BE INFORMED IN TERMS OF THE EVIDENCE, IF NOT IN TERMS OF THE CONDUCT A LAWYER GOES THROUGH AND MANEUVERS AND STEPS AND STRATEGIES AND CONDUCT THAT A LAWYER DISPLAYS IN REPRESENTING A PERSON AT TRIAL BECAUSE HE DOESN'T EVEN HAVE THE EVIDENCE.

NOW, WE'RE NOT GOING TO GO TO TRIAL ON TUESDAY. IF YOU DON'T WAIVE ANY OF YOUR RIGHTS, WE'LL GO TO TRIAL A WEEK LATER AND I DON'T THINK THE SPEEDY TRIAL ACT WILL BE VIOLATED, BUT YOU HAVE TO TELL ME WHAT YOU WANT TO DO.

MR. SUTCLIFFE: IT'S PAINFUL OBVIOUS TO ME THAT THIS COURT IS -- THESE PEOPLE IN THIS COURT ARE DOING WHATEVER THEY WANT TO DO. NOBODY IS ASSISTING ME IN SQUAT, OKAY. COMMUNICATION IS A TWO-WAY STREET, YOUR HONOR. YOU'VE LAID AT MY FEET THE BLAME BY NOT COMMUNICATING AND THREATENING, AS YOU PUT IT, AND NOT SPEAKING TO THESE PEOPLE. WELL, THOSE ARE ASSUMPTIONS BECAUSE YOU'VE ONLY HEARD ONE SIDE TO THE STORY AND THERE'S TWO SIDES TO EVERY COIN. YOU REFUSE TO LISTEN TO MY SIDE OF THE STORY WHEN I BELIEVE YOU SHOULD HAVE BECAUSE I COULD HAVE BROUGHT TO THE LIGHT WHAT WAS GOING ON AND YOU COULD HAVE STOPPED IT, YOU HAD THE POWER TO STOP IT. YOU HAVE THAT POWER AND I RECOGNIZE THAT POWER. IT'S INHERENT IN THIS COURTROOM.

THE COURT: BUT LET THE RECORD REFLECT, MR. SUTCLIFFE, BECAUSE I'VE LOOKED AT THE TRANSCRIPT. I GAVE YOU THE RIGHT. I ALWAYS GIVE A PERSON A RIGHT WHEN A PERSON TELLS ME HE OR SHE IS MOVING TO WITHDRAW. YOU HAD AN OPPORTUNITY TO EXPLAIN YOUR PERCEPTION, YOUR MEMORY, OR YOUR VERSION OF WHAT HAS GONE ON. THE RECORD WILL REFLECT WHAT IT WILL. I DON'T DOUBT FOR A MINUTE, AND I UNDERSTAND WHY YOU FEEL AGGRIEVED. PROBABLY EVERYONE ELSE IN THE COURTROOM MAYBE, ESPECIALLY ME, BUT YOU STILL HAVE TO UNDERSTAND THAT THE DECISION THAT YOU NEED TO MAKE, NOT NECESSARILY AT THIS PRECISE MINUTE BECAUSE I WILL GIVE YOU AN OPPORTUNITY THIS AFTERNOON TO THINK ABOUT IT, TO TALK TO MR. REED, IF YOU WANTED TO, IS WHETHER YOU WANT TO REPRESENT YOURSELF OR NOT.

MR. SUTCLIFFE: I THINK I'VE MADE A VERY KNOWINGLY AND INTELLIGENT CHOICE FROM DAY ONE, FROM THE TIME YOU TOLD ME YOU'D COME OFF THAT BENCH AND POP ME UPSIDE THE HEAD. I DON'T WANT TO BE MY OWN LAWYER. I'M NOT SKILLED TO BE MY OWN COUNSEL. I'M NOT A TRAINED DOCTOR JURIST, DOCTORATE. MAYBE I CAN HANDLE A PARKING TICKET BUT THAT'S ABOUT IT. NO. I DON'T WANT TO FACE THE GOVERNMENT, UNITED STATES OF AMERICA BY MYSELF. NO. I'VE NEVER WAIVED COUNSEL. I'D BE A FOOL. YOU SHOULD SEND ME TO DEVENS IF I DID. NO, SIR. AND I DON'T WAIVE MY SPEEDY TRIAL. I WANT MY TRIAL TO START TUESDAY. I WANT THIS NIGHTMARE OVER WITH, YOUR HONOR. I WANT MY DAY IN COURT. I BELIEVE I HAVE MY RIGHT TO MY DAY IN COURT. THEY'RE READY TO GO. LET'S GO. LET'S GET THIS DOG AND PONY SHOW OVER WITH OR ON WITH OR HOWEVER WE DO IT, PLEASE. I WANT MY DAY IN COURT, THAT'S ALL I WANT.

THE COURT: YOU'LL HAVE YOUR DAY IN COURT.

MR. SUTCLIFFE: NEXT TUESDAY.

THE COURT: MR. REED, YOU'VE HEARD WHAT THE PROSECUTOR SAID ABOUT THIS ARRAY OF EVIDENCE. NOW, IT'S GOING TO TAKE ME MORE THAN A FEW DAYS, I ASSUME, TO TRACK DOWN WHERE IT IS AND WHY IT'S WHERE IT IS, WHEREVER IT IS. AND IT'S REALLY A QUESTION OF WHY IT'S NOT WITH YOU AND/OR WITH MR. SUTCLIFFE. HOW LONG WOULD IT TAKE YOU TO PUT IN MR. SUTCLIFFE'S AND IN MR. REED'S HANDS WHAT I THINK IS THE KEY AND RELEVANT AND APPROPRIATE ARRAY OF EVIDENCE? AND IF I FOLLOW WHAT YOU'VE TOLD ME, THAT WOULD CONSIST OF EIGHT CD'S OR SO THAT WERE TURNED OVER ON JUNE 4TH OF 200

EIGHT I.D.E. ITEMS, TWO OF WHICH WERE REALLY INOPERATIVE BUT SIX IN TWO DIFFERENT CATEGORIES CONTAIN EVIDENCE AND THE ZIP DISKS AND THE FLOPPIES AS WELL THAT YOU TURNED OVER ON JULY 29TH OF 2002.

THE DUPLICATES OF THE BACKUP OF THE EVIL GX THAT GLOBAL CROSSING TURNED OVER TO YOU THAT WERE MADE AVAILABLE TO THE FEDERAL PUBLIC DEFENDER, AND THE TWO CD'S ON AUGUST 5TH OF 2002. NOT -- YOU DON'T EVEN HAVE ANY MORE OF THE MATERIAL THAT WAS GIVEN TO HARRIS ON OCTOBER 20TH, THAT WOULDN'T BE PART OF IT. THE 70 CD'S THAT YOU TURNED OVER TO HARRIS ON NOVEMBER 22ND WHICH ARE PART OF THE GOVERNMENT'S EXHIBITS.

AND IF THERE WERE THREE SUPPLEMENTAL ONES THAT YOU TURNED OVER TO HIM EIGHT DAYS LATER, NOVEMBER 30TH, THOSE AS WELL. THE TRIAL EXHIBITS, TWO CD'S, AND THE FIVE FLOPPIES THAT YOU TURNED OVER THE DAY BEFORE THE SCHEDULED JANUARY 14TH.

AND THAT'S IT.

MS. DUARTE: YOUR HONOR, THE PROBLEM, AND THE REASON WE'RE DISCUSSING IT AT THE TABLE, ABSENT THE HARD DRIVES WHICH ARE THE I.D.E.'S AND THE SCUZZIES, ABSENT THE HARD DRIVES, IT'S HARD TO SAY. JUST WITH CD'S AND FLOPPIES IT'S A LOT OF MEDIA. IF WE CAN GET EVERYBODY WORKING ON IT, IT WOULD PROBABLY TAKE AT LEAST A WEEK GIVEN THAT IT'S FRIDAY. IT WOULD BE THE END OF NEXT WEEK I WOULD IMAGINE, BECAUSE WE HAVE TO GET -- WE DON'T JUST HAVE BIG STORES OF THE MEDIA WE'D HAVE TO GET ALL THE BLANKS AND THEN COPY THEM ALL INDIVIDUALLY. THE HARD DRIVES MIGHT EVEN TAKE A LITTLE BIT LONGER THAN THAT BECAUSE THE F.B.I. ALSO DOESN'T KEEP THE H

DRIVES THAT WE CAN USE TO MAKE COPIES SO WE HAVE TO GET THEM, BRING THEM IN, COPY, BRING THEM OUT.

THE COURT: YOU KNOW, I HAVE A HIGH LEVEL OF CONFIDENCE, AND I'M NOT SAYING THIS IN A SMUG OR SARCASTIC WAY, THAT WITH YOUR RESOURCEFULNESS, WHICH I THINK IS CONSIDERABLE, AND THE RESOURCES AVAILABLE TO YOUR OFFICE, YOU COULD ACCELERATE THAT PROCESS BY SEVERAL DAYS OR PARTS OF IT; AND NOT EVERYTHING ELSE HAS TO WAIT UNTIL EVERYTHING ELSE IS COMPLETED.

THIS IS AN UNUSUAL CASE AND A LOT OF THE DIFFICULTIES IN THIS CASE, INCLUDING THE NUISANCE TO YOU AND YOUR COLLEAGUES OF NOT BEING SURE WHEN YOU'RE GOING TO TRIAL, IF THAT'S IN THE BACK OF YOUR MIND, ARE NOT YOUR FAULT. BUT THE FACT IS THE RIGHT THING HAS GOT TO BE DONE.

MS. DUARTE: I UNDERSTAND, YOUR HONOR, AND I'M NOT --

THE COURT: IT'S NOT IN ANY SIDE'S INTEREST TO RACE TO TRIAL BEFORE THE GUN IS ACTUALLY SHOT WHEN THERE'S GOING TO BE ERROR BUILT INTO THE PROCESS.

MS. DUARTE: WELL, I AGREE WITH THAT AND I'M NOT ASKING TO RACE TO TRIAL. AS A MATTER OF FACT, GIVEN THE SITUATION, IF MR. SUTCLIFFE OR THE COURT WERE GOING TO CONTINUE THE TRIAL AND EXCLUDE SPEEDY TRIAL TIME, WE WOULD AGREE TO THAT BECAUSE I DON'T REALLY KNOW AS I EXPRESSED TO THE COURT EXACTLY WHAT'S GONE ON.

THE COURT: YOU'RE INVITED TO FILE A MEMORANDUM AS TO GROUNDS AND AUTHORIZATION, IF THEY EXIST, AND I DON'T KNOW IF THEY EXIST, UNDER THESE CIRCUMSTANCES OR TAILORED CIRCUMSTANCES LIKE

THIS, EVEN AGAINST THE DEFENDANT'S WISHES. THAT WOULD BE A LAWFUL THING FOR ME TO DO. I DON'T HAVE A VIEW ONE WAY OR THE OTHER.

MS. DUARTE: I DON'T KNOW EITHER, YOUR HONOR, AND I WILL DO SOME RESEARCH ON IT. I DO WANT TO -- LET ME ADD ONE MORE COMMENT TO THE COPYING SITUATION, AND THEN I JUST WANT TO ADDRESS ONE OTHER THING. IN TERMS OF THE COPYING, I APPRECIATE THAT THE COURT THINKS THAT I'M RESOURCEFUL AND I CERTAINLY WOULD TRY. I'LL MAKE THAT REPRESENTATION THAT I WILL TRY AS HARD AS I CAN. NOT JUST UP TO ME AND NOT UP TO THE PEOPLE THAT I'M ASKING TO DO IT. IT'S ACTUALLY A HARDWARE LIMITATION.

THE COURT: HOLD ON FOR A SECOND, MR. SUTCLIFFE, IS THERE ANY ASSISTANCE THAT THE CLERK OF THE COURT COULD PROVIDE?

MR. SETTLE: YEAH. I BELIEVE WE COULD HAVE ASSISTANCE FOR HER, YOUR HONOR.

THE COURT: THAT WOULD ENABLE THESE HARD DRIVES, FOR EXAMPLE, TO BE DUPLICATED?

MS. DUARTE: YES.

THE COURT: MR. SETTLE.

MR. SETTLE: WE COULD PROVIDE SOME LEVEL OF ASSISTANCE, BUT I DON'T KNOW THAT WE COULD DO ALL OF IT FOR THEM. I WOULD HAVE TO CONFER TO THE CLERK OF THE COURT.

MS. DUARTE: THE PROBLEM WITH RELEASING THE HARD DRIVES, YOUR HONOR, IS CHAIN OF CUSTODY PROBLEM.

THE COURT: OH, THOSE COULD BE --

MS. DUARTE: WOULD THE COURT GIVE ME JUST A SECOND

YOUR HONOR, THERE'S A POSSIBILITY THAT I'D HAVE TO EXPLORE THAT IF THE COURT WANTED SOMETHING QUICKER, WE COULD ACTUALLY TRY TO GET A COPY FROM THE GOVERNMENT'S EXPERT WHO HAS PROVIDED COPIES OF WHAT HE'S DONE, PROBABLY QUICKER THAN WE CAN GET IT FROM THE F.B.I. AND THEN WE COULD FOLLOW UP WITH ACTUAL EVIDENTIARY SECURE COPIES STRAIGHT FROM THE F.B.I. BUT I CAN TELL, YOUR HONOR, THAT TO GET THE F.B.I. TO RELEASE EVIDENCE FOR COPYING HERE, THAT -- PLEASE DON'T MAKE ME TRY TO DO THAT, YOUR HONOR.

WHAT I CAN DO IS SPEED THAT UP ALONG AS MUCH AS POSSIBLE WITHIN THE CONSTRAINTS, AND I CAN GET THE ENCASE CASE COPIES, THAT'S A COPYING TOOL, YOUR HONOR, CAPTURE TOOL, THAT MY EXPERT MADE SO THAT AT LEAST THEY CAN KNOW WHAT'S ON IT. I CAN DO THAT. AND EVERYTHING BUT THE HARD DRIVES IS GOING TO TAKE A LONG TIME TO LOOK THROUGH, YOUR HONOR. I MEAN, IT'S GOING TO TAKE A LONG --

THE COURT: WELL, I KNOW IT'S NOT UNCOMMON FOR LAWYERS TO EXERCISE JUDGMENT AND CLIENTS TO EXERCISE JUDGMENT AS TO HOW FAR THEY START AND HOW FAR THEY GO AND WHAT'S RELEVANT AND WHAT ISN'T. IT'S PRETTY CLEAR FROM YOUR COMMENTS TODAY I'M CERTAIN BOTH TO MR. SUTCLIFFE AND TO MR. REED, AND I'LL DISCUSS WITH MR. REED WHERE HE STANDS SHORTLY, WHAT IS REALLY -- WHAT REALLY MATTERS HERE. I MEAN, I'M TRYING TO BE VERY EXPANSIVE IN LOOKING OUT FOR THE INTEREST OF THE DEFENDANT, BUT NOT ALL THIS STUFF IS GOING TO HAVE ANY BEARING WHATSOEVER ON HIS FUNDAMENTAL RIGHTS. HIS FUNDAMENTAL RIGHTS ARE GOING TO BE PROTECTED, BUT NOT ALL -- THIS IS AT ISSUE.

NOW, I'M GOING TO SPEAK IN TERMS OF AN ORDER, MR. SETTLE, BUT I RESPECT YOU A LOT AND THE EXECUTIVE FOR WHOM YOU WORK SO IT'S NOT MEANT TO BE CONFRONTATIONAL, BUT I AM ORDERING THE CLERK ORALLY TO PROVIDE MAXIMUM FEASIBLE ASSISTANCE TO THE U.S. ATTORNEY'S OFFICE TO DUPLICATE AS MUCH OF THE EVIDENCE THAT HAS NOW BEEN CHRONICLED AND NOT IN THE CURRENT POSSESSION OF EITHER MR. REED OR MR. SUTCLIFFE AS QUICKLY AS POSSIBLE. AND I'LL JUST LEAVE IT TO THE CLERK'S OFFICE AND TO THE U.S. ATTORNEY'S OFFICE TO FIGURE OUT WHAT'S DOABLE.

AND I'M ORDERING THE U.S. ATTORNEY TO PURSUE EVERY POSSIBLE MEANS, INCLUDING CONTACTING THE EXPERT TO HAVE ANOTHER COPY MADE OF WHATEVER THE EXPERT HAS.

NOW, MR. REED, I DON'T KNOW WHETHER CONSISTENT WITH THE LAW AND THE APPLICATION OF THE SPEEDY TRIAL ACT THAT THE RIGHTS OF A DEFENDANT WOULD BE PROTECTED IF A JURY WERE IMPANELED AND THE ACTUAL PROSECUTION OF THE CASE, THE OPENING STATEMENTS, AND THE SUBMISSION OF EVIDENCE WERE TO FOLLOW AT SOME RELATIVELY BRIEF INTERVAL AFTER THAT. YOU ARE SITTING HERE WITH A UNDERSTANDABLE WORRIED LOOK, IF NOT A SCOWL ON YOUR FACE, AND I UNDERSTAND WHY AND I'M CONCERNED ABOUT THAT. BUT YOU NEED TO TELL ME, PLEASE, WHAT YOUR SCHEDULE IS.

MR. REED: OBVIOUSLY, I'M FREE NEXT WEEK. I'M ACTUALLY FREE THE FOLLOWING WEEK, YOUR HONOR, AND I AM FREE THE FOLLOWING WEEK, OCTOBER 14TH. I HAVE NO TRIALS. I'M ALSO FREE OCTOBER 21ST, THAT WEEK. I'M PRETTY FREE THE ENTIRE MONTH OF OCTOBER

YOUR HONOR.

THE COURT: WELL, IF, MR. REED, I MAKE A FINDING THIS AFTERNOON THAT BECAUSE OF MY NEGLECT TO GO THROUGH, TO CROSS EVERY T AND EVERY I THAT I THOUGHT HAD BEEN ADEQUATELY COVERED -- BECAUSE THE MESSAGE CLEARLY GOT THROUGH TO MR. SUTCLIFFE, HE'S CONFIRMED THAT YET AGAIN TWICE TODAY THAT I CONSISTENTLY TOLD HIM IT WAS NOT IN HIS INTEREST TO, BY CONDUCT OR OTHERWISE, GO IT ALONE AND WAIVE HIS RIGHT TO A LAWYER; BUT I DON'T THINK UNDER THE CURRENT RECORD IT WOULD BE FAIR TO HIM OR CONSISTENT WITH THE 9TH CIRCUIT'S REQUIREMENTS TO PROCEED WITH THE FINDING I MADE, BECAUSE THAT FINDING CAME AFTER PLENTY OF WARNINGS BUT IT DIDN'T COME AFTER A RECITAL OF THE ELEMENTS OF THE CASE AND THE POSSIBLE PENALTIES, THAT WAS WHERE I ERRED.

SO I AM, IN LIGHT OF MR. SUTCLIFFE'S STATEMENTS TO ME THIS AFTERNOON, POISED TO APPOINT YOU AS COUNSEL, NOT AS BACKUP COUNSEL. AND I WANT YOU TO BE ABLE TO DO YOUR JOB AND CONSISTENTLY PROFESSIONAL AND, FROM MY EXPERIENCE, EXCELLENT FASHION YOU DO IT AND I DON'T DOUBT FOR A SECOND THAT A LAWYER NEEDS TIME TO PREPARE.

YES, MR. SUTCLIFFE.

MR. SUTCLIFFE: I WILL OBJECT TO THAT.

THE COURT: WHY?

MR. SUTCLIFFE: BECAUSE THIS MAN HAS JUST ADMITTED THAT HE HAS NOT SEEN THE EVIDENCE, HE HAS NOT BEEN PROVIDED WITH THE EVIDENCE. THE LEAST THAT YOU'VE GIVEN THE PREVIOUS LAWYERS WAS

THREE MONTHS. YOU SAID IN THE TRANSCRIPT OF JANUARY 17TH -- EXCUSE ME ONE SECOND TO FIND IT -- MRS. DUARTE POINTED IT OUT IN HER REQUEST THAT HE BE APPOINTED -- GIVE ME ONE SECOND TO FIND THE PAGE, YOUR HONOR.

YES. HERE IT IS. JANUARY 14TH, REPORTER'S TRANSCRIPT, PAGE 18. YOU DON'T THINK YOU HAVE THE ABILITY TO DEFEND YOURSELF AGAINST THE UNITED STATES OF AMERICA AND YOU'RE RIGHT ABOUT THAT, I AGREE WITH YOU 100 PERCENT. THAT MEANS IF YOU DON'T DEFEND YOURSELF WHICH IN PRINCIPLE WOULD BE YOUR RIGHT. IT WOULD BE CRAZY TO DO IT BUT IT WOULD BE YOUR RIGHT AND YOU'RE GOING TO HAVE ANOTHER LAWYER. THAT LAWYER IS GOING TO HAVE TO GO THROUGH THE SAME LEARNING CURVE THAT ALL PREVIOUS LAWYERS WENT THROUGH. IN HER MEMORANDUM OF POINTS AND AUTHORITY, SHE STOPS THERE. WHERE IF WE GO TO THE ORIGINAL TRANSCRIPT ON PAGE 18 IT SAYS THERE'S GOING TO BE A LONG DELAY. I OBJECT TO ANY LONG DELAYS. I THINK 18 MONTHS IS A EXTREMELY LONG DELAY BASED ON THE NATURE OF THIS CASE, AND I WOULD OBJECT STRONGLY TO THAT --

THE COURT: THERE ARE TWO DIFFERENT OBJECTIONS YOU SEEM TO BE MAKING. ONE IS TO DELAY, WHICH IS ONE THING, AND THE SECOND IS TO APPOINT OF A LAWYER. NOW, LET'S DEAL WITH THE SECOND FIRST.

MR. SUTCLIFFE: OKAY.

THE COURT: ARE YOU OBJECTING TO THE APPOINTMENT OF A LAWYER, YES OR NO? PUT ASIDE THE ISSUE OF DELAY FOR A SECOND.

MR. SUTCLIFFE: I'M OBJECTING TO HAVING TO MAKE THIS CHOICE. I'M OBJECTING TO --

THE COURT: MR. SUTCLIFFE, PLEASE ANSWER THE QUESTION OR ELSE YOU'LL LEAVE ME NO CHOICE BUT TO FIND THAT BY REFUSING TO ANSWER THE QUESTION YOU'RE PLAYING A CAGEY GAME.

MR. SUTCLIFFE: NO. I WOULD SUGGEST THAT YOU'RE PLAYING A CAGEY GAME.

THE COURT: NOW, THE QUESTION THAT I'LL GIVE YOU AN OPPORTUNITY ONE MORE TIME TO ANSWER IS: DO YOU OBJECT TO HAVING A LAWYER REPRESENT YOU?

MR. SUTCLIFFE: I'LL STAND ON MY FERETTA RIGHTS.

THE COURT: WELL, YOUR FERETTA RIGHTS ARE TO HAVE NO LAWYER. IS THAT A WAY OF YOU TELLING ME THAT --

MR. SUTCLIFFE: NO. MY FERETTA RIGHTS ARE -- WELL, LET'S LOOK AT FERETTA AND LET'S READ FERETTA.

THE COURT: WE'RE NOT GOING TO SIT HERE AND READ FERETTA, AND, MR. SUTCLIFFE, WE'RE NOT GOING TO DEBATE THE LAW. THAT'S ONE THING THAT YOU'RE NEVER GOING TO ARRANGE TO DO IN ANY COURT, INCLUDING THIS ONE. THE QUESTION IS PRETTY STRAIGHTFORWARD. ASSUMING FOR A MOMENT THAT YOUR RIGHTS TO HAVE A LAWYER REPRESENT YOU HAVE ENOUGH TIME TO GET UP TO SPEED TO REPRESENT YOU EFFECTIVELY COULD BE CREATED, DO YOU WANT A LAWYER, YES OR NO?

MR. SUTCLIFFE: I DON'T UNDERSTAND YOUR QUESTION. IF YOU'RE ASKING ME: DO I WANT THE ASSISTANCE OF COUNSEL, WHICH IS GUARANTEED TO ME BY THE 6TH AMENDMENT, YOU BET. I'VE ALWAYS WANTED THAT AND I'VE ALWAYS TOLD YOU THAT. DO I WANT SOMEONE TO

REPRESENT ME? NO. ONLY THE ACCUSED WILL SPEAK FOR THE ACCUSED, AS I CITED IN FERETTA, AND TOLD YOU ON JANUARY 14TH.

THE COURT: WELL, A LAWYER WOULD BE THE ONLY ONE SPEAKING FOR YOU. IF YOU'RE TELLING ME THAT YOU WANT YOUR 6TH AMENDMENT RIGHTS PROTECTED AND THE LAWYER IS NOT GOING TO DO ANYTHING OR ONLY DO WHAT YOU ALLOW HIM TO DO, THEN MAKE THAT CLEAR RIGHT NOW.

MR. SUTCLIFFE: WELL --

THE COURT: YOU HAVE A LAWYER, MR. SUTCLIFFE, YOU DON'T QUESTION THE WITNESSES, YOU DON'T ADDRESS THAT JURY.

MR. SUTCLIFFE: WHERE IS THAT WRITTEN IN THE CONSTITUTION? I CAN'T FIND THAT ANYWHERE, YOUR HONOR.

THE COURT: WELL, YOU MAY HAVE TO LOOK IN A DIFFERENT PLACE, MR. SUTCLIFFE. I'M NOT GOING TO DEBATE THAT. IF YOU HAVE A LAWYER, THE LAWYER ACTS AS THE LAWYER AND YOU SIT THERE AND ACT AS A CLIENT.

MR. SUTCLIFFE: THAT'S REPRESENTATIVE. THAT'S WHAT YOU'RE SPEAKING OF.

THE COURT: PARDON ME?

MR. SUTCLIFFE: YOU'RE SPEAKING OF A REPRESENTATIVE, SOMEONE WHO REPRESENTS ME? IS THAT WHAT YOU'RE REFLECTING?

THE COURT: YEAH. THAT'S WHAT I'M SPEAKING OF.

MR. SUTCLIFFE: I'M ASKING FOR ASSISTANCE OF COUNSEL. FERETTA CLEARLY DISTINGUISHES DIFFERENTLY. YOU GAVE ME A MOUSE ALREADY. HE THREATENED ME. MR. NICOLAYSEN WAS YOUR

REPRESENTATIVE.

THE COURT: MR. SUTCLIFFE, IF I APPOINT MR. REED, ARE YOU GOING TO INTERFERE WITH HIS AUTHORITY AND DUTY TO DELIVER AN OPENING STATEMENT? YES OR NO?

MR. SUTCLIFFE: I'VE NEVER INTERFERED WITH ANY LAWYER -- IN ANSWER TO YOUR QUESTION --

THE COURT: TELL ME WHAT YOU'RE GOING TO DO IF I APPOINT MR. REED.

MR. SUTCLIFFE: I CAN'T STOP YOU FROM DOING ANYTHING YOU WANT TO DO. YOU'RE OBVIOUSLY GOING TO DO WHATEVER YOU WANT TO DO SO WHY AM I BEING ASKED? I DON'T UNDERSTAND WHY YOU'RE EVEN ASKING ME, YOUR HONOR. IF YOU'RE GOING TO DO IT, DO IT.

THE COURT: OKAY. I THINK THE RECORD WILL BE PRETTY CLEAR.

MR. SUTCLIFFE: YOU MADE HIM MY OWN LAWYER ON THE 27TH AND NOW YOU'RE TELLING ME I HAVE TO CHOOSE DO I WANT A LAWYER. THAT MAKES ABSOLUTELY NO SENSE TO ME AT ALL. YOU MADE HIM MY LAWYER. OKAY. I SPEAK FOR MYSELF NOW. YOU MADE ME. YOU'VE MADE THIS ANIMAL. I'LL STAY WITH SPEAKING FOR MYSELF. YOU ORDERED ME.

THE COURT: OKAY. I'M GOING TO MAKE SOME FINDINGS ON THE RECORD, AND THE FINDINGS ARE DESPITE MY BEST EFFORT, ALTHOUGH I'VE BEEN CONTRACTED FOR MORE TIME THAN ALREADY HAS BEEN CONSUMED, I CAN'T GET A DIRECT AND RESPONSIVE ANSWER FROM MR. SUTCLIFFE AS TO HIS CHOICE AS TO REPRESENTING HIMSELF OR REPRESENTING A LAWYER -- OR BEING REPRESENTED BY A LAWYER AND THERE APPEARS TO BE A VIEW

THAT MR. SUTCLIFFE HAS AS TO WHAT THE ROLE OF A LAWYER IS THAT DESPITE MANY EFFORTS TO, SOMETIMES OUTSIDE THE PRESENCE OF THE PROSECUTOR, DEMONSTRATE WHAT THE PROPER ROLE AND NECESSARY AUTHORITY OF A LAWYER IS, I DON'T SEEM TO HAVE SUCCEEDED IN GETTING HIM TO UNDERSTAND.

NEVERTHELESS, MY FINDING IS THAT ON THE BASIS OF THE RECORD COMING INTO THE COURTROOM TODAY AND MR. SUTCLIFFE'S GUARDED, MANIPULATIVE, CAGEY BUT SELF-INTERESTED STATEMENTS THAT HE WANTS TO HAVE A LAWYER AND HE WOULD BE CRAZY NOT TO HAVE A LAWYER, PRUDENT SUGGEST THAT I APPOINT MR. REED, AT LEAST FOR THE TIME BEING AND WITH THE HOPE AND THE INTENTION THAT IT WOULD BE FOR THE CONCLUSION AND DURATION OF THIS CASE, AS THE LAWYER FOR MR. SUTCLIFFE. AND THAT'S MY FINDING AND THAT'S MY RULING.

IF MR. SUTCLIFFE ENGAGES IN CONDUCT THAT MR. REED CONCLUDED AND DEMONSTRATED IN ANY HEARING THAT MIGHT HAVE TO BE UNDERTAKEN IN THE COURT WOULD INTERFERE WITH HIS ABILITY TO CARRY OUT HIS PROFESSIONAL DUTIES THE WAY A LAWYER IS UNDERSTOOD AND ENTITLED TO CARRY THEM OUT, THEN I WOULD HAVE TO RELIEVE MR. REED OF THAT RESPONSIBILITY. I HOPE IT DOESN'T COME TO THAT. IF IT EVER COMES TO THAT, MR. SUTCLIFFE WILL BE GIVEN AN OPPORTUNITY, AS HE ALWAYS HAS BEEN, TO STEP FORTH ON THE RECORD HIS VIEWS AS TO THE ROLE AND THE PERFORMANCE OF MR. REED AND HIS LAWYERS.

THE TRIAL WILL NOT PROCEED ON TUESDAY. THE GOVERNMENT IS DIRECTED TO DO ALL THAT I ALREADY SAID CONCERNING THE DUPLICATION OF EVIDENCE. WE WILL SET THIS DATE FOR TRIAL. I WANT

TO SPEAK TO MY CLERK. HOLD ON.

MR. REED: YOUR HONOR, BEFORE YOU DO THAT, CAN I MAKE SOME SUGGESTIONS NOW THAT I'M THE ATTORNEY OF RECORD IN THE CASE?

THE COURT: YES.

MR. REED: I WAS JUST GOING TO INDICATE TO THE COURT, YOUR HONOR, THAT THE COURT MAY WANT TO HAVE JUST A VERY BRIEF STATUS HEARING IN THIS MATTER PERHAPS AT 9:00 ON MONDAY, WE CAN CALL MR. NICOLAYSEN, AND PERHAPS MR. NICOLAYSEN STILL IS IN POSSESSION OF ALL THE DISKS, ALL THE DISCOVERY WILL REPORT TO COURT. THAT WAY IF THEY'RE THERE, THE GOVERNMENT WON'T HAVE TO TAKE THE TIME TO DUPLICATE ALL OF THESE CD'S AND THAT MIGHT BE A WAY TO ALLEVIATE THAT PROBLEM. I JUST SUSPECT, AND THIS IS JUST A SUSPICION, THAT WHEN MR. NICOLAYSEN WAS TOLD -- HE WAS COMMUNICATED TO WITH RESPECT TO THE DISCOVERY IN THIS CASE HE WAS PROBABLY THINKING THAT HE WAS RESPONSIBLE FOR -- SINCE MR. SUTCLIFFE WAS IN PRO PER AT THAT TIME, THAT HE WAS RESPONSIBLE FOR SENDING THE CD'S OVER TO MDC.

THE COURT: WELL, I HAVE A DIFFERENT RECOLLECTION. YOU MAY BE RIGHT, BUT MY RECOLLECTION IS THAT HE WAS ORDERED AND AGREED TO MAKE THEM AVAILABLE TO YOU AS WELL.

MR. REED: THERE MAY HAVE BEEN SOME MISCOMMUNICATION ABOUT THAT. IN ANY CASE, MR. SUTCLIFFE COULDN'T HAVE SEEN THE CD'S OVER THERE OR WORKED ON THE CD'S IN PRO PER ANY WAY. HE DOESN'T HAVE A COMPUTER AVAILABLE TO HIM SO IT'S MOOT. BUT I WAS THINKING IF WE COULD MEET MONDAY MORNING --

THE COURT: WELL, STEVE, BRING YOUR CALENDAR FOR MONDAY. I'M NOT SURE WE NEED TO MEET IN COURT. IF YOU CAN GET IT FROM MR. NICOLAYSEN AND YOU CAN COMMUNICATE THAT TO MS. DUARTE, WOULDN'T THAT BE SUFFICIENT?

MR. REED: MAYBE WE SHOULD BE ORDERED TO MEET AT THE U.S. ATTORNEY'S OFFICE AT 9:00. THAT WAY I CAN JUST CONFIRM THAT THE CD'S THAT MR. NICOLAYSEN RETURNS TO ME MATCH UP PERFECTLY WITH THE LIST THAT THE GOVERNMENT HAS GOT SO THAT WE'LL ALL KNOW AT THAT TIME THAT I'VE GOT EVERYTHING THAT I'M SUPPOSED TO HAVE.

BUT MORE IMPORTANTLY, YOUR HONOR, I NEED SOMETHING THAT'S MORE IMPORTANT THAN THAT IN ORDER TO PREPARE FOR THIS CASE. I NEED TO BE WITH MR. SUTCLIFFE AT MDC AND HAVE A COMPUTER AVAILABLE TO BOTH OF US SO THAT WE CAN GO THROUGH ALL OF THESE DIFFERENT FILES, SO THAT HE CAN DIRECT ME WITH RESPECT TO THE DEFENSE OF THE CASE. AND I'M NOT SURE --

THE COURT: DO YOU HAVE A LAPTOP YOURSELF?

MR. REED: I DO, YOUR HONOR. BUT IT'S A BIG -- NO. I DON'T HAVE A LAPTOP. I JUST HAVE A PC. I DON'T HAVE A PORTABLE COMPUTER.

THE COURT: WELL, SEEMS TO ME THAT CONSISTENT WITH THE AUTHORITY THAT I HAVE UNDER THE CRIMINAL JUSTICE ACT, I CAN AUTHORIZE THAT FUNDS BE PROVIDED FOR YOU TO RENT A LAPTOP, AND I AM AUTHORIZING THAT.

NOW, I DON'T KNOW WHAT KIND OF PROVISIONS I WOULD TO ARRANGE FOR WITH THE WARDEN OF THE MDC TO ALLOW YOU TO E

THAT LAPTOP IN AND TO USE IT IN A SECURED ROOM WITH MR. SUTCLIFFE, BUT WHATEVER IT TAKES, I WILL DO IT, OR AT LEAST TRY TO DO IT, AND I'M PRETTY CONFIDENT I WILL SUCCEED IN DOING IT. SO THE GOVERNMENT WILL PAY FOR YOUR RENTAL OF A LAPTOP. MR. SUTCLIFFE HAS GOT CONSIDERABLE PROWESS AND INSIGHT INTO MOST THINGS HAVING TO DO WITH ELECTRONIC EVIDENCE AND COMPUTERS AS YOU WELL KNOW AND YOU'RE WELCOME TO SEEK HIS VIEWS AS WELL ABOUT OTHER THINGS THAT YOU MIGHT NEED TO MAKE THE OPPORTUNITY WORK.

I WILL ALSO --

MR. REED: WE'RE GOING TO NEED A PRINTER.

THE COURT: RENT IT. I WILL ALSO MAKE WHATEVER EFFORTS ARE NECESSARY TO ASSURE SPECIAL ACCESS IN TERMS OF AMOUNTS OF TIME OR FREQUENCY OF VISITS, BUT YOU'LL HAVE TO LET MY CLERK KNOW WHEN YOU -- OR WHAT REGIMEN OF VISITS AND TIME YOU THINK IS APPROPRIATE TO SPEND SO I CAN DO SOME ADVANCED WORK. AND I'M TELLING THE GOVERNMENT THAT I WOULD BE DOING THIS EX PARTE IN THE SENSE OF CALLING THE WARDEN AND ASSURING THAT MR. REED AND MR. SUTCLIFFE ARE GIVEN MAXIMAL, FEASIBLE OPPORTUNITY TO WORK WITH EACH OTHER. WHAT ELSE DID YOU WANT TO ALERT ME TO?

MR. REED: HE NEEDS FULL ACCESS TO THE LAW LIBRARY.

THE COURT: WELL, THAT'S A DIFFERENT ISSUE, AND I DON'T THINK THAT MY -- I KNOW THAT MY UNDERSTANDING ABOUT WHAT A LAW LIBRARY ACCESS IS IS DIFFERENT THAN WHAT MR. SUTCLIFFE SAID, BUT SO LONG AS YOU'RE HIS LAWYER, YOU HAVE ACCESS TO A LAW LIBRARY, AND I DON'T THINK THAT'S A NEED THAT HAS TO BE OR RIGHTLY MUST BE

ADDRESSED SO THAT'S NOT SOMETHING THAT I'M GOING TO MAKE ANY SPECIAL ARRANGEMENTS FOR.

ANYTHING ELSE, MR. REED?

MR. REED: YOUR HONOR, ONCE THE CD ROMS ARE PROVIDED TO ME, SINCE THEY ARE RATHER COMPLEX, MR. SUTCLIFFE NEEDS ACCESS TO THOSE CD ROMS AND THE ABILITY TO THEN TAKE THEM TO THE LIBRARY THERE AT MDC WHERE THEY HAVE A COMPUTER WHERE HE CAN PUT THEM IN AND VIEW THEM. SOMETIMES WITHOUT ME BEING PRESENT. AND HE NEEDS A PRINTER THERE AT THAT LOCATION TO PRINT OUT WEB PAGES.

THE COURT: I DON'T THINK HE NEEDS A PRINTER AND I'M NOT GOING TO GO TO THAT -- A FAIR DEFENSE, AND I KNOW THAT YOU UNDERSTAND HOW THAT IS ORDINARILY DEFINED ON A CASE-BY-CASE BASIS AND EFFECTIVE ASSISTANCE ARE ONE THING; BUT RIGHTS, PRIVILEGES, PREROGATIVES, AND ADVANTAGES THAT MOST DEFENDANTS NEVER HAVE, INCLUDING DEFENDANTS WHO ARE NOT IN CUSTODY, IS ANOTHER THING.

AND I'M WILLING TO GO TO THE EXTREME LIMITS -- I'M NOT SURE THEY'RE EXTREME BUT TO CERTAIN LIMITS, BUT I'M NOT GOING TO ORDER, AT A GOVERNMENT EXPENSE, MR. SUTCLIFFE HAVE SPECIAL EQUIPMENT INSTALLED IN THE LIBRARY. AND IF THAT'S REVERSIBLE ERROR, SO BE IT. ANYTHING ELSE, MR. REED?

MR. REED: NO, YOUR HONOR.

THE COURT: YES, MS. DUARTE.

MS. DUARTE: YOUR HONOR, IT'S MY UNDERSTANDING THAT IN ORDER TO VIEW THE COPIES THAT WE'RE GOING TO MAKE, IN ADDITION TO WHAT MR. REED HAS NOTED, THEY MAY ALSO NEED A ZIP DRIVE, Z-I-P,

ZIP DRIVE. BECAUSE IF WE'RE GOING TO DUPLICATE THE ORIGINAL EVIDENCE, THERE WERE SOME ZIP DISKS; AND ALSO A -- LAPTOPS GENERALLY DON'T HAVE THE ABILITY TO VIEW HARD DRIVES WITHOUT AN OUTSIDE VIEWER WHERE YOU MOUNT THE HARD DRIVE AND VIEW IT ON THE LAPTOP. HE WOULD NEED THAT EQUIPMENT AS WELL.

THE COURT: WELL, I'M NOT GOING TO SIT HERE AND BE SURE TO INVITE EDUCATION ABOUT EVERY COMPONENT PART OF WHAT HE NEEDS. YOU DETERMINE IN YOUR BEST PROFESSIONAL JUDGMENT WHAT YOU NEED AND GET IT AND IT WILL BE PAID FOR AN A RENTAL BASIS.

MS. DUARTE: THANK YOU, YOUR HONOR.

THE COURT: ANYTHING ELSE?

MR. REED: WHEN IS THE TRIAL DATE?

THE COURT: YEAH. THAT'S WHAT I'M ABOUT TO --

OKAY. THE TRIAL DATE IS CONTINUED TO OCTOBER 7TH, AND DEPENDING UPON THE RESEARCH, AND I MAY DO SOME ON MY OWN, BUT I WANT THE GOVERNMENT TO BRIEF THIS ISSUE, IT MIGHT BE EXTENDED BEYOND THAT. IT'S CONCEIVABLE TO ME THAT A JURY COULD BE PICKED ON OR BEFORE OCTOBER 10TH WITH THE ACTUAL PRESENTATION OF EVIDENCE TO FOLLOW AT SOME LATER TIME WITH THE RIGHTS OF A DEFENDANT UNDER THE SPEEDY TRIAL ACT NOT BEING VIOLATED.

SO I WANT THOSE POSSIBILITIES TO BE AT LEAST CONSIDERED AND ADDRESSED IN THE MEMORANDUM YOU FILE.

MS. DUARTE: AS TO WHETHER OR NOT THERE'S A BASIS FOR THE WAIVER ABSENT DEFENDANT'S CONSENT, YOUR HONOR, JUST TO MAKE SURE I GOT IT RIGHT.

THE COURT: THAT'S ONE THING. AND ANOTHER THING IS WHETHER THE RIGHTS OF THE DEFENDANT ARE ACCOMPLISHED IF THE JURY IS PICKED, EVEN IF THE EVIDENCE IS NOT ACTUALLY COMMENCED AT THAT IMMEDIATE TIME AND UNDER WHAT CIRCUMSTANCES, IF ANY, A SLIGHT DELAY CAN BE PROVIDED. MAYBE ONE ISN'T NECESSARY, IT REALLY DEPENDS -- YOU KNOW, I DON'T THINK -- I THINK I UNDERSTAND THIS CASE FAR BETTER NOW IN PART BECAUSE OF CERTAIN THINGS I'VE READ RECENTLY AND IT DOESN'T STRIKE ME AS THAT COMPLICATED A CASE. THE NATURE OF THE EVIDENCE IS A LITTLE BIT FOREIGN TO ME BECAUSE I'M NOT GOOD AT THE -- BUT THE NATURE OF THE ISSUES ARE PRETTY STRAIGHTFORWARD AND CLEAR. SO I THINK WITHOUT PREJUDGING IT THAT IT MAY NOT BE NECESSARY TO CONSUME SIGNIFICANT AMOUNTS OF TIME TO ASSURE THAT MR. REED FEELS IN GOOD FAITH IN HIS MIND THAT HE'S UP TO SPEED.

THERE ARE MANY OTHER ISSUES THAT I WAS GOING TO ADDRESS BUT GIVEN THE LATE HOUR AND THE FINDINGS THAT I MADE IN THE POSTPONEMENT OF THE TRIAL DATE I'M NOT GOING TO GO INTO MOST OF THOSE ISSUES.

THE -- THERE'S ONE THING I WANT TO ALERT YOU TO, MR. REED. I'M SURE YOU MAY HAVE ALREADY SURMISED THIS AND WOULD ADDRESS IT, BUT I NOTICED ON THE GOVERNMENT'S WITNESS LIST THE NAME ORLEY MANN (PHONETIC), I BELIEVE SHE'S EITHER THE CURRENT OR FORMER WIFE OF MR. SUTCLIFFE. THAT RAISES POTENTIAL ISSUES OF PRIVILEGE. I HAVE NO IDEA WHAT CIRCUMSTANCES, IF ANY, RESULTED IN HER BEING A DESIGNATED WITNESS IN THIS CASE, BUT TO MAKE SURE THAT

YOU DON'T HAVE A GAP IN YOUR UNDERSTANDING I WANTED TO MENTION THAT TO YOU.

YOU CAN ARRANGE FOR ALL SUBPOENAS. I WANT THE JURY INSTRUCTIONS THAT WERE PREVIOUSLY AGREED TO, TO MAKE SURE YOU MAKE THOSE AVAILABLE TO MR. REED AND I NEED A DISKETTE, BECAUSE I LOST THE ONE OR WE CAN'T FIND THE ONE. THERE SEEMS TO BE A GOBLIN SURROUNDING THIS CASE, AND I WANT TO FIDDLE WITH IT SO I WOULD BENEFIT FROM THE DISKETTE. I THINK THAT COVERS IT. THANK YOU, COUNSEL.

MR. REED: YOUR HONOR, THERE WERE SOME MOTIONS THAT MR. SUTCLIFFE DID FILE.

THE COURT: I CAN'T RULE ON THOSE MOTIONS EXCEPT AS ONE CLARIFICATION. THE GOVERNMENT CAN FILE AN OPPOSITION BUT I THINK THAT'S IMPORTANT TO NOTICE. THERE'S A MOTION TO DISMISS THE THREAT COUNTS UNDER RULE 29.

MR. REED: WELL, THAT'S GOING TO BE WITHHELD, YOUR HONOR.

THE COURT: YEAH. I WOULD THINK SO. THAT'S REALLY A MOTION TO BE MADE DURING THE COURSE OF THE TRIAL. THERE IS A RENEWED MOTION CONCERNING THE RECONSTRUCTION ELECTRONICALLY OF THE EVIL GX.COM WEBSITE. NOW, I ISSUED A RULING ON THAT BEFORE I RECEIVED THIS RENEWED MOTION. I'M NOT SURE IF MR. SUTCLIFFE GOT THE RULING.

MR. SUTCLIFFE: YES, I DID, YOUR HONOR.

THE COURT: AND THAT RULING DENIED THE MOTION

CONDITIONED UPON THE GOVERNMENT CONFIRMING A COUPLE OF ITEMS SO PLEASE RISE, MS. DUARTE. ONE IS THAT IT'S BEEN ADDRESSED. IT WAS THAT THE DEFENDANT HAS POSSESSION OR ACCESS TO THE DOWNLOADS CAPTURED BY THE GOVERNMENT INCLUDING THOSE BY ANDREW RAMSEY. HE DOESN'T HAVE POSSESSION. HE DID HAVE ACCESS, ALTHOUGH NOT IN HIS OWN CAPACITY, TO TURN ON A COMPUTER. BUT FOR SOME REASON THE ACCESS, MEANING THAT AVAILABLE THROUGH HIS PRIOR LAWYERS WAS NOT TAKEN ADVANTAGE OF.

SO I'M GOING TO HOLD OFF A DENIAL UNTIL I'M SATISFIED THAT MR. REED DOES HAVE POSSESSION TO THOSE DOWNLOADS CAPTURED BY THE GOVERNMENT AND IN ITS POSSESSION, INCLUDING THOSE AT GLOBAL CROSSING, TURNED OVER. AND YOU ALREADY DESCRIBED WHAT THOSE ARE, SO I THINK THE RECORD DOESN'T HAVE TO BE SUPPLEMENTED.

MS. DUARTE: I DID, YOUR HONOR, AND I'LL MAKE THOSE A PRIORITY. I CAN GET THOSE OVER TO MR. REED, IF HE CAN'T GET THEM FROM MR. NICOLAYSEN, I'D SAY BY MONDAY AFTERNOON.

THE COURT: OKAY. AND THE SECOND PART WAS THAT HE HAS POSSESSION OF THE EVIDENCE OF CONTEXT. I THINK THE PARTIES KNOW WHAT THAT MEANS. AND IT WAS SPECIFICALLY KIND OF DESCRIBED IN FOOTNOTE TWO OF YOUR OPPOSITION. GIVE THAT MATERIAL TO MR. REED, JUST FILE A DECLARATION CONFIRMING THAT IT'S BEEN DONE, AND THEN THIS CONDITIONAL ORDER DENYING THE MOTION FOR RECONSTRUCTION OF EVIL GX.COM WEBSITE WILL BECOME FINAL.

MS. DUARTE: THANK YOU.

THE COURT: ANOTHER MOTION -- IT WASN'T REALLY A MOTION

BUT IT WAS A KIND OF INHERENT REQUEST CONCERNING ACCESS TO COMPUTERS AT THE MDC AND THE LIKE, ACCESS TO THE LIBRARY HAS BEEN ADDRESSED BY MR. REED'S STATEMENTS SO I THINK I'VE ADDRESSED THOSE. IS THERE ANYTHING ELSE, MR. REED, OR, MR. SUTCLIFFE, THAT YOU THINK WAS SUBMITTED TO ME IN THE WAY OF A MOTION EXPLICIT OR IMPLIED THAT REQUIRES A RULING?

MR. REED: MAY I JUST HAVE A MOMENT, YOUR HONOR?

THE COURT: SURE.

MR. REED: YES, YOUR HONOR. IT WAS THE NOTICE OF MOTION AND MOTION TO DISMISS THE THREAT CHARGES.

THE COURT: I DIDN'T ARTICULATE THAT YET? OKAY. THAT'S THE ONE I WANT TO HAVE THE GOVERNMENT FILE AN OPPOSITION TO. THAT'S UNDER SUBMISSION.

MR. REED: THANK YOU.

THE COURT: NOW, I THINK IT'S PRUDENT, AND I'M NOT INTENDING TO RAISE ANY LEVEL OF ACRIMONY BY DOING THIS, BUT GIVEN MY PRIOR COMMENTS AND THE REGRETTABLY TORTURED HISTORY OF THIS CASE, I AM NOW GOING TO ORALLY SUPPLEMENT THE WRITTEN WARNINGS THAT HAVE BEEN CIRCULATED AND MADE AVAILABLE AND SERVED UPON MR. SUTCLIFFE MORE THAN ONCE CONCERNING THE RISKS OF SELF-REPRESENTATION. AND I WANT IT TO BE VERY CLEAR THAT I WILL FIND THAT BY CONDUCT THERE IS A CHOICE OF SELF-REPRESENTATION UNDER THE CIRCUMSTANCES I ALREADY DESCRIBED, WHICH I HOPE WON'T HAPPEN IF MR. REED'S CAPACITY TO FUNCTION PROPERLY AS A LAWYER IS DISRUPTED OR INTERFERED WITH.

TO SET A STATUS CONFERENCE RIGHT NOW BECAUSE I THINK IT WOULD BE PREMATURE BUT I'LL BE HAPPY TO RESPOND AND SET ONE UP AS QUICKLY AS POSSIBLE IF IT'S NECESSARY.

MS. DUARTE: THANK YOU, YOUR HONOR.

(COURT WAS ADJOURNED IN THE MATTER AT 3:45.)

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Pg 67- lines 15-19 ??

UNITED STATES OF AMERICA, PLAINTIFF, VS. STEVEN WILLIAM SUTCLIFFE, DEFENDANT.	DOCKET NUMBER CR-2002-350(A)-AHM LOS ANGELES, CALIFORNIA SEPTEMBER 26, 2003

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE A. HOWARD MATZ,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: ELENA J. DUARTE,
ASST. U.S. ATTORNEY
LOS ANGELES, CA

FOR THE DEFENDANT: STEVEN WILLIAM SUTCLIFFE,
PRO SE
DAVID R. REED, STAND-BY COUNSEL
ATTORNEY AT LAW
LOS ANGELES, CA

COURT REPORTER: NANCY SMITH-WELLS
UNITED STATES COURTHOUSE
312 N. SPRING STREET
ROOM 402
LOS ANGELES, CA 90012
(213) 621-2148

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER.

(IN LOS ANGELES, LOS ANGELES COUNTY, CALIFORNIA; FRIDAY, 9-26-03, IN OPEN COURT.)

THE DEPUTY CLERK: CALLING ITEM NUMBER ONE, CR-02-350(A), USA VS. STEPHEN WILLIAM SUTCLIFFE.

COUNSEL, STATE YOUR APPEARANCES PLEASE.

MS. DUARTE: GOOD MORNING, YOUR HONOR. ELAINE A. DUARTE FOR THE UNITED STATES. WITH ME ARE JASON GONZALEZ, A.U.S.A. AND JEFF CUGNO FROM THE F.B.I.

THE COURT: OKAY. GOOD MORNING TO ALL OF YOU.

MR. SUTCLIFFE: GOOD MORNING, YOUR HONOR. STEVEN SUTCLIFFE, PRESENT IN COURT.

THE COURT: GOOD MORNING, MR. SUTCLIFFE.

MR. REED: GOOD MORNING, YOUR HONOR. DAVID REED, STANDBY COUNSEL.

THE COURT: AND GOOD MORNING TO YOU AS WELL. WE HAVE A LOT OF ITEMS THAT WE NEED TO DISCUSS, AND IN RESPECTS TO THE FIRST AND THRESHOLD ONE SHOULD BE THE STATUS OF MR. SUTCLIFFE'S PREPARATION AND OPPORTUNITY TO PREPARE FOR TRIAL AND HIS REPRESENTATION, AND I THINK WE WILL GET TO THAT VERY SHORTLY BUT AS AN ACCOMMODATION AND INTENDED COURTESY TO A NUMBER OF OTHER PEOPLE WHO HAVE COME TO ADDRESS DIFFERENT ISSUES SO THAT THEY WON'T HAVE TO RETURN AT THE LUNCH BREAK, I'M GOING TO START WITH THOSE. SO WE WILL TALK ABOUT MR. SUTCLIFFE'S REQUESTS, INCLUDING THOSE THAT WERE SENT TO ME AND RECEIVED IN LETTER FORM. I GOT 'EM LATE LAST NIGHT CAUSED THEM TO BE FILED TODAY.

BUT BEFORE WE DO THAT, ASSUMING, AND I DON'T HAVE A FINAL VIEW ON THIS, THAT THE DEFENSE OF MR. SUTCLIFFE WILL BE PROVIDED PRIMARILY BY MR. SUTCLIFFE WITH MR. REED SERVING AS STANDBY COUNSEL AND THAT THE TRIAL WILL BEGIN NEXT WEEK. I HAVE ASKED TO COME TO COURT REPRESENTATIVES OF THE MARSHAL'S OFFICE AND THE CSO'S, AND ALSO JAMES SETTLE. IS HE HERE?

MR. SETTLE: YES, YOUR HONOR.

THE COURT: AND JAMES SETTLE WHO'S A VERY, VERY SKILLFUL AND ABLE HEAD OF THE COURT'S TELECOMMUNICATION SYSTEMS, INCLUDING COMPUTERS, BECAUSE MR. SUTCLIFFE WILL BE IN NEED OF AND WILL GET THE ACCESS TO THE -- AT LEAST THE CORE KIND OF ELECTRONIC EQUIPMENT HIS DEFENSE ENTITLES HIM TO, BUT WE NEED TO MAKE SURE THAT THERE IS CLARITY ABOUT THAT.

SO LET'S START. I'VE BEEN TOLD BY MY CLERK, JUST ON THE ASSUMPTION THAT THE TRIAL WILL BEGIN NEXT WEEK, THERE ARE A COUPLE OF CONSIDERATIONS THAT AFFECT SOME OF THE OTHER ITEMS THAT I MENTIONED IN THE NOT VERY -- IN THE EXPANSIVE BUT NOT NECESSARILY COMPLETE AGENDA THAT I CIRCULATED IN WRITING FOR PURPOSES OF ALERTING THE PARTIES TO WHAT I WANTED TO COVER IN TODAY'S STATUS CONFERENCE.

NOW, IN THIS CASE, ASSUMING THAT MR. SUTCLIFFE IS REPRESENTING HIMSELF, WE ARE GOING TO NEED, IN FAIRNESS TO HIM, AND IN THE INTEREST OF JUSTICE, TO MAKE CERTAIN CHANGES, AND WHAT I ORDINARILY ARRANGE FOR VARIOUS PROCEDURES INCLUDING, FOR EXAMPLE, SELECTION OF JURORS.

I WANT MR. SUTCLIFFE TO BE ABLE TO ADDRESS THE COURT, ADDRESS WITNESSES, AND ADDRESS THE JURORS IN A WAY AS CLOSE AS POSSIBLE TO THE NORMAL WAY A PRO SE CRIMINAL DEFENDANT WOULD DO THAT, BUT FOR REASONS REFLECTED, I THINK SUFFICIENTLY, IN THE RECORD IN THIS CASE RIGHT FROM THE BEGINNING, MY RESPONSIBILITIES WHEN THERE WAS A FIRST OF TWO BAIL APPLICATION HEARINGS I BELIEVE THAT CERTAIN RESTRICTIONS ON MR. SUTCLIFFE'S FREEDOM OF MOVEMENT ARE WARRANTED AND NEED TO BE MAINTAINED.

WHAT I CURRENTLY INTEND TO DO IS TO PERMIT MR. SUTCLIFFE TO ADDRESS ALL INDIVIDUALS; THE COURT, THE JURORS, WITNESSES FROM COUNSEL TABLE. THERE WILL BE NO CUFFS ON HIM -- NO HANDCUFFS ON HIM AND HE WILL HAVE THE OPPORTUNITY TO RISE AND SIT AND MOVE ABOUT AS IS NEEDED. GIVEN THE CONFIGURATION OF COUNSEL TABLE WHERE HE WILL BE SEATED -- AND FOR THE RECORD I WANT TO DESCRIBE THIS AS I THINK MOST JUDGES WOULD EXPECT IF THEY WERE READING THE TRANSCRIPT -- THE TABLE AT WHICH ALL THE LAWYERS AND ALL OF THE PARTIES IN CASES BEFORE THIS COURT SIT HAS A PANEL THAT PRECLUDES SOMEONE FROM SEEING BELOW THE WAIST LEVEL -- IT'S ACTUALLY HIGHER THAN THE WAIST, BUT A LITTLE BEFORE THE TOP LEVEL OF THE DESK OR TABLES.

IN SHORT, WHAT THAT MEANS IS THAT NO JURORS WOULD BE ABLE TO SEE WHETHER MR. SUTCLIFFE IS CONFINED THROUGH THE FORM OF WHAT I THINK IS APPROPRIATE HERE, WHICH WOULD BE LIMITED -- NOT THE MOST INTRUSIVE -- I'M NOT EVEN SURE WHAT THE RIGHT WORD IS. WHAT'S AN ANKLE BRACE COMMONLY CALLED? CAN SOMEONE WHO'S HERE

FROM THE MARSHALS' OFFICE TELL ME.

MARSHAL: LEG RESTRAINTS.

THE COURT: LEG RESTRAINTS. WHAT IS THE LEAST INTRUSIVE LEG RESTRAINT THAT THE MARSHAL HAS AVAILABLE?

MARSHAL: THE LEG RESTRAINTS HE'S CURRENTLY WEARING WILL WORK.

THE COURT: COULD YOU DESCRIBE THOSE FOR THE RECORD, PLEASE.

MARSHAL: BRANDY MARTIN FROM THE U.S. MARSHALS.

THE COURT: DESCRIBE THE ONES HE'S CURRENTLY WEARING. I CAN'T EVEN SEE THEM MYSELF.

MARSHAL: JUST LIKE THE SAME BRACELET HE WOULD HAVE ON HIS HAND IS AROUND HIS ANKLE. THERE'S A CANE IN BETWEEN. HOWEVER, TO CUT DOWN ON THE NOISE, WE HAVE AN ANKLE RESTRAINT LIKE THAT WHERE THE CHAIN IN BETWEEN IS COVERED WITH PLASTIC AND THAT WAY IF HE DOES RISE AND HITS THE CHAIR, WE'RE NOT MAKING ANY NOISE.

THE COURT: OKAY. WHAT WOULD BE THE NORMAL PRACTICE FOR THE MARSHALS AND/OR THE CSO'S IN TERMS OF HAVING SUFFICIENT PRESENCE IN THE COURTROOM IN A TRIAL, EVEN ASSUMING THAT MR. SUTCLIFFE WERE REPRESENTED BY COUNSEL? HOW MANY PEOPLE?

MARSHAL: IN THIS SITUATION, YOUR HONOR, WE WERE GOING TO HAVE FOUR PEOPLE IN THIS COURTROOM.

THE COURT: FOUR PEOPLE?

MARSHAL: YES. TO COVER THAT EXIT AND THAT EXIT AND FOR

HIM TOO. NO MATTER WHERE THEY'RE PLACED FOR THE COMFORT OF THE COURT AND FOR THE JURORS TO NOT BE INFLUENCED IN ANY WAY.

THE COURT: OKAY. I CAN WORK OUT THE DETAILS LATER AND GIVE MR. SUTCLIFFE AN OPPORTUNITY TO RESPOND TO THESE ISSUES AND EVERY ISSUE. I WANT YOU TO BE SURE THAT YOU WILL BE HEARD ABOUT EVERYTHING. BUT JUST PLEASE CONTINUE TO BE PATIENT AS YOU HAVE BEEN, AND I APPRECIATE THAT.

MR. SUTCLIFFE: THANK YOU.

THE COURT: NOW, WERE YOU PLANNING TO SEND FOUR PEOPLE TO COVER THE TWO DIFFERENT DOORS THAT PROVIDE ACCESS TO THE CORRIDOR WHERE JURORS OFTEN WALK, AND FOR -- WHERE WERE YOU PROPOSING THE OTHERS BE STATIONED?

MARSHAL: I WAS GOING TO HAVE ONE OVER HERE THIS END, YOUR HONOR. SITTING BACK AGAINST THE WALL. THE CLOSEST TABLE HERE USUALLY MAKES 'EM BLEND IN WITH EVERYBODY SO IT DOESN'T LOOK LIKE THEY'RE ACTUALLY WITH THE U.S. MARSHALS. THE POSITION AT THIS END WOULD ACTUALLY BE SITTING OUT IN THE PUBLIC AREA SO THAT WAY THEY WOULDN'T LOOK LIKE THEY'RE INSIDE. THE TWO INDIVIDUALS THAT NORMALLY SIT BACK HERE WITH THE PRISONER, THE INDIVIDUAL ON TRIAL. AGAIN, CLOSE TO THIS TABLE WOULD BE ONE PERSON, THIS PERSON SITTING HERE AND ONE MORE JUST BEHIND HERE SO AS NOT TO MAKE IT LOOK LIKE YOU HAVE MARSHALS ALL AROUND THE PLACE.

THE COURT: OKAY. WELL, THAT SOUNDS LIKE TO ME A SENSIBLE APPROACH. BUT IT'S VERY IMPORTANT THAT ALL FEASIBLE STEPS BE TAKEN TO PREVENT JURORS FROM SEEING THESE LEG RESTRAINTS.

SO THERE WILL BE NO SIDE BAR CONFERENCES. IF IN THE VERY RARE BUT CONCEIVABLY REAL CIRCUMSTANCE THAT A SIDE BAR IS APPROPRIATE, WHOEVER SEEKS ONE, WHETHER IT'S A LAWYER FOR THE GOVERNMENT, MR. SUTCLIFFE AND/OR HIS LAWYER SHOULD SIMPLY ASK FOR ONE, AND IF I CONSIDER THAT ONE IS WARRANTED, I WILL EXCUSE THE JURORS. THERE WILL BE NO NEED FOR COUNSEL OR MR. SUTCLIFFE OR COUNSEL FOR THE GOVERNMENT TO GO OFF TO THE CORNER OF THE COURTROOM THAT I TYPICALLY USE WHERE I BRING THE COURT REPORTER TO CONDUCT SIDE BAR CONFERENCES.

WE WILL MAKE CHANGES AS WELL IN THE PROCEDURE I OTHERWISE ORDINARILY FOLLOW FOR EXCHANGING INFORMATION ONE SIDE TO THE OTHER ABOUT PROPOSED EXERCISE OF PEREMPTORY OBJECTIONS. SO THAT IN ART TERMS IT WILL MEAN THAT THE CHANGE FUNDAMENTALLY WILL BE THAT THE DISCLOSURE TO THE OTHER SIDE OF WHO YOU WOULD TEND TO EXCUSE WILL NOT BE MADE AT THE LECTERN AND WILL NOT REQUIRE MOVEMENT AROUND THE COURTROOM.

I WILL GO OVER THOSE PROCEDURES AT A LATER TIME SO AS TO FREE UP THE VARIOUS PEOPLE THAT COME TO COURT TODAY.

NOW, THERE'S AN UNUSUAL TWIST. IF THE TRIAL STARTS ON TUESDAY, THERE'S AN UNUSUAL TWIST I WANT TO ALERT THE PARTIES TO, BECAUSE IT'S VERY IMPORTANT THAT CAREFUL THOUGHT BE GIVEN TO THIS AND THAT ALL APPROPRIATE STEPS BE TAKEN TO AVOID A PROBLEM. I HAVE BEEN INFORMED THAT THERE WILL BE SOMETIME ON WEDNESDAY OF NEXT WEEK A DRILL, AN EVACUATION DRILL, BUILDING-WIDE. BY THEN WE WILL HAVE JURORS IMPANELED AND, OF COURSE, THE PARTIES WILL BE

PRESENT. ORDINARILY AN EVACUATION DRILL, EVEN GIVEN THE NEED TO PROCEED DELIBERATELY AND CALMLY AND FOLLOWING WHATEVER INSTRUCTIONS -- AND I REALLY TRULY DON'T KNOW EXACTLY WHAT THE INSTRUCTIONS AND CIRCUMSTANCES THAT THE CSO'S WERE PLANNING TO IMPLEMENT AS TO SPECTATORS, AS TO GOVERNMENT COUNSEL; BUT I WILL BE WORKING WITH, AT LEAST THROUGH MY CLERK AND POSSIBLY DIRECTLY WITH THE MARSHALS, TO ASSURE THAT THE JURORS EXIT IN ONE DIRECTION AND ONE WAY FIRST AND THAT MR. SUTCLIFFE IS GIVEN THE OPPORTUNITY TO EXIT THE BUILDING AT A DIFFERENT EXIT, OUTSIDE THEIR VIEW AND THAT THEY'RE KEPT SEPARATE SO THAT THE LEG RESTRAINTS THAT HE WILL BE WEARING, ANY OTHER RESTRAINTS OUTSIDE THE COURTROOM, IF THE MARSHALS THOUGHT THAT HAND RESTRAINTS WERE APPROPRIATE, THAT WOULD BE THEIR RIGHT TO USE. BUT I DON'T WANT THERE TO BE ANY INADVERTENT RISK THAT THE JURORS UPON LEAVING THE COURTROOM OR RETURNING TO THE COURTROOM AT THE CONCLUSION OF THE EVACUATION DRILL, ASSUMING IT TAKES PLACE, AND I DON'T KNOW WHAT TIME IT WILL TAKE PLACE -- BUT ASSUMING IT TAKES PLACE DURING COURT HOURS, WILL SEE MR. SUTCLIFFE.

SO THAT IS EXTREMELY IMPORTANT AND I AM ORDERING -- WOULD IT BE YOU, MR. MARTIN, WHO WOULD BE RESPONSIBLE FOR IMPLEMENTING THOSE ARRANGEMENTS?

MARSHAL: I'LL MAKE THE ARRANGEMENTS. DEPUTY HESSELRODE(PHONETIC) IS THE DEPUTY IN CHARGE THAT WILL BE HERE EACH DAY FOR YOU. MR. SUTCLIFFE WILL ACTUALLY EXIT THROUGH THAT DOOR THERE NEXT TO THE JUROR BOX. AFTER THE JURY IS COMPLETELY

GONE, THAT'S WHEN HE WILL EXIT.

THE COURT: ALL RIGHT. AND AT ALL TIMES MR. SUTCLIFFE IS TO BE IN THE COURTROOM AND AT COUNSEL TABLE BEFORE THE JURORS ARE BROUGHT IN. IS THAT UNDERSTOOD, MR. HESSELRODE?

MARSHAL: YES, SIR.

THE COURT: OKAY. ARE THERE ANY QUESTIONS THAT YOU HAVE SO FAR ABOUT SECURITY CONSIDERATIONS, MR. SUTCLIFFE?

MR. SUTCLIFFE: YEAH. I JUST WONDER, YOUR HONOR. I WAS BROUGHT HERE THIS MORNING INSTEAD OF USUALLY THROUGH THE ELEVATOR AS I'VE BEEN FOR THE LAST 18 MONTHS WHILE I'VE BEEN INCARCERATED, AND TODAY I HAD A SPECIAL TRIP DOWN A LONG, WINDING TUNNEL, UP AND DOWN STAIRS; AND WHEN I ASKED THE MARSHAL WHY I WAS BEING UP AND DOWN, WHICH I CONSIDER DANGEROUS TO MY HEALTH SEEING AS I'M SHACKLED AROUND THE ANKLES AND THE WAIST AND WRIST AT THE TIME, I DON'T WANT TO FALL DOWN THE STAIRS, I WAS TOLD TO TALK TO MANAGEMENT --

THE COURT: TALK TO WHAT?

MR. SUTCLIFFE: MANAGEMENT. WHEN I INQUIRED AS TO WHO WAS MANAGEMENT? THEY SAID THAT YOU ARE MANAGEMENT. SO ERGO I'D LIKE TO KNOW WHY --

THE COURT: OKAY. I DON'T GET INVOLVED IN DETERMINING WHAT ACCESS ROUTES ARE TAKEN BY MARSHALS IN ANY CASE AND I DON'T INTEND TO INTERFERE WITH THEIR AUTHORITY AND DISCRETION IN THIS CASE, BUT I AM REQUESTING AND ORDERING THEM TO MAKE SURE THAT ANY ROUTE THAT IS TAKEN AND ANY ACCOMPANIMENT -- ANY ASSISTANCE OR ANY

PRESENCE OF MARSHALS ACCOMPANYING MR. SUTCLIFFE BE INTENDED TO MAKE SURE THAT EVERYONE, INCLUDING THE MARSHALS, TRAVEL SAFELY. I CAN'T GET INVOLVED IN FIGURING OUT WHICH OTHER ROUTES ARE AVAILABLE, BUT IN TERMS OF THE SECURITY MEASURES INSIDE THE COURTROOM THAT I JUST TALKED ABOUT, DO YOU HAVE ANY QUESTIONS OR OBJECTIONS?

MR. SUTCLIFFE: NO, YOUR HONOR.

THE COURT: OKAY. ANY RESPONSES OR QUESTIONS FROM THE GOVERNMENT?

MS. DUARTE: NONE, YOUR HONOR.

THE COURT: ALL RIGHT. NOW, LET'S TALK FOR A MINUTE -- AND I WANT TO THANK THE MARSHALS AND CSO'S FOR BRINGING THE APPROPRIATE SUPERVISORS HERE. I'M NOT POSITIVE THAT I'VE ADDRESSED EVERY CONCEIVABLE ISSUE THAT MAY ARISE IN THIS UNUSUAL CASE, BUT IF THERE ARE OTHER CONSIDERATIONS THAT THE MARSHALS HAVE ABOUT BRINGING MR. SUTCLIFFE TO COURT, REMOVING HIM FROM COURT, MAKING SURE THAT NO PROSPECTIVE JUROR OR ACTUAL JUROR -- AND THAT WILL REQUIRE, BY THE WAY -- AND I'M INSTRUCTING THE COURTROOM DEPUTY THAT ALL PROSPECTIVE JURORS WHO ARE FIRST BROUGHT DOWN TO THE COURTROOM FOR INITIAL VOIR DIRE BE KEPT ON THE LEFT SIDE OF THE COURTROOM, FACING THE BENCH.

SO AS THEY ENTER THE COURTROOM, THEY'LL BE BROUGHT LEFT SO THEY WILL NOT HAVE THE OPPORTUNITY TO -- FROM SITTING ON THE OTHER SIDE OF THE COURTROOM OBSERVE ANYTHING BELOW THE COUNSEL TABLE TOP OR DESKTOP.

NOW, ANYTHING ELSE THAT THE MARSHALS CAN THINK OF ON THE ISSUE OF SECURITY THAT I NEED TO ADDRESS?

MARSHAL: JUST ONE THING FOR -- WHEN JURY SELECTION STARTS, YOUR HONOR, IT WOULD PROBABLY BE BEST IF WE WERE CALLED AND WHEN IT'S TIME FOR HIM TO COME UP IN CASE THERE ARE SOME POTENTIAL JURORS LINGERING. SO THAT WAY, YOU KNOW, WE DON'T JUST COME RIGHT UP AT A SPECIFIC TIME AND WE COULD POSSIBLY RUN INTO SOMEBODY IN THE COURTROOM WHO WOULD SEE HIM IN RESTRAINTS. I DON'T KNOW IF YOU WANT TO BRING HIM UP A HALF-HOUR EARLIER OR CALL US?

THE COURT: I'LL TELL YOU, AND I'M NOT SURE IT WILL BE THE SAME THING EVERY DAY, BUT I DO KNOW THAT HE WILL ALWAYS BE HERE BEFORE THE JURY ARRIVES.

MARSHAL: I WAS WORRIED ABOUT JURY SELECTION.

THE COURT: I KNOW. WE'LL PROBABLY HAVE THE JURORS COME DOWN BECAUSE WE'RE GOING TO COVER A LOT OF GROUND TODAY, SOME OF WHICH WILL HAVE TO BE THIS AFTERNOON. PROBABLY HAVE THE JURORS COME DOWN, NOT BEFORE 9:00 ON TUESDAY MORNING OR POSSIBLE IMPANELMENT. SO THAT MEANS THAT I WOULD LIKE MR. SUTCLIFFE WHO WOULD NEED ACCESS TO BATHROOMS AND THE LIKE, WHO MIGHT NEED TO SET UP FILES ON THE COUNSEL TABLE, MAY NEED TO TURN ON COMPUTER EQUIPMENT, HE SHOULD BE UP IN THIS COURTROOM, UNLESS I ORDER THAT IT BE SOONER FOR ADDITIONAL CONFERENCES, HE SHOULD BE HERE IN THE COURTROOM AND AT COUNSEL TABLE BY NOT LATER THAN 8:30 ON TUESDAY MORNING.

MARSHAL: YES, YOUR HONOR.

THE COURT: ANYTHING ELSE, MR. MARTIN?

MARSHAL: NO, SIR.

THE COURT: PLEASE STAND BY AND DON'T LEAVE YET. NOW, IN TERMS OF COMPUTER EQUIPMENT, I HAVE READ YOUR SUBMISSIONS. I HAVE CAUSED THEM TO BE COPIED, FILED, AND MADE AVAILABLE TO THE GOVERNMENT AND COUNSEL FOR MR. REED. I'D LIKE TO GIVE YOU AN OPPORTUNITY, MR. SUTCLIFFE, TO STATE IN THE PRESENCE OF MR. JAMES SETTLE, THE COURT COORDINATOR FOR TELECOMMUNICATIONS EQUIPMENT, WHAT KIND OF COMPUTER EQUIPMENT YOU THINK YOU NEED TO DEFEND YOURSELF FAIRLY HERE IN THE COURTROOM AT YOUR COUNSEL TABLE.

MR. SUTCLIFFE: I CAN'T MAKE THAT REQUEST AT THIS TIME, YOUR HONOR, AS I'M NOT AWARE OF WHAT I'M TO EXPECT TO BE GIVEN TO ME AS FAR AS HARDWARE FROM THE GOVERNMENT. THEY HAVE TURNED OVER -- I'M IN RECEIPT OF NO CD ROMS. I'M IN RECEIPT OF NO ZIP DISK, I'M IN RECEIPT OF NO FLOPPY DISK, I'M IN RECEIPT OF NO OPTICAL DISK, I'M IN RECEIPT OF NO TAPES, SO I CAN'T ANSWER THAT QUESTION AT THIS POINT.

THE COURT: WELL, I'M A LITTLE PUZZLED BY THAT RESPONSE, MR. SUTCLIFFE, BECAUSE THE LETTERS I GOT LATE LAST NIGHT, WHICH ARE CAUSED TO BE FILED TODAY, AMONG OTHER THINGS, I BELIEVE IT'S YOUR HANDWRITING, I KNOW IT CAME FROM YOU, YOU HAVE STATED ON PAGE TWO --

MR. SUTCLIFFE: WHICH DOCUMENT ARE YOU REFERRING TO, YOUR HONOR?

THE COURT: IT'S ATTACHED TO MINUTE ORDER IS WHAT I GOT FROM YOU LAST NIGHT. ONE IS A LETTER TO THE CLERK OF THE COURT. THE OTHER IS A SECOND RELATED BUT DIFFERENT LETTER --

MR. SUTCLIFFE: OKAY. I SEE IT.

THE COURT: -- TO ME.

MR. SUTCLIFFE: YES. I THINK I SEE THE ONE YOU'RE TALKING ABOUT, YES.

THE COURT: PAGE TWO YOU SAY THAT YOU GOT A LETTER FROM THE PROSECUTOR ON SEPTEMBER 17TH, NINE DAYS AGO, AND IT CONTAINED A CD ROM DISK. AND YOU THEN GO ON TO TELL ME ALL KINDS OF THINGS ABOUT HOW YOU NEED TO GET COMPUTERS TO MAKE USE OF THE CD ROM DISK.

MR. SUTCLIFFE: RIGHT.

THE COURT: BEFORE I ASK YOU TO CLARIFY WHAT YOU WERE SAYING IN THE LETTER AND WHAT YOU'RE SAYING NOW, LET'S JUST MAKE SURE WE HAVE A CLEAR RECORD HERE AS TO WHAT, IF ANY, ELECTRONIC EVIDENCE AND CONCRETE TANGIBLE EVIDENCE HAS BEEN PROVIDED TO MR. SUTCLIFFE TO THE KNOWLEDGE OF THE LEAD PROSECUTOR, MS. DUARTE. AND I MEAN TO MR. SUTCLIFFE PERSONALLY AND NOT TO ANY OF HIS MANY PRIOR ATTORNEYS.

MS. DUARTE: JUST TO MR. SUTCLIFFE PERSONALLY?

THE COURT: YEAH.

MS. DUARTE: BECAUSE --

THE COURT: AND IF YOU WERE TOLD BY ONE OF THE OTHER LAWYERS THAT THEY HAD PHYSICALLY GIVEN TO HIM WHATEVER YOU'RE

ABOUT TO ACCOUNT FOR AS THE ELECTRONIC EVIDENCE, YOU CAN TELL ME ABOUT THAT.

MS. DUARTE: OKAY. YOUR HONOR, MAY I BE PERMITTED -- I WILL DO THAT. MAY I BE PERMITTED ALSO TO MAKE A RECORD AS TO WHAT HAS BEEN DISCOVERED TO MR. SUTCLIFFE'S ATTORNEYS PREVIOUSLY.

THE COURT: YES.

MS. DUARTE: IT WON'T TAKE ME VERY LONG, BUT I DID SPEND A LOT OF TIME ON IT LAST NIGHT. MAY I APPROACH THE PODIUM TO DO THAT?

THE COURT: ALL RIGHT.

MS. DUARTE: YOUR HONOR, ACCORDING TO MY RECORDS --

THE COURT: TELL YOU WHAT, MS. DUARTE, I WANT TO GET THROUGH THE QUESTION OF EQUIPMENT IN THE COURTROOM. I'LL GIVE YOU THE OPPORTUNITY TO GO THROUGH YOUR RECITALS ABOUT WHAT DISCOVERY WAS PROVIDED LATER ON IN THE DAY, BUT MR. SETTLE IS HERE NOW. I DON'T WANT TO HAVE TO BE DOING SOMETHING UNNECESSARILY. NOW, IN TERMS OF -- I THINK THE REAL QUESTION IS WHAT ARE YOU -- NOT SO MUCH WHAT MR. SUTCLIFFE HAS BEEN GIVEN SO FAR DIRECTLY OR INDIRECTLY BUT WHAT KIND OF ELECTRONIC EQUIPMENT AND EVIDENCE DO YOU INTEND TO USE AT TRIAL?

MS. DUARTE: I INTEND TO USE CD ROMS AND FLOPPY DISKS, YOUR HONOR.

THE COURT: WHAT KIND OF EQUIPMENT TO USE THOSE CD ROMS OR FLOPPY DISK ARE YOU GOING TO BE USING, EITHER AT COUNSEL TABLE OR AT THE ELECTRONIC PLATFORM NEXT TO THE LECTERN?

MS. DUARTE: BASICALLY TWO LAPTOP COMPUTERS. IF YOUR HONOR WANTS SPECIFICS AS TO CABLING AND OTHER EXTERNAL DRIVES THAT WILL BE USED, I WOULD PROBABLY HAVE TO --

THE COURT: I DON'T NEED THAT.

MS. DUARTE: LET ME THEN -- I UNDERSTAND THAT THIS COURT WANTS THIS LATER. MAY I ANSWER JUST ONE OF THE COURT'S QUESTIONS ABOUT THAT CD ROM THAT WAS VERY RECENTLY SENT TO MR. SUTCLIFFE?

THE COURT: YES.

MS. DUARTE: JUST SO I CAN CLEAR THIS UP, AND A LETTER ACCOMPANYING WHICH EXPLAINED THIS TO MR. SUTCLIFFE AND TO MR. REED. THE CD ROM THAT WAS VERY RECENTLY, I BELIEVE, ON SEPTEMBER 17TH, SENT TO MR. SUTCLIFFE, WAS A VERY RECENT DISCOVERY OF THE GOVERNMENT THAT THERE APPEARED TO BE A COPY, AT LEAST A PARTIAL COPY, OF THE WEBSITE ORIGINALLY ENTITLED EVIL GX.COM STILL ALIVE, IF YOU WILL, THROUGH THE INTERNET THROUGH A SERVER CALLED G-O CITIES. WHEN WE DISCOVERED THAT, IT STILL MIGHT BE ON THE INTERNET, I ASKED THE AGENTS TO MAKE A COPY. THEY MADE A COPY AND AS SOON AS I GOT THE COPY ON CD I PROVIDED A COPY TO MR. SUTCLIFFE. THAT IS NOT SOMETHING THAT I'M GOING TO USE IN EVIDENCE OF THIS CASE, YOUR HONOR. IT HAPPENED -- IT'S ON THE INTERNET, COULD STILL BE ON THE INTERNET NOW, I DON'T KNOW; BUT BECAUSE I HAD A COPY OF IT, I PROVIDED IT TO MR. SUTCLIFFE. IT'S NOT EVIDENCE, IT'S NOT PRIOR DISCOVERY THAT WASN'T PROVIDED, IT'S A VERY NEW DISCOVERY.

TO THE QUESTIONS OF MY PERSONAL KNOWLEDGE, I DON'T KNOW

PERSONALLY THAT HE'S RECEIVED, HIM PERSONALLY, ANY OTHER ELECTRONIC EVIDENCE IN THIS CASE. I HAVE BEEN TOLD BY BOTH MR. HARRIS AND MR. NICOLAYSEN AT VARIOUS TIMES THAT THEY HAVE GONE THROUGH WITH HIM AND DISCUSSED VARIOUS PIECES OF ELECTRONIC EVIDENCE, PARTICULARLY MR. NICOLAYSEN. MR. NICOLAYSEN AND I CONVERSED QUITE A BIT ABOUT THE MYWEBS CD -- M-Y-W-E-B-S -- WHICH WILL BE INTRODUCED AT TRIAL AS GOVERNMENT'S EXHIBIT 65, AND I DO HAVE A RECORD OF WHEN I FIRST TURNED THAT CD OVER, BUT I'LL WAIT TO LET YOU KNOW THAT.

OTHER THAN THAT, I DIDN'T KEEP SPECIFIC RECORDS AS TO WHEN I TALKED TO DEFENSE ATTORNEY ABOUT WHAT PARTICULAR EXHIBITS IN REGARD TO THEIR PROVISION DIRECTLY TO MR. SUTCLIFFE, SO I JUST DON'T KNOW.

THE COURT: OKAY. YOU CAN BE SEATED IF YOU'D LIKE. TO SPEED THINGS ALONG, IF YOU WANT TO ADDRESS ME AT COUNSEL TABLE, THAT'S OKAY TOO, AT LEAST FOR THE CURRENT TIME.

NOW, MR. SUTCLIFFE, ASSUMING THAT THE GOVERNMENT'S GOING TO BE USING CD ROMS AND FLOPPY DISKS AND TO USE THOSE AND DISPLAY THOSE, IT'S GOING TO HAVE LAPTOP COMPUTERS AND YOU WANT TO HAVE ACCESS TO WHATEVER THEY DISPLAY. WHAT YOU NEED IS A LAPTOP COMPUTER, RIGHT?

MR. SUTCLIFFE: IF I HEARD MRS. DUARTE CORRECTLY, SHE'S GOING TO BE USING TWO LAPTOPS SO LAPTOP TO BE JUST AS PREPARED. JUST LIKE A D.J. YOU SPIN ONE READY AND GET THE OTHER ONE PREPPED. YOU SHOW WHAT'S ON HERE WHILE YOU'RE RESEARCHING THE OTHER ONE.

MAKES YOU A LOT MORE EFFICIENT. I USED IT ALL THE TIME WHEN I WAS A COMPUTER CONSULTANT.

THE COURT: OKAY.

MS. DUARTE: IF I MAY, THE REASON WHY WE'RE USING TWO COMPUTERS, OR AT LEAST PLANNING TO AS OF NOW, IS BECAUSE THE COMPUTER ITSELF ONLY HAS SPACE FOR ONE DRIVE HERE TO A CD PLAYER, IF YOU WILL, OR A FLOPPY PLAYER. WE HAVE SOME EXHIBITS THAT ARE FLOPPIES AND SOME THAT ARE CD'S, ALL WHICH HAVE PREVIOUSLY BEEN PROVIDED. IN ORDER SO THAT WE DON'T HAVE TO ACTUALLY CHANGE THE INTERNAL DRIVES DURING THE PRESENTATION OF THE TESTIMONY, WE WANT ONE COMPUTER WITH CD, ONE WITH FLOPPY. IT'S NOT TO DO TWO THINGS AT ONCE. IT'S TO MAKE THINGS GO MORE QUICKLY WHEN WE HAVE TO CHANGE THE TYPE OF EXHIBIT.

THE COURT: I'LL GIVE YOU A MOMENT TO RESPOND, BUT IT MAY NOT BE NECESSARY, MR. SUTCLIFFE. THANK YOU. JUST SIT DOWN FOR A MINUTE. MR. SUTCLIFFE, CAN YOU PROVIDE FOR THE DEFENSE TEAM, AND THAT MEANS AT THE DEFENSE TABLE, TWO LAPTOPS.

MR. SETTLE: ABSOLUTELY.

THE COURT: OKAY. YOU'LL HAVE TWO LAPTOP COMPUTERS. NOW, WHAT KIND OF COMPUTERS DO YOU PROPOSE TO PROVIDE?

MR. SETTLE: IF IT'S YOUR INTENTION TO PROVIDE HIM EQUAL EQUIPMENT WITH WHAT THE U.S. ATTORNEYS ARE USING, WE'LL PROVIDE HIM WITH A PENTIUM LEVEL LAPTOP. I DON'T KNOW SPECIFICALLY WHAT SPEED IT WILL BE RIGHT OFFHAND BUT ONE WILL HAVE CD DRIVE AND ONE WILL HAVE A FLOPPY DRIVE BECAUSE THEY ALL HAVE INTERCHANGEABLE

DRIVES. WE'LL PROVIDE HIM WITH LIKE TO LIKE AND A SWITCHER TO TURN TO HAVE ONE DISPLAYED AT A TIME AND IT WILL DISPLAY JUST AS ALL YOUR EQUIPMENT DOES. YOU'LL HAVE A DISPLAY ON YOUR BENCH SO THE JURORS CAN SEE IT AND IT WILL BE UP ON COUNSEL TABLE.

THE COURT: SO IT WILL BE HOOKED UP TO THE MONITORS?

MR. SETTLE: UH-HUH.

THE COURT: THAT'S A YES?

MR. SETTLE: THAT'S A YES.

THE COURT: ALL RIGHT. IN ORDER FOR EVIDENCE TO BE USED, DEMONSTRATED, RETRIEVED, DISPLAYED, MANIPULATED FOR PURPOSES OF EITHER QUESTIONING OR ARGUMENT, WILL THE LAPTOP COMPUTERS BE HOOKED UP INTO THE SYSTEM THAT IS ALREADY AVAILABLE, ELECTRONIC MEDIA SYSTEM THAT'S FUNDAMENTALLY A ONGOING PIECE OF EQUIPMENT IN THE COURTROOM BE SUFFICIENT, MR. SETTLE?

MR. SETTLE: YES, YOUR HONOR.

THE COURT: YOU CAN'T ANTICIPATE ANY INABILITY ON THE PART OF WHOEVER IS USING THE COMPUTERS THAT YOU WILL PREPARE TO MAKE COMPLETE USE OF THEM FOR PURPOSES OF A TRIAL; IS THAT CORRECT?

MR. SETTLE: THERE'S ALWAYS A POTENTIAL FOR SOME ERROR BUT WE'LL BE HERE TO SUPPORT IT AND PRETEST IT TO MAKE SURE THAT THERE ARE NO PROBLEMS.

THE COURT: OKAY. AND WHEN WILL YOU BE ABLE TO INSTALL THAT EQUIPMENT?

MS. SETTLE: WE CAN HAVE IT INSTALLED MONDAY.

THE COURT: OKAY. WELL, I HAVE A LOT OF PEOPLE COMING THROUGHOUT MONDAY FOR OTHER MATTERS, BUT I'D LIKE IT INSTALLED BY MID TO LATE AFTERNOON ON MONDAY AT THE LATEST.

NOW, DO YOU HAVE ANY QUESTIONS SO FAR, MR. SUTCLIFFE?

MR. SUTCLIFFE: YES, THANK YOU, YOUR HONOR. I WOULD LIKE TO LODGE AN OBJECTION TO WHAT MS. DUARTE JUST SAID TO THE COURT. I BELIEVE SHE MISSPOKE OR IS TOTALLY LYING, ONE OF THE TWO. I'M NOT GOING TO SPECULATE, BUT SHE SAID THAT ALL CD ROMS AND FLOPPIES HAVE PREVIOUSLY BEEN PROVIDED TO ME. THAT IS A FALSEHOOD. I HAVE NOT RECEIVED ALL THE DISCOVERY IN THIS CASE, AND I HAVE PAPERWORK, AND THE COURT RECORD CLEARLY REFLECTS THAT.

I'D LIKE A CHANCE TO ARGUE THAT POINT AT ANY TIME THIS COURT WOULD GRANT ME THAT MOTION.

THE COURT: OKAY. MR. REED, I'D LIKE TO ADDRESS SOME QUESTIONS TO YOU, PLEASE.

MR. REED: YES, YOUR HONOR.

THE COURT: PARTICULARLY FOCUSING ON ELECTRONIC EVIDENCE OR EVIDENCE IN DOCUMENTARY FORM SUCH AS PRINTOUTS THAT WERE DOWNLOADED FROM ELECTRONIC EVIDENCE. CAN YOU TELL ME, PLEASE, WHAT, IF ANY, EVIDENCE, EITHER GENERATED BY AS PART OF THE WORK PRODUCT OF PRIOR ATTORNEYS THE LAWYERS WHO PREVIOUSLY REPRESENTED MR. SUTCLIFFE OR TURNED OVER AS PART OF DISCOVERY TO ANY LAWYER AT ANY PREVIOUS TIME BY THE GOVERNMENT, YOU PERSONALLY HAVE BEEN GIVEN? JUST DESCRIBE THAT GENERICALLY.

MR. REED: YOUR HONOR, I'VE BEEN GIVEN A SIGNIFICANT

AMOUNT OF DOWNLOADED WEB PAGES. I DON'T HAVE THEM MEMORIZED.

THE COURT: NO. I DON'T THINK YOU NEED TO GIVE ME AN INVENTORY.

MR. REED: I HAVE A SIGNIFICANT NUMBER OF WITNESS INTERVIEWS, 302'S, THINGS OF THAT NATURE. MR. NICOLAYSEN LAST WEEK GAVE ME THE CD ROM MYWEBS. I DID PICK THAT UP AND I DO HAVE THAT WITH ME TODAY. AND THAT'S THE NATURE OF THE EVIDENCE THAT I'VE BEEN GIVEN, YOUR HONOR.

THE COURT: NOW, I DON'T THINK IT IS INAPPROPRIATE FOR THE RECORD TO NOTE THAT I'VE PREVIOUSLY AUTHORIZED EXPERTS, OR AT LEAST ONE EXPERT, I DON'T GO BACK AND CHECK THE FILE BUT AT LEAST ONE EXPERT, AND I THINK COULD HAVE BEEN MORE THAN ONE, SOMEBODY WITH SPECIFIC SKILL AND ADVANCED SKILL IN COMPUTER TECHNOLOGY AND INTERNET TECHNOLOGY AS WELL TO BE APPOINTED TO REPRESENT OR ASSIST PRIOR COUNSEL. HAVE YOU SEEN ANY EXPERT REPORTS?

MR. REED: NO. NOT AT ALL, YOUR HONOR.

THE COURT: HAS ANYBODY DISCUSSED WITH YOU ANY OF MR. SUTCLIFFE'S PRIOR LAWYERS, ANY EXPERT REPORTS THAT MAY HAVE BEEN GENERATED?

MR. REED: NO, YOUR HONOR.

THE COURT: DO YOU HAVE THE EQUIPMENT AT YOUR OFFICE, MR. REED, THAT ENABLES YOU TO USE AND, IF NECESSARY, DOWNLOAD MATERIAL FROM CD ROMS AND FLOPPY DISK UNDER MYWEBS CD ROM, FOR EXAMPLE?

MR. REED: I BELIEVE I DO, YOUR HONOR.

THE COURT: OKAY. IT COULD BE THAT I AM MISTAKEN IN MY UNDERSTANDING AS TO WHETHER OR NOT PRIOR EXPERTS WERE LINED UP AND I HAVE NO IDEA ONE WAY OR THE OTHER WHETHER THEY DID ANYTHING IF THEY WERE LINED UP. BUT FOR THE RECORD, I'M GOING TO INSTRUCT MY CLERK TO CONTACT ALL OF THE PRIOR COUNSEL IN THIS CASE AND ORDER THEM TO FILE, POSSIBLY BY LATER TODAY, AND IN ANY EVENT EARLY MONDAY MORNING, UNDER SEAL AND IN CAMERA, A REPORT AS TO WHAT, IF ANY, EXPERT TESTIMONY OR EXPERT ASSISTANCE, EVEN IF IT WASN'T INTENDED TO BE TESTIMONY, THEY OBTAINED OR RECEIVED, WHAT, IF ANY, WORK PRODUCT FROM EXPERTS THEY OBTAINED OR RECEIVED.

AND IF THEY DID GET ANY, WHERE IT IS, WHAT THEY DID WITH IT, WHETHER THEY TURNED IT OVER TO ANYONE. IF SO, WHO AND THE WHEN AND THE LIKE. THAT WILL BE FILED UNDER SEAL AND IN CAMERA AND I'LL EVALUATE IT, AND DEPENDING ON WHAT I LEARN, TAKE APPROPRIATE STEPS TO ENSURE THAT MR. SUTCLIFFE'S RIGHTS ARE PROTECTED.

MEANTIME, MR. REED, I WOULD APPRECIATE IT IF YOU, OVER THE LUNCH BREAK, AND WE WILL HAVE TO TAKE A LUNCH BREAK, MAKE AN INQUIRY YOURSELF, AT LEAST OF MR. NICOLAYSEN. AND HE'S PROBABLY THE ONLY LAWYER THAT YOU -- OF THE FOUR THAT PREVIOUSLY REPRESENTED MR. SUTCLIFFE, THAT YOU'VE DEALT WITH; IS THAT CORRECT?

MR. REED: CORRECT, YOUR HONOR.

THE COURT: OKAY. SO SEE IF YOU CAN TRACK HIM DOWN, FIND OUT ABOUT THAT; ALL RIGHT, MR. REED?

NOW, MR. SETTLE, SINCE YOU'RE THE EXPERT ABOUT ALL THINGS ELECTRONIC AND VIDEO EQUIPMENT AND COURTROOM TECHNOLOGY, IS THERE ANY CONSIDERATION THAT I SHOULD HAVE ASKED ABOUT THAT I DID NOT MENTION?

MR. SETTLE: THE CONCERNS THAT I WOULD HAVE ARE I THINK THE COURT SHOULD HAVE AS FAR AS PRESENTING EXHIBITS OR EVIDENCE IN THIS MATTER IS THAT, ONE, THAT THEY ARE VIEWED BY THE COURT AND WE KNOW WHAT'S PRESENTED AND THAT IT'S VALIDATED THAT BOTH SIDES, SINCE WE'RE USING DIFFERENT MEDIUMS, ARE ACTUALLY SHOWING THE SAME -- PROJECTING THE SAME IMAGES.

IN OTHER WORDS, THAT ONE IMAGE HASN'T BEEN ALTERED TO REFLECT SOMETHING THAT ISN'T ON THE OTHER COMPUTER, BECAUSE WE'LL BE BASICALLY TRYING TO SHARE THE SAME DOCUMENTS OR EVIDENCE BUT FROM DIFFERENT COMPUTERS; SO THERE'S ALWAYS THE POTENTIAL THAT ONE HAS BEEN ALTERED OR CHANGED OR ISN'T EXACTLY AS THE OTHER. AND THAT WOULD BE THE CONCERN THAT I HAVE.

THE COURT: AND HOW COULD SOMEBODY ALLAY OR AVOID THAT CONCERN?

MR. SETTLE: BY USING THE SAME SOURCE, HAVING ONE SET OF DISKS THAT ARE POSSIBLY SHARED OR FROM THE SAME COMPUTER TO BE USED AS EXHIBITS OR EVIDENCE -- HOW THE FAIREST WAY TO DO THAT I'M NOT REAL SURE ON BUT I'M SURE WE CAN WORK OUT THE DETAILS.

THE COURT: DO YOU HAVE ANY OBJECTION, MS. DUARTE, OVER THE LUNCH BREAK OR TO UNAVOIDABLY HAVE TO BE A LITTLE BIT EXTENDED BEYOND WHAT I USUALLY TAKE TO SITTING DOWN WITH MR. SETTLE AND

MR. SUTCLIFFE AND WITH MR. REED IN A SAFE AND SECURE FASHION PURSUING THAT OBJECTIVE THAT MR. SETTLE JUST TALKED TO US ABOUT.

MS. DUARTE: YOUR HONOR, MAY MY CO-COUNSEL AND CASE AGENT BE PRESENT AS WELL?

THE COURT: YES.

MS. DUARTE: I DON'T HAVE AN OBJECTION. I CAN TELL THE COURT RIGHT NOW THAT I THINK THE -- WE CAN TALK ABOUT IT AND THEN TALK ABOUT IT WITH THE COURT AFTER LUNCH.

THE COURT: OKAY. THAT'S WHAT YOU SHOULD DO, BECAUSE I DON'T KNOW IF THAT'S AN ACTUAL CONCERN. I KNOW YOU'RE TRYING TO BE HELPFUL BY ALERTING ME TO POTENTIAL CONSIDERATIONS, BUT IT MAY NOT BE AN ACTUAL CONCERN. AND IF IT IS AN ACTUAL CONCERN AND THERE ARE ALTERNATIVE MEANS OF ADDRESSING IT BESIDES EITHER DUPLICATING OR -- THE EVIDENCE AGAIN OR ASSURING A SINGLE SOURCE, PLEASE BRING THAT UP AT THE DISCUSSIONS. ALL RIGHT, MR. SETTLE?

MR. SETTLE: YES, YOUR HONOR.

THE COURT: OKAY. NOW, MY STAFF AND I ARE GOING TO HAVE TO LEAVE THE COURTROOM, BUT I WANT TO SET THE CONTEXT FOR WHAT -- APART FROM GETTING FEEDBACK ABOUT THIS ISSUE OF THE COMPUTERS WHEN WE RESUME, WHICH WILL BE ABOUT 2:00, I WANT TO TELL YOU WHAT MY THOUGHTS ARE ABOUT THE STATUS OF REPRESENTATION HERE BECAUSE MY OBJECTIVE IS TO HAVE MR. SUTCLIFFE -- GIVE MR. SUTCLIFFE ADDITIONAL TIME TO THINK ABOUT THE SITUATION AND TO DISCUSS IT SEPARATELY AND PRIVATELY WITH MR. REED IF HE WOULD LIKE TO, AND FOR ALL SIDES TO KNOW WHAT I THINK IS THE STATE OF THE RECORD AND

THE STATE OF THE CONCERNS.

THE SOMEWHAT TORTURED HISTORY OF THIS CASE, AS REFLECTED BY TRANSCRIPTS WHICH I HAVE GOTTEN AND REVIEWED IN RECENT DAYS OR WEEKS, REFLECTS THAT ON SEVERAL OCCASIONS, THE FIRST BEING AT LEAST AUGUST 22ND OF 2002 THERE WERE COLLOQUIES THAT I HAD WITH MR. SUTCLIFFE CONCERNING BOTH HIS RIGHT AND THE PERIL HE WOULD INVITE IF HE EXERCISED HIS RIGHT TO REPRESENT HIMSELF. MR. SUTCLIFFE HAS NEVER SAID I WANT TO BE MY OWN LAWYER. I'VE NOTED THAT BEFORE AND I'M NOT GOING TO SIT UP HERE AND REVIEW EVERY SINGLE COLLOQUY WE HAD. ULTIMATELY, I FOUND THAT BY HIS CONDUCT HE HAD WAIVED HIS RIGHT TO YET ANOTHER APPOINTED COUNSEL AFTER HAVING EXHAUSTED FOUR AND DONE SO UNDER CIRCUMSTANCES WHICH, IN SEVERAL OCCASIONS TURN OUT TO BE REMARKABLY ANTAGONISTIC AND CONFRONTATIONAL.

NOW, ON VARIOUS OCCASIONS MR. SUTCLIFFE, IN FACT, ACKNOWLEDGED TO ME THAT IT WOULD BE A MISTAKE FOR HIM TO REPRESENT HIMSELF AND I ALLUDED TO SOME OF THE PERILS AND SOME OF THE DANGERS ON SEVERAL DIFFERENT OCCASIONS AND HE SAID HE UNDERSTOOD THOSE. THE FILING THAT I RECEIVED FROM MR. SUTCLIFFE LAST NIGHT, WHICH I'VE ATTACHED TO AN ORDER AND CIRCULATED TO THE PARTIES, BASICALLY PROVIDES, IF IT'S ACCURATE ACCOUNT OF THE SITUATION, A STRONG INDICATION THAT IN TRYING TO REPRESENT HIMSELF IN THE LAST FEW WEEKS MR. SUTCLIFFE HAS ENCOUNTERED A LOT OF SEVERE CHALLENGES AND OBSTACLES, WHICH I'LL GIVE HIM AN OPPORTUNITY TO SUPPLEMENT IF HE WANTS WHEN WE COME BACK HERE. AND IT'S A LITTLE HARD FOR ME TO

READ MR. SUTCLIFFE'S MIND, BUT I CAN'T BE SURE WHAT THAT LETTER, WHICH IS NOW PART OF THE FILE, WAS INTENDED TO COMMUNICATE AND WHETHER IT WAS A REQUEST TO HAVE A CONDITIONAL CHANCE TO BE REPRESENTED BY COUNSEL.

I'VE TAKEN LOTS OF MEASURES IN THE LAST FEW WEEKS TO DO WHATEVER I THOUGHT I COULD DO FEASIBLY AND COULD DO RESPONSIBLY TO ASSIST MR. SUTCLIFFE WITHOUT TAKING SIDES IN THIS CASE. I HAVE ISSUED CERTAIN ORDERS ABOUT HOW THINGS AND WHEN THINGS COULD BE SERVED UPON HIM. I TRACKED DOWN THE HEAD OF THE METROPOLITAN DETENTION CENTER IN ANOTHER STATE, NOT REALIZING HE WAS ON VACATION TO ARRANGE FOR -- ON A SPECIAL EXCEPTION BASIS MATERIALS TO BE RECEIVED THAT ARE HAND-DELIVERED TO GET -- MAKE SURE THEY GET TO MR. SUTCLIFFE SOONER THAN THEY OTHERWISE WOULD IF THEY WERE SENT BY THE MAILS, WHICH IS THE ORDINARY REQUIREMENT THAT THE MDC IMPOSES.

I HAVE TAKEN IT UPON MYSELF TO ALLOW MATERIALS WHICH ARE NOT IN COMPLIANCE WITH THE LOCAL COURT RULES CONCERNING FILING TO BE FILED. WE HAVE XEROXED THEM, WE HAVE SERVED THEM ON -- OR ARRANGED TO HAVE THEM MADE AVAILABLE TO THE PROSECUTION IN THIS CASE. I RESPONDED, ALTHOUGH MR. SUTCLIFFE THINKS IT WAS NOT ADEQUATE, TO REQUESTS CONCERNING THE ISSUANCE OF SUBPOENAS.

NOTWITHSTANDING ALL OF THAT, I AM CONCERNED THAT MR. SUTCLIFFE'S RIGHT TO A FAIR TRIAL, WHICH IS INHERENTLY AFFECTED AS IT WOULD BE FOR ANYBODY WHO CHOOSES TO REPRESENT HIMSELF, BY THE FACT THAT HE'S ON HIS OWN, IT'S COMPLICATED AND

COMPOUNDED IN WAYS THAT I DID NOT PREVIOUSLY KNOW ABOUT BY VIRTUE OF HIS CURRENT INCARCERATION.

NOW, THE RECORD IN THIS CASE REFLECTS, ON SEVERAL OCCASIONS, THAT I EXPLORED WITH MR. SUTCLIFFE THE RISKS HE WOULD TAKE IF HE, BY HIS CONDUCT; PUT HIMSELF IN A POSITION BY ALLOWING HIM NO CHOICE BUT TO DEEM THAT HE WAIVES HIS RIGHT TO COUNSEL.

I, HOWEVER, DID NOT BUILD THE NECESSARY RECORD THAT I THINK WOULD BE REQUIRED TO ASSURE THAT HE WAS INFORMED IN ADVANCE OF ALL OF THOSE RISKS. AND IN PARTICULAR, I ERRED BY NOT ARTICULATING THE ELEMENTS OF THE CASE, MEANING OF THE TWO DIFFERENT SETS OF CRIME THAT ARE ALLEGED THAT HE COMMITTED AND THE PENALTIES. I COULD HAVE BEEN MORE EXPANSIVE ABOUT SOME OF THE MECHANICAL -- NOT MECHANICAL, BUT SOME OF THE FUNCTIONAL OBSTACLES ANYBODY WOULD FACE IN REPRESENTING THEMSELF IN A CRIMINAL TRIAL. MUCH OF THAT HAS BEEN ADDRESSED AND WAS ADDRESSED BEFORE I GOT MR. SUTCLIFFE'S FILING LAST NIGHT THROUGH A FEW ORDERS THAT I'VE ISSUED, BOTH DIRECTLY BY MYSELF AND THROUGH ORDERS ISSUED BY THE PROSECUTION TO SET FORTH IN WRITING AND TO SERVE AND HANDSERVE UPON MR. SUTCLIFFE MANY DISCLOSURES ABOUT THESE CONSIDERATIONS.

WHAT I WOULD WANT YOU TO DO OVER THE LUNCH BREAK, IF YOU CHOOSE TO, MR. SUTCLIFFE, IS TO EVALUATE WHERE YOU STAND IN TERMS OF READINESS FOR TRIAL ON TUESDAY, DISCUSS WITH MR. REED WHATEVER YOU THINK WOULD BE APPROPRIATE AND HE WOULD THINK WOULD BE APPROPRIATE ABOUT REPRESENTATION ON A FULL BASIS HE COULD PROVIDE YOU, EVALUATE YOUR RIGHTS UNDER THE SPEEDY TRIAL ACT. I KNOW THAT

YOU HAVE NOT WAIVED THOSE RIGHTS AND YOU'LL HAVE TO, MS. DUARTE, DO ANOTHER CALCULATION ABOUT HOW MUCH TIME WILL BE AVAILABLE UNDER THE SPEEDY TRIAL ACT, IF THE CASE DOES NOT PROCEED ON TUESDAY.

I WILL INVITE YOU TO ADDRESS THE COURT WHEN WE RETURN, MR. SUTCLIFFE, TO TELL ME WHAT YOUR POSITION IS AFTER NOW HAVING RECEIVED IN WRITING AND ON SEVERAL OCCASIONS ORALLY FROM THE COURT AND FROM THE BENCH UNUSUAL AND DETAILED DISCLOSURES ABOUT PRO SE REPRESENTATION.

SO THAT'S SOMETHING THAT NEEDS TO BE ADDRESSED. WE'RE GOING TO BE ADJOURNED UNTIL 2:00. WE'LL RESUME THEN. MR. SETTLE IS EXCUSED AND THOSE SPECIAL REPRESENTATIVES OF THE MARSHALS AND THE CSO'S THAT CAME TO ADDRESS THE SECURITY CONCERNS NEED NOT RETURN EITHER AT 2:00.

(RECESS.)

THE COURT: I'LL JUST LET THE RECORD REFLECT THAT MR. SUTCLIFFE AND MR. REED ARE PRESENT AT THEIR COUNSEL TABLE AND SO IS THE PROSECUTION TEAM.

ALL RIGHT. FOLLOWING UP ON SOME OF THE MATTERS WE GOT TO BEFORE THE BREAK, I'D LIKE TO START BY ASKING YOU, MS. DUARTE, TO FIRST TELL ME ABOUT THE OUTCOME. YOU DON'T HAVE TO GET INTO EVERY SINGLE DETAIL, BUT THE DISCUSSION CONCERNING THE COMPUTERS.

MS. DUARTE: OH. YES, YOUR HONOR. WE DID HAVE A DISCUSSION ABOUT THE COMPUTERS AND THE PRIMARY CONCERN WAS THAT THE EVIDENCE -- IF MR. SUTCLIFFE BRINGS IN ELECTRONIC EVIDENCE AND IT'S SUBJECT TO ALTERATION, WHICH IT WOULD JUST BY ITS VERY NATURE

BE, THEN THERE WOULD BE AN EVIDENTIARY ISSUE. WHAT WE ALL SEEM TO HAVE AGREED ON IS THE NEED TO USE A CONSISTENT SET OF EXHIBITS, WHICH WOULD BE THE GOVERNMENT EXHIBITS; BUT, OF COURSE, MR. SUTCLIFFE WOULD BE ABLE TO VIEW THEM, USE THEM, AND ADD TO THEM.

IN OTHER WORDS, I HAVE TOLD MR. SUTCLIFFE AND MR. REED THAT IF THERE'S SOMETHING THAT YOU'VE GIVEN THEM IN THE PAST IN DISCOVERY, WHICH WE CAN GET INTO LATER, WHICH HE WANTS TO EXHIBIT AND HE LET'S ME KNOW ABOUT THAT, WE WILL MAKE IT AVAILABLE, HE CAN EXHIBIT IT AND EITHER THE GOVERNMENT OR THE DEFENSE CAN INTRODUCE IT.

SO I THINK THAT WE'RE OKAY THERE. AND THEN WE ALSO --

THE COURT: I'M NOT OKAY BECAUSE I DON'T THINK I UNDERSTAND IT. I SURMISE THAT THERE'S GOING TO BE A -- SOME KIND OF A DISCUSSION WITH DISCLOSURE CONCERNING JUST WHAT EVIDENCE HAS PHYSICALLY MADE ITS WAY TO THE DEFENDANT BUT --

MS. DUARTE: I DIDN'T KNOW THAT YOU WERE TALKING ABOUT THAT, YOUR HONOR. I'M SORRY.

THE COURT: NO. I'M NOT. I'M NOT TALKING ABOUT THAT SO LET ME CONTINUE. FROM WHAT YOU SAID IT STRIKES ME -- LET ME JUST ASK YOU. THIS PROPOSAL AND THIS SOLUTION THAT YOU JUST SUMMARIZED RIGHT NOW COULD NOT BE IMPLEMENTED ACCORDING TO YOUR UNDERSTANDING BECAUSE MR. SUTCLIFFE DOESN'T HAVE THAT DISCOVERY; IS THAT CORRECT?

MS. DUARTE: THAT'S MY UNDERSTANDING FROM MR. SUTCLIFFE.

THE COURT: OKAY. NOW, ASSUMING THAT HE GETS IT BEFORE, OF COURSE, THE START OF THE TRIAL, WHAT IS IT THAT HE WILL GET? WILL HE BE ABLE TO TAKE IT WITH HIM TO THE MDC? AT HIS OWN CHOICE WILL HE BE ABLE TO ACCESS IT IF SOMETHING ELSE IS BEING DISPLAYED DURING THE TRIAL? IF YOU'RE SHOWING A WEBSITE PAGE OF A WITNESS AND HE DOESN'T CARE TO FOLLOW THAT EVIDENCE AND HE WANTS TO ACCESS THE COMPUTER TO LOOK FOR SOMETHING ELSE THAT HE THINKS MIGHT BE IMPORTANT FOR HIS DEFENSE, WILL HE BE ABLE TO DO IT? WEBSITE.

MS. DUARTE: IT'S HARD TO ANSWER THAT, YOUR HONOR, BECAUSE I DON'T KNOW. I TALKED WITH MR. REED AND MR. SUTCLIFFE ABOUT THIS OVER THE BREAK. I DON'T KNOW WHAT HE WANTS, AND I CAN EXPLAIN TO YOU THE NATURE OF THE ELECTRONIC EVIDENCE AND THE WAY IT'S BEEN TURNED OVER. IF HE WANTS ANY OF WHAT WE'RE EXHIBITING PART OF WHICH IS ACTUALLY TO ADDRESS HIS CONCERN THAT THE ENTIRE WEBSITE -- YOU KNOW, HIS CONCERN IS THAT THE ENTIRE WEBSITE IS NOT GOING TO BE EXHIBITED.

WHAT I HAVE TOLD COUNSEL AND COUNSEL IN THE PAST IS THAT I'M NOT NECESSARILY GOING TO EXHIBIT THE ENTIRE WEBSITE, THAT'S A FACT. HOWEVER, I WILL MAKE IT AVAILABLE. I WILL EVEN MAKE IT A GOVERNMENT'S EXHIBIT AND I'VE ALSO TURNED OVER COPIES BUT I WILL ALSO MAKE IT AVAILABLE HERE AS AN EXHIBIT IN TRIAL SHOULD DEFENSE CARE TO SHOW SOME ADDITIONAL THAT I DON'T SHOW.

THE COURT: OKAY. THAT'S FINE AND I'M PLEASED ABOUT THAT, BUT I'M LOOKING AT THIS IN A VERY CONCRETE AND PRACTICAL WAY. DURING THE COURSE OF ANY TRIAL, THE LAWYER REPRESENTING THE

CLIENT FREQUENTLY LOOKS FOR OTHER EVIDENCE, A TRANSCRIPT PAGE, AN EXHIBIT, A PIECE OF OTHER TANGIBLE EVIDENCE WHILE SOMETHING ELSE IS UNDERWAY IN THE COURT, IN THE TRIAL. NOW, THAT COULD BE WHAT MR. SUTCLIFFE CHOOSES TO DO, AND I JUST WANT TO KNOW, SINCE SO MUCH OF THE EVIDENCE IN THIS CASE IS GOING TO BE -- IS GOING TO CONSIST OF MATERIAL THAT WAS ON THE INTERNET THAT WAS IN THE WEBSITE THAT MAY BE DOWNLOADED OR PRINTED OUT FOR VIEWING BY THE JURORS, THAT HE WILL HAVE ACCESS TO WHATEVER IS IN THE ARRAY OF EVIDENCE THAT THE GOVERNMENT WAS REQUIRED TO TURN OVER OR CHOSE TO TURN OVER AT HIS CHOICE, WHEN HE WANTS IT, AND I MEAN IN THE COURTROOM ONLY. I'M NOT PROMISING OR EVEN SUGGESTING THAT HE WOULD HAVE THIS COMPUTER MATERIAL AVAILABLE AT THE PRISON.

BUT CAN HE TROLL THROUGH THIS DISCOVERY, SITTING AT HIS COUNSEL TABLE WHEN YOU'RE PUTTING ON YOUR CASE?

MS. DUARTE: COULD I JUST HAVE A MOMENT, YOUR HONOR?

(COUNSEL CONFERRED SOTTO VOCE.)

MS. DUARTE: YOUR HONOR, SPEAKING ABOUT THE DISCOVERY NOW AND NOT JUST THE EVIDENCE THAT THE GOVERNMENT IS EXHIBITING AT TRIAL, IT'S AN ENORMOUS AMOUNT OF INFORMATION. IS IT POSSIBLE FOR ALL THAT INFORMATION TO ACTUALLY BE ACCESSIBLE TO MR. SUTCLIFFE DURING THE COURSE OF THE TRIAL? IF THAT'S THE QUESTION --

THE COURT: TO THE EXTENT THAT AT LEAST, FOR EXAMPLE, IT'S RETRIEVABLE IN PRINCIPAL THROUGH A COMPUTER. IF TO USE A BIZARRE EXAMPLE, IF A PIECE OF THE EVIDENCE WAS A HAT THAT SOMEBODY WORE ON ITS HEAD, I WOULDN'T EXPECT THAT OF COURSE. AND

IT WAS ONE SUCH HAT AND IT WAS IN THE CUSTODY OF THE GOVERNMENT, I WOULDN'T EXPECT THAT TO BE AVAILABLE FOR HIS TOUCHING AT ANY POINT THAT HE FELT LIKE IT. BUT IF IT'S SOMETHING THAT IS PART OF THE ARRAY OF ELECTRONIC EVIDENCE OR EVIDENCE TAKEN FROM ELECTRONIC MEDIA, IT SEEMS TO ME TO BE NECESSARY AND IN ANY EVENT FAIR FOR HIM TO HAVE UNFETTERED ACCESS TO IT AT LEAST WHILE THE TRIAL IS UNDERWAY HERE IN THE COURTROOM SO THAT'S WHAT I'M TRYING TO UNDERSTAND.

MS. DUARTE: I DON'T THINK WE ALONE COULD MAKE THAT POSSIBLE BECAUSE IT'S TOO MUCH INFORMATION AND IT'S MULTIPLE HARD DRIVES THAT YOU'RE TALKING ABOUT. WE'D HAVE TO -- I THINK WE'D HAVE TO CHECK WITH MR. SETTLE AS -- MR. SETTLE?

THE COURT: SETTLE. AND HE'S BEEN GOOD ENOUGH TO COME BACK HERE.

MS. DUARTE: HE HAS, AS TO WHETHER OR NOT THAT WOULD BE POSSIBLE. BUT, YOUR HONOR, TO USE A SIMILAR ANALOGY, I THINK -- MAYBE I WON'T EVEN TRY -- PART OF THE REASON WHY, AND I KNOW YOU WANT TO ADDRESS THIS LATER, BUT PART OF THE REASON WHY IN A CASE LIKE THIS IT HAS BEEN TURNED OVER SO FAR IN ADVANCE AND THE COURT MADE THIS CASE COMPLEX, I THINK RIGHTFULLY SO, BECAUSE OF THE HUGE AMOUNT OF ELECTRONIC EVIDENCE WAS SO THAT THE DEFENSE TEAM COULD WORK THROUGH THIS, PUT WHAT THEY WANTED TO DISPLAY TODAY, CUSTOMARILY RUN IT BY THE GOVERNMENT, WE COULD AGREE THAT IT'S ALL FORENSICALLY SOUND, THERE HAVE BEEN NO ALTERATIONS AND THIS WOULD BE DONE.

WHETHER OR NOT THIS CAN BE DONE WITH THIS AMOUNT OF INFORMATION BASICALLY ON THE FLY BY MR. SUTCLIFFE IS A WHOLE DIFFERENT QUESTION AND I DON'T KNOW THE ANSWER. BUT NOW THAT CUSTOMARILY THE REASON IT WOULD NEED TO BE DONE IS BECAUSE THIS ALL WOULD HAVE BEEN SORTED OUT FROM THE DISCOVERY PROVIDED.

THE COURT: WELL, I KNOW THAT YOU'VE REPRESENTED TO ME ON MORE THAN ONE OCCASION THAT YOU'VE TURNED OVER DISCOVERY TO VARIOUS LAWYERS WHO PREVIOUSLY REPRESENTED THE DEFENDANT. YOU PROPOSE STIPULATIONS, WHICH THE DEFENDANT DECLINED TO ENTER INTO, SO IF THAT'S WHAT YOU'RE REFERRING TO IN TERMS OF THE PAST HISTORY, I'M A LITTLE BIT OF AWARE OF THAT.

MR. SETTLE, DO YOU KNOW WHAT I'M DRIVING AT? CAN YOU UNDERSTAND WHAT I'M TRYING TO ASCERTAIN?

MR. SETTLE: YES, YOUR HONOR.

THE COURT: IN TERMS OF THE CAPACITY OF THE TECHNOLOGY, THOSE TWO LAPTOP COMPUTERS AND THE ACCOMPANYING EQUIPMENT THAT WOULD BE NECESSARY TO ACCOMPLISH THEIR PURPOSE IN A TRIAL, COULD THAT BE DONE? COULD MR. SUTCLIFFE, IN THE COURSE OF THE TRIAL, HAVE UNFETTERED ACCESS TO THIS BROAD ARRAY OF INFORMATION?

MR. SETTLE: YOUR HONOR, I BELIEVE THERE WOULD BE SOME LIMITATIONS. IT'S MY UNDERSTANDING THAT HE HAD SEVERAL HARD DRIVES, VERY LARGE HARD DRIVES THAT WOULD BE MUCH GREATER THAN THE CAPACITY OF THE LAPTOPS THAT WE WOULD MAKE AVAILABLE AT ANY ONE PLACE. HOWEVER, IT'S BEEN -- I'VE BEEN LED TO BELIEVE THAT THE ACTUAL AMOUNT OF WHAT'S ON THE HARD DRIVE WOULD BE USED WOULD BE

SMALL ENOUGH TO FIT ON EITHER ONE OF THE HARD DRIVES BUT WE WOULD NEED TO IDENTIFY -- HAVE SOME SORT OF FINITE IDENTIFICATION OF WHAT'S TO BE USED, THE SIZE OF THE DATA.

THE COURT: OKAY. THANK YOU. AND I MAY GET BACK TO YOU IN ONE MOMENT. MS. DUARTE, ASSUMING FOR THE MOMENT THAT THE -- BOTH SIDES AGREE ON WHAT THE UNIVERSE OF POTENTIALLY RELEVANT EVIDENCE IS AND THAT IT'S CONSIDERABLY LESS AND THE EVIDENCE IN ITS RAW FORM THAT WOULD BE ON THESE VARIOUS HARD DRIVES, SOME OF WHICH ARE PACKED WITH LOTS OF DATA, IS IT YOUR UNDERSTANDING THAT IF YOUR ASSESSMENT OF WHAT'S POTENTIALLY RELEVANT EVIDENCE WERE ACCEPTED BY THE DEFENDANT IT COULD BE PLACED ON TO TWO DISKS, EITHER ONE OF WHICH WOULD GO -- TWO HARD DRIVES, EITHER ONE OF WHICH WOULD GO INTO ONE OF THOSE LAPTOPS AND THEREFORE BE ACCESSIBLE AT WILL DURING THE COURSE OF THE TRIAL?

MS. DUARTE: I DON'T THINK THE COURT NECESSARILY MEANS HARD DRIVES BECAUSE THE HARD DRIVES WOULDN'T -- OR MAYBE IT DOES.

THE COURT: DON'T ASSUME I KNOW WHAT I'M TALKING ABOUT. SO JUST CORRECT ME IF I'M WRONG.

MS. DUARTE: DO YOU MEAN, YOUR HONOR, THAT WE COULD ACTUALLY HAVE TWO --

THE COURT: HOW ARE YOU GOING TO BRING YOUR EVIDENCE TO THE COURT IN TERMS OF THE EXTENT TO WHICH YOU SEEK TO ACCESS IF THROUGH YOUR LAPTOPS? JUST DESCRIBE THAT.

MS. DUARTE: FLOPPIES AND CD ROMS. WHAT WE HAVE DONE -- THIS HAS LL BEEN TURNED OVER. WHAT WE HAVE DONE IS FOR EACH OF

THE CHARGED ACCOUNTS. EACH OF THE CHARGED ACCOUNTS IN THE INDICTMENT, OF WHICH THERE ARE NINE, WE'VE PREPARED ANYWHERE BETWEEN THREE AND I BELIEVE THE MOST HAS 19 OR 18, VERY SMALL PAGES. IT'S EITHER A FLOPPY OR A CD ROM WHICH WE CAN JUST TAKE IN AND OUT AT WILL AS WE START TO DISCUSS THE COUNTS AND SHOW WHICH ARE DOWNLOADS, WHICH ARE PAGES THAT ARE RESTORED FROM THE WEBSITES. THE WITNESSES WILL AUTHENTICATE THEM BECAUSE THEY SAW THEM ON THE INTERNET, SUCH AS THEY WOULD PHOTOGRAPHS. AND WE ALSO HAVE PRINTED COPIES OF THOSE AVAILABLE IN CASE THERE'S AN ISSUE OR A TECHNICAL PROBLEM. THAT IS THE WAY THAT WE WERE GOING TO PUT ON OUR CASE.

THE COURT: OKAY. IF THOSE FLOPPIES AND THOSE CD ROMS CONTAINING THE EXACT CONTENTS AS YOU HAVE SAID WERE PROVIDED TO MR. SUTCLIFFE AND AVAILABLE TO HIM IN THE COURTROOM, MR. SETTLE, UNDER THAT HYPOTHETICAL, WOULD HE HAVE ACCESS TO WHATEVER HE WANTED TO LOOK FOR DURING THE ONGOING COURSE OF THE TRIAL?

MR. SETTLE: YES, YOUR HONOR.

THE COURT: OKAY. NOW, DID YOU REACH ANY KIND OF UNDERSTANDING THAT YOU THINK WAS BILATERAL DURING THE CONVERSATION OVER LUNCH AS TO THE MATERIAL THAT -- IF IT COULD BE DUPLICATED AND MADE AVAILABLE TO MR. SUTCLIFFE, WOULD BE ALL THE MATERIAL THAT HE WANTED?

MS. DUARTE: WE DID NOT REACH AN UNDERSTANDING AT ALL. I DON'T THINK IT'S THROUGH ANY FAILURE TO TRY. IT SEEMS TO BE THAT I DON'T UNDERSTAND WHAT HE'S LOOKING FOR AND HE DOESN'T -- I

DON'T THINK HE KNOWS OR UNDERSTANDS WHAT I HAVE TO OFFER BECAUSE HE HASN'T RECEIVED IT APPARENTLY. THAT'S THE PROBLEM.

THE COURT: OKAY. SO WHAT DID YOU MEAN TO THE EXTENT THAT YOU WERE INDICATED, WHEN YOU FIRST STOOD UP THIS AFTERNOON, THAT THERE HAD BEEN AN AGREEMENT ON THE NEED TO USE CONSISTENT SET OF EXHIBITS AND THE WAY TO ACCOMPLISH THAT?

MS. DUARTE: WELL, WHAT I MEANT WAS IS THAT WHAT I TALKED WITH MR. SUTCLIFFE AND MR. REED ABOUT WAS THAT IF WE CAN MAKE KNOWN TO MR. SUTCLIFFE AND MR. REED WHAT WE HAVE; AND IN ADDITION TO WHAT I DESCRIBED TO THE COURT WE ALSO HAVE SEVERAL OTHER CD'S THAT WE WERE GOING TO MAKE AVAILABLE AS EXHIBIT THAT HAVE COMPLETE DOWNLOAD OF THE WEBSITE, WHICH IS WHAT I UNDERSTOOD MR. SUTCLIFFE -- AS I UNDERSTOOD IN THE MOTION RESPONSE. AFTER TALKING WITH HIM, I'M NOT SURE HE'S SEEN THOSE.

THE COURT: YOU'RE NOT SURE HE'S SEEN WHICH?

MS. DUARTE: MY DOWNLOADS, SO I DON'T THINK HE REALLY UNDERSTANDS WHAT I HAVE. I THINK IF HE WERE TO HAVE WHAT I HAVE AND TO SEE IT I'M OPTIMISTIC THAT IT WOULD ACTUALLY BE WHAT HE NEEDS AND THAT WE COULD WORK THIS OUT.

THE COURT: OKAY. THANK YOU, MS. DUARTE.
MR. SUTCLIFFE, WHAT DO YOU THINK YOU WANT?

MR. SUTCLIFFE: JUST IN CASE YOU MISUNDERSTOOD WHAT SHE SAID. WHEN SHE SAID "MY DOWNLOADS," SHE DIDN'T MEAN "MY" MEANING "HER." THE NAME OF THE FOLDER CALLED "MY DOWNLOADS." JUST TO CLARIFY THAT. PLAY OF WORDS.

THE COURT: I'M AWARE OF THE --

MR. SUTCLIFFE: I DON'T KNOW IF YOU'VE SEEN THE CD ROMS.

THE COURT: NO. I HAVEN'T SEEN ANY OF IT.

MR. SUTCLIFFE: IT'S LABELED MY DOWNLOAD.

THE COURT: TRY TO BE PRACTICAL. PLEASE, IN LIGHT OF WHAT MS. DUARTE JUST EXPLAINED, MR. SETTLE JUST EXPLAINED. WHAT DO YOU THINK YOUR RIGHTS TO SELF-DEFENSE AND TO A FAIR TRIAL ENTITLE YOU TO GET?

MR. SUTCLIFFE: I'LL TRY TO BE FAIR. OKAY. I AGREE WITH WHAT YOU SAID, WHICH IS I SHOULD HAVE ACCESS TO THE ARRAY OF ALL ELECTRONIC HARD DATA THAT HAS BEEN GENERATED, TURNED OVER, OR SUBPOENAED TO DATE AND I SHOULD HAVE FULL UNFETTERED ACCESS TO IT DURING THE TRIAL AT ANY TIME, ANYPLACE DURING THAT TRIAL. IT SHOULD BE RETRIEVABLE TO ME. I SHOULD NOT HAVE TO SEARCH FOR IT, ASK SOMEBODY TO GO GET IT, IT SHOULD BE AVAILABLE TO ME. I THINK IT SHOULD HAVE BEEN AVAILABLE A LONG TIME AGO BUT THAT'S TO SAY THE LEAST. AND I RESERVE THE RIGHT TO AMEND THAT AS WE GO ON.

MS. DUARTE: YOUR HONOR.

THE COURT: YES.

MS. DUARTE: I GUESS I DIDN'T UNDERSTAND THAT, BUT --

THE COURT: NEITHER DID I.

MS. DUARTE: WOULD THE COURT LIKE ME JUST VERY QUICKLY TO GO THROUGH WHAT I'VE TURNED OVER? THIS IS STRICTLY --

THE COURT: I KNOW YOU'RE ANXIOUS TO DO THAT AND I TOLD YOU I WILL GIVE YOU THE CHANCE SO PLEASE BE PATIENT.

MS. DUARTE: I'M SORRY. ALL RIGHT. I APOLOGIZE.

THE COURT: ALL RIGHT. MR. REED, DID YOU REACH MR. NICOLAYSEN?

MR. REED: DIDN'T PERSONALLY BUT WE EXCHANGED VOICE MAIL MESSAGES AND I THINK I HAVE THE INFORMATION THAT THE COURT WANTED ME TO FIND OUT.

THE COURT: COULD YOU REPORT TO US PLEASE, THEN.

MR. REED: YES, YOUR HONOR. THE COURT WANTED TO FIND OUT THE HISTORY OF WHETHER EXPERTS WERE OBTAINED IN THIS CASE, AND MR. NICOLAYSEN INDICATED TO ME THAT HE DID MAKE CONTACT WITH A COMPANY IN THE BAY AREA. THE NAME OF THE COMPANY IS CALLED MOBILE --

THE COURT: YOU DON'T NECESSARILY HAVE TO TELL ME THAT NOW.

MR. REED: HE INDICATED THAT HE MADE CONTACT WITH AN EXPERT. THERE WAS LOGISTICAL PROBLEMS AS TO WHETHER OR NOT THESE EXPERTS COULD BE AVAILABLE DOWN HERE IN LOS ANGELES. THERE WERE PROBLEMS BACK AND FORTH BETWEEN MR. NICOLAYSEN AND THEIR AVAILABILITY TO DO THINGS; AND THEN EVENTUALLY, MR. NICOLAYSEN REPORTED THIS TO ME, HE INDICATED THAT THE GOVERNMENT TURNED OVER TO HIM A CD ROM ENTITLED "MYWEBS." LET ME GET THAT MORE ACCURATELY.

MYWEBS, W-E-B-S. AND THIS PARTICULAR CD ROM MR. NICOLAYSEN WAS UNDER THE IMPRESSION THAT IF CAPTURED, FOR THE GREAT PART, THE EVIL GX.COM WEBSITE, AND HE FELT THAT BECAUSE IT

DID CAPTURE IT, IT CAPTURED IT IN SUCH A WAY THAT HE COULD MANEUVER THROUGH IT FROM ONE HYPERLINK TO ANOTHER HYPERLINK, THAT HE WASN'T GOING TO NEED AN EXPERT IN THE CASE AND THAT'S BECAUSE OF A CERTAIN DEFENSE THAT HE HAD IN MIND, WHICH I PREFER TO KEEP SECRET AT THIS TIME.

THE COURT: YEAH. I DON'T WANT YOU TO GO INTO THAT.

MR. REED: AND THAT'S WHY I DIDN'T GO THROUGH WITH THE EXPERT --

THE COURT: THAT'S WHY WHAT?

MR. REED: THAT'S WHY HE DIDN'T GO THROUGH WITH ACTUALLY FOLLOWING THROUGH, GETTING THE EXPERTS, HAVING THEM COME TESTIFY; HE FELT THAT HE HAD SUFFICIENT INFORMATION WITH THAT CD ROM TO ACCOMPLISH WHAT HE NEEDED THROUGH CROSS-EXAMINATION OF WITNESSES AND THROUGH OTHER MEANS.

THE COURT: NOW, YOU TOLD ME BEFORE THE BREAK, I THINK, THAT THAT CD ROM, THE MYWEBS, IS SOMETHING THAT YOU PERSONALLY HAVE IN YOUR POSSESSION.

MR. REED: I DO. I HAVE IT RIGHT HERE.

THE COURT: TO YOUR KNOWLEDGE, DOES MR. SUTCLIFFE HAVE IT IN HIS POSSESSION?

MR. REED: I'M NOT SURE ABOUT THAT, YOUR HONOR. I HAVE IT AVAILABLE.

THE COURT: OKAY. GO AHEAD, MS. DUARTE, SINCE MAYBE IT'S GOING TO AFFECT SOME OF THE THINGS THAT I CHOOSE TO DO. IF YOU WANT TO, WITHOUT GETTING INTO EVERY SCRAP OF PAPER, JUST

ENLIGHTEN ME ABOUT WHAT IT IS THAT YOU THINK YOU'VE DONE TO FOSTER THE EXCHANGE OF INFORMATION NECESSARY TO ENABLE SOMEONE, WITH OR WITHOUT A LAWYER, TO DEFEND HIMSELF UNDER THESE CHARGES? WHAT HAVE YOU PRODUCED?

MS. DUARTE: WELL, YOUR HONOR, THIS IS JUST -- I WENT THROUGH AND DID A BRIEF CHRONOLOGY, IT'S VERY BRIEF, AS TO THE ELECTRONIC EVIDENCE, OKAY. AND I CAN DO THE REST IF YOU WANT AND I CAN FILE IT IN THE FORM OF A DECLARATION.

THE COURT: I THINK YOU SHOULD.

MS. DUARTE: ON JUNE 4TH, 2002, ACCORDING TO MY RECORDS, I TURNED OVER TO MS. POTASHNER AT THE FEDERAL DEFENDER'S OFFICE EIGHT CD'S. THEY WERE ENTITLED HOSTING SOLUTIONS, ABOVE INC., WEB GROUP, A SERIES OF PRESERVATIONS DATED OCTOBER 6TH, DECEMBER 7TH, DECEMBER 2ND, FEBRUARY 28TH, AND MARCH 5TH. THAT WAS A SINGLE CD. A PRESERVATION FOR MARCH 28TH, A CD ENTITLED GX BACKUP, A CD ENTITLED 12-12-01, AND A CD BY THE SHORT NAME OF PAUL CARPENTER.

NOW, THESE CD'S CONSISTED OF, AMONG OTHER THINGS, MULTIPLE DOWNLOADS OF THE EVIL GX WEBSITE FROM THE INTERNET IN AS COMPLETE A FORM AS POSSIBLY CAN BE CAPTURED ON THE DATES NOTED.

THE COURT: WHO HAD EXECUTED THOSE DOWNLOADS?

MS. DUARTE: THE F.B.I. AGENTS AND MEMBERS OF GLOBAL CROSSING AND THE BEVERLY HILLS POLICE DEPARTMENT.

THE COURT: OKAY. AND THAT WAS -- AND THE DOWNLOADS WERE RECORDED BY DATE SO THAT IT WAS THE VERSION OF THE WEBSITE THAT COULD BE ESTABLISHED AT LEAST ON SOME KIND OF IDENTIFYING TAG

ON THE DOWNLOAD.

MS. DUARTE: THAT IS CORRECT, YOUR HONOR. THE THREE THAT I MENTIONED, THE ONES FROM HOSTING SOLUTIONS, ABOVE INC., AND WEB GROUP, THOSE ARE ALL INTERNET SERVICE PROVIDERS, AND THOSE EITHER CONSISTED OF A COMPLETE DOWNLOAD OF THE WEBSITE FROM THE ACTUAL INTERNET SERVICE PROVIDER THAT HAD IT. I KNOW IN PARTICULAR THE ONES FROM HOSTING SOLUTIONS WAS PURSUANT TO A SEARCH WARRANT, WHICH I TURNED OVER.

THE COURT: I HAVE TO INTERRUPT YOU BECAUSE I'M NOT SURE HOW FAR DOWN THE ROAD YOU'RE GOING TO TAKE ME ON THIS. YOUR PURPOSE IS TO ESTABLISH WHAT THE GOVERNMENT DID IN GOOD FAITH THAT IS TO PROVIDE EVIDENCE AS IT'S REQUIRED TO MAYBE BEYOND WHAT IT'S REQUIRED TO DO TO SOME OF THE PRIOR LAWYERS IN THAT CASE, RIGHT?

MS. DUARTE: NOT JUST THAT, YOUR HONOR, BUT I THOUGHT IT WOULD AID IN OUR DISCUSSION OF THE VARIOUS TERMINOLOGY, FLOPPIES, CD'S, AND HARD DRIVES. IF I COULD AT LEAST GET TO THE POINT, LET THE COURT KNOW WHAT I TURNED OVER FROM DEFENDANT'S HARD DRIVE.

THE COURT: GO AHEAD.

MS. DUARTE: I WANT TO MAKE CLEAR THAT THESE EIGHT CD'S OUTSIDE FROM DEFENDANT'S COMPUTER EVIDENCE. ALL FROM INTERNET OR INTERNET HOST PROVIDERS.

THEN ON JULY THE 29TH, 2002, THIS IS WHEN I TURNED OVER TO THE FEDERAL DEFENDER'S OFFICE COPIES OF THE ENTIRE CONTENTS OF DEFENDANT'S COMPUTER THAT HAD BEEN SEIZED FROM HIS HOME. AND WHAT I TURNED OVER CONSISTED OF EIGHT I.D.E.'S, WHICH ARE A FORM OF

HARD DRIVE, I.D.E. DRIVES. IT'S IMPORTANT TO NOTE, YOUR HONOR, THAT TWO WERE DAMAGED AND TWO WERE BLANK. I WAS MERELY RETURNING THEM TO THE FEDERAL DEFENDER'S OFFICE. FOUR HAD DATA ON THEM FROM DEFENDANT'S COMPUTER. FOUR DIFFERENT I.D.E. HARD DRIVES AND TWO SCSI DRIVES KNOWN AS SCSI DRIVES. SO THAT'S A TOTAL OF SIX HARD DRIVES CONTAINING INFORMATION.

23 CD'S, FOUR ZIP DRIVES AND -- ZIP DISKS, EXCUSE ME. AND 29 FLOPPIES, FLOPPY DISKS. AND THAT WAS THE CONTENT OF THE DEFENDANT'S COMPUTER AT HOME ON JULY 29TH THAT I TURNED OVER.

THEN DURING THE REST OF THE INVESTIGATION AND THE CASE, AND I KNOW YOU DON'T WANT ME TO GO THROUGH THIS IN DETAIL RIGHT NOW, BUT I TURNED OVER AS I OBTAINED THEM, VARIOUS OTHER CD'S WHICH CONTAINED OTHER DOWNLOADS.

THE COURT: TO THE PUBLIC DEFENDER'S OFFICE OR OTHER COUNSEL?

MS. DUARTE: SO FAR THE PUBLIC DEFENDER'S OFFICE ON AUGUST THE 5TH, TWO CD'S AND AUGUST THE 9TH DUPLICATIVES. THEY APPARENTLY LOOKED AT THEM AND DETERMINED THAT THEY WERE FLAWED. THEY ASKED ME FOR DUPLICATES AND AUGUST THE 9TH I TURNED OVER DUPLICATES INCLUDING DUPLICATE OF THE BACKUP -- EXCUSE ME -- THE BACKUP OF THE WEBSITE MADE BY GLOBAL CROSSING WHICH WERE MULTIPLE, I CAN'T EVEN NAME ALL THE DATES, YOUR HONOR. THERE WERE AT LEAST -- I'D REPRESENT RIGHT NOW WITHOUT LOOKING, THERE WERE AT LEAST 20, 25 DIFFERENT DATES.

THE COURT: BACKUPS OF THE EVIL GX WEBSITE?

MS. DUARTE: YES. DOWNLOADED STRAIGHT FROM THE INTERNET BY GLOBAL CROSSING. THEN MR. HARRIS CAME IN. THERE WERE A COUPLE OF OTHER EVENTS BUT THEY'RE NOT SIGNIFICANT, YOUR HONOR. AND THEN MR. HARRIS CAME IN, AND I THINK THIS IS IMPORTANT BECAUSE THIS IS WHERE THIS PRIOR DEBATE ABOUT THE, QUOTE, UNQUOTE, MISSING CD STARTED. MR. HARRIS CAME IN ON OCTOBER 20TH, AND I RETURNED TO HIM ON THAT DATE 103 CD'S AND FLOPPIES. I HAVE A RECEIPT. I TOLD HIM THAT THESE WERE ORIGINAL EVIDENCE. THEY WERE SEIZED FROM DEFENDANT'S HOUSE BACK IN NEW HAMPSHIRE, AND WE HAD DETERMINED -- THEY DETERMINED THAT THE F.B.I., THAT THEY HAD NO EVIDENTIARY VALUE. I WAS NOT USING ANYTHING FROM THEM AND I WAS RETURNING THEM AS ORIGINAL EVIDENCE BACK TO HIM.

THE COURT: IN OTHER WORDS, WITHOUT EXPECTING IT TO BE PART OF YOUR EVIDENCE AT TRIAL?

MS. DUARTE: CORRECT.

THE COURT: DID YOU KEEP A COPY OF IT, OF THESE 103 CD'S.

MS. DUARTE: I DON'T HAVE A COPY. THE ONLY THING THAT MIGHT HAVE OCCURRED, ALTHOUGH I DON'T THINK IT DID. LET ME ASK THE CASE AGENT IF IT WAS IMAGED, YOUR HONOR? NO. IT WASN'T EVEN IMAGED BY THE F.B.I. BECAUSE IT WAS SO UNCLEAR IT DIDN'T HAVE EVIDENTIARY VALUE.

THE COURT: BASICALLY, YOU'RE SAYING WE TOOK THIS FROM THE COMPUTER, FROM THE THINGS THAT WE SEIZED WHEN WE CONDUCTED THE SEARCH AND WE DON'T NEED 'EM AND THEY'RE YOURS.

MS. DUARTE: TAKE 'EM BACK. THAT'S CORRECT, YOUR HONOR. AT THE SAME TIME, THERE WAS ALSO SOME DISCUSSION OF THE DOCUMENTARY EVIDENCE SEIZED AND THE P.D.'S OFFICE HAD GONE THROUGH IT.

THE COURT: OKAY. BUT YOU DIDN'T GIVE TO MR. HARRIS THE EIGHT CD'S AND OTHER MATERIAL THAT YOU TALKED TO ME ABOUT THAT YOU GAVE TO POTASHNER ON JUNE 4TH NOR THE CONTENTS OF HIS COMPUTER THAT YOU GAVE TO F.P.D. ON JULY 29TH.

MS. DUARTE: THAT'S CORRECT. I WAS NOT ASKED TO NOR DID I REDO THAT DISCOVERY.

THE COURT: OKAY. HAVE YOU EVER REDONE THE DISCOVERY?

MS. DUARTE: NO. AND I'VE NEVER BEEN ASKED TO. I'VE NEVER BEEN TOLD THERE WAS A PROBLEM.

THE COURT: SO YOU DIDN'T GIVE IT A NEW OR A SECOND TIME TO MR. NICOLAYSEN EITHER?

MS. DUARTE: NO. MR. NICOLAYSEN CAME ON AND BY THIS TIME I HAD TURNED OVER -- BY THE TIME MR. NICOLAYSEN CAME ON, I HAD TURNED OVER TO MR. HARRIS IN ADDITION TO WHAT I JUST SAID. ON NOVEMBER 22ND I HAD TURNED OVER SEVEN CD'S WHICH WERE PREPARED BY OUR EXPERT.

THE COURT: THIS IS TO MR. NICOLAYSEN?

MS. DUARTE: NO-NO-NO. THIS IS STILL MR. HARRIS, YOUR HONOR.

THE COURT: NOVEMBER 22ND OF 2002?

MS. DUARTE: THAT IS CORRECT, YOUR HONOR.

THE COURT: WHAT DID YOU GIVE HIM?

MS. DUARTE: SEVEN CD'S PREPARED BY THE EXPERT. NOW, THESE CD'S, AND AMONG THEM, I BELIEVE, YOUR HONOR, IT WAS MYWEBS, THE ONE THAT EVERYBODY HAS BEEN TALKING ABOUT. SO THAT WAS NOVEMBER 22ND. AND THESE CD'S CONTAINED COMPILATIONS THAT WERE CREATED BY THE EXPERT, MADE FROM THE EVIDENCE ALREADY TURNED OVER WHICH WAS A PART OF MR. SUTCLIFFE'S COMPUTER. SO WHAT MY EXPERT HAD DONE WAS GONE THROUGH ALL THOSE HARD DRIVES, FLOPPIES, THINGS I MENTIONED BEFORE THAT HAD BEEN TURNED OVER AND MADE A COMPILATION. MADE SEVEN CD'S THAT WERE COMPILATION THAT WE FELT WERE EVIDENTIARY VALUE BECAUSE THEY MIRRORED THE COUNTS IN THE INDICTMENT.

AND WE FOUND WEB PAGES ON HIS COMPUTER THAT DID THAT, SO WE COPIED THEM AND WE MADE THEM CD'S FOR LATER TO THE EXHIBITS.

THE COURT: BUT EVERYTHING THAT WERE ON THESE SEVEN CD'S -- WHEN YOU SAY THE EXPERT, YOU MEAN THE GOVERNMENT'S EXPERT.

MS. DUARTE: THE GOVERNMENT'S EXPERT.

THE COURT: EVERYTHING THAT HE DID IN THE WAY OF SYNTHESIZING FROM OTHER MATERIAL, IT WAS FROM OTHER MATERIAL THAT HAD BEEN PREVIOUSLY GIVEN TO ONE OF THE LAWYERS; RIGHT?

MS. DUARTE: THAT IS CORRECT. ON NOVEMBER 30TH I TURNED OVER THREE MORE CD'S, SAME THING. COMPILATIONS BY THE EXPERT THAT I INTEND TO POSSIBLY USE AS EVIDENCE AT TRIAL. THESE WERE ALSO EVIDENCE TURNED OVER. ON JANUARY 13, THE DAY BEFORE WE WERE SCHEDULED TO GO TO TRIAL IN HERE ON THE 14TH, I HAVE A LETTER FROM

MR. HARRIS WHERE I GAVE HIM TWO CD'S AND FIVE FLOPPIES, WHICH WERE THE GOVERNMENT'S TRIAL EXHIBITS, WHICH, AGAIN, WERE COMPILATIONS FROM THE DOWNLOADS I HAD ALREADY TURNED OVER. BUT I TOLD HIM THAT THESE HAD BEEN CREATED BY US SHOWING SPECIFIC WEB PAGES THAT MIRRORED THE COUNTS AND THIS IS WHAT WE WERE USING AT TRIAL, AND I GAVE HIM ADVANCE COPIES SO THAT IN THE EVENT THAT HE WANTED TO SHOW MORE THAN WE WERE SHOWING, WHICH I THOUGHT HE MIGHT, HE WOULD KNOW WHAT WE WERE SHOWING AND HE COULD DO IT.

THE COURT: WHAT DID HE TURN OVER ON NOVEMBER 30?

MS. DUARTE: NOVEMBER 30TH?

THE COURT: YEAH. YOU HAD MENTIONED THAT.

MS. DUARTE: THREE MORE CD'S OF THE SAME TYPE AS THOSE TURNED OVER ON NOVEMBER 22ND, AND THOSE WERE ALSO COMPILATIONS BY THE EXPERT FOR A TOTAL OF TEN I BELIEVE HE'S DONE TO DATE.

THE COURT: AND THAT WAS TO MR. HARRIS?

MS. DUARTE: THAT WAS TO MR. HARRIS, AND THAT WAS -- WE WERE GETTING READY FOR TRIAL AGAIN AND THE EXPERT HAD DONE MORE WORK AND HE HAD DONE A FEW MORE COMPILATIONS SO I TURNED THEM OVER. THE REPORT HAD BEEN TURNED OVER LONG BEFORE THAT BUT I'M ONLY TALKING ABOUT ELECTRONIC EVIDENCE.

THEN MR. NICOLAYSEN CAME ON AND ON JANUARY 28TH OF THIS YEAR I WROTE HIM A LETTER, AND I HAVE THAT, AND IN THAT LETTER I ENCLOSED HARD COPIES OF ALL PREVIOUS CORRESPONDENCE THAT HAD ANYTHING TO DO WITH DISCOVERY, INCLUDING THE LETTERS THAT I'VE BEEN QUOTING FOR THE COURT IN MAKING THIS REPRESENTATION. AND I

ASKED HIM TO GO THROUGH THEM. THIS IS WHAT HE SHOULD HAVE, PLEASE MAKE SURE THAT HE HAD IT.

THE COURT: IN OTHER WORDS, THEY ARE HARD COPIES OF ALL THE PREVIOUS CORRESPONDENCE, SO IT WAS A WAY OF GIVING HIM A WRITTEN INVENTORY OF WHAT HAD BEEN PREVIOUSLY PRODUCED TO OTHER LAWYERS.

MS. DUARTE: THAT IS CORRECT. AND I -- I MEAN, OBVIOUSLY, THIS ISN'T AN INQUIRY ABOUT MY CONDUCT AND I KNOW THAT, YOUR HONOR, BUT I'VE ALSO AS I'VE DONE WITH ALL ATTORNEYS I MADE MYSELF AVAILABLE FOR ADDITIONAL CONSULTATION BUT I THOUGHT THAT THAT WAS THE EASIEST WAY TO SHOW HIM WHAT HAD HAPPENED BECAUSE I KNEW THAT HE WAS STEPPING INTO A DIFFICULT CASE AT THIS POINT.

AND IN THAT LETTER, I ALSO TOLD HIM THAT MR. HARRIS AND I HAD HAD A MEET-AND-CONFER; THAT THE COURT HAD ORDERED WHEN MR. HARRIS WAS RELIEVED, THE ISSUE ABOUT THE MISSING -- AND I PUT THE TERM IN QUOTES, CD'S FROM BUREAU OF PRISONS HAD BEEN BROUGHT UP BY MR. SUTCLIFFE. SO MR. HARRIS AND I HAD A MEET AND CONFER ABOUT THE EVIDENCE THAT WAS TURNED OVER TO HIM AND WE HAD FIGURED OUT WHICH THREE CD'S, IF YOU WILL, HE SUPPOSEDLY NO LONGER HAD AND I LISTED THOSE FOR MR. NICOLAYSEN AND I TOLD HIM THAT THEY WERE FROM -- I'M SORRY.

THE COURT: GO AHEAD.

MS. DUARTE: THAT THEY WERE FROM THAT BATCH OF CD'S AND FLOPPIES THAT WE HAD EARLIER RETURNED DEEMING TO HAVE NO EVIDENTIARY VALUE WHATSOEVER. THEY WERE EITHER PROGRAMS, SOME

WERE GAMES, SOME WERE DAMAGED, AND THAT I DIDN'T CONSIDER THAT TO BE AN ISSUE BUT TO LET ME KNOW IF ANYBODY NEEDED ANYTHING ELSE.

THE COURT: IN OTHER WORDS, THOSE THREE SO-CALLED MISSING CD'S WERE SIMPLY FROM THE MATERIAL YOU WERE RETURNING TO HIM.

MS. DUARTE: TO THE BEST OF MR. HARRIS AND I'S DETERMINATION WHEN WE MEET, THAT'S TRUE. HE INFORMED ME WHAT NUMBERS WE WERE MISSING, I SHOWED HIM THE RECEIPT AND LOOKED UP THE NUMBERS AND FROM THAT I WAS ABLE TO ASCERTAIN WHAT WAS MISSING.

AND SINCE THEN, YOUR HONOR, I HAVE NOT CREATED ANY ADDITIONAL ELECTRONIC EVIDENCE, I HAVE NOT TURNED OVER ANY ADDITIONAL ELECTRONIC EVIDENCE, AND THAT'S A BRIEF CHRONOLOGY. AND THAT'S WHY SOMETIMES WHEN THE COURT IS TALKING ABOUT CD'S AND FLOPPIES AND HARD DRIVES, IT'S DIFFICULT BECAUSE WE DO HAVE SOME CD'S THAT ARE FROM THE HARD DRIVE WHICH IS WHAT WE CONSIDER TO HAVE EVIDENTIARY VALUE. WE TURNED OVER ALL OF IT LONG AGO FOR THE PURPOSE THAT DEFENSE COULD DO THE SAME -- OH, THE AUGUST CD, WHICH I ALREADY MENTIONED, YOUR HONOR. THE CD WHICH I SENT MR. SUTCLIFFE AT MDC LAST MONTH, I ALREADY BROUGHT THAT UP, YOUR HONOR, AND THAT JUST -- I SENT THAT OVER BECAUSE WE HAD CAPTURED IT OFF THE WEB AND I THOUGHT HE SHOULD HAVE A COPY BUT I'M NOT USING THAT. I JUST BECAME AWARE OF IT BEFORE WE COPIED IT. ASIDE FROM THAT, I HAVE NOT CREATED ANYMORE EXHIBITS OR TURNED ANYTHING ELSE OVER AND THAT'S WHY IT'S DIFFICULT SOMETIMES TO TALK ABOUT IT

BECAUSE THE HARD DRIVES WERE COPIED IN THEIR TRUE FORM, THEY WERE ALL TURNED OVER. AND SINCE THEN, OUR EXPERT HAS USED THEM AND MADE SOME CD'S OUT OF THEM BUT THE HARD DRIVES I'VE NEVER EVEN SEEN THEM SINCE. THIS IS NOT SOMETHING THAT WE WALK AROUND AND USE IN OUR COMPUTERS, WE ONLY USE THE CD'S AND FLOPPIES.

THE COURT: THANKS, VERY MUCH. I CAN SEE WHY YOU WANTED TO ARTICULATE THAT AND YOU'RE RIGHT. AT NO TIME HAD I EVER EVEN THOUGHT THAT THE GOVERNMENT OR YOU PERSONALLY DID ANYTHING INAPPROPRIATE OR UNETHICAL, NOT AT ALL. NOW, MR. REED, YOU JUST HEARD WHAT MS. DUARTE TOLD ME. HOW MUCH OF THAT MATERIAL THAT SHE JUST DESCRIBED DO YOU BELIEVE YOU HAVE IN YOUR PHYSICAL POSSESSION?

MR. REED: I HAVE NONE, YOUR HONOR. I JUST HAVE THE MYWEBS CD. THAT'S ALL I OBTAINED.

THE COURT: DO YOU KNOW WHERE IT IS NOW?

MR. REED: I DON'T, YOUR HONOR.

THE COURT: HOW MUCH OF THAT MATERIAL THAT MS. DUARTE JUST TOLD ME ABOUT, JUST THE MATERIAL THAT SHE DESCRIBED IN COURT, MR. SUTCLIFFE, DO YOU HAVE IN YOUR PHYSICAL POSSESSION?

MR. SUTCLIFFE: I HAVE THE MYWEBS CD WHICH I RECEIVED AT DEVENS. I'VE NEVER BEEN ABLE TO REVIEW AND I HAVE THE ONE SHE JUST SENT ME SHE'S SPEAKING ABOUT WHICH I RECEIVED SEVERAL DAYS AGO. THAT'S ALL I HAVE. I MIGHT HAVE ONE FLOPPY, EXCUSE ME. IT WAS SENT TO ME THE SAME TIME AS THE MYWEBS. I BELIEVE IT'
DON'T KNOW. I DON'T RECALL IT. I THREW IT IN A FOLDER AN

THERE WITH MY WEB CD ROM EVER SINCE THEN.

THE COURT: SPEAK UP.

MR. SUTCLIFFE: I'VE NOT BEEN ABLE TO VIEW IT SO I REALLY DIDN'T CARE WHAT WAS ON IT.

THE COURT: ALL RIGHT. ONE REASON I TOOK THE BENCH THREE OR FOUR MINUTES LATE THIS AFTERNOON IS I WAS DRAFTING AN ORDER I WAS INTENDED AND TOLD YOU I WOULD ISSUE TO THE PRIOR LAWYERS IN THIS CASE, AND I'M GOING TO TAILOR THAT ORDER TO WHAT I BELIEVE AND NOW UNDERSTAND BASED UPON WHAT THE LAWYERS AND MR. SUTCLIFFE JUST TOLD ME. BECAUSE I AM UTTERLY ASTONISHED, BAFFLED, AND UPSET THAT DESPITE MY EFFORTS AND ORDERS THAT THE MATERIAL HAS NOT BEEN TRANSFERRED FROM ONE LAWYER TO THE SUCCESSIVE LAWYER AND IS NOT IN THE CURRENT POSSESSION OF THE STANDBY LAWYER OR THE DEFENDANT. I DON'T SEE HOW WE CAN PROCEED TO TRIAL, EVEN PUTTING ASIDE ISSUES OF WHO REPRESENTS MR. SUTCLIFFE UNDER THAT STATE OF AFFAIRS AND I DON'T INTEND TO DO SO.

WHAT IS THE CALCULATIONS ON THE SPEEDY TRIAL ACT THAT I ASKED TO YOU LOOK INTO?

MS. DUARTE: YOUR HONOR, WHEN I HAD DONE IT PREVIOUSLY, I HAD SAID THAT ACCORDING TO MY CALCULATIONS, THE LAST DAY THAT WE COULD START TRIAL WOULD BE OCTOBER 10TH. THAT HAS NOT CHANGED BECAUSE YOU DID NOT EXCLUDE TIME LAST TIME.

THE COURT: YEAH. MR. SUTCLIFFE DID NOT WAIVE TIME AND THAT WAS HIS RIGHT.

MS. DUARTE: RIGHT. SO JUST TO LET YOU KNOW, YOUR HONOR, I BELIEVE IT IS STILL THE SAME BECAUSE I HAD DONE IT OUT TILL OCTOBER 10TH.

THE COURT: OKAY. NOW, MR. SUTCLIFFE, THIS IS DIRECTED TO YOU.

MR. SUTCLIFFE: YES, SIR.

THE COURT: I ASKED YOU TO TAKE INTO ACCOUNT THE FEW COMMENTS I MADE ABOUT THIS ISSUE OF SELF-REPRESENTATION BEFORE WE HAD THE LUNCH BREAK.

MR. SUTCLIFFE: UH-HUH.

THE COURT: THE LAW IS PRETTY CLEAR, AND I DID NOT FOLLOW IT, AT LEAST IN SOME RESPECTS, I DIDN'T FOLLOW IT LITERALLY, CONCERNING THE NOTICE THAT A JUDGE IS REQUIRED TO GIVE AN INDIVIDUAL ABOUT ACTING IN HIS OWN DEFENSE. I ALREADY TOLD YOU MANY TIMES, AND I DON'T THINK WE HAVE TO CONTINUALLY BELABOR THIS, THAT I REALIZE YOU NEVER SAID TO ME I WANT TO BE MY OWN LAWYER, SO PLEASE UNDERSTAND THAT I'M NOT SITTING HERE THINKING YOU AFFIRMATIVELY EXPRESSED IN WORDS A DESIRE TO GO WITHOUT A LAWYER.

BUT I FOUND, FOR I THINK VERY AMPLE REASON, THAT YOUR CONDUCT AMOUNTED TO THAT CHOICE AND THAT YOU MADE THAT CHOICE FOR TACTICAL PURPOSES AND WILLINGLY.

HOWEVER, I ALSO THINK THAT THE PARAMOUNT OBLIGATION I HAVE IS TO FOLLOW THE LAW AND TO MAKE SURE THAT PEOPLE WHO COME TO TRIAL IN THIS COURT, NO MATTER WHAT KIND OF CASE, GET A FAIR TRIAL. SO I DO NOT INTEND TO HOLD YOU TO THAT FINDING OF WAIVER

UNLESS YOU NOW WANT TO EXPRESS A VIEW, A PREFERENCE, IN LIGHT OF ALL THE WARNINGS I'VE GIVEN YOU, INCLUDING RECENT ONES, INCLUDING ONES IN WRITING, AND ONES THAT I WILL SUPPLEMENT WITH BASICALLY REPEATED COMMENTS HERE IN COURT IN JUST A MINUTE.

IF YOU TELL ME YOU WANT TO BE YOUR OWN LAWYER AND YOU WANT TO GO TO TRIAL, THAT WILL BE YOUR CHOICE, ALTHOUGH I WILL GO THE EXTRA MILE FIGURATIVELY SPEAKING AND TELL YOU ABOUT SOME OF THE THINGS I'VE MORE THAN ONCE DISSEMINATED AND COMMUNICATED TO YOU IN WRITING JUST THIS WEEK.

THE BOTTOM LINE IS THAT I'M TELLING YOU THAT IF YOU WANT TO BE REPRESENTED BY COUNSEL, I WOULD HONOR THAT CHOICE, AND IF YOU WANT TO REPRESENT YOURSELF, I WOULD BE REQUIRED TO HONOR THAT CHOICE AND IT WOULD BE, I THINK, A VALID AND BINDING CHOICE, ALTHOUGH I WOULD GIVE YOU MORE TIME FOR THE TRIAL NO MATTER WHAT AND GO THROUGH THE ROUTINE OF TELLING YOU IN COURT WHAT YOU'VE NOW BEEN TOLD MANY TIMES IN WRITING. SO PLEASE TELL ME WHAT YOUR PREFERENCE IS.

MR. SUTCLIFFE: YOU ARE CORRECT THAT IT'S A NON SECULAR ISSUE, THAT YOU HAVE COUNSELED ME EXTENSIVELY ON THE DANGERS AND I PAID VERY CLOSE ATTENTION AND SAT UP WHEN YOU SAID YOU'D COME OFF THAT BENCH AND NOT BEAT ME IN THE HEAD AND KICK ME IN THE SHINS, SO I APPRECIATE THAT. I'M KIND OF CONFUSED THOUGH -- TO MAKE A CHOICE THE U.S. ATTORNEY HAS PROVIDED ME WITH A DOCUMENT, WHICH IS MARKED GOVERNMENT'S SPECIAL TRIAL MEMORANDUM, AND IT SPEAKS SPECIFICALLY OF BEHAVIOR, AND IN THERE IT SEEMS THAT I'M SUPPOSED

TO -- I'LL BE REMOVED IF I CONDUCT DISRUPTIVE BEHAVIOR; BUT ON PAGE FOUR OF THAT DOCUMENT IT SAYS THAT I MAY NOT INTERRUPT THE GOVERNMENT'S QUESTIONING OF WITNESSES EXCEPT TO RAISE AN OBJECTION. CORRECT ME IF I'M WRONG, BUT THAT'S WHAT GOT ME SENT OFF FOR TREATMENT, OBJECTING AND INTERRUPTING. BUT NOW I'M BEING DIRECTED TO DO THAT, SO I'VE NEVER WAIVED MY RIGHT TO ASSISTANCE OF COUNSEL. I'VE DEMANDED IT SINCE I'VE GOT HERE. I'M WHERE I AM.

THE COURT: WELL, THAT LAST SENTENCE DOESN'T MEAN ANYTHING CLEARER TO ME BECAUSE IT'S REMINISCENT OF OTHER KINDS OF ANSWERS YOU'VE GIVEN WHEN I'VE TRIED TO PIN YOU DOWN AS TO WHAT YOU WANT. BUT LET ME TRY TO EXPLAIN SOMETHING TO YOU ABOUT THE FIRST POINT YOU RAISED.

IT IS NOT CORRECT THAT YOU WOUND UP BEING SUBJECTED TO MORE THAN ONE EXAMINATION BECAUSE YOU INTERRUPTED THE GOVERNMENT LAWYER, AND IT'S NOT CORRECT THAT YOU DID THAT BECAUSE YOU INTERRUPTED ME MANY TIMES. TODAY YOU HAVEN'T AND I'M GRATEFUL THAT YOU HAVEN'T. I EXPECT THAT YOU WANT, AND IF YOU DO, YOU'LL PAY THE CONSEQUENCE. BUT IN ANY EVENT, WITHOUT GOING BACK INTO THOSE ISSUES BECAUSE THOSE ARE LONG SINCE RESOLVED, YOU'RE NOT CORRECT AS TO WHY THERE WERE SERIOUS QUESTIONS AS TO YOUR COMPETENCY THAT REQUIRED THESE EXAMINATIONS TO BE CONDUCTED. NOW, YOU'VE BEEN FOUND TO BE COMPETENT, I'VE ALWAYS KNOWN YOU'RE VERY SHARP. THAT'S NOT AN ISSUE THAT WE'RE HERE TO RECONSIDER. IN TERMS OF REPRESENTING YOURSELF AT TRIAL, YOU WOULD BE REQUIRED TO

FOLLOW THE SAME STANDARDS AND THE SAME REQUIREMENTS AS A LAWYER WOULD, AND ON THE QUESTION OF INTERRUPTION, YOU WOULD BE ENTITLED TO STAND UP, WHICH IS A PHYSICAL WAY OF SIGNALING TO ME YOU WANT TO VOICE AN OBJECTION. AND AT THE CONCLUSION OF THE QUESTION AND BEFORE ANY ANSWER IS BEGUN TO BE GIVEN TO SAY YOU OBJECT.

THERE WILL BE LIMITATIONS ON YOU LIKE THERE ARE ON EVERY LAWYER AS TO HOW YOU GO ABOUT DOING THAT. YOU CAN'T SIMPLY GIVE A LONG SPEECH AND POUND THE TABLE FIGURATIVELY OR LITERALLY ABOUT WHY IT'S UNFAIR FOR THAT QUESTION TO BE ASKED OR ANYTHING ABOUT THE MOTIVES OF THE QUESTION OR ANYTHING LIKE THAT. THAT'S WAY BEYOND BOUNDS. BUT YOU WOULD BE ENTITLED TO OBJECT AS LONG AS YOU FOLLOW THE RULES. I'M NOT GOING TO TELL YOU ALL THE RULES. MR. REED, IF HE FUNCTIONS EVEN IN THE CAPACITY ONLY OF STANDBY COUNSEL, CAN REVIEW SOME OF THOSE WITH YOU, BUT THOSE HAVE ALREADY BEEN ADVERTED TO, AT THE VERY LEAST IN SOME OF THE DISCLOSURES THAT I MADE TO YOU IN WRITING AND ORALLY.

NOW, THERE ARE FUNDAMENTAL CONCEPTS WHICH YOU'RE VERY SMART ENOUGH TO UNDERSTAND ABOUT A TRIAL, AND THAT IS THAT JURORS ARE TREATED WITH DIGNITY. THE PROCESS IS TREATED WITH DIGNITY. TANTRUMS ARE NOT TOLERATED. CIVILITY IS NECESSARY AND RULES ARE FOLLOWED.

MR. SUTCLIFFE: BY EVERYBODY?

THE COURT: BY EVERYBODY. AND THAT INCLUDES THE JUDGE, AND I'M TRYING TO FOLLOW THEM RIGHT NOW BY GIVING YOU THIS SECOND OPPORTUNITY. YOU HAVE THE POWER AND -- YOU HAVE THE RIGHT TO

MAKE YOUR CHOICE. YOU NEED TO TELL ME WHAT YOUR CHOICE IS. IF YOU CHOOSE TO EXERCISE YOUR RIGHT TO SELF-REPRESENTATION, THAT WILL BE GRANTED, IT WILL BE HONORED. IF YOU CHOOSE TO HEDGE AND EQUIVOCATE, I'M NOT SURE WHAT I'LL DO. IF YOU CHOOSE TO SAY, YOU KNOW WHAT, I GOT A LOT AT STAKE HERE AND I HAVE FIGURED OUT A DEFENSE AND I DON'T KNOW WHICH ONE THAT MR. NICOLAYSEN THOUGHT MIGHT WORK, I DON'T KNOW WHAT MR. REED'S VIEWS ARE. I DON'T EXPECT HIM, AND HE'S NOT BEING ASKED TO ARTICULATE ANY. I CAN BEGIN TO SEE WHAT SOME OF YOURS ARE AND MAYBE THIS IS A VERY TRIABLE CASE, MAYBE YOUR -- MAYBE IN THIS CASE IS NOT AS FOREORDAINED OR CERTAIN AS SOME PEOPLE MIGHT THINK.

SO A PRUDENT THING TO DO FOR SOMEBODY IN YOUR SITUATION WOULD BE IS I'LL TAKE MY BEST SHOT AT IT. YOU CAN TAKE YOUR BEST SHOT AT BEING YOUR OWN LAWYER, IF YOU WANT, OR YOU CAN BE A LAWYER. BUT IF YOU DO THE SAME THING AGAIN, MR. SUTCLIFFE, OR THE SAME THING HAS BEEN ESTABLISHED ON FOUR DIFFERENT OCCASIONS WHERE YOU HAVE TRIED TO CONTROL AND DIRECT AND LIMIT THE LAWYER WHO HAS BEEN DOING HER BEST OR HIS BEST TO REPRESENT YOU AND HAVE INTERFERED WITH THE RIGHT AND THE NEED AND THE OBLIGATION AND THE DUTY OF THAT LAWYER TO EXERCISE INDEPENDENT JUDGMENT AND PROFESSIONAL CARE IN REPRESENTING YOU, AND IF AS HAPPENED FOUR PREVIOUS TIME -- AT LEAST -- I'M NOT SURE. IT'S FAIR TO SAY IT HAPPENED AD NAUSEAM. YOU TURN ON THE LAWYER AND YOU SUE THE LAWYER AND YOU REFUSE TO TALK TO THE LAWYER AND YOU THREATEN THE LAWYER, THEN THAT WILL BE A REINFORCED DEFINITIVE STATEMENT BY

CONDUCT ON YOUR PART THAT YOU DON'T WANT A LAWYER. IT WILL NOT BE A BASIS TO FIND YOU'RE INCOMPETENT. IT WILL BE A BASIS TO FIND THAT YOU MADE YOUR CHOICE AND YOUR CHOICE IS GO IT ALONE.

THOSE ARE THE ALTERNATIVES AVAILABLE TO YOU. RIGHT NOW I DON'T THINK THIS CASE IS READY FOR TRIAL AND MUCH OF THE REASON IS NOT IMMEDIATELY ATTRIBUTABLE TO YOU. SOME OF IT IS NOT ATTRIBUTABLE TO YOU AT ALL. ALL OF THIS MYSTERIOUS CONFUSION ABOUT WHAT HAPPENED TO THE EVIDENCE THAT THE GOVERNMENT LONG AGO DISCLOSED TO YOUR PRIOR LAWYERS WOULD NEVER HAVE ARISEN IF THERE NEVER HAD BEEN ALL OF THESE EFFORTS WHICH ARE TOTALLY INAPPROPRIATE OR OBSTRUCTIVE ON YOUR PART TO INTERFERE WITH THEIR WORK, BUT YOU'RE NOT RESPONSIBLE FOR THE FACT THAT ONE LAWYER DIDN'T TURN OVER TO THE NEXT LAWYER WHAT THAT LAWYER WAS INSTRUCTED TO TURN OVER BY ME AND AGREED TO TURN OVER. I'M GOING TO GET TO THE ROOT OF THIS ONE WAY OR ANOTHER BECAUSE IT'S ABSOLUTELY UNACCEPTABLE. MR. REED IS IN NO POSITION TO PROVIDE EVEN STAND BY POSITION THAT WOULD BE INFORMED IN TERMS OF THE EVIDENCE, IF NOT IN TERMS OF THE CONDUCT A LAWYER GOES THROUGH AND MANEUVERS AND STEPS AND STRATEGIES AND CONDUCT THAT A LAWYER DISPLAYS IN REPRESENTING A PERSON AT TRIAL BECAUSE HE DOESN'T EVEN HAVE THE EVIDENCE.

NOW, WE'RE NOT GOING TO GO TO TRIAL ON TUESDAY. IF YOU DON'T WAIVE ANY OF YOUR RIGHTS, WE'LL GO TO TRIAL A WEEK LATER AND I DON'T THINK THE SPEEDY TRIAL ACT WILL BE VIOLATED, BUT YOU HAVE TO TELL ME WHAT YOU WANT TO DO.

MR. SUTCLIFFE: IT'S PAINFUL OBVIOUS TO ME THAT THIS COURT IS -- THESE PEOPLE IN THIS COURT ARE DOING WHATEVER THEY WANT TO DO. NOBODY IS ASSISTING ME IN SQUAT, OKAY. COMMUNICATION IS A TWO-WAY STREET, YOUR HONOR. YOU'VE LAID AT MY FEET THE BLAME BY NOT COMMUNICATING AND THREATENING, AS YOU PUT IT, AND NOT SPEAKING TO THESE PEOPLE. WELL, THOSE ARE ASSUMPTIONS BECAUSE YOU'VE ONLY HEARD ONE SIDE TO THE STORY AND THERE'S TWO SIDES TO EVERY COIN. YOU REFUSE TO LISTEN TO MY SIDE OF THE STORY WHEN I BELIEVE YOU SHOULD HAVE BECAUSE I COULD HAVE BROUGHT TO THE LIGHT WHAT WAS GOING ON AND YOU COULD HAVE STOPPED IT, YOU HAD THE POWER TO STOP IT. YOU HAVE THAT POWER AND I RECOGNIZE THAT POWER. IT'S INHERENT IN THIS COURTROOM.

THE COURT: BUT LET THE RECORD REFLECT, MR. SUTCLIFFE, BECAUSE I'VE LOOKED AT THE TRANSCRIPT. I GAVE YOU THE RIGHT. I ALWAYS GIVE A PERSON A RIGHT WHEN A PERSON TELLS ME HE OR SHE IS MOVING TO WITHDRAW. YOU HAD AN OPPORTUNITY TO EXPLAIN YOUR PERCEPTION, YOUR MEMORY, OR YOUR VERSION OF WHAT HAS GONE ON. THE RECORD WILL REFLECT WHAT IT WILL. I DON'T DOUBT FOR A MINUTE, AND I UNDERSTAND WHY YOU FEEL AGGRIEVED. PROBABLY EVERYONE ELSE IN THE COURTROOM MAYBE, ESPECIALLY ME, BUT YOU STILL HAVE TO UNDERSTAND THAT THE DECISION THAT YOU NEED TO MAKE, NOT NECESSARILY AT THIS PRECISE MINUTE BECAUSE I WILL GIVE YOU AN OPPORTUNITY THIS AFTERNOON TO THINK ABOUT IT, TO TALK TO MR. REED, IF YOU WANTED TO, IS WHETHER YOU WANT TO REPRESENT YOURSELF OR NOT.

MR. SUTCLIFFE: I THINK I'VE MADE A VERY KNOWINGLY AND INTELLIGENT CHOICE FROM DAY ONE, FROM THE TIME YOU TOLD ME YOU'D COME OFF THAT BENCH AND POP ME UPSIDE THE HEAD. I DON'T WANT TO BE MY OWN LAWYER. I'M NOT SKILLED TO BE MY OWN COUNSEL. I'M NOT A TRAINED DOCTOR JURIST, DOCTORATE. MAYBE I CAN HANDLE A PARKING TICKET BUT THAT'S ABOUT IT. NO. I DON'T WANT TO FACE THE GOVERNMENT, UNITED STATES OF AMERICA BY MYSELF. NO. I'VE NEVER WAIVED COUNSEL. I'D BE A FOOL. YOU SHOULD SEND ME TO DEVENS IF I DID. NO, SIR. AND I DON'T WAIVE MY SPEEDY TRIAL. I WANT MY TRIAL TO START TUESDAY. I WANT THIS NIGHTMARE OVER WITH, YOUR HONOR. I WANT MY DAY IN COURT. I BELIEVE I HAVE MY RIGHT TO MY DAY IN COURT. THEY'RE READY TO GO. LET'S GO. LET'S GET THIS DOG AND PONY SHOW OVER WITH OR ON WITH OR HOWEVER WE DO IT, PLEASE. I WANT MY DAY IN COURT, THAT'S ALL I WANT.

THE COURT: YOU'LL HAVE YOUR DAY IN COURT.

MR. SUTCLIFFE: NEXT TUESDAY.

THE COURT: MR. REED, YOU'VE HEARD WHAT THE PROSECUTOR SAID ABOUT THIS ARRAY OF EVIDENCE. NOW, IT'S GOING TO TAKE ME MORE THAN A FEW DAYS, I ASSUME, TO TRACK DOWN WHERE IT IS AND WHY IT'S WHERE IT IS, WHEREVER IT IS. AND IT'S REALLY A QUESTION OF WHY IT'S NOT WITH YOU AND/OR WITH MR. SUTCLIFFE. HOW LONG WOULD IT TAKE YOU TO PUT IN MR. SUTCLIFFE'S AND IN MR. REED'S HANDS WHAT I THINK IS THE KEY AND RELEVANT AND APPROPRIATE ARRAY OF EVIDENCE? AND IF I FOLLOW WHAT YOU'VE TOLD ME, THAT WOULD CONSIST OF EIGHT CD'S OR SO THAT WERE TURNED OVER ON JUNE 4TH OF 200

EIGHT I.D.E. ITEMS, TWO OF WHICH WERE REALLY INOPERATIVE BUT SIX IN TWO DIFFERENT CATEGORIES CONTAIN EVIDENCE AND THE ZIP DISKS AND THE FLOPPIES AS WELL THAT YOU TURNED OVER ON JULY 29TH OF 2002.

THE DUPLICATES OF THE BACKUP OF THE EVIL GX THAT GLOBAL CROSSING TURNED OVER TO YOU THAT WERE MADE AVAILABLE TO THE FEDERAL PUBLIC DEFENDER, AND THE TWO CD'S ON AUGUST 5TH OF 2002. NOT -- YOU DON'T EVEN HAVE ANY MORE OF THE MATERIAL THAT WAS GIVEN TO HARRIS ON OCTOBER 20TH, THAT WOULDN'T BE PART OF IT. THE 70 CD'S THAT YOU TURNED OVER TO HARRIS ON NOVEMBER 22ND WHICH ARE PART OF THE GOVERNMENT'S EXHIBITS.

AND IF THERE WERE THREE SUPPLEMENTAL ONES THAT YOU TURNED OVER TO HIM EIGHT DAYS LATER, NOVEMBER 30TH, THOSE AS WELL. THE TRIAL EXHIBITS, TWO CD'S, AND THE FIVE FLOPPIES THAT YOU TURNED OVER THE DAY BEFORE THE SCHEDULED JANUARY 14TH.

AND THAT'S IT.

MS. DUARTE: YOUR HONOR, THE PROBLEM, AND THE REASON WE'RE DISCUSSING IT AT THE TABLE, ABSENT THE HARD DRIVES WHICH ARE THE I.D.E.'S AND THE SCUZZIES, ABSENT THE HARD DRIVES, IT'S HARD TO SAY. JUST WITH CD'S AND FLOPPIES IT'S A LOT OF MEDIA. IF WE CAN GET EVERYBODY WORKING ON IT, IT WOULD PROBABLY TAKE AT LEAST A WEEK GIVEN THAT IT'S FRIDAY. IT WOULD BE THE END OF NEXT WEEK I WOULD IMAGINE, BECAUSE WE HAVE TO GET -- WE DON'T JUST HAVE BIG STORES OF THE MEDIA WE'D HAVE TO GET ALL THE BLANKS AND THEN COPY THEM ALL INDIVIDUALLY. THE HARD DRIVES MIGHT EVEN TAKE A LITTLE BIT LONGER THAN THAT BECAUSE THE F.B.I. ALSO DOESN'T KEEP THE H

DRIVES THAT WE CAN USE TO MAKE COPIES SO WE HAVE TO GET THEM, BRING THEM IN, COPY, BRING THEM OUT.

THE COURT: YOU KNOW, I HAVE A HIGH LEVEL OF CONFIDENCE, AND I'M NOT SAYING THIS IN A SMUG OR SARCASTIC WAY, THAT WITH YOUR RESOURCEFULNESS, WHICH I THINK IS CONSIDERABLE, AND THE RESOURCES AVAILABLE TO YOUR OFFICE, YOU COULD ACCELERATE THAT PROCESS BY SEVERAL DAYS OR PARTS OF IT; AND NOT EVERYTHING ELSE HAS TO WAIT UNTIL EVERYTHING ELSE IS COMPLETED.

THIS IS AN UNUSUAL CASE AND A LOT OF THE DIFFICULTIES IN THIS CASE, INCLUDING THE NUISANCE TO YOU AND YOUR COLLEAGUES OF NOT BEING SURE WHEN YOU'RE GOING TO TRIAL, IF THAT'S IN THE BACK OF YOUR MIND, ARE NOT YOUR FAULT. BUT THE FACT IS THE RIGHT THING HAS GOT TO BE DONE.

MS. DUARTE: I UNDERSTAND, YOUR HONOR, AND I'M NOT --

THE COURT: IT'S NOT IN ANY SIDE'S INTEREST TO RACE TO TRIAL BEFORE THE GUN IS ACTUALLY SHOT WHEN THERE'S GOING TO BE ERROR BUILT INTO THE PROCESS.

MS. DUARTE: WELL, I AGREE WITH THAT AND I'M NOT ASKING TO RACE TO TRIAL. AS A MATTER OF FACT, GIVEN THE SITUATION, IF MR. SUTCLIFFE OR THE COURT WERE GOING TO CONTINUE THE TRIAL AND EXCLUDE SPEEDY TRIAL TIME, WE WOULD AGREE TO THAT BECAUSE I DON'T REALLY KNOW AS I EXPRESSED TO THE COURT EXACTLY WHAT'S GONE ON.

THE COURT: YOU'RE INVITED TO FILE A MEMORANDUM AS TO GROUNDS AND AUTHORIZATION, IF THEY EXIST, AND I DON'T KNOW IF THEY EXIST, UNDER THESE CIRCUMSTANCES OR TAILORED CIRCUMSTANCES LIKE

THIS, EVEN AGAINST THE DEFENDANT'S WISHES. THAT WOULD BE A LAWFUL THING FOR ME TO DO. I DON'T HAVE A VIEW ONE WAY OR THE OTHER.

MS. DUARTE: I DON'T KNOW EITHER, YOUR HONOR, AND I WILL DO SOME RESEARCH ON IT. I DO WANT TO -- LET ME ADD ONE MORE COMMENT TO THE COPYING SITUATION, AND THEN I JUST WANT TO ADDRESS ONE OTHER THING. IN TERMS OF THE COPYING, I APPRECIATE THAT THE COURT THINKS THAT I'M RESOURCEFUL AND I CERTAINLY WOULD TRY. I'LL MAKE THAT REPRESENTATION THAT I WILL TRY AS HARD AS I CAN. NOT JUST UP TO ME AND NOT UP TO THE PEOPLE THAT I'M ASKING TO DO IT. IT'S ACTUALLY A HARDWARE LIMITATION.

THE COURT: HOLD ON FOR A SECOND, MR. SUTCLIFFE, IS THERE ANY ASSISTANCE THAT THE CLERK OF THE COURT COULD PROVIDE?

MR. SETTLE: YEAH. I BELIEVE WE COULD HAVE ASSISTANCE FOR HER, YOUR HONOR.

THE COURT: THAT WOULD ENABLE THESE HARD DRIVES, FOR EXAMPLE, TO BE DUPLICATED?

MS. DUARTE: YES.

THE COURT: MR. SETTLE.

MR. SETTLE: WE COULD PROVIDE SOME LEVEL OF ASSISTANCE, BUT I DON'T KNOW THAT WE COULD DO ALL OF IT FOR THEM. I WOULD HAVE TO CONFER TO THE CLERK OF THE COURT.

MS. DUARTE: THE PROBLEM WITH RELEASING THE HARD DRIVES, YOUR HONOR, IS CHAIN OF CUSTODY PROBLEM.

THE COURT: OH, THOSE COULD BE --

MS. DUARTE: WOULD THE COURT GIVE ME JUST A SECOND

YOUR HONOR, THERE'S A POSSIBILITY THAT I'D HAVE TO EXPLORE THAT IF THE COURT WANTED SOMETHING QUICKER, WE COULD ACTUALLY TRY TO GET A COPY FROM THE GOVERNMENT'S EXPERT WHO HAS PROVIDED COPIES OF WHAT HE'S DONE, PROBABLY QUICKER THAN WE CAN GET IT FROM THE F.B.I. AND THEN WE COULD FOLLOW UP WITH ACTUAL EVIDENTIARY SECURE COPIES STRAIGHT FROM THE F.B.I. BUT I CAN TELL, YOUR HONOR, THAT TO GET THE F.B.I. TO RELEASE EVIDENCE FOR COPYING HERE, THAT -- PLEASE DON'T MAKE ME TRY TO DO THAT, YOUR HONOR.

WHAT I CAN DO IS SPEED THAT UP ALONG AS MUCH AS POSSIBLE WITHIN THE CONSTRAINTS, AND I CAN GET THE ENCASE CASE COPIES, THAT'S A COPYING TOOL, YOUR HONOR, CAPTURE TOOL, THAT MY EXPERT MADE SO THAT AT LEAST THEY CAN KNOW WHAT'S ON IT. I CAN DO THAT. AND EVERYTHING BUT THE HARD DRIVES IS GOING TO TAKE A LONG TIME TO LOOK THROUGH, YOUR HONOR. I MEAN, IT'S GOING TO TAKE A LONG --

THE COURT: WELL, I KNOW IT'S NOT UNCOMMON FOR LAWYERS TO EXERCISE JUDGMENT AND CLIENTS TO EXERCISE JUDGMENT AS TO HOW FAR THEY START AND HOW FAR THEY GO AND WHAT'S RELEVANT AND WHAT ISN'T. IT'S PRETTY CLEAR FROM YOUR COMMENTS TODAY I'M CERTAIN BOTH TO MR. SUTCLIFFE AND TO MR. REED, AND I'LL DISCUSS WITH MR. REED WHERE HE STANDS SHORTLY, WHAT IS REALLY -- WHAT REALLY MATTERS HERE. I MEAN, I'M TRYING TO BE VERY EXPANSIVE IN LOOKING OUT FOR THE INTEREST OF THE DEFENDANT, BUT NOT ALL THIS STUFF IS GOING TO HAVE ANY BEARING WHATSOEVER ON HIS FUNDAMENTAL RIGHTS. HIS FUNDAMENTAL RIGHTS ARE GOING TO BE PROTECTED, BUT NOT ALL -- THIS IS AT ISSUE.

NOW, I'M GOING TO SPEAK IN TERMS OF AN ORDER, MR. SETTLE, BUT I RESPECT YOU A LOT AND THE EXECUTIVE FOR WHOM YOU WORK SO IT'S NOT MEANT TO BE CONFRONTATIONAL, BUT I AM ORDERING THE CLERK ORALLY TO PROVIDE MAXIMUM FEASIBLE ASSISTANCE TO THE U.S. ATTORNEY'S OFFICE TO DUPLICATE AS MUCH OF THE EVIDENCE THAT HAS NOW BEEN CHRONICLED AND NOT IN THE CURRENT POSSESSION OF EITHER MR. REED OR MR. SUTCLIFFE AS QUICKLY AS POSSIBLE. AND I'LL JUST LEAVE IT TO THE CLERK'S OFFICE AND TO THE U.S. ATTORNEY'S OFFICE TO FIGURE OUT WHAT'S DOABLE.

AND I'M ORDERING THE U.S. ATTORNEY TO PURSUE EVERY POSSIBLE MEANS, INCLUDING CONTACTING THE EXPERT TO HAVE ANOTHER COPY MADE OF WHATEVER THE EXPERT HAS.

NOW, MR. REED, I DON'T KNOW WHETHER CONSISTENT WITH THE LAW AND THE APPLICATION OF THE SPEEDY TRIAL ACT THAT THE RIGHTS OF A DEFENDANT WOULD BE PROTECTED IF A JURY WERE IMPANELED AND THE ACTUAL PROSECUTION OF THE CASE, THE OPENING STATEMENTS, AND THE SUBMISSION OF EVIDENCE WERE TO FOLLOW AT SOME RELATIVELY BRIEF INTERVAL AFTER THAT. YOU ARE SITTING HERE WITH A UNDERSTANDABLE WORRIED LOOK, IF NOT A SCOWL ON YOUR FACE, AND I UNDERSTAND WHY AND I'M CONCERNED ABOUT THAT. BUT YOU NEED TO TELL ME, PLEASE, WHAT YOUR SCHEDULE IS.

MR. REED: OBVIOUSLY, I'M FREE NEXT WEEK. I'M ACTUALLY FREE THE FOLLOWING WEEK, YOUR HONOR, AND I AM FREE THE FOLLOWING WEEK, OCTOBER 14TH. I HAVE NO TRIALS. I'M ALSO FREE OCTOBER 21ST, THAT WEEK. I'M PRETTY FREE THE ENTIRE MONTH OF OCTOBER

YOUR HONOR.

THE COURT: WELL, IF, MR. REED, I MAKE A FINDING THIS AFTERNOON THAT BECAUSE OF MY NEGLECT TO GO THROUGH, TO CROSS EVERY T AND EVERY I THAT I THOUGHT HAD BEEN ADEQUATELY COVERED -- BECAUSE THE MESSAGE CLEARLY GOT THROUGH TO MR. SUTCLIFFE, HE'S CONFIRMED THAT YET AGAIN TWICE TODAY THAT I CONSISTENTLY TOLD HIM IT WAS NOT IN HIS INTEREST TO, BY CONDUCT OR OTHERWISE, GO IT ALONE AND WAIVE HIS RIGHT TO A LAWYER; BUT I DON'T THINK UNDER THE CURRENT RECORD IT WOULD BE FAIR TO HIM OR CONSISTENT WITH THE 9TH CIRCUIT'S REQUIREMENTS TO PROCEED WITH THE FINDING I MADE, BECAUSE THAT FINDING CAME AFTER PLENTY OF WARNINGS BUT IT DIDN'T COME AFTER A RECITAL OF THE ELEMENTS OF THE CASE AND THE POSSIBLE PENALTIES, THAT WAS WHERE I ERRED.

SO I AM, IN LIGHT OF MR. SUTCLIFFE'S STATEMENTS TO ME THIS AFTERNOON, POISED TO APPOINT YOU AS COUNSEL, NOT AS BACKUP COUNSEL. AND I WANT YOU TO BE ABLE TO DO YOUR JOB AND CONSISTENTLY PROFESSIONAL AND, FROM MY EXPERIENCE, EXCELLENT FASHION YOU DO IT AND I DON'T DOUBT FOR A SECOND THAT A LAWYER NEEDS TIME TO PREPARE.

YES, MR. SUTCLIFFE.

MR. SUTCLIFFE: I WILL OBJECT TO THAT.

THE COURT: WHY?

MR. SUTCLIFFE: BECAUSE THIS MAN HAS JUST ADMITTED THAT HE HAS NOT SEEN THE EVIDENCE, HE HAS NOT BEEN PROVIDED WITH THE EVIDENCE. THE LEAST THAT YOU'VE GIVEN THE PREVIOUS LAWYERS WAS

THREE MONTHS. YOU SAID IN THE TRANSCRIPT OF JANUARY 17TH -- EXCUSE ME ONE SECOND TO FIND IT -- MRS. DUARTE POINTED IT OUT IN HER REQUEST THAT HE BE APPOINTED -- GIVE ME ONE SECOND TO FIND THE PAGE, YOUR HONOR.

YES. HERE IT IS. JANUARY 14TH, REPORTER'S TRANSCRIPT, PAGE 18. YOU DON'T THINK YOU HAVE THE ABILITY TO DEFEND YOURSELF AGAINST THE UNITED STATES OF AMERICA AND YOU'RE RIGHT ABOUT THAT, I AGREE WITH YOU 100 PERCENT. THAT MEANS IF YOU DON'T DEFEND YOURSELF WHICH IN PRINCIPLE WOULD BE YOUR RIGHT. IT WOULD BE CRAZY TO DO IT BUT IT WOULD BE YOUR RIGHT AND YOU'RE GOING TO HAVE ANOTHER LAWYER. THAT LAWYER IS GOING TO HAVE TO GO THROUGH THE SAME LEARNING CURVE THAT ALL PREVIOUS LAWYERS WENT THROUGH. IN HER MEMORANDUM OF POINTS AND AUTHORITY, SHE STOPS THERE. WHERE IF WE GO TO THE ORIGINAL TRANSCRIPT ON PAGE 18 IT SAYS THERE'S GOING TO BE A LONG DELAY. I OBJECT TO ANY LONG DELAYS. I THINK 18 MONTHS IS A EXTREMELY LONG DELAY BASED ON THE NATURE OF THIS CASE, AND I WOULD OBJECT STRONGLY TO THAT --

THE COURT: THERE ARE TWO DIFFERENT OBJECTIONS YOU SEEM TO BE MAKING. ONE IS TO DELAY, WHICH IS ONE THING, AND THE SECOND IS TO APPOINT OF A LAWYER. NOW, LET'S DEAL WITH THE SECOND FIRST.

MR. SUTCLIFFE: OKAY.

THE COURT: ARE YOU OBJECTING TO THE APPOINTMENT OF A LAWYER, YES OR NO? PUT ASIDE THE ISSUE OF DELAY FOR A SECOND.

MR. SUTCLIFFE: I'M OBJECTING TO HAVING TO MAKE THIS CHOICE. I'M OBJECTING TO --

THE COURT: MR. SUTCLIFFE, PLEASE ANSWER THE QUESTION OR ELSE YOU'LL LEAVE ME NO CHOICE BUT TO FIND THAT BY REFUSING TO ANSWER THE QUESTION YOU'RE PLAYING A CAGEY GAME.

MR. SUTCLIFFE: NO. I WOULD SUGGEST THAT YOU'RE PLAYING A CAGEY GAME.

THE COURT: NOW, THE QUESTION THAT I'LL GIVE YOU AN OPPORTUNITY ONE MORE TIME TO ANSWER IS: DO YOU OBJECT TO HAVING A LAWYER REPRESENT YOU?

MR. SUTCLIFFE: I'LL STAND ON MY FERETTA RIGHTS.

THE COURT: WELL, YOUR FERETTA RIGHTS ARE TO HAVE NO LAWYER. IS THAT A WAY OF YOU TELLING ME THAT --

MR. SUTCLIFFE: NO. MY FERETTA RIGHTS ARE -- WELL, LET'S LOOK AT FERETTA AND LET'S READ FERETTA.

THE COURT: WE'RE NOT GOING TO SIT HERE AND READ FERETTA, AND, MR. SUTCLIFFE, WE'RE NOT GOING TO DEBATE THE LAW. THAT'S ONE THING THAT YOU'RE NEVER GOING TO ARRANGE TO DO IN ANY COURT, INCLUDING THIS ONE. THE QUESTION IS PRETTY STRAIGHTFORWARD. ASSUMING FOR A MOMENT THAT YOUR RIGHTS TO HAVE A LAWYER REPRESENT YOU HAVE ENOUGH TIME TO GET UP TO SPEED TO REPRESENT YOU EFFECTIVELY COULD BE CREATED, DO YOU WANT A LAWYER, YES OR NO?

MR. SUTCLIFFE: I DON'T UNDERSTAND YOUR QUESTION. IF YOU'RE ASKING ME: DO I WANT THE ASSISTANCE OF COUNSEL, WHICH IS GUARANTEED TO ME BY THE 6TH AMENDMENT, YOU BET. I'VE ALWAYS WANTED THAT AND I'VE ALWAYS TOLD YOU THAT. DO I WANT SOMEONE TO

REPRESENT ME? NO. ONLY THE ACCUSED WILL SPEAK FOR THE ACCUSED, AS I CITED IN FERETTA, AND TOLD YOU ON JANUARY 14TH.

THE COURT: WELL, A LAWYER WOULD BE THE ONLY ONE SPEAKING FOR YOU. IF YOU'RE TELLING ME THAT YOU WANT YOUR 6TH AMENDMENT RIGHTS PROTECTED AND THE LAWYER IS NOT GOING TO DO ANYTHING OR ONLY DO WHAT YOU ALLOW HIM TO DO, THEN MAKE THAT CLEAR RIGHT NOW.

MR. SUTCLIFFE: WELL --

THE COURT: YOU HAVE A LAWYER, MR. SUTCLIFFE, YOU DON'T QUESTION THE WITNESSES, YOU DON'T ADDRESS THAT JURY.

MR. SUTCLIFFE: WHERE IS THAT WRITTEN IN THE CONSTITUTION? I CAN'T FIND THAT ANYWHERE, YOUR HONOR.

THE COURT: WELL, YOU MAY HAVE TO LOOK IN A DIFFERENT PLACE, MR. SUTCLIFFE. I'M NOT GOING TO DEBATE THAT. IF YOU HAVE A LAWYER, THE LAWYER ACTS AS THE LAWYER AND YOU SIT THERE AND ACT AS A CLIENT.

MR. SUTCLIFFE: THAT'S REPRESENTATIVE. THAT'S WHAT YOU'RE SPEAKING OF.

THE COURT: PARDON ME?

MR. SUTCLIFFE: YOU'RE SPEAKING OF A REPRESENTATIVE, SOMEONE WHO REPRESENTS ME? IS THAT WHAT YOU'RE REFLECTING?

THE COURT: YEAH. THAT'S WHAT I'M SPEAKING OF.

MR. SUTCLIFFE: I'M ASKING FOR ASSISTANCE OF COUNSEL. FERETTA CLEARLY DISTINGUISHES DIFFERENTLY. YOU GAVE ME A MOUSE ALREADY. HE THREATENED ME. MR. NICOLAYSEN WAS YOUR

REPRESENTATIVE.

THE COURT: MR. SUTCLIFFE, IF I APPOINT MR. REED, ARE YOU GOING TO INTERFERE WITH HIS AUTHORITY AND DUTY TO DELIVER AN OPENING STATEMENT? YES OR NO?

MR. SUTCLIFFE: I'VE NEVER INTERFERED WITH ANY LAWYER -- IN ANSWER TO YOUR QUESTION --

THE COURT: TELL ME WHAT YOU'RE GOING TO DO IF I APPOINT MR. REED.

MR. SUTCLIFFE: I CAN'T STOP YOU FROM DOING ANYTHING YOU WANT TO DO. YOU'RE OBVIOUSLY GOING TO DO WHATEVER YOU WANT TO DO SO WHY AM I BEING ASKED? I DON'T UNDERSTAND WHY YOU'RE EVEN ASKING ME, YOUR HONOR. IF YOU'RE GOING TO DO IT, DO IT.

THE COURT: OKAY. I THINK THE RECORD WILL BE PRETTY CLEAR.

MR. SUTCLIFFE: YOU MADE HIM MY OWN LAWYER ON THE 27TH AND NOW YOU'RE TELLING ME I HAVE TO CHOOSE DO I WANT A LAWYER. THAT MAKES ABSOLUTELY NO SENSE TO ME AT ALL. YOU MADE HIM MY LAWYER. OKAY. I SPEAK FOR MYSELF NOW. YOU MADE ME. YOU'VE MADE THIS ANIMAL. I'LL STAY WITH SPEAKING FOR MYSELF. YOU ORDERED ME.

THE COURT: OKAY. I'M GOING TO MAKE SOME FINDINGS ON THE RECORD, AND THE FINDINGS ARE DESPITE MY BEST EFFORT, ALTHOUGH I'VE BEEN CONTRACTED FOR MORE TIME THAN ALREADY HAS BEEN CONSUMED, I CAN'T GET A DIRECT AND RESPONSIVE ANSWER FROM MR. SUTCLIFFE AS TO HIS CHOICE AS TO REPRESENTING HIMSELF OR REPRESENTING A LAWYER -- OR BEING REPRESENTED BY A LAWYER AND THERE APPEARS TO BE A VIEW

THAT MR. SUTCLIFFE HAS AS TO WHAT THE ROLE OF A LAWYER IS THAT DESPITE MANY EFFORTS TO, SOMETIMES OUTSIDE THE PRESENCE OF THE PROSECUTOR, DEMONSTRATE WHAT THE PROPER ROLE AND NECESSARY AUTHORITY OF A LAWYER IS, I DON'T SEEM TO HAVE SUCCEEDED IN GETTING HIM TO UNDERSTAND.

NEVERTHELESS, MY FINDING IS THAT ON THE BASIS OF THE RECORD COMING INTO THE COURTROOM TODAY AND MR. SUTCLIFFE'S GUARDED, MANIPULATIVE, CAGEY BUT SELF-INTERESTED STATEMENTS THAT HE WANTS TO HAVE A LAWYER AND HE WOULD BE CRAZY NOT TO HAVE A LAWYER, PRUDENT SUGGEST THAT I APPOINT MR. REED, AT LEAST FOR THE TIME BEING AND WITH THE HOPE AND THE INTENTION THAT IT WOULD BE FOR THE CONCLUSION AND DURATION OF THIS CASE, AS THE LAWYER FOR MR. SUTCLIFFE. AND THAT'S MY FINDING AND THAT'S MY RULING.

IF MR. SUTCLIFFE ENGAGES IN CONDUCT THAT MR. REED CONCLUDED AND DEMONSTRATED IN ANY HEARING THAT MIGHT HAVE TO BE UNDERTAKEN IN THE COURT WOULD INTERFERE WITH HIS ABILITY TO CARRY OUT HIS PROFESSIONAL DUTIES THE WAY A LAWYER IS UNDERSTOOD AND ENTITLED TO CARRY THEM OUT, THEN I WOULD HAVE TO RELIEVE MR. REED OF THAT RESPONSIBILITY. I HOPE IT DOESN'T COME TO THAT. IF IT EVER COMES TO THAT, MR. SUTCLIFFE WILL BE GIVEN AN OPPORTUNITY, AS HE ALWAYS HAS BEEN, TO STEP FORTH ON THE RECORD HIS VIEWS AS TO THE ROLE AND THE PERFORMANCE OF MR. REED AND HIS LAWYERS.

THE TRIAL WILL NOT PROCEED ON TUESDAY. THE GOVERNMENT IS DIRECTED TO DO ALL THAT I ALREADY SAID CONCERNING THE DUPLICATION OF EVIDENCE. WE WILL SET THIS DATE FOR TRIAL. I WANT

TO SPEAK TO MY CLERK. HOLD ON.

MR. REED: YOUR HONOR, BEFORE YOU DO THAT, CAN I MAKE SOME SUGGESTIONS NOW THAT I'M THE ATTORNEY OF RECORD IN THE CASE?

THE COURT: YES.

MR. REED: I WAS JUST GOING TO INDICATE TO THE COURT, YOUR HONOR, THAT THE COURT MAY WANT TO HAVE JUST A VERY BRIEF STATUS HEARING IN THIS MATTER PERHAPS AT 9:00 ON MONDAY, WE CAN CALL MR. NICOLAYSEN, AND PERHAPS MR. NICOLAYSEN STILL IS IN POSSESSION OF ALL THE DISKS, ALL THE DISCOVERY WILL REPORT TO COURT. THAT WAY IF THEY'RE THERE, THE GOVERNMENT WON'T HAVE TO TAKE THE TIME TO DUPLICATE ALL OF THESE CD'S AND THAT MIGHT BE A WAY TO ALLEVIATE THAT PROBLEM. I JUST SUSPECT, AND THIS IS JUST A SUSPICION, THAT WHEN MR. NICOLAYSEN WAS TOLD -- HE WAS COMMUNICATED TO WITH RESPECT TO THE DISCOVERY IN THIS CASE HE WAS PROBABLY THINKING THAT HE WAS RESPONSIBLE FOR -- SINCE MR. SUTCLIFFE WAS IN PRO PER AT THAT TIME, THAT HE WAS RESPONSIBLE FOR SENDING THE CD'S OVER TO MDC.

THE COURT: WELL, I HAVE A DIFFERENT RECOLLECTION. YOU MAY BE RIGHT, BUT MY RECOLLECTION IS THAT HE WAS ORDERED AND AGREED TO MAKE THEM AVAILABLE TO YOU AS WELL.

MR. REED: THERE MAY HAVE BEEN SOME MISCOMMUNICATION ABOUT THAT. IN ANY CASE, MR. SUTCLIFFE COULDN'T HAVE SEEN THE CD'S OVER THERE OR WORKED ON THE CD'S IN PRO PER ANY WAY. HE DOESN'T HAVE A COMPUTER AVAILABLE TO HIM SO IT'S MOOT. BUT I WAS THINKING IF WE COULD MEET MONDAY MORNING --

THE COURT: WELL, STEVE, BRING YOUR CALENDAR FOR MONDAY. I'M NOT SURE WE NEED TO MEET IN COURT. IF YOU CAN GET IT FROM MR. NICOLAYSEN AND YOU CAN COMMUNICATE THAT TO MS. DUARTE, WOULDN'T THAT BE SUFFICIENT?

MR. REED: MAYBE WE SHOULD BE ORDERED TO MEET AT THE U.S. ATTORNEY'S OFFICE AT 9:00. THAT WAY I CAN JUST CONFIRM THAT THE CD'S THAT MR. NICOLAYSEN RETURNS TO ME MATCH UP PERFECTLY WITH THE LIST THAT THE GOVERNMENT HAS GOT SO THAT WE'LL ALL KNOW AT THAT TIME THAT I'VE GOT EVERYTHING THAT I'M SUPPOSED TO HAVE.

BUT MORE IMPORTANTLY, YOUR HONOR, I NEED SOMETHING THAT'S MORE IMPORTANT THAN THAT IN ORDER TO PREPARE FOR THIS CASE. I NEED TO BE WITH MR. SUTCLIFFE AT MDC AND HAVE A COMPUTER AVAILABLE TO BOTH OF US SO THAT WE CAN GO THROUGH ALL OF THESE DIFFERENT FILES, SO THAT HE CAN DIRECT ME WITH RESPECT TO THE DEFENSE OF THE CASE. AND I'M NOT SURE --

THE COURT: DO YOU HAVE A LAPTOP YOURSELF?

MR. REED: I DO, YOUR HONOR. BUT IT'S A BIG -- NO. I DON'T HAVE A LAPTOP. I JUST HAVE A PC. I DON'T HAVE A PORTABLE COMPUTER.

THE COURT: WELL, SEEMS TO ME THAT CONSISTENT WITH THE AUTHORITY THAT I HAVE UNDER THE CRIMINAL JUSTICE ACT, I CAN AUTHORIZE THAT FUNDS BE PROVIDED FOR YOU TO RENT A LAPTOP, AND I AM AUTHORIZING THAT.

NOW, I DON'T KNOW WHAT KIND OF PROVISIONS I WOULD TO ARRANGE FOR WITH THE WARDEN OF THE MDC TO ALLOW YOU TO E

THAT LAPTOP IN AND TO USE IT IN A SECURED ROOM WITH MR. SUTCLIFFE, BUT WHATEVER IT TAKES, I WILL DO IT, OR AT LEAST TRY TO DO IT, AND I'M PRETTY CONFIDENT I WILL SUCCEED IN DOING IT. SO THE GOVERNMENT WILL PAY FOR YOUR RENTAL OF A LAPTOP. MR. SUTCLIFFE HAS GOT CONSIDERABLE PROWESS AND INSIGHT INTO MOST THINGS HAVING TO DO WITH ELECTRONIC EVIDENCE AND COMPUTERS AS YOU WELL KNOW AND YOU'RE WELCOME TO SEEK HIS VIEWS AS WELL ABOUT OTHER THINGS THAT YOU MIGHT NEED TO MAKE THE OPPORTUNITY WORK.

I WILL ALSO --

MR. REED: WE'RE GOING TO NEED A PRINTER.

THE COURT: RENT IT. I WILL ALSO MAKE WHATEVER EFFORTS ARE NECESSARY TO ASSURE SPECIAL ACCESS IN TERMS OF AMOUNTS OF TIME OR FREQUENCY OF VISITS, BUT YOU'LL HAVE TO LET MY CLERK KNOW WHEN YOU -- OR WHAT REGIMEN OF VISITS AND TIME YOU THINK IS APPROPRIATE TO SPEND SO I CAN DO SOME ADVANCED WORK. AND I'M TELLING THE GOVERNMENT THAT I WOULD BE DOING THIS EX PARTE IN THE SENSE OF CALLING THE WARDEN AND ASSURING THAT MR. REED AND MR. SUTCLIFFE ARE GIVEN MAXIMAL, FEASIBLE OPPORTUNITY TO WORK WITH EACH OTHER. WHAT ELSE DID YOU WANT TO ALERT ME TO?

MR. REED: HE NEEDS FULL ACCESS TO THE LAW LIBRARY.

THE COURT: WELL, THAT'S A DIFFERENT ISSUE, AND I DON'T THINK THAT MY -- I KNOW THAT MY UNDERSTANDING ABOUT WHAT A LAW LIBRARY ACCESS IS IS DIFFERENT THAN WHAT MR. SUTCLIFFE SAID, BUT SO LONG AS YOU'RE HIS LAWYER, YOU HAVE ACCESS TO A LAW LIBRARY, AND I DON'T THINK THAT'S A NEED THAT HAS TO BE OR RIGHTLY MUST BE

ADDRESSED SO THAT'S NOT SOMETHING THAT I'M GOING TO MAKE ANY SPECIAL ARRANGEMENTS FOR.

ANYTHING ELSE, MR. REED?

MR. REED: YOUR HONOR, ONCE THE CD ROMS ARE PROVIDED TO ME, SINCE THEY ARE RATHER COMPLEX, MR. SUTCLIFFE NEEDS ACCESS TO THOSE CD ROMS AND THE ABILITY TO THEN TAKE THEM TO THE LIBRARY THERE AT MDC WHERE THEY HAVE A COMPUTER WHERE HE CAN PUT THEM IN AND VIEW THEM. SOMETIMES WITHOUT ME BEING PRESENT. AND HE NEEDS A PRINTER THERE AT THAT LOCATION TO PRINT OUT WEB PAGES.

THE COURT: I DON'T THINK HE NEEDS A PRINTER AND I'M NOT GOING TO GO TO THAT -- A FAIR DEFENSE, AND I KNOW THAT YOU UNDERSTAND HOW THAT IS ORDINARILY DEFINED ON A CASE-BY-CASE BASIS AND EFFECTIVE ASSISTANCE ARE ONE THING; BUT RIGHTS, PRIVILEGES, PREROGATIVES, AND ADVANTAGES THAT MOST DEFENDANTS NEVER HAVE, INCLUDING DEFENDANTS WHO ARE NOT IN CUSTODY, IS ANOTHER THING.

AND I'M WILLING TO GO TO THE EXTREME LIMITS -- I'M NOT SURE THEY'RE EXTREME BUT TO CERTAIN LIMITS, BUT I'M NOT GOING TO ORDER, AT A GOVERNMENT EXPENSE, MR. SUTCLIFFE HAVE SPECIAL EQUIPMENT INSTALLED IN THE LIBRARY. AND IF THAT'S REVERSIBLE ERROR, SO BE IT. ANYTHING ELSE, MR. REED?

MR. REED: NO, YOUR HONOR.

THE COURT: YES, MS. DUARTE.

MS. DUARTE: YOUR HONOR, IT'S MY UNDERSTANDING THAT IN ORDER TO VIEW THE COPIES THAT WE'RE GOING TO MAKE, IN ADDITION TO WHAT MR. REED HAS NOTED, THEY MAY ALSO NEED A ZIP DRIVE, Z-I-P,

ZIP DRIVE. BECAUSE IF WE'RE GOING TO DUPLICATE THE ORIGINAL EVIDENCE, THERE WERE SOME ZIP DISKS; AND ALSO A -- LAPTOPS GENERALLY DON'T HAVE THE ABILITY TO VIEW HARD DRIVES WITHOUT AN OUTSIDE VIEWER WHERE YOU MOUNT THE HARD DRIVE AND VIEW IT ON THE LAPTOP. HE WOULD NEED THAT EQUIPMENT AS WELL.

THE COURT: WELL, I'M NOT GOING TO SIT HERE AND BE SURE TO INVITE EDUCATION ABOUT EVERY COMPONENT PART OF WHAT HE NEEDS. YOU DETERMINE IN YOUR BEST PROFESSIONAL JUDGMENT WHAT YOU NEED AND GET IT AND IT WILL BE PAID FOR AN A RENTAL BASIS.

MS. DUARTE: THANK YOU, YOUR HONOR.

THE COURT: ANYTHING ELSE?

MR. REED: WHEN IS THE TRIAL DATE?

THE COURT: YEAH. THAT'S WHAT I'M ABOUT TO --

OKAY. THE TRIAL DATE IS CONTINUED TO OCTOBER 7TH, AND DEPENDING UPON THE RESEARCH, AND I MAY DO SOME ON MY OWN, BUT I WANT THE GOVERNMENT TO BRIEF THIS ISSUE, IT MIGHT BE EXTENDED BEYOND THAT. IT'S CONCEIVABLE TO ME THAT A JURY COULD BE PICKED ON OR BEFORE OCTOBER 10TH WITH THE ACTUAL PRESENTATION OF EVIDENCE TO FOLLOW AT SOME LATER TIME WITH THE RIGHTS OF A DEFENDANT UNDER THE SPEEDY TRIAL ACT NOT BEING VIOLATED.

SO I WANT THOSE POSSIBILITIES TO BE AT LEAST CONSIDERED AND ADDRESSED IN THE MEMORANDUM YOU FILE.

MS. DUARTE: AS TO WHETHER OR NOT THERE'S A BASIS FOR THE WAIVER ABSENT DEFENDANT'S CONSENT, YOUR HONOR, JUST TO MAKE SURE I GOT IT RIGHT.

THE COURT: THAT'S ONE THING. AND ANOTHER THING IS WHETHER THE RIGHTS OF THE DEFENDANT ARE ACCOMPLISHED IF THE JURY IS PICKED, EVEN IF THE EVIDENCE IS NOT ACTUALLY COMMENCED AT THAT IMMEDIATE TIME AND UNDER WHAT CIRCUMSTANCES, IF ANY, A SLIGHT DELAY CAN BE PROVIDED. MAYBE ONE ISN'T NECESSARY, IT REALLY DEPENDS -- YOU KNOW, I DON'T THINK -- I THINK I UNDERSTAND THIS CASE FAR BETTER NOW IN PART BECAUSE OF CERTAIN THINGS I'VE READ RECENTLY AND IT DOESN'T STRIKE ME AS THAT COMPLICATED A CASE. THE NATURE OF THE EVIDENCE IS A LITTLE BIT FOREIGN TO ME BECAUSE I'M NOT GOOD AT THE -- BUT THE NATURE OF THE ISSUES ARE PRETTY STRAIGHTFORWARD AND CLEAR. SO I THINK WITHOUT PREJUDGING IT THAT IT MAY NOT BE NECESSARY TO CONSUME SIGNIFICANT AMOUNTS OF TIME TO ASSURE THAT MR. REED FEELS IN GOOD FAITH IN HIS MIND THAT HE'S UP TO SPEED.

THERE ARE MANY OTHER ISSUES THAT I WAS GOING TO ADDRESS BUT GIVEN THE LATE HOUR AND THE FINDINGS THAT I MADE IN THE POSTPONEMENT OF THE TRIAL DATE I'M NOT GOING TO GO INTO MOST OF THOSE ISSUES.

THE -- THERE'S ONE THING I WANT TO ALERT YOU TO, MR. REED. I'M SURE YOU MAY HAVE ALREADY SURMISED THIS AND WOULD ADDRESS IT, BUT I NOTICED ON THE GOVERNMENT'S WITNESS LIST THE NAME ORLEY MANN (PHONETIC), I BELIEVE SHE'S EITHER THE CURRENT OR FORMER WIFE OF MR. SUTCLIFFE. THAT RAISES POTENTIAL ISSUES OF PRIVILEGE. I HAVE NO IDEA WHAT CIRCUMSTANCES, IF ANY, RESULTED IN HER BEING A DESIGNATED WITNESS IN THIS CASE, BUT TO MAKE SURE THAT

YOU DON'T HAVE A GAP IN YOUR UNDERSTANDING I WANTED TO MENTION THAT TO YOU.

YOU CAN ARRANGE FOR ALL SUBPOENAS. I WANT THE JURY INSTRUCTIONS THAT WERE PREVIOUSLY AGREED TO, TO MAKE SURE YOU MAKE THOSE AVAILABLE TO MR. REED AND I NEED A DISKETTE, BECAUSE I LOST THE ONE OR WE CAN'T FIND THE ONE. THERE SEEMS TO BE A GOBLIN SURROUNDING THIS CASE, AND I WANT TO FIDDLE WITH IT SO I WOULD BENEFIT FROM THE DISKETTE. I THINK THAT COVERS IT. THANK YOU, COUNSEL.

MR. REED: YOUR HONOR, THERE WERE SOME MOTIONS THAT MR. SUTCLIFFE DID FILE.

THE COURT: I CAN'T RULE ON THOSE MOTIONS EXCEPT AS ONE CLARIFICATION. THE GOVERNMENT CAN FILE AN OPPOSITION BUT I THINK THAT'S IMPORTANT TO NOTICE. THERE'S A MOTION TO DISMISS THE THREAT COUNTS UNDER RULE 29.

MR. REED: WELL, THAT'S GOING TO BE WITHHELD, YOUR HONOR.

THE COURT: YEAH. I WOULD THINK SO. THAT'S REALLY A MOTION TO BE MADE DURING THE COURSE OF THE TRIAL. THERE IS A RENEWED MOTION CONCERNING THE RECONSTRUCTION ELECTRONICALLY OF THE EVIL GX.COM WEBSITE. NOW, I ISSUED A RULING ON THAT BEFORE I RECEIVED THIS RENEWED MOTION. I'M NOT SURE IF MR. SUTCLIFFE GOT THE RULING.

MR. SUTCLIFFE: YES, I DID, YOUR HONOR.

THE COURT: AND THAT RULING DENIED THE MOTION

CONDITIONED UPON THE GOVERNMENT CONFIRMING A COUPLE OF ITEMS SO PLEASE RISE, MS. DUARTE. ONE IS THAT IT'S BEEN ADDRESSED. IT WAS THAT THE DEFENDANT HAS POSSESSION OR ACCESS TO THE DOWNLOADS CAPTURED BY THE GOVERNMENT INCLUDING THOSE BY ANDREW RAMSEY. HE DOESN'T HAVE POSSESSION. HE DID HAVE ACCESS, ALTHOUGH NOT IN HIS OWN CAPACITY, TO TURN ON A COMPUTER. BUT FOR SOME REASON THE ACCESS, MEANING THAT AVAILABLE THROUGH HIS PRIOR LAWYERS WAS NOT TAKEN ADVANTAGE OF.

SO I'M GOING TO HOLD OFF A DENIAL UNTIL I'M SATISFIED THAT MR. REED DOES HAVE POSSESSION TO THOSE DOWNLOADS CAPTURED BY THE GOVERNMENT AND IN ITS POSSESSION, INCLUDING THOSE AT GLOBAL CROSSING, TURNED OVER. AND YOU ALREADY DESCRIBED WHAT THOSE ARE, SO I THINK THE RECORD DOESN'T HAVE TO BE SUPPLEMENTED.

MS. DUARTE: I DID, YOUR HONOR, AND I'LL MAKE THOSE A PRIORITY. I CAN GET THOSE OVER TO MR. REED, IF HE CAN'T GET THEM FROM MR. NICOLAYSEN, I'D SAY BY MONDAY AFTERNOON.

THE COURT: OKAY. AND THE SECOND PART WAS THAT HE HAS POSSESSION OF THE EVIDENCE OF CONTEXT. I THINK THE PARTIES KNOW WHAT THAT MEANS. AND IT WAS SPECIFICALLY KIND OF DESCRIBED IN FOOTNOTE TWO OF YOUR OPPOSITION. GIVE THAT MATERIAL TO MR. REED, JUST FILE A DECLARATION CONFIRMING THAT IT'S BEEN DONE, AND THEN THIS CONDITIONAL ORDER DENYING THE MOTION FOR RECONSTRUCTION OF EVIL GX.COM WEBSITE WILL BECOME FINAL.

MS. DUARTE: THANK YOU.

THE COURT: ANOTHER MOTION -- IT WASN'T REALLY A MOTION

BUT IT WAS A KIND OF INHERENT REQUEST CONCERNING ACCESS TO COMPUTERS AT THE MDC AND THE LIKE, ACCESS TO THE LIBRARY HAS BEEN ADDRESSED BY MR. REED'S STATEMENTS SO I THINK I'VE ADDRESSED THOSE. IS THERE ANYTHING ELSE, MR. REED, OR, MR. SUTCLIFFE, THAT YOU THINK WAS SUBMITTED TO ME IN THE WAY OF A MOTION EXPLICIT OR IMPLIED THAT REQUIRES A RULING?

MR. REED: MAY I JUST HAVE A MOMENT, YOUR HONOR?

THE COURT: SURE.

MR. REED: YES, YOUR HONOR. IT WAS THE NOTICE OF MOTION AND MOTION TO DISMISS THE THREAT CHARGES.

THE COURT: I DIDN'T ARTICULATE THAT YET? OKAY. THAT'S THE ONE I WANT TO HAVE THE GOVERNMENT FILE AN OPPOSITION TO. THAT'S UNDER SUBMISSION.

MR. REED: THANK YOU.

THE COURT: NOW, I THINK IT'S PRUDENT, AND I'M NOT INTENDING TO RAISE ANY LEVEL OF ACRIMONY BY DOING THIS, BUT GIVEN MY PRIOR COMMENTS AND THE REGRETTABLY TORTURED HISTORY OF THIS CASE, I AM NOW GOING TO ORALLY SUPPLEMENT THE WRITTEN WARNINGS THAT HAVE BEEN CIRCULATED AND MADE AVAILABLE AND SERVED UPON MR. SUTCLIFFE MORE THAN ONCE CONCERNING THE RISKS OF SELF-REPRESENTATION. AND I WANT IT TO BE VERY CLEAR THAT I WILL FIND THAT BY CONDUCT THERE IS A CHOICE OF SELF-REPRESENTATION UNDER THE CIRCUMSTANCES I ALREADY DESCRIBED, WHICH I HOPE WON'T HAPPEN IF MR. REED'S CAPACITY TO FUNCTION PROPERLY AS A LAWYER IS DISRUPTED OR INTERFERED WITH.

NOW, MR. SUTCLIFFE, THIS IS INTENDED TO GET TO YOU. THE CHARGES AGAINST YOU ARE SET FORTH IN THE FIRST SUPERSEDING INDICTMENT. THERE ARE TWO DIFFERENT STATUTES THAT HAVE BEEN ALLEGED TO HAVE BEEN VIOLATED. WHAT IS THE DOCUMENT, MS. DUARTE, WHERE YOU LISTED THE ELEMENTS AND THE PENALTIES?

MS. DUARTE: I BELIEVE IT'S CALLED -- I CAN GET IT, YOUR HONOR.

THE COURT: CHARGES AND POTENTIAL PENALTIES. I HAVE IT. OKAY. I'M GOING TO PARAPHRASE A DOCUMENT THAT'S BEEN SERVED ON MR. SUTCLIFFE AS TO COUNTS ONE THROUGH FOUR WHICH ALLEGE A VIOLATION OF 18 USC SECTION 875. THE GOVERNMENT WOULD HAVE TO PROVE, BEYOND A REASONABLE DOUBT AND TO THE SATISFACTION OF ALL THE JURORS, THAT MR. SUTCLIFFE TRANSMITTED A COMMUNICATION IN INTERSTATE COMMERCE, THAT THE COMMUNICATION THREATENED TO INJURE SOMEONE, THAT IN DOING SO HE THREATENED -- AND COMMUNICATING THAT THREAT HE HAD THE SPECIFIC INTENT TO THREATEN.

THOSE ARE THE BASIC ELEMENTS OF THE THREAT ALLEGATIONS UNDER 18 USC 875(C).

FOR THE COUNTS FIVE THROUGH NINE WHICH ALLEGE THAT HE AIDED AND ABETTED FRAUD AND RELATED ACTIVITY IN CONNECTION WITH IDENTIFICATION INFORMATION, THAT BEING IN VIOLATION OF 18 USC SECTION 1028(A)(7). AND IN ORDER FOR THE JURY PROPERLY TO CONVICT HIM OF THOSE COUNTS, THEY WOULD HAVE TO BE SATISFIED BEYOND A REASONABLE DOUBT. AND ALL OF THEM WOULD -- THAT IN DOING WHAT HE DID CONCERNING THE POSTING OF THE SOCIAL SECURITY NUMBERS, HE

ACTED KNOWINGLY; THAT HE TRANSFERRED THE SOCIAL SECURITY NUMBERS OF ANOTHER PERSON THAT IS TRANSFERRED EFFECTED INTERSTATE COMMERCE THE WAY THAT IT WAS CARRIED OUT, THAT IS WITHOUT LAWFUL AUTHORITY AND THAT HE ACTED WITH THE INTENT TO AID AND ABET THE CRIME OF FALSE REPRESENTATION OF A SOCIAL SECURITY NUMBER WITH THE INTENT TO DECEIVE.

ALL OF THAT BEING IN VIOLATION OF 42 U.S.C. SECTION 408(A)(7)(B).

THE ELEMENTS OF THE CRIME OF FALSE REPRESENTATION OF A SOCIAL SECURITY NUMBER WITH THE INTENT TO DECEIVE, WHICH IS KIND OF AN UNDERLYING CRIME, ARE THAT THE PERPETRATOR FALSELY, AND THAT COULD BE EITHER THE DEFENDANT OR THE PERSON HE WAS AIDING AND ABETTING BY EVERYTHING INTEREST THE SOCIAL SECURITY NUMBERS. IT'S NOT NECESSARILY THE DEFENDANT, THAT THAT PERSON, THE PERPETRATOR FALSELY REPRESENTED THAT A CERTAIN SOCIAL SECURITY NUMBER WAS THE SOCIAL SECURITY NUMBER ASSIGNED TO HIM OR TO HER BY THE COMMISSIONER OF SOCIAL SECURITY. ALSO THAT THE PERPETRATOR KNEW THAT THE SOCIAL SECURITY NUMBER HAD NOT BEEN ASSIGNED TO HIM OR HER AND THAT THE PERPETRATOR ACTED WITH THE INTENT TO DECEIVE.

FOR EACH COUNT IN VIOLATION OF COUNTS ONE THROUGH FOUR, THE MAXIMUM PENALTY WOULD BE FIVE YEARS IMPRISONMENT, A THREE-YEAR PERIOD OF SUPERVISED RELEASE, A FINE OF $250,000.00 AND A MANDATORY SPECIAL ASSESSMENT OF THE $100.00.

THE STATUTORY MAXIMUM FOR THE VIOLATION OF THE SOCIAL SECURITY RELATED COUNTS UNDER SECTION 1028(A)(7) IS THREE YEARS ON

EACH COUNT, THAT'S THREE YEARS IMPRISONMENT, ONE-YEAR PERIOD OF SUPERVISED RELEASE, A $250,000.00 FINE, AND A MANDATORY SPECIAL ASSESSMENT OF $100.00.

IF YOU PUT THEM ALL TOGETHER, THE TOTAL MAXIMUM THAT MR. SUTCLIFFE WOULD FACE IN PRINCIPLE UNDER THE STATUTE WOULD BE 35 YEARS IMPRISONMENT, THREE-YEAR PERIOD OF SUPERVISED RELEASE, A FINE OF $2,250,000.00 OR TWICE THE GROSS GAIN OR GROSS LOSS RESULTING FROM THE OFFENSE, WHICHEVER IS GREATER, AND A MANDATORY SPECIAL ASSESSMENT OF $900. THERE COULD ALSO BE MANDATORY RESTITUTION FOR VICTIMS OF THESE OFFENSES IF APPLICABLE. THERE ARE OTHER COLLATERAL CONSEQUENCES WHICH DO NOT GET TO THE PRECISE PENALTIES, AND THOSE ARE SET FORTH IN THE SUMMARY OF CHARGES AND THE POTENTIAL PENALTIES. SO ARE THE SENTENCING FACTORS, AND I WON'T ~~REPEAT THOSE~~ BUT I REFER TO THOSE AND INCORPORATE THOSE BY REFERENCE. inform you of those. see illegal sentence

I HAVE ALREADY TOLD YOU, MR. SUTCLIFFE, BUT I'LL TELL YOU AGAIN, THAT WERE I FORCED TO MAKE A FINDING, AND I REALLY HOPE I WON'T BE, THAT BY YOUR CONDUCT AND POSSIBLY BY YOUR EXPLICIT CHOICE, IF THAT EVER HAPPENED, YOU WOULD WAIVE YOUR RIGHT TO HAVE A LAWYER REPRESENT YOU. IN REPRESENTING YOURSELF, YOU WOULD HAVE TO FOLLOW AND ABIDE BY THE FEDERAL RULES OF CRIMINAL PROCEDURE, THE FEDERAL RULES OF EVIDENCE, THE LOCAL RULES OF THIS COURT AT SENTENCING, IF IT GOT TO THAT POINT. YOU WOULD HAVE TO APPLY AND ADAPT AND FOLLOW THE U.S. SENTENCING GUIDELINES.

THERE ARE CERTAIN PROCEDURES AND RULES THAT ARE

APPLICABLE TO THE SELECTION OF A JURY AND THE EXERCISE OF PEREMPTORY OBJECTIONS OR OBJECTIONS FOR CAUSE TO PROSPECTIVE JURORS. ALL THAT IS LOOSELY CALLED THE PROCESS OF VOIR DIRE, AND YOU WOULD BE REQUIRED TO FOLLOW THOSE PROCEDURES AND RULES LIKE ANY LAWYER WOULD. YOU WOULD BE RESPONSIBLE FOR MAKING YOUR OWN MOTIONS. YOU WOULD BE RESPONSIBLE FOR QUESTIONING WITNESSES AND YOU WOULD HAVE TO QUESTION THEM IN THE WAY THAT LAWYERS ARE REQUIRED TO FOLLOW. YOU WOULD BE RESPONSIBLE FOR VOICING YOUR OWN OBJECTIONS, AGAIN, IN THE MANNER THAT LAWYERS WOULD BE REQUIRED TO FOLLOW. I TOLD YOU A LITTLE BIT ABOUT THAT EARLIER. YOU WOULD BE RESPONSIBLE FOR QUESTIONING EXPERTS OR DEALING WITH EXPERTS, IF YOU HAD ANY IN YOUR CAMP, FOR MAKING APPROPRIATE BUT NOT INAPPROPRIATE OPENING OR CLOSING STATEMENTS. IT WOULD BE PARTICULARLY TOUGH FOR YOU TO GET YOUR VERSION OF THE FACTS BEFORE THE JURY BECAUSE WITHOUT A LAWYER YOU WOULD HAVE TO QUESTION YOURSELF. IT WOULD PROBABLY REQUIRE YOU TO SIT ON THE WITNESS -- IN THE WITNESS SEAT UP HERE IN THE STAND, ASK A QUESTION, AND THEN IF THERE'S NO OBJECTION, ANSWER THE QUESTION. IT WOULD NOT BE PERMITTED TO GIVE A NARRATIVE AND YOU WOULD NOT BE PERMITTED TO GIVE A SPEECH. YOU WOULD NOT BE PERMITTED TO HAVE ANY OUTBURSTS.

I THINK I ALLUDED TO THIS IN ONE OF OUR CONVERSATIONS, IF YOU ASSUME, AS I THINK IS VERY OFTEN THE CASE, THAT JURORS ARE AFFECTED BY THE PERSONALITIES OF PEOPLE AND NOT JUST BY THE EVIDENCE AND THE FACTS THAT THEY HEAR ABOUT, TO THE EXTENT THAT YOUR PERSONALITY BECAME A FACTOR IN THE COURTROOM, IT WOULD BE

PRONOUNCED AND YOU WOULD BE MORE OF A PRESENCE, ANYONE WOULD, EVEN IF IT WERE A VERY SHY PERSON, JUST BY BEING THE ONLY ONE ACTING ON YOUR OWN BEHALF, NOT HAVING A LAWYER THERE TO RUN INTERFERENCE.

JURORS UNDERSTAND, ALTHOUGH SPECIAL INSTRUCTION WOULD HAVE TO BE TAILORED THAT INDIVIDUALS IN A CRIMINAL CASE WHO CANNOT AFFORD A LAWYER HAVE A RIGHT TO HAVE A LAWYER REPRESENTED, THEY'VE SEEN THAT IN MOVIES AND IN THEIR OWN EXPERIENCE, SO THEY WON'T THINK THAT YOU'VE BEEN DEPRIVED OF A RIGHT UNFAIRLY AND THEY WON'T BE LIKELY TO TAKE PITY ON YOU IF YOU'RE WAGING WAR AGAINST THE U.S. ATTORNEY'S OFFICE ON YOUR OWN.

THEY WOULD UNDERSTAND THAT YOU WOULDN'T BE GIVEN ADDITIONAL LICENSE JUST BECAUSE YOU'RE REPRESENTING YOURSELF WOULDN'T ENTITLE YOU, EVEN IN THEIR MINDS, AND THEY WOULD BE TOLD ABOUT THIS TO PROCEED DIFFERENTLY OR AT AN ADVANTAGE THAT -- AND IN A WAY THAT LAWYERS WOULDN'T ORDINARILY BE EXPECTED TO.

I THINK YOU ALREADY KNOW THAT I INTEND TO MAINTAIN DECORUM IN THIS COURTROOM AND ANY OUTBURSTS WOULD BE SUBJECT TO VARIOUS SANCTIONS, ALL OF WHICH HAVE BEEN SIGNIFICANTLY AND EXTENSIVE DESCRIBED IN THE DOCUMENTS SERVED UPON YOU CALLED THE GOVERNMENT'S SPECIAL TRIAL MEMORANDUM WHICH I INCORPORATE BY REFERENCE AND WHICH -- HAVE YOU RECEIVED THAT ONE, MR. SUTCLIFFE?

MR. SUTCLIFFE: YES.

THE COURT: OKAY. THOSE ARE MY ADDITIONAL WARNINGS, AND THEY'RE NOT ONES THAT I'M TOUCHING ON FOR THE FIRST TIME BUT I THINK THEY'RE QUITE DEFINITIVE. WE'RE ADJOURNED: I'M NOT GOING

TO SET A STATUS CONFERENCE RIGHT NOW BECAUSE I THINK IT WOULD BE PREMATURE BUT I'LL BE HAPPY TO RESPOND AND SET ONE UP AS QUICKLY AS POSSIBLE IF IT'S NECESSARY.

MS. DUARTE: THANK YOU, YOUR HONOR.

(COURT WAS ADJOURNED IN THE MATTER AT 3:45.)

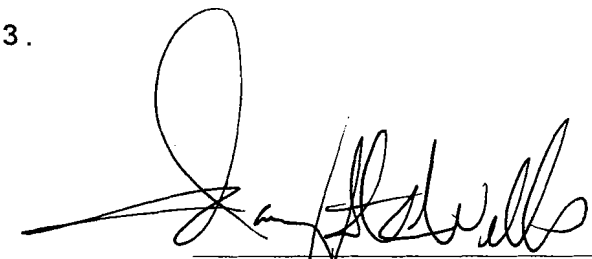
C E R T I F I C A T E

UNITED STATES OF AMERICA

CENTRAL DISTRICT OF CALIFORNIA

I, NANCY SMITH-WELLS, OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT, FOR THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT THE FOREGOING 83 PAGES CONSTITUTE A TRUE TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE SAID COURT, HELD IN THE CITY OF LOS ANGELES, CALIFORNIA, IN THE MATTER THEREIN STATED.

IN TESTIMONY WHEREOF, I HEREUNTO SET MY HAND ON THIS, THE 12TH DAY OF NOVEMBER 2003.



NANCY SMITH-WELLS
OFFICIAL COURT REPORTER
CENTRAL DISTRICT OF CALIFORNIA

UNDER SEAL

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

- - -

HONORABLE A. HOWARD MATZ, JUDGE PRESIDING

- - -

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	NO. CR 02-350-AHM
STEVEN WILLIAM SUTCLIFFE, Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Wednesday, October 1, 2003

COPY

LEONORE A. LeBLANC, CSR 2525
Reporter Pro Tem
11333 Moorpark St., #449
Studio City, California 91602
(818) 980-4095

UNDER SEAL

APPEARANCES:

For the Plaintiff:

DEBRA W. YANG
United States Attorney
STEVEN D. CLYMER
Assistant United States Attorney
Chief, Criminal Division
ELENA J. DURATE
JASON GONZALES
Assistant United States Attorneys

For the Defendant:

STEVEN WILLIAM SUTCLIFFE
In propria Persona

DAVID R. REED
Attorney at Law (Standby counsel)

UNDERSEAL

I N D E X

PROCEEDINGS

Status Conference

Defendant's counsel motion to withdraw

UNDER SEAL

LOS ANGELES, CALIFORNIA; WEDNESDAY, OCTOBER 1, 2003; 11:45 AM

THE CLERK: Calling Item Number 3, CR 02-350(A), U.S.A. vs. Steven William Sutcliffe.

Counsel, state your appearances, please.

MS. DUARTE: Good morning, your Honor. Elena Duarte and Jason Gonzalez on behalf of the United States.

THE COURT: Good morning.

MR. REED: Good morning, your Honor. David Reed on behalf of Mr. Sutcliffe. He's present in court. And with me at the counsel table, your Honor, is Sarah Linn Ritts, the paralegal.

THE COURT: Okay. Welcome to all of you.

This is a status conference that the parties requested and I'm happy to provide. As far as I can perceive, the items that we need to address are issues involving the trial date and the speedy trial calculations, a status of motions -- what are pending basically and what the briefing schedule and decision-making schedule is or ought to be -- the status of the electronic evidence and the other evidence that we discussed last time that various steps have been ordered to be taken to make sure that Mr. Reed and/or Mr. Sutcliffe have.

Are there any other broad topics that need to be addressed today?

MR. REED: Yes, your Honor. I'm moving to

withdraw from the case. And I can give the Court a thorough rundown and detail as to why, but that's one of the things that will be on the agenda today. It might be something that we can take up right away.

THE DEFENDANT: I would object if it involves any attorney-client confidentiality.

THE COURT: Well, let's clear the courtroom and listen to Mr. Reed first.

Anybody who is not with the Bureau of Prisons or the U.S. Marshal will have to leave the courtroom, and the proceedings, when we resume after everyone has left, will be, at least temporarily, placed under seal.

MS. DUARTE: Your Honor, if I may, may I just ask the Court for the opportunity, if the Court deems it reasonable, to be heard before the Court grants Mr. Reed's motion, if it's inclined to do so?

THE COURT: All right.

MS. DUARTE: Thank you, your Honor. I appreciate it.

THE COURT: Before you begin to speak, Mr. Reed --

Who are you?

MS. STANDEFER: I'm the attorney advisor for the Los Angeles Bureau of Prisons.

THE COURT: Okay. Well, you'll have to wait outside, also.

MS. STANDEFER: Okay. Well, you said it would be okay, so I thought you meant I could stay.

THE COURT: No, I meant for purposes of security, ma'am. Could you give us your name, please.

MS. STANDEFER: Amy Standefer.

THE COURT: Okay. You're welcome to be here, but for the time being you need to be excused.

(Prosecutor and other parties not present.)

THE COURT: All right, Mr. Reed.

MR. REED: Thank you, your Honor.

Your Honor, I'm going to try my very best to stay away from communications made that were confidential, in the nature of confidential communications between Mr. Sutcliffe and myself. And let me just take a look at some notes here.

But I would indicate, your Honor, that there have been some things that have been said to me that are not made in the nature of attorney-client communications, and they are in the nature of threats that have been made to me by Mr. Sutcliffe; they were made to me in the presence of my paralegal just recently, within the last five minutes, and I do intend to talk about those at the conclusion of my presentation with respect to my motion to withdraw, and I will quote, as best I possibly quote with respect to these. And threats are not included in the attorney-client privilege. There is case authority to that effect.

THE COURT: I agree.

MR. REED: And to that extent I do wish the Court to order that the attorney waiver does not apply.

THE COURT: Of course, I don't know what the language will be, but if they constitute threats there would be no privilege accompanying them, none attached to them, and I so indicate.

THE DEFENDANT: Can we have him please define threats?

THE COURT: No.

THE DEFENDANT: There are legal threats. There are many different kinds of threats. He's been using a very broad brush when he's defining the threat here. So I'd like it to be clarified before he divulges any --

THE COURT: Okay. That request is denied.

THE DEFENDANT: Excuse me?

THE COURT: That request is denied.

Please proceed, Mr. Reed.

MR. REED: Your Honor, when I came on board in this case on September 2nd of 2003 to be standby counsel, I came into this case wanting to do my best for Mr. Sutcliffe.

On or about September 4th Mr. Nicolaysen sent me a large portion of highly relevant discovery. There were key 302's, reports, Web pages, copies of the exhibits book, witness files, cross-examination strategies and lists. And

I must say that Mr. Nicolaysen did a very good job on this case, and he helped me very much to get up to speed during that first phase of the case.

At first, your Honor, I conferred with Mr. Sutcliffe at MDC but only on legal issues, such as the constitutionality of various issues, discussions about the commerce clause, and motions that I may be able to help him with while he was in pro se. And after conferring with Mr. Sutcliffe he did want me to look into various things as his standby counsel, and I did a tremendous amount of research for Mr. Sutcliffe, which did result in the construction of some interesting motions, I thought, which had to do with the commerce clause.

THE COURT: Did you say construction of motions?

MR. REED: The construction of motions.

THE COURT: Meaning drafting of motions?

MR. REED: Drafting of motions, your Honor.

THE COURT: But not yet been filed; correct?

MR. REED: They have. Actually, your Honor, what I did was I drafted them, and then I went over to consult with Mr. Sutcliffe with respect to these motions, and he basically adopted the work that had been done and filed them, and they are some of the written, typewritten motions that have been filed with the Court.

THE COURT: You mean the motions to dismiss the

threats counts?

MR. REED: That's correct.

THE COURT: And the Rule 29 motion?

MR. REED: And the Rule 29. Somewhat above and beyond what I was supposed to do as a standby counsel, just because I wanted to strike up a very good relationship with Mr. Sutcliffe, and I wanted to help him in every conceivable way in this case.

Mr. Nicolaysen also sent me the My Webs CD, and that contains most of the relevant files for Mr. Sutcliffe's case, according to Mr. Nicolaysen. I did review many of those files, and those files were downloaded -- I've been told -- downloaded from Mr. Sutcliffe's hard drives. And I started to study those to get up to speed as the standby counsel on this case, and I felt that I'd be surely up to speed as standby counsel by the 29th, which was the day that the Court originally ordered this case to go to trial.

I did not feel that I needed any of the CDs, the floppies, the hard drives, none of the materials that Mr. Sutcliffe demanded in order for me to be an adequate standby counsel. And that is, I think, what contributed a little bit to the confusion there at the beginning of the case with respect to whether Mr. Nicolaysen turned over all this material to me or whether he didn't. In part, I'm at fault, your Honor, in the sense that I didn't demand from

him that I get all these things because I felt that with the possession of the My Web CDs it wouldn't be necessary. So I have to admit some of the fault with respect to that confusion, your Honor.

THE COURT: So you got the My Webs, and you got certain written discovery from -- that had been provided by the Government, and you got both those categories from Nicolaysen, but you didn't get the floppies and what else?

MR. REED: I didn't get the floppies, I didn't get the Zip drives, and I didn't get the actual hard drives in the case --

THE COURT: Okay.

MR. REED: -- and I didn't get all the CDs, the numerous CDs. I did get that one CD, the My Web CDs.

Now, getting into certain areas that have to do with attorney-client communications, I'm going to try to stay away from them only to tell the Court that after I did these motions I conferred with Mr. Sutcliffe because I wanted, as his standby counsel, to once and for all find out exactly what the defense of the case would be, exactly what the nature of the files were that he wanted to search for on all of this vast discovery so that I could aid him in any way to go to all these CDs, if I ever did get possession of them, find the file, confer with him and present it in some way, help him to present it in some way while he was pro se

in the trial.

And so there were discussions -- and I'm not going to get into the details of those -- between myself and Mr. Sutcliffe, asking him help me, cooperate with me, tell me what you need to see on these CDs, and I'll do everything I can. And that inquiry was never answered by Mr. Sutcliffe, except to the extent that there was this general demand, as there always has been, evidently, in this case, that Mr. Sutcliffe demands to see all of the materials, all of the discovery, all the hard drives, all the CDs. And to this day, your Honor, frankly as his -- now that I'm full counsel in the case and while I was standby counsel, to this day I don't know what Mr. Sutcliffe has in mind regarding what files he's exactly looking for that can help him win this case, why he needs the CDs, why he needs to see everything. And I did want to know what were on those files that would cause him prejudice if it was not presented at trial. I needed his assistance, and I've never obtained it, your Honor.

Now, then on September 26th the Court, surprisingly to me, ordered me to be full counsel. I wasn't coming in last Friday thinking that that was going to occur. And the Court continued the case until October 7th for me to get into MDC to confer with Mr. Sutcliffe with the computer equipment that the Court was going to order, to find out

exactly what he needs with respect to this computer material. And, as the Court probably knows, I did a great deal of work right after that session over the weekend preparing applications for a paralegal, applications to get into MDC with computer equipment, on and on. And not only that, I was doing a great deal of other work which I have here, and I haven't filed -- voir dire, which has not been filed, but I prepared it -- and various other things in order to be ready for October 7th because I wanted to do the very best I could for Mr. Sutcliffe.

However, when I was starting to prepare those motions I started to believe that I would not be ready by October 7th, 2003, by virtue of the technology that I had to master to show the jury what I really needed to show them, because I knew basically what my defense was going to be and it's kind of clearly set forth in the motion to dismiss -- The Court can probably figure it out -- that these were not transmitted threats. I needed to present Web page material and how the Web sites were set up to show how extremely difficult it would have been for a victim to ever find these threats, and I wanted to do that in a technologically-advanced way with my paralegal. That was my strategy, and I felt that I wasn't going to be ready by October 7th because I had to do that work.

And I hoped that with the laptop computer that the

Court was going to order, me to take into MDC, along with my paralegal, I could finally sit down with Mr. Sutcliffe once and for all with all this material and have him find these files that he keeps claiming he needs to see in order to present a defense. So I was really looking forward to that.

THE COURT: I think I should note that I did issue the order authorizing you to, at CJA expense, obtain the equipment we had discussed at the last hearing, and I issued an order. Did you get that order?

MR. REED: I got the order. The Court's done everything that it possibly can to make it smooth for me to represent Mr. Sutcliffe. I got the order, I took it to MDC, I served it over there, and the order was not followed by MDC, and I think you'll probably have a Bureau of Prison personnel person here to explain why.

But to make the long and short of it, when I went over there on Monday with the order to start the work with Mr. Sutcliffe --

THE COURT: Monday being two days ago --

MR. REED: Just two days ago.

THE COURT: -- for the record?

MR. REED: And we're going to get to that. The MDC officials would not, would not honor it.

Now, on Friday the Court made me full counsel in this case. It made me the attorney of record. I was no

longer standby counsel, and my understanding of that principle, just so that the record is clear -- and I've been practicing law for many years, your Honor -- is that as the attorney of record I am technically the person who's in charge of a defendant's case. As the attorney of record I'm responsible for treating all of my clients equally, but I have the control of the strategy of the case. I have the control to determine what comes into evidence, and I have complete control over how this case is going to be tried. And I intended to make that clear to Mr. Sutcliffe on Monday when I did meet with him, but I didn't get to that point.

THE COURT: I think I had already touched on those things.

MR. REED: And there is nothing, basically, that the defendant can do to take the power away from me to control the case, except there's one very important area where I don't have control, and that's the constitutional right of a defendant to testify or not testify in the case. I don't have any control over that. And I wanted to explain that in detail to Mr. Sutcliffe on Monday, but I didn't get time to do it, but we're going to get into that in a little bit.

And I wanted to, once and for all, while I was the attorney of record, once and for all when I went go over on Monday to tell Mr. Sutcliffe that I am the person that's

going to be responsible for his case and not you. Once and for all let's tell me what you're looking for in terms of these files. Let's stop demanding to see every single piece of discovery.

Now I might add, your Honor, that there's ample authority in the Ninth Circuit which states that a defendant does not have the right -- he does not have the right to go through every single piece of discovery in a case. The right is with his attorney. And as long as he's represented by an attorney, that right cannot be breached, and that's basically the U.S. v. Robinson case. That's 913 F.2d 712. It's a Ninth Circuit case, 1990. And it basically states that demand for a defendant to view every file or every piece of discovery is not a constitutional right. As long as he's represented by an attorney, it's the attorney's duty to review that discovery. I wanted to explain that principle to Mr. Sutcliffe on Monday. I didn't get a chance to do so, but I did kind of quickly today.

Now, getting back to my Monday, over the weekend I did all the motions. I was ready to file them on Monday and serve them at MDC, et cetera. I was going to buy a laptop computer. And what we wanted to do before we did that was meet with the U.S. Attorney's Office -- by the way, I did get to know my paralegal over the weekend. We had several conferences. We talked about the case. But it was very,

very important for me to make sure that I had all of the discovery that the Court was concerned about with respect to this confusion concerning prior counsel and myself. So Miss Sarah Ritts did deliver all of the discovery to me that was in the possession of Greg Nicolaysen on Monday morning, and we had a meeting -- we set up a meeting with the U.S. Attorney's Office so that we could meet with them and go through every single CD, every Zip drive --

THE COURT: And this is the same paralegal who had previously assisted Mr. Nicolaysen.

MR. REED: That's correct, your Honor.

THE COURT: And that's the one I reappointed to assist you and Mr. Sutcliffe; right?

MR. REED: That's right, your Honor. And she knows the computer material backwards and forwards in this case, almost all of it. But she's been extremely helpful to me because she categorized it for Mr. Nicolaysen previously, and I felt that she would be very helpful to be my paralegal, and I appreciate the Court appointing her for me.

So she brought me all the discovery, and we made an appointment to meet with the U.S. Attorney on Monday morning. I went on Monday morning with the U.S. Attorney and the case agent, and we confirmed with them that we had every single piece of discovery that had been sent, issued to prior counsel. We reviewed -- we sat down in their

office. We had CDs on the floor --

THE COURT: You know, Miss Duarte filed a declaration to that effect. Have you read it?

MR. REED: No, your Honor. I think it was an under-seal-type filing. I'm not sure.

THE COURT: No, I don't think so. She filed a document entitled "Status Filing re Electronic Discovery, Declaration of Elena Duarte." It was filed on September 29th. It contains many attachments, and it describes the meeting that was held at her office on Monday. So I don't believe it's under seal at all. I don't see why it would be, anyway. So a lot of what you're telling me now has already been a matter in her filing.

MR. REED: Very well, your Honor.

THE COURT: And you don't have to go into exquisite detail.

MR. REED: Okay, your Honor. Then after we had our meeting I wanted to run over to Mr. -- now, when I saw that discovery I said to myself, in view of the fact that Mr. Sutcliffe wanted to see all these files or had some file that he was aware of, I knew I was going to be in trouble being ready for trial by October 7th. I knew in my mind I'd better ask the Court for a continuance. I just was not going to be ready, and by that time I hadn't even looked at instructions.

So I went over to Mr. Sutcliffe on -- after our meeting with the Government on Monday to meet with him. It was a rushed meeting, admittedly. I did have to be in court at around 1:15. I met with him for about a half hour, not quite a half hour. And I indicated to Mr. Sutcliffe words to the effect, "I'm sorry, Mr. Sutcliffe, I'm simply not going to be ready in the case. I'm going to need a continuance." And Mr. Sutcliffe -- basically the nature of the discussions at that time were that Mr. Sutcliffe did not want me to make a motion to continue the case, and we got into a discussion. It wasn't an argument or anything like that, but I was going to refuse to follow his orders because I was counsel of record. And I was going to make this motion to continue today. By the way, I haven't made it yet. I just want the record to be perfectly clear that I haven't made that motion.

THE COURT: I agree you haven't.

MR. REED: But I indicated to him words to the effect that I intended to, and Mr. Sutcliffe at that time indicated that I would be violating his due process rights were I to make such a motion. And I indicated that there's nothing that I can do about it, I'm going to have to make it because I'm not going to be ready, and basically the discussion came up where Mr. Sutcliffe indicated to me that I better fall on my sword --

THE DEFENDANT: Objection, your Honor. How is this not attorney-client privileged material?

THE COURT: Go ahead, you may continue.

MR. REED: -- and that I essentially would be depriving him of his constitutional right by not going to trial in an incompetent manner, built incompetence into the record, my being unprepared and --

THE COURT: I don't understand. Was it your understanding -- this doesn't call for something that was said -- and I'm asking you about your understanding -- was it your understanding, from whatever was said, that Mr. Sutcliffe wanted you to go to trial on the 7th knowing, him knowing that you thought that you were not prepared to and thereby creating a basis for him to establish that you were not competent, if the jury convicted him, and thereby giving him an issue on appeal?

MR. REED: Exactly right, your Honor. And I was not going to do so.

Now, I wanted to meet with Mr. Sutcliffe today before court to explain to him that I just can't do that in good conscience. I'm not that kind of lawyer; that I'm an officer of the Court and can't do it. And I met with him just briefly before court started. I did want to get to talk to him earlier, but we had the fire drill, and --

THE COURT: There is going to be some day, likely,

other judges who read this transcript, and the fire drill that Mr. Reed was referring to he meant literally the entire courthouse was evacuated, and it's affected everyone's schedules.

MR. REED: I wanted to basically communicate information to Mr. Sutcliffe as to several points. One, that I'm going to be in charge of the case; two, that I'm in charge of the strategy; three, he is not in charge, not with me as attorney of record; four, I am going to be asking you, once and for all, to show me the files; five, I'm going to be moving for a continuance today, and it's at that point where we get into the threat.

THE COURT: What was the threat?

MR. REED: The threat is that Mr. Sutcliffe is going to sue me. He's sued attorneys in the past. He sued Mr. Nicolaysen. He's going to make my life miserable. He's going to sue me until the end of time, quote/unquote. And I refuse to interact with this gentleman. I've been doing this too long. My life is too short. I don't need the threats in my life. I think that there is a complete and irreconcilable, at least in my part, breakdown in the attorney-client privilege. I'm not going to talk to this man. I'm not going to interact with him. And I'm not going to make a motion for a new trial (sic) today. I'm not going to do anything to deprive him of his constitutional right to

go forward in a speedy trial manner. And I want to make that clear that I'm not doing it because he's threatened me, that if I do so, he'll sue me. And that's the nature of the threats that he told me today, your Honor, and I am asking the Court to be relived.

THE COURT: All right. Thank you, Mr. Reed.

Mr. Sutcliffe, do you want to respond?

THE DEFENDANT: Yes, sir. Thank you very much, your Honor.

Okay. First, I'd like to bring to the Court's attention several points that the moral rules of professional conduct for the federal system says in a client-lawyer relationship Rule 1.1 starts off with competence. Mr. Reed has already admitted that it was his fault, he was not competent for getting the CD-Roms, which this Court ordered were to be originally turned over to me in its entirety. Mr. Nicolaysen's threat lives on, and he's doing his best to sabotage my case. But he was not prepared. That's his fault, not my fault.

Secondly, the scope of representation. The lawyer shall abide by the client's decisions concerning the objectives of the representation. I've never told this man to throw this case. I told him to be prepared for October 7th. I told him he does not have the authority -- I have not delegated him authority to waive my rights. That's what

started the conflict between Mr. Nicolaysen and I down in that holding room on March 14th before I was brought up here. He's telling me this is his case. Excuse me, I beg to differ. This is my case. I'm facing thirty-five years, not him.

Furthermore, I'm sure -- Stephen, your clerk, he told me that you hadn't received a letter, but I sent you a letter after Mr. Reed came by on Monday, and it was not for a half hour; it was for five minutes, maybe six, if you want to stretch the truth. I sent him a letter, which I have -- I presented a copy to him right here.

I'd like to see it back, please. Thank you.

I also sent your Honor a letter at the same time. It was September 29th. And if you'd like to read it, you're more than welcome.

THE COURT: No, not right now.

THE DEFENDANT: Okay. I'd like to read it onto the record.

Dear Judge, Honorable Judge Matz, today September 29th, 2003, David Reed came by to visit me briefly. It was my intent to clarify with Mr. Reed the respective roles each of us will play in the upcoming trial. First, you acknowledged in a hearing conducted on 9/26, 2003, that you had again erred when you determined that my conduct had acted as a waiver of my Sixth Amendment right to the

effective assistance of counsel, guaranteed in the Constitution of the United States, and that you were again rescinding an order improperly made.

Second, you acknowledge that I have repeatedly and, in essence, since I first appeared before you demanded my right to the effective assistance of counsel. I have never agreed to be represented. I have never delegated by right in the Constitution to the effective assistance of counsel, and I do not now, nor will I ever delegate my constitutional right to the effective assistance of counsel. And each one of the words assistance is underlined.

In all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel. The right to defend is given directly to the accused for it is he who suffers the consequences if the defense fails. That's from directly from Ferretta (phonetic), and I quote from page 588 that it is self-evident that the Amendment -- speaking of the Sixth -- makes no direct reference to representation. A representative is -- it speaks of an assistance of counsel and an assistant, however is -- however expert is still an assistant. I don't want a representative; I want an assistant. The right to have assistance of counsel is too

fundamental and to absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. That's Dutzman vs. U.S., D-u-t-z-m-a-n, 205 Fed.2d 343, cert. denied. 74 Supreme Court 50.

I would like this Court to be aware that in our system --

THE COURT: Mr. Sutcliffe, do you oppose Mr. Reed's motion?

THE DEFENDANT: I object to him categorizing me as threatening him.

THE COURT: I asked you a different question, Mr. Sutcliffe. He has moved --

THE DEFENDANT: I haven't finished with my --

THE COURT: -- relieve to withdraw.

THE DEFENDANT: I'd like to --

THE COURT: Answer my question first.

THE DEFENDANT: I'd like to finish my point, first.

THE COURT: Answer my question. Do you oppose it, it, yes or no?

THE DEFENDANT: Please frame the question again.

THE COURT: Mr. Reed has moved for permission to withdraw as your lawyer, no longer to be your lawyer. Do you oppose that motion?

THE DEFENDANT: It depends on the role he's

playing.

THE COURT: If he plays the role that he described as being the one that he intended to play, do you oppose the motion?

THE DEFENDANT: Yes.

THE COURT: So you want him to be the lawyer the way he said he would be the lawyer, calling the shots?

THE DEFENDANT: No.

THE COURT: That's the way he would be the lawyer, and the only way he would be the lawyer.

THE DEFENDANT: Well, I attempted to try and define that role with him on the 29th, but like I say he came in and --

THE COURT: Okay. All right. Mr. Sutcliffe, your letters -- the letter will be filed. I don't need to hear more about the letter.

Is there anything further you want to say on the question of Mr. Reed?

THE DEFENDANT: Yes, your Honor. He made the statement that he had never obtained my assistance prior to September 26. I believe that there's been an intentional interference with my constitutional right to effective assistance of counsel, in the fact that he came to see me on the 15th and the 19th of last month, and we discussed jurisdiction. And he wanted me to elaborate on the 15th the

jurisdictional allegations that I had raised up with this Court, when I demanded the Court take jurisdictional notice -- judicial notice, excuse me. The U.S. Attorney filed some papers between -- it was delivered to me on the 24th and the 25th by Agent Cudnell (phonetic), and within those stacks of papers was a quote from the U.s. Attorney that she had spoken with the defense, and that she was filing this jury instruction to the jurisdictional -- regarding the jurisdiction. Now, seeing as I was appointed defense in my own, in pro se, by this Court and he wasn't made attorney of record until the 26th, she's gone to him and had discussions about my trial tactics and strategies when he wasn't even my counsel of record. So he's interfered; she's interfered. So that's a false statement he's made.

I sat with him. He couldn't have filed those things that he admitted that he gave to me, which I amended, those motions that were filed, the four of them, unless he had obtained my assistance. So on the 15th and 19th he did obtain my assistance, and so his statement that he never obtained it prior to the 26th is false; it's misleading, just like he's trying to mislead the Court today, that I made a threat to him. What I said was if you violate my constitutional right, I will sue. You bet you -- you bet I will. That's a conditional threat -- okay -- if it's even a

threat. I'm just advising him that I'm going to protect my rights.

THE COURT: Anything else, Mr. Sutcliffe?

THE DEFENDANT: Yes. There's one other thing I'd like to being to this Court's attention.

THE COURT: Make it quick, please.

THE DEFENDANT: Okay.

THE COURT: I'm supposed to be in a meeting right now.

THE DEFENDANT: I'll try to make it as brief as I can, your Honor. Thank you.

Okay. You said -- This is from the transcript of August 27th, and I'm speaking on page 59, and you said that, on line 17, I understand that -- excuse me -- I said I understand I've been prejudiced extremely by not having a new lawyer appointed against my objections, come in, try and get up to speed with a half a million pages of discovery and fifty CD-Roms ad nauseam, how is that not prejudicing me?

And you said we're not going to have a debate about it, and it was my choice to fire Mr. Harris and to create the circumstances where I was compelled to grant your request. And then you went on to cite U.S. Kelm (phonetic) on page 60, and you said that I have a devious and manipulative way at the time to refuse to waive my Sixth Amendment right to counsel.

As to the CD-Roms, which were

THE COURT: I don't need to hear more about the CD-Roms. That's not the motion before me.

Anything you want to add, Mr. Reed?

THE DEFENDANT: I'd like the record to reflect that for the period of time that you deemed my waiver of my right to effective assistance of counsel, not only was I denied due process, not only was I denied my right to speedy trial, not only was I subjected to cruel and unusual punishment because of that because I was not able to have assistance of counsel to bring bail for those three, four weeks that I was subjected to those conditions that I was put under, but to appoint this man and have him now tell me that he's going to waive my rights, I object to it. It's subjecting me to further cruel and unusual punishment.

I have demanded my right to a speedy trial and not an entitlement under the Act. I didn't want an entitlement under the -- for representation. I don't seek that right; I've never asked for that right; I've never wavered on that. And if this Court believes that I have delegated anything close to that seeking for an entitlement of a representative other than an assistant, as provided by my rights under the Sixth Amendment, I'd like someone to please put that on the record where that delegation of authority came from.

THE COURT: Okay. Everything has been on the

record during this proceeding.

Any response, Mr. Reed?

MR. REED: Just two, your Honor. I just wanted to clarify that Miss Ritts was an employee of Greg Nicolaysen in this case previously. She was never appointed by the Court. She privately worked for Mr. Nicolaysen. So that representation by the defendant was incorrect.

But I just wanted to clarify that at the beginning of my relationship with Mr. Sutcliffe he did assist me. I think I did make that clear. He assisted me with respect to pointing me in the direction of the motions that he did want to file. I was explaining that to the Court to explain to the Court that we did have this good relationship at the beginning, that he did assist me, he did show me some case authority, and I --

THE COURT: Now, you told me, Mr. Reed -- I'm going to interrupt -- you told me earlier that you had asked him for his assistance, particularly in explaining to you exactly what he needed and why he needed it and what he thought it would do for his defense in the nature of the CDs and the hard drives, and that you had never -- he had never told you. Did he refuse to tell you?

MR. REED: No, your Honor. That's one area, the motion practice where Mr. Sutcliffe did help me. The other thing that I was trying to make very clear is that I needed

some direction with respect to finding these files and all these CDs, these Roms and all of that, and there was never a specific answer by Mr. Sutcliffe exactly what he needed to find, and it was basically he needed to see everything; that he's in pro se; he needed to see everything. I asked him what it was that he needed to find so I could help him and he just demanded to see everything. It's that simple.

THE DEFENDANT: Your Honor, I object to that. I specifically told him that I was looking for my PST and PAB files, which Mr. Harris -- I had also told Mr. Harris when he was counsel. He had faxed a letter to the AUSA on the 13th, the day before trial, and I specifically said I need my PAB and my PST files from my hard drive.

Did I not ask you to find those files?

MR. REED: Yes, he did, your Honor.

THE DEFENDANT: That's just one. I gave him specific instances of what I'm looking for. So, again, he's misstating the truth. I have been nothing -- I've assisted him. Remember I told you, your Honor, it's a two-way street. This is my life.

THE COURT: Okay. It's a two-way street --

THE DEFENDANT: Thank you, your Honor.

THE COURT: -- that's true, in principle.

Let's bring the prosecutor in, please.

MR. REED: I would indicate to the Court, your

Honor, that I brought the entire discovery down here to --

THE COURT: You mean it's here in the courtroom?

MR. REED: It's in the courtroom. Got all the CDs, all the files, all the paperwork, virtually everything.

(Prosecutor and other parties present.)

THE COURT: And when you say virtually everything, what does it not include?

MR. REED: Well, it doesn't include a good deal of the, I think, printouts of paperwork that are basically not relevant to the case. There was a significant -- there was a significant amount of materials that were sent to Mr. Sutcliffe while he was in pro se, which I think there's going to be a record of, there is some record of. A lot of the material that was in there, that was sent to him in pro se, I did not get. I got the major, relevant reports, the exhibit books, 302's, witness statements, things of that nature. What I've got is here, your Honor.

THE COURT: Okay. Miss Duarte --

MR. REED: I ask that that be sealed, our previous motion, my motion that I just made be sealed by the reporter, your Honor.

THE COURT: Well, I'm going to disclose what the motion was. You already said so in the presence of the whole courtroom.

And that is that Mr. Reed moved to be granted

permission to withdraw. I haven't ruled on it. I've heard from Mr. Reed and Mr. Sutcliffe.

Did you want to be heard about that?

MS. DUARTE: I did, your Honor, briefly because obviously I don't know what the situation is. But I would actually urge the Court again, knowing whatever -- with the addition of whatever the Court knows that I don't know, obviously, taking precedence, I would urge the Court to, if at all possible, keep Mr. Reed as Mr. Sutcliffe's counsel for the short duration that this case is expected to continue, and continue the case for as brief a time as necessary, which I anticipate will be no more than about four weeks, like said in my papers.

THE COURT: Well, are you referring to the papers that you're filing today, that you filed today?

MS. DUARTE: No, your Honor. That was the papers I filed Monday that referred to the remaining time under the Speedy Trial Act.

THE COURT: Okay. Well, I was handed a courtesy copy of an item filed today --

MS. DUARTE: Yes, your Honor.

THE COURT: -- entitled "Submission Regarding Speedy Trial Act Waivers and Compliance." Have you served that on either Mr. Reed or Mr. Sutcliffe?

MS. DUARTE: I have Mr. Reed, your Honor.

THE COURT: Do you have that before you, Mr. Reed?

MR. REED: Yes, your Honor.

THE COURT: Okay. And I haven't actually finished it, and I haven't even studied it, but I take it that it's the Government's position that I am the authority, regardless of whether any given defendant consents to make findings that the interests of justice requires extension beyond the seventy-day period.

MS. DUARTE: That is correct, your Honor, you do have the authority, obviously within some limited time frame, and this case has gone on very long, and we know this. But I think that the Court does have the authority in particular to make the finding, and I don't know what Mr. Reed said to the Court today. I do know that when I spoke to Mr. Reed earlier about the case we talked about the possibility of going in I believe it was three or four weeks, and whether or not he could be ready. If he has represented to the Court that he would be ready in three to four weeks, I think it's well within the Court's discretion, absent even a motion from him and over defendant's objection, to exclude time in the interests of justice based on the need for defense preparation, knowing that defense counsel just got the evidence this past Monday. And even had he had it earlier, frankly, your Honor, he needed time to confer with his client about it.

THE COURT: Okay. Well, I don't think I have to be persuaded that neither Mr. Reed nor any other lawyer on such short notice would feel subjectively or objectively ready to proceed to trial on the short time frame that an October 7th trial would contemplate. I also don't think that Mr. Sutcliffe would be ready, if he represents himself, because he has to have the evidence, maybe not all of it and maybe all of it.

Here's what I'm going to do. I'm going to take the motion under submission --

MS. DUARTE: Your Honor, I'm sorry, which motion --

THE COURT: The motion to withdraw.

MS. DUARTE: Yes, your Honor.

THE COURT: And Mr. Reed has made certain representations about the state of the file, speaking generically.

Now, Amy Standefer is here. Will you step forward, please, to the lectern. You are general counsel or one of the general counsels for the Bureau of Prisons at the local Metropolitan Detention Center where Mr. Sutcliffe is housed; is that correct?

MS. STANDEFER: That is correct, your Honor.

THE COURT: All right. Now please tell me, as an officer of the Court, what would happen in terms of the

logistics and mechanics of getting a file from a lawyer for Mr. Sutcliffe -- it happens to be Mr. Reed, who's right here in the courtroom to your right -- he brought to the courtroom certain items. I don't know exactly what they are, but generally they're much of the overall file in this case. And if I were to order him to give them to Mr. Sutcliffe today here in this courtroom and I intended to have Mr. Sutcliffe take them with him when he returns to his cell today and have them in his direct possession in his cell, how could that be achieved?

MS. STANDEFER: I believe he would need to give the documents to the U.S. Marshals, who would then transport the documents to MDC/LA. It gets a little tricky --

THE COURT: Here's what I'm driving at; okay? I don't want to get too bogged down in technicalities, and I'd appreciate it if you don't subject me to them. I don't know exactly what the ongoing rules and regulations at the MDC are in terms of getting information, documents, files, CD-Roms, floppy disks, hard drives into the hands of inmates who's pending criminal cases involve such evidence.

There's been suggested to me that a lawyer can't simply bring stuff over there and leave it. Instead, it has to be mailed. I don't want this mailed; okay? I've got the stuff here in the courtroom. The lawyer is here; the file is here, and the client is here. So I need your

assistance -- and I don't care who carries it. I understand it would have to be the Marshals, but I want it to arrive in the cell of Mr. Sutcliffe this afternoon. Now, can that happen or not?

MS. STANDEFER: I believe by the arrangement you reached with the Warden, in that case it can happen.

THE COURT: Okay. And would you be good enough to tell me, please, Miss Standefer, what you could do to assure that will happen if I issue that order here in court.

MS. STANDEFER: I will go back to the Warden immediately and tell him that these documents will be coming in with either the Marshals or Mr. Sutcliffe, and he will make the arrangements.

THE COURT: Who's here from the Marshal's Office?

DEPUTY MARSHAL: Deputy Tom Cwohey, C-w-o-h-e-y.

Your Honor, if we could have Mr. Reed drop them off at MDC to the legal department due to the large volume of it, and plus if there's any items that are not going to be authorized through MDC.

THE COURT: But I don't think there are going to be any items not authorized. I'm not presuming to interfere with ongoing legitimate security considerations. If there were a knife or something like that in this material, you would have the right to remove it, so I'm not saying it would be beyond inspection. But I don't want anything

removed unless it's a bona fide security concern. Is that understood?

MS. STANDEFER: Yeah, and that's usually what occurs. In this case it would go to the lobby, like if that's what -- the way they want to do it, what we've been doing is having the FBI agent bring it to the lobby, and then either the FBI agent hands it directly to Mr. Sutcliffe to make sure that all the documents are there, and then Mr. Sutcliffe brings the documents up with him, if that's how your Honor would like to do this.

THE COURT: That's fine. So, in other words, you're agreeing, Miss Standefer, it doesn't have to be the Marshals who transport it, it could be Mr. Reed.

MS. STANDEFER: Yes.

MS. DUARTE: Your Honor, may I be heard very briefly? I just want for clarification, Miss Standefer has mentioned the documents several times. I think that the Court -- although tell me if I'm wrong -- I think that the Court is actually ordering that the electronic evidence, including disks, CDs and floppy disks, be provided directly to Mr. Sutcliffe. If it is, I just wanted to make sure that the Court and Miss Standefer and the Marshals are actually speaking about the same thing.

THE COURT: I said all that. I described what the file is.

MS. DUARTE: Okay.

THE COURT: It includes all that, whatever is in the file. If a banana peel was in the file, I want it all to go to Mr. Sutcliffe. And he'll have to figure out what kind of use of generally available computer equipment he'll make use of, if I take that route.

But until I'm satisfied that not just what you have here, Mr. Reed, but everything right down to that last figurative banana peel, has been brought over to the MDC for delivery directly to Mr. Sutcliffe, I'm not going to grant your motion to withdraw. Once you file a declaration showing me that that has happened I am very likely to grant the motion. And with that likelihood in mind, in order to create a record and save unnecessary and avoid the consumption of unnecessary documents -- this case is just one of many I'm responsible for, and it generates a considerable amount of activity time and writing -- I would, if I get to that order, do so based upon the findings that the necessary communications between lawyer and client -- in this case Mr. Reed and Mr. Sutcliffe -- have been irrevocably torn asunder; that the necessary element of trust has been irrevocably torn asunder; that the necessary capacity for each other mutually to assist each other in the common objective of having a lawyer represent a client has been irrevocably torn asunder; that there is a fundamental

disagreement that Mr. Sutcliffe and Mr. Reed have about the proper role, authority, independence and discretion of a lawyer. The record which has been generated, which is currently under seal, reflects those differences. Mr. Sutcliffe wants an assistant; he doesn't want a representative. Whatever the distinction is, that's the way he has characterized it. I make the findings that what Mr. Reed's characterization of the proper role of a lawyer is are correct, sound, well-established, consistent with my understanding and my intention.

So those are going to be all the findings, if I proceed to the next step of permitting Mr. Reed to withdraw. If I do that, I will, after evaluating this submission -- and I want you to give today to Mr. Sutcliffe your copy of this document that was filed today. He can take it back to the MDC with him. It's entitled "Submission Regarding Speedy Trial Act Waivers and Compliance," and I will evaluate the alternatives available and what the law is and determine how much additional time to provide for the case to be prepared and be ready for trial.

Knowing that Mr. Sutcliffe is extremely familiar with this case, extremely familiar with the evidence in this case, although it has not been in his direct possession for a long time, extremely proficient at the use of computers, computer applications, computer technology, and computer

know-how; knowing that Mr. Sutcliffe apparently has discussed various rights and possible motions that may or may not be filed in the future -- there's at least two that have been filed, one is to dismiss the threat counts, and the second, a related one, is a Rule 29 motion, so I think that there's no doubt that additional time is necessary.

I'd like the record to --

You're Mr. McAfee, aren't you?

MR. McAFEE: I am, your Honor.

THE COURT: Okay. Mr. McAfee, who has represented Mr. Sutcliffe, with the Court's permission, in these proceedings, and who was allowed to speak on behalf of Mr. Sutcliffe at an earlier proceeding, has been attending court; he's been here all day; he's been in court at the last meeting. He has access to Mr. Sutcliffe at the jail, and he's been taking assiduous notes. He appears, from everything I've been able to see, to be orchestrating, if not orchestrating, at least assisting Mr. Sutcliffe in formulating the views that Mr. Sutcliffe has expressed. So I don't think an open-ended, lengthy period of additional time would be necessary to assure that Mr. Sutcliffe's constitutional rights to a fair trial will be protected, in the event that I find that, by his conduct -- and I am not going to repeat the observations I made outside the presence of the prosecutor today -- he has chosen to waive and has

indeed waived, if I make that finding, his right to representation by appointed counsel.

I reiterate that Mr. McAfee is welcome, assuming that he's a member in good standing of the Bar of this Court, to assume the defense of Mr. Sutcliffe. Mr. McAfee seems to have plenty of time available to devote to this cause, and if he wishes to, on a pro bono basis, represent the defendant I would evaluate -- I'm not necessarily agreeing -- but I would evaluate his right to substitute in.

Okay. Now, the other things that I needed to address that I mentioned at the beginning of this hearing -- the Speedy Trial Act and the motions, the electronic evidence -- I think have been provided for.

I'll give you one opportunity to respond to what I've said, Mr. Sutcliffe.

THE DEFENDANT: Thank you, your Honor, I appreciate that.

I object to the characterization that I'm extremely familiar with this case. I have been provided no electronic discovery. Everybody admits there's a ton of it, figuratively speaking, and that this Court on August 27th, page 76, lines 18 through 20 -- Mr. Nicolaysen says, "Can I give the CD disks to Mr. Brennan?

"The Court: No, no. I want Mr. Sutcliffe to have them."

I still haven't had them. So I'm not extremely familiar. This is two years, almost two years going on two years of my life when I have not seen any of this discovery.

THE COURT: Mr. Sutcliffe, if you represent yourself --

THE DEFENDANT: They dumped 8,000 pages in my cell which I share with another man, the latter part of this last month. So, no, I'm extremely familiar.

THE COURT: If you make a motion to continue the trial because you don't think you're ready to proceed to trial on whatever date I set, assuming that you're representing yourself, which I think is a strong likelihood, I will entertain that motion.

THE DEFENDANT: This reminds me of my choice given to me by -- between the U.S. Court and Mr. Harris -- you either go with ineffective assistance of counsel, who's going to violate your rights, or you can represent yourself. That's like saying to me, do you want me to kick you in the head, or do you want me to kick you in the teeth? Neither one are very appealing to me, your Honor, at this point. I've demanded effective assistance -- emphasis on assistance -- of counsel. That's all I've asked for. I've worked with these -- with this gentleman here, as the other lawyers, and the record clearly reflects that. However, I don't like to have my rights violated, and I will not allow

01/14/c pg 5

anybody to violate my rights. It's my right, and I'm going to protect it any way I can.

THE COURT: Okay. You've made that clear, and you've been given an opportunity to protect it.

Yes?

MS. DUARTE: One more housekeeping matter, your Honor?

THE COURT: Yes.

MS. DUARTE: Defendant's motion to dismiss based on the Constitution, his threat counts, he filed that last Friday, the 26th. The Court ordered me to answer it, did not, however, set a date that it was due. At the time we were scheduled for trial on October 7th and I had --

THE COURT: When can you file it?

MS. DUARTE: I can file it on Monday, the 6th.

THE COURT: Okay. File your opposition on the 6th. The trial will be continued beyond October 7th to a date I will set. It's continued without Mr. Sutcliffe's explicit concurrence. I'm not making a finding that his conduct doesn't constitute implicit assent to a continuance of the trial. I will look into the authorities that have been presented to me concerning the application of extensions under the Speedy Trial Act and set another date.

MS. DUARTE: And then after I file the motion on the 6th will Mr. Sutcliffe have a week to reply, and then

the Court will take the motion under submission?

THE COURT: No. He'll have ten days. Now I want you to continue, throughout the duration of this case, even during what may be a very limited period that Mr. Reed is still counsel of record, to hand-serve at the MDC Mr. Sutcliffe with everything that you file in this case. And the Warden of the MDC has been kind enough, professional enough and responsive enough -- and I want to commend him for all those qualities -- to assure that whatever are the ongoing general prohibitions against that happening are not going to be enforced as to Mr. Sutcliffe, so Mr. Sutcliffe is receiving additional and special treatment arising out of and attributable to the strange circumstances of his case.

All right. I have to get off the bench, Mr. Sutcliffe. I'll give you one more chance.

THE DEFENDANT: One last thing, your Honor. It's my understanding that there are going to be ten hard drives that are -- and two of them have been damaged. That's the first I found about it last week when we were here. Does the Court suppose that I'm supposed to build a computer to view the hard drives? Because as far as I'm concerned, I don't believe I have one to view these hard drives. They need to be hooked up. They need special equipment because some of these are scuzzy drives, some of them are IDE. There's ten of them, so that's going to require at least two

computers to be made available. I'll be glad to build them, but I need the parts.

THE COURT: I'm not going to order the parts, Mr. Sutcliffe.

THE DEFENDANT: Well, you've given me discovery which I cannot view. I just want the record clear.

THE COURT: Miss Standefer, what equipment is available to inmates to view CD-Roms and floppy disks and other material accessible and designed for use on computers?

MS. STANDEFER: As Mr. Sutcliffe is aware, because he has been reviewing his discovery in our education department, we have two or three computers and down in the visiting room we have another computer that attorneys can use to view the discovery with their clients.

THE COURT: And are there any printers accompanying those computers?

MS. STANDEFER: No, we do not allow printers into the institution for inmate use.

THE COURT: Are there any Zip disks?

MS. STANDEFER: Zip drives?

THE COURT: Is that what they're called, Zip drives?

THE DEFENDANT: Yes.

THE COURT: Are there Zip drives?

MS. STANDEFER: Not that I'm aware of.

THE COURT: Now, if I arrange to have a Zip drive made available at the prison, could it be used in conjunction with whatever laptops or computers are currently there?

MS. STANDEFER: I believe we could accommodate that, your Honor, maybe in the visiting room, or we'll figure it out.

THE COURT: ~~Could~~ Did you get a Zip drive yet, Mr. Reed? As ordered previously.

MR. REED: No, we didn't, your Honor. They're not to expensive, from my understanding, though. They're very small.

THE COURT: Okay. So Mr. Reed, I already issued an order authorizing you, at CJA expense, to get that. And I know you're getting the assistance, I hope so at least, of the skillful insight of the paralegal I appointed. So when you bring over the material, or if you can't do it at the first time I want you to, at court expense, ultimately, bring the Zip drive, but that doesn't go directly to Mr. Sutcliffe. You make sure that you can coordinate with Miss Standefer because there may be security concerns that the MDC has as to under what circumstance it can be used, but I want it to be in the four corners, figuratively speaking, of that facility and available for Mr. Sutcliffe's use. And you're going to one who arranges for it.

MR. REED: Yes, your Honor.

THE DEFENDANT: One quick point, your Honor. She brought up the fact that she has seen me viewing CD-Roms, and what she's referring to, I want the record to reflect, that she's speaking of the 49 CD-Roms that Mr. Harris provided while I was at MDC. Miss Duarte has referred to those last weak when we were in here as, quote/unquote, here, this is the stuff we don't want. You know, here you can have it back. Well, I'd the record to reflect that within my records of those 49 CD-Roms are two search warrant obtained discovery matter, e-mails and from Hosting Solutions, as well as the last ISP that hosted that was called -- one second here -- search warrant from the Hosting Solutions. There was the two e-mails, Gary underscore ~~winter~~ Winnick 2000 (phonetic), there was the all 80 plus Zip files that were downloaded from Andrew Ramsey, and it was also the search warrant on the ISP called the Web Group. So I'm sure that the U.S. Attorney will have no problems suppressing all that evidence, and say here you go, you don't need it.

THE COURT: Okay. The record will reflect what you said. We're adjourned.

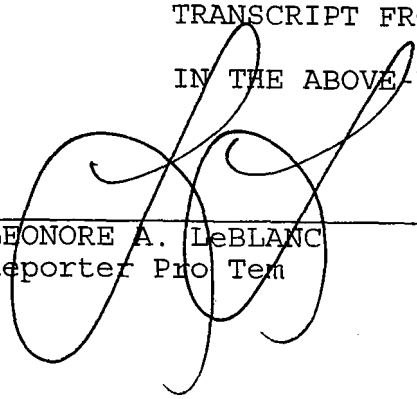
(Proceedings concluded.)

UNDER SEAL

October 1, 2003 USA v. Sutcliffe

REPORTER'S CERTIFICATE

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



September 18, 2004

LEONORE A. LeBLANC
Reporter Pro Tem

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE A. HOWARD MATZ, JUDGE PRESIDING

- - -

UNITED STATES OF AMERICA,

Plaintiff,

vs. No. CR2002-350(A)-AHM

STEVEN WILLIAM SUTCLIFFE,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

November 7, 2003

ARLENE F. VAUGHN, CSR, RPR
Official Court Reporter
312 North Spring Street
Los Angeles, CA 90012
(626) 798-9804

COPY

APPEARANCES:

On behalf of the Plaintiff:

UNITED STATES DEPARTMENT OF JUSTICE
ELENA J. DUARTE, ASSISTANT UNITED STATES ATTORNEY
312 North Spring Street
15th Floor
Los Angeles, California 90012
(213) 894-8611

On behalf of Defendant:

STEVEN WILLIAM SUTCLIFFE
In propria persona

Advisory Counsel:
DAVID REED, ATTORNEY AT LAW

LOS ANGELES, CALIFORNIA; NOVEMBER 7, 2003; 10:18 A.M.

THE CLERK: Item number 1, CR2002-350(A), U.S.A. versus Steven William Sutcliffe.

Counsel, state your appearances, please.

MS. DUARTE: Good morning, Your Honor.

Elena Duarte for the Government, with special agent Jeffrey Cugno from the F.B.I. as case agent.

THE COURT: Good morning.

THE DEFENDANT: Good morning, Your Honor. The Defendant is present.

MR. REED: Good morning, Your Honor.

David Reed, advisory counsel. And present in the courtroom is Armando Cruz, private investigator.

THE COURT: Good morning to both of you.

We're here to prepare for the commencement of trial next Wednesday, November 12. I issued an order on October 28 for this status conference and specified on it a number of different agenda items. 12 were enumerated there. There are a few more that we're going to address. I'm not necessarily going to stick to the sequence that was set forth on the status conference order that was filed on October 28.

One of the items on that order happens to be the last one, happens to do with something that came up in at least one previous proceeding, that being the communication that Mr. Sutcliffe referred to in open court that he had sent to

Mr. Reed. As a result of various requests and rulings, I ordered that that be filed under seal, and that was done. I think it would be advisable to have it unsealed and made public, but I wanted to explore Mr. Sutcliffe's views in particular.

Do you have any objection to that, Mr. Sutcliffe?

THE DEFENDANT: No, Your Honor. Actually, I sent a letter to you dated November 3 where I asked that it be entered to -- filed in this case.

THE COURT: That will be done.

I am looking at a copy I brought out to the bench that shows it was filed. It has the file stamp. And it also shows it was filed under seal. I'm ordering that the seal be lifted and that the document be filed on a regular basis and available for appropriate purposes to members of the public.

I brought copies so that the parties and counsel can have copies if they want.

Do you have any objection to my making the copies that were Xeroxed available to the prosecution?

THE DEFENDANT: I believe I sent the prosecution a copy of this letter I sent to you, which included in that letter to you was the October 22nd correspondence, as well as the 9-29 2003 correspondence in question.

THE COURT: Oh. All right. We'll just stop there. The order is that the document be filed for all purposes and

not under seal.

Now I think the next thing we should do is address the question of how evidence will be presented, and particularly with respect to the equipment and facilities and arrangements that have been made to protect the rights of both parties in a case which is heavily dependent upon electronic evidence, especially evidence relating to the Internet.

I'd like to call forth and ask to stand at the lecturn, Mr. James Settle, who is the chief of the court's telecommunications system and to whom or about whom I previously issued an order designed to make sure that we're ready to go on Wednesday.

In the courtroom, as everyone knows or has realized, is a considerable array of equipment.

Mr. Settle, would you please be good enough to explain what you've done and what is in the courtroom, whether there are any additional either pieces of equipment or arrangements that have to be completed in order to enable both sides to have access to and free use of evidence that's being either introduced or admitted. And I will just refer by reference to the minute order that was sent out October 28 which has to do with much of what you're about to tell us. So please proceed in your own words.

MR. SETTLE: Thank you, Your Honor.

We have provided, for the Defendant's exclusive use,

a 200 gb external hard drive that is tied to a Pentium III-500.

THE COURT: Speak up more clearly, please.

MR. SETTLE: A Pentium desktop computer provided with a 200 gb external hard drive. On that 200 gb hard drive we have copied all files that have been provided to Mr. Sutcliffe as Exhibit LA 1-A, LA 1-B, LA 1-C and LA 1-S, with a mirror of a SCSI drive that he had in his possession.

THE COURT: For the benefit of a clear record and to assist our court reporter, who is new, I think, to this courtroom, SCSI is an acronym and you should print it out as S-C-S-I.

Go ahead, Mr. Settle.

MR. SETTLE: We also have provided a 250 megabit zip drive which is available and is loaded onto a PC that's available to Mr. Sutcliffe at this time.

THE COURT: Available here in the courtroom.

MR. SETTLE: In the courtroom.

THE COURT: Everything you've been describing and are about to describe is here in the courtroom. Is that correct?

MR. SETTLE: That's correct.

THE COURT: When I say, "here in the courtroom," and you say that as well, we're referring to the desk and table at which Mr. Sutcliffe will be sitting during the course of the trial. Is that correct?

MR. SETTLE: That is correct.

All the drives have been labeled as previously described. The drive labeled LA 1-A was partitioned and we built a partition folder on the copy drive so that when Mr. Sutcliffe uses it here in the courtroom, it will be very similar as he would have had it available to him at MDC or anywhere else he was using it.

THE COURT: Okay. Using what? That drive?

MR. SETTLE: Using that particular hard drive.

THE COURT: Okay.

MR. SETTLE: All the devices are tied into the courtroom system, which would allow them to be displayed around the courtroom on the various monitors at counsel table, for the jurors, at the judge's bench and CRD desk.

THE COURT: So there is a monitor at Mr. Sutcliffe's table?

MR. SETTLE: Yes. In fact, he has two monitors, one that will be allowing him to view everything that's displayed in the courtroom and one that's exclusively tied to his system. That will allow him to work offline when other evidence or exhibits may be presented to the court at large.

THE COURT: In other words, if he wants to tap into the evidence to find something that he wants to review while the trial is underway or that he may consider displaying as evidence in questioning he may conduct, he can do that?

MR. SETTLE: That is correct. He can retrieve and

display any evidence or exhibits that are on any of the hard drives.

And that's about it.

THE COURT: What about the Elmo?

MR. SETTLE: We provided, also, a digital document camera for his exclusive use, as well.

THE COURT: Just describe how that will be worked.

MR. SETTLE: That allows him to take hard copies and display it to everyone in the courtroom without passing the document itself around.

THE COURT: Okay. He can accomplish that through equipment that's available on his table?

MR. SETTLE: He has an actual document camera in front of him at the counsel table. It would require him to request that the courtroom deputy activate it. The control of all the equipment is under the control of the deputy.

THE COURT: Let me stop there. I take it that you're referring to what I understand should be called the switcher.

MR. SETTLE: That is correct.

THE COURT: Now the switcher will be and has been mounted at the table immediately in front of me where the courtroom deputy will be sitting. Is that correct?

MR. SETTLE: That's correct. We've mounted and labeled it with -- currently it has five ports on it that are active for different input devices around the courtroom.

THE COURT: All right. Now in order for the evidence to be presented smoothly, I take it that directions have to be given to the CRD as to which set of equipment should be activated for use and especially for presentation of evidence to the jury. Is that correct.

MR. SETTLE: That is correct?

THE COURT: So the way to do that -- and I think I want to make this simple and clear and I want both counsel for the Government and Mr. Sutcliffe to follow this instruction -- is that if it's your turn to be presenting evidence or displaying evidence or otherwise arguing about evidence or in closing argument before the jury, you will be required to simply say the following, "Your Honor, I request that the CRD switch on the medium that I need," or words to that effect. I will not be issuing that direction every single time the need may arise or someone else's turn may kick in. I will be as helpful as I can be, but I'm relying on those who are presenting or using evidence to simply say, "Your Honor, I request the CRD to switch on the medium I need." And that will be the signal for the CRD to activate the particular button that will enable that person to access evidence.

Is that understood, Mr. Sutcliffe?

THE DEFENDANT: Clearly.

THE COURT: Ms. Duarte?

MS. DUARTE: Yes, Your Honor.

THE COURT: Okay. The material -- not the material, but the equipment you've been describing, the tower for the computer and the various means and facilities necessary to activate these hard drives and the zip drive, have they been loaded with the evidence that you're aware of has been made available to Mr. Sutcliffe?

MR. SETTLE: Yes, Your Honor. We had technicians actually go to MDC and copy directly from the hard drives that were previously described LA 1-A through C plus LA 1-S. All have been copied in entirety directly from the IDE drives to the external Maxster (phonetic spelling) drive we're using, and they are labeled and made available in its entirety now.

THE COURT: Is it correct, then, that the -- is a duplicate set here in the courtroom that doesn't have to be removed or lugged back and forth of the evidence that you're aware of the Government has turned over to Mr. Sutcliffe, including evidence the Government doesn't intend to use?

MR. SETTLE: That is correct. We copied the entire drive in its entirety and it will not have to be moved back and forth. It is a complete mirrored set of the drives that were housed at MDC that he's currently using in preparation.

THE COURT: Okay. Now the order that I issued on October 28 included a requirement that a printer be available for the Defendant's use in the courtroom so that if he wanted to download from the electronic evidence a certain portion or

item that would be a document that would be introduced into evidence so that the jury could take it back during its deliberations because they will not have this electronic evidence back there. Where is the printer? Or is there one?

MR. SETTLE: There is a printer and it will be installed directly to the PC that will be available to Mr. Sutcliffe and it will be sitting on the end of the counsel table. There is not one here at this time, but there will be one here this afternoon.

THE COURT: Now have you tested this equipment in the courtroom?

MR. SETTLE: Yes. We have actually went through and selected sample files and displayed them, switched back and forth from the different mediums, including the Government's laptops, Mr. Sutcliffe's PC, and both document or Elmo cameras.

THE COURT: Is there any aspect of the October 28 order that you have not yet been able to complete installing or accomplishing?

MR. SETTLE: No. We were able to accomplish all the goals set forth in the order.

THE COURT: Before I explore with Mr. Sutcliffe and counsel for the Government whether they want to have any of this evidence tested right now so that the sailing will be smooth once we start the trial, let me first ask whether there are any questions.

Do you have any questions about what Mr. Settle has said so far, Ms. Duarte.

MS. DUARTE: I do, Your Honor. I wasn't aware if he made mention of any write protect or write device that might be present to insure that the drives can't be written to.

MR. SETTLE: The drives were copied as they were. We copied the files just as they were. If they were write protected prior to, they're still write protected. There was nothing changed.

THE COURT: That's write spelled w-r-i-t-e. Is that correct?

MS. DUARTE: W-r-i-t-e.

THE COURT: Okay. That's for the purpose of a clear record.

Does that answer your question and address your concern?

MS. DUARTE: Actually it does not, Your Honor, because it's my understanding that the file itself is not -- the drive itself is not write protected as to the data. You can write protect a drive which protects it from alteration as you read it through use of a separate device. There was a device, I understand, that provided for that at MDC.

THE COURT: Provided for what?

MS. DUARTE: For the write protect block to be on at MDC. What I was inquiring as to is whether there is a similar

device provided on this computer set that would insure that the evidence could not be changed.

THE COURT: Before I hear from Mr. Sutcliffe, who has risen and I will allow him to speak in a moment, did you understand what she said?

MR. SETTLE: Yes, I do, and we have not provided for that. There's not an external or a separate write protect device put on it. The only write protection would be if the files currently had on it write protection, they were copied with that same write protection. There was an external device -- there is an external device that's available to protect the data from being written, but we did not provide for one of those.

THE COURT: There's an external device at the MDC. That's what you're saying. Right?

MR. SETTLE: Yes.

THE COURT: What would it take to attach one or install one --

MR. SETTLE: Just a matter of purchasing it and installing it.

THE COURT: How much does that cost?

MR. SETTLE: I'm not aware of the cost of that, but I can certainly have it within the next 30 minutes or so.

THE COURT: Mr. Sutcliffe, did you want to say something?

THE DEFENDANT: Yes, Your Honor. Thank you.

Is it my understanding that the drives here that I'm looking at on the screen are mirror images of the drives from MDC?

THE COURT: That is correct.

THE DEFENDANT: I would like the record to reflect that I've had access to most of those drives on a continued basis without write protection afforded the device they're speaking about. It was put on the first drive. After that it kind of got: Well, here. I'm in a hurry. Here's your drive. Here's your next drive you requested. Hook it up yourself.

THE COURT: That's what you were being told by someone at the MDC?

THE DEFENDANT: Yes. I've been hooking up the drives by myself now. I've had ample opportunity to change any file I wanted on there. I just want the record to reflect that's what's occurred since I've been there.

Furthermore, as in my papers I filed, one of those drives is mysteriously missing. It turned up missing on the SCSI, along with who knows what else, you know. I just want the record to reflect that. If that's her concern, it's too late.

THE COURT: Okay. The record will so reflect that. I construe what you're saying to be consistent with your representing that you don't intend to screw around with the

hard drives, you haven't done it so far, even though you are representing that you could have done it, and you don't intend to do it in the future. Is that all correct?

THE DEFENDANT: That's correct. I even found an unsecured file on one of the computers they brought down and brought it to the MDC's attention that had -- showed the list of a whole bunch of separatees (phonetic spelling) who are not even supposed to be in the same building or same rooms, and things like that, and I told them you shouldn't have this file on there. I opened it by accident, totally inadvertently. I just want the record to reflect that, too, in case it's ever brought up.

THE COURT: All right. Well, thank you for doing so. I think although it doesn't seem to be a problem and I'm reassured that there won't be a problem, I would, in the interest of being protective of the system itself, which is what I'm here to do, note that if there had been some kind of tampering with evidence that was actually being presented in the courtroom during the presentation of the trial, that could invite some very serious questions as to whether or not that would itself constitute apparent criminal behavior. I'm not suggesting it's going to happen. I'm not suggesting it has happened. But that, too, is a break.

In any event, to avoid these issues, to avoid further expenditures of very precious time on all of these logistical

arrangements, I'm directing and ordering the clerk of the court, through you, Mr. Settle, to attach that write protect mechanism --

MR. SETTLE: I understand.

THE COURT: -- on the equipment here in the courtroom. All right?

Yes, Mr. Sutcliffe.

THE DEFENDANT: My concern is not the write protect drive being attached at this point. My concern that I raised is the issue and I brought forth to the Court's attention what I just explained is that the fact that one of the SCSI drives has been represented to me to have been stolen from within MDC, from within the room, allegedly, that I go into to examine this data that's being provided to me. There is a lot of people that seem to be going in and out of that room unauthorized. In fact, one of the personnel told me the other day that it's my job to make sure they don't come in this room now.

The point is anybody could have come in that room and deleted or altered a file that's on this computer now that we're discussing. So before we go forward, I think it would be very wise upon everybody in here to cross check to make sure that what is on the original drives is actually what is on here and that there's not stuff missing because I can't go through -- I'm too busy preparing for my defense to go through every single file in multi gigabytes' worth of data here to see

if some clown who might have stole my hard drive has also deleted some file which is necessary in my defense. That's the reason I brought it up for Your Honor's attention. Thank you.

THE COURT: Thank you. I'm not going to order that very time-consuming comparison be undertaken because I don't see that there's any factual basis to make some kind of presumptive finding that anyone has tinkered or tampered with the evidence and with the material that was on the hard drive. You certainly told us that you haven't. I don't have any basis to know what happened to the item you say is missing, but I would like the record to reflect, as the files would anyway, that the Government filed a document on November 34 entitled "Status Filing Re Replacement of Defendant's Copy of SCSI Drive LA 1-S," and it sets forth the Government's understanding as to the need to replace or install something that for some reason I don't fully understand it had discovered wasn't among the equipment then available to Mr. Sutcliffe. Whether somebody inadvertently lost it or what, I don't have a basis to find. But I don't have any concern about the fact that all of the evidence based upon that filing and other things that have been represented to the Court has been available to the Defendant.

So you'll get the write protect mechanism and that will address Ms. Duarte's concerns.

Any other concerns before I hear from Mr. Sutcliffe about what Mr. Settle has said and what has been described for

the record?

MS. DUARTE: If I could have just a second.

(Pause in the proceedings.)

MS. DUARTE: None, Your Honor.

THE COURT: Okay. Mr. Sutcliffe.

THE DEFENDANT: Yes, Your Honor. I bring the Court's attention to the minute order on October 21 wherein on the second paragraph in response -- it says, "In response to the Court's questions, Mr. Cevera confirms the receipt of the SCSI drive and assures the Court that it will be working by today."

It was not working by that day. It was not working until just a couple days ago. I just received that drive in an i.d. format, as I mentioned in the paperwork I filed this morning in my motion in limine.

I just want the record to reflect I haven't had anywhere near ample opportunity to examine that because of the failure on the Government's part to provide that drive to me or to keep it in a secure place so that it would be available to be installed and available so I can look at it as they assured it would be on the 21st of October.

THE COURT: The courtroom deputy told me that you had filed certain motions. I haven't read the motions. I don't even know what the titles are on the motions. Are you seeking in the filing of those motions a continuation of the trial?

THE DEFENDANT: Oh, not at all. I just want the

record to reflect on the 21st they assured the Court it would be available. It was not. And, further, it was represented to me that that drive had been lost, stolen, destroyed, who knows what. And you told them to get it working that day. And it says one SCSI drive, not SCSI drives.

THE COURT: Okay. I will look at what you filed, and to the extent the motions require a ruling, I'll make a ruling before we bring the jurors down on Wednesday morning. If the Government thinks that it has a need to respond -- today is Friday -- the Government better respond on Monday. We're closed on Tuesday, although I know I and my staff will be here.

Let's move on. Do you want any of this system to be -- and if so, it will have to be done very briefly -- to be tested in your presence this at status conference?

MS. DUARTE: There's no need for that, Your Honor.

THE COURT: Okay. Mr. Sutcliffe, do you?

THE DEFENDANT: Yes, Your Honor. I noticed quickly as I was looking through here, I will require Microsoft Front Page to be installed on this machine and I will need a brief period of time to configure this machine to my needs. Other than that, it looks okay.

THE COURT: What is the Microsoft software that you're talking about? Why do you need it?

THE DEFENDANT: It is what I created all my websites in. It's what I used to -- I need it for display purposes. It

gives multiple displays of pages. Instead of looking at it in 1D flat format, you can look at it and get almost like a two-, three-dimensional view of the web page where it's pointing to, where it goes, what the code is behind what you don't see. It's all very relevant to the defense.

THE COURT: It sounds like it might be helpful. I'm not sure that it's required and I'll take your request under consideration.

Do you have any of that software already available to the Court?

MR. SETTLE: Yes, we do, Your Honor.

THE COURT: Do you have any objection to having it loaded onto the laptop?

MS. DUARTE: May I have just a minute, Your Honor?

THE COURT: Yes.

(Pause in the proceedings.)

MS. DUARTE: No objection, Your Honor.

THE COURT: That will be done later today.

MS. DUARTE: Your Honor, may I ask a point of clarification about an earlier ruling?

THE COURT: Yes.

MS. DUARTE: When you indicated that I should answer the motions in limine to the extent I feel the need by Monday, if these motions have been previously made by previous counsel, should I just refer to that date in filing or need I answer

them again?

THE COURT: If you think that's sufficient, you can do that and I can find the earlier date in the filing. There's going to be an army of lawyers in here on a civil case on Monday and I'm going to chew them out for raping the forest by dumping on the Court mountains of unnecessary material. So that's my view on an ongoing basis. If you don't think I need to see it, fine, but I'm not going to tell you how to file your papers.

MS. DUARTE: Understood.

THE COURT: Do you want to go through a very quick test of anything right now? Because if you don't, then we can move on.

THE DEFENDANT: No. It looks fine. Thank you, Your Honor.

THE COURT: All right. Then let's move on.

Mr. Settle, you're welcome to stay, and I would in fact prefer that you stay, but if you have some kind of pressing obligation, we have addressed the matters that are specifically dependent upon you, so I would not insist that you stay here.

MR. SETTLE: Thank you, Your Honor.

THE COURT: But I would prefer.

MR. SETTLE: I will be here.

THE COURT: Now let's go down the October 28 order

that set forth the agenda for this session. And I think I can do it fairly efficiently.

The first item was attached to that order so that the parties -- and I will be using the word "parties" just as a shorthand way to refer to both the prosecution and the defense -- would have a basis to understand what this trial will require in terms of their conduct and the arrangements that will be made. But there are some changes.

The first item referred to this Court's standing criminal order. And I want to just -- I'm not going to read the order and I'm not going to go down every provision in the order, but I'm going to tell you what is different about how this trial will be conducted.

I will expect the parties to be here at 8:00 in the morning. And I'm directing the marshal to arrange for Mr. Sutcliffe to be available at counsel table, having taken care of all the necessary arrangements before then, including bathroom usage, if possible, obviously if someone needs to use the bathroom at any given time, that request will be accommodated whether it's a juror or a witness or the parties. But I prefer to have him here and have use of the equipment and the evidence available to him here in the courtroom by 8:00.

The jurors are going to be told that they are going to be in the box by not later than 8:30, not a minute later. I'm going to go over with them on a continuing basis that they

are to make all plans, including at a time when traffic is backed up because of the strike, so that there is not any occasion when any of them is even a minute late. And the clerk will bring them out and they will be in the box at 8:30 and I'll come out and the trial will start at 8:30.

Now most days -- but I reserve the right to make changes dependent on a number of factors, primarily my other responsibilities. Most days the trial will continue to 1:30 without a lunch break and there will be two 15-minute breaks. During that period between 8:00 and 8:30, if there are issues that need to be addressed outside the presence of the jury, that's when they'll be addressed. I can't be sure that on a good faith basis there might be other occasions where something has to be addressed outside the presence of the jury, and I'll talk about that a little bit more later, even at a time when the trial is under way, in which case, of course, I'll have to excuse the jury.

But I am setting aside 8:00 to 8:30 for counsel and the parties to get ready, to have their witnesses ready. At the time that the jury walks into the jury box at 8:30, if there's a witness who was previously sworn and who had begun to testify the previous day but hadn't yet completed his or her testimony, I want the witness in the witness seat. I'll remind the witness that she or he was previously sworn and we'll zoom right in.

So if there's a need to vary the schedule, and in particular to have proceedings in the afternoon -- and I can easily see that there would be -- I'll give you at least a day's notice, at least. And I'll try to give you more than that. And I think I can.

On the first day, the schedule will be a little bit different because I want to complete the selection of the jury that day and we'll never do it because of the unusual features of this case, which I'll talk more about in a minute. So that first day will be a full day and there will be a lunch break, but the same arrival time will apply. And before the jurors are brought down -- and I hope very much that those jurors will be outside the courtroom and ready to come in by not a minute later than 9:00 -- we will go over the motions in limine, or whatever they are that you filed today, and I'll issue my rulings on those and make sure that any other last minute adjustments are explored. So the Wednesday, when we start trial on November 12, will be a full day.

Item 2D on the Court's standing trial order is not applicable. We're not going to have a conference in the jury room the way I ordinarily do. And I've already drafted a statement of the case. I asked the clerk to show the draft to the parties. And I hope that you've had a chance to read it. I gave you ample time.

This is something, Mr. Sutcliffe, that the jurors

will be told about almost immediately after entering the courtroom before the process of picking a jury goes on. It's a customary thing. If it were a civil case, I would tell them about what kind of case it is. This is intended to be a neutral statement just so they know a little bit about the case.

Any objections to the statement of the case, Ms. Duarte?

MS. DUARTE: Your Honor, the second paragraph, I think, needs to be reworked a little bit.

THE COURT: Why?

MS. DUARTE: I don't think it's an accurate statement of the charge. The Government's actually alleging that Mr. Sutcliffe transferred the Social Security numbers by virtue of their posting on the Internet, and that's actually within the definitions section of the statute. And then that he had the intent, at the time that he did that posting or transferring, to aid and abet another felony, that is the use of the Social Security numbers.

I could grab my instructions. I don't have them --

THE COURT: I don't know if I -- I see your point and I think you're probably, in principle, right.

MS. DUARTE: I can either keep going right now and look at the jury instructions briefly and let the Court know or I could submit, immediately after the hearing, a proposed

revised paragraph.

THE COURT: You do the latter. I may have already fixed it by then.

Any other objections?

MS. DUARTE: No, Your Honor. The first paragraph, no objections, nor to the last.

THE COURT: Mr. Sutcliffe?

THE DEFENDANT: Yes, Your Honor. Regarding the limiting instructions on killercop.com --

THE COURT: I'll get to that later. Just on the statement of the case. I am going to change, to a slight extent, paragraph 2.

THE DEFENDANT: No objections.

THE COURT: Ms. Duarte, if the first sentence -- first three lines of the first sentence in the middle paragraph on the statement of the case read as follows, would I correctly state what the Government's charge is?

Here's what they would say. "Second, the Government alleges, in counts 5 through 9, that Mr. Sutcliffe obtained and transferred to the Internet the Social Security numbers of various individuals and that in doing so he intended to aid and abet the making of a false representation."

MS. DUARTE: Yes, Your Honor, if I could just have a minute.

Yes, Your Honor, false representation of a Social

Security number.

THE COURT: And the portion that relates to the persons not being the ones to whom they had actually been assigned, you're moving to strike?

MS. DUARTE: Yes, Your Honor.

THE COURT: Okay. I'll do that. You don't have to submit anything. That's going to be the statement of the case.

Turning back to the standing criminal trial order, paragraph 5 is inapplicable. We won't have that last conference. You can disregard that. Some of the provisions, particularly, for example, 13, 14 and 15, in the Court's standing order are applicable. I may go over that ground again in setting forth what the requirements are for particularly Mr. Sutcliffe, who is in the unusual position of representing himself. But I admonish him to read those provisions as well as some others that are attached to this order that I sent out for today's conference.

On paragraph 19, which relates to stipulations, are there any stipulations?

MS. DUARTE: No, Your Honor.

THE COURT: Okay. That's what I assumed.

THE DEFENDANT: Excuse me, Your Honor. I was given two documents this morning by Ms. Duarte regarding some apparent stipulations that she said that she conferred with Mr. Harris. I object to any stipulations that have been

entered by previous counsel without my knowledge.

THE COURT: They won't be used. You can sit down. We have no stipulations. Whatever Mr. Harris may have agreed to or signed, I'm not going to impose on you.

THE DEFENDANT: Thank you, Your Honor.

MS. DUARTE: Your Honor, Defendant is actually speaking of 90211 declarations which were made earlier and turned over earlier when Mr. Harris was representing Mr. Sutcliffe, which the Government intends to ask the Court to introduce the records which speak for themselves based --

THE COURT: If there's an independent evidentiary basis for that evidence to be admitted and you just made it available to show the opposing side, at an earlier stage, the opposing lawyer, that's fine.

MS. DUARTE: Correct.

THE COURT: Mr. Sutcliffe has it now. I'll make a ruling at the appropriate time.

MS. DUARTE: Your Honor, may I ask a question based on that?

Does the Court prefer that -- if I'm moving something for a 90211, does the Court want the affidavit with the exhibit or for a separate determination?

THE COURT: Separate determination.

MS. DUARTE: Thank you.

THE COURT: Attachment B to the October 28 order that

I issued is a different iteration of another judge's instructions for how criminal trials are to be conducted in that judge's courtroom I incorporated into this order. There's a lot of overlap, so I'm not going to touch on that.

But in the case of Mr. Sutcliffe -- and this is very important to understand -- the Court has gone to extraordinary steps, that I'm not aware of any precedent for, to make sure that you have the opportunity to access evidence, review evidence, and present evidence at counsel table and to defend yourself in the maximum and most appropriate and efficient way possible.

Consistent with that, Mr. Sutcliffe, you are not only authorized but directed to, throughout the trial, remain at counsel table. You're allowed to stand. You're allowed to shift from one side of the table to the other to access any of this elaborate equipment that I'm now looking at that has been installed.

We have put skirts all around the visible portions of the counsel table that jurors could see. You will be required to continue to wear the restraints around your feet or your ankles -- I'm not sure exactly how they are rigged up -- during the trial. You have a right not to have any juror or prospective juror see those. When the jurors come in the courtroom and when they're sitting in the process of jury selection, I'm going to make sure they sit in places where they

won't be able to see those restraints.

You also have an independent duty -- and I am instructing you to do your level best to carry this out consistently -- not to wander around in any way that intentionally or inadvertently would enable jurors to see that you have those restraints.

So we have installed this equipment within easy arm's reach. If you need to rise to make an objection, of course you'll be able to do that. I don't think there's anything that you need that is not available to you at counsel table.

Consistent with that approach, you may address the Court from counsel table, you may question witnesses from counsel table, you may deliver opening statement from counsel table, you may deliver closing argument from counsel table. You not only may do all those things, but that's what I'm ordering you to do. So to the extent one of these orders said something about counsel approaching the lecturn, it doesn't apply to you. It does apply to the Government.

Any questions about that?

THE DEFENDANT: Yes. That's going to make side bars very difficult.

THE COURT: Yes. And I'll talk about side bars later.

THE DEFENDANT: One other point, Your Honor.

In here under instruction E, it says that -- that's

the lecturn you were speaking about. All right. Under subsection E of E, I notice it says speak up when making an objection. I'm just concerned -- I notice that in the standing order of October 28 under number 10, it said, "Potential consequences of disruptive behavior." I know in the past the Court has been concerned about the volume of my voice. I'd like this Court to please define and provide a written definition of what constitutes disruptive behavior.

The Defendant recognizes the trial is an adversary proceeding and the defense needs guidance on how to aggressively advocate on his own without being considered disruptive.

Also, the Court rarely if ever immediately recognizes nor permits the Defendant to speak up when the issue is ripe and before the Court and requiring the Defendant to wait lengthy periods of time before he's permitted to make an objection, during which time additional objections might arise, making it impossible for me to remember all of my objections.

My concern is I would like that to be done before trial starts so that I have a clear, unvague --

THE COURT: Okay.

THE DEFENDANT: -- theory I'm going here.

THE COURT: It's a sound proposal. I'm about to do it now. I'm not going to do it in writing, so just listen carefully.

First of all --

THE DEFENDANT: Excuse me, Your Honor. I need to write this down, please. One second. Thank you.

THE COURT: Okay. In terms of your behavior, Mr. Sutcliffe --

THE DEFENDANT: In terms of what constitutes disruptive behavior.

THE COURT: I will get to that. Just listen carefully because these are the ground rules that you have to follow.

Either intentional or persistent or flagrant --

THE DEFENDANT: I'm sorry. You're going to have to slow down, Your Honor.

THE COURT: I'm not going to slow down to the point where you take down every word. I think it's sufficient if you just listen. I am going to give you something to take back to the prison afterwards. But just listen. I'm not going to read and recite this as slowly as necessary, but I'll send a copy to you of the core of this if you just want to be able to have it back there to review and consider.

First of all, when you need to object or feel you have a right to object, you stand up. That's the eye signal that lawyers provide to the judge. You permit the questioner to finish the question before you voice your objection. You can rise if you think it's an objectionable question that the

prosecutor is trying to ask. Stand up, let the prosecutor finish the question, say, "I object," and just give a very brief basis. "I object. Hearsay." "I object. Leading." No speeches. No references to unfair, no references to the prosecutor knowing better, no references to a kangaroo court, nothing like that because no lawyer could ever get away with that and you're going to be required to adhere to the same standards as lawyers.

When you object, I'll rule upon your objection. If I deny the objection, please sit down. That's what lawyers will have to do, including Ms. Duarte or anyone else on her team. You don't argue with the judge after the judge has issued a ruling.

THE DEFENDANT: Doesn't that defeat the purpose of a timely objection, Your Honor, to preempt the words of the document that's being introduced before it can prejudice the jury?

THE COURT: No, it doesn't, not at all. The jury will be told that questions are in evidence and they're not allowed to take into account what a lawyer says, including in the process of framing a question. No documents will be shown to the jury unless they are already admitted into evidence. You may be dealing with a situation where you and I see a document that the Government is offering into evidence but the jury doesn't because we will have a capacity to mute the

screens before the jury. Until a document is in evidence, it isn't going to be displayed to the jury.

And I'm not going to go through a long course in Evidence 101, but I'm telling you that your rights are going to be exactly the same as every other defendant's and every other litigant's rights and this is the way you have to assert your objections.

The volume of your voice just has to be sufficient so that the jurors and the witnesses and the Court and counsel can hear you. And I think it would be helpful to have the microphone close to you. I'm not worried about you shouting unless you get so belligerent that I'll deal with that on a different basis. And I'll turn to that a little bit later.

You are required to adhere to all of the requirements that lawyers are required to adhere to when it comes to delivering opening statements and closing arguments.

Opening statements in general are previews of the evidence and they have to deal with what the elements of the allegations in the indictment are and what the anticipated theories of the defense will be, if you choose to give an opening statement. You're not required to, but you're entitled to. You can give one when the Government finishes giving its opening statement or you can reserve one until the Government rests its case if you decide to put on your own case. But you're going to have to be bound by the same restrictions on

opening statement and you can't attempt to suggest that the jury is going to hear about evidence that you have no good faith basis to believe will be received.

On closing argument, you're going to have to argue what the evidence was. You're going to have to argue about what the evidence was, not about what it could have been if I had made rulings allowing some evidence to get in that I in fact excluded. You can argue about inferences that a jury would be reasonably entitled to draw from the evidence, but you're going to have to stick to the evidence and the charges and take measures to try to persuade the jury why the Government failed to prove what it's alleging against you.

You won't be entitled to introduce any kind of defenses that you didn't give proper notice for. I don't think you're planning to. But that would include entrapment and duress and alibi defenses. If you rely on a theory of advice of counsel, and there's been some reference to that, it may be your right to show that you lacked the specific intent that the Government is going to have to prove you had as to some of these allegations. But that is not a defense that would entitle you to acquittal just because you received information from a lawyer. And if you invoke information from a lawyer that gets to the question of what your state of mind was and why it was not a criminal state of mind, why you did not have the specific intent, I already told you once that you are

likely to be opening the door, as a matter of law, to examination of both you and that lawyer by the Government about things that you didn't want the jury to hear but that may be related to the communications you had with that lawyer.

You are not to address anybody in the courtroom except me or a witness that you're questioning. If you have a gripe with the prosecutor or even a proposal that may help the smooth presentation of evidence and the efficient use of time in the trial, do it when the jury is outside of the room and not when the court proceedings are under way.

You don't talk to witnesses, you don't talk to Government counsel, you don't talk to the Court when other people are talking. If you do that, that, too, would be disruptive behavior.

You may choose to testify. If you testify, you'll be allowed to testify from the witness chair, but you'll be required to ask questions and then answer the questions. Before you can say anything that is consistent with whatever your theory of defense is or whatever your position is that you want the jury to hear from your lips and your mouth, you'll have to ask a question. And the purpose of that is to give the Government an opportunity to object to your question along the same lines and in the same manner that I already told you you will be required to follow.

And I'll rule on the Government's objections if there

are any. And if I say the objection is sustained, then you won't be permitted to answer it. You should -- it's going to be awkward, but you should say, "Mr. Sutcliffe, did you ever tell Miss Smith that you really meant it when you put that statement on the Internet?" I'm making up this question. Okay?

That's the way you would ask the question. You wouldn't say, "Did I ever intend -- did I ever say that to Miss Smith?" You would refer to yourself as a third person. And you would answer the question. You would say, "No, I did not." And you would move on to the next question. That's the way you're going to be required to engage in questions and answers if you testify.

You will have the choice, if you want -- I'll consider entertaining this choice -- of writing down the questions that you propose to ask Steven Sutcliffe in his capacity as a witness and have Mr. Reed, who will be stand-by counsel -- and I'll be talking about his role in a minute -- ask those questions from the lecturn table. If you prefer to have him be the person, the vehicle through whom your written questions are voiced so it comes over in a more conventional, natural basis and it doesn't seem awkward, I'll consider allowing you to do that. It's your choice.

Now disruptive behavior, in addition to violating these standard provisions and others -- I'm not attempting to

exhaust every possible conventional rule of order, decorum, respect that a Court is entitled to, every court. Conventional -- I mean disruptive behavior would include shouts, interruptions, threats, facial gestures or body language that display either contempt or were in some way menacing.

You and I have worked out a good relationship. You've been admirable in the way you've handled yourself today and in recent appearances. If you just take that approach, we will not have a problem, you'll get a fair trial, there won't be any need to revisit these issues.

In order to give you the guidance you wanted to have and in anticipating, because I think you are a smart guy, you would ask that question, I asked the clerk to prepare a document. It's entitled "Disruptive Defendant." I had it marked hearing Exhibit A. It's not Court Exhibit A. You don't have to read it now, but it will tell you -- and you can have a copy. And I'm directing the clerk to give it to you -- what the measures are that would be available to me if I make a finding that you -- or if I made this finding for anybody else -- had been disruptive. And those measures can be very, very extreme, including ejecting you from the courtroom and even permitting the trial to proceed in your absence or temporarily ejecting you from the courtroom. I could hold you in contempt. I could gag you. I don't want to do any of those

things. I'm kind of hopeful that none of them will even cross my mind. But you can read what the measures are that are available to the Court in the document you've now been given called Hearing Exhibit A.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: All right. Here are the procedures we're going to use for selecting a jury. When the jurors first come in the courtroom, I will read the statement of the case, I will describe who the parties are, I will ask the -- I will have the prosecution -- the prosecutor introduce herself and whoever is with her at counsel table. I guess it's going to be you, Mr. Cugno?

MR. CUGNO: Yes, Your Honor.

THE COURT: I'll ask the jurors if they know either of those people. Then I'll do the same with you, Mr. Sutcliffe, and also with Mr. Reed.

More than once I will have both occasion and, I think, the need to instruct the jurors about the unusual circumstance -- although by no means unprecedented. This happens many times -- that the Defendant in the case is representing himself. So I prepared a draft document. It's entitled "Statement Re: Pro Per/Logistics." And I asked the courtroom deputy to give it to both sides before I came out on the bench this morning. I'm not going to invite any comment on this document. I'm not going to sit here and cause anybody to

edit it. This is my obligation, my responsibility. This is what I came up with last night. And it's the gist of what I'm going to tell the jurors when they're in the back of the room.

In the process of questioning them a little later on in the stage of picking a jury, I will go over some of this ground, as well, to make sure that no jurors are placed on the ultimate jury panel who are going to be sidetracked, much less prejudiced by the fact that Mr. Sutcliffe is representing himself.

After I explore with the jurors a number of factors common to them all before any particular jury is identified by name or asked to answer any questions, after I finish doing that, we'll go to what we can consider to be stage two of the process of jury selection.

Now when I ask questions in the back of the room, they will be designed to weed out prospective jurors who clearly are not in a position to be considered for service or to be picked.

If, for example, by coincidence, it turned out that one of the jurors was Mr. Cugno's sister -- I don't know if he has a sister -- I would obviously excuse that juror. The way I intend to exercise my authority basically to weed out jurors who ought not even be called for further questioning is to look down at counsel table and say -- listen carefully to this, Mr. Sutcliffe -- "I intend to proceed accordingly," or words to

that effect. "I," meaning me, "intend to proceed accordingly. Any objections?" In other words, I'm about to say to this juror, "Go back to the jury room. We don't need you here."

I would do it if it was Mr. Cugno's sister. I would do it if a juror was about to deliver a baby the next day. I would do it if a juror had unquestionable and not contrived financial hardship. I would do it if a juror had heard anything about this case. I would do it if a juror knew any of the names of the witnesses. All the names of the witnesses will be read -- of the witnesses on the Government's list -- and I need an extra copy of that.

MS. DUARTE: I have it.

THE COURT: -- will be read to the jurors when they're in the back of the courtroom. And if I think that there's a basis to excuse a juror for cause before anybody gets into the question of specific questions, I will say, "I intend to proceed accordingly and if there's no objection, I'll excuse this juror."

After that, we start at stage two. Here's how that's going to work for this trial only. The names of 30 jurors will be called. You will have, both of you, at your counsel table, the list of individual persons who were sent down to this courtroom. And each of them will be listed numerically. Somebody will be number 1 and somebody will be number 42. I think that's how many we're going to have all together. 42?

45 or so.

The first 30 in numerical order -- and the numerical order is determined absolutely randomly up in the third floor jury room -- will be called to sit elsewhere from where they may have been sitting as they entered the courtroom. Fourteen of them will sit in that box which has 14 chairs in that jury box. Six will sit behind that monitor. And I want the monitor removed during the process of jury selection or put against the wall so I can see those people. Six will be on the front bench near the door with the seal. And ten will either sit in the center row there or the first two rows. I need to see how they squeeze in to make sure that Mr. Sutcliffe's rights are protected.

And I will do the questioning of all 30 of those people in round two. And I will use the standard jury questionnaire form. And I want the clerk to give that form to Mr. Sutcliffe. I think the Government is familiar with it. They've seen it before.

And now I'm going to tell you the additional questions I'm going to ask, not the precise questions, but the topic. In an earlier stage in the case, the Government issued proposed voir dire questions, and so did one of Mr. Sutcliffe's previous lawyers, Mr. Harris. And both of those proposals contained certain questions tailored to this case that the jurors have to answer in addition to the questions that I'll be

asking them again about the circumstances of Mr. Sutcliffe representing himself.

From the Government's proposed voir dire questions I will ask number 4 and 5 relating to experiences with law enforcement, and particularly with the FBI. I will ask questions 7 through 10. 7 has to do with computer proficiency. 8 has to do with organizations that advocate rights to privacy. I'm not going to ask about "belong to." I'm going to ask whether they contribute to or advocate. And the same with question 9. The mere fact that somebody belongs to groups that advocate that position will not be cause for excusing that juror, but may warrant further question.

I'm going to give the gist of what the Government proposed in number 10, but it's going to be much more neutral. The Government wanted me to ask whether somebody had any unpleasant experience with Global Crossing. I'm not going to do it that way. The question is going to be has anyone or have you had any experience, period, not pleasant or unpleasant or favorable or unfavorable, just any experience with Global Crossing, any impressions of, feelings towards Global Crossing, anybody own any stock in Global Crossing.

Those were some of the areas that Mr. Harris proposed. He asked some questions about familiarity with the Internet.

Questions 1 through 3 I'm going to ask. Question 6

I'm going to ask. Question 7 I'm going to ask about law enforcement contacts. Question 6 has to do with disputes with employers. Question 10 has to do with crime victims. I'm going to ask that.

All of the questions in 11 through 13 I'm going to ask, with slight variations, to make sure that if there are ties with Global Crossing, including people who may have used the services provided by Global Crossing or businesses with Global Crossing, I'm going to ask those questions.

Okay. After I finish asking those questions -- and it's going to take a long time. It's going to be 30 people. And I'm doing this differently so we don't have to have people going to the lecturn at the point when they're going to exercise their challenges -- I will excuse all the jurors from the courtroom with certain instructions to remain outside. I'll ask both sides whether there are additional questions you want me to ask a particular person among those 30, some follow-up questions I didn't ask, some different questions specifically tailored to something that juror told me about her profession or something else.

I will also ask, outside the presence of the jurors, whether any of the answers that any of those 30 jurors gave in your opinion provided a basis to excuse that juror for cause so you don't have to use up one of your available peremptory challenges. And if you say so, I will then rule -- hear from

the other side, and then I'll rule upon whether I think that juror should be excused for cause.

If a juror tells me something that to me, one of those 30 people in stage two -- that to me does constitute grounds for excusing that juror for cause, I'm going to look down on you, just the way I did in stage one, and I'm going to say, "Counsel, I intend to proceed accordingly." I'm going to say, "I intend to proceed accordingly." If I say, "Counsel," it's not going to be a big deal.

That's what I'm going to say. That's my signal to you. If you don't think that it would be a correct decision exercising my discretion to excuse that prospective juror for cause, then you stand up and say, "May I be heard." In which event, you'll be heard, maybe not then but later on, at a time when I think it's most efficient, about whether or not that juror should be excused for cause.

After we review what your positions are about follow-up questions and objections for cause to those jurors, then I'll invite them back in. They will resume their seats. Thirty people is a lot to keep track of. I won't do the pace too quickly. You'll both be taking notes. You'll both be eyeballing these people.

To help you out, at end of my questioning of the 30, before I send them out to the corridor, I will review, just so you hear their names again, and I'll say, "Just so the parties

can keep track, juror number 1 is Ms. Smith, who works for AT&T," and just three seconds of capitulation, but not more than three seconds. So you have it fresh in your mind about which ones you think you want to strike.

They come back in. The defense has ten peremptory objections. The Government has six. That's 16. If you both have used up all your peremptories and there has been no juror among those 30 struck for cause, that would leave 14 jurors and that will be our jury panel. The first 12 in number will be the -- meaning the ones with the lowest 12 numbers who weren't struck, will be the regular jury, and the remaining two individuals, who may have been jurors numbers 23 and 29, will be the two alternates. We'll have our jury.

Depending on what time we achieve that result, we'll then proceed to opening statements after a break. People need to use the bathroom, jurors need to get sworn, all that. I hope to get to opening statements -- I think we can -- on Wednesday morning.

There's a doctrine called Batson. I'm not going to tell you all about it, but I will provide you this much guidance. It's meant to provide protection to both sides that nobody on the other side excuses the jurors for reasons that would be unconstitutional, such as race or religion, although I don't inquire about religion, or some other factor that is a constitutionally protected status.

If you think that the other side is going to be violating that doctrine, here is how you're going to tell me about it. Before those jurors come back in is when you'll be taking turns outside their presence. I should have said this a moment ago, but I forgot to. They're out in the corridor and they've finished all the questioning, and if I bring them back in, it's because you persuaded me I need to question them further. Or possibly juror number 31 has to go through the same series of questions because somebody got dismissed for cause. Okay?

Then when all the questions are finished, I excuse them again and you just sit here and tell me which juror, by name and by number. The Government goes first. You get two turns. The Government goes again. You get two turns. Okay? That way if somebody says, "I want to dismiss juror number 5," and somebody thinks that that would violate the Batson doctrine because people with green hair have a right to serve on the jury and that's the only reason a dismissal is really being proposed, you'll be able to state your position from where you're seated without the jurors hearing it. And that's the way we're going to pick this jury.

Any questions?

Any questions?

THE DEFENDANT: No, Your Honor.

THE COURT: Okay. So we covered items 1, 2, 3 and 4

and 5.

Civilian garb. This is something I've already explored with you, Mr. Sutcliffe. It would be in your interest to wear a white shirt and a regular pair of slacks. What's your position on whether you want to and available means for you to do so?

THE DEFENDANT: My position on that, Your Honor, is I would love nothing more than to be able to wear slacks and a shirt and a tie and a suit, but unfortunately I have none of those and I'm indigent. I have no money to my name. I have about 20 bucks in my account. I notice that you did recommend it. I contacted Mr. McAfee and others about providing it. Unfortunately, Mr. McAfee is a very busy man. When he comes to see me regarding my habeas corpus motions, the last thing I have on my mind is bothering him further, begging him for more help. I don't think it's his responsibility to provide me clothing. I have no family out here. It's my understanding from the Government that I have no more worldly possessions, thanks to my wife. So that's pretty much where I am.

THE COURT: Mr. McAfee, would you stand up, please.

Is your name Wesley McAfee?

MR. MCAFEE: That's correct, Your Honor.

THE COURT: Have you appeared as a lawyer on a limited occasion on behalf of Mr. Sutcliffe in this courtroom previously?

MR. MCAFEE: In one singular occasion under some rather tight restrictions, I did.

THE COURT: You're his friend. Is that correct?

MR. MCAFEE: I don't know how you define friend. I'm his attorney.

THE COURT: Okay. Mr. McAfee, as his attorney and as somebody who took time out of his busy schedule to come here today, are you willing to assist Mr. Sutcliffe in obtaining at least a minimal amount of civilian garb?

MR. MCAFEE: I don't have the opportunity to do so nor am I willing to do so under the circumstances.

THE COURT: The opportunity doesn't exist because you don't have time to buy a shirt at a store. Is that right?

MR. MCAFEE: Are you asking me if that's right or are you asking me if that's my position?

THE COURT: I just want to understand what you told me.

MR. MCAFEE: I'll be happy to explain. I don't know Mr. Sutcliffe's sizes, number one. I don't have the opportunity to buy him clothing. I'll be in Clark County on Monday on a federal matter. I won't be back until Thursday of next week. Plus, I don't have the financial ability to buy Mr. Sutcliffe clothes, nor do I think it's appropriate for me as his attorney to do so.

THE COURT: Okay. I'm not going to direct you to do

so. It's your choice and Mr. Sutcliffe's. Let the record reflect you've had the opportunity and you declined the opportunity for the reasons stated.

MR. MCAFEE: May I be seated?

THE COURT: You may be seated.

Okay. What are your garment sizes?

THE DEFENDANT: Large, extra large. I don't know.

THE COURT: How tall are you?

THE DEFENDANT: Six foot four.

THE COURT: Okay. Item 7 on the agenda is the role of Mr. Reed of stand-by counsel, who has an obligation that the Court has imposed and has been professional in carrying it out.

Mr. Reed, I want you to be able to view the evidence that is presented at the trial. The role of stand-by counsel, even if the client turns to stand-by counsel for any kind of assistance, is inherently limited and a person representing himself at trial doesn't have the right to shift back and forth between proceeding through a lawyer and proceeding on his own during the course of any given trial. But you are available to respond to questions about courtroom procedures and logistical questions to provide some kind of logistical assistance, getting a refill of water, or anything else that Mr. Sutcliffe might request and that a lawyer might do.

I don't know what will happen in the course of this trial, but I want you to be prepared to view and be familiar

with the evidence as it's being presented. It has not been your duty, and Mr. Sutcliffe's letter made it very clear that he didn't want you to exercise that duty, to determine what's to be done with the evidence, what evidence to introduce, or anything else. That's been established very clearly, including the letter that's now been unsealed.

I think that the most appropriate place for you to sit would be behind the electronic equipment that the Court has positioned next to the lecturn for use by the prosecutor and by lawyers generally. That way, as I understand how the system has been set up, if material is being displayed on the monitors that are available at counsel table and to the jury, you'll be able to see it.

Am I correct about that, Mr. Settle?

MR. SETTLE: Yes.

THE COURT: That's where you should sit.

MR. REED: I should sit back on the bench, Your Honor?

THE COURT: Yes.

MR. REED: Very well.

THE COURT: Actually, I think it would be better for to you sit where you are right now, at the end of the table. That way you can actually have clearer access to what's on the monitor. And if you need to use it, Ms. Duarte, you angle it slightly differently. So why don't you sit where are you. Is

that acceptable to you, Mr. Reed?

MR. REED: It is, Your Honor.

THE COURT: Okay. That's what we'll do.

You don't have a duty to call upon Mr. Reed for assistance of this limited nature, but you have a right to do it, and I've already told you, Mr. Sutcliffe, that I would be inclined to direct him to ask you the questions that you want to ask yourself if you choose to testify. And you don't need to tell me now and you shouldn't. That's not your obligation. And you may choose to make a decision later on and disclose it later on. But you have that right.

Okay. I have discussed with the -- now turning to number 8, security arrangements, I have discussed with the representatives of the Marshals Office --

THE DEFENDANT: Your Honor, I'm sorry. May I be heard?

THE COURT: Yes.

THE DEFENDANT: Before we move on to number 8, there's a couple points I would like to bring up to the Court for clarification, if I may.

THE COURT: Go ahead.

THE DEFENDANT: Thank you, Your Honor.

I filed a letter to you asking for reconsideration.

THE COURT: I'm going to turn to that. It's on my list. It's an additional item, your motion for

reconsideration. I will address that later.

THE DEFENDANT: Okay. I also sent another letter also requesting clarification on the ruling regarding removal of Mr. Reed as appointed counsel based on several factors that the Court had elicited from appointed counsel at the time. And I requested clarification on the reasoning behind that. Has the Court reflected upon that letter?

THE COURT: Yes. I don't think any clarification is necessary. The basis for my findings and statements and rulings concerning Mr. Reed and his status and his relationship with you are sufficient and complete and I don't intend to revisit that. Your motion for reconsideration on the allegations in the indictment I'll turn to in a couple minutes.

THE DEFENDANT: I just want the record to reflect I object. I didn't understand a word you just said there, Your Honor. I asked a very simple question in the letter, which was did you or did you not rely upon certain statements reflected from Mr. Reed as to your decision to remove him as my counsel.

THE COURT: Okay. This is the kind of thing that if it happened during the course of a ruling on an evidentiary objection would be totally inappropriate for you to do. You're now arguing with me. I gave you an answer. I can't ever be sure whether what I say to somebody is going to be comprehensible to that person, but the bottom line on this particular inquiry concerning Mr. Reed's status is finished.

It's over. We're not going over that ground again If you don't understand what I ruled on before, I'm sorry, but I'm not going to go over that ground again.

Turning to the security arrangements, I reviewed with a representative of the Marshals Office the provisions, and I don't think they have to be discussed again. But I have stated to the Marshals Office, and I know that it's their intention anyway, that all steps, all steps be taken to assure that there's no inadvertent display of the leg restraints that Mr. Sutcliffe will be required to wear in the courthouse that jurors may see. Jurors come and go in the hallways, they use the bathrooms, although sometimes once they've been empaneled, they use only the ones in the jury room. Make sure the corridor is checked before Mr. Sutcliffe is out there and that no jurors are present, and take all steps to make sure that his rights are protected in that regard.

The marshals have represented to me -- and this is another display of their admirable professionalism -- that they will determine whether if by chance there is available at the MDC civilian garb that might fit Mr. Sutcliffe, and if there is, they will arrange to have it brought to court.

Is that correct?

MR. MARTIN: That's correct, Your Honor.

THE COURT: That was the voice of Mr. Martin.

We've done number 9. We've done number 10.

Did you circulate to the Court -- the hearing Exhibit A to Mr. Sutcliffe?

The clerk says yes.

The Government's witnesses and exhibit lists, I think you have supplemented those recently. Right?

MS. DUARTE: Yes, Your Honor. Yesterday I filed second amended as to both.

THE COURT: Okay. Now that we're on the eve of trial and with all the different rulings and directions I've issued today, what is your presumptive schedule, which may vary from day to day, of time that we'll devote to this trial? What is your estimate as to how long it will take, assuming we pick the jury the first day? How many days thereafter until the Government rests?

MS. DUARTE: Assuming --

THE COURT: No stipulations.

MS. DUARTE: Assuming no stipulations and a reasonable amount of cross-examination, four to five court days, Your Honor.

THE COURT: I'm going to tell the jurors when they assemble in this courtroom that the trial, including deliberations, is likely to take eight calendar days. I always tell them it's no guarantee. I don't know what the defense will consist of and I hope there won't be cumulative evidence and waste of time. But you're assuming that the schedule is

8:30 to 1:30. Right?

MS. DUARTE: 8:30 to 1:30, pick the jury one day and do witnesses every day.

THE COURT: It's not going to be less than an eight-day trial. It could be a ten-day trial. So if there are jurors who have preplanned and prepaid vacation plans -- and I'll tell them about days when we won't be trying the case -- oh, and I should tell you both now. I serve on the Model Jury Instructions Committee for the Ninth Circuit and I am required to attend a meeting elsewhere on November 20 and 21, Thursday and Friday. We will be dark those days. We will, of course, be dark on Thanksgiving, the 27th, and the next day, the 28th. So those are days where -- and I will tell the jurors that.

MS. DUARTE: Your Honor, if I may.

THE COURT: Yes.

MS. DUARTE: Along the same lines, I can't find it right now, but I know the Court has a sheet that it attaches where it asks the parties to --

THE COURT: Trial witness estimate.

MS. DUARTE: Trial witness estimate. Is the Court requiring that in this case?

THE COURT: Yes, I'd like to see it. You don't have to get the cross-examination from Mr. Sutcliffe.

MS. DUARTE: I'll do my estimate, Your Honor. I still think we can do it in five court days because a number of

the witnesses are fairly brief.

THE COURT: Good. If we do it faster, fine. We'll see what happens. I don't want to have jurors told they're going to be gone in six days when that's not going to be likely at all.

Okay. Here are rulings, including on the motion for reconsideration, that need to be made at this hearing. I already issued a minute order reflecting rulings on motions in limine that were made a long time ago. I'm not going to reiterate what's in that ruling, but there was a notice of ruling that was filed on January 13, 2003.

In connection with proceedings that occurred at that time, there was discussion, colloquy and argument about other areas of inquiry that were informally referred to in that notice of ruling. So these are additional rulings supplementing my prior written rulings relating to motions in limine.

First, no party may inquire about any witness's current employment, where that person works. You can inquire what kind of position they have, what kind of occupation or profession, but not who the employer is unless you establish, based upon a showing of relevance and that probative value of knowing exactly who the employer is exceeds the risk of prejudice or confusion or waste of time, that such an answer is important. And it would be highly unlikely that I would say it

would be. So nobody is to inquire about where a particular witness works unless it's a law enforcement agent. Anybody can inquire about that.

Nobody is to ask any inquiries about any witness's children, whether they have any, how many, what their names are, what their ages are.

Nobody is to ask for any kind of personal information that has no bearing. And this is true in trials generally, so these aren't unique rulings, but I'm making it specifically clear.

Deliberate or persistent failure to abide by those restrictions would constitute disruptive behavior.

No party may elicit evidence and ask questions about business developments at Global Crossing that go beyond the story, whatever it will consist of, that unfolds about Mr. Sutcliffe's relationship with Global Crossing. And that specifically involves matters that affected him or that he got involved in, specifically to the extent that there may have been investigations of other Global Crossing employees for actual or apparent misconduct on the job, viewing pornography, engaging in sexual harassment, or anything else like that. That is not a basis of inquiry that I will permit. It would not provide impeachment value unless it were established and I ruled in advance that it could prove motive or bias on the part of that witness against the party in this case.

There have been a lot of rulings by other judges, and by me, for that matter, on issues before the trial including bail and detention, findings that were made, findings that were changed, findings about competency. Nobody is to inquire about any of those. That's off limits.

Now in your motion for reconsideration, Mr. Sutcliffe, I read the motion, I'm not sure exactly what relief you're asking for. If you want to tell me pithily, I'll give you that opportunity now.

THE DEFENDANT: Could you point to me exactly what you're referring to as far as the motion for -- I asked you in a letter to reconsider the four previous motions that were filed February 4.

THE COURT: I ruled on those. I set out an order on those. Those have been denied.

THE DEFENDANT: I'd like clarification on the second ruling, which you stated on page -- on October 28, the Court denied defense motion. On the second page, line 22 through 26, you said that "The Court has gone to extraordinary lengths to assure that all the evidence Defendant's previous lawyer obtained is made available to Defendant, and the Court is satisfied that such evidence has indeed been made available."

Can this Court please point me to any declaration under penalty of perjury from any lawyer that is signed stating that they have delivered and they are assured that all of the

evidence has been turned over to me.

THE COURT: That's an inappropriate question to ask. That's clarification --

THE DEFENDANT: Is that --

THE COURT: -- that isn't necessary. Don't interrupt. That's a no-no. I'm not going to be providing clarification about statements, particularly ones in writing, that I made previously. You may either not understand or not agree with what I've said, but that doesn't give you a right to have me go back and try to persuade you. These are rulings I've made. These are not arguments and they're not debates.

When you make a motion for reconsideration, as you did a different motion, then you have a right to a ruling on that. And that's what I was turning to. But I'm not going to start going over ground that I previously considered and resolved. So don't go down that path.

Now in your motion for reconsideration, the one that I was referring to that I thought you were asking about before says, "Motion for reconsideration," and underneath it it says, "Motion to dismiss counts 1 through 4 as vague and overbroad as a matter of law. Memorandum of law attached exhibits."

That's a document that was filed on or about November 3, I think. I could be wrong about the date. It had various attachments, Exhibits A through F.

If you want to tell me in a very pithy, meaning get

right to the point, fashion what is it that you are seeking in the way of relief, I'll give you a brief opportunity to do so.

THE DEFENDANT: Yes. Thank you, Your Honor.

I'm looking to dismiss counts 1 through 4 as being unconstitutional on their face based on this law that was passed in 1934. Its application in today's day and age is, I believe, unconstitutional in that it fails to assert specific intent, which leads naturally to a difference in application. It fails to give adequate notice to people concerning the conduct that the statute prescribes.

It's so overbroad that the chilling effect it can have upon speech -- and I can speak firsthand as to that chilling effect because I am about as cold as you can get now. I don't speak unless I preface or end my sentences with, figuratively speaking, of course, anymore.

But in that document I've given examples as to people whose very behavior, very words could technically be arrested for their speech under this vague and overbroad law. And I would respectfully ask the Court to give that some serious consideration and consider dismissing counts 1 through 4 based on that that law is unconstitutional on its face due to the overbreathe and chilling effect it poses to the people of this country.

THE COURT: Okay. I have given it careful thought and I gave it careful thought early on, and I think it was in

early 2003. In fact, the minute order that I referred to -- not the minute order. The notice of ruling. No. It's a different order. Let me find it.

There was a minute order that was filed on December 4, 2000, which in writing denied the motion to dismiss counts 1 through 4 that had been made at the time. That was based on -- the caption said, "Selective Prosecution." And thereafter, the argument -- I'm not sure if it was on that day or not -- got to the issue of vagueness and First Amendment overbreathe.

We had, as I recall -- "we" meaning the parties. And at the time Mr. Sutcliffe was represented by Mr. Harris -- an extensive colloquy about the constitutionality of that provision as applied to facts alleged in this indictment. And I read a lot of cases then. I read them again. The Planned Parenthood case makes it clear that there is no constitutional infirmity in 875(C). The facts of this case will warrant a prosecution. The Government will have to prove the specific intent required under the statute.

Speech does not -- protected speech does not encompass threatening speech. And if it's used in the facilities of interstate commerce, as the Internet is, such threatening speech can violate the law.

The motion for reconsideration is denied. And I think that's all that needs to be said about that.

Now you did ask for a change or some kind of clarification in one of the documents, I think the limiting instruction about killercop.com, and I said we'll talk about that later. You may be heard.

THE DEFENDANT: Thank you, Your Honor.

Before we get there, I also have a motion to dismiss counts 1 through 9 for lack of jurisdiction. Has the Court received that? Is the Court ready to rule on that?

THE COURT: I'm not sure when you filed that one.

THE DEFENDANT: That was filed at the same time or shortly thereafter. It should have been.

THE COURT: What's your theory that I lack jurisdiction?

THE DEFENDANT: Not you, personally, Your Honor. Basically, I have a document here, if the Court would like to examine or make copies for the Government. I believe it was filed.

THE COURT: Take the copy.

THE DEFENDANT: The theory is that this Court -- the Government lacks jurisdiction as a matter of law in that the Government, under the Commerce Laws, Article 1, I believe it's clause A, section 3, has to show interstate movement, at the minimal, to suffice jurisdiction over the accused. I don't believe the Government can prove that and I demand that the Government have to prove that before they try me.

THE COURT: Your demand that the Government have to prove that is granted. The Government will have to prove that the facilities of interstate commerce were used in connection with the conduct alleged in the indictment. If it proves that, there's no jurisdictional barrier to an otherwise valid conviction.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: Let's talk about the killercop.com instruction. What's your objection to that?

THE DEFENDANT: I received a letter from the Government dated November 4, signed by Elena Duarte. In there she says, under three sections -- in the second section, she says, "Enclosed please find the following: Five packets of material recently provided by the LAPD containing downloads of and information for the killercop.com website. The Government is not planning on using any of this material at trial. I think that this material is contained on the CD marked "Killercop" already in your possession. Nevertheless, as printouts were given to me, I'm passing on copies to you."

These are what was represented to be from killercop.com.

THE COURT: Let the record reflect there that Mr. Sutcliffe is holding onto a --

THE DEFENDANT: I have no objections. And in fact --

THE COURT: Don't interrupt me.

THE DEFENDANT: I'm sorry.

THE COURT: I'm making a record favorable to you. Now don't interrupt me.

Mr. Sutcliffe was displaying in his hand a sheaf of papers.

Now continue, Mr. Sutcliffe.

THE DEFENDANT: Thank you, Your Honor. I wasn't intending to interrupt you. I thought you had stop speaking.

I would like these documents marked as exhibits and entered as defense.

I further would like the Court to take a good hard look at the amount of Brady material -- Brady violations that's been conducted by the Government in these drips and dribbles of things that are coming in and are not coming in, specifically requested by the defense from the Government.

I objected to the wording of the jury instructions that you're putting on there. I don't see the relevance of instructing other than -- only for the fact to show that the Defendant can create a website. I'll stipulate that I can create a real good website. I'll even demonstrate it for the jury. I'll give them ABC's on how to create a website.

THE COURT: Okay. You've raised different issues.

First of all, I'm not going to mark as an exhibit the pieces of paper that you referred to, but you can offer them as evidence, if you want, at the trial, and if they're otherwise

admissible, your motion will be granted and they'll be received into evidence. If you think that they're helpful to your defense, that should be what you do.

On the so-called Brady violations, I'm not aware of any evidence establishing that the Government has failed to carry out its constitutional obligations under Brady. I don't know if that was a motion for dismissal based upon that theory, but if it was, I deny it.

On relevance and the limiting instructions on killercop.com, this was something that was touched on a long time ago in an earlier hearing. This limiting instruction I will use, although I'm willing to consider slight variations of the language if somebody establishes it would improve it.

I'm going to use this instruction if and only if and only when there is reference to killercop.com. The minute that evidence and inquiry is raised is when I will give this limiting instruction to the jury. I have already found that evidence relating to the Defendant's involvement in killercop.com is relevant and can be introduced, but only for limited purposes. This limiting instruction is designed to make it clear to the jury what those limited purposes are.

Do you have any response to the limiting instruction, Ms. Duarte?

MS. DUARTE: No, Your Honor.

THE COURT: Now what in the limiting instruction --

assuming that I denied, and I have denied, your anticipatory motion to exclude that evidence -- I'm telling you now I'm not going to exclude it, but I am going to limit its use and purpose. With that guidance that I now just reiterated, is there some objection you have to the particular language here?

THE DEFENDANT: No, but I'm concerned about your saying that you're going to limit it.

THE COURT: When the jury receives information about killercop.com, they're going to be told what I wrote down here that I gave to you. They're going to be reminded about that in a general way when they're instructed at the end of the case, that if evidence was admitted for a limited purpose only, it can be used only for that purpose. They can't consider whatever the evidence may show about your involvement with killercop.com to reach some conclusion that you were inclined -- that is what the propensity means -- to commit a crime. They can consider it for other reasons. That's what this says. That's what's going to happen.

THE DEFENDANT: Thank you, Your Honor.

I'd like to make at this time, Your Honor, a motion to dismiss for Brady violations. I've also -- in that letter I just read to the Court from the Government, I was provided, in the first paragraph, two additional documents entitled "Probation Reports" redacted as to personal information regarding the Hall conviction.

I'd also like to make, at this time, a motion to dismiss counts 1 through 4 for grand jury misconduct and outrageous Government misconduct. If the Court would like to hear from that.

THE COURT: No. I think I understand the basis that you make the motion and the theory that supports it. I deny both motions.

THE DEFENDANT: Can you articulate why, Your Honor.

THE COURT: They lack support, factual support, evidentiary support, and they lack merit.

THE DEFENDANT: May I be heard on it?

THE COURT: That's my reason for denying.

THE DEFENDANT: May I be heard on the second motion?

THE COURT: Which one?

THE DEFENDANT: The motion to dismiss counts 1 through 4 for grand jury misconduct.

THE COURT: Grand jury misconduct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: What's your theory?

THE DEFENDANT: Grand jury misconduct and/or outrageous Government misconduct, prosecutorial misconduct, however you want to phrase it, Government misconduct.

THE COURT: What's your theory for that?

THE DEFENDANT: My theory, Your Honor, is that the first year I was incarcerated, everybody was proceeding under a

general intent crime. The Government finally superseded the indictment when the defense raised up that this was not a general intent crime, this was a specific intent crime. The Government, on that theory, then, went back to the grand jury and was supposed to apprise them that this was no longer a general intent, but a specific intent crime.

I have read the transcript of the hearing of the superseding indictment, and it failed to note any mention of anyone informing the grand jury that this was all of a sudden a specific intent crime. Therefore -- I believe that the Fifth Amendment requires that defendant be convicted only on a charge considered by the grand jury. And I would cite U.S. versus Dubo -- that's spelled D-u-b-o -- 186 F. 3d, 1177, 1179, which is a Ninth Circuit case in 1999 holding that indictments failure to specify mens rea require dismissal, the requirement insuring that defendant is prosecuted, quote, "on the basis of the facts presented to the grand jury." And I would cite U.S. versus Rosi, R-o-s-i, 27 F. 3d, 409, at page 414, which is, again, a Ninth Circuit.

I don't believe the grand jury was ever told that this was a specific intent crime. At least I didn't see it in the transcript.

THE COURT: Okay. I haven't read the transcript, but I can tell you that the motion lacks merit. The superseding indictment contains, as part of its language, the necessary

allegation -- whether it can be proven or not, we'll see -- of mens rea, which addresses that case you talked about.

Do you want to be heard about the rest of what Mr. Sutcliffe said?

MS. DUARTE: We oppose the motion, Your Honor. As to the rest of what he said -- I'm sorry. Regarding?

THE COURT: His theory that you had a duty to specifically say something about --

MS. DUARTE: I don't have the transcript in front of me, but I don't recognize and am not aware of the legal duty he's talking about. Generally I read the statute and the elements to the grand jury. I then present the indictment. So they had it from several sources that that was the requirement.

THE COURT: I have considered and I reject that motion, as well, both motions, Mr. Sutcliffe.

Now I think the one remaining thing that was reverted to before but we haven't explicitly established is something that we may have to play by ear, which is whether, and if so, how to conduct sidebar conferences.

The only way I would consider conducting a sidebar conference is if somebody requests one and I conclude, under the context of the circumstances, that one would be warranted. We will not be conducting sidebar conferences the way I usually do, which is to invite those participating in the conference to get up from where they're sitting and join me on the side of

the courtroom in the presence of the court reporter. Instead, the conferences would either have to be done right at defense table, assuming that we just kept the jury in the box, so that the court reporter would move over to where Mr. Sutcliffe will be sitting and we would conduct the sidebar conference there, or we'll have to excuse the jury.

More likely than not, if I really thought that a sidebar was warranted, I would excuse the jury. If I thought that warnings and admonitions relating to the issue, which I hope will not surface, of disruptive behavior was warranted, I would probably dismiss the jurors, as well.

So I'm not making a final determination as to whether I would ever, in the presence of the jury, permit sidebar conferences and if so where and under what circumstances, but I'm telling you both that I'm disinclined to do it. So be very, very measured in wondering to yourself whether you should even ask for one.

Is there any issue that I haven't covered in this lengthy hearing with all the items on the agenda that either side wants to raise before we adjourn?

Ms. Duarte?

MS. DUARTE: No, Your Honor.

THE COURT: Mr. Sutcliffe.

THE DEFENDANT: Thank you, Your Honor. Yes, there is.

First off, let's talk about the jurisdictional challenge. When will that be heard on? I assume prior to trial beginning.

THE COURT: The jurisdictional motion has been denied. It's not going to be heard.

THE DEFENDANT: You denied it?

THE COURT: I denied it.

THE DEFENDANT: Based on what law, authority?

THE COURT: The motion lacks merit, Mr. Sutcliffe. I already told you. If the Government establishes that the facilities of interstate commerce were used, the jurisdictional element has been established and your rights have been protected. Now I'm not going to go over that ground a third time.

What else do you want to raise?

THE DEFENDANT: I have six to seven large boxes of discovery in my cell. I'll require the Court to order the DOP to assist in carrying those boxes down into this courthouse in a timely fashion so it's all here. I won't be able to do that because I'll be handcuffed. I'd like the Court to please make sure that that's taken care of.

Also --

THE COURT: Are you asking that the boxes be brought to the courtroom before the start of the first day and then just kept here thereafter?

THE DEFENDANT: I don't know if I feel comfortable leaving them here. It's a lot of my defense and a lot of my personal notes on individual witnesses and legal discovery.

THE COURT: I'll tell you, Mr. Sutcliffe, I'm not going to order anybody to lug it here and lug it back on a daily basis. That's out of the question. I have gone to extraordinary steps to make available to you a duplicate set of the evidence that I understand the Government will be relying on, and we've gone over that ground.

If you want to have these other items, whatever they may consist of, I will require that they be brought over at the start of the first day of trial. And your concern about whether other people are going to rifle through those boxes and see something they're not entitled to, I understand why you have the concern. I don't fault you for expressing it. But it's not going to happen. You don't have to worry about it. Those will be available to you and only to you unless you ask Mr. Reed, and I agree, that Mr. Reed look at it as well. They'll be right near you. Tell me whether you want that done.

THE DEFENDANT: Yes, I want that done.

THE COURT: Okay. I'm issuing an order. I understand that Amy Standifer is here.

MS. STANDIFER: Yes, I am, Your Honor.

THE COURT: You work with the MDC. And you have been cooperative and professional thus far. Will you arrange to be

sure that come Wednesday morning, not later than 8:00, those boxes are brought over here.

MS. STANDIFER: Yes, Your Honor.

THE COURT: Thank you.

THE DEFENDANT: Your Honor, I object to that. I already accused this woman of perjury. I filed a letter to the AUSA requesting, under Title 18, Section 3232(A), that an investigation be opened up into her alleged perjury in front of this Court, as well as an investigation into obstruction of justice by the other legal staff member of the BOP.

So I don't trust -- and that's not paranoid. I don't trust the BOP to handle my property, especially now in light of the fact that another SCSI drive has turned up stolen, lost, missing, whatever. I object strenuously on that.

THE COURT: Okay. Your objection is noted and denied.

BOP is ordered, and Ms. Standifer will communicate and see to it that it's implemented, the order, so the boxes will be here.

You are ordered to cooperate. If you don't agree to turn over to the people who are designated to lug these boxes over here, those boxes, then you'll have no basis to object to their absence. So it's going to be your choice. Your concern about issues of perjury, I don't respond to. I don't conduct investigations. I'm not going to evaluate those. That's the

way it's going to be. Boxes will be here provided you cooperate in turning them over.

What's next on your agenda, Mr. Sutcliffe?

THE DEFENDANT: When does the Court want me to turn those over?

THE COURT: You should probably turn them over on Tuesday afternoon so you have use of them between now and the start of trial.

THE DEFENDANT: Will the Court ask or order the BOP to provide fresh boxes which can be taped up? Mine can't be taped up. They're just big boxes. I'd feel much safer if they were packed and taped.

THE COURT: Fine. They'll be packed and taped. They'll be kept physically secure.

What's next, Mr. Sutcliffe?

THE DEFENDANT: I notice the Court keeps saying it's gone to extraordinary lengths to show all the evidence is in my hands. In your motion where you denied order requiring me the production of audio tapes, you again stated that you've gone to extraordinary lengths to show that all the evidence has been provided to me and that you're satisfied that such evidence has indeed been available. Then you went on to say, "Indeed, on October 23, 2003, Defendant sent a letter to the Court confirming that he had recently received four audio tapes from one of his prior lawyer's paralegal."

Well, I would point the Court back to that letter and I would again tell the Court that I am not in possession of all my discovery, that I did not receive the four audio tapes, and I did notify the Court in that letter on October 23 that the Court is referring to where in that letter that was sent to me from Sara Ritz, it says, "I unfortunately have received --" This is her speaking. "Dear Steven, I have unfortunately received the tapes and other information that we discussed." And she goes on to say, "I just wanted you to know I tried to get the tapes to you as you have requested for quite some time. I will see if there is any way to get the information to you through the MDC channels."

So with all due respect, Your Honor, the Court is incorrect. And that it would be so satisfied so quickly to waive away my rights under Brady, under due process, you know, it really upsets me, Your Honor.

THE COURT: Okay. Well, I understand your position and it's noted.

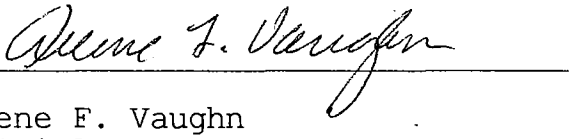
Anything else, Mr. Sutcliffe?

THE DEFENDANT: No, Your Honor.

THE COURT: We're adjourned. We'll see you on Wednesday morning.

(Proceedings concluded at 12:13 p.m.)

I certify that the foregoing is a true and correct transcript of the stenographically recorded proceedings in the above-entitled matter.



August 18, 2004

Arlene F. Vaughn
Official Reporter