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CA 04-50189  
DC NO. CR 02-00350-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. )  
 )  
 )  
 )  
\_\_\_\_\_ )

I

**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

- A. WHETHER APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL.
- B. WHETHER THE TRIAL COURT LACKED JURISDICTION.
- C. WHETHER SECTION 875(C) IS UNCONSTITUTIONAL ON ITS FACE FOR VAGUENESS.
- D. WHETHER APPELLANT WAS SUBJECTED TO UNCONSTITUTIONAL SELECTIVE PROSECUTION.
- E. WHETHER THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE INDICTMENT ON SPEEDY TRIAL GROUNDS.
- F. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO RECUSE JUDGE MATZ.

- G. WHETHER THE DISTRICT COURT ERRED IN DENYING MR. SUTCLIFFE'S REQUEST TO RECONSTRUCT THE WEBSITE "EVILGX.COM".
- H. WHETHER THE DISTRICT COURT ERRED IN DENYING MR. SUTCLIFFE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF THE RIFLE.
- I. WHETHER THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE INDICTMENT.
- J. WHETHER THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.
- K. WHETHER THE DISTRICT COURT COMMITTED A REVERSIBLE ERROR IN ITS JURY INSTRUCTION.
- L. WHETHER THIS CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR RESENTENCING.

II

STATEMENT OF THE CASE

A. Nature of the Case

1. Jurisdiction of the District Court

This appeal is from the District Court's judgment pronounced on April 15, 2004, following a guilty verdict by jury of three counts of making threats to injure in interstate commerce in violation of 18 U.S.C. section 875(c) and five counts of transferring social security numbers with intent to aid and abet the false use of a social security number in violation of 18 U.S.C. section 1028(a)(7). The District Court had jurisdiction pursuant to 18 U.S.C. Section 3231.

2. Basis for Jurisdiction in the Court of Appeal

This Court has jurisdiction over appeals from final judgments under 28 U.S.C. Section 1291.

3. Notice of Appeal was Timely

The judgment was pronounced on April 15, 2004. On the same day, Appellant filed a Notice of Appeal, and therefore, the appeal was timely made.

B. Proceedings and Disposition of the Trial Court

On March 26, 2002, FBI agents arrested Appellant, Steven Sutcliffe, in Manchester, New Hampshire, on

information. The government brought Mr. Sutcliffe to Los Angeles where the alleged victims were, and indicted him on April 5, 2002, charging him with four counts of making threats to injure in interstate commerce in violation of 18 U.S.C. section 875(c) and five counts of transferring social security numbers with intent to aid and abet the false use of a social security number in violation of 18 U.S.C. section 1028(a)(7). (ER 490)<sup>1</sup>. On April 9, 2002, Mr. Sutcliffe made his initial appearance. (RT 4/9/02)

On January 10, 2003, a First Superseding Indictment was filed against Mr. Sutcliffe, charging him with the same offenses as the original indictment but adding the element of specific intent to threaten. (ER 183-187).

On January 17, 2003, Mr. Sutcliffe entered a plea of not guilty to the First Superseding Indictment. (ER 500). A jury trial began on November 12, 2003, and on December 4, 2003, the jury found Mr. Sutcliffe not guilty on count three and found him guilty on all other charges. (RT 12/4/03 at 2191).

On April 15, 2004, the District Court conducted a sentencing hearing and sentenced Mr. Sutcliffe to the

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<sup>1</sup>"ER" refers to Excerpts of Records; "RT" refers to Reporter's Transcript—Pre trial proceedings are followed by the date of the hearing and the page number; Trial is indicated by simply the page number.

custody of the Bureau of Prisons for a term of 46 months on counts one, two, and four and 36 months on each of counts five through nine, all to be served concurrently. Mr. Sutcliffe was ordered to a supervised release for a term of three years. As a part of the supervised release conditions, the district court imposed the special conditions under General Order 01-05 and ordered Mr. Sutcliffe, among other things, to participate in mental health treatment. The district court further restricted Mr. Sutcliffe's use of computers. (ER 475-480; RT 4/15/04 at 71-74).

On September 12, 2005, the district court modified certain special conditions pending this appeal. The district court ordered Mr. Sutcliffe to spend eight sessions with a therapist, at which point after the eighth session the counseling shall terminate upon a favorable report from the probation officer. Also, the court allowed Mr. Sutcliffe to use his computer outside of his employment to save for his own record keeping and retrieval purposes personal data and photos and to communicate with members of his immediate family. (ER 485-486).

C. Bail Status

Mr. Sutcliffe has completed serving his 46-month sentence and is currently on supervised release.

### III

#### STATEMENT OF FACTS

##### Prosecution Case

##### Background

In the fall of 2001, Mr. Sutcliffe, a computer technician, worked for Global Crossing (herein after "GX") as a contractor, providing computer technical support. (RT 319-322). Mr. Sutcliffe was highly qualified, and GX offered him regular employment. (RT 324, 357). GX hired Mr. Sutcliffe, although there was a dispute regarding his unwillingness to provide his social security number. (RT 360-361). However, shortly thereafter, a problem arose regarding Mr. Sutcliffe's application, and at a meeting in September, 2001 with Richard Saly, director of human resources, Mr. Sutcliffe's employment was terminated. (RT 363-364).

After his termination, Mr. Sutcliffe was observed picketing outside the GX building. Mr. Sutcliffe held a sign that referred to a website "evilgx.com" (herein after referred to as the website). (RT 325, 364-365). According to GX employees, the website contained personal information on the staff and board members of GX, including pay scales,

social security numbers, addresses, and other information. (RT 326-327, 365-367, 402). The website also contained some information that was on Richard Saly's computer. (RT 367-368). In addition, some of the information contained in the website was identical to the information that was on Janet Troxell's payroll computer. (RT 402).

The prosecution presented evidence to show that while Mr. Sutcliffe was working at GX, he worked on the computers of Elizabeth Greenwood, Richard Saly, and Janet Troxell. (RT 334-336, 338-340, 358, 373, 400).

Andrew Ramsey, manager of policy enforcement for GX, accessed the website and started archiving copies of the website to track additions and deletions to the website. (RT 603-605). He put the copies of the website on a CD-ROM and turned it over to the FBI. (RT 608-609).

Frank Harrill, a FBI cybercrime supervisor and the case agent, viewed the website from the fall of 2001 to mid-2002 and made copies of the website. (RT 407, 418-419). He made copies of the website on November 7, 2001, December 12, 2001, and March 28, 2002. (RT 419, 430, 489). He observed social security numbers that had a link to an article on identity theft. (RT 425-426).

Orly Mann, Mr. Sutcliffe's wife, testified that she and Mr. Sutcliffe had lived at Bedford Street in Los Angeles and

that in November of 2001, they relocated to New Hampshire. (RT 581-582). Mr. Sutcliffe's apartment manager also testified that Mr. Sutcliffe had moved out of his apartment on November 5, 2001. (RT 594-602).

A search of Mr. Sutcliffe's residence in New Hampshire resulted in the seizure of a computer, CDs, floppy disks, some documents, and a Russian rifle with ammunition. (RT 1116-1128).

The prosecution also presented evidence to show that the evilgx.com website was registered with DirectNIC on September 20, 2001 and that the owners were S. Sutcliffe and Richard L. Weatherman. (RT 1298-1302). A banner-free hosting was purchased on October 10, 2001, and the website was deactivated on October 25, 2001. (RT 1305, 1311). The website was turned back on on November 7, 2001 and deactivated again on November 12, 2001. (RT 1311-1312). The evidence also showed that the website was hosted by Carolina Online from October 2, 2001 to December 30, 2001. (RT 1238-1246). From January 9, 2002 to February 18, 2002, the website was hosted by Hosting Solutions, and Mr. Sutcliffe was the customer. (RT 1107-1115). Mr. Sutcliffe's wife held an account for high speed internet and cable TV from November 29, 2001 to March 29, 2002. (RT 1269-1271).

cable TV from November 29, 2001 to March 29, 2002. (RT 1269-1271).

**Counts 1 and 2** (Tracy Hall)

Count one alleged that on or about October 24, 2001, the following **posting** on the website constituted a threat against Tracy Hall: "I will personally send you back to the hell from where you came." (ER 2, 184). Count two alleged that on or about January 31, 2002, the following **posting** on the website constituted a threat against Tracy Hall: "I will kill you." (Ibid).

Hall testified that she went to Mr. Sutcliffe's residence on October 16 and 17, 2001 to serve him with a temporary restraining order on behalf of GX. She observed Mr. Sutcliffe through a sliding glass window and left the document in front of the door. She then called him and left a message saying he had been served. (RT 1321-1323). As she was leaving, she observed Mr. Sutcliffe through her side mirror writing down something. That night she observed on the website her name and license plate, which was a South Dakota plate. (RT 1324-1325).

She also served Leslie McAffe, Mr. Sutcliffe's attorney, with a copy of the service. When she went to McAffe's office, she requested him to remove her information from the website. (RT 1328-1329). McAffe responded by

telling her that there was nothing illegal about it. (RT 1330).

Hall continued to check the website during the month of October. She observed five or six different versions regarding her. She observed a page on the website that stated: "If you don't like seeing your license plate . . . by the way, I was planning on taking a trip to South Dakota real soon . . . maybe we can hook up." There was also a reference to Mount Rushmore. (RT 1332). Upon seeing the reference to South Dakota and Mount Rushmore, she called the person in South Dakota from whom she had obtained the van and told him to be careful. (RT 1332).

The same page also stated: "You think seeing that number is bad, trust us when we say it will get much, much worse." (RT 1333). A link from the phrase "you think seeing that number is bad. . ." went to a page that had personal information on one of the lawyers who handled the temporary restraining order. A link from the phrase "much, much, worse" went to an article regarding identity theft. Upon seeing this part of the page, she felt that her next punishment would be the **posting** on the website of her personal information and having her identity used by someone else. (RT 1333-1335).

The bottom part of the page stated the following: "To close, Tracy Hall, if you call this house again and threaten me, or my family, or ever appear near me, or my family, I will personally send you back to the hell from where you came." Upon seeing this statement, she was scared. (RT 1335).

In January of 2002, Hall observed the following on the website: "Tracy, have you ever been stabbed with a knife? I have. A real big one, punctured my lung. . . the reason I am telling you this is to let you know I understand you were just doing your job, . . . Just as that man was doing his job, which at the time was to try to kill me. As I forgave him, I can forgive you. . . I really don't take kindly to people threatening me or lying to the courts that they served me with a T.R.O., . . . Our paths are now crossed and we are forever joined . . . to deal with that I am going to make you a one time offer. If I never see or hear from or of you again, I will forget you . . . However, if I do ever hear your name mentioned against me ever again I will personally add you to my domain list. I think you understand the issues now enough to understand what this means. If I ever see you near my family again, and I know how to stalk too, I will kill you. That's my offer. Now, go in the peace and lie about me no more." (RT 1336-1337).

Upon seeing the page, Hall felt like she was stuck with Mr. Sutcliffe for the rest of her life, and she took literally that he was going to kill her. (RT 1337-1338). She planned to move out of the state and contacted law enforcement regarding the statements. (RT 1339-1340).

**Counts 4 and 9** (Elizabeth Greenwood and her Social Security number)

Count Four alleged that the following **posting** on the website on March 17, 2002 constituted a threat: "Dedicated to Elizabeth Greenwood" and accompanied by sound file of voice stating "This is all far from over" and linked to a photograph of Greenwood and her young daughter. Count Nine related to the **posting** on the website of her social security number. (ER 3, 5, 185, 187).

Greenwood worked as GX's assistant general counsel and assistant corporate secretary from August of 1999 to December of 2001. (RT 623-624). Mr. Sutcliffe worked on her computer in June of 2001. (RT 625-626). She had a picture of herself and her daughter in her computer. (RT 626).

In August of 2001, Greenwood met Mr. Sutcliffe at her office regarding his refusal to provide social security number based on his religious belief against paying taxes.

(RT 627). The next time she saw Mr. Sutcliffe, he was picketing outside the GX building. (RT 628).

She accessed the website and observed Richard Saly's information. (RT 629). More and more information appeared on the website as time passed. (RT 630). She even observed on the website certain information regarding GX directors, senior executives and their assistants that was on her computer. (RT 633-634). An article discussing identity theft was linked to the pages containing names and personal information. (RT 662). She saw information on two of the attorneys that were handling a civil litigation against Appellant to get the information off the website. (RT 671-674). She also observed information on Tracy Hall and Gary Winnick, the CEO of GX. (RT 675, 686-690).

In March of 2002, Greenwood observed a page on the website that stated the following: "Welcome to the ship! Dead-icated to Elizabeth Greenwood". She also observed a picture, which was on her computer, of herself and her daughter with scary music, and a voiceover that stated: "I can outrun you, I can outthink you, I can outphilosophize you, and I'm going to outlast you." (RT 699, 706). The voiceover was from the movie "Cape Fear" which was about an ex-convict who stalks and attempts to kill the daughter of

the attorney that he blames for his wrongful conviction.

(RT 706)

Greenwood also heard, "Welcome to my domain. This is all far from over. . . Elizabeth, you now owe me \$15,000 for the violation of the contract, and I am coming to collect from you personally." (RT 700-701). She thought that the reference to the money had to do with a contract that had to be accepted in the beginning of the website. (RT 701). The website also contained her personal information, including her address, her home phone number, her social security number, and her date of birth. (RT 702). She did not give anyone permission to publish her social security number on the website. (RT 705).

**Counts 5 to 7 (Posting of Social Security numbers)**

Count Five alleged that on October 24, 2001, Mr. Sutcliffe posted on the website approximately 15 social security numbers assigned to other individuals. Count Six alleged that on November 12, 2001, Mr. Sutcliffe posted on the website approximately 100 social security numbers assigned to other individuals. Count Seven alleged that on December 3, 2001, Mr. Sutcliffe posted on the website approximately 1,900 social security numbers assigned to other individuals. (ER 4, 186).

The prosecution introduced exhibits 7, 9, and 11 to show that there were 15, 120, and 1,400 valid social security numbers respectively of GX employees posted on the website. (RT 1036-1042). Richard Saly testified that no one permitted Mr. Sutcliffe to publish the social security numbers. (RT 369).

**Count 8** (Gary Winnick Social Security number)

Count Eight alleged that on February 13, 2002, Mr. Sutcliffe posted on the website the social security number assigned to Gary Winnick. (ER 4, 186).

Greenwood testified that she saw a reference to Gary Winnick on the website around January or February of 2002. (RT 687). The information on that page had Winnick's social security number. (RT 688, 1055).

**Rule 29 Motion**

After the government rested, Mr. Sutcliffe made a Rule 29 motion for judgment of acquittal. (RT 1611-1619). Mr. Sutcliffe also moved for judgment of acquittal after defense rested. (RT 2105-2109). The district court denied Mr. Sutcliffe's motion for judgment of acquittal. (RT 1611-1619, 2105-2109).

## Defense

Attorney Leslie McAfee represented Mr. Sutcliffe in his civil litigation with GX and other civil matters. (RT 1633-1634). He was listed as the contact person on the website. (RT 1635). His email address, "trialattorney@hotmail.com" was also listed on the website. (RT 1636). He provided advice and direction to Mr. Sutcliffe on what constituted a legal threat. (RT 1638).

McAfee met Tracy Hall on October 18, 2001 at his office when she came to serve documents on Mr. Sutcliffe. (RT 1669-1670). She threatened to make Mr. Sutcliffe and McAfee's legal life miserable. (RT 1671).

McAfee testified that he created most of the disclaimer on the website and that the purpose was to alert potential viewers of the site that certain content is not being represented to be true. (RT 1821-1822). He also informed Mr. Sutcliffe what he needed to do to avoid making a threat on the website. (RT 1823-1824). When McAfee was contacted by some people requesting him to remove their personal information from the website, he honored the requests. (RT 1830-1831). The web page with words "I will kill you" was removed right after McAfee told Mr. Sutcliffe to link it to the page that he was referring to. (RT 1849).

Los Angeles County Sheriff's detective Robert Campbell testified that he interviewed Tracy Hall during an investigation of a case. (RT 1760-1762). Tracy Hall had given false information to one of the victims in the case he was working on. Tracy Hall eventually pled to dissuading a witness. (RT 1764-1766). Tracy Hall also threatened a slander suit against him. (RT 1763).

William Siebert, who works for a computer forensic software company, testified during the cross-examination that he could not say with 100 percent certainty that all the pages in the website were created by Mr. Sutcliffe. (RT 1609).

During the cross-examination, Agent Harrill also testified that the website was registered to someone else other than Mr. Sutcliffe, possibly to Leslie McAfee, in the beginning. (RT 531, 533 537). 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).

## IV

### STANDARD OF REVIEW AND ARGUMENTS

A. APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

#### FACTUAL BACKGROUND

On April 9, 2002, the district court appointed the Federal Public Defender's office to represent Mr. Sutcliffe. (RT 4/9/02 at 8). On August 22, 2002, Defendant complained to the court that he could not trust his lawyer, Ms. Hilary Potashner and stated his reasons. (RT 8/22/02 at 8-12). When asked whether there was any issue concerning Mr. Sutcliffe's competency, Ms. Potashner answered in the negative. (Id. at 5). The court then suggested that another lawyer from the Public Defender's Office, Ms. Bednarski, who had been working on the case with Ms. Potashner, should mainly represent Mr. Sutcliffe. (RT 8/22/02 at 17-19, 27, 34).

On September 23, 2002, Ms. Bednarski moved to be relieved from representing Mr. Sutcliffe. Ms. Bednarski informed the court that the Federal Public Defender's ability to zealously and effectively represent Mr. Sutcliffe has been impaired. (RT 9/23/02 at 3, 7). She felt that it is not something that can be fixed by inquiry or explanation. (Id. at 8). She represented to the court that

it would be in Mr. Sutcliffe's best interest that the office of the Federal Public Defender be relieved. (RT 9/23/02 at 9). Mr. Sutcliffe opposed Ms. Bednarski's motion to be relieved and asserted that it was their way of covering up their incompetence and failure to comply with the professional responsibilities. (Id. at 10-11, 18).

After stating what his lawyers failed to do, Mr. Sutcliffe requested the court to require the Federal Public Defender's Office to continue to represent him. (Id. at 13-18). The court found that the relationship between Mr. Sutcliffe and his lawyers is such that the lawyers cannot provide effective assistance. (Id. at 19). The court further stated it was not in his best interest to require the Public Defenders to represent him and that it was not making any findings as to who is right and who is wrong. (Id. at 21). The district court then relieved the office of the Federal Public Defender from representing Mr. Sutcliffe.<sup>2</sup> (Id. at 29).

On September 25, 2002, the district court appointed Mr. Bill Harris from the Indigent Defense Panel to represent Mr. Sutcliffe. (RT 9/25/02 at 3-4). At a hearing on November 21, 2002, Mr. Harris raised the issue that he might not be

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<sup>2</sup>The court later made the claim that Mr. Sutcliffe had fired them. (RT 8/27/03 at 60).

competent to represent Mr. Sutcliffe because the case was a computer case. He stated to the court that he is like a "child learning the scales", that he does not know how to manipulate the disks, that the evidence like being in Chinese when he did not speak Chinese, and that he does not possess the technical expertise. (RT 11/21/02 at 14-15, 17).

Thereafter, Mr. Sutcliffe filed a motion regarding Mr. Harris' incompetence and ineffectiveness to proceed. (RT 12/04/02 at 16-18). The court stated that computers and [internet] technology were not "really much of an issue in this case" and did not think "that's what the trial is likely to focus on at all." (Id. at 18). The court further went on to state that it believed a lawyer who had never even seen a computer could effectively represent Mr. Sutcliffe and do a "bang-up job." (Ibid).

On January 14, 2003, Mr. Sutcliffe informed the court that he has dismissed Mr. Harris from representing him for incompetence. (RT 1/14/03 at 4). Mr. Harris also stated to the court that there has been a complete breakdown in the attorney-client relationship. (Id. at 8). The district court made a specific finding that the attorney-client relationship has been shattered and relieved Mr. Harris. (Id. at 12-13).

The court then went on say that it was willing to give Mr. Sutcliffe the right to a lawyer, "but only one additional time, absent anything compelling" and to inform him that he does not have a right to select his own lawyer and that if the same "syndrome" occurs with the new lawyer, he will have waived his right to excuse that counsel or to be represented by replacement counsel. (Id. at 13-14).

On January 17, 2003, the court appointed Greg Nicolaysen to represent Mr. Sutcliffe. (RT 1/17/03 at 4). At a status conference hearing held on March 14, 2003, Mr. Sutcliffe asked the court to relieve Mr. Nicolaysen as his counsel. (RT 3/14/03 at 5). Without conducting a hearing on Mr. Sutcliffe's motion to relieve Mr. Nicolaysen, the court proceeded with the competency hearing and removed Mr. Sutcliffe from the court when he objected to Mr. Nicolaysen conducting the hearing on his behalf. (Id. at 12).

On August 4, 2003, Mr. Nicolaysen filed a motion for order relieving counsel.<sup>3</sup> (ER 262). On August 27, 2003, at a hearing on the motion, the district court granted Mr. Nicolaysen's motion to be relieved without further evidence or information. (RT 8/27/03 at 46). The court found that there is a complete breakdown in communication. (Ibid).

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<sup>3</sup>Mr. Nicolaysen subsequently filed two supplemental declarations in support of the motion. (ER 315, 321).

When Mr. Sutcliffe insisted that his motion to relieve Mr. Nicolaysen for ineffective representation predates Mr. Nicolaysen's motion to be relieved (Id. at 47), the court granted Mr. Sutcliffe's motion to relieve Mr. Nicolaysen. (Id. at 51). It did so without making any finding of misconduct or ineffective representation on Nicolaysen's part. (Ibid). The district court prohibited Mr. Sutcliffe from putting on the record as to why he requested Mr. Nicolaysen to be fired. (Ibid).

The court then commented that Mr. Sutcliffe had gone through four attorneys, fought with all of them, and insisted on firing all of them. (Id. at 60). In response, Mr. Sutcliffe explained to the court that he simply wanted effective counsel. (Id. at 61). The court ultimately concluded that Mr. Sutcliffe, through his actions, waived his right to counsel and have chosen to proceed in pro per. (Id. at 60-61, 64-65). The court then appointed Michael J. Brennan as a standby counsel for Defendant. (Id. at 65-67).

On September 2, 2003, Mr. Brennan represented to the court that his schedule would not allow him to function as a standby counsel for Mr. Sutcliffe and requested the court to appoint an alternate standby counsel that he had talked to already. (RT 9/2/03 at 5-7). On the same day, the court

ordered Mr. David Reed to meet with Mr. Sutcliffe to see if he can act as a standby counsel. (Id. at 9-10).

On September 26, 2003, after ascertaining from Mr. Sutcliffe that he does not waive his right to counsel, the district court reversed its earlier position and appointed Mr. Reed as counsel. (RT 9/26/03 at 50-51, 56-57, 63, 68). The court also noted that neither Mr. Sutcliffe nor Mr. Reed was in possession of discovery that he previously ordered turned over.<sup>4</sup> (Id. at 49)

Five days later, on October 1, 2003, Mr. Reed moved to withdraw from the case. (RT 10/1/03 at 4-5). Mr. Reed felt he was not going to be ready for the trial by October 7, 2003. (Id. at 12, 17). When he informed Mr. Sutcliffe that he needed to move for a continuance, Mr. Sutcliffe did not want him to move for a continuance. (Id. at 18). When Mr. Reed insisted on continuing the trial, Mr. Sutcliffe allegedly threatened to sue Mr. Reed. (Id. at 20). Therefore, Mr. Reed, citing a complete breakdown in the attorney-client relationship, asked the court to be relieved. (Id. at 20-21). Mr. Sutcliffe read on the record a letter he sent the court wherein he repeated his right to the effective assistance of counsel. (Id. at 22-24). The

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<sup>4</sup>The court continued the trial over Mr. Sutcliffe's insistence on going to trial as schedule, in 9 business

district court stated that it would not grant Mr. Reed's motion until Mr. Reed turns over the discovery to Mr. Sutcliffe. (Id. at 38).

On October 7, 2003, the district court issued an order granting Mr. Reed's motion to withdraw and also ordering him to act as a standby counsel.<sup>5</sup> (ER 379). The court also found that Mr. Sutcliffe has waived his right to appointed full counsel of record. (ER 381-382). Consequently, Mr. Sutcliffe was forced, once again, to represent himself.

During the trial, the court clarified the reason for forcing Mr. Sutcliffe to represent himself by stating, "You are proceeding without counsel because your conduct, although not your lips and your words, clearly and persistently reflected a refusal to be represented by counsel. And that's why I made the ruling that I did." (RT 1213-1214).

#### Standard of Review

Whether a defendant was denied a Sixth Amendment right to counsel is a question of law reviewed de novo. United States v. Ortega, 203 F.3d 675, 679 (9<sup>th</sup> Cir. 2000).

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days. (RT 9/26/03 at 57, 68).

<sup>5</sup>The court noted that "Mr. Reed's motion to withdraw may have been somewhat premature or precipitous." (ER 380). Nevertheless, the court went on to find that the attorney-client relationship between Defendant and Mr. Reed has been gravely impaired. (Ibid).

Whether a defendant has knowingly, voluntarily, and intelligently waived his Sixth Amendment right to counsel is a mixed question of law and fact reviewed de novo. See United States v. Percy, 250 F.3d 720, 725 (9<sup>th</sup> Cir.), cert. denied 122 S.Ct. 493 (2001). The district court's denial of a motion to substitute counsel is reviewed for an abuse of discretion, but that discretion must be exercised within the limitations of the Sixth Amendment. See United States v. Moore, 159 F.3d 1154, 1159 n.3 (9<sup>th</sup> Cir. 1998).

#### Arguments

1. The Record Does Not Support the District Court's Finding that Appellant Waived His Right to Counsel.

It has been long established that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. Faretta v. California, 422 U.S. 806, 832 (1975), citing Powell v. Alabama, 287 U.S. 465 (1932); Johnson v. Zerbst, 304 U.S. 458 (1938); Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972). Moreover, because a defendant who represents himself relinquishes many of the traditional benefits associated with the right to counsel, before he can represent himself, the accused must "knowingly and intelligently" forgo the

benefits. Faretta v. California, 422 U.S. at 835, citing Johnson v. Zerbst, 304 U.S. at 464-465.

However, a court may force a defendant to proceed pro se if his conduct is "delatory and hinders the efficient administration of justice." United States v. Kelm, 827 F.2d 1319, 1322 (9<sup>th</sup> Cir. 1987) (quoting United States v. Leavitt, 608 F.2d 1290, 1293 (9<sup>th</sup> Cir. 1979)); see also Plumlee v. Del Papa, 426 F.3d 1095, 1108 (9<sup>th</sup> Cir. 2005) (noting that a defendant is not entitled to new counsel if the conflict was of the defendant's making).

Nevertheless, this Court acknowledged that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights," and doubts must be resolved in favor of no waiver. United States v. Meeks, 987 F.2d 575, 579 (9<sup>th</sup> Cir.), cert. denied, 510 U.S. 919 (1993), citing Michigan v. Jackson, 475 U.S. 625, 633 (1986) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

In Meeks, the defendant was initially represented by an attorney appointed by the district court. After replacing the appointed counsel with a private attorney, the defendant again asked the district court to relieve the private attorney and appoint an attorney. The district court granted the defendant's motion to relieve the private attorney and appointed a counsel for the defendant. The

second appointed attorney filed to be relieved, and at the same time, the defendant moved for another attorney. The district court granted the appointed attorney's motion to be relieved; however, the court, frustrated by the delays caused by defendant's "continual changing of attorneys," ordered the defendant to appear pro se at trial, unless he retained counsel. Id. at 577.

This Court held in Meeks that the district court erred in denying the defendant's motion to substitute counsel while, at the same time, granting the appointed counsel's motion to withdraw. This Court concluded that by doing so, the district court waived the defendant's right to counsel for him, leaving him without representation. Ibid.

According to United States v. Meeks, 987 F.2d at 579, the district court could have: (1) denied both the defendant's and the counsel's motions leaving the counsel as the attorney, (2) granted both motions and appointed someone else or (3) given the defendant the opportunity to knowingly and intelligently waive his right to counsel and to proceed pro se. Because the district court failed to do any of the three, this Court reversed the judgment. Ibid.

Most recently, in Plumlee v. Del Papa, 426 F.3d 1095, 1108 (9<sup>th</sup> Cir. 2005), this Court again held that the trial court violated the defendant's Sixth Amendment right to

counsel by refusing to appoint substitute counsel in the face of an irreconcilable conflict between the defendant and his counsel. This Court also held that in such a situation, the defendant's decision to represent himself cannot be considered voluntary. Ibid.

In this case, over Mr. Sutcliffe's repeated objections, the district court forced Mr. Sutcliffe to represent himself during the trial. Although the district court found that through his actions, Mr. Sutcliffe waived his right to be represented by an attorney, the record does not support such finding by the court.

The record shows that Mr. Sutcliffe's initial counsel, the Federal Public Defender's Office, was relieved at the request of the attorneys. In relieving them, the district court made no finding as to who was at fault. (RT 9/23/02 at 21). **In fact, the record shows Mr. Sutcliffe requesting the court to order the Public Defender's Office to continue to represent him.** (Id. at 18). Therefore, the dismissal of the Public Defender's Office as Mr. Sutcliffe's counsel cannot be attributed to something that he did.

Mr. Harris, Mr. Sutcliffe's second trial counsel appointed on September 25, 2002, was **relieved because of incompetence.** On January 14, 2003, Mr. Sutcliffe moved to relieve Mr. Harris from representing him. (RT 1/14/03 at

4). Mr. Sutcliffe submitted a Writ of Mandamus to Compel in which he asserted that Mr. Harris ineffectively assisted him by 1) failing to object to the prosecutor's lies at the January 10, 2003 hearing; 2) failing to challenge the original indictment based on prosecutorial misconduct at the Grand Jury hearing; 3) failing to challenge the district court's jurisdiction; and 4) allowing some discovery material to be stolen without back-up copies. (ER 188). Mr. Sutcliffe also argued that Mr. Harris was computer illiterate, which is to his detriment in a computer crime case. (RT 1/14/03 at 16, 23-24).

The district court construed Mr. Sutcliffe's request as a request for substitution of attorney and conducted a hearing outside of the presence of the prosecutor. (RT 1/14/03 at 6-7). Mr. Harris stated to the court that there has been a complete breakdown in the attorney-client relationship. (Id. at 8-9). Mr. Harris also expressed that Mr. Sutcliffe **might** have a personality disorder and that his relationship with Mr. Sutcliffe has reached an impasse. (Id. at 11). The district court made a specific finding that the attorney-client relationship has been shattered. (Id. at 12). The court relieved Mr. Harris from representing Mr. Sutcliffe. (Id. at 12-13).

Without making any other findings, the court went on to inform Mr. Sutcliffe that he will get only one more lawyer to represent him, and without explaining the word "syndrome", the court warned him that, absent anything compelling, if the same "syndrome" occurs with the new lawyer, he will have waived his right to excuse that counsel or to be represented by replacement counsel. (Id. at 14) The court also informed Mr. Sutcliffe that it has the power and the obligation to find that he has waived his right to have a lawyer represent him. (Id. at 23). After agreeing to appoint another counsel for Mr. Sutcliffe, the district court questioned Mr. Sutcliffe's ability to confer with counsel and informed him that the court would order a psychiatric evaluation. (Id. at 19-21).

Again, nothing in the record shows that the dismissal of Mr. Harris was of Mr. Sutcliffe's own making or a self-serving attempt to sabotage his attorney-client relationship in order to obstruct or delay the proceedings. The district court made no such finding. And even Mr. Harris raised the issue of his own incompetence in handling computer cases.

On January 17, 2003, after being appointed to represent Mr. Sutcliffe (RT 1/17/03 at 4), Mr. Nicolaysen suggested to the court that Mr. Sutcliffe be sent to a medical facility in Rochester, Minnesota to be evaluated for competency

instead of by a local physician or psychologist, as suggested by the court. (Id. at 16-17). Mr. Nicolaysen also suggested that Mr. Sutcliffe might be a candidate for a battery of psychological tests. (Id. at 17). Mr. Sutcliffe vigorously objected to Mr. Nicolaysen representing him. (Id. at 17-18).

At a status conference hearing held on March 14, 2003, Mr. Sutcliffe asked the court to relieve Mr. Nicolaysen as his counsel. (RT 3/14/03 at 5). Mr. Sutcliffe thereafter repeatedly informed the court that Mr. Nicolaysen does not speak for him. (Id. at 7-8). After a doctor submitted a report concluding that Mr. Sutcliffe is competent, and the prosecutor stipulated that Mr. Sutcliffe is competent, Mr. Nicolaysen refused to accept the conclusion and proceeded to cross-examine the doctor.<sup>6</sup> (RT 3/14/03 at 11). As Mr. Nicolaysen was examining the doctor, Mr. Sutcliffe interrupted the examination and consequently, the court ordered him removed from the courtroom. (Id. at 12). Through his cross-examination, Mr. Nicolaysen got the doctor to admit that given Mr. Sutcliffe's so-called paranoid disorder, there is a "possibility" the attorney/client relationship cannot function. (Id. at 31). Moreover, Mr.

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<sup>6</sup>The doctor met with Defendant five times for about three hours each time. (RT 3/14/03 at 18).

Nicolaysen got the doctor to admit that given the outburst in the courtroom, it would be prudent to conduct further evaluation before the district court reaches a decision on Mr. Sutcliffe's competency. (Id. at 41, 47). After the hearing, the court ordered Mr. Sutcliffe to be ~~examined~~ at a medical facility pursuant to 18 U.S.C. section 1441(d)<sup>7</sup>. (Id. at 60-61, 67). The court explained to Mr. Sutcliffe that the court will receive another report and another hearing will take place. (Id. at 67). The court again clarified that it did not make a finding that Mr. Sutcliffe needs to be rehabilitated or treated but that a further examination is required. (Id. at 70).<sup>8</sup>

On March 20, 2003, the district court issued an order entitled "Order Re: Further Competency Determination of Defendant Pursuant to 18 U.S.C. section 4241(d)", making a specific finding that "[t]he question as to whether defendant is presently competent to stand trial is still unresolved" and that "[f]urther evaluation at a Federal

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<sup>7</sup>The correct section is 4241.

<sup>8</sup>It appears that the court was confused. After repeatedly stating that the court is not making a finding on the competency issue because it wants further examination of Defendant, it agreed with a doctor from the Bureau of Prisons and the prosecutor that the order was under 18 U.S.C. section 4241(d), which authorizes hospitalization for **treatment** after a finding of incompetency. (Id. at 69-70, 74-75). Such confusion is further demonstrated by a hearing held outside of Defendant's presence. (RT 4/7/03 at 3-4).

Medical Center such as FMC Rochester is not only prudent, but is also required in the interests of justice. (ER 224-227). The court then ordered Defendant to be transported to FMC Rochester, Minnesota for a reasonable period of time for the purpose of determining the defendant's competency to stand trial pursuant to 18 U.S.C. section 4241(d).<sup>9</sup> (Ibid).

On April 7, 2003, a status conference was held without Mr. Sutcliffe's presence. At the hearing, the district court questioned Mr. Nicolaysen and the prosecutor regarding the joint proposed amended order lodged by them, because the proposed order **had** the court making a finding that Mr. Sutcliffe was suffering from a mental disease or defect, rendering him mentally incompetent, contrary to the court's earlier finding. (RT 4/7/03 at 3). Both Mr. Nicolaysen and the prosecutor pointed out to the court that section 4241(d) is for **restoration** of competency and **not for evaluation**. (RT 4/7/03 at 4-8). Mr. Nicolaysen further suggested to the court that the proceeding pursuant to **4241(d) was more prudent than to simply conduct further evaluation.** (Id. at 8-9). Court agreed and found Mr. Sutcliffe incompetent

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<sup>9</sup>However, Defendant could not be transported to Rochester, Minnesota as ordered. (ER 230).

outside of his presence and signed an order for treatment.<sup>10</sup>  
(Id. at 10-11; ER 231-233).

On August 27, 2003, after finding Mr. Sutcliffe competent to stand trial (RT 8/27/03 at 45-46), the court granted Mr. Nicolaysen's motion filed on August 4, 2003 to be relieved from representing Mr. Sutcliffe. (Id. at 46). The court found that there is a complete breakdown in the communication. (Ibid.). Mr. Sutcliffe insisted that his motion to relieve Mr. Nicolaysen for ineffective representation predates Mr. Nicolaysen's motion to be relieved. (Id. at 47).

The court then granted Mr. Sutcliffe's motion to relieve Mr. Nicolaysen without making any finding of misconduct or ineffective representation on Nicolaysen's part. (Id. at 51). When Mr. Sutcliffe wanted to put on the record as to why he requested Mr. Nicolaysen to be fired, the court prohibited him from doing so. (Ibid).

The court commented that Mr. Sutcliffe had gone through four attorneys, fought with all of them, and insisted on firing all of them. (Id. at 60). In response, Mr. Sutcliffe explained to the court that he simply wanted effective counsel. (Id. at 61). The court ultimately

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<sup>10</sup>Contrary to the court's order but rather consistent with the initial order, Mr. Sutcliffe was not treated for

concluded that Mr. Sutcliffe, through his actions, waived his right to counsel and have chosen to proceed in pro per. (Id. at 60-61, 65).

In dismissing Nicolaysen, the district court failed to properly conduct a hearing on Mr. Sutcliffe's motion for substitution of attorney.

It is well established that when a defendant seeks substitution of attorney, the court must hold a hearing to inquire into the defendant's complaint and the extent of conflict between the defendant and counsel and also to consider the timeliness of the motion and the extent of resulting inconvenience and delay. United States v. Smith, 282 F.3d 758, 763 (9<sup>th</sup> Cir. 2002).

During the March 26, 2003 hearing, when Mr. Sutcliffe objected to Mr. Nicolaysen's representation, the court state that it would "deal with that motion later." (RT 3/26/03 at 5). However, the court never addressed Mr. Sutcliffe's motion. On August 27, 2003, when the court finally granted Mr. Sutcliffe's motion to relieve Mr. Nicolaysen, the court would not permit Mr. Sutcliffe from stating his reasons for wanting to dismiss Mr. Nicolaysen. Thus, the court failed to conduct a proper hearing on Mr. Sutcliffe's motion to relieve Mr. Nicolaysen.

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competency but was evaluated for competency. (ER 284).

Moreover, Mr. Nicolaysen took an antagonistic position against Mr. Sutcliffe from the very beginning. It was apparent that from the beginning that Mr. Nicolaysen wanted to find Mr. Sutcliffe incompetent to stand trial. He not only suggested a medical facility in the east coast to conduct the psychiatric evaluation, he also suggested that Mr. Sutcliffe might be a candidate for a battery of psychological tests. (RT 1/17/03 at 17). Mr. Nicolaysen in fact refused to accept the conclusion that Mr. Sutcliffe was competent to stand trial rendered by the doctor who spent more than 15 hours with him. In fact, after Mr. Sutcliffe was removed from the court on March 26, 2003, Mr. Nicolaysen tried to convince everyone that Mr. Sutcliffe was incompetent.

In addition, outside of his client's presence (at a subsequent hearing), Mr. Nicolaysen persuaded the court and obtained an order, finding that Mr. Sutcliffe suffered from a mental defect and that he should be treated. In light of Mr. Nicolaysen's repeated attempt to find Mr. Sutcliffe incompetent to stand trial, Mr. Sutcliffe was embroiled in irreconcilable conflict with his counsel.

This Court has long ago held that "[t]o compel one charged with grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled

in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever. Brown v. Craven, 424 F.2d 1166, 1170 (9<sup>th</sup> Cir. 1970). "A natural corollary of this holding is that where the erroneous denial of a motion to substitute counsel prompts a defendant to choose self-representation, reversal of the conviction is warranted in spite of the client's 'choice' to represent himself. Plumlee v. Del Papa, 426 F.3d at 1104. No defendant should be compelled to undergo a trial with an attorney who repeatedly attempts to portray his client as a mentally ill person when he is not.

Clearly, under these circumstances, the dismissal of Mr. Nicolaysen cannot be viewed as Mr. Sutcliffe's own making or a self-serving attempt to sabotage his attorney-client relationship in order to obstruct or delay the proceedings.

Finally, Mr. Reed was relieved as Mr. Sutcliffe's counsel at his request. Mr. Reed stated that because Mr. Sutcliffe threatened to sue him for attempting to continue the trial, he could no longer function as his attorney. Mr. Reed admitted that Defendant was helpful in filing certain motions (RT 10/1/03 at 29) and also in pointing out which discovery material was pertinent to the trial. (Id. at 30). Clearly, the reason for the breakdown in the relationship

between Mr. Sutcliffe and Mr. Reed was over the issue of continuance of the trial. Mr. Sutcliffe simply wanted to protect his speedy trial rights. (Id. at 26-27).

In light of the fact that the district court continued the trial date without Mr. Sutcliffe's concurrence once he became pro per (Id. at 43), the court could have continued the trial without his concurrence and allowed Mr. Reed to continue to represent Mr. Sutcliffe.

As demonstrated above, the record does not support the district court's finding that Mr. Sutcliffe, through his conduct, waived his Sixth Amendment right to counsel.

The district court should have: (1) denied Mr. Reed's motion, leaving Mr. Reed as the attorney, (2) granted Mr. Reed's motion and appointed someone else or (3) given Mr. Sutcliffe the opportunity to knowingly and intelligently waive his right to counsel and to proceed pro se. Because the district court failed to do any of the three, the judgment should be reversed.

2. The Record Does Not Show that Appellant Knowingly and Intelligently Waived His Right to Counsel.

In addition, before a defendant can choose to represent himself, he must knowingly and intelligently waive his right to counsel. Faretta v. California, 422 U.S. at 835. This Court has held that a defendant can knowingly and

intelligently waive his right to counsel only after he is aware of the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation. United States v. Wadsworth, 830 F.2d 1500, 1504 (9<sup>th</sup> Cir. 1987). The record does not show that Mr. Sutcliffe knowingly and intelligently waived his right to counsel.

B. THE TRIAL COURT LACKED JURISDICTION.

FACTUAL BACKGROUND

On January 14, 2003, through a Writ of Mandamus to Compel, Mr. Sutcliffe challenged the district court's jurisdiction in the case. (ER 189). In it, Mr. Sutcliffe argued that the court lacked subject matter jurisdiction under the Interstate Commerce Clause of the Constitution. (Ibid). On August 27, 2003, Mr. Sutcliffe again challenged the subject matter jurisdiction of the court. (RT 8/27/03 at 9). The district court denied Mr. Sutcliffe's contention that the court lacks subject matter jurisdiction. (Ibid).

On September 2, 2003, Mr. Sutcliffe renewed his objection to the district court's jurisdiction in the case. (RT 9/2/03 at 4). The district court again denied his objection to the jurisdiction. (Id. at 8).

On November 7, 2003, Mr. Sutcliffe once again challenged the district court's jurisdiction and demanded that the government prove the interstate element of the offenses. (RT 11/7/03 at 63-64) <sup>11</sup>.

#### Standard of Review

Whether a district court has jurisdiction is reviewed de novo. United States v. Pena, 319 F.3d 509, 511 (9<sup>th</sup> Cir. 2003). The assumption of jurisdiction by a district court is also reviewed de novo. United States v. Ross, 372 F.3d 1097, 1105 (9<sup>th</sup> Cir. 2004).

However, the question of whether or not Mr. Sutcliffe's actions sufficiently affected interstate commerce to provide jurisdiction is a jurisdictional question intertwined with the merits. United States v. Barone, 71 F.3d 1442, 1444 n.4 (9th Cir. 1995). "In instances where the question of jurisdiction is intertwined with the merits and must be resolved by a jury, the standard of review is unsettled. Id. 'Because the question is resolved by the jury, the standard for reviewing the sufficiency of evidence to

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"Mr. Sutcliffe continued to object to the court's jurisdiction and the court continued to deny Mr. Sutcliffe's objection. (See RT 11/12/03 at 5). Mr. Sutcliffe's Motion to Dismiss Counts 1-9 for lack of jurisdiction was "PLACED IN FILE - NOT USED" by the court on December 5, 2003. (ER 482).

support a jury verdict, see Jackson v. Virginia, 443 U.S. 307, 319 (1979), may well apply to this issue.'" Id.

#### Argument

The elements of section 875(c) are 1) an intentional interstate transmission of a communication; 2) threatening to injure a person, 3) with the specific intent to threaten. United States v. Twine, 853 F.2d 676, 679-80 (9<sup>th</sup> Cir. 1988). There is no doubt that section 875(c) requires proof that the threatening communication was actually transmitted across state lines by the defendant. See United States v. Oxendine, 531 F.2d 957 (9<sup>th</sup> Cir. 1976).

In order to convict someone under section 1028(a)(7), the Government must prove the following elements beyond a reasonable doubt: (1) that the defendant knowingly transferred or used a means of identification of another person; (2) that such transfer was performed without lawful authority; (3) that such transfer was performed with the intent to commit, or aid or abet, any Federal crime or any felony under State or local law; and (4) that the transfer was in or affected interstate or foreign commerce. See 18 U.S.C. § 1028(a)(7), (c). Again, one of the elements under section 1028(a)(7) is that the transfer of a means of identification of another person has to take place across state lines.

In this case, the prosecution failed to prove that the materials that were posted on the website were actually transmitted across state lines. First of all, the government failed to prove where Mr. Sutcliffe was at the time that the threatening communications or the social security numbers were posted on the website. The government even failed to demonstrate that a computer outside of California was used in **posting** the messages and the social security numbers.

Even more importantly, the government failed to demonstrate how the communication crossed state lines. There was no testimony by any of the government witnesses that by virtue of using the internet, the materials posted on the website (by whoever) crossed state lines. No one testified in this case how the messages posted on a website at one place necessarily travel across state lines.

In United States v. Kammersell, 196 F.3d 1137 (10<sup>th</sup> Cir. 1999), both the sender and the recipient of the threat lived in Utah. However, there was evidence to show that the threat that was communicated through the internet was automatically transmitted through interstate telephone lines from the sender's computer in Utah to the On Line Server in Virginia and then back to Utah. The Tenth Circuit held that

the "interstate commerce" requirement of the section 875(c) had been met.

Unlike Kammersell, there was no such evidence presented in this case. The simple fact that a message was posted on the internet, without any evidence to show where the message was posted from and how the message crossed state lines, is not sufficient to satisfy the interstate element of sections 875(c) and 1028(a)(7).

C. SECTION 875(C) IS UNCONSTITUTIONAL ON ITS FACE FOR VAGUENESS.<sup>12</sup>

Standard of Review

Whether a statute is unconstitutionally vague is a legal issue subject to de novo review. Planned Parenthood Fed'n of Am, Inc. v. Gonzalez, 435 F.3d 1163, 1171 (9<sup>th</sup> Cir. 2006)

Argument

To survive vagueness review, a statute must "(1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner." Planned Parenthood Fed'n of Am, Inc. v. Gonzalez, 435 F.3d at 1171;

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<sup>12</sup>Mr. Sutcliffe filed a motion, challenging the vagueness of

see also Kolender v. Lawson, 461 U.S. 352, 357 (1983) (void-for-vagueness doctrine to the statute "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.") "The need to avoid vagueness is particularly acute . . . when [the statute] implicates constitutionally protected rights." Planned Parenthood Fed'n of Am, Inc. v. Gonzalez, 435 F.3d at 1181 (citation omitted).

Section 875(c) states as follows: Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." This statute is unconstitutionally vague.

There is no doubt that in order to be convicted under section 875(c), the threat has to be made with the specific intent to threaten. See United States v. Twine, 853 F.2d 676, 679-80 (9<sup>th</sup> Cir. 1988). Moreover, the threat has to be a "true threat" before it can be prohibited. According to the Supreme Court "'true threat' encompass those statements where the speaker means to communicate a serious expression

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the statute. (ER 208).

of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat . . .” Virginia v. Black, 538 U.S. 343, 359-60 (2003) (citations omitted).

However, section 875(c) fails to define within the statute what words constitute a true threat, nor does it require specific intent to threaten. Absent a clear definition of what constitutes a true threat within the statute, coupled with the absence of the specific intent requirement, the statute fails to provide fair warning of the prohibited conduct to those it regulates and it permits arbitrary and discriminatory enforcement.

This is especially so because whether a defendant’s words constitute a true threat “should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners.” United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9<sup>th</sup> Cir. 1990) (citations omitted). Furthermore, in determining whether a threat should be treated as a true threat, the Second Circuit has held that the threat on its face and in the circumstances in which it is made has to be “so unequivocal, unconditional, immediate and specific . . . as to convey a gravity of purpose and imminent prospect of

execution." United States v. Kelner, 534 F.2d 1020 (2<sup>nd</sup> Cir.), cert. denied, 429 U.S. 1022 (1976). The Supreme Court also looked at the conditional nature of the statement made in Watts v. United States, 394 U.S. at 708 to conclude that the statements were political hyperbole and not a true threat. Without any guidance within the statute as to what constitute a true threat, section 875(c) fails to provide fair warning of the prohibited conduct to those it regulates.

Moreover, the statute's failure to define what constitutes a true threat permits arbitrary and discriminatory enforcement. The government is left to guess and determine at whim which words constitute a true threat. Consequently, a citizen cannot hold the government liable for its failure to prosecute under the statute. For example, in this case, Joe Shmoe, a Global Crossing employee, sent an e-mail to Mr. Sutcliffe, stating "if you post my info again I'm personally going to make sure you get your ass kicked. . . ." (ER 35). Mr. Sutcliffe challenged the government's failure to prosecute Joe Shmoe. (ER 23). In response, the government stated that "'Shmoe's' e-mail is not similar to defendant's conduct by any means. Sutcliffe is charged with multiple threats to kill, over a period of five months, in conjunction with **posting** personal information of others (including, apparently, that of 'Joe

Shmoe') on his website." (ER 61-62). The government appears to draw an arbitrary distinction. If a threat is considered a true threat, it is a threat whether it is made numerous times or once. However, because the statute does not define what kind of threat is proscribed, it allows an arbitrary enforcement.

D. APPELLANT WAS SUBJECTED TO UNCONSTITUTIONAL SELECTIVE PROSECUTION.

Standard of Review

"This Court has employed both a de novo standard and a clearly erroneous standard when reviewing a selective prosecution claim." United States v. Culliton, 328 F.3d 1074, 1080 (9<sup>th</sup> Cir. 2003).

Argument

Although the executive branch has broad discretion to decide whom to prosecute, such prosecutorial discretion is not unfettered, and selectivity in the enforcement of criminal laws is subject to constitutional constraints. United States v. Culliton, 328 F.3d at 1081. "The two elements of a selective prosecution claim are that others similarly situated have not been prosecuted and that the allegedly discriminatory prosecution of the defendant was based on an impermissible motive." Ibid. (citations

omitted). The decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification," including the exercise of protected statutory and constitutional rights. Wayte v. United States, 470 U.S. 598, 608 (1985).

Mr. Sutcliffe in this case was embroiled in a labor dispute with Global Crossing. He was protesting the reason for which Global Crossing terminated his employment. And in doing so, he created a website to post and exchange information regarding Global Crossing. Mr. Sutcliffe was simply exercising his right to First Amendment of freedom of speech by protesting the improper termination of his employment.

Mr. Sutcliffe has satisfied both elements of selective prosecution. Mr. Sutcliffe has already demonstrated that Joe Shmoe, who was similarly situated, was not prosecuted in this case. Joe Shmoe, a Global Crossing employee, sent an e-mail to Mr. Sutcliffe, stating "if you post my info again I'm personally going to make sure you get your ass kicked. . . ." Joe Shmoe's threat was not any different from the alleged threats made by Mr. Sutcliffe. Joe Shmoe also used internet, just like Mr. Sutcliffe, to post his

threatening message. Clearly, Joe Shmoe was similarly situated as Mr. Sutcliffe but not prosecuted.

Moreover, the prosecution of Mr. Sutcliffe was based on the fact that he was exercising his constitutional right of freedom of speech in a labor dispute. It was the government's attempt to silence Mr. Sutcliffe from speaking out against Global Crossing for its improper termination of his employment. Clearly, the prosecution was based on a discriminatory purpose.

Because Mr. Sutcliffe satisfied both elements of selective prosecution, Counts One through Four should have been dismissed.

Furthermore, the district court abused its discretion in denying Mr. Sutcliffe's request to subpoena Debra Yang, the United States Attorney General for the Central District of California to support his selective prosecution argument. (RT 449-451). As demonstrated above, Mr. Sutcliffe has clearly shown "some evidence" that similarly situated persons were not prosecuted in this case. See United States v. Armstrong, 517 U.S. 456, 469 (1996).

E. THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE  
INDICTMENT ON SPEEDY TRIAL GROUNDS.

Procedural Background

The indictment in this case was filed on April 5, 2002. On April 9, 2002, Mr. Sutcliffe made his initial appearance. (RT 4/9/02).

On May 16, 2002, parties filed a stipulation, requesting a continuance of the trial date and to exclude the time from May 16, 2002 to September 3, 2002. (ER 6-11).

<sup>13</sup> The district court granted the request. (Ibid).

On August 22, 2002, at a status conference, the district court continued the trial date to October 22, 2002 at the request of defense counsel, with the defense counsel representing to the court that she will be ready to try the case on October 22, 2002. (RT 8/22/02 at 31-34). The court gave its personal "guarantee" the trial would take place on October 22, 2003, "absent compelling circumstances." (Id. at 26). The court expressed its "intent on getting this case to trial." (Id. at 35)

However, on September 23, 2002, Mr. Sutcliffe's counsel sought to be relieved. Mr. Sutcliffe objected on the ground that relieving the Public Defender's Office would jeopardize

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<sup>13</sup>Although the stipulation states that the defense counsel spoke with Mr. Sutcliffe, he contends that stipulation was signed without his knowledge or consent.

his speedy trial rights and insisted that the counsel continue to represent him. (RT 9/23/02 at 17-18). The district court granted the Public Defender's request to be relieved over Mr. Sutcliffe's objection and continued the trial to December 3, 2002. (Id. at 29-30). The court stated, however, "That's when I wanted to reset this date for trial. I don't want the continuance that's necessitated by this substitution of counsel to delay Mr. Sutcliffe's rights to a speedy trial." (Id. at 30).

On November 27, 2002, parties submitted a stipulation to continue the trial date from December 3, 2002 to January 14, 2003. (ER 125-129)<sup>14</sup>. The district court granted the request. (Ibid).

On December 4, 2002, Mr. Sutcliffe filed a motion to dismiss the indictment on the ground that his right to speedy trial has been violated. (ER 136-137). He contended that the incompetence of his court appointed attorneys have resulted in the delay and that he has not and does not consent to the continuances. (Ibid). Mr. Sutcliffe cried the last time the court waived his right to a speedy trial over his objection and called any delay a "nightmare." (RT

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<sup>14</sup>Again, although the stipulation states that Mr. Sutcliffe is willing to waive his right to a speedy trial for the period of time represented by the stipulation, Mr. Sutcliffe contends that the stipulation was signed without his

12/4/02 at 25). The district court denied Mr. Sutcliffe's motion to dismiss the indictment. (Id. at 28-29).

On January 14, 2003, Mr. Sutcliffe moved to relieve his second appointed counsel, Mr. Harris, for incompetence. (RT 1/14/03 3-4; ER 188). The district court relieved Mr. Harris from representing Mr. Sutcliffe and ordered a competence evaluation of Mr. Sutcliffe. (Id. at 12-13, 20-21).

On January 17, 2003, the district court set March 25, 2003 as the trial date. (RT 1/17/03 at 16). On January 21, 2003, the district court issued an order excluding the period between January 14, 2003 and March 25, 2003. (ER 197).

On March 14, 2003, at the competency hearing, the district court concluded that Mr. Sutcliffe should be examined further. (RT 3/14/03 at 61). On March 20, 2003, the district court ordered further examination of Mr. Sutcliffe, vacated the March 25, 2003 trial date, set a competency hearing for August 6, 2003, rescheduled the trial for September 9, 2003, and excluded the time period from March 14, 2003 until such time as Mr. Sutcliffe is found competent. (ER 224).

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knowledge or consent.

On August 27, 2003, the district court found Mr. Sutcliffe competent to stand trial and relieved Nicolaysen as Mr. Sutcliffe's appointed counsel. (RT 8/27/03 at 45-46, 50-51). The court decided that Mr. Sutcliffe would represent himself with a standby counsel. (Id. at 60-61, 64-65). The district court then reset the trial date to September 30, 2003 over Mr. Sutcliffe's objection but commented that the time between September 9 and September 30 would not be excluded. (Id. at 72).

On the same date, the government filed a status report regarding speedy trial calculations and exclusions. (ER 308). In it, the government reported that 31 days remained from the 70-day period. (Ibid). Mr. Sutcliffe again demanded his right to speedy trial under the Sixth Amendment to no avail. (RT 8/27/03 at 69-70).

On September 2, 2003, the district court relieved one standby counsel, Mr. Brennen, because of schedule conflict and appointed another standby counsel, Mr. Reed. (RT 9/2/03 at 5-7, 11).

On September 26, 2003, the district court appointed Mr. Reed as Mr. Sutcliffe's counsel (RT 9/26/03 at 63, 68) and continued the trial to October 7, 2003. (Id. at 73). On September 29, 2003, the government filed a supplemental status report regarding speedy trial time remaining. (ER

372). In it, the government reported that the time since September 9, 2003 is excluded because of pending motions. (ER ).

On October 1, 2003, Mr. Reed moved to be relieved as Mr. Sutcliffe's counsel, which the court granted pending successful transfer of all discovery. (RT 10/1/03 at 21, 38-41). The court then continued the trial to a date to be determined later and noted that the continuance was without Mr. Sutcliffe's explicit consent. (Id. at 43).

On October 7, 2003, the court issued an order granting Mr. Reed's motion to be relieved, finding that Mr. Sutcliffe has waived his right to appointed counsel, and continuing the trial to November 12, 2003, while excluding the time from October 8 to November 12, 2003. (ER 379). On November 12, 2003, a jury was impaneled and voir dire began.

#### Standard of Review

This Court reviews a district court's application of the Speedy Trial Act de novo. United States v. Daychild, 357 F.3d 1082, 1089 n.5 (9<sup>th</sup> Cir. 2003). This Court also reviews the district court's ruling on a motion to dismiss an indictment de novo. Ibid.

#### Argument

It is well settled that a criminal defendant's trial must normally commence within seventy days of the filing of

the indictment or the defendant's initial court appearance, whichever is later. Id., at 1090 n.6; 18 U.S.C. section 3161(c)(1). However, time for delays caused by filing and disposing of motions, time for delays from continuances, and time for delays from proceedings to determine a defendant's competence to stand trial are excluded from the calculation of the seventy-day limit. 18 U.S.C. section 3161(h)(1)(F), (h)(8)(A), and (h)(1)(A). "If trial does not commence within the seventy-day limit, after setting aside excluded time, the court must dismiss the indictment upon the defendant's motion filed before trial." United States v. Daychild, 357 F.3d at 1090.

In addition to the time limit set by federal statute, there is a Sixth Amendment right precluding excessive pretrial delay after charges have been leveled against a defendant. Barker v. Wingo, 407 U.S. 514, 530 (1972). In determining whether a defendant has been deprived of his speedy trial right under Sixth Amendment, courts must balance the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and the prejudice to the defendant. United States v. Daychild, 357 F.3d at 1090.

Since Mr. Sutcliffe made his initial appearance on April 9, 2002, the speedy trial clock began to run on April 9, 2002.<sup>15</sup>

In this case, all four factors identified in Barker weigh in favor of Mr. Sutcliffe. The delay in bringing Mr. Sutcliffe to trial in this case was approximately 19 months, which is "presumptively prejudicial." See United States v. Murillo, 288 F.3d 1126, 1132 (9<sup>th</sup> Cir. 2002) ("A delay of thirteen months between arrest and trial is 'presumptively prejudicial.>"). Also, the reason for the delay cannot be attributed to Mr. Sutcliffe. The reason for the delay was mostly because all five (two from the Public Defender's office) court-appointed attorneys were incompetent and were not prepared to proceed with the trial. (See Denial of Right to Counsel Argument, supra). Mr. Sutcliffe repeatedly requested the court to appoint competent counsel.

The record clearly demonstrates that Mr. Sutcliffe demanded his right to speedy trial (RT 9/23/02 at 17-18; RT 12/4/02 at 28-29; RT 10/1/03 at 28; ER ), and nothing in the

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<sup>15</sup>The First Superseding Indictment filed on January 10, 2003 does not affect the start time since the "Speedy Trial Act . . . does not require that the 70 day speedy trial period be restarted upon the filing of a superseding indictment when the superseding indictment charges the same offenses as the original indictment." United States v. Karsseboom, 881 F.2d 604, 606 (9<sup>th</sup> Cir. 1989).

record shows that Mr. Sutcliffe joined the defense counsel's request for continuance.

"Actual prejudice is typically demonstrated in three ways: 'oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the [accused's] defense will be impaired.'" United States v. Gregory, 322 F.3d 1157, 1163 (9<sup>th</sup> Cir. 2003) (quoting Doggett v. United States, 505 U.S. 647, 654 (1992)).

Mr. Sutcliffe became increasingly anxious and concerned about the state of his case as the trial got delayed. Each attorney appointed by the court was ill prepared and felt inadequate to try this computer related case. (See Denial of Right to Counsel Argument, supra). The third court appointed attorney, Mr. Nicolaysen, whom the court stated that it appointed because of his "unusually extensive experience with computer law, computer usage and computer technology" (RT 1/17/03 at 3), took an antagonistic position against Mr. Sutcliffe from the very beginning and was responsible for sending Mr. Sutcliffe away for a "psychiatric treatment." Such action by Mr. Nicolaysen delayed Mr. Sutcliffe's trial further and caused a severe anxiety on Mr. Sutcliffe.

Moreover, as each appointed attorney got relieved and as the trial got delayed as a result, Mr. Sutcliffe's

anxiety and frustration grew because of missing discovery and because of his attorneys' failure to properly turn over discovery and the case file. Nineteen months is a long time for any defendant to suffer as Mr. Sutcliffe did.

F. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO RECUSE JUDGE MATZ.

Factual Background

In a letter dated December 13, 2002, Mr. Sutcliffe complained to the district court of his appointed counsel's ineffectiveness. In response, the district court Judge Matz issued an order, proscribing Mr. Sutcliffe from communicating directly with the Court and ordering him to communicate with the court only through his counsel. (ER 142). On January 3, 2003, Mr. Sutcliffe filed a request that Judge Matz recuse himself for having demonstrated personal bias and prejudice toward Mr. Sutcliffe by failing to provide competent attorney to represent him and by limiting him from communicating to court of his counsel's ineffectiveness. (ER 157). Judge Matz construed the request as a motion for recusal and assigned it randomly to another judge for ruling. (ER 161). On January 6, 2003, Judge Virginia A. Phillips issued an order, denying the motion for recusal. (ER 174).

On February 4, 2003, Mr. Sutcliffe filed a Supplemental Affidavit of Defendant in Support of His Motion to Disqualify the Judge in this Matter Under Title 28 Section 144. (ER 198) Mr. Sutcliffe pointed out that Judge Matz stated on the record that the only way Mr. Sutcliffe was getting out of the case was through a trial.<sup>16</sup> (ER 199). Mr. Sutcliffe argued that Judge Matz's mind was made up not to consider any other alternative, including his motions to dismiss the indictment, but to proceed to trial in this case, regardless of the merits of the motions. (Ibid).

Without any explanation as to why the court waited so long, on June 3, 2003, four months after the supplemental affidavit was filed, Judge Matz issued an order, construing Mr. Sutcliffe's supplemental affidavit as a Motion for Recusal and postponed evaluation of the motion until after the results of Mr. Sutcliffe's competency examination are forward to the court, which was ordered on February 6 and 13, 2003.<sup>17</sup> (ER 162).

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<sup>16</sup>Judge Matz stated as follows: "If you want to have a decision made as to your fate, it's going to be made by a jury. That means you're going to have to undergo a trial. That means you will remain in custody. This is going to happen no matter what. . . ." (RT 1/14/03 18-19).

<sup>17</sup>Had Judge Matz timely construed the supplemental affidavit as a motion for recusal, Judge Matz could not have issued the February 6 and March 19, 2003 orders to have Mr. Sutcliffe examined.

On August 21, 2003, Mr. Sutcliffe filed yet a third motion for recusal. (ER 296-301). The motion for recusal was based on the argument that Judge Matz was implicated in a conspiracy to deprive Mr. Sutcliffe of his civil rights. Mr. Sutcliffe had named Judge Matz as a co-conspirator (not as a defendant) in a lawsuit. (Ibid). The complaint filed in the civil lawsuit was incorporated by reference.

On August 25, 2003, district court Judge Virginia A. Phillips again denied the motion for recusal of Judge Matz. (ER 304).

#### Standard of Review

A District Court's decision whether to grant a motion for recusal is reviewed for an abuse of discretion. United States v. Martin, 278 F.3d 988, 1005 (9<sup>th</sup> Cir. 2002).

#### Argument

Section 455(a) of 28 U.S.C. provides that "any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

The test whether a judge should disqualify himself in any proceeding is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." United States

v. Hernandez, 109 F.3d 1450, 1453 (9<sup>th</sup> Cir. 1997), quoting United States v. Studley, 783 F.2d 934, 939 (9<sup>th</sup> Cir. 1986).

One of the chief complaints Mr. Sutcliffe had against Judge Matz was the fact that he would not appoint a competent counsel to represent Mr. Sutcliffe, and thus unnecessarily delaying the trial to Mr. Sutcliffe's detriment.<sup>18</sup> (See Right to Counsel argument, *infra*). After appointing three incompetent attorneys, the fourth attorney, Mr. Nicolaysen, appointed by Judge Matz refused to accept Dr. Backer's conclusion that Mr. Sutcliffe was competent to proceed to trial and ultimately persuaded the doctor to opine that more evaluation may be necessary. When urged by Mr. Nicolaysen, Judge Matz made a finding without Mr. Sutcliffe being present in court that Mr. Sutcliffe was suffering from a mental defect and issued an order for a mental treatment.<sup>19</sup> Subsequently, upon learning that Mr. Sutcliffe had named Mr. Nicolaysen as a defendant in a

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<sup>18</sup>A detailed description of the events that occurred is included in Mr. Sutcliffe's civil complaint, naming Judge Matz as a co-conspirator. (ER 235-261).

<sup>19</sup>This was in violation of Mr. Sutcliffe's right to be present at every critical stage of the trial. After Mr. Sutcliffe was sent to a medical facility, he was returned without receiving any treatment because it was determined that Mr. Sutcliffe was not suffering from any mental disease or defect.

lawsuit for violation of his civil rights, Judge Matz relieved Mr. Nicolaysen from representing Mr. Sutcliffe.<sup>20</sup>

It was based on the above actions of Judge Matz, coupled with Judge Matz's comment that he will not consider any alternative other than a trial and the fact that he is referred to in a lawsuit as a co-conspirator to violate Mr. Sutcliffe's civil rights, that Mr. Sutcliffe moved for Judge Matz's recusal.

The fact that Judge Matz is accused by Mr. Sutcliffe of conspiring to violate his civil rights alone would be sufficient to question Judge Matz's ability to stay impartial. However, the details of the alleged conspiracy would lead any reasonable person with knowledge of all the facts to question the judge's impartiality.

Such conclusion is also supported by Judge Matz's subsequent actions and rulings in the trial. Judge Matz grew increasingly more impatient with Mr. Sutcliffe. At one point, Judge Matz yelled at Mr. Sutcliffe. (RT at 881). Such an outburst by the judge demonstrates his impatience and bias toward Mr. Sutcliffe.

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<sup>20</sup> Interestingly, the court did not hold a hearing or rule on Mr. Sutcliffe's motion to remove Mr. Nicolaysen as his counsel prior to the hearing where Mr. Nicolaysen persuaded the court to examine Mr. Sutcliffe further. Rather, the court allowed Mr. Nicolaysen to prejudice Mr. Sutcliffe at that hearing and in the subsequent hearing (finding of

Moreover, after relieving Mr. Reed as his counsel, Judge Matz forced Mr. Sutcliffe to go to trial pro per and also denied Mr. Sutcliffe's request for appointment of counsel for sentencing. (See Denial of Right to Counsel Argument, supra). Such a ruling by the judge again demonstrates judge's impartiality.

Judge Matz' denial of Mr. Sutcliffe's meritorious pre-trial motions also shows that Mr. Sutcliffe did not receive a fair and unbiased consideration of his motions because the judge was so set on going to trial in this case. (See Motion to Dismiss Argument, infra).

Because any reasonable person with knowledge of all of the above facts would have concluded that the judge's impartiality might reasonably be questioned, the district court erred in denying Mr. Sutcliffe's motion for recusal of Judge Matz.

G. THE DISTRICT COURT ERRED IN DENYING MR. SUTCLIFFE'S REQUEST TO RECONSTRUCT THE WEBSITE "EVILGX.COM".

Standard of Review

This Court generally reviews the district court's ruling on a motion in limine for an abuse of discretion. United States v. Ross, 206 F.3d 896, 898 (9<sup>th</sup> Cir. 2000).

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mental defect) held outside his presence.

However, if the order precludes the presentation of a defense, it is reviewed de novo. Id., at 898-899.

### Argument

Early in the proceedings, the court admitted that Mr. Sutcliffe's words charged were not clear in the limited context presented.<sup>21</sup> (RT 4/16/02 at 8). Prior to trial, Mr. Sutcliffe filed a motion for an order that the government be required to reconstruct the website at issue, "evilgx.com", for purposes of trial. (ER 324-328). Mr. Sutcliffe emphasized that context is crucial in determining whether any threat was created or communicated. (Ibid). The government in response stated that the reconstruction of the website to the degree requested by Mr. Sutcliffe was not possible or practical. (ER 337).

On the third day of the trial, Mr. Sutcliffe again moved the court to order reconstruction of the website. (RT 462-463). The district court denied Mr. Sutcliffe's motion by holding that reconstruction of the website is not necessary and not feasible. (Id. at 464). However, the government admitted during the trial they previously had the means and

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<sup>21</sup>The court stated, "Well I agree with that proposition that it's a different kind of threat and there may not be a physical threat if indeed that's what armed refers. You may be right, that's what it refers to. It's not entirely clear from the context." (RT 4/16/02 at 8).

ability to reconstruct the website, after the fact. (RT at 1045, Lines 3-9):

QUESTION: Were you able to reconstruct or reload, if you will, the missing links that you only had the name of but not the content?

ANSWER: Yes.

QUESTION: Did you do that in a couple of cases to complete these exhibits?

ANSWER: Yes.

It is undisputed that whether a defendant's words constitute a true threat "should be considered in light of their entire factual context. . . ." United States v. Orozco-Santillan, 903 F.2d 1262 (9<sup>th</sup> Cir. 1990) (citations omitted). "Therefore, we hold that 'threat of force' in FACE means what our settled threats law says a true threat is: a statement which, in the **entire context and under all the circumstances**, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person." Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058, 1077 (9<sup>th</sup> Cir. 2002) (emphasis added).

Because the district court refused to order reconstruction of the website, Mr. Sutcliffe was denied an opportunity to argue that the alleged threats were not true threats given the whole context of the website.

The government concedes that the website pages were added, taken away, and edited/augmented, that the website contained various links at any given time, and that reconstruction of the entire website is impossible. (ER 338). Without having the website exactly as it would have appeared to a viewer at the time the alleged threats were made, Mr. Sutcliffe could not show the whole context to argue that the alleged threats were not true threats. Therefore, the district court erred in denying Mr. Sutcliffe's motion for reconstruction of the website.

H. THE DISTRICT COURT ERRED IN DENYING MR. SUTCLIFFE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF THE RIFLE.

Standard of Review

This Court generally reviews the district court's ruling on a motion in limine for an abuse of discretion. United States v. Ross, 206 F.3d 896, 898 (9<sup>th</sup> Cir. 2000). Rulings under Federal Rule of Evidence 404 are reviewed for abuse of discretion. United States v. Geston, 299 F.3d 1130, 1137 (9<sup>th</sup> Cir. 2002).

## Argument

Prior to trial, Mr. Sutcliffe filed a motion in limine on January 3, 2003 to exclude the rifle found in his home in Connecticut. (ER 143-148). Mr. Sutcliffe argued that the introduction of the rifle is irrelevant, that it constitutes improper character evidence under Federal Rule of Evidence 404, and that even if admissible, it is unduly prejudicial under Rule 403. (Ibid). On January 10, 2003, the district court denied the motion subject to a limiting instruction that the court intends to give. (RT 1/10/03 30-31).

On November 7, 2003, Mr. Sutcliffe again moved to exclude the introduction of the rifle. (ER 390-391). The district court again denied the motion. (ER 411). On the first day of the trial, Mr. Sutcliffe again objected to the introduction of evidence that he possessed any weapon or ammunition. (RT at 23).

During the trial, the court gave the following limited instruction: "Mr. Sutcliffe is not accused of committing any crime arising out of his possession of any weapon or ammunition. You may consider evidence of his possession of weapons and ammunition only for the limited purpose of deciding whether the government has met its burden of proving that if Mr. Sutcliffe made, or caused to be made, the communications that have been alleged in this case, in

making those communications, he acted with a specific intent to threaten the persons who were the subject of these communications." (RT 588-589).

The government introduced a picture of the rifle (Id. at 588) and the rifle itself with the bayonet extended. (RT 1126). The Court again gave the following instruction in permitting the exhibition of the rifle: "But I want to caution you, . . ., the defendant is not accused of any crime relating to the acquisition, use, or possession of weapons. The purpose for which this information is being received is not to establish criminal conduct or an inclination to commit criminal conduct just by mere virtue of possessing this rifle. There are other bases on which the information may be relevant, including for you to determine what may have been meant or was meant by "I am armed," and including whether or not the defendant actually had the intent with which he is charged." (RT 1126-1127).

The district court abused its discretion in permitting the evidence of the rifle to be introduced in this case.

First of all, the statement Mr. Sutcliffe made was "I am **now** armed," as opposed to "I am armed." Mr. Sutcliffe's wife testified that Mr. Sutcliffe had the rifle for a long time. (Id. at 593). Mr. Sutcliffe had the rifle when she first met him. (Ibid). Mr. Sutcliffe could not have been

referring to the rifle when he said "I am now armed" given that he had the rifle for a long time.

In addition, in United States v. Philibert, 947 F.2d 1467, 1470-1471 (11<sup>th</sup> Cir. 1991), the Eleventh Circuit held that the evidence of the defendant's purchase of firearms was irrelevant to whether the defendant did or did not place a threatening phone call in violation of section 875(c). The Court held that admission of the firearm constituted improper character evidence under Federal Rule of Evidence 404 and that the error deprived the defendant of a fair trial. Id., at 1471.

In this case, the rifle was exhibited with the bayonet extended. Although the district court gave a limited instruction to the jury, Mr. Sutcliffe's possession of the rifle was irrelevant in determining whether he acted with a specific intent to threaten the persons he is accused of threatening. Therefore, the district court abused its discretion in permitting the introduction of the rifle. It constituted improper character evidence to his detriment.

I. THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE INDICTMENT.

Procedural Background

On November 12, 2002, Mr. Sutcliffe moved, through his appointed counsel Mr. Harris, to dismiss Counts One through Four of the indictment on the ground that the indictment failed to state an offense under section 875(c) because the alleged communication did not constitute a threat.<sup>22</sup> (ER 16-19). Mr. Sutcliffe argued that the threats fall short of a true threat and that they are protected speech under the First Amendment. (Ibid). For Counts Five through Nine, Mr. Sutcliffe argued that an offense is not stated in the indictment. (ER 19).

In addition, on January 3, 2003, Mr. Sutcliffe moved to dismiss Counts One through Four on a further ground that the indictment fails to allege specific intent to threaten, which is an element under section 875(c). (ER 163). The government responded by arguing that the threats were indeed true threats and that the government intends to return a superseding indictment to address the defect in the indictment. (ER 177-181).

On January 10, 2003, a first superseding indictment was filed, charging Mr. Sutcliffe with Counts One through Four

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<sup>22</sup>Mr. Sutcliffe was acquitted on Count Three, and thus,

of violating section 875(c) and Counts Five through Nine of violating section 1028(a)(7). The superseding indictment alleged that Mr. Sutcliffe transmitted the threats with the specific intent to threaten the victims. (ER 183-187).

On January 14, 2003, Mr. Harris was relieved as Mr. Sutcliffe's counsel before any motion to dismiss the first superseding indictment could be filed.

#### Standard of Review

The sufficiency of an indictment is reviewed de novo. United States v. Rodriguez-Rodriguez, 364 F.3d 1142, 1145 (9<sup>th</sup> Cir. 2004). The district court's denial of the motion to dismiss the indictment is also reviewed de novo. United States v. Navarro-Vargas, 367 F.3d 896, 898 (9<sup>th</sup> Cir. 2004).

#### Argument

This Court has long ago stated that an indictment is sufficient if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. United States v. Morrison, 536 F.2d 286, 288 (9<sup>th</sup> Cir. 1976) (quoting Hamling v. United States, 418 U.S. 87, 117 (1974)). It is also axiomatic that, "to be legally sufficient, the indictment must assert facts which

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Count Three will not be addressed here.

in law constitute an offense; and which, if proved, would establish prima facie the defendant's commission of that crime." United States v. Superior Growers Supply, Inc., 982 F.2d 173, 177 (6<sup>th</sup> Cir. 1992) (citing Fleisher v. United States, 302 U.S. 218 (1937)). Furthermore, although the language of the statute may be used in the general description of the offense, "it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." Hamling v. United States, 418 U.S. at 117-18 (quotation marks omitted). This is especially so in section 875(c) cases, "because the alleged threatening statement must be viewed from the objective perspective of the recipient, which frequently involves the context of the parties' relationship. For this reason, it is incumbent on the Government to make that context clear in such an indictment, unless the alleged threat is direct." United States v. Landham, 251 F.3d 1072, 1081 (6<sup>th</sup> Cir. 2001).

In this case, the district court should have dismissed the indictment with respect to Counts One, Two, and Four

because the language was insufficient to state an offense under section 875(c).<sup>23</sup>

Count One alleged that Mr. Sutcliffe willfully, knowingly, and with the specific intent to threaten, transmitted the following threat: **Posting** on website evilgx.com stating "I will personally send you back to the hell from where you came." Count Two alleged that Mr. Sutcliffe willfully, knowingly, and with the specific intent to threaten, transmitted the following threat: **Posting** on website evilgx.com stating "I will kill you." Count Four alleged that Mr. Sutcliffe willfully, knowingly, and with the specific intent to threaten, transmitted the following threat: **Posting** on website evilgx.com stating "Dead-icated to Elizabeth Greenwood" and accompanied by sound file of voice stating "This is all far from over" and linked to a photograph of Greenwood and her young daughter.

The threats alleged in the First Superseding Indictment fails to state an offense because none of the alleged threats are alleged with a statement of the facts and circumstances sufficient to inform Mr. Sutcliffe of the offense under section 875(c). There is nothing in the indictment to show the context within which the statements

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<sup>23</sup>Mr. Sutcliffe was acquitted of Count Three, and thus Count Three will not be addressed here.

were made and how the statements were to be received by the listeners. Simply asserting that Mr. Sutcliffe posted certain statements without setting forth the proper context fails to state an offense.

This is so in this case because the alleged statements cannot be construed as threats as posted on the website. In Count One, the statement, "I will personally send you back to the hell from where you came" does not contain any threat to injure the listener. It could be construed as telling someone to go to hell in an ornate fashion or telling someone that he is going to make that person's life miserable like hell. Without any context of violence, such statement cannot be construed as a threat to injure.

Likewise, the statement "I will kill you" in Count Two cannot be construed as a threat without the proper context of violence. The term "kill" is ambiguous and has various meanings in different context. Again, without the statement of the facts and circumstances under which the statement was made, it cannot be construed as a threat to injure.

The statement "This is all far from over" with the words "Dead-icated to Elizabeth Greenwood" in Count Four also does not contain any threat to injure the listener. Rather, it is simply a play on words. There is no

indication that Mr. Sutcliffe would inflict bodily harm on Greenwood.

Because the statements made by Mr. Sutcliffe are not communication threatening to injure a person, Counts One, Two, Four of the indictment fail to allege a violation under section 875(c).

With respect to Counts Five through Nine, section 1028(a)(7) makes it a crime to "knowingly transfer[] or use[], without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law." 18 U.S.C. § 1028(a)(7). However, the indictment fails to identify any principal whom Mr. Sutcliffe intended to aid and abet commit a criminal offense by transferring the social security numbers. In addition, the indictment fails to allege that someone actually committed a criminal offense. (See Judgment of Acquittal Argument, *infra*). Therefore, the district court should have dismissed the indictment for failure to allege an offense under section 1028(a)(7).

J. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

Standard of Review

A trial court's ruling on a motion for acquittal is reviewed de novo. United States v. Johnson, 357 F.3d 980, 983 (9<sup>th</sup> Cir. 2004). When a claim of sufficiency of the evidence is preserved by a motion for acquittal at the close of the evidence, the appellate court reviews the district court's denial of the motion de novo. United States v. Carranza, 289 F.3d 634, 641 (9<sup>th</sup> Cir. 2002). The appellate court reviews evidence presented against the defendant in a light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See United States v. Johnson, 357 F.3d at 983.

Argument

A. Counts One, Two, and Four

Counts One through Four of the first superseding indictment charged Defendant of willfully, knowingly, and with the specific intent to threaten, transmitted, caused to be transmitted, and aided and abetted the transmission of communications in interstate commerce, which communications were threats to injure the person of another in violation of 18 U.S.C. section 875(c). The elements of section 875(c)

are 1) an intentional interstate transmission of a communication; 2) threatening to injure a person, 3) with the specific intent to threaten. United States v. Twine, 853 F.2d 676, 679-80 (9<sup>th</sup> Cir. 1988).

However, the Supreme Court has held that "a statement such as [section 875(c)], which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." Watts v. United States, 394 U.S. 705, 707 (1969). In Virginia v. Black, 538 U.S. 343, 359-50 (2003), the Supreme Court further defined "true threats" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." See also United States v. Cassel, 408 F.3d 622, 631 (9<sup>th</sup> Cir. 2005).

Moreover, the "question of whether a defendant communication is a true threat rather than speech protected by the First Amendment--a threshold question of law for the court--is different from the question of whether a reasonable person would interpret the communication as a true threat--a question for the jury at trial." United States v. Francis,

164 F.3d 120, 123 n.4 (2d Cir. 1999), citing United States v. Kelner, 534 F.2d 1020, 1025 (2d Cir. 1976) and United States v. Malik, 16 F.3d 45, 49 (2d Cir. 1994).

In Watts, the defendant was convicted of making a threat against the President under 18 U.S.C. section 871(a) by making the following statement: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J." Watts v. United States, 394 U.S. at 706. The Supreme Court held that, "taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners [who responded with laughter]," the "kind of political hyperbole indulged by petitioner" was merely "a kind of very crude offensive method of stating a political opposition to the President," and was not a true threat. Id., at 708. In doing so, the Supreme Court distinguished "political hyperbole" from a "true threat," and recognized the importance of examining statements "in context" to determine whether they are true threats punishable by law. Ibid.

The messages at issue in this case were protected speech in furtherance of a labor dispute under the First Amendment, and thus they did not constitute a true threat. Mr. Sutcliffe was a former employee of Global Crossing until he was terminated in September 2001. Mr. Sutcliffe was allegedly terminated for integrity and insubordination. (RT 361, 364, 381). According to Saly, Mr. Sutcliffe had falsely represented on his job application that he did not have a conviction in the past 7 years. (RT 383).

Mr. Sutcliffe was outraged by his termination, and he protested his termination by picketing outside Global Crossing. One of the messages posted on the website demanded an apology from Global Crossing. One of the messages addressed to Greenwood read: "Now just say you are sorry. Admit that an infraction ticket is not a crime . . ." (RT 707). Another message read, "Until then I shall fight your accusations under the law." (RT 903). Clearly, Mr. Sutcliffe was embroiled in a labor dispute with Global Crossing, and the alleged messages that were posted in the website were made in the context of a labor dispute, and thus, they were speech protected under the First Amendment.

1. Counts One and Two

Counts One and Two alleged that Mr. Sutcliffe posted the following statements directed at Tracy Hall: 1) "I will personally send you back to the hell from where you came;" and 2) "I will kill you." Tracy Hall was a process server hired by Global Crossing to serve Mr. Sutcliffe with a temporary restraining order to stop him from making statements on the website in protest of the termination of his employment. Not only was Hall trying to serve the TRO to stop the website, she also contacted Child Protective Services to report Mrs. Sutcliffe allegedly beating her daughters. (RT 723-24). Thus, Hall was entangled in Mr. Sutcliffe's labor dispute with Global Crossing.

It was in this context Mr. Sutcliffe made the statements alleged in Counts One and Two. The full text of the statement alleged in Count One is as follows: "To close, Tracy Hall, if you call this house again and threaten me, or my family, or ever appear near me, or my family, I will personally send you back to the hell from where you came." (RT 1335).

The full text of the statement alleged in Count Two is as follows: ". . . I really don't take kindly to people threatening me or lying to the courts that they served me

with a T.R.O., . . . Our paths are now crossed and we are forever joined . . . to deal with that I am going to make you a one time offer. If I never see or hear from or of you again, I will forget you . . . However, if I do ever hear your name mentioned against me ever again I will personally add you to my domain list. I think you understand the issues now enough to understand what this means. If I ever see you near my family again, and I know how to stalk too, I will kill you. That's my offer. Now, go in the peace and lie about me no more." (RT 1336-1337).

The Supreme Court stated in Watts that the language used in labor disputes "is often vituperative, abusive, and inexact." Watts v. United States, 394 U.S. at 708. As in Watts, the statements directed at Hall were conditional. Therefore, "taken in context, and regarding the expressly conditional nature of the statement[s]" the statements directed at Hall were merely "a kind of very crude offensive method" of telling Hall to stay out of the labor dispute Mr. Sutcliffe has against Global Crossing and were not a true threat.<sup>24</sup>

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<sup>24</sup> The Second Circuit also held that a threat has to be "so unequivocal, unconditional, immediate and specific . . . as to convey a gravity of purpose and imminent prospect of execution" before it can be a threat. United States v. Kelner, 534 F.2d 1020 (2<sup>nd</sup> Cir.), cert. denied, 429 U.S. 1022 (1976)

2. Count Four

Count Four alleged that Mr. Sutcliffe posted the following statements directed at Elizabeth Greenwood:

"Dead-icated to Elizabeth Greenwood" and accompanied by sound file of voice stating "This is all far from over" and linked to a photograph of Greenwood and her young daughter.

Greenwood was GX's assistant general counsel and assistant corporate secretary. (RT 623-624). Mr. Sutcliffe had interacted with Greenwood regarding his problems with human resources at Global Crossing. (RT 627). Again, it is clear that the statement at issue was made in the context of a labor dispute. Because the message was posted as a part of the labor dispute, it could not be construed as a true threat. Moreover, the statement at issue did not even "communicate a serious expression of an intent to commit an act of unlawful violence" upon Greenwood. Mr. Sutcliffe did not state that he would physically harm her in any way.

The district court should have granted Mr. Sutcliffe's motion for acquittal because the alleged statements were not a true threat, but rather protected speech under the First Amendment. See Watts v. United States, 394 U.S. at 708.

B. Counts Five through Nine

Counts Five through Nine of the first superseding indictment charged Mr. Sutcliffe of violating 18 U.S.C. section 1028(a)(7) of knowingly transferring, without lawful authority and in a manner affecting interstate commerce, Social Security numbers, with the intent to aid and abet false representation of Social Security numbers for any purpose, with intent to deceive in violation of 42 U.S.C. section 408(a)(7)(B).

Section 1028(a)(7) makes it a crime to "knowingly transfer[] or use[], without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law." 18 U.S.C. § 1028(a)(7). Thus, in order to conviction someone under section 1028(a)(7), the Government must prove the following elements beyond a reasonable doubt: (1) that the defendant knowingly transferred or used a means of identification of another person; (2) that such transfer was performed without lawful authority; (3) that such transfer was performed with the intent to commit, or aid or abet, any Federal crime or any felony under State or local law; and (4) that the transfer

was in or affected interstate or foreign commerce. See 18 U.S.C. § 1028(a)(7), (c).

42 Title U.S.C. section 408(a)(7)(B) provides: "Whoever . . . for any . . . purpose . . . with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him or to such other person . . . shall be guilty of a felony." Thus, in order to convict someone under section 408(a)(7)(B), the Government must show that defendant (1) for any purpose, (2) with the intent to deceive, (3) represented a particular social security number to be his or another person's, (4) which representation is false. See United States v. Perez-Campos, 329 F.3d 1214, 1215 (10<sup>th</sup> Cir. 2003), citing United States v. Darrell, 828 F.2d 644, 647 (10<sup>th</sup> Cir. 1987); see also United States v. Porter, 409 F.3d 910, 915 (8<sup>th</sup> Cir. 2005), citing United States v. McKnight, 17 F.3d 1139, 1143 (8<sup>th</sup> Cir. 1994).

In order to convict someone for aiding and abetting a criminal offense, the evidence must establish that the offense actually was committed. United States v. Korab, 893

F.2d 212, 213 (9<sup>th</sup> Cir. 1989), citing United States v. Powell, 806 F.2d 1421, 1424 (9<sup>th</sup> Cir. 1986). In addition, "[t]here is no question but there must be a guilty principal before there can be an aider or abettor. (citations omitted)." United States v. Jones, 425 F.2d 1048, 1056 (9<sup>th</sup> Cir.), cert. denied, 400 U.S. 823 (1970).

Therefore, in order to prove that Mr. Sutcliffe intended to aid and abet any crime, the government must demonstrate that Mr. Sutcliffe knew that his action would tend to advance "some nefarious purpose of the principal" and that he had "the specific intent of facilitating or advancing the principal's commission of the underlying crime." See United States v. Frampton, 382 F.3d 213, 223 (2d Cir. 2004).

The evidence in this case failed to show that Mr. Sutcliffe transferred or aided and abetted the transfer of Social Security numbers with intent to aid and abet false representation of Social Security numbers in violation of section 408(a)(7)(B). There was no evidence whatsoever to show that **anyone** committed a crime under section 408(a)(7)(B) by representing a particular social security number to be his or another person's for any purpose with the intent to deceive.

Because the government failed to identify the principal whom Mr. Sutcliffe intended to aid and abet, there was no evidence to support Mr. Sutcliffe's convictions under 18 U.S.C. section 1028(a)(7) and 42 U.S.C. section 408(a)(7)(B). See United States v. Korab, 893 F.2d at 213 and United States v. Jones, 425 F.2d at 1056.

Moreover, the government completely failed to demonstrate any false representation of any social security number actually occurred—again, there was no evidence to support Mr. Sutcliffe's convictions under sections 1028(a)(7) and 2. Both deficiencies mandated the district court to grant Mr. Sutcliffe's motion, and in failing to do so, the district court erred.

#### C. All Counts

As argued earlier (See Jurisdiction Argument, supra), the government failed to present evidence to show that the alleged messages and the social security numbers were actually transmitted across state lines as required under sections 875(c) and 1028(a)(7).

Moreover, Mr. Sutcliffe presented evidence that before anyone can enter the website, he/she has to agree to the terms and conditions set by the author of the website. (RT 492-493). None of the alleged victims were "captive

audience" in that they did not have to access the website to view the communication that offended them.

K. THE DISTRICT COURT COMMITTED A REVERSIBLE ERROR IN ITS JURY INSTRUCTION.

Standard of Review

Whether a jury instruction misstates elements of a statutory crime is a question of law and is reviewed de novo. United States v. Phillips, 367 F.3d 846, 854 (9<sup>th</sup> Cir. 2004). In reviewing jury instructions, the relevant inquiry is whether the instruction as a whole are misleading or inadequate to guide the jury's deliberation. United States v. Garcia-Rivera, 353 F.3d 788, 792 (9<sup>th</sup> Cir. 2003). An erroneous jury instruction is subject to harmless error review. United States v. Omer, 429 F.3d 835, 840 (9<sup>th</sup> Cir. 2005).

Argument

The district court gave the following jury instruction in defining "true threat": "True threats are not protected by the First Amendment and are not free speech or expression. A statement is a true threat where a reasonable person would foresee that the listener will believe he or she will be subjected to physical violence upon his or her person." (RT 2126). The district court instructed the jury with what is

often referred to as an "objective" true threat definition. See United States v. Stewart, 420 F.3d 1007, 1017 (9<sup>th</sup> Cir. 2005). Such instruction was erroneous.

In Virginia v. Black, 538 U.S. 343, 359-50 (2003), the Supreme Court defined "true threats" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." This Court has referred the Supreme Court's definition as a "subjective" true threat definition and held that the Black's definition of true threat should control threat cases. United States v. Stewart, 420 F.3d at 1017.

By instructing the jury with an "objective" true threat definition, the district court clearly erred. The district court's error was harmful.

According to Virginia v. Black, the jury must find that the speaker intended to communicate a **serious expression of an intent** to commit an act of unlawful violence before finding him guilty of making a true threat. As argued earlier, Mr. Sutcliffe in this case did not communicate a serious expression of an intent to physically harm anyone. (See Judgment of Acquittal Argument, supra). Had the jury been instructed with the Black definition of true threat, it

would not have convicted Mr. Sutcliffe of Counts One, Two, and Four.

L. THIS CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR RESENTENCING.

1. APPELLANT WAS DENIED HIS RIGHT TO COUNSEL AT SENTENCING.

Procedural Background

After the jury rendered a guilty verdict in this case, the district court ordered Mr. Reed to continue to act as a standby counsel for Mr. Sutcliffe for purposes of sentencing. (RT 2194). On March 1, 2004, at a status conference hearing, the district court again confirmed that it had appointed Mr. Reed to function as standby counsel for Mr. Sutcliffe for purposes of the sentencing proceeding and that Mr. Sutcliffe had been representing himself thus far. (RT 3/1/04 at 25). In response, Mr. Sutcliffe informed the court that he did not ask to be made his own counsel. (Id. at 27).

On March 11, 2004, Mr. Sutcliffe filed a Motion and Notice of Objection to Minute Order Dated March 1, 2004 and requested for assistance of counsel under the Sixth Amendment. (ER 454-460). In its Points and Authorities, Mr. Sutcliffe argued that he never made an intelligent and knowing waiver of his right to assistance of counsel and

that he does not waive his right at sentencing. (Ibid). Mr. Sutcliffe demanded the district court to grant him assistance of counsel. (Ibid).

On March 11, 2004, the district court issued a minute order summarily denying Mr. Sutcliffe's request for assistance of counsel at sentencing. (ER 462).

#### Standard of Review

Whether a defendant was denied Sixth Amendment rights to counsel is reviewed de novo. United States v. Moore, 159 F.3d at 1158. A district court's denial of a request for substitution of counsel is reviewed for abuse of discretion. See Id. at 1158 n.3. The decision to allow a pro se litigant to proceed with some hybrid representation (co-counsel or advisory counsel\_) is reviewed for abuse of discretion. United States v. George, 85 F.3d 1433, 1439 (9<sup>th</sup> Cir. 1996).

#### Argument

It has been firmly established that in felony cases, a criminal defendant is entitled to be represented by counsel at all critical stages of the prosecution, including sentencing. See Lopez v. Thompson, 202 F.3d 1110, 1117 (9<sup>th</sup> Cir. 2000) (citing Mempa v. Rhay, 389 U.S. 128, 134-037 (1967)). Moreover, this Court has stated that "it is clearly established federal law that the right to counsel

may be re-asserted during sentencing, and a trial court cannot deny a defendant's timely request for representation without a sufficient reason." Robinson v. Ignacio, 360 F.3d 1044, 1061 (9<sup>th</sup> Cir. 2004).

Despite such well established law regarding a defendant's right to counsel at sentencing, Mr. Sutcliffe was denied of his right to counsel at sentencing in this case. Once again, the district court compelled Mr. Sutcliffe to represent himself at sentencing without making any finding that he waived his right to counsel knowingly, intelligently and unequivocally. See United States v. Farhad, 190 F.3d 1097, 1099 (9<sup>th</sup> Cir. 1999) ("A waiver of the right to counsel must be knowing, intelligent, and unequivocal. . . We approach this question cautiously, indulging 'every reasonable presumption against waiver.'"). The record clearly indicates that the district court compelled Mr. Sutcliffe to represent himself over his protest that he did not ask to be made his own counsel.

Not only that, Mr. Sutcliffe specifically requested the district court to appoint a counsel for him to represent him at sentencing. (ER <sup>454-460</sup>~~413-418~~). Nevertheless, the district court summarily denied his request, without even holding a hearing to address his request.

Because Mr. Sutcliffe was denied this Sixth Amendment right to counsel at his sentencing, the case should be remanded to the district court for resentencing.

2. APPELLANT'S SENTENCE VIOLATED HIS SIXTH AMENDMENT RIGHT TO HAVE A JURY DETERMINE BEYOND A REASONABLE DOUBT THE FACTS WHICH RESULTED IN HIS ENHANCED SENTENCE

#### Standard of Review

A district court's interpretation and application of the Sentencing Guidelines are reviewed de novo. See United States v. Nielsen, 371 F.3d 574, 582 (9<sup>th</sup> Cir. 2004). The district court's application of the guidelines to the facts of a particular case is reviewed, however, for an abuse of discretion. See United States v. Miguel, 368 F.3d 1150, 1155 (9<sup>th</sup> Cir. 2004). The district court's factual findings in the sentencing phase are reviewed for clear error. See United States v. Nielsen, 371 F.3d at 582. A claim that a sentence violates Apprendi v. New Jersey, 530 U.S. 466 (2000) is reviewed de novo. United States v. Smith, 282 F.3d 758, 771 (9<sup>th</sup> Cir. 2002). Also, under United States v. Ameline, 409 F.3d 1073, 1079 (9<sup>th</sup> Cir. 2005), unpreserved Booker error is reviewed for plain error.

#### Argument

In Apprendi v. New Jersey, *supra*, 530 U.S. at 490, the Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime

beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." In Blakely v. Washington, 124 S.Ct. 2531, 2537 (2004), the Supreme Court held that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." Ibid.

Most recently, in United States v. Booker, 125 S.Ct 738, 756 (2005), the Supreme Court again held that enhancing sentences based on facts found by the court alone and not by the jury violated the Sixth Amendment imperative that "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." The Supreme Court then rendered the sentencing guidelines advisory and not mandatory, and

restored discretion to courts to impose sentences within the range prescribed by the statutes of conviction, as long as those sentences are reasonable. Id., at 756-757.

In this case, the district court in violation of Apprendi increased Mr. Sutcliffe's offense level by 10 levels and increased Mr. Sutcliffe's criminal history category to Two from One after making the following findings under U.S.S.G. sections 2B1.1(b)(8) and 2A6.1(b)(1): 1) that Mr. Sutcliffe relocated to evade law enforcement and/or that the crime involved sophisticated means; 2) that the offense involved substantially more than two communications to the same victim; and 3) that Mr. Sutcliffe intended to carry out the threat made to the victim. (RT 4/15/04 at 16-23). However, subsequent to sentencing Mr. Sutcliffe, the district court conceded that under Blakely, it imposed a sentence in violation of the Sixth Amendment.<sup>25</sup> (ER ~~439~~<sup>482</sup> ~~441~~<sup>484</sup>).

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<sup>25</sup> Subsequent to sentencing, Mr. Sutcliffe filed a Petition for Writ of Error Coram Nobis. On July 30, 2004, the district court filed an order denying the petition for writ of error coram nobis. (ER ~~439~~<sup>483</sup>). In the order, the district court conceded that its sentence violated Mr. Sutcliffe's Sixth Amendment rights because it was longer than the maximum sentence that could have been imposed solely on the basis of the facts implicitly reflected in the jury verdict. (ER ~~440~~<sup>483</sup>). The court, nevertheless, stated that it will wait for the Ninth Circuit's remand of the case before correcting the sentence. (ER 442).

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Because the district court sentenced Mr. Sutcliffe beyond the statutory maximum based on the findings not made by the jury beyond a reasonable doubt, he was denied his Sixth Amendment right to a jury trial, and the case should be remanded to the district court under United States v. Ameline, 409 F.3d 1073, 1084-85 (9<sup>th</sup> Cir. 2005) (en banc); see also United States v. Moreno-Hernandez, 419 F.3d 906, 916 (9<sup>th</sup> Cir. 2005) (Ameline's limited remand procedure applies to cases involving both constitutional and non-constitutional Booker error).


V

**CONCLUSION**

For the foregoing reasons, Defendant respectfully urges this Court to reverse Mr. Sutcliffe's convictions.

Dated: April 24, 2006

Respectfully submitted,

  
Sung B. Park, Esq.

Attorney for Appellant  
Steven Sutcliffe

**CERTIFICATE OF RELATED CASES**

Counsel for the appellant hereby certifies that there are no cases related to this appeal known to him pending in this Court at this time.

Dated: April 24, 2006

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Sung B. Park', is written over a horizontal line.

Sung B. Park, Esq.

Attorney for Appellant  
Steven Sutcliffe

**CERTIFICATE OF COMPLIANCE PURSUANT TO FED.R.APP.32(A)(7)(C)  
AND CIRCUIT RULE 32-1 FOR CASE NUMBER 04-50189**

I certify that:

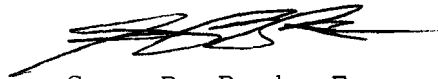
Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is

Monospaced, has 10.5 or fewer characters per inch and contains 18,217 words.

On May 23, 2006, this Court granted Appellant's motion to file an oversized opening brief.

Dated: June 5, 2006

Respectfully submitted,



Sung B. Park, Esq.

Attorney for Appellant  
Steven Sutcliffe

**CERTIFICATE OF SERVICE**

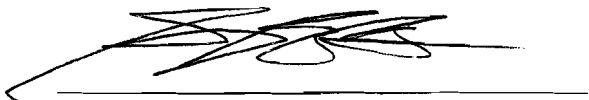
I, the undersigned, declare: that I am a citizen of the United States and a resident of Los Angeles County and employed in Van Nuys, California; that my business address is 17620 Sherman Way, Suite 211, Van Nuys, California, 91406; that I am over the age of eighteen years; that I am not a party to the above-entitled action; the service by mail was made to:

Elena Duarte  
AUSA  
1200 U.S. Courthouse  
312 N. Spring Street  
Los Angeles, California 90012

by placing in the United States Mail at Los Angeles, California on June 6, 2006:

TWO COPIES OF APPELLANT'S OPENING BRIEF; EXCERPTS OF RECORD

This certificate is executed on the date shown below, at Van Nuys, California.



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Sung B. Park

DATE OF EXECUTION: June 6, 2006