No. 04-50189
DC NO. CR 02-350-(A)AHM
(Central District of California)

IN THE UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellee, vs. STEVEN WILLIAM SUTCLIFFE, Defendant/Appellant.	**PETITION FOR RECONSIDERATION** FRAP 27-10; FRCP 60, Due Process Clause of the Fifth Amendment. Declaration; Exhibits.

Comes Now the Appellant to request the court reconsider its previous decision in this case. The petition to reconsider is based upon law and facts that were either not previously raised by appellate counsel (no longer on the case), or which were raised but improperly framed or examined, or facts that were not raised at the time but could have altered the outcome of the decision had they been reviewed.

INTRODUCTION

Appellant Sutcliffe asserts that numerous due process violations occurred in this case, and that those violations separately and cumulatively led ultimately to the negative OPINION against him in this Court. Appellant further argues that his appellate counsel (Sung Park) failed to raise these due process violations, inter alia, properly, and these failures led to an adverse OPINION by this court. Appellant respectfully requests that the court rehear and reconsider the OPINION.

I. DUE PROCESS VIOLATIONS REGARDING THE DESIGNATION OF THE CASE AS 'COMPLEX'

Sutcliffe's right to Due Process was violated in connection with the treatment of this case as 'complex'. The record is confused [1] on the designation of complexity and this confusion reflects the violation of rights and due process. Early in the case it was designated as a complex computer case, but not in accordance with the legal procedure required by law.

1. On May 16, 2002, (docket 23) "A stipulation and order was filed by the Judge to continue the trial date and exclude time until September 3, 2002" This stipulation listed as reason number 1 that this case was a 'complex' computer case.
2. Reference to the designation of the case as 'complex' can also be found in **Exhibit 1**, attached hereto, filed by Debra W. Yang, on August 27, 2003.
3. It is essential to understand that the designation of the case as a "complex computer case" after initial arraignment is what allowed time to be waived even though Sutcliffe never agreed to waived time. Moreover, the specific stipulation as to the complexity by the prosecutor and the Public Defender's office and judge constituted a specific finding. "We do not count continuances granted by the district court where it made no specific findings supporting a general mantra[s] of 'complexity'." (US v. Aviles, 170 F.3d 863, 869 (9th Cir.1998)).
4. Thus, there is a clear distinction between a 'complex' case as defined by law, and a regularly

[1] "all this is very technical – I *tried* very hard to follow what you were doing. *I don't think the jury could follow it."* Trial Transcript, 11.17.2003. Judge Alvin Howard Matz, Page 809, lines 12-20

(non-legally defined) complex (or complicated). Only the actual and lawful designation of a case as legally 'complex' can be sufficient for waiving time when the Defendant does not agree to waive time. In order to waive time and justify experts, the court must follow the procedures for designating a case as complex, and *then must manage the case accordingly* – neither of which was done. Therefore, in essence, the court used the 'excuse' of complexity to waive time but failed to adhere strictly to the process, rules and laws governing complex cases.

5. To establish the fact that the case was, in fact, being treated as complex despite the failure of the prosecutor to file the required notice can be found in the transcript of September 26, 2003, on page 31 (This transcript is attached as **Exhibit 2,** hereto):
6. Ms. Duarte's comment, along with the stipulation in the record from May 16, 2002, together provide solid evidence that the court was, in fact treating this case as legally 'complex' for certain purposes.
7. Additionally, the record reflects in numerous locations that experts were ordered for the defense's case. Had the court not designated the case as complex, no experts would have been ordered at state expense. References to these experts can be found most readily in the record from September 26, 2003:
   a. "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… 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." See transcript of September 26, 2003, page 20.

8. The Manual for Complex Litigation (2004 Edition) specifies the responsibility of the court to supervise counsel: "**Fair** and **efficient** resolution of **complex litigation** required that the court exercise early and effective supervision (and where necessary, control), that counsel act cooperatively and professionally, and that the judge and counsel collaborate to develop and carry out a comprehensive plan for the conduct of pretrial and trial proceedings." Additionally, the Manual further specifies the specific duties the Judge should

perform in order to exercise **effective** management of a **complex case**:

> "Effective judicial management generally has the following characteristics:
> • *It is active.* The judge anticipates problems before they arise rather than waiting passively for counsel to present them. Because the attorneys may become immersed in the details of the case, innovation and creativity in formulating a litigation plan frequently will depend on the judge.
> • *It is substantive.* The judge becomes familiar at an early stage with the substantive issues in order to make informed rulings on issue definition and narrowing, and on related matters, such as scheduling, bifurcation and consolidation, and discovery control.
> • *It is timely.* The judge decides disputes promptly, particularly those that may substantively affect the course or scope of further proceedings. Delayed rulings may be costly and burdensome for litigants and will often delay other litigation events. The parties may prefer that a ruling be timely rather than perfect.
> • *It is continuing.* The judge periodically monitors the progress of the litigation to see that schedules are being followed and to consider necessary modifications of the litigation plan. Interim reports may be ordered between scheduled conferences.
> • *It is firm, but fair.* Time limits and other controls and requirements are not imposed arbitrarily or without considering the views of counsel, and they are revised when warranted. Once established, however, schedules are met, and, when necessary, appropriate sanctions are imposed (see section 10.15) for derelictions and dilatory tactics.
> • *It is careful.* An early display of careful preparation sets the proper tone and enhances the court's credibility and effectiveness with counsel.
> The judge's role is crucial in developing and monitoring an effective plan for the orderly conduct of pretrial and trial proceedings."
> (See Manual for Complex Litigation, 4th, pages 12-13).

9. By the time this case had been on track for over a year, and with trial only weeks away, Judge Matz *had no idea what was going on relating to the experts he had appointed*; clearly his supervision of this case was lacking, as reflected in the record from September 26, 2003:

> **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.**" (See transcript of proceedings from September 23, 2006, page 21.)

10. The fact is that experts were not only ordered, but the original Public Defender's office had not only found and secured one (paid $5000), but that expert had analyzed over 1000 pages of data and knew the material quite well and was ready to testify. Mysteriously, none of that information was forwarded to Sutcliffe, to subsequent counsel, or made its way

into the record or trial.[2] Judge Matz was completely ignorant of what had taken place, and under no circumstances could a reasonable person conclude that he was managing any aspect of this 'complex computer case' or the counsel and experts appointed to defend Sutcliffe.

11. Surprisingly, also on September 26, 2003, Judge Matz directly contradicted the stipulation of complexity made on May 16, 2002 in order to reassure newly appointed counsel Reed that he would be prepared for trial on time.

    "THE COURT: … 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 is *pretty* straightforward and clear. So I think without prejudicing 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." See transcript of proceedings from September 26, 2003, page 74.

12. Nothing in the case had changed since May 16, 2002, when all agreed the case was, in fact, complex, but here on September 26, 2003, Judge Matz changed that determination unilaterally to persuade Mr. Reed to accept appointment as counsel and to handle the trial, *which at that point was very close at hand*. The Court's characterization of the case as uncomplicated was not truthful, and was a manipulation to secure Reed's appointment. As Reed later found out, the case had become more complicated because of the amount of time that had gone by, not to mention that several items of discovery evidence and reports and all the expert analysis had become lost or stolen [3] during that time as well, further complicating the ability to mount an adequate defense. Reed was bushwhacked. And the district court admittedly knew it.[4]

---

[2] See Nicolaysen's declaration attached to 'Ex Parte Application by Defendant Steven William Sutcliffe for Order Appointing Computer Expert Under Criminal Justice Act, dated March 24, 2003, page 4.

[3] See **Exhibit 3**, attached hereto.

[4] "[REED,] 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. 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**

13. Judge Matz failed to adhere or just ignored to due process requirements:
    a. *Comprehensive Plan*: there was no comprehensive plan created or followed; the record reflects no such plan.
    b. *Effective Supervision*: Judge Matz did not supervise or control counsel properly; numerous problems were reported with evidence, discovery, communications and experts, but only after months of delays was any order issued to correct and even then the corrections were inadequate.
    c. *Active*: Judge Matz was not active but passive, waiting for problems to arise before dealing with them.
    d. *Timely*: Judge Matz failed to rule timely on issues that affected further proceedings (see sections two and three of this document relating to the right to proceed Sui Juris and competency proceedings).[5]
    e. *Continuing*: Judge Matz failed to stay appraised of the progress of the case except when the case was calendared; no interim supervision was exercised.
    f. *Firm but Fair*: Judge Matz failed to hold previous counsel accountable for their failure to procure experts, obtain and turn over evidence and discovery or even to file the required complex notice in the record. Time limits were not honored but extended and waived despite the objections of Sutcliffe.
    g. *Careful*: Judge Matz' failure to follow the law on the 'complex' designation and management of this case, particularly regarding counsel, evidence and experts, demonstrates a clear lack of care on his part.

ALONE AND WAIVE HIS RIGHT TO A LAWYER. " Yet, Matz also claimed before this previous statement: "SO A **PRUDENT THING TO DO FOR SOMEBODY IN YOUR SITUATION** [SUTCLIFFE] **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**." Page 54. Ibid. Appellant wonders where this constitutional attitude was on January 14, 2003?

[5] See "Defendant's Motion for Court to Reconsider Orders of 8/27/03" filed September 4, 2003. This motion contained specific objections to the fact that Judge Matz improperly delayed hearing Sutcliffe's motion to relieve Nicolaysen for months while Nicolaysen continued to act as counsel despite Sutcliffe's objections, AND then hearing Nicolaysen's motion to be relieved before hearing Sutcliffe's motion to relieve him; this course of action effectively allowed Nicolaysen to blame Sutcliffe for the problems with the attorney/client relationship and prevent Sutcliffe from registering his factually-based complaints about Nicolaysen into the record. Altogether this series of improper actions by the Judge allowed him to later declare that Sutcliffe, by his actions, had waived his right to counsel.

14. Among the legal requirements are that the US attorney is required to file a "Notice to Court of Complex Criminal Case'. This requirement can be found in General Order No. 07-02. A sample of this required notice is attached as **Exhibit 4,** attached hereto. The law and the notice itself specify that the form be filed no later than two business days *prior* to the time of arraignment. This Notice was never filed at any time, despite the fact that there were two arraignments, and therefore *two opportunities to meet the requirement and procedural process*. **Exhibit 5,** attached hereto.
15. The court failed to adhere to legal requirements and procedure and the result was that the case was only *partially* treated as complex. For purposes of waiving time the case was treated as complex, but for purposes of expert witnesses, judicial management and appointment of appropriate counsel for the defendant, it was not. This was another substantive violation of the Due Process Clause.
16. Experts were ordered but there was no follow through, no reports, no investigations made. At trial, the Defense had no expert except for cross-examination of the government's expert, which of course is by nature prejudicial to the defense.
    a. Over a year after the designation as complex, still no expert reports or witness testimony had been obtained for the defense. All of the attorneys assigned to Sutcliffe failed to follow the court's instructions to provide a proper defense in this regard.[6]
    b. Counsel Reed went so far as to attempt to justify the complete failure of all defense counsels to procure the experts on September 26, 2003:

> "REED: And that's why I didn't go through with the expert - -
> THE COURT: That's why what?
> REED: That's why he didn't go through with actually following through, getting the experts, having them come testify; he [Nicolaysen] felt that he had sufficient information with that CD—ROM to accomplish what he needed through cross-examination of (government) witnesses and other means." (See

[6] This established fact contributes to Sutcliffe's continual assertions that his appointed counsel was incompetent and/or ineffective.

transcript of proceedings from September 26, 2003, page 38)

c. The above statement by counsel Reed is astonishing; it is unfathomable that a competent defense counsel would rely for his 'expert' witness (required by law in a complex case) on information provided alone by the expert for the adversary, thereby precluding cross-examination.[7]

Thus in summary on this argument we are dealing with two options, both of which result in reversible error to the case: Either the case WAS complex or it WAS NOT.

If the case WAS complex,[8] then the court erred by

a) Ensuring the U.S. Attorney's office filed the proper notice required by law,
b) Failing to ensure experts for the defense were secured and managed,
c) Failing to ensure each appointed attorney was competent to handle the complex issues of the case
d) Failing to properly manage a complex case resulting in lost reports, files and witnesses for the defense.
e) Deciding unilaterally on September 26, 2003 that the case was suddenly no longer complex so as to commandeer the last-minute cooperation through a bushwhacking of Mr. Reed.

If the case WAS NOT complex, then the court and U.S. Attorney erred by

a) Waiving time improperly, violating Sutcliffe's Speedy Trial rights under the Due Process Clause; and,

---

[7] Later herein we will show that Nicolaysen actually threatened Sutcliffe that he would cause him to lose the case if Sutcliffe made him look bad, go to court or otherwise did not do as he was told. Nicolaysen's failure to procure the experts as ordered can be construed to be related to this threat. Nicolaysen's declaration attached to 'Ex Parte Application by Defendant Steven William Sutcliffe for Order Appointing Computer Expert Under Criminal Justice Act, dated March 24, 2003, page 4, clearly states experts were hired and performed work but none of that work ever made it to the defendant or to the trial. Please see **Exhibit 6,** attached hereto of Transcript of 09.26.2003, Pg. 20.

[8] First-Degree Murder trials, with one or more victims, have been brought to trial faster then this case was in the district court. "Three measures of processing time were taken from the day of the murder--to arrest, to indictment, and to final disposition. Most spouse murder defendants were arrested on the same day the killing occurred.
Average time to indictment was 4 months. Average time to final disposition was almost exactly 1 year. For husbands tried by a jury, 12 1/2 months was the average elapsed time from the day of the murder to the conclusion of the jury trial. For wives tried by a jury it was significantly longer, about 18 1/2 months." Source: U.S. Department of Justice. See http://www.ojp.usdoj.gov/bjs/pub/ascii/spousmur.txt

b) Appropriating funds for the government for experts when such was not required
c) Misrepresenting the complexity of the case to all the parties and then filing six "ends of justice" extensions for waivers of time.[9]

II. DUE PROCESS VIOLATIONS REGARDING RIGHT TO PROCEED SUI JURIS

The first noteworthy event to take place pertinent to the Sixth Amendment right to counsel is that the Public Defender's office assigned to Sutcliffe moved to withdraw from the case. Sutcliffe in fact objected to them withdrawing, citing the fact that it would cause an unreasonable delay in trial.

Why did they withdraw? They refused to enter their reasons on the record, but the Appellant avers their reason was related to two facts:

a) that the Public Defender's office at the time supported a bill,[10] which proposed abridging Sutcliffe's speech on the internet based on speech found on a website www.killercop.com,[11] previously owned and operated by Mr. Sutcliffe; and,
b) that the Public Defender's office had some role in the police activity which resulted in the removal of www.killercop.com from the internet. See **Exhibit 27**, attached hereto.

The withdrawal not only of the individual Public Defender, but also of the entire office, for the entire district is extremely unusual, and created immediately an undue burden upon the Defendant. This is relevant because it establishes a pattern of behavior on the part of the Public Defenders office that they refused to aid Mr. Sutcliffe because of his political beliefs and speech. If this 'conflict' extended to every attorney in the Public Defender's office for the

---

[9] "Congress did not intend the 'ends of justice' exclusion … to be granted as a matter of course but rather to be used **sparingly** and **only when necessary**." U.S. v. Ramirez-Cortez, 213 F.3d 1149, 1155 (9th Cir. 2000) Speedy Trial Act imposes strict specificity requirements for '**ends of justice**' exception; if district court fails to comply with them, period of time covered by continuance will not constitute excludable delay." U.S. v. Lloyd, 125 F.3d 1263 (9th Cir. 1997)

[10] See **Exhibit 7**, attached hereto.

[11] "The behavior that neither resulted in a conviction nor even an arrest but that was facially unlawful, and in any event a very chilling indication of the consideration as to how likely it is that he would commit further crimes is that he undoubtedly and indisputably set up this killercop.com website." Sentencing Transcript, 04.15.2004, Page. 25.

entire district, *why should the defendant believe it will not also extend to those attorney's appointed through the Public Defenders office*, or at the least, that the Public Defender's office would choose the most inappropriate attorney possible for Sutcliffe to ensure his conviction. Indeed, the facts confirmed Sutcliffe's fears. The next attorney "dragged" into the case,[12] Harris, was completely and utterly computer illiterate and didn't even know what a hard drive was. This improper appointment was IN SPITE of the fact that the court designated the case complex because of computer issues and ordered experts be assigned. **Yet, Sutcliffe was blamed for firing Harris.**

Sutcliffe's motion to relieve counsel Harris was filed and heard on January 14, 2003. Focusing only on the issue of relieving counsel, Sutcliffe's demand was clear that he wanted to "stand Sui Juris, without counsel, and under the foregoing conditions, only the Accused may speak for the Accused," if the court would not provide him funds to retain an attorney of his choice. See **Exhibit 8,** attached hereto, a copy of the original motion with the relevant statements highlighted. [13]

1. Judge Matz claimed not to understand the paperwork, despite the clear statement regarding Sutcliffe's desire on this matter. "I don't understand your paperwork so you need to tell me what you're asking for" was the Judge's response (see transcript of January 14, 2003, p. 5, 6.).
2. Sutcliffe reiterated multiple times during the January 14th hearing that what he wanted was stated in the paperwork he filed and that he would stand on that paperwork. (see transcript of January 14, 2003, p. 5, 6, 7).
3. When asked if he wanted another lawyer, Sutcliffe replied "That's not what I want." (see transcript of January 14, 2003, p. 16).

[12] See **Exhibit 9**, attached hereto.

[13] The actual title of the motion was "Writ of Mandamus to Compel; Motion to Dismiss counsel for the Ineffective Assistance; Motion to Dismiss for the Lack of the Jurisdiction; Motion to Dismiss for Prosecutorial Misconduct; Motion to Dismiss for the Outrageous Government Conduct; Motion to Dismiss for Violations of the 5th and 6th Amendments of the Bill of the Rights by the Prosecutor, Counsel and Court."; However, the court disregarded everything in the document except for the motion to relieve counsel, so we refer to this motion primarily as a "motion to relieve counsel" for the purposes of this discussion.

It is important to note here that this is where Sutcliffe makes the statement “I want this case dismissed. How many lawyers do I have to go through?” This statement was misinterpreted by the court and counsels to mean that Sutcliffe intended to continually dismiss counsel regardless of their competence, but such was never said or meant; this was an inference that was NOT intended at all. To clarify, Sutcliffe believed at this point, based upon the history to date, that all the attorneys appointed by the Public Defender’s office would be equally incompetent and that the continual appointment of incompetent counsel would only prolong his incarceration. To Sutcliffe, the court asked him “Do you want another incompetent lawyer?” His response was based upon that frame of understanding.

4. Sutcliffe wanted, at all times, competent counsel to be provided for him (therefore it can be understood that he would prefer not to go to trial alone which is supported by his statements during the hearing about not feeling qualified to fight alone), but if the counsel provided was incompetent then Sutcliffe would have no alternative but to proceed without counsel. This was stated clearly in his motion to relieve counsel, when he stated on page 5: “Further, since it is now common knowledge that my court appointed counsel, former and latter, is ineffective, incompetent and/or beholden to my adversary (cite omitted) the Accused *demands* that if this court intends to move forward from this point that this court shall make monies available to the Accused so that he Accused may locate and secure competent counsel… [Or] if this previous request is denied [then I] will stand Sui Juris, without counsel…”
5. In the hearing, after reviewing the facts regarding Harris’ failure to follow instructions from Sutcliffe, and the fact that the court recognized and expressed its concerns about counsel’s competence on November 21, 2002, page 14-15, Sutcliffe reiterated from his motion: “With that I will stand on my paperwork and request that money be provided so I choose competent counsel.” See transcript of January 14, 2003, p. 25.
6. Judge Matz immediately denied that request [transcript of January 14, 2003, p. 25]. It was clearly stated in the motion that in the event that request was denied Sutcliffe would proceed without counsel, but Judge Matz ignored Sutcliffe’s written

statement and instead proceeded to inform Sutcliffe that he would appoint another attorney [transcript of January 14, 2003, p. 25].

7. Sutcliffe believed that he did not need to reiterate his written statement that he would rather have no counsel than an incompetent counsel, and repeatedly said that he stands on his paperwork. The court erroneously construed Sutcliffe's standing on his paperwork to mean that he wanted another attorney appointed.
8. Judge Matz then explained that the trial would be delayed while another attorney was appointed, and when asked if he understood Sutcliffe replied "I understand that I've been prejudiced to an extreme amount by having a new lawyer appointed, against my objection…" [transcript of January 14, 2003, p.30] This would seem to be a quite clear implication that Sutcliffe did not want another (incompetent) attorney appointed.

Further, the District court judge clearly violated this circuit's law [14] on January 14, 2003, when he forced Sutcliffe to choose between incompetent counsel, and none at all.[15] See **Crandall v. Bunnell**, No. 96-56644, (9th Cir.1998). It needs to be stated also that during the hearing of January 14, 2003, it was Sutcliffe's belief that his albeit reluctant decision to proceed without counsel was clearly stated in his Faretta demand and that continual reiteration of it would not make any difference to Judge Matz who was apparently determined to appoint more incompetent counsel. Sutcliffe further made clear his position on the next hearing date of January 17, 2003.

9. Sutcliffe stated his objection to the appointment of Nicolaysen on January 17, 2003, at his first opportunity: "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." See transcript from January 17, 2003, p. 5.
10. Judge Matz ignored him.

[14] Crandell V Brunnell, No. 96-56644, (9th Cir.1998)(Opinion by the Honorable Judge Beezer)

[15] JUDGE: "You have one choice. Meaning, there are two things from which you can choose. It's either Mr. Harris or yourself." SUTCLIFFE: "I will stand on my paperwork." See Transcript of 01.14. 2003, p. 5. *Despite choosing the latter of the unconstitutional choice, the court ignored Sutcliffe's choice.*

11. Sutcliffe offered to proceed with his arraignment [see transcript of January 17, 2003, p. 5](Sui Juris) without inquiring of Sutcliffe's objections. [16]
12. Sutcliffe reiterated again "No man speaks for me unless he can show me his authority that I signed over and delegated him to speak for me."
13. Judge Matz clearly ignored Sutcliffe's refusal to accept Nicolaysen and said, "Mr. Nicolaysen is your lawyer and he's proceeding under the authority of the court."
14. Sutcliffe replied, "No, he's not my lawyer. He's your lawyer. He's not my lawyer. He's your lawyer."
15. Even Mr. Nicolaysen understood Mr. Sutcliffe's demand to dismiss him and accordingly asked "Does your Honor wish us to remain at the counsel table?"[17] The court instructed him to remain.
16. After additional matters were discussed, Sutcliffe again objected, but this objection was again ignored.

Thus, if there was any confusion after January 14, 2003 that Sutcliffe wanted at that moment to proceed Sui Juris under Faretta, it should have been abundantly clear on January 17, 2003. Regardless, the court proceeded anyway without hearing (see fn.17, supra) on motions submitted by Sutcliffe despite the clear refusal of this representation. Moreover, it was foisted counsel's actions that then caused Sutcliffe to be subjected to improper transfer and commitment to another facility for competency evaluation and later treatment. The next section deals with particulars relating to the denial of due process connected with this competency examination.

On March 14, 2003, at the very next opportunity to be heard, Sutcliffe again objected to the appointment of Nicolaysen and made it again clear he refused his [mis]representation. The relevant pages of the transcript of March 14, 2003, are attached hereto as **Exhibit 10**. Nicolaysen was about to begin discussing Sutcliffe's being found competent after the exam by the Doctor, when Sutcliffe objected to his [mis]representation.[18] Sutcliffe believed that Nicolaysen

---

[16] "Due process does not require [a] higher standard, [it] requires a[n] ... inquiry." See Godinez v Moran, 509 U.S. 389 (1993).

[17] See Transcript of January 17, 2003. Ibid.

[18] We must note here that earlier in the morning, prior to the hearing on March 14, 2003, Nicolaysen visited Sutcliffe in the holding cell and threatened him: "…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

was going to negatively affect his case and situation and wished to prevent such damage from occurring.[19] This necessitated that he object immediately.[20]

17. Judge Matz ignored the motions and objections and informed Sutcliffe that if he had one more 'outburst' he would be removed from the courtroom.
18. At this point Judge Matz recognized that Sutcliffe's statements constituted a motion to relieve Nicolaysen as counsel and agreed to rule on it 'later' in the proceeding. See transcript of March 14, 2003, p. 9, "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." He never did rule on it, Judge Matz did not actually rule on the motion on March 14, 2003, or ever.[21] Instead, he allowed Nicolaysen, over Sutcliffe's objections, to question Dr. Backer and manipulate his testimony to support subjecting Sutcliffe to further psychological examinations for an indefinite period of time, and only after that would the Judge consider the motion to relieve counsel. Then, months later on August 27, the judge allowed Nicolaysen's motion to be relieved to be heard and granted it without ever hearing Sutcliffe's motion to relieve Nicolaysen.
19. It should be particularly noteworthy that by denying Sutcliffe's motion to relieve counsel immediately, said counsel proceeded to damage his 'client' and subject him to additional damages. Not only does this offend the sensibilities of an expected client/attorney relationship but also the fact that

---

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." See transcript of proceedings from September 2, 2003, p. 14. This was one key reason why Sutcliffe reacted so negatively to the appointment Nicolaysen as counsel, but the cornerstone reason was that Nicolaysen had told Sutcliffe that he was not ready for trial and that Nicolaysen had failed to procure any experts as required for a 'complex' case, and beyond that Nicolaysen continually told Sutcliffe that he would have to waive time, something that Sutcliffe believed was not in his interests. The transcript of proceedings from September 2, 2003, page 14 is hereto attached as **Exhibit 11**.

[19] To further support Sutcliffe's suspicions, Nicolaysen first had Sutcliffe "removed" from the defense table, then proceeded to attempt to establish Sutcliffe's incompetence, despite the conclusion of Dr. Backer. "Nicolaysen: " I'm not prepared to simply accept, at face value, the conclusion in the report, that my client is competent." See transcript of March 14, 2003, p.11. This resulted in a **6-month delay** of trial.

[20] "Objection. He does not speak for the Accused." See transcript of March 14, 2003, p. 7.

[21] See DEFENDANT'S MOTION FOR COURT TO RECONSIDER ORDERS OF 8/27/03; SPECIFICALLY, ORDER GRANTING GREGORY NICOLAYSEN'S MOTION TO BE RELIEVED; AND ORDER REFUSING TO CONSIDER DEFENDANT'S PREVIOUSLY FILED MOTION TO HAVE NICOLAYSEN REMOVED AS COUNSEL FOR HIS INCOMPETENCE. Filed September 4, 2003.

> this attorney was forced upon him and allowed to take such a damaging course of action against his own client while the client is demanding the attorney be removed is exactly the kind of violation of basic rights which Faretta meant to prevent.

This course of action by Judge Matz was highly improper and prejudicial to Sutcliffe. Permitting Nicolaysen to proceed in any respect or for any period of time as attorney for Sutcliffe was a violation of Sutcliffe's Sixth Amendment rights stated under Faretta v. California, 422 U.S. 806 (1975). Moreover, Sutcliffe's objections were proper, timely and needed to be made at that time of a violation to try to prevent further damage by Nicolaysen. Judge Matz' silencing of Sutcliffe and threatening to remove him for objecting, and then did, denied Sutcliffe the ability to defend himself against what was happening right before his eyes. And continued to happen again and again.

In summary, Sutcliffe stated in writing on January 14, 2003 that he wanted to proceed Sui Juris. On the hearing that day he objected at every turn to the appointment of counsel by or through the Public Defender's office and made it clear that he did not authorize Harris or Nicolaysen to represent him, yet the court refused to grant him Sui Juris status. He objected again on January 17, 2003 and yet again on March 14, 2003. And, as Sutcliffe feared, the actions of his court-appointed counsel did in fact continue to inflict further damage upon Sutcliffe.

It should be clear to this court from the record that Sutcliffe clearly refused representation and should have been allowed to proceed without counsel. Judge Matz denied Sutcliffe this right and forced representation upon Sutcliffe in violation of the Faretta doctrine and the protections of the Sixth Amendment. This denial and course of action by Judge Matz constitutes both substantive and procedural violations of 5th Amendment Due Process Clause and is an automatic reversible error.

III. DUE PROCESS VIOLATIONS AT THE COMPETENCY HEARING

The competency hearing of Steven Sutcliffe was an important error in due process in this case. Here we will show that the entire procedure specified by law for the conducting of such an inquiry was not followed properly, or at all in its essential respects to protect the rights of the defendant.

This failure was a compound effort of both the incompetent and conflicted counsel assigned to the defendant along with negligence and abuse of the court with the complete support of the prosecutor. We shall briefly here examine the facts and law pertaining to these specific violations:

A. Law of the Matter

18 USC 4241 through 4247 specifies the due process to be followed in the determination and treatment of competency of a defendant in a criminal trial. This procedure is mandatory, not suggestive, and violation of it is a clear violation of due process.

In addition to the law itself, the Benchbook for US Judges (March 2000 rev.) specifically declares this law "is a complex enactment, the provisions of which are spelled out in great detail. Its provisions must be read with care and complied with meticulously." (Benchbook for US District Court Judges, March 2000 rev., p. 53) See **Exhibit 12,** attached hereto.

There were multiple hearings in connection with the competency examination(s) and treatment. In addition there is the matter of the time spent in the examination and treatment that exceeded that allowed by 18 U.S.C. 4241, without lawful extensions by the Director, required by due process. These errors affected both the substantive and procedural rights of the Defendant.

The following is a listing of the due process violations that occurred and reference to documents from the record which detail the facts and law on the matter, all of which is incorporated hereat as if fully set forth.

1. Judge Matz had determined on January 14, 2003, that he was going to subject Sutcliffe to a competency examination.[22] According to the law the Judge did not have sufficient reasonable grounds to authorize this on his own. The only facts supporting the Judge's improper action was Sutcliffe's refusal to accept incompetent and ineffective counsel forced upon him by the court, and for filing documents with the court to attempt to preserve his rights.
2. On January 17, 2003, Judge Matz appointed Mr. Nicolaysen as Sutcliffe's counsel. Sutcliffe objected and the court

[22] See transcript from January 14, 2003, page 31.

violated due process and Sutcliffe's Faretta rights by not immediately relieving Nicolaysen. Instead, the court steamrolled right over Sutcliffe's objections and appointed Nicolaysen and then permitted Nicolaysen to propose expanding the scope of the competency examination originally ordered by the Judge. The original examination was to be conducted by a local physician, but Nicolaysen proposed an extensive psychological profiling in a facility out of state and for a prolonged period of time. This expansion of the scope of the competency treatment was proposed solely by Nicolaysen.[23] The court adopted Nicolaysen's proposal and proceeded to transfer Sutcliffe to a facility out of state to a prolonged 'treatment' of competency. Again, this proposal would not have been adopted had Nicolaysen been removed promptly as required under Faretta or had the district court not forced Sutcliffe to make an unconstitutional choice between incompetent counsel Harris, or no counsel at all back in January 14, 2003.

3. On March 14, 2003, Sutcliffe again attempted to remove Nicolaysen as counsel.[24] The court improperly delayed ruling on that motion violating Sutcliffe's Faretta rights yet again. The court then silenced Sutcliffe from further objecting. Nicolaysen then challenged Dr. Backer's opinion that Sutcliffe was, in fact, competent.[25] He called Dr. Backer to the stand and the court removed Sutcliffe from the courtroom. Nicolaysen then proceeded to manipulate the testimony from Dr. Backer to elicit a contrary conclusion by getting him to state that it was "probably" prudent to send him to a medical center, but the court NEVER made a finding of incompetence.[26] From this manipulated conclusion by Nicolaysen, Sutcliffe was now to be subjected to further competency evaluation and/or treatment.[27] Had Nicolaysen been removed promptly as required by Faretta, the original finding of competency would have been honored. Judge Matz made an improper finding on this date that "the 'interests of justice'[28] require that you be examined further."[29]

4. The court did NOT make a factual finding of incompetence, required by 18 USC 4247(d) for treatment, but instead subjected Sutcliffe to another competency

---

[23] See transcript from January 17, 2003, pages 17-18.
[24] See transcript from March 14, 2003, page 5.
[25] Ibid., page 11: "Mr. Nicolaysen: I'm not prepared to simply accept, at face value, the conclusion in the report, that my client is competent."
[26] Ibid., pages 18-49.
[27] Ibid, pages 68-69.
[28] There is no such animal allowed in the law. The only extension allowed by the law is an "ends" of justice extension. The court used two "interests" and four "ends." See fn. 9, Supra.
[29] Ibid., page 68.

'evaluation' under 18 USC 4247(a). This was improper because the evaluation had already been conducted and the Sutcliffe found competent. Moreover, U.S. Attorney Debra Yang clearly knew 4241(a) was only for exams only as she previously demonstrated on January 17.2003. See **Exhibit 13**, attached hereto. **Yet, she remained silent on March 14, 2003 and failed to correct the error.** And did not admit this violation until April 7th, 2003, at the *secret hearing*. See **Exhibit 14**, attached hereto. Furthermore, the April 7th hearing *quickly* took place ONLY after all parties, including THIS COURT were notified on April 4th 2003, in Sutcliffe's PETITION FOR REHEARING, IMMEDIATE RELIEF REQUESTED[30] which case is hereby incorporated into this argument.

5. On April 7, 2003, a hearing was held while Sutcliffe was out-of-state "being treated." This hearing itself violated the Fifth Amendment due process rights of Sutcliffe, substantive and procedural, because Sutcliffe had a right to be present, especially in light of the fact that Sutcliffe had demanded the removal of Nicolaysen as his counsel much earlier. Nicolaysen was improperly retained and acted further against Sutcliffe's interests during the April 7, 2003 hearing. All parties in this hearing were unlawful and admitted they knew ***previously*** that the judge failed to follow process under the law.

6. Judge Matz improperly declared that Sutcliffe's presence was not required a) because he was represented by Nicolaysen and b) because it's a 'mixed issue of fact and law.' He was in error in both respects: Nicolaysen was not authorized to act for Sutcliffe (See Faretta), Sutcliffe's presence was required under Due Process since the issue of competency was only an issue of fact, not law.[31] (See Dusky v. US, 362 US 402, annotations at paragraph 8 on page 2083.) Thus, this April 7 hearing violated Sutcliffe's due process rights on several counts.

7. During the April 7, 2003 hearing, the court admits it did not make a finding of incompetence.[32] Yet the prosecutor admitted that they had to treat the procedure as a 4241(d) treatment, and for that a finding of incompetence was necessary.[33] Nicolaysen admitted that there would be a legal defect without the finding.[34] Sutcliffe was not provided with a transcript of the April 7, 2003 hearing

---

[30] Case No., 03-712223, (9th Cir.2003) DENIED.
[31] See transcript from August 27, 2003, page 10 of pages 8-11, attached hereto as **Exhibit 15**.
[32] See transcript from April 7, 2003, page 4.
[33] Ibid,, page 5.
[34] Ibid., page 7.

until two months thereafter by Nicolaysen, despite being ordered to send it "promptly" to Sutcliffe, as well as the "treating[35]" Doctor.

8. Sutcliffe was held for treatment for a period of 4 months, during which time he was not provided any treatment. When brought back to California he immediately questioned the credibility and accuracy of Dr. Patenaude's report, said Dr. was later investigated and removed from office for falsifying records like Sutcliffe claimed.[36] [37] And, at no time was Sutcliffe deemed competent for trial. No certificates were ever filed by the Director of the Facility *required* under 18 U.S C. 4241-4147(d), certifying the report of Dr.(sic)Patenaude, or extending the time, including up to the present, either for an "reasonable" extension of time[38] or for his release. Nor did the court make an inquiry of the Director for the extensions or certificate *required*. The court violated due process by failing to obtain the proper release certificate, or even inquire about one. See **Exhibits 16 & 17**, attached hereto. The court violated due process by proceeding with trial although nothing had changed since the court found him incompetent previously. Furthermore, Dr. Patenaude's report is arguably invalid by virtue of the fact that a) the director failed to certify it and b) coupled with the testimony by Sutcliffe at the August 27, 2003 hearing (before the trial). The court further denied Sutcliffe due process when it failed to rule or act on his motions for documentation pertaining to reasonable[39] extensions of time while detain and being examined or treated.

9. See also **Exhibits 18, 19, 20, 21, 22 & 23**, attached hereto.

IV. DUE PROCESS VIOLATIONS BY APPEALS COUNSEL

Sung Park, failed to raise these due process violations in his appeal, nor was authorized to stipulate away my personal or subject-matter jurisdictional challenge and therefore the Appellant respectfully requests that the court reconsider

[35] Who never once treated Sutcliffe.

[36] See docket 334 on January 6, 2004, court received letter from director of facility questioning the credibility and accuracy of Dr. Patenaude's reports and notifying court's across the country. Also see transcript of proceedings from August 27, 2003 where Sutcliffe declares no treatment took place.

[37] See cases filed against the credibility and accuracy of Dr.'s reports, attached hereto as Exhibits 21 & 22. See also http://tinyurl.com/2xe9g8

[38] See Jackson V. Indiana, 406 U.S. 715, 733 (1972)("[i]mposed a rule of reasonableness…")

[39] See Docket of District Court CR. 02-350(A) AHM, Docket No. 334 & 350. See also, Page. 6, April 15, 2004.

its decision on this case and find reversible error, or act on Sutcliffe's previous motion, dated *before* the OPINION of this court.[40]

CONCLUSION

Sutcliffe was given an unconstitutional choice of incompetent counsel, or none at all. Then when he chooses none (himself-Faretta) the time-honored right was not honored. The case was not managed as a complex case. This lead to multiple due process violations and this honorable court should rehear the case and find reversible error. And the accused apologizes for annoying this court. See **Exhibit 24**, attached hereto.

Respectfully Submitted,

_____

Steven: Sutcliffe, Filed Sui Juris

Dated: October 21, 2007

[40] OBJECTION TO APPOINTMENT OF CONFLICTED COUNSEL FROM FEDERAL PUBLIC DEFENDERS OFFICE. MOTION TO RELIEVE COUNSEL FOR CONFLICT AND INCOMPETENCE: MOTION TO REPRESENT SELF UNDER THE DURESS: FACTS: DECLARATION.

EX

1

DEBRA W. YANG
United States Attorney
JACQUELINE CHOOLJIAN
Assistant United States Attorney
Chief, Criminal Division
ELENA J. DUARTE (CA Bar No. 168817)
Assistant United States Attorney
1500 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-8611
Facsimile: (213) 894-8601

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. STEVEN WILLIAM SUTCLIFFE, Defendant.	CR No. 02-350(A)-AHM STATUS FILING RE: SPEEDY TRIAL CALCULATIONS AND EXCLUSIONS Date: August 27, 2003 Time: 9:00 a.m. Honorable A. Howard Matz

Plaintiff United States of America, through its attorney of record, Assistant United States Attorney Elena J. Duarte, hereby respectfully submits this status filing regarding Speedy Trial (18 U.S.C. § 3161 et seq.) calculations and exclusions made in the instant criminal case thus far. From the government's calculation, based on the criminal docket, or Clerk's Record ("CR"), as outlined below, 39 days of the 70 days permitted under the Speedy Trial Act have passed. 31 days remain. As time is currently excluded from calculation under the Speedy Trial Act through and including September 9, 2003 (C.R. 145, 157), this means that the trial could properly begin as late as October 10, 2003, even assuming there are no additional exclusions of time under the Act.

CALCULATIONS AND EXCLUSIONS

Indictment No. CR 02-350 was filed on April 5, 2003. (CR 11). Defendant made his first appearance in the Central District on April 9, 2002. (CR 7). At defendant's Post-Indictment Arraignment, held on April 15, 2002, jury trial was set for June 4, 2002. (CR 20). On May 16, 2002, the parties agreed by stipulation to continue the trial date to September 3, 2002, and exclude time from calculation under the Speedy Trial Act, 18 U.S.C. § 3161 et seq., from May 16 though September 3, 2002. (CR 23). The district court so ordered, based on the complexity of the case (18 U.S.C. § 3161(h)(8)(B)(ii)) and defense counsel's need to prepare (18 U.S.C. § 3161(h)(8)(B)(iv)) given the large volume of electronic evidence seized (125 gigabytes), the somewhat novel Internet-based nature of the prosecution, and various other reasons. (CR 23). At this point, it appears that 38 days of the 70 days permitted by 18 U.S.C. § 3161(c)(1) had passed.

Approximately two weeks before the September 3, 2002 trial date, the matter was calendared for status conference. (CR 37). At the status conference, the trial date was continued at defense counsel's request to October 22, 2002, and time was excluded from Speedy Trial Calculation pursuant to stipulation by the parties through October 22, 2002, for defense preparation. (CR 36, 38).[1] Defendant agreed to the first continuance (CR 23) and did not object to the second (CR 38).

---

[1]By this time, AFD Marilyn Bednarski had replaced AFD Hilary Potashner as lead counsel for defendant. (CR 38).

On September 23, 2002, the Office of the Federal Defender moved ex parte to be relieved; the district court granted the motion, continued the trial date to December 3, 2002, and appointed counsel William Harris. (CR 44, 45).[2] Harris filed pretrial motions on October 23, 2002 (application for bail review); November 12, 2002 (motion to dismiss); and November 13, 2002 (motion for discovery/dismissal on selective prosecution grounds). (CR 47, 55, 57, 59). The government filed a motion in limine on October 30, 2002. (CR 50). The bail review motion was heard and denied by the district court on November 21, 2002; the motions to dismiss were heard and decided on December 4, 2002. (CR 65, 73). Thus from October 23 through December 4, 2002 was excluded from calculation as pretrial motions were pending (18 U.S.C. § 3161(h)(1)(F)). Even assuming no written or oral findings regarding excludable time through December 3, 2002 were made on September 23, 2002, only one additional day of the 70 days permitted by 18 U.S.C. § 3161(c)(1) had passed, for a total of 39 days.

On November 26, 2002, the parties agreed by stipulation to continue the trial date to January 14, 2003, and exclude time from calculation from November 26, 2002 through and including January 14, 2003, and the district court so ordered, based on the complexity and

---

[2]It appears that the issue of excludable time was not addressed in writing by the parties or the district court at the time of this continuance to December 3, 2002. The time may have been excluded orally; the government does not currently have a copy of the transcript. In any event, as explained above, as time had previously been excluded through October 22, 2002, and a pretrial motion was filed by defense on October 23, 2002, only one day was not excluded from calculation, even assuming that no specific finding re: excludable time was made on September 23, 2002.

volume of the electronic evidence seized in the case (18 U.S.C. § 3161(h)(8)(B)(ii)); Harris' need to prepare further given the complexity of the case and the fact of his recent appointment (18 U.S.C. § 3161(h)(8)(B)(iv)); and the pendency of pretrial motions (18 U.S.C. § 3161(h)(1)(F)). (CR 68). On November 27, 2002, defendant (through Harris) took an interlocutory appeal of the district court's denial of bail; the Ninth Circuit affirmed the district court on January 14, 2003. (CR 69, 112). Thus from November 27, 2002 through January 14, 2003 was excluded from calculation as delay resulting from an interlocutory appeal (18 U.S.C. § 3161(h)(1)(E)) as well as by stipulation of the parties. In the interim, the parties filed additional pretrial motions (CR 74, 76, 82-84, 90, 91, 100-103); all were decided on January 10, 2003. (CR 104). Thus the time through January 10, 2003, was also excluded from calculation as pretrial motions were pending (18 U.S.C. § 3161(h)(1)(F)).

On January 14, 2003, what was to have been the first day of jury trial, defendant moved pro per to "dismiss" Harris and the district court granted defendant's motion, appointed new counsel, continued the trial to March 25, 2003, ordered defendant to undergo a 30 day competency evaluation pursuant to 18 U.S.C. §§ 4241(b)& 4247(b), as described in detail above, and excluded time from computation under the Speedy Trial Act pursuant to 18 U.S.C. § 3161(h)(1)(A). (CR 113-115, 118). On March 14, 2003, the parties appeared for a hearing on defendant's competency as described above; at the conclusion of the hearing the district court ordered defendant to undergo a four month evaluation pursuant to 18 U.S.C.

§ 4241(d), continued the trial date to September 9, 2003, and excluded time from computation under the Speedy Trial Act pursuant to 18 U.S.C. § 3161(h)(1)(A) and (h)(8)(A). (CR 139, 144, 145, 154, 157, 158). On March 20, 2003, defendant (pro per) petitioned for an emergency stay of/ mandamus relief from several of the district court's orders (CR 135, 144, 145); the Ninth Circuit granted a temporary stay of the orders through March 28, 2003, but then denied defendant's requests in their entirety on March 28, 2003. (CR 148, 159). Therefore March 24 through March 28, 2003 was also excluded from calculation as delay resulting from an interlocutory appeal (18 U.S.C. § 3161(h)(1)(E)).[3]

Additional motions have also been filed during this most recent exclusion of time; the time of the motions' pendency is also excluded from calculation (18 U.S.C. § 3161(h)(1)(F)) above and beyond the order already in place excluding time through September 9, 2003 (CR 145). On August 1, 2003, the district court referred defendant's Motion to Recuse, pending since February 4, 2003 (CR 132), to Judge Phillips for determination; the motion was denied on August 6, 2003 (CR 171). On August 4, 2003, defense filed a motion seeking relief from appointment which is still pending. (CR 170).

//

[3]On April 3, 2003, defendant submitted a motion for rehearing in that case that is still pending.

Thus it appears that no additional time, beyond those 39 days already referenced above, have counted toward Speedy Trial Act calculation. All other time has been excluded under at least one, and usually two or more, statutory bases. 31 days remain in the 70 days allowed under the Act, 18 U.S.C. § 3161(c)(1).

DATED: August 27, 2003

Respectfully submitted,

DEBRA W. YANG
United States Attorney

JACQUELINE CHOOLJIAN
Assistant United States Attorney
Chief, Criminal Division

/s/ Duarte

ELENA J. DUARTE
Assistant United States Attorney

Attorneys for Plaintiff
UNITED STATES OF AMERICA

DECLARATION:

I, Steven: Sutcliffe, do hereby affirm the following facts to be true under the penalty of the perjury.

1. I never authorized Sung Park to stipulate, never less "admit," and waive my right to challenge that I "transferred" any specific pages of the website I was charged with violating. See **Exhibit 25**, attached hereto.
2. Sung Park allowed me to write the jurisdiction argument in the appeal brief related to FTP log's, NIC'S, MAC'S AND IP'S, since he was not and expert, and no computer expert reports have ever been turned over to the defense, despite being paid for in the past by the court. Despite being ORDERED to be turned over by the district court. See **Exhibit 26**, attached hereto.
3. Right before oral argument was to begin, Sung Park, again asked me to "coach" him on the jurisdiction challenge, specifically regarding FTP log files, NIC'S, MAC'S AND IP'S.
4. I have never waived my right to question personal jurisdiction of the district court.
5. I have never seen nor received any expert reports or investigative reports paid for by the district court. Nor were any ever turned over to the counsel appointed for the appeal.
6. No appeals counsel appointed ever applied for or hired any experts to help in the appeal.
7. I have not heard from William Melcher since my previous Motion was filed with this court. And I renew my objection to his conflicted appointment from the Public Defenders office and his lack of ability to lick a stamp for three months to contact me since being appointed.

I, Steven: Sutcliffe, do hereby affirm the aforementioned facts.

_____

Dated: October 21, 2007

EX
2

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.

EX
3

STEWART & HARRIS
LAWYERS
1499 HUNTINGTON DRIVE, SUITE 403
SOUTH PASADENA, CALIFORNIA 91030

TELEPHONE (626) 441-9300
TELECOPIER (626) 441-9301

December 11, 2002

Mr. Steven W. Sutcliffe
Reg. No. 02837-049
Metropolitan Detention Center
Post Office Box 1500
Los Angeles, California 90053-1500

47
Rec'd
12.11.2002
MISSING CDROMS
-34
-38
-40

Re: USA v. Sutcliffe
U.S.D.C. Case No. CR 02-350-AHM

Dear Mr. Sutcliffe:

Enclosed are 52 floppy disks and compact disks for your review, marked by number. I assume you have seen a copy of Warden Seifert's letter allowing you computer access. Please begin reviewing this information and make notes keyed into the numbers on the disks.

Very truly yours,

William S. Harris
of STEWART & HARRIS

WSH:tmm
Enclosures
wsh\sutcliffe.ltr15

U.S. Department of Justice

Federal Bureau of Prisons
Metropolitan Detention Center

Los Angeles, California

December 11, 2002

FROM: A. Standefer, Attorney Advisor

SUBJECT: Discovery material

TO: Steven Sutcliffe, Reg. No: 02837-049

You will be delivered today one box containing 52 CD-Roms and two floppy disks. * BOX WAS MISSING CDs 34, 38 and 40. 16-32 were sent without cases. 6th Circuit
By signing this memorandum, you accept receipt of this box containing the above-mentioned discovery. This serves as authorization for you to retain these boxes in your property.

INMATE AGREES TO CONDITIONS SET FORTH IN THIS MEMORANDUM

Inmate's Signature

12.11.2002
Date

****

THIS SECTION MUST BE SIGNED BY STAFF IF THE INMATE REFUSES TO AGREE TO THE CONDITIONS OF THIS MEMORANDUM.

Inmate Steven Sutcliffe refused to sign.

Name (Print)

Signature

Title

Date

cc: Inmate File

EX
4

the ACAS. The assignments shall be in such a manner that each active judge of the Court, over a period of time, shall be assigned an equal number of cases.

8.1.1 PREPARATION OF ASSIGNMENT CARDS

After the close of business at the end of each calendar month, a sufficient number of electronic cards shall be added for each judge receiving criminal case assignments to satisfy the requirements of the next month's business.

8.1.2 PRESERVATION OF ASSIGNMENT RECORDS

Records pertaining to all case assignments shall be preserved for two years after the end of the calendar year in which the assignments were made.

8.2 COMPLEX CRIMINAL CASES

8.2.1 INITIAL COMPLEX CRIMINAL CASE IDENTIFICATION AND ASSIGNMENT

Not later than two business days prior to the time of arraignment, the government shall file a Notice of Complex Case advising the Court if there are eight (8) or more defendants in the initial indictment, or whether the presentation of the evidence in its case-in-chief (including cross-examination) will exceed twelve (12) trial days. If either of these conditions is present, the case shall be randomly assigned to a judge from a separate Complex Criminal Assignment Wheel.

8.2.2 SUBSEQUENT IDENTIFICATION AS A COMPLEX CRIMINAL CASE AND ASSIGNMENT

8.2.2.1 RESPONSIBILITY OF THE GOVERNMENT

Upon the filing of a superseding indictment, the

government shall also file a Notice of Complex Case advising the Court if the number of defendants or the time estimate for the presentation of the evidence in its case-in-chief has changed.

8.2.2.2 ADDITIONAL CASE CREDIT IF CASE BECOMES COMPLEX

Once a criminal case is assigned, it shall remain with the originally assigned judge and will not be reassigned from the Complex Criminal Assignment Wheel if superseding indictments are filed that make the case complex in accordance with Section 8.2.1. However, superseding indictments that increase the number of defendants and/or the trial estimate for the government's presentation of the evidence in its case-in-chief shall entitle the assigned judge to additional case credit in the Non-Complex Criminal Assignment Wheel as outlined below:

Number of Defendants in Superseding Indictment	Revised Government Time Estimate	Additional Case Credit
8 - 12	Less than 12	1
8 - 12	12 or More	2
13 - 16	Less than 12	2
13 - 16	12 or More	3
17 - 20	Less than 12	3
17 - 20	12 or More	4
21+	Less than 12	4
21+	12 or More	5

8.2.2.3 REQUEST FOR ADDITIONAL CASE CREDIT

At any time, a judge may bring a complex

EX
5

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF(S) v. DEFENDANT(S).	Initial Indictment: _____ Case Number to be Assigned by Criminal Intake Clerk Superseding Indictment: _____ Case Number **NOTICE TO COURT OF COMPLEX CRIMINAL CASE** (To Be Filed No Later than Two Business Days Prior to the Time of Arraignment)

☐ **Initial Indictment**

Upon a careful review of the initial indictment, it is the opinion of the United States Attorney's Office that this case qualifies as complex because:

☐ There are eight (8) or more defendants. The number of defendants is _____.

and/or

☐ The presentation of the evidence in the Government's case-in-chief (including cross-examination) will exceed twelve (12) trial days. The current estimate is _____ trial days.

☐ **Superseding Indictment**

Upon a careful review of the _____ superseding indictment, it is the opinion of the United States Attorney's Office that this case now qualifies as complex because:

☐ There are eight (8) or more defendants. The number of defendants is _____ (The previous number of defendants was _____).

and/or

☐ The presentation of the evidence in the Government's case-in-chief (including cross-examination) will exceed twelve (12) trial days. The current estimate is _____ trial days. (The previous estimate was _____ trial days.)

Date: _____

_____
Assistant United States Attorney

EX
6

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.

EX
7

ASSEMBLYMEMBER NOREEN EVANS
7TH ASSEMBLY DISTRICT
FOR IMMEDIATE RELEASE: June 29, 2005
CONTACT: Sean MacNeil
PHONE: (916) 319 - 2007

Evans Bills Helps Public Safety and Government Officials Protect Themselves and Families at Home from Intimidation or Attack

(SACRAMENTO) A bill authored by Assemblymember Noreen Evans (D-Santa Rosa) passed out of the Senate Judiciary Committee yesterday evening that will help public safety and government officials keep their personal home addresses and phone numbers private.

AB 1595 passed with a vote of 5-0. It now passes to the Senate Public Safety Committee.

"Anyone with internet access can find the home address and telephone numbers of public safety and elected officials," said Evans. "Those who serve their fellow citizens should be able to do so without their families at home becoming the target of intimidation or an attack. Sadly, this threat is very real."

Various websites specialize in providing this information and the harmful intentions of some are self-evident. www.killercop.com - now inoperable - offered a cash reward with no questions asked for the death or home addresses of two LAPD officers. Another currently inoperable website, www.justicefiles.org, fostered vigilantism by providing names, addresses, phone numbers, and social security numbers of police officers.

To keep this information from aggrieved individuals seeking to intimidate or exact revenge, AB 1595 enables public safety and government officials to prevent individuals, businesses, and associations from publicly posting their home addresses and phone numbers once a written confidentiality request is submitted.

"This bill specifically provides public servants – such as judges, district attorneys, public defenders, sheriffs, police, mayors, city attorneys, city council members, and boards of supervisors – with a statutory basis to obtain a court order mandating that this information be removed from a website operating under questionable intentions," added Evans. "Typically, it takes approximately one week to a month to obtain such a court order."

This bill originated in the January 2004 findings of California's Public Safety Officials' Home Protection Advisory Task Force. Chaired by the Attorney General, it included representatives from the Department of Justice, the California Highway Patrol, the Office of Privacy Protection, the judicial and criminal justice community, state recorders and assessors, and the business community.

AB 1595 is supported by the Judicial Council of California, the California District Attorneys Association, the California Association of Public Defenders, the California Judges Association, the California Association of Highway Patrolmen, the Peace Officers Research Association of California, LA County District Attorney, LA County Police Chiefs Association, LA County Sheriff, San Bernardino County Sheriff, Whittier Police Department, and the California Alliance for Consumer Protection.

###

Capitol Office: State Capitol - Sacramento, CA 94249-0007 - Phone: (916) 319 - 2007 - Fax: (916) 319 - 2107
District Office: Santa Rosa - 50 D Street, Suite 301 - Santa Rosa, CA 95404 - Phone: (707) 546 - 4500 - Fax: (707) 546 - 9031
District Office: Vallejo - 640 Twolumne Street, Suite B - Vallejo, CA 94590 - Phone: (707) 649 - 2307 - Fax: (707) 649 - 2311
Home Page: http://www.assembly.ca.gov/evans - **Email:** Assemblymember.Evans@assembly.ca.gov

EX
8

Copy

Filed

Steven-William: Sutcliffe
02837-049
Metropolitan Detention Center
P.O. Box 1500
L.A., California Republic
90035

United States District Court
Central District Of California

People of the United States Plantiff, -v- Steven-William: Sutcliffe Accused	Case Number CR 02-350-AHM Writ of the Mandamus to Compel; Motion to Dismiss Counsel for the Ineffective Assistance; Motion to Dismiss for the Lack of the Jurisdiction; Motion to Dismiss for Prosecutorial Misconduct; Motion to Dismiss for the Outragous Government Conduct; Motion to Dismiss for Violations of the 5th and 6th Amendments of the Bill of the Rights by the Prosecutor, Counsel and Court. Courtroom: 14 Date: 1.14.2003 Time: N/A

ruled on only

Accused, Steven-William: Sutcliffe, proceeding Sui Juris, hereby moves this court and gives notice to all parties involved of this Writ of the Mandamus and seeks all remedies available under the laws of this nation; in the intrest of justice, to compel the United States Attorney General John Ashcroft to halt these proceedings and to assist the accused in presenting facts and documents concerning previously mentioned crimes and wrongdoings brought to the attention of present court appointed counsel, previously appointed counsel and this court. Further, Accused moves to dismiss appointed counsel as ineffective forthwith. Further, Accused moves to Dismiss all counts of the Superseding Indictment for Prosecutorial Misconduct. Further, Accused moves to Dismiss this case for Outragous Government Conduct by the prosecutor. Further, Accused moves to Dismiss this case for the Violations of the Accuseds rights under the 5th and 6th Amendments from the Bill of the Rights by the Prosecutor, appointed counsel and this court.

Accused denies jurisdiction of the court, Accused raised this issue at his first arraignment and the court proceeded to ignore the challenge. The court then proceeded to ignore the Accused demanded right to know the nature of the charge against the accused so the Accused could properly pepare a defense. The courts failure to inform the Accused has prejudiced the Accused as the court allowed the Accused to proceed and prepare a defense to an element which was unknown to the Accused and at the 11th hour the prosecutor and this court seek to supersed the indictment and change the nature of the charge. After the arraignment the Accused came before the Hon. A. Howard Matz on April 16th, 2002 for a bail hearing after the prosecutor contested a previous grant of the bail. The Hon. A. Howard Matz began the hearing by berating and taking great ubbrage at the Accuseds challenge to the jurisdiction mentioned at the previous bail hearing in his remarks to the Accused and court appointed counsel (Since removed) and used the Accuseds challenge of the jurisdiction to state that the Accused had no respect for the law, amongst other comments. All remarks by the Judge and the counsel were thereafter removed by the time the Accused received a requested copy of the hearing later that same year when newly appointed counsel was appointed. This fact is incorporated into the Writ of the Mandamus.

Accused has stated on the record that previous appointed counsel Potashner has Obstructed Justice and committed Misprison of Felony; Accused now adds the charge of Aiding and Abetting and Conspiracy to Obstruct Justice. Further, Accused has accused Does 1-10 of the Manchester, N.H. Police of Torture, and brought this to the attention of all parties involved. Accused incorporates Special Agent Cugno and Laveride with Aiding and Abetting Torture, Misprison of Felony and Conspiracy Against Rights, as well as Obstruction of Justice and incorporates these charges into the Writ of the Mandamus. Further, Accused, on 12.13.2002, sent this court a letter stating the fact that someone from within the B.O.P. had stolen discovery, prior to the Accused receiving it last month and further that an A. Roedell attempted to Obstruct Justice by covering this fact up with an Antedated receipt. That letter and this fact is now incorporated in the Writ of the Mandamus. Further the Accused believes the prosecutor in this case has committed Misprison of Felony, and informed present counsel and demanded counsel subpoena her along with documents to support this charge. Counsel has refused and stated " You can't do that. " This fact is incorporated in the Writ of the Mandamus.

Further, Accused has made multiple requests for his court appointed counsel to effectivly assist him, as recently as the hearing on 1.10.2003, yet when the prosecutor stood before this court on said date and told a bald-face lie, regarding www.killercop.com and evilgx.com, counsel failed to object after being told to do so by the Accused. As the Accused has now, once again, be prejudiced by the courts ruling in favor of the prosecutor, based on this bald-faced lie, which neither the court of counsel challenged, accused has lost all faith in the court appointed counsel and counsel is forthwith dismissed with prejudice. Accused demands a hearing on this lie by the prosecutor to show the bias of the prosecution and demands a copy of the transcripts of the hearing on 1.10.2003 right away. Further, Accused has demanded counsel assist in a challenge to the original indictment, in that the Accused believes the prosecutor poisoned the Grand Juries minds by her choice of inflammatory words. Again counsel has failed to assist in this defense. This lie, and the conduct by the prosecutor to the first Grand Jury clearly falls under outrageous conduct, as well as Prosecutorial Misconduct. The governments attemt to introduce inflammatory, irrelevent and inadmissable evidence, based on a lie, will clearly prejudice the Accused and lead to a miscarriage of the justice if allowed to stand.

Acused demands this Writ be brought to the U.S. Attorney General John Ashcroft personally, since the current U.S. Attorney General of the District has a conflict of intrest as she is both named and disparaged within the website www.killercop.com, and has been for the last 4 years, which is at the heart of the issue and lie in these proceeding before this court. Accused cites Title 18, Section 3332(a) and the Bill of the Rights as the authority to compel this court to protect the rights of the accused, since this court seems unwilling to do so.

Further, Accused seeks and moves to dismiss the superseding indictment on the grounds that the law under counts 1-4 are so vague that a reasonable person could not tell if he is subject to the violation of the law. Accused uses the superseding indictment as Exhibit-A in his arguement and is prepared to orally argue this on the record.

A statue, though plain and unambigous on its face, may, when applied, violate due process of law. U.S. v. Spector, Cal.1952, 72 S.Ct. 591, 343 U.S. 169, 96 L.Ed. 863; rehearing denied 72 S.Ct. 1040, 343 U.S. 951, 96 L.Ed. 1088 The constitutional vice in a vague or indefinite statue is the injustice to accused in placing him on trial for an offense, the nature of which he is given no fair warning. American Communications Ass'n, C.I.O., v. Douds, N.Y. 1950, 70 S.Ct. 674, 339 U.S. 382, 94 L.Ed. 925, rehearing denied 70 S.Ct. 1017, 339 U.S. 990, 94 L.Ed. 1391.

Accused also challenges the jurisdiction of the court as the court lacks subject matter jurisdiction under the Interstate Commerce Clause of the Constitution. Accused cites "7 Department of Justice Manual Section 9-2.142. Also, Petite v. U.S., 361 U.S. 529 (1960); United States v. Lopez, 514 U.S. 549 (1995) and Jones v. United States, 120 S.Ct. 1904 (2000). Accused has previously requested court appointed counsel argue and preserve the aforementioned rights, but again counsel resists in assisting the Accused.

Accused has informed this court that the defense has had discovery material stolen, and that counsel had been and continues to be to incompetent to have made back-up copies so the Accused could review all discovery material prior to trial, yet this court has ignored this fact and the fact that this court would proceed to try the Accused after knowledge of this fact shows the Accused that he will get a trial in name only.

Accused invokes full Sovereignty under the Common Law of the Constitution of the united States of America, Accused demands all rights at all times. Further, Accused demands the Common Law right of Sua Sponte and demands the court inform the Accused, at every stage of the proceedings of the Accuseds rights, whether Organic, Federal, State of local, and in a timely manner. Accused only comes before the court because of the previous abuse of the power by the government to arrest and incarcerate. Forthwith the Accused appears by Special Apperence, at all times, only, until jurisdiction over the accused has been proven on the record. Any attempt to usurp jurisdiction over the Accused through deception or any fictious name will become prima facie evidence of lack of the jurisdiction. This applies to any presumed, assumed or implied attempts to obtain jurisdiction over the Accused, as Accused has witnessed in the past by the court.

Accused understands under the Common Law that a man or woman doesn't committ a crime by words alone, and further that unless one willfuly damages another man or woman by depriving said people of the United States of their God given right to Life, Liberty and Property, no crime has been committed. Accused will require, and hereby demands, in the courtroom, at any trial, if any, as provided for in the Article of the Six in the Bill of the Rights, the body of the man or woman making any claim of the damage against the Accused, and not any alledged-representative of said people. Accused further understands the rights bestowed by the Creator and protected by the Bill of the Rights within the Constitution are for the security of the people, for the people and by the people, all of the people, including the Accused.

Further, since it is now common knowledge that my court appointed counsel, former and latter, is ineffective, incompetent and/or beholden to my adversary (Burgett v. Texas, 289 U.S. 109), the Accused demands that if this court intents to move forward from this point forward that this court shall make monies available to the Accused so that the Accused may locate and secure competent counsel who can effectivly assist the Accused as the Accused has lost all faith in the court appointed counsel of the court. Accused will also take this time to state that he believes that his former counsel has, along with one or more cohorts, committed legal malpratice and has substantially and matterially prejudiced the Accuseds rights so that the Accused can never get a fair trial. This was also brought to the courts attention and is incorporated in the Writ of the Mandamus. Forthwith the Accused, if this previous request is denied, will stand Sui Juris, without counsel, and under the foregoing conditions, only the Accused may speak for the Accused. (Chandler v. Fretag, 348 U.S. 3.; Faretta v. California, 442 U.S. 806). Accused will not sign a waiver of the counsel.

Without jurisdiction, the court can not proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. (Ex parte McCardle (1869))

To close, the Accused need not remind the courts of their proper role as active guardians of the Constitutional rights of the Citizen, and of the constitutional limitations on federal power and not as active subverters of those limits or passive accomplices to the subversions of the other branches of the government. For the aforementioned reasons setforth in this document the Accused prays relief be granted in this cause and instant case. So help me God.

Accused does sign this document: 1.13.2003

Steven-William: Sutcliffe

Steven-William: Sutcliffe, Sui Juris
Accused.

EX
9

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

EX
10

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

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

EX
11

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.)

EX
12

1.12 Mental competency in criminal matters

The mental competency of a defendant may come before the court in a number of different contexts. The most important are:

- competency to stand trial;
- competency to plead guilty;
- competency to commit the crime with which defendant is charged (e.g., ability to form the requisite intent);
- competency after acquittal by reason of insanity;
- competency to be sentenced;
- mental condition as it bears on the sentence to be imposed;
- civil commitment of a convicted offender in need of care or treatment for a mental condition;

The Insanity Defense Reform Act of 1984, 18 U.S.C. §§ 4241–4247, is now controlling with respect to most situations involving the mental competency of a defendant. It is a complex enactment, the provisions of which are spelled out in great detail. Its provisions must be read with care and complied with meticulously.

A. Competency to stand trial (18 U.S.C. § 4241):

1. 18 U.S.C. § 4241(a) provides that after the commencement of a prosecution and prior to sentencing, either the U.S. attorney or defense counsel may move for a hearing to determine defendant's mental competency. The court shall grant the motion, or shall order a hearing on its own motion, if there is reasonable cause to believe that defendant is not mentally competent:
   (a) to understand the nature and consequences of the proceedings against him; or
   (b) to assist properly in his defense.
2. Prior to the hearing the court may (and probably should) order that a psychiatric or psychological examination be

conducted and that a report be filed with the court. 18 U.S.C. § 4241(b).

(a) The examiner should be asked for his or her opinion as to whether defendant is suffering from a mental disease or defect rendering defendant mentally incompetent to understand the nature and consequences of the proceedings against him or her or to assist properly in his or her defense. The examiner should be requested to have the report include all of the information required by 18 U.S.C. § 4247(c)(l) through (c)(4)(A).

(b) The psychiatrist or psychologist should not be asked to determine defendant's mental competency at the time the alleged offense was committed.

(c) To secure a § 4241 examination the court may, if necessary, order defendant committed to a suitable hospital or facility for a reasonable period not to exceed thirty days, even if defendant is not otherwise confined. For just cause this commitment may be extended by fifteen days. 18 U.S.C. § 4247(b).

3. The court shall then hold an evidentiary hearing, to be conducted pursuant to the provisions of 18 U.S.C. § 4247(d). Defendant "shall be represented by counsel." *Id.*

4. At the conclusion of the evidentiary hearing, the court shall make a finding by a preponderance of the evidence as to the accused's mental competency to stand trial. 18 U.S.C. § 4241(d).

(a) A finding of mental competency to stand trial does not prejudice a plea of not guilty by reason of insanity, because the court's finding is not admissible in evidence on the issue of guilt or innocence. 18 U.S.C. § 4241(f).

(b) If defendant is found to be incompetent to stand trial, the court shall commit the defendant to the custody of the Attorney General. 18 U.S.C. § 4241(d). The trial

court should receive periodic reports as to defendant's mental condition.

(c) The Attorney General shall hospitalize defendant for a reasonable period not to exceed four months, to determine whether there is a substantial probability that defendant will in the foreseeable future become competent to stand trial. 18 U.S.C. § 4241(d)(l).

(d) The Attorney General may hospitalize defendant for an additional reasonable period of time if the court finds that within that additional period there is a substantial probability that defendant will become competent to stand trial. 18 U.S.C. § 4241(d)(2).

(e) If, at the end of the time provided for by 18 U.S.C. § 4241(d), defendant is still not competent to be tried, he or she is subject to further commitment under the provisions of § 4246 if the court finds by *clear and convincing evidence* that releasing defendant would create a substantial risk of bodily injury to another or of serious damage to another's property. The provisions of § 4246 are detailed and complex. To avoid error the court must refer to those provisions and follow them with great care. The report of any § 4246 psychiatric or psychological examination must comply with the requirements of § 4247(c). Any hearing must be held pursuant to the provisions of § 4247(d).

(f) When the director of the facility certifies to the court that defendant is competent to stand trial, the court must hold a hearing, conducted pursuant to the requirements of 18 U.S.C. § 4247(d). If the court determines that defendant is competent to stand trial, it shall order defendant's discharge from the facility and set the matter down for trial. 18 U.S.C. § 4241(e).

B. Competency to plead guilty:

Because a defendant is required to make a knowing and voluntary waiver of certain constitutional rights in entering a guilty plea, the court must, in accepting a Fed. R. Crim. P. 11 plea, be satisfied that defendant has sufficient mental com-

EX
13

DEBRA W. YANG
United States Attorney
JACQUELINE CHOOLJIAN
Assistant United States Attorney
Chief, Criminal Division
ELENA J. DUARTE (CA Bar No. 168817)
Assistant United States Attorney
1500 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-8611
Facsimile: (213) 894-8601

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. STEVEN WILLIAM SUTCLIFFE, Defendant.	CR No. 02-350(A)-AHM MOTION TO DETERMINE COMPETENCY OF DEFENDANT AND REQUEST FOR PSYCHIATRIC EXAMINATION AND REPORT PURSUANT TO 18 U.S.C. §§ 4241(a)&(b); [PROPOSED] ORDER Date: January 17, 2003 Time: 11:00 a.m. Honorable A. Howard Matz

Plaintiff United States of America, through its attorney of record, Assistant United States Attorney Elena J. Duarte, hereby respectfully moves for a hearing to determine the competency of defendant to stand trial, pursuant to 18 U.S.C. § 4241(a), and asks for a psychiatric evaluation and report of defendant's competency to stand trial, pursuant to 18 U.S.C. §§ 4241(b) and 4247(b)&(c).

This motion is based on the Court's conclusion, after exploring certain issues with defendant and his then-counsel of record, William Harris, out of the presence of the government, that circumstances warranted that defendant be evaluated in order to determine defendant's competency to stand trial.

EX
14

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.

EX
15

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.

EX
16

Steven-William: Sutcliffe
02837-049
Metropolitan Detention Center
P.O. Box 1500
Los Angeles, California 90053-1500
Forced IN Pro Se

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
PLANTIFF,

-VS-

Steven-William: Sutcliffe,
Accused

Case: CR 02-350(A)-AHM

RE-REQUEST FOR DOCUMENTS TO BE FILED AS A MATTER OF LAW; ATTACHMENTS; DECLARATION OF ACCUSED; POINTS AND AUTHORITIES MEMORANDUM.

I, Steven-William: Sutcliffe, hereby respectfully files this document and re-requests documents required to be filed as a matter of law. This submission and request is based on the attached Declaration, the attached exhibits, and all files and records of this case. The accused respectfully also requests the copies requested be expedited for use at sentencing on April 15, 2004.

DATED: March 26, 2004

Respectfully

Steven Sutcliffe

Steven: Sutcliffe

POINTS AND AUTHORITY

I. The accused was deemed "incompetent" by the court at the behest of Gregory Nicolaysen, then court-appointed counsel, in April of 2003[1]. The accused was "treated" at FMC Devens in Massachusetts by a Dr. Patenaude for approximately two months, at which time Dr. Patenaude finally decided the accused was "cured" by Dr. Patenaude's skillful therapy.[2] The accused was returned to California MDC to rot for two more months. Sometime during this time period Dr. Patenaude filed a report with the court to state he believed the accused was [now] competent. The court conducted a competency hearing approximately two months after the accused was returned to MDC wherein the court now deemed the accused was competent based on the report filed by Dr. Patenaude. Subsequently thereafter Dr. Patenaude was held under an investigation and terminated [for hanky-panky].

---

1. The accused is not sure of the exact date of the hearing in April as the accused had already been flown clear across the country before the secret-hearing for "treatment" of the incompetence the court had yet to find.

2. NO treatment, period, was provided to the accused at all.

The court has viewed documents related to Dr. Patenaude's termination, but filed them under seal. The accused has requested to view these documents, but has yet to see them in camera. The accused filed a letter to the HON. A. Howard Matz, on Oct. 5, 2003, wherein the accused, among other discovery issues, brought to the attention of the court the lack of a copy of the certificate "required to be issued pursuant to 18 USC 4241(e)." (See attachment Exhibit 1, page 2).

After the trial, on March 2, 2004, the court caused to be filed another request for discovery of the elusive certificate, among other things. (See attached EXHIBIT-2) The court then ORDERED previous court appointed counsel to provide a copy of the elusory certificate to the accused. On 03.13.2004 the accused received a reply from David R. Reed addressed to Steven: William-Sutcliffe (sic) wherein Mr. Reed states he has "never been in possession of any... reports" related to 18 USC 4241-4247. (See attached EXHIBIT-3, page 2, lines 20-21). Further, Mr. Reed then states he spoke to previous counsel, Gregory Nicolaysen, who "claims" that he [Nicolaysen] had turned over the psychologist report, [Accused disputes this lie and demands proof]

but, "he [Nicolaysen] said he did not provide to defendant... a document which 'traditionally' is not sent to the attorney, rather is sent to the court from the... director to confirm that the actual reports (sic) that are sent are accurate. That document is known as the [elusive] certificate." (Reed Declaration, attached EXHIBIT-3, page 4, lines 19-24)

II.

Mr. Nicolaysen [once again] is wrong in both fact and law. The [elusive] certificate is NOT "traditionally" NOT sent to the attorney.[3] A simple reading of the law shows that the "director... shall promptly (EMPHASIS added) file a certificate... with the clerk of the court. The clerk shall send a copy of the certificate to [the defendant's] counsel and to the attorney for the government. [Then] the court shall hold a hearing... to determine the competency of the defendant. (See 18 USC 4241(e)).

The accused wonders what legend, myth or folklore Mr. Nicolaysen bases such wisdom, and how many other "clients" he has sent away as incompetent to delay their trial, to aquire such knowledge to quote tradition of the certificate.

Prior to the commitment the accused was ordered to be examined ON a motion to determine the mental competency to stand trail by Mr. Nicolaysen, under authority of 18 USC 4241(a). The examination was conducted at MDC in Los Angeles under authority of 18 USC 4241(b). Section (b) requires that exam and report follow the due process of 18 USC 4247(b) and (c). 18 USC 4247(b) states that any examination pursuant to an order under section 4241 shall NOT exceed thirty days. However, "the director of the facility may apply for a 'reasonable' extension, but not to exceed fifteen days under section 4241 ... [or] ... upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant. The accused was held for examination past the thirty days and has never been provided a copy of a request for a 'reasonable' extension.

III. CONCLUSION

The accused has respectfully requested discovery from the court, and now previous Counsel for written documents, required to be filed as a matter of due process under

both the Due Process Clause of the Fifth Amendment of the Constitution and 18 USC 4241-4247, prior to trial and after the fact. The accused needed these documents for his defense [prior to trial] and now requires them for both sentencing and appeal. As such the accused respectfully, again, requests copies, certified, as requested, herein, and in his original request, or, in the stead, a document stating no such documents were filed with the court.

Dated: 03:26:2004

Respectfully,

Steven Sutcliffe

Steven: Sutcliffe

Declaration of Accused

I, Steven-William: Sutcliffe, hereby declare I have not todate received any documents requested by the court. I have received a declaration from Mr. David R. Reed, but nothing from Gregory Nicolaysen or any other party.

Dated: 03:26:2004

Signed under penalty of perjury.

Steven Sutcliffe

Steven: Sutcliffe
02837-049

EX
17

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

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

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

THE COURT: It does not.

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

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

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

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

MR. SUTCLIFFE: Thank you, Your Honor.

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

I read the presentence -- this is not necessarily

Ex
18

65 Temporary Commitment of Incompetent Defendant for Treatment to Regain Competency

If, after the competency hearing, the court finds by a preponderance of the evidence that the defendant is presently incompetent to stand trial, the court must commit the defendant to the custody of the Attorney General. The Attorney General must then place the defendant in a suitable facility for treatment for a reasonable period of time, not to exceed four months, to determine whether there is a substantial probability that in the foreseeable future, the defendant will attain the capacity to permit the trial to proceed. *See* 18 U.S.C. § 4241(d). This commitment to the custody of the Attorney General for treatment is mandatory. *United States v. Shaway*, 865 F.2d 856 (7th Cir. 1989); *United States v. Donofrio*, 896 F.2d 1301 (11th Cir.), *cert. denied*, 497 U.S. 1005 (1990).

If, after the initial period of the treatment, the court finds that there is a substantial probability that the defendant will attain the capacity to permit the trial to proceed within an additional reasonable period of time, the Attorney General shall continue to hospitalize the defendant for treatment for an additional reasonable period of time until the defendant regains competence or the pending charges are disposed of according to law. 18 U.S.C. § 4241(d)(2).

When the director of the facility in which the defendant is hospitalized determines that the defendant has recovered his or her competency to stand trial, the director must file a certificate to that effect with the clerk of the court that ordered the commitment. The court then will hold another competency hearing. If the court finds by a preponderance of the evidence that the defendant has recovered to the extent that he/she is able to understand the nature and consequences of the proceedings against him/her and to assist properly in his/her defense, the court shall order the defendant's immediate discharge from the facility in which the defendant is hospitalized and set a date for trial. The defendant is then subject to the normal release and detention provisions of 18 U.S.C. §§ 3141 *et seq.*, which apply to all criminal defendants. 18 U.S.C. § 4241(e).

EX
19

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

STEVEN WILLIAM SUTCLIFFE,

Defendant.

CASE NO. CR 02-350(A)-AHM

ORDER RE: FURTHER COMPETENCY DETERMINATION OF DEFENDANT PURSUANT TO 18 U.S.C. § 4241(d)

This case came before the Court for a status hearing on the issue of defendant's competency to stand trial on March 14, 2003. The United States was represented by Assistant United States Attorney Elena J. Duarte. The defendant was present and represented by Gregory Nicolaysen, Esq.

At the hearing, all parties indicated that they had received and read the report regarding defendant's competency, which had been prepared by Dr. Rushton A. Backer, Clinical Psychologist, at the Metropolitan Detention Center in Los Angeles ("MDC/LA"), where defendant had been evaluated. Dr. Backer represented that at the Court's direction he had given a copy of his report to defendant, on the day preceding the hearing. In his report, Dr. Backer opined that defendant was competent to stand trial, that is, defendant understood the nature of the charges against him and was

cc: USMO, PSA

145

EXHIBIT B

EX
20

ENTER ON ICMS
MAR 21 2003

FILED
CLERK, U.S. DISTRICT COURT
MAR 20 2003
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

Priority ✓
Send ✓
Enter
Closed
JS-5/JS-6
JS-2/JS-3
Scan Only

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. STEVEN WILLIAM SUTCLIFFE, Defendant.	CASE NO. CR 02-350(A)-AHM ORDER RE TRANSFER TO FMC ROCHESTER

Pursuant to the provisions of 18 U.S.C. § 4241(d), defendant Steven William Sutcliffe hereby is committed into the custody of the Attorney General of the United States, to be transported forthwith to FMC Rochester, Minnesota, address: P.O. Box 4600, Rochester, Minnesota 55903-4600; telephone (507) 287-0674; fax (507) 287-9601, for a reasonable period of time, but not to exceed four months, for the purpose of determining the defendant's competency to stand trial. The United States Marshal shall see to it that Mr. Sutcliffe is transported by direct flight and that he arrives at and is admitted into FMC Rochester by not later than April 1, 2003. Sutcliffe shall be returned to MDC/LA by not later than July 31,

///

///

cc: USMO, PSA

(144)

EXHIBIT C

EX
21

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 2004

(Argued: June 24, 2005 Decided: November 1, 2005)

Docket Nos. 03-1575(L), 03-1610(CON)

UNITED STATES OF AMERICA,

Appellee,

- v. -

XIAO QIN ZHOU aka Viet Guy aka Viet Boy aka Vietnamese Boy, LIN LI aka Yi Jun aka Crazy Chung, CHUN RONG CHEN aka Yi Non, LI WEI aka Yi Guan, LI XIN YE aka Pai Fot, and HING WAH GAU aka Yi Hei,

Defendants,

CHEN ZI XIANG aka Yi Soon aka Yi Soon Gang and LIN XIAN WU aka Ah Oo,

Defendants-Appellants.

Before: MINER and CALABRESI, Circuit Judges, and AMON, District Judge.*

Appeals from judgments of conviction entered in the United States District Court for the Southern District of New York (Casey, J.), following a jury trial, convicting each of the defendants-appellants of one count of extortion, in violation of 18 U.S.C. §§ 2 and 1951; one count of conspiracy to commit extortion, in violation of 18 U.S.C. § 1951; three counts of robbery, in violation of 18 U.S.C. §§ 2 and 1951; three counts of conspiracy to commit robbery, in violation of 18 U.S.C. § 1951; and four counts of using, carrying, and possessing a firearm

---

* The Honorable Carol B. Amon, United States District Court for the Eastern District of New York, sitting by designation.

during and in relation to participation in the charged extortion, robberies, and conspiracies to commit extortion and robbery, in violation of 18 U.S.C. § 924(c)(1)(A)(ii).

Affirmed in part, reversed in part, and remanded.

LESLIE C. BROWN, Assistant United States Attorney (David N. Kelley, United States Attorney for the Southern District of New York, Katherine Polk Failla, Assistant United States Attorney, on the brief), New York, NY, for Appellee.

SANFORD TALKIN, Talkin, Muccigrosso & Roberts, L.L.P., New York, NY, for Defendant-Appellant Chen Xiang.

ELLYN I. BANK, ESQ. (James M. Branden, of counsel, on the brief), New York, NY, for Defendant-Appellant Lin Xian Wu.

explanation of the understanding or intent with which certain acts [had been] performed," both of which were deemed permissable. Finally, the court found that any "danger of prejudice [could] be minimized by the use of a limiting instruction to the jury."

C. Lin's Mental Competence

On October 25, 2002, Lin moved the District Court, pursuant to 18 U.S.C. § 4244(a), for a hearing to determine his mental condition, on the ground that there was "reasonable cause to believe that [he was] suffering from a me[n]tal disease or defect for the treatment of which he [was] in need of custody for care or treatment in a suitable facility." Lin also requested, pursuant to 18 U.S.C. § 4244(b), that he be given "a psychiatric or psychological examination" prior to the hearing. Between February 13 and March 28, 2003, in accordance with an order of the District Court, a "forensic mental health evaluation" of Lin was conducted by Dr. Thomas Patenaude, a forensic psychologist affiliated with the Devens Federal Medical Center — a facility operated by the U.S. Department of Justice, Federal Bureau of Prisons ("BOP") — in Ayer, Massachusetts. The goal of the evaluation was to determine whether Lin was "suffering from a mental disease or defect for the treatment of which he [was] in need of custody for care or treatment in a suitable facility." Dr. Patenaude reported "with reasonable psychological certainty" that Lin was not suffering from such a mental disease or defect. The District Court made no further orders before trial with respect to Lin's mental condition.

On or about December 18, 2003, subsequent to Lin's trial, conviction, and appeal, the District Court received a letter from the BOP stating that an internal investigation had revealed "sufficient evidence to question the credibility and accuracy of [Dr. Patenaude's] psychological evaluation" of Lin. On February 13, 2004, Lin moved this Court to stay his appeal and remand

the case to allow him to seek an order from the District Court "for a new psychological evaluation." On April 1, 2004, this Court granted that motion. On July 19, 2004, the District Court granted a second examination but, over Lin's objection, ordered that Lin be evaluated by "an examiner to be designated by the [BOP]," rather than "by [Lin's] chosen examiner." Between July 30 and August 26, 2004, Dr. Randall Rattan, a forensic psychologist affiliated with the BOP, conducted a psychological evaluation of Lin at the Federal Medical Center in Fort Worth, Texas. After examining Lin and the records associated with his case, Dr. Rattan's opinion was that Lin "appeared competent for both trial and sentencing."

D. Trial and Sentence

The evidence at trial established that Appellants had, as part of a gang, engaged in a series of crimes during the approximately six-month period from July 2001 to January 2002. The Government's evidence at trial consisted of testimony from cooperating witnesses Xiao, Li Xin Ye, and Chun Rong Chen — who, as noted above, were co-defendants and part of the gang that committed the crimes charged. The Government's witnesses also included victims of the crimes, as well as law enforcement officers who were involved in the investigation of the gang's activities. The Government also introduced physical evidence, including guns and ammunition, recovered from an apartment that Appellants had shared with a co-conspirator.

On May 29, 2003, after a two-week trial, a jury found both Chen and Lin guilty of each of the charged offenses. On September 18, 2003, the District Court sentenced Chen to a term of imprisonment of seventy months on Counts One, Two, Four, Five, Seven, Eight, Ten, and Eleven, to be followed by an aggregate consecutive term of imprisonment of 984 months on

EX
22

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

GREGORY P. VIOLETTE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil no. 04-135-P-S
	)	Crim. No. 00-26-B-S
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER ON MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

SINGAL, Chief District Judge

Before the Court is Petitioner Violette's Motion to Vacate, Set Aside or Correct Sentence (Civil Docket # 1). For the reasons stated below, the motion is DENIED.

On October 31, 2002, this Court sentenced Petitioner to 87 months imprisonment after he plead guilty to bankruptcy fraud, mail fraud, wire fraud, money laundering, and making false statements to a financial institution. Petitioner brings this habeas petition pursuant to 28 U.S.C. § 2255, requesting relief on two grounds: (1) that new evidence impugning the credibility of the psychologist who examined Defendant to determine his competency to stand trial requires that his conviction be vacated; and (2) the Supreme Court's decision in Blakey v. Washington, 124 S.Ct. 2531 (2004), renders Petitioner's sentence unconstitutional, requiring it to be vacated. Given the "emerging complexity" of the issues involved in this habeas petition, the Magistrate Judge appointed counsel to the Petitioner (Civil Docket # 12). Appointed Counsel conducted an examination of the issues involved in the case, and filed a Response to the Government's Opposition (Civil Docket # 22) in which he stated that he was "unable to find any non-frivolous issues to

raise in this Petition relating to either Dr. Patenaude's evaluation of Mr. Violette, Mr. Violette's competency during the proceedings below, or Mr. Violette's sentencing hearing."[1] (Resp. to Gov't's Opp'n (Civil Docket # 22) at 3.)

A. Misconduct of the Psychological Examiner

The basis for the first ground of Petitioner's motion is the recent finding by the Office of Internal Affairs of the U.S. Bureau of Prisons that the psychiatrist who evaluated Petitioner prior to his guilty plea, Dr. Thomas Patenaude, falsified the records of four federal inmates "to make it appear he met with inmates when in fact he had not." (Gov't's Opp'n to Mot. to Vacate, Set Aside or Correct Sentence (Civil Docket # 16) at 23.) Petitioner received a psychological examination from Dr. Patenaude at the order of the Court after announcing his intent to pursue an insanity defense at trial. After receiving the results of the examination, Petitioner withdrew his Motion for a Competency Hearing. Presumably, Petitioner believes that the recent revelations regarding Dr. Patenaude's misconduct casts doubt upon the reliability of Dr. Patenaude's finding that Petitioner was competent to stand trial.

---

[1] Counsel cites Anders v. California, 386 U.S. 738 (1967) for the proposition that a court-appointed attorney is not required to press an appeal if he can find no non-frivolous issues. Anders allows a court-appointed attorney to withdraw from a case on appeal if, after a "conscientious examination," he "finds his case to be wholly frivolous." Id. at 744. The request for withdrawal must be accompanied by "a brief referring to anything in the record that might arguably support the appeal." Id. The court must then undertake "a full examination of all the proceedings" and decide whether the appeal is indeed frivolous. Id.

It is not clear to the Court that Anders, which involved a direct appeal, is applicable to habeas proceedings even if the Court has appointed counsel to the petitioner. See Pennsylvania v. Finley, 481 U.S. 551 (1987) (holding that a court-appointed attorney need not comply with Anders in withdrawing from a case involving the collateral appeal of a conviction in state court). Since there is no constitutional right to representation for prisoners mounting collateral attacks on their sentences, the constitutional concerns underlying the Anders holding would appear to be inapplicable. Id. at 554–555. However, finding that there is no harm in following the Anders procedure in light of the particular facts of this case, the Court follows counsel's lead without expressing any opinion on whether the Anders procedure must or even should be followed in future habeas cases where there is court-appointed counsel.

EX
23

TENTH CIRCUIT BLOG

WEDNESDAY, FEBRUARY 28, 2007

Ex Parte Communication By Judge With Jurors Was Harmless Error

Bodine v. Warden, 2007 WL 534449 (2/22/07)(unpub'd) - Any error committed when the judge had a conversation with Oklahoma jurors, outside the presence of counsel and the petitioner, was harmless. The jurors told the judge they wanted all the 20 year sentences they voted for to run consecutively. The judge did impose them consecutively for a total of 220 years. The petitioner had not shown the judge was influenced by the jurors.

POSTED BY SHARI ALLISON AT 9:17 AM

Order to Involuntarily Medicate Defendant to Competency Affirmed

United States v. Archuleta, 2007 WL 549277 (2/23/07)(unpub'd) - The 10th affirms an order to involuntarily medicate a defendant to competency. The 10th troublingly holds that, in deciding whether the governmental interest in making the defendant competent has been lessened by the time the defendant has already spent in custody, the court should compare the time in custody to the statutory maximum, not to the sentence the defendant is likely to receive under the guidelines. The 10th doesn't explain why that is so.

POSTED BY SHARI ALLISON AT 9:17 AM

CASE SUMMARIES AND COMMENTARY BY FEDERAL DEFENDERS OF THE TENTH CIRCUIT

PREVIOUS POSTS

ARCHIVES

challenged warrant, supporting affidavit, photos, etc., COA was limited to referring to district court findings. Warrant was sufficiently particular despite lack of clarity as to whether it described Mr. Brakeman's property or his neighbor's. Officer's opening of glasses case containing meth during pat-down search was perfectly fine because Mr. Brakeman might have broken free and seized the case and it could have contained a knife or other weapon.

POSTED BY SHARI ALLISON AT 1:23 PM

Interesting Unpublished Decisions

U.S. v. Gaines, 2007 WL 241293 (1/30/07) - Important case for anyone whose client was evaluated by Dr. Thomas Patenaude. The d.ct. erred when it refused to hold an evidentiary hearing regarding whether the defendant had been incompetent at the time of his guilty plea. A letter from BOP informed the d.ct. that an internal investigation of the doctor revealed sufficient evidence to question the credibility and accuracy of his psychological evaluations. The d.ct.'s holding at the plea hearing that the defendant was competent did not preclude relief because those findings were made before receipt of the BOP letter. If the doctor's report was the primary reason for the competency finding, the defendant would be entitled to collateral relief. The defendant had good reason for not raising the competency issue on appeal because the letter was sent after the appeal.

U.S. v. Crook, 2007 WL 182998 (1/25/07) - A example of the weakness of the Double Jeopardy Clause. It was okay to pursue an embezzlement prosecution under 18 U.S.C. § 666, even though the d.ct. dismissed for lack of evidence a previous embezzlement prosecution under 18 U.S.C. § 641 based on the same conduct. The d.ct. dismissed the § 641 charge because § 641 required the money taken to be U.S. property. § 666 doesn't have that element.

Heckard v. Tafoya, 2007 WL 241280 (1/30/07) - A previous 2241

EX
24

NINTH CIRCUIT BLOG

MONDAY, OCTOBER 15, 2007

US v. Sutcliffe, No. 04-50189 (10-11-07). The defendant was a dissatisfied IT employee. He was let go by his company, and then SSNs started appearing on websites, and threats being made. The defendant apparently ignored a restraining order, and became increasingly hostile. He was eventually charged and convicted on interstate threats and transferring SSN numbers to facilitate a criminal activity. On appeal he raises numerous issues. the most interesting is the trial court's "implicit finding" that he waived counsel. He went through five appointed lawyers, suing them or attacking them or blatantly disregarding their advice. The court, exasperated, held that his actions were akin to his wanting self-representation, and the court so ordered, with an appointment of stand-by counsel. The 9th affirmed. The 9th held that the defendant's actions toward and relationship with appointed counsel made it clear that the district court did not err in finding self-representation. This finding was carried over to the defendant's argument that he should have had appointed counsel for sentencing. The 9th held that stand by counsel acted in the defendant's interests. This issue differs from trial representation, and once a conviction occurred, it could be argued that counsel was needed, especially with guidelines. The 9th however affirmed. Lastly, there was no *Ameline* error, because the 9th held that the sentence would have been the same. (This strikes one as being annoyed with appellant.)

US v. Richard, No. 06-10377 (10-12-07). The jury sends out a note, "We want to hear a portion of a witness's testimony." What's a court to do? Well, a good starting point would be this

CASE SUMMARIES AND COMMENTARY BY FEDERAL DEFENDERS OF THE NINTH CIRCUIT

CONTRIBUTORS

JON SANDS
PAUL M. RASHKIND
STEVE SADY
CARL GUNN
DAVID PORTER
JOHN RHODES
STEVE KALAR

CLICK HERE FOR SUPREME COURT & OTHER CIRCUIT BLOGS

CLICK HERE FOR STEVE SADY'S BLOG SUMMARY

PREVIOUS POSTS

EX
25

Steven Sutcliffe

From: steven.sutcliffe [steven.sutcliffe@gmail.com]
Sent: Tuesday, November 21, 2006 2:35 PM
To: Sung B. Park
Subject: RE: IMPORTANT: jurisdiction

SHOW ME WHERE YOU BELIEVE THE GOVERNMENT PROVED I TRANSMITTED ANY PAGE ESTABLISHED THROUGH A NETWORK LOG FILE.

IN ALL THE CASES CITED THE ACCUSED ADMITTED TRANSMITTING. THE GOVERNMENT WAS NEVER PUT TO THE CRUCIBLE OF PROVING IT.

I DON'T ADMIT TRANSMITTING.

Steven Sutcliffe

From: steven.sutcliffe [steven.sutcliffe@gmail.com]
Sent: Monday, November 20, 2006 7:43 PM
To: Sung Park
Subject: 3 issues we discussed Number 2

Showing that the defendant was in fact the one who transmitted the page(s) in question.

Here was the case cited in Hew Hampshire when I was arrested there. U.S. v. WHIFFEN, 121 F.3d 18 (1st Cir. 1997)

"[t]o establish a violation of section 875(c), **the government must establish that the defendant intended to transmit the interstate communication** and that the communication contained a true threat. Whether a communication in fact contains a true threat is determined by the interpretation of a reasonable recipient familiar with the context of the communication. The government does not have to prove that the defendant subjectively intended for this recipient to understand the communication as a threat.

Darby , 37 F.3d at 1066. Our sister circuits have also considered what constitutes a "true threat" under other federal threat statutes. See United States v. Fulmer , 108 F.3d 1486, 1491 (1st Cir. 1997) (collecting cases). "

"the government must establish that the defendant intended to transmit the interstate communication "

Mr. Park, There is only one way to establish that the defendant intended to transmit the "communication." They must show the defendant did it in deed transmit it or get someone else to do it.. At least that is the standard in the first circuit. That element was never stated in the government's indictment. Nor proved at trial: EXAMPLE:

The fact that he had access to it shows his identification, shows it was ***most likely*** him that ***posted it.***" Page 2139, Lines 11-15 Elena Duarte

Sung, anyone with a username and a password had access to it. You said that in the opening brief: Agent Harrill also testified that either the owner of the website or someone who has the user ID and password to the FTP upload section could upload the content on the website.(RT 534).

PROSECUTOR: "And all of the representatives that testified, testified that the manner in which to upload Webpages to the website that they hosted was [generally] by 'FTP' – File Transfer Protocol – which is the transfer of the electronic data from one area to another." Page 2143, Lines 21-25

Page 2147, Lines 11-16
PROSECUTOR: "Now, you also heard the elements of the second group of charges: Transferring social security numbers with the intent to aid and abet. And you heard the elements of that: That the defendant acted knowingly, ***that he transferred the number***, that it was in a manner affecting interstate commerce

"that he transferred the number" is an element, admitted by Duarte. Not someone else. They must prove that "he" transferred it. Not someone or something else transferred it.

The only way to prove who transmitted it is through the use of the server's logs.

ENTER: GOVERNMENT WITNESS: WILLIAM SIEBERT, Director of Customer Relations, Guidance Software/computer forensics consultant.

Page 1608, Lines 15-20
PROSECUTOR: "In you opinion, were they the product of visiting a site, perhaps making a download or two, and then backing up that data?"
ANSWER: "It is possible that that is the product of '***downloading***' a webpage or an – ***downloading*** the webpage ***or*** actually creating it on his machine and ***uploading*** it back to the Internet."

Page 1608, Lines 21-25, Page 160, Lines 1-4
PROSECUTOR: "In you examination of the seized media, were you able to form an opinion on who created – I should say, on whether the website 'evilgx.com' was created on the computer that you were examining?"
ANSWER: "Yes. I would most definitely say that the 'evilgx.com' webpages were built on the hardware seized from Mr. Sutcliffe."
PROSECUTOR: "Nothing further, Your Honor."
COURT: "Okay. Anything further?"
DEFENDANT: "Yes, Your Honor, just one question."

Page 1609, Lines 7-11 and 17-21
DEFENDANT: "Of these pages you talked about that were created – on 'evilgx' that were created on this computer, can you tell with 100 percent accuracy whether all of these pages were created by the defendant?"
ANSWER: "No, I cannot."
DEFENDANT: "And if those pages were ***downloaded*** to somebody else who had FTP access to that website, they could tinker with the page, too, couldn't they?"
ANSWER: "Yes. They could alter the Webpages that were up on the internet."

Page 1610, Lines 9-
DEFENDANT: "Can you tell, through your analysis, where physically the defendant or anybody was when that page, or any of those pages, was put up on the website?"
ANSWER: "No, I can't tell you where the computer was physically located when the webpages were created and ***posted*** to the internet."

DEFENDANT: "Nothing further, Your Honor."

ENTER: GOVERNMENT WITNESS: MONTE WHITE, Customer Support Manager, Intercosmos MediaGroup, New Orleans, Louisiana.
INVOLVES EXHIBTS: 42& 43

Page 1307, lines 11-13
PROSECUTOR: "In other words, do those logs reflect the ***successful uploads*** to the website?"
ANSWER: "No."[1]

ENTER: GOVERNMENT WITNESS: DAVID JOHNSON, Team Lead for Network Abuse Team, Comcast Cable Company.
INVOLVES EXHIBTS: 31 & 32

Page 1276, Lines 4-25
PROSECUTOR: "Does this [exhibit] also show any kind of identifying feature or address for the computer [of the accused[2]]?"
ANSWER: "On the bottom portion of the page, it shows the MAC address[3] of the computer[4]"
QUESTION: The which address?"
ANSWER: The MAC address."
QUESTION: "Without getting to technical, what is the purpose of assigning a MAC address to this account?"
ANSWER: "*The MAC address actually is the single identifier for a PC* or a computer device, and *that is essentially what ties a computer to an IP address at a given time*."
QUESTION: "Does that MAC address actually correspond to hardware in the user's computer?"[5]
ANSWER: "It does."[6]

Page 1278, Lines 1-17
Q: "What time do these – what time frame do these records cover …?"
A: "They cover the period of February 1, 2002 to March 22, 2002."
Q: "And were there any records available before that time for this computer and this IP address?"
A: "No."
Q: "So do you know whether or not -- this IP address that was originally assigned in November and that we see being used from February on, do you know whether or not for sure that was the same IP address being used in the interim?"
A: "No."

Page 1280, Lines 3-15
ACCUSED:
Q: "To your knowledge, does AT&T or Comcast have any knowledge of any logs[7] available for any dates between January and March 29th of disconnect and connect times from that cable modem?"
A: "Not to my knowledge."
Q:" To your knowledge, does Comcast or AT&T have any logs available for locations of that cable modem between January and March of 2002?"
A: "Locations of the actual cable modem device as to who – which customer may have had it at that time?"
Q: "Well, the IP address. I'm speaking specifically to the IP address?
A: " Okay. To the IP address, not to my knowledge."

ENTER: GOVERNMENT WITNESS: MAURICE GILMORE, Owner of Hosting Solutions, Virginia. HOST from January 9 till February 18, 2002. (See page 1114)
INVOLVES EXHIBIT 36 "Subscriber Info," not FTP log transfer info!

Page 1108, Lines 8-18
PROSECUTOR: "By '*uploading their website,*' is there a particular method or way to upload that your system used?"
A: "Yes. Our clients, they use a protocol FTP. And what they'll do, from they're home PC, they'll just upload their contents to our servers.
Q: And by 'upload' to your computer, does that constitute a physical *transfer* to your computer?"
A: " Yes. It does."

ENTER: GOVERNMENT WITNESS: FRANK HARRILL, Special Agent, FBI, Original Case Agent In Charge
Transcript of 11.13.2003
Page 417, Lines 7-25
PROSECUTOR: "Once a website is on the Internet, can it be changed?"
A: "It can."
Q: "How is that?"
A: ***Anyone with access to the website can upload*** – we've talked about FTP – updated content, and they could change one web page or they could change the entire website at virtually anytime."

---

[1] Right after this testimony the judge remembers the defense requested a copy of a pretrial status conference transcript requested TWO MONTHS ago and finally provides a copy for the accused. See page 1312, lines 15-23.
[2] The computer NIC was never entered as an exhibit, nor was the computer as a whole, either.
[3] Ethernet addresses are known as Media Access Control (MAC) addresses, hardware addresses, or sometimes just Ethernet addresses. Since many computers may share a single Ethernet segment, each must have an individual identifier.
These identifiers are hard-coded on to the NIC. A NIC is a Network Interface Card. A MAC address is a 48-bit number, also stated as a 12-digit hexadecimal number. This number is broken down into two halves, the first 24-bits identify the vendor of the Ethernet card, and the second 24-bits is a serial number assigned by the vendor. See INTRODUCING NETWORK ANALYSIS, SYNGRESS PUBLISHING, http://www.syngress.com/book_catalog/284_eps/sample.pdf

[4] MAC addresses are unique, and no two computers should have the same one. However, this is not always the case. Occasionally there could be a manufacturing error that would cause more than one network interface card to have the same
MAC address, but mostly, people will change their MAC addresses on purpose. This can be done with a program, such as ipconfig, that will allow you to fake your MAC address. Faking your MAC address is also called spoofing.
[5] There is no way he could know without examining the defendant's computer and Network Card. See fn. 4, supra.

[6] See Government's Response To Court's Order On Computer And Email Evidence, United States Of America V. Zacarias Moussaoui, Crim. No. 01-455-A Eastern District Of Virginia, Alexandria Division

(Sept. 2002). "In October 2001, further investigation revealed that that IP address was assigned to PC11, a lab computer on the campus of the University of Oklahoma, using Network Interface Card identified with MAC address 00:B0:D0:43:85:C8." Page 12, Ibid. Source:
http://news.findlaw.com/hdocs/docs/terrorism/usmouss90402grsp.pdf

[7] "Clearly, the FBI needs engineering personnel to develop and deploy sophisticated electronic surveillance capabilities in an increasingly complex and technical investigative environment, skilled CART personnel to conduct the computer forensics examinations to support an increasingly diverse set of cases involving computers, as well as expert NIPC personnel to examine network log files to track the path an intruder took to his victim. In cases such as Los Alamos or Columbine, both NIPC and CART personnel were called in to bring their unique areas of expertise to bear on the case." See, Statement for the Record of Louis J. Freeh, Director Federal Bureau of Investigation on Cybercrime Before the Senate Committee on Appropriations Subcommittee for the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Washington, D.C. February 16, 2000

SUNG PLEASE NOTE:
Transcript of 11.07.2003
Page 62, Lines 15-18
Judge: "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.

Page 63, Lines 12-25 deals with **jurisdiction Motion filed early in 2003**
.Defendant: "I don't believe the Government can prove that and I demand the Government have to prove that **before** they try me."
Page 64, Lines 1-7
Judge: "**Your demand that the Government have to prove that is granted.** [1] 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 is no jurisdictional barrier to an other wise valid conviction."
Defendant: "Thank you, Your Honor."[2]

---

[1] See RT 11.12.2003, Pages 4-6
[2] The judge never allowed the defendant to put the government to the test, BEFORE any trial took place. See fn. 12 above. This written challenge was later PLACED IN FILE – NOT USED. It is now missing from the file.

Steven Sutcliffe

From: steven.sutcliffe [steven.sutcliffe@gmail.com]
Sent: Tuesday, November 21, 2006 12:55 PM
To: Sung Park
Subject: network log files = jurisdiction

network log files = jurisdiction

"Clearly, the FBI needs engineering personnel to develop and deploy sophisticated electronic surveillance capabilities in an increasingly complex and technical investigative environment, skilled CART personnel to conduct the computer forensics examinations to support an increasingly diverse set of cases involving computers, as well as expert NIPC personnel to examine network log files to track the path an intruder took to his victim. In cases such as Los Alamos or Columbine, both NIPC and CART personnel were called in to bring their unique areas of expertise to bear on the case." See, Statement for the Record of Louis J. Freeh, Director Federal Bureau of Investigation on Cybercrime Before the Senate Committee on Appropriations Subcommittee for the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Washington, D.C. February 16, 2000

CALL ME IF YOU STILL DON'T AGREE WITH THIS PREMISE.

EX
26

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.

EX
27

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?