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No. CR 03-350 (A) -AAH

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Los Angeles, California 90012
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1 LOS ANGELES, CALIFORNIA; WEDNESDAY, AUGUST 27, 2003;

2 A.M. SESSION

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4 THE CLERK: Calling item No. 1, CR 02-350(A), USA
5 versus Steven William Sutcliffe.

6 THE COURT: Before anyone begins to make an
7 appearance of counsel, let me explain how I think we should and
8 will proceed this morning.

9 First, I need to recite for the record the fact that
10 I think on August 25th, which I guess was two days ago, Judge
11 Phillips denied the then-last pending -- or so far as I know
12 last pending motion to recuse me. So I am authorized to carry
13 out my responsibilities, and I intend to do so.

14 There are essentially four matters that we need to
15 address today on the calendar. The first -- and I'm choosing
16 it first because I think it's practical to do so, and
17 Mr. Sutcliffe requested that it be done this way -- is the
18 issue of whether he has now returned to, or is at least in the
19 status of, competence sufficient to proceed to trial.

20 The second question is who will represent him. And
21 that, obviously, relates to Mr. Nicolaysen's motion to
22 withdraw. The third, depending on how I rule on that motion,
23 will be what options remain available to Mr. Sutcliffe. And
24 the fourth will be the trial date.

25 So I hope that everyone will understand that it is

1 important to follow this order and to comply with all of the
2 appropriate procedures.

3 If appearances are made by Mr. Nicolaysen on behalf
4 of Mr. Sutcliffe, I don't want that to trigger any initial
5 reaction, because he currently is properly constituted as
6 counsel. I will not have Mr. Nicolaysen address any of the
7 merits except to confirm that he filed a certain position on
8 the issue of competence. So this is how we'll proceed. And,
9 with that, let's have the appearances of counsel.

10 MS. DUARTE: Good morning, Your Honor. Elena Duarte
11 and Jason Gonzalez on behalf of the United States.

12 MR. GONZALEZ: Good morning.

13 MR. NICOLAYSEN: Good morning, Your Honor. Greg
14 Nicolaysen, defense counsel, appearing.

15 MR. McAFEE: Good morning, Your Honor. Leslie McAfee
16 appearing on behalf of Mr. Sutcliffe, who has been specially
17 retained for the purposes of competency hearing only.

18 THE COURT: Mr. McAfee, we'll deal with your status.
19 I'm not necessarily accepting that you have any right, or any
20 lawyer would have a right, to appear for a special limited
21 purpose. At this time, I'll ask you to sit in one of the
22 benches and not at counsel table, and we'll proceed
23 accordingly.

24 MR. McAFEE: Very well, Your Honor. Lodge my
25 objection for the record both to your sitting on the bench in

1 this matter and to the court's indication that it has not yet
2 recognized my right to represent Mr. Sutcliffe.

3 THE COURT: All right. Now please be seated.

4 Okay. Let's turn first to the issue of competence.
5 I think and hope that, consistent with the order I issued
6 earlier this month, Dr. Patenaude is currently on the telephone
7 and listening to these proceedings; is that correct?

8 Are you there, Dr. Patenaude?

9 THE CLERK: Dr. Patenaude?

10 THE COURT: We'll take a temporary hiatus while we
11 plug him in. He was on the phone, I was told before. I have
12 not personally spoken to him, ever, but I understand he is
13 available, if necessary, for purposes of the first issue on
14 today's agenda.

15 Can you hear us here at this end? Can you hear us,
16 Dr. Patenaude?

17 DR. PATENAUDE: Yes, I can, Your Honor.

18 THE COURT: Okay. I also directed the U.S. attorney
19 to make available Dr. Backer.

20 Is he present?

21 DR. BACKER: Present, Your Honor.

22 THE COURT: Dr. Backer is here.

23 And is the chief psychologist at the local MDC also
24 available?

25 DR. IHLE. Yes.

1 THE COURT: What's your name, sir?

2 DR. IHLE: Dr. Ihle.

3 THE COURT: Dr. Ihle. Okay.

4 I think the parties and the counsel are familiar with
5 the lengthy procedural background that preceded the order that
6 was issued -- that I issued on April 7th that led to the
7 transfer of Mr. Sutcliffe to the facility in Massachusetts --
8 it's known as Devens -- for purposes of further examination and
9 diagnoses.

10 Skipping ahead to what really is relevant for
11 purposes of today's proceeding, on -- not before August 18th.
12 I'm not sure when it came in. But sometime after August 18th,
13 I received a forensic report that is dated August 14th. It was
14 transmitted with a cover letter dated August 18th. It is the
15 report that Dr. Patenaude prepared.

16 The bottom line, consistent with all of the previous
17 analyses, is that Dr. Patenaude concluded that Mr. Sutcliffe is
18 competent to stand trial at this time. I have given a copy of
19 that report to the clerk. I am going to order that it be filed
20 as part of the official record in this case. So that will be
21 part of the official proceedings.

22 On about August 20th, Mr. Nicolaysen, as currently
23 designated official counsel for Mr. Sutcliffe, filed a position
24 paper in which he concurred with Dr. Patenaude's conclusion and
25 indicated that he did not anticipate any questioning.

1 On August 20th, the government filed a comparable
2 memorandum in which it stated, through Ms. Duarte, that the
3 government expects to ask that the court find that the
4 defendant's competent.

5 I see nothing in the record before me that would
6 prompt me to reach any conclusion other than that Mr. Sutcliffe
7 is competent to proceed to trial, but I think it's
8 particularly, given the history of this case, important to
9 establish what the appropriate standards are and deal with some
10 of the procedural rights that Mr. Sutcliffe has.

11 The issue is whether or not -- and there are two
12 different ways the law has formulated this, but the statute and
13 the applicable case law are fundamentally comparable. Whether
14 he, Mr. Sutcliffe, has the sufficient present ability to
15 consult with his lawyer, or with a lawyer, in a reasonable
16 degree, with a reasonable degree of rational understanding.
17 The statute refers to assisting properly in his defense.

18 The second part or second prong of this issue or this
19 standard for determining competency is whether he has a
20 rational and factual understanding of the proceeding against
21 him, or of the nature and consequences of the proceeding
22 against him, if you use the language from the statute.
23 Dr. Patenaude dealt with both standards, both elements, and
24 made certain findings and reached the conclusion that he,
25 Mr. Sutcliffe, is competent.

1 If there were a contested issue as to that question,
2 it would be the government's burden of proof to prove that
3 Mr. Sutcliffe is competent. If Mr. Sutcliffe were arguing that
4 he is not competent, which is clearly not the case, then he
5 would have the burden of proving that condition by a
6 preponderance of evidence.

7 Mr. Sutcliffe has the right to counsel, although, as
8 with all rights to counsel, that can be waived, by conduct or
9 by choice. He has the right to testify; he has the right to
10 present evidence; he has the right to subpoena witnesses; he
11 has the right to cross-examine. Those are the general contours
12 of what this kind of hearing entails. Now, let's start with
13 counsel for the government.

14 Do you wish to question Dr. Patenaude?

15 MS. DUARTE: Your Honor, at this point I'll submit on
16 the report with no additional questions.

17 THE COURT: Mr. Nicolaysen, am I correct in having
18 characterized the position paper that you filed?

19 MR. NICOLAYSEN: That's correct, Your Honor.

20 THE COURT: And you do not wish to question
21 Dr. Patenaude?

22 MR. NICOLAYSEN: I do not.

23 THE COURT: Mr. Sutcliffe, I'll give you the
24 opportunity to be heard directly. Do you wish to question
25 Dr. Patenaude?

1 THE DEFENDANT: Thank you, Your Honor, for giving me
2 the opportunity to speak. I want to state, first off, that I
3 object to your sitting on the bench, ruling against me in any
4 way, shape or form under the due process clause of the Fifth
5 Amendment. I would like you to recuse yourself forthwith and
6 assign another judge to rule on any further matters.

7 Furthermore, I want the court to take judicial
8 notice, which it has failed to do on numerous occasions, to my
9 challenge to the jurisdiction on the subject matter in this
10 courtroom.

11 Will you take jurisdictional notice of that now?

12 THE COURT: Mr. Sutcliffe, those are matters which
13 are not appropriate to raise. I deny your motion to recuse
14 myself. I deny your contention that the court lacks
15 jurisdiction.

16 Now, please answer my question. Do you wish to
17 question Dr. Patenaude, through counsel?

18 THE DEFENDANT: The answer to your question is yes.
19 I object to the court ruling on my competency without a full
20 hearing under 4247 of Title 18, as well as all rights reserved
21 on the Bill of Rights of rights, because I received no
22 treatments, no psychiatric or psychological interventions since
23 being ruled incompetent on April 7.

24 In the absence of such interventions or treatment,
25 and with my conduct being exactly the same and consistent

1 throughout my hearings and every proceeding that I've been in
2 this courtroom, this entire case, I believe I'm entitled to a
3 hearing to determine on what basis I was deemed incompetent on
4 the first and second instances so that I can determine what
5 criteria I can now be deemed incompetent.

6 I don't know how I'm not incompetent since nothing
7 has changed since the court first found me to be incompetent.
8 I am not saying I believe I'm incompetent, but I'm not sure of
9 the criteria based on this court's findings previously decided.
10 I have yet to even be provided with a copy of Dr. Patenaude's
11 report. If nothing has changed, then how I can be anything
12 different than what I was originally?

13 Furthermore, I frankly don't understand why my
14 presence is needed here today because, as the conduct of the
15 government, the defense counsel, and this court's own action on
16 April 7 clearly prove, all of you believe that the accused need
17 not be present in the courtroom or, for that matter, not
18 present in the same state to make a finding -- a judicial
19 finding of fact that the accused is or is not incompetent as
20 required by the law.

21 A finding of competency is one of a fact, not law.
22 United States versus Shepard, 538 F.2d 107 at 110; United
23 States versus Fratus -- F-r-a-t-u-s -- 530 F.2d 644 at
24 page 647; U.S. versus Winn, 577 F.2d 86 at note 14 on page 88;
25 Dusky v. United States, 362 U.S. 402, annotations at

1 paragraph 8 on page 2083.

2 Rule 43, which you used to explain my absence
3 obviously does not apply. And since a finding of incompetence
4 is one of clearly a fact, not law -- I am not a corporation --
5 under the first part of Rule 43. And under the right of due
6 process afforded to an accused in a court, the court could not
7 abridge that right by that rule. Pursuant to Title 18, section
8 2072(b), no rule shall abridge, modify or enlarge a substantive
9 right. Rights trump rules.

10 Further, this court never found me incompetent at the
11 March 14th hearing, so the hearing on April 7th should have
12 been conducted pursuant to the protections afforded to an
13 accused under the Fifth Amendment, due process, and the Sixth
14 Amendment, compulsory process, of the Bill of Rights of rights,
15 as well as U.S.C. 4247(d) as in Delta.

16 Bottom line is why my presence was not required
17 April 17th, the hearing of my incompetence decision, but it's
18 required today. I'd like the court to please explain these two
19 differences that I've raised.

20 THE COURT: Are you finished, Mr. Sutcliffe?

21 THE DEFENDANT: Sure.

22 THE COURT: Okay.

23 Dr. Patenaude, have you heard what Mr. Sutcliffe
24 stated?

25 DR. PATENAUDE: Yes, I have.

1 THE COURT: I know that you're not physically present
2 to evaluate demeanor, but I will tell you that Mr. Sutcliffe's
3 demeanor was not inappropriate, he was calm in setting forth
4 his position, and he was reading from some notes that he
5 clearly had prepared.

6 With that information before you, does that statement
7 that Mr. Sutcliffe just completed in any way affect your
8 opinion?

9 DR. PATENAUDE: No, it does not.

10 THE COURT: And what relevance, if any, do you
11 think -- relevance to the question of Mr. Sutcliffe's
12 competence, do you think Mr. Sutcliffe's statement has?

13 DR. PATENAUDE: I don't think it has any. I don't --
14 you know, I didn't find any evidence for a mental disease or
15 defect with him, and it sounds that he's controlling himself in
16 court there.

17 THE COURT: And would your opinion have been affected
18 if the same precise statement had been articulated with the
19 exact same words but under circumstances displaying an absence
20 or unwillingness to manifest self-control appropriate for the
21 requirements of a court of law?

22 DR. PATENAUDE: I'm sorry, Your Honor. I missed part
23 of that. There is a rustling noise.

24 THE COURT: Okay. The question I was trying to ask
25 you is whether what you just told me would have been in any way

1 affected or changed if instead of delivering his position and
2 stating it in the manner I already told you he did,
3 Mr. Sutcliffe had done so as part of an uncontrollable
4 outburst, inappropriate and unwarranted in a court of law?

5 DR. PATENAUDE: Would that change my opinion in any
6 way?

7 THE COURT: Right.

8 DR. PATENAUDE: No.

9 THE COURT: Could you explain that, please.

10 DR. PATENAUDE: Why that wouldn't change -- well --

11 THE COURT: Yes. I know I'm asking you about a
12 hypothetical, which is not inappropriate. But please explain
13 to me why that would not change your opinion.

14 DR. PATENAUDE: Sure, sure. Well, I think
15 ultimately, regarding the issue of competency, as I understand
16 it, is that, you know, we're looking for whether or not a
17 defendant may presently be suffering from a mental disease or
18 defect that renders him mentally incompetent, speaking from the
19 statute, and found no evidence for that in him.

20 I believe that Mr. Sutcliffe's behavior is willful,
21 volitional, goal directed. He certainly -- terms of
22 rationality, he certainly understands, you know, what he is
23 doing. He has reasoned that out; he's demonstrated insight and
24 an ability to introspect regarding his behavior and his
25 subsequent actions.

1 And regarding just maintaining reasonable behavior,
2 again, I think that he chooses not to sometimes. I think he
3 just gets real angry, and that's just a part of who he is. But
4 I don't think it's, again, due to mental illness.

5 THE COURT: Dr. Patenaude, I didn't arrange
6 telephonically to have you sworn in. I don't think it's
7 unwarranted to do that. And after I swear you in, through the
8 clerk, I will ask you questions about what you've just already
9 stated for the court.

10 So let's, through the clerk, telephonically swear
11 Dr. Patenaude in.

12 THE CLERK: Please raise your right hand.

13 DR. PATENAUDE: Okay. It's raised.

14 (Witness sworn)

15 THE COURT: Dr. Patenaude, I know what you've told
16 us, and it preceded the oath that you've just sworn.

17 Do you confirm that everything you've said thus far,
18 before you were sworn in, you would have said under oath and is
19 subject to the same obligation you had to testify truthfully?

20 DR. PATENAUDE: Yes, that is true.

21 THE COURT: Now, Dr. Patenaude, in any of your
22 discussions with Mr. Sutcliffe -- how many total discussions
23 did you have, by the way?

24 DR. PATENAUDE: Let me grab my record here.

25 We had, I'd say, eight or nine pretty lengthy --

1 well, no -- eight or nine discussions. Many of them were
2 pretty lengthy, and then there's general informal discussion.

3 THE COURT: The eight or nine are in some manner, as
4 you see them, distinctive or distinct from and different from
5 the informal discussions?

6 DR. PATENAUDE: Yeah. The informal discussions were
7 just passings on the compound here in the hospital. Just --
8 they were just general pleasantries about how he was doing,
9 things like that.

10 THE COURT: Now, Dr. Patenaude, would you please tell
11 me what your training and professional background is.

12 DR. PATENAUDE: Yeah. I have a doctorate in clinical
13 psychology, and I've been trained as a forensic psychologist in
14 -- both while in graduate school, and then my internship
15 training was in forensic psychology.

16 THE COURT: Where did you receive your doctorate?

17 DR. PATENAUDE: The Illinois School of Professional
18 Psychology.

19 THE COURT: When did you receive it?

20 DR. PATENAUDE: I received that on -- gosh, when did
21 I receive that? I believe it was October of '97.

22 THE COURT: October of '97?

23 DR. PATENAUDE: Yes.

24 THE COURT: And did you write a thesis that had
25 something to do with issues related to mental competency or

1 mental illness in the context of court proceedings?

2 DR. PATENAUDE: Actually, no. My thesis dealt with
3 children and behavior problems.

4 THE COURT: What experience, training, course work or
5 otherwise have you had that qualified you to be functioning as
6 a forensic psychologist?

7 DR. PATENAUDE: Sure. During my clinical training,
8 before I was awarded my degree, I did a full year internship at
9 the Northeast Florida State Hospital, which is a combined
10 civil/forensic hospital and received a year of training in
11 competency and other evaluations.

12 I also, while in school, did some therapy practicum
13 and a diagnostic practicum that were in the forensics areas,
14 and then I've been functioning as a forensic psychologist since
15 August 2000 with the Federal Bureau of Prisons.

16 THE COURT: And throughout that time, have you been
17 in the institution you're currently working at?

18 DR. PATENAUDE: Yes, I have, at the Federal Medical
19 Center at Devens.

20 THE COURT: And how many evaluations have you
21 conducted to determine whether or not an individual is
22 competent to proceed to trial?

23 DR. PATENAUDE: I haven't -- I don't have the exact
24 number, but I would say probably close to 250 to 300.

25 THE COURT: Are you able to tell me with some level

1 of accuracy whether, and, if so, on how many occasions, you've
2 concluded that an individual was not competent?

3 DR. PATENAUE: Not with accuracy, but I would say
4 that maybe one out of 15 or 20 possibly, one out of 15
5 evaluations that I do.

6 THE COURT: All right. And was there anything
7 distinctive about the evaluation of -- and the experience that
8 you had in working with Mr. Sutcliffe that affected your
9 conclusion?

10 DR. PATENAUE: Yeah, I think so.

11 THE COURT: That is not -- let me just complete my
12 question. I know we may have some difficulty speaking over
13 each other since you're not physically present, but I'll try to
14 limit that.

15 I just wanted to have you answer that question
16 without regard to, and without reiterating, what you already
17 wrote down in your very detailed report.

18 DR. PATENAUE: Okay. No, I would say that I think
19 that Mr. -- you know, within my evaluation, I guess I -- there
20 wasn't anything real surprising in it. But, you know, he --
21 other than -- than his -- his demonstrative behavior in court,
22 that I think led to the finding of incompetency, and then his
23 demonstrated behavior here at the hospital, which was
24 nondisruptive, and then his -- again, his insight into that
25 behavior. And then just trying to figure out with him why

1 exactly he behaved that way in court.

2 THE COURT: To what extent do you attach any
3 significance on the issue of Mr. Sutcliffe's competency to the
4 fact that, thus far, including Mr. Nicolaysen, there have been
5 four experienced criminal defense lawyers who have attempted to
6 represent him, or have represented him, in the course of this
7 proceeding, three of whom, at either his or their request, but
8 without any opposition by him, I relieved of their
9 representation. And I don't know if you have seen the -- have
10 you seen the motion to withdraw -- to be permitted to withdraw
11 that Mr. Nicolaysen filed?

12 DR. PATENAUDE: I have. I have not read the entire
13 motion yet.

14 THE COURT: So you're aware there's pending before
15 me, as I indicated at the outset of this hearing, a motion to
16 withdraw brought by the fourth lawyer. And are you aware that
17 a lawsuit has been filed against him?

18 DR. PATENAUDE: I am.

19 THE COURT: Filed by Mr. Sutcliffe?

20 DR. PATENAUDE: Yes, I'm aware.

21 THE COURT: Have you seen the allegations in that
22 lawsuit?

23 DR. PATENAUDE: I perused them. I don't have them in
24 memory.

25 THE COURT: To what extent, if any, does the

1 background concerning Mr. Sutcliffe's relationship with these
2 four different lawyers affect your opinion as to his
3 competence, particularly, Dr. Patenaude, under the first prong
4 relating to whether or not the individual is able to consult
5 with his attorney and assist properly in his defense with a
6 reasonable degree of rational understanding?

7 DR. PATENAUDE: Well, Mr. Sutcliffe certainly
8 possesses a factual and rational understanding of the whole
9 idea of assisting his attorney in developing legal strategies
10 and things like that.

11 And I think based on what he said to me, you know,
12 his reason for wanting to change attorneys is what he terms --
13 I guess it's a legal term -- "ineffective assistance," and also
14 that he believes his rights are being violated.

15 Also my opinion that I think part of the difficulty
16 that he has had in working with his attorneys has been just a
17 general factor or feature of his personality.

18 Now, in terms of being rational, he's demonstrated
19 this ability with me and others, you know, to have meaningful
20 and intelligent conversations and to reason and understand what
21 is being said to him and weigh consequences, weigh decisions.

22 Yet, again, I think that he, you know, again, due to
23 his belief that he's not being effectively represented is
24 interfering with his ability to assist or get along with his
25 attorneys. And I've seen -- spoken to Mr. Nicolaysen at

1 length, and he seems to me to be, you know, really working hard
2 to work with Mr. Sutcliffe. So I don't know what the problem
3 is.

4 THE COURT: The question I would like you to answer,
5 more succinctly, if possible, in any event, more directly, is
6 to what extent, if any, is your opinion affected by the
7 procedural history that I already summarily summarized -- I
8 already summarized concerning Mr. Sutcliffe and his four
9 counsel thus far.

10 DR. PATENAUDE: No, no, my opinion was not affected
11 by that.

12 THE COURT: And please explain why not.

13 DR. PATENAUDE: Well, again, I think that, you know,
14 I was looking at his present functioning. And it just seems
15 that what is going on with his present function has -- and if
16 you focus that in on his relationship with his attorneys, there
17 is a pattern there. And I believe that his behavior that he
18 presents with when working with his attorney is willful and
19 under his control, and it's not the product of a mental disease
20 or mental defect.

21 THE COURT: Would another way of putting it be that
22 it would be at least consistent with a desire that has at least
23 two components, one is to assert and maintain control of the
24 world and circumstances in which he is functioning, and the
25 second being to manipulate the proceedings?

1 DR. PATENAUDE: That is correct. That would be my
2 opinion, yes. I agree with that.

3 THE COURT: As to both prongs?

4 DR. PATENAUDE: Yes, I do.

5 THE COURT: All right.

6 Ms. Duarte, are there any questions in light of what
7 Dr. Patenaude has now stated since I began to question him that
8 trigger -- that you wish to ask in the form of any follow-up?

9 MS. DUARTE: No, Your Honor. I don't have any
10 follow-up questions.

11 THE COURT: Mr. Nicolaysen, do you have any questions
12 you wish to ask?

13 MR. NICOLAYSEN: No, nothing, Your Honor.

14 THE COURT: Mr. Sutcliffe, do you have any questions
15 you wish to ask Dr. Patenaude?

16 THE DEFENDANT: Reading my mind, Your Honor. I'd
17 like my retained counsel to come forward and question the
18 witness.

19 THE COURT: Do you have any questions you want to ask
20 Dr. Patenaude?

21 DR. PATENAUDE: No, I don't.

22 THE COURT: No, no, no. That was a question directed
23 to Mr. Sutcliffe.

24 Do you personally, Mr. Sutcliffe, have any questions
25 you want to ask Dr. Patenaude?

1 THE DEFENDANT: Until I'm found competent, I don't
2 see how that is relevant. I have retained counsel. I would
3 like counsel to come forward and represent me, Mr. McAfee in
4 the background.

5 THE COURT: All right. Well, Mr. McAfee has no
6 right -- no individual lawyer has a right, no individual
7 litigant has a right, to have counsel represent that individual
8 for limited purposes. But I also have the authority to permit
9 it, and I, for pragmatic reasons, will permit it without in any
10 way making any finding as to Mr. McAfee's competence to
11 function in that capacity.

12 But since you've asked him to do so, since he's a
13 member of the court, he says, and since he's here, I'll permit
14 him to ask questions, but only about Mr. Sutcliffe's current
15 mental condition for purposes of the finding that I'm required
16 to make at this hearing and not about any findings that anybody
17 else made, I or any prior psychologist or therapist at an
18 earlier stage in these proceedings.

19 Now, step forward, Mr. McAfee, to speak into the
20 microphone here at the lectern. And with that limitation and,
21 particularly, the scope of relevance that you would be required
22 to adhere to is the same as any lawyer. It's triggered by the
23 contents of Dr. Patenaude's report.

24 You got that report, right?

25 MR. McAFEE: No, Your Honor, I did not, and I would

1 request a few moments to peruse it.

2 THE DEFENDANT: I would like a few minutes to
3 consult with my lawyer.

4 THE COURT: Mr. Nicolaysen, I had issued an order
5 that Dr. Patenaude's report be made physically delivered to
6 Mr. Sutcliffe.

7 Did you attempt to comply with that order?

8 MR. NICOLAYSEN: Yes, Your Honor. I went down in
9 person on August 21st and attempted to meet with Mr. Sutcliffe.
10 I had the report. I didn't mail it to him when I got it on
11 August the 20th. I went in person, and the visit was refused.

12 THE COURT: Did you leave the report with anybody to
13 hand over to Mr. Sutcliffe?

14 MR. NICOLAYSEN: I did not, specifically because of
15 the nature of the report. Typically, I will mail documents to
16 Mr. Sutcliffe, I have done so, and I have done so recently,
17 including my pleadings, things of that nature.

18 Something of this nature, which is very confidential,
19 I wanted to personally deliver to my client. He refused the
20 visit. I anticipated we would be seeing each other on the
21 25th, the following Monday. And so I did not follow up.

22 THE DEFENDANT: I'd also like the record to reflect
23 that this court, on April 7, ordered the transcript of the
24 hearing of April 7 to be provided to Dr. Patenaude and
25 Mr. Sutcliffe quote, unquote, promptly. I did not receive a

1 copy of that secret hearing of April 7, where my presence was
2 not, supposedly, required for almost eight weeks.

3 THE COURT: All right. Now, Mr. Sutcliffe, I'm not
4 going to be open to repeated or maybe to any additional
5 gratuitous volunteered statements which are not relevant to
6 whatever is being discussed at a particular time. Your gripe
7 about Mr. Nicolaysen will be addressed very shortly because of
8 the fact that on the agenda for this morning's hearing, that
9 motion is one of the items.

10 Now, Mr. McAfee, this report, although detailed, is
11 not that long. I want Mr. Nicolaysen -- do you have an extra
12 copy, Mr. Montes?

13 Do you have an extra copy, Ms. Duarte?

14 MS. DUARTE: I may have an additional copy, Your
15 Honor. Actually, he can look at the one attached to my motion
16 that I submitted to the court.

17 THE COURT: Show it to Mr. McAfee.

18 Mr. McAfee, you can sit over at the side of the
19 courtroom. I will give you not more than 20 minutes to go over
20 the report and discuss it with Mr. Sutcliffe. Hearing will be
21 adjourned in the interim. You will be required to discuss it
22 in the courtroom but without anyone else being within earshot
23 of you. The clerk will come and get me. We'll resume the
24 hearing.

25 Now I'm telling you right now, Mr. McAfee, that your

1 right, which is -- your permission that I'm granting you, the
2 exercise of my discretion, will be immediately revoked if you
3 do not comply with the requirements and the guidelines that I
4 already told you.

5 Do you understand that?

6 MR. McAFEE: I do understand what you have
7 articulated, Your Honor.

8 THE COURT: And do you agree to comply?

9 MR. McAFEE: I will comply with it to the best degree
10 of my professional skill.

11 THE COURT: We're adjourned for the purposes I've
12 already articulated.

13 Dr. Patenaude, you don't have to stay on the line
14 right now. I want you to call back in 15 minutes, using the
15 same procedures and facilities you already knew about, so that
16 you'll be ready and available to go promptly, without any
17 further glitch, in 20 minutes from now.

18 DR. PATENAUDE: Yes, Your Honor.

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

20 (Recess)

21 THE COURT: Welcome back, and please be seated.

22 Dr. Patenaude, are you there?

23 DR. PATENAUDE: I am, sir.

24 THE COURT: All right. Mr. McAfee has been given
25 special permission to ask you a few questions.

1 You may proceed, Mr. McAfee.

2 MR. McAFEE: Thank you very much, Your Honor.

3 EXAMINATION

4 BY MR. McAFEE:

5 Q. Good morning, Dr. Patenaude -- good afternoon, I guess,
6 where you are.

7 A. Yes. Thank you.

8 Q. You've made some conclusions that were articulated by the
9 court, and I want to make sure I understand those as related to
10 his present condition.

11 Did you indicate on -- and I'm sorry, I don't have
12 the report in front of me, and it is 13 pages long, and I was
13 given 20 minutes to look at it. So --

14 THE COURT: You now have it in front of you. Please
15 proceed, Mr. McAfee. We don't need speeches.

16 MR. McAFEE: If I misinterpret something, I
17 apologize, Dr. Patenaude.

18 Q. Did you indicate that Steven Sutcliffe attempted or
19 demonstrated a character trait that he wished to manipulate the
20 proceedings?

21 A. I'm sorry. I didn't quite hear the last part of that
22 question.

23 Q. All right. Was it your opinion the defendant,
24 Mr. Sutcliffe, demonstrated a character consistent with someone
25 who wished to manipulate the proceedings around him?

1 A. Yeah, he does present with control and power issues, and
2 it does seem that, from my discussion with him, that he does
3 want to control his legal proceedings in terms of legal
4 strategies and how things are done.

5 Q. All right. And would this issue or element of control be
6 part of the element of his ability to cooperate with counsel?

7 A. I'm sorry. Could you restate that.

8 Q. Sure. Would this desire to exercise the control that
9 you've articulated, would that affect his ability to cooperate
10 with counsel?

11 A. I'm sorry. So what you're asking is does he have an
12 ability to cooperate with counsel?

13 Q. Well, no. If I understand you correctly, you've indicated
14 your belief that Mr. Sutcliffe shows a desire to try to control
15 the legal proceedings around him?

16 A. Yes.

17 Q. And if he has an attorney that's appointed to work with
18 him, would Mr. Sutcliffe's desire to exercise control interfere
19 with his ability to cooperate with that attorney?

20 A. Well, again, I think that Mr. Sutcliffe has a particular
21 way he wants things to run, and I think that he feels his past
22 attorneys have not represented him well because of that.

23 He does believe that you could represent him well,
24 and -- I couldn't say, you know, with a hundred percent
25 certainty whether or not, you know, he does work with an

1 attorney who he believes will represent him well, whether or
2 not he'll try to control that situation.

3 Q. Okay. So was there ever any discussions between yourself
4 and Mr. Sutcliffe about how he felt his participation in the
5 proceedings should be observed by the court or should -- in
6 other words, his interactions with counsel, did he ever
7 articulate how he saw himself participating in those
8 proceedings?

9 A. How he felt he was participating in those proceedings?

10 Q. No, how he should --

11 A. I'm sorry. I'm having a little trouble hearing you.

12 Q. I don't know what to do to help you.

13 THE COURT: Just maybe move the microphone closer to
14 you and speak louder.

15 MR. McAFEE: I'm almost swallowing it.

16 Q. Did Mr. Sutcliffe ever articulate to you how he perceived
17 his role in the legal proceedings?

18 A. Yes, he did.

19 Q. And what did he tell you in that regard?

20 A. Well, he discussed wanting to take an active role in
21 devising his legal strategies. At one point, he talked about
22 just wanting to go pro se. And then at another point, he also
23 talked about having you represent him. So...

24 Q. All right. But that's a little different than what you've
25 just told me, so I want to understand.

1 You told me that he wanted to be an active
2 participant. Is that the same thing as wanting to control the
3 proceedings?

4 A. Well, I think that, you know, he says active. He didn't
5 use that exact term, but that is the way he verbalized it. But
6 based on what I'm also hearing from him, and what I've seen in
7 the record and talking with other people, that there is an
8 element where he is, I believe, is trying to control his legal
9 proceedings, yes.

10 Q. All right. If Mr. Sutcliffe were in a relationship with
11 any attorney, whether that's with me or anybody else, in which
12 he perceived that that attorney was not permitting him an
13 active participant role, how would that affect Mr. Sutcliffe's
14 ability to cooperate with counsel?

15 A. I'm sorry. If -- I didn't hear you on the first part of
16 that.

17 Q. If Mr. Sutcliffe perceived that he was not being allowed
18 to be an active participant with his attorney, whoever that
19 attorney might be, how would that affect his ability to
20 cooperate with counsel?

21 A. Well, he'll probably -- he'll act out.

22 Q. All right. And so if, in fact, Mr. Sutcliffe is not being
23 given -- I'm not saying this is true -- but if, in fact,
24 Mr. Sutcliffe is not being given an opportunity to be an active
25 participant with whatever attorney is representing him, would

1 you expect him then to act out, given your knowledge of his
2 personality?

3 A. Yeah, yes, I would.

4 THE COURT: Mr. McAfee, please characterize or define
5 what you mean by "active participant" in the context of
6 real-world case where somebody's on trial.

7 MR. McAFEE: Sure. Well, actually, Your Honor, if I
8 may, I'd rather, if Dr. Patenaude has a definition of that
9 based on what Mr. Sutcliffe told him. Because I think it's
10 Mr. Sutcliffe's perception that is important here and not mine.

11 THE COURT: No, Mr. McAfee. You used the term in the
12 question you asked. Just explain to the witness, as I would
13 ask any lawyer to do, how you define that term.

14 MR. McAFEE: Okay. Well, I would define that term,
15 Your Honor, with -- to Dr. Patenaude as an attorney that --

16 THE COURT: No. Come on. Active participant on the
17 part of the client.

18 MR. McAFEE: Yes, Okay. An active participant is a
19 person who is permitted to participate in their case. That
20 means they have communications with their attorney; they are
21 asked by their attorney, questions; they are listened to by
22 their attorney; they are asked their opinions about either
23 legal defenses or facts of the case; and they are allowed to
24 render their opinion.

25 Q. Dr. Patenaude, would you think that would be consistent

1 with Steven's perception of how he saw active participation?

2 A. Well, I think there's a difference between when you're
3 talking about assist issues. He -- I don't think he is
4 allowing -- again, this is my opinion, and I'm not a legal
5 expert -- but I don't see him -- I've never seen him, really,
6 to allow Mr. Nicolaysen to function as his attorney, really.

7 And in terms of being an active participant, I think
8 that if Mr. Sutcliffe were that -- with an attorney he liked, I
9 think that "active participant" to him means that he has
10 control over what is going on.

11 Q. All right. But you've never observed Mr. Sutcliffe in the
12 presence of Mr. Nicolaysen, have you?

13 A. I have witnessed -- yeah, I heard a telephone conversation
14 between them.

15 Q. Okay. And that was a single telephone conversation?

16 A. I'm sorry?

17 Q. That was a single telephone conversation?

18 A. Yes.

19 Q. How long did that last, sir?

20 A. That -- I think they've spoken a few times when I was
21 here. But I don't recall how long that telephone conversation
22 lasted.

23 Q. Were you on the telephone, or could you hear the
24 communication that was going on, or were you just observing
25 Mr. Sutcliffe?

1 A. I was actually standing outside of my office, and I heard
2 Mr. Sutcliffe yelling at Mr. Nicolaysen and being very
3 argumentative and devaluing of him.

4 Q. You don't know what Mr. Nicolaysen was saying to
5 Mr. Sutcliffe that elicited that response?

6 A. No, I don't.

7 Q. So you don't know whether what was being spoken to by
8 Mr. Nicolaysen was appropriate for that kind of response, or
9 whether Mr. Sutcliffe's response was inappropriate?

10 A. Okay.

11 Q. Is that fair?

12 A. Sure, sure.

13 Q. If the term that was spoken to by Mr. Nicolaysen was
14 appropriate for the response that Mr. Sutcliffe was giving, how
15 would that affect your opinion?

16 A. Regarding his ability -- his competency?

17 Q. No, regarding your opinion of his interactions and not
18 letting Mr. Nicolaysen have a chance to represent him.

19 A. Well, again, based on my discussions with Mr. Nicolaysen
20 and also with the -- with Mr. Sutcliffe, again, you know, I
21 will fall back on my opinion that I believe that Mr. Sutcliffe
22 is trying to control the situation because Mr. -- you know, as
23 I gathered from Mr. Sutcliffe, Mr. Nicolaysen won't do what he
24 wants him to do.

25 I also think that another factor in this is

1 Mr. Sutcliffe's thoughts about Judge Matz.

2 Q. I don't know if that's gris for the mill here, unless
3 Judge Matz wants to go into that.

4 A. Well, I think that -- I think -- If I may, Your Honor. I
5 think that that --

6 THE COURT: Dr. Patenaude, there's no question
7 pending. This lawyer has a right to have you function as a
8 witness like any lawyer would. So if he doesn't want to follow
9 up, then you shouldn't volunteer the information.

10 THE WITNESS: Yes, Your Honor.

11 BY MR. McAFEE:

12 Q. As regards -- I'm sorry. I have to put my glasses on.

13 As regards to the issue of control and his
14 interaction with Mr. Nicolaysen, at least as you have opined,
15 did you make any -- was there any discussion about
16 Mr. Sutcliffe's opinions on Mr. Nicolaysen when he first
17 arrived at FMC-Devens?

18 A. Yeah. He made it very clear to me that Mr. Nicolaysen was
19 not his attorney.

20 Q. So from the very outset, you were aware that
21 Mr. Sutcliffe's relationship with Mr. Nicolaysen was, at best,
22 strained?

23 A. Well, I didn't know the nature of the relationship. I
24 knew that Mr. Sutcliffe said that Mr. Nicolaysen was not his
25 attorney, and he seemed unhappy with him.

1 Q. That was from the very beginning of your relationship with
2 Mr. Sutcliffe?

3 A. Yes.

4 Q. So would be fair to state that those feelings that
5 Mr. Sutcliffe articulated existed before he got to FMC-Devens?

6 A. Yes.

7 Q. Do you have any idea how many times Mr. Nicolaysen has
8 actually visited his client?

9 MS. DUARTE: Objection, irrelevant, Your Honor.

10 THE COURT: Sustained.

11 BY MR. McAFEE:

12 Q. I'm trying to get to the number of interactions between
13 Mr. Sutcliffe and Mr. Nicolaysen upon which you can base your
14 opinion.

15 Do you have any idea as to how many interactions
16 occurred prior to Mr. Sutcliffe's going to FMC-Devens?

17 THE COURT: Wait, wait, wait. "Interactions" is not a
18 clear term. Why don't you reframe the question, please.

19 BY MR. McAFEE:

20 Q. Do you know how many times --

21 I did and I got objections sustained.

22 THE COURT: Why don't you ask him whether
23 Mr. Sutcliffe told him how many times he met with
24 Mr. Nicolaysen or whether Mr. Sutcliffe told him how many times
25 Mr. Nicolaysen attempted to meet with Mr. Sutcliffe but was

1 rebuffed. Then you can have a foundation for what you want to
2 pursue.

3 MR. McAFEE: Fair enough. Thank you, Your Honor.

4 Q. During your discussions with Mr. Sutcliffe, did he,
5 Mr. Sutcliffe, indicate on how many occasions he had been
6 visited by his attorney, Mr. Nicolaysen?

7 A. Well, there weren't any personal visits.

8 Q. Thank you, Doctor.

9 THE COURT: No, was your question about visits in
10 Massachusetts or visits in California?

11 MR. McAFEE: No, sir. Visits in California.

12 THE COURT: Did you understand that?

13 THE WITNESS: I didn't know it was in California. I
14 was talking about Massachusetts.

15 THE COURT: That is what I thought.

16 BY MR. McAFEE:

17 Q. Did Mr. Sutcliffe indicate on how many occasions while he
18 was incarcerated in California, and while Mr. Nicolaysen was
19 acting as his court-appointed attorney, that Mr. Nicolaysen
20 actually came and visited Mr. Sutcliffe during his term of
21 incarceration?

22 A. I don't know.

23 Q. It was never discussed between you and Mr. Sutcliffe?

24 A. I'm sorry?

25 Q. That was never discussed between you and Mr. Sutcliffe?

1 A. I'm sure it was. I just don't recall.

2 Q. Do you recall whether Mr. Sutcliffe articulated his
3 pleasure or displeasure at the number of times that he was
4 visited by his court-appointed attorney while he was in
5 California incarcerated?

6 A. I don't recall.

7 Q. Do you have an impression that Mr. Sutcliffe was happy or
8 unhappy about the number of visits he had had by
9 Mr. Nicolaysen, in California?

10 MS. DUARTE: Same objection to this line.

11 THE COURT: Overruled.

12 THE WITNESS: I really don't recall. That was
13 probably something that was just peripheral in passing. I
14 wasn't focusing in on that, but I don't remember.

15 BY MR. McAFEE:

16 Q. Well, all right. So if you don't have a recollection of
17 the visits, how about any other types of communications between
18 Mr. Nicolaysen and Mr. Sutcliffe while he was in California?

19 Do you have an impression as to how many other types
20 of communications may have occurred between Mr. Nicolaysen and
21 Mr. Sutcliffe, other than personal?

22 THE COURT: Okay, Mr. McAfee, you need to ask your
23 questions in an appropriate manner. Asking him about
24 impressions is not the appropriate way. Ask him about
25 whether -- what he was told.

1 We all know that Dr. Patenaude has never been in
2 California during the course of this case. So ask him what --
3 then what he knows is, evidently, primary from, maybe
4 exclusively from, the reports that he recited and from your
5 client. Ask him what your client told him.

6 MR. McAFEE: Thank you, Your Honor.

7 Q. Dr. Patenaude, did Mr. Sutcliffe tell you anything about
8 any other types of communications, other than personal visits,
9 that he had had with Mr. Nicolaysen before he came to Devens.

10 A. You know, I really don't remember. I know that
11 Mr. Sutcliffe spoke about it, but I was not focusing on that.
12 I didn't see it. You know, I was more focusing on other issues
13 at the time. That might be a better question for Dr. Backer or
14 Dr. Ihle.

15 Q. I'm just trying to get an idea of how you came to your
16 opinion that it appeared that Mr. Sutcliffe was not letting
17 Mr. Nicolaysen provide a defense for him.

18 I mean if you're not aware of the number of visits,
19 not aware of the communications other than the one single phone
20 call that you overheard Mr. Sutcliffe talk, over which you had
21 no idea of what the content was, what do you draw -- upon what
22 do you draw your conclusion that Mr. Nicolaysen was not being
23 afforded the opportunity that you expressed?

24 A. Oh, that -- I'm drawing my conclusions from -- that
25 Mr. Sutcliffe is not allowing this because he believes that

1 Mr. -- again, legal term -- Mr. Nicolaysen is providing
2 ineffective assistance, and he doesn't want to have anything to
3 do with him.

4 Q. All right. And do you have any basis for evaluating
5 whether or not, in fact, Mr. Nicolaysen has or is rendering
6 effective assistance of counsel?

7 A. Well, I've had many conversations with Mr. Nicolaysen.
8 He's requested to speak with Mr. Sutcliffe since he's been
9 here, and I brought those requests to Mr. Sutcliffe, which he
10 refused to speak with Mr. Nicolaysen, citing that
11 Mr. Nicolaysen wasn't his attorney. And Mr. Nicolaysen has
12 supplied me with recall records and everything I need. He's
13 been very available.

14 Q. But what I'm trying to get at is the opinion that you drew
15 regarding the relationship between Mr. Sutcliffe and
16 Mr. Nicolaysen, not your relationship with Mr. Nicolaysen.

17 Upon what did you use to draw your conclusion that
18 Mr. Sutcliffe was not giving or affording Mr. Nicolaysen an
19 opportunity?

20 A. That he said that Mr. Sutcliffe indicated that, one,
21 Mr. Nicolaysen -- he refused to knowledge Mr. Nicolaysen as his
22 attorney because he sees him as not representing him well and,
23 again, providing ineffective assistance.

24 Q. All right. Let me just tackle one more area if I might.

25 During the time that Mr. Sutcliffe was at Devens, did

1 he ever -- did he speak to you about his dissatisfaction with
2 the length of time this matter was taking to get to trial?

3 A. Yes, he did.

4 Q. Did it appear to you that Mr. Sutcliffe was unhappy about
5 the length of time it was taking for this matter to get to
6 trial?

7 A. Yes, he was unhappy about it.

8 Q. Did Mr. Sutcliffe articulate frustrations about delays
9 that he perceived were occurring?

10 A. Yes, he was frustrated over his evaluation.

11 Q. I'm more concerned about the issue of delay than I am
12 about the evaluation.

13 A. Well, I had a court order, so I wouldn't say it was
14 necessarily delay. I mean it was something that was indicated
15 by the court.

16 But, yes, he was frustrated that he had to come out
17 here for possibly 120 days.

18 Q. I'm sorry. Maybe my question was too narrow.

19 I'm talking delays, in general, from the date of his
20 arrest, until today, as opposed to just the delay -- if that is
21 the right term -- that occurred while he was at Devens.

22 Did he articulate to you his frustration over the
23 delay, in general, as to how long it was taking him to get to
24 trial?

25 A. Yes, he was frustrated about that, yes.

1 Q. Did it appear to you that Mr. Sutcliffe had a rational
2 understanding about what a delay meant and how long he had been
3 incarcerated?

4 A. Well, I didn't -- you know, I didn't ask him, but I didn't
5 assess for his understanding of delay. But he indicated that
6 he felt that his legal proceedings were going slower than he
7 had hoped.

8 Q. Do you have an opinion, Doctor, as to whether or not
9 Mr. Sutcliffe would do anything knowingly to create a delay in
10 his proceedings?

11 A. Well, it seems that he, again -- you know, I kind of want
12 to stay out of -- I don't want to get into the legal aspects of
13 this because I wasn't evaluating that. But I know that he
14 certainly spends quite a bit of time writing motions and things
15 of that nature.

16 Q. Is it your understanding that motions cause delays in the
17 date a trial will occur?

18 A. Again, I'm not -- you know, I'm not a legal expert. I
19 don't really understand the totality of everything that's gone
20 on in his legal proceedings. I've just been assessing the
21 competency.

22 Q. Again, I'm only interested in the competency issues. I'm
23 not interested in trying to derive legal opinion from you.

24 But I'd like you to consider this hypothetical: If
25 Mr. Sutcliffe knew that writing motions would necessarily

1 result in a delay in his coming to trial, based on your
2 observations of Mr. Sutcliffe, do you believe Mr. Sutcliffe
3 would engage in that conduct?

4 A. I'm sorry? Hello?

5 Q. Yeah, we're still here.

6 A. He would engage -- do I believe he would engage in that
7 conduct?

8 Q. Right. Would he knowingly do something, in your view,
9 that would result in a further delay or additional delay in his
10 coming to trial?

11 A. I never asked him if that was his purpose.

12 Q. Do you have an opinion based on your observations and
13 report that you've created here?

14 A. Well, I think -- you know, my opinion is that I think that
15 Mr. Sutcliffe, on one level, has been manipulating his
16 proceedings, particularly through his disruptive outbursts in
17 court.

18 Q. Okay. Let me ask you about that because you've said that
19 a couple times now. Let's talk about manipulating.

20 I need to know what you mean by manipulating so the
21 record is clear as to what that term, as you are using it,
22 means.

23 A. Controlling.

24 Q. So when you say "manipulating," what you're articulating
25 is that by his outbursts -- and I'll ask you what you mean by

1 that in a moment -- by his outbursts, he is trying to control
2 the proceedings; is that correct?

3 A. I think that his outbursts serve a number of different
4 purposes. One is to, obviously, let the court know his
5 dissatisfaction over what's going on. I also think that it's a
6 part of his way of necessarily taking kind of an offensive
7 maneuver -- excuse me -- in delaying things.

8 Now -- but then, again, that is just kind of a side
9 opinion. I didn't evaluate for that with him. I didn't
10 specifically speak to him about that.

11 Q. I appreciate that.

12 If -- however, you did ask him about his relationship
13 with his attorney, and you have given your opinion about that.
14 If Mr. Sutcliffe believed that his attorney was not rendering
15 effective assistance or protecting his rights, that is,
16 Mr. Sutcliffe's rights, would you expect Mr. Sutcliffe to
17 assert his own rights in a court proceeding?

18 A. He has said that to me, yes.

19 Q. All right. And would that include -- or do you know
20 whether that would include outbursts or -- that is,
21 interrupting court proceedings in order to be sure that his
22 rights, as he perceived them, were being protected?

23 A. Would that make him engage in disruptive behavior in court
24 if he perceived his rights were being violated? Is that what
25 you're asking?

1 Q. No. I'm asking if your interpretation of disruptive
2 conduct is an outburst and definition of an outburst is an
3 interruption of the court proceedings? What I'm asking is if
4 Mr. Sutcliffe believed he had to interrupt the court
5 proceedings to assert a right, or rights, that his
6 court-appointed attorney was not asserting for him, in
7 Mr. Sutcliffe's perception, would that -- would that render --
8 would that change your opinion that he was trying to manipulate
9 the proceedings for the purpose of delay?

10 A. Well, I don't know. I couldn't say whether or not, you
11 know, again -- you know, we didn't talk about why he was doing
12 that. He gave me -- you know, he essentially said that he just
13 began speaking for himself because, I think, one, he didn't
14 acknowledge Mr. Nicolaysen as his attorney and also he believed
15 that the judge was being unfair and -- Judge Matz that is --
16 and that he just wanted to present his case.

17 Q. Okay. So would it be fair, then, based on what you've
18 told me, that you believe that his outbursts were motivated, at
19 least in part, by his desire to assert his rights and present
20 his case --

21 A. Yeah, I would -- yeah. I'd say at least in part, yes.

22 Q. I'm not asking you to render an opinion whether you think
23 it's appropriate because court proceedings, I know, are not
24 your area of expertise.

25 Based on your interactions with Mr. Sutcliffe, do you

1 believe that Mr. Sutcliffe can have a meaningful
2 attorney-client relationship with Mr. Nicolaysen?

3 A. No, I don't. I think that Mr. Sutcliffe does not respect
4 Mr. Nicolaysen and, again, does not believe that Mr. Nicolaysen
5 can represent him as he would like to be represented.

6 Q. Are you aware that these feelings go back as far as
7 January 17, 2003?

8 A. I don't know the specific dates. I know that
9 Mr. Sutcliffe has stated that he, I think, has always objected
10 to Mr. Nicolaysen's representation.

11 Q. Did Mr. Sutcliffe inform you that in March -- I believe it
12 was on March 14. I'm sorry. I don't have the motion in front
13 of me. But at some time in March, I believe, might have been
14 February, Mr. Sutcliffe had filed a motion with the court to
15 have Mr. Nicolaysen relieved as his attorney for incompetency
16 of counsel.

17 Were you aware of that?

18 A. Again, I think Mr. Sutcliffe did mention that.

19 MR. McAFEE: Your Honor, if I may just briefly chat
20 with Mr. Sutcliffe to make sure there's nothing I've missed.

21 THE COURT: Go ahead.

22 MR. McAFEE: Thank you, Your Honor.

23 Q. Dr. Patenaude, did Mr. Sutcliffe ever tell you or relate
24 to you his beliefs that Mr. Nicolaysen had lied to him?

25 A. Mr. Sutcliffe did mention, as I recall, that he felt he

1 was lied to.

2 Q. By Mr. Nicolaysen?

3 A. Yes.

4 Q. Do you believe that if Mr. Sutcliffe believed that, that
5 that would interfere with his ability to trust Mr. Nicolaysen
6 as his attorney?

7 A. Yeah, I -- again, I think Mr. Sutcliffe made it very clear
8 that he doesn't have confidence in Mr. Nicolaysen or that he
9 trusts him.

10 MR. McAFEE: Thank you very much, Your Honor.

11 THE COURT: All right. You don't have any further
12 questions, do you, Ms. Duarte?

13 MS. DUARTE: I do not have any follow-up.

14 THE COURT: Nor do you, Mr. Nicolaysen?

15 MR. NICOLAYSEN: Nothing, Your Honor. Thank you.

16 THE COURT: I don't either, Dr. Patenaude.

17 And on this first prong of today's hearing, I find --
18 now, Mr. McAfee, go back to the lectern. You're counsel for
19 this issue, and I take it your position is that your client is
20 competent to proceed to trial, correct?

21 MR. McAFEE: I believe that would be my statement,
22 Your Honor, that he is competent -- I take that back. No. It
23 is my opinion that he is not incompetent pursuant to the statutory
24 definition of 4241 (a) or (d).

25 THE COURT: I find that Mr. Sutcliffe is competent to

1 proceed to trial based upon all the testimony that's been given
2 today, including from Dr. Patenaude in response to Mr. McAfee's
3 questions and the report and all of the materials and records
4 in the file. So let's turn to the second issue on the agenda,
5 which is Mr. Nicolaysen's motion --

6 MR. McAFEE: Your Honor, may I be seated?

7 THE COURT: -- to withdraw.

8 You may be seated. Don't leave the room.

9 MR. McAFEE: I'm not.

10 THE COURT: I grant that motion to withdraw. It
11 doesn't require any further evidence or information.

12 Let the record reflect that there's been a total
13 breakdown in communication. It's been confirmed by the
14 testimony of Dr. Patenaude; it's been confirmed by the
15 questioning that elicited that testimony. According to the
16 evidence, there were nine written communications between
17 April 17th and June 13th that Mr. Sutcliffe did not respond to.
18 Mr. Sutcliffe has sued his lawyer. That case is still pending
19 before another federal judge. He refused to meet with him as
20 recently as August 19th and refused to --

21 MR. NICOLAYSEN: August 21, Your Honor.

22 THE COURT: August 21. And it is clear from
23 everything that I have witnessed and all that I've read that
24 Mr. Sutcliffe, just as Dr. Patenaude said, regards
25 Mr. Nicolaysen with contempt.

1 Under these circumstances, Mr. Nicolaysen is relieved
2 of his representation. Now, Mr. Nicolaysen, please go to the
3 lectern.

4 You may be seated, Mr. Sutcliffe.

5 THE DEFENDANT: I'm just letting the court know that
6 I'm standing, and that is my way of not interrupting, not
7 having an outburst, but I want the court to recognize that when
8 I stand, I have an objection which I wish to make on the
9 record.

10 First off, I object that his motion is going in front
11 of my motion. My motion to recuse him for ineffective
12 assistance of counsel predates his. I'd like to be heard
13 first. First in line, first served.

14 THE COURT: What else is the basis for your standing?

15 THE DEFENDANT: Well, Your Honor, you -- on the
16 August 12th order regarding the August 25th hearing, at
17 paragraph 5, on page 2, line 7 through 16, the court stated
18 that it had advised me previously against causing a breakdown
19 in communications.

20 I've searched my records and reviewed all the
21 transcripts that are available to me, and I can't find any such
22 previous advisement, notwithstanding the fact that the
23 breakdown is not caused by me or my conduct.

24 So could you please direct me to the hearing or
25 previous order to which the court referred to in the

1 August 12th order. I would also request a copy of that
2 transcript or order be provided to me forthwith.

3 Furthermore, this court has advised me several times
4 not to represent myself pro se, counseling me about the
5 dangers, the pitfalls, and the perils; and I thanked this court
6 for that counsel in the past.

7 I've only asked for effective assistance of counsel,
8 nothing more, and I think I'm entitled -- not only entitled to
9 it, I have a right to it. And justice demands that it be
10 provided to me. You failed to protect my rights.

11 THE COURT: We'll deal with all those issues in a
12 minute. Why don't you sit down now, okay?

13 THE DEFENDANT: Thank you.

14 THE COURT: Mr. Nicolaysen, before you're formally
15 relieved of your duties, I want to remind you what I trust you
16 already understand, and I also need to get some information
17 about the state of the record here.

18 Have you received all of the required information
19 that you may have sought from any expert that the court may
20 have appointed to assist in your representation of this
21 defendant, yes or no?

22 MR. NICOLAYSEN: Yes.

23 THE COURT: Is there any further work that would be
24 required on behalf of Mr. Sutcliffe's defense by any expert the
25 court may have previously appointed at public expense to assist

1 in the defense of Mr. Sutcliffe?

2 MR. NICOLAYSEN: No, Your Honor.

3 THE COURT: Did you get all of the materials that had
4 been generated in the nature of work-product materials from the
5 three prior counsel for Mr. Sutcliffe?

6 MR. NICOLAYSEN: I believe so, yes.

7 THE COURT: Have you issued any trial subpoenas?

8 MR. NICOLAYSEN: Yes, to Mr. McAfee.

9 THE COURT: You don't have to tell me who, but are
10 there any other individuals -- without telling me who they
11 are -- to whom trial subpoenas have been issued?

12 MR. NICOLAYSEN: No.

13 THE COURT: Is there any additional information that
14 any -- that Mr. Sutcliffe -- who may be representing himself,
15 or any standby lawyer, or Mr. McAfee, if he's hired -- would
16 need to have that you can state on the record, without
17 violating any duties you have as a lawyer, including
18 attorney-client privilege, so that the state of the materials
19 available or the preparation in trial defense available for
20 Mr. Sutcliffe can be cleared?

21 Anything else that you need to set on the record?

22 MR. NICOLAYSEN: Probably just state that over the
23 past six months, I have organized the file very well, very
24 thoroughly. It is in a very good state to be transferred to
25 any new counsel or to Mr. Sutcliffe directly, depending on the

1 rules and procedures at MDC for that function.

2 I have extensive outlines, and I'm fully prepared to
3 assist and facilitate the transition to whoever may take over
4 the case.

5 I should also state on the record that if this court
6 is inclined to have Mr. Sutcliffe proceed in pro se, if he will
7 meet with me, I will certainly sit with him and walk him
8 through all of the file materials if, in fact, he is willing to
9 do that, and I will not Bill of Rights for that time. But I'm
10 prepared to do that so that the transfer process, by which I'm
11 relieved and someone new comes in, possibly the defendant
12 himself, is a transition that is smooth and effective.

13 THE COURT: Okay. Well, that would be appropriate.
14 And, in general, without having to enumerate every single
15 aspect of it, I remind you -- and I know that you already
16 understand this and are fully committed to complying with it --
17 that it would be your duty to assist in the transition, to make
18 all work product available, and to make yourself available to
19 any successor counsel or to Mr. Sutcliffe for purposes of
20 assisting in his defense.

21 MR. NICOLAYSEN: Again, I'm happy to do so, Your
22 Honor, and I want the court and the record to reflect that I
23 bear no ill-will or animosity. And that to the extent it is,
24 from a transitional point of view, necessary for me to attempt
25 to work directly with Mr. Sutcliffe, should he be in pro se, in

1 order to make the transition effective, I am perfectly happy to
2 do so.

3 THE COURT: Okay. Now, please remain in the
4 courtroom. Your motion is granted.

5 I will grant Mr. Sutcliffe's motion to recuse you but
6 with a specific observation that I am making no finding
7 whatsoever that you engaged in any misconduct or failed to
8 provide effective assistance of counsel. And, indeed, I think
9 the record clearly reflects just the opposite, and you've done
10 a salutary job under difficult circumstances.

11 MR. NICOLAYSEN: Thank you. Your Honor, if the court
12 please, I'll sit in the audience section.

13 THE COURT: Yeah, you can sit in the audience.

14 Now, in response to your request, Mr. Sutcliffe --

15 THE DEFENDANT: I'm standing, which means I'm
16 objecting.

17 THE COURT: Yeah. I understand that. Your objection
18 is noted.

19 THE DEFENDANT: I'd like to get on the record the
20 reasons for my motion to have him fired for ineffective of --

21 THE COURT: He's been fired, and that's no longer --

22 THE DEFENDANT: -- on the record, my reasons --

23 THE COURT: You are declined. You set forth -- it's
24 not permitted, and you've made your motion, and it's been
25 granted with the qualifications that I already said.

1 Mr. Nicolaysen no longer is your attorney.

2 Before I get to the question of the earlier
3 transcript, did you want to be heard, Ms. Duarte?

4 MS. DUARTE: I'm sorry, Your Honor, yes, very
5 briefly.

6 I just had a procedural point while Mr. Nicolaysen
7 was still up here. In terms of the subpoenas, early on in the
8 case, when Mr. Harris was representing Mr. Sutcliffe, the court
9 had ordered me to ensure that Mr. Gary Winnick, who had been
10 subpoenaed by Mr. Harris, was made available. Mr. Nicolaysen
11 had indicated to me that that availability was no longer
12 necessary or required. So I have indicated that to
13 Mr. Winnick's attorney, and he is not under my subpoena
14 anymore.

15 I just wanted to make that clear because that was
16 kind of left hanging, and I don't think there's any written
17 communication that would be in the file between myself and
18 Mr. Nicolaysen on that point.

19 THE COURT: Thank you for clarifying.

20 Okay. Now, in response to Mr. Sutcliffe's recent
21 request for what the court was -- what I was referring to, in
22 noting that I had previously given warnings to Mr. Sutcliffe
23 that he would be deemed to have waived his Sixth Amendment
24 right to appointed counsel, the transcript of January 14, 2003,
25 which I will make available to Mr. Sutcliffe, which I got in

1 the last couple of days and I don't think has been distributed.

2 At that point in the proceedings, Mr. Harris, the
3 third lawyer, was still representing Mr. Sutcliffe. There are
4 a number of things that were addressed, some of them outside
5 the presence of the U.S. attorney. It is not inappropriate to
6 recite the following. On page 13, I noted that Mr. Sutcliffe
7 had filed a writ of mandamus in which he had said that if a
8 previous request he had made was denied, he would "stand sui
9 juris" -- sui, new word j-u-r-i-s -- "without counsel and under
10 the foregoing conditions. Only the accused may speak for the
11 accused."

12 And then I mentioned that he had cited,
13 Mr. Sutcliffe, in a document he had filed, the Faretta case --
14 which is misspelled in the transcript. It says,
15 "V-e-r-e-t-t-a." It's F-a-r-e-t-t-a. And I noted that
16 Mr. Sutcliffe had refused to sign a waiver of counsel.

17 And then I proceeded to say the following. This is a
18 precise quote. This is on page 13:

19 "You do have a right to" -- this is the quote:

20 "You do have a right to a lawyer. And I'm willing,
21 but only one additional time, absent anything compelling. If
22 the same syndrome occurs with any third lawyer that I appoint
23 to represent you, then you will have been, if those facts
24 occur, and I'm not making any finding because there's no basis
25 to, then you will have waived your right to excuse that

1 counsel, or to be represented by replacement counsel.

2 "I will have to advise any new lawyer of the
3 procedural history of this case. The lawyer who would be
4 appointed to represent you, if you choose to proceed with a
5 lawyer, will be someone who is a member of this court's
6 indigent defense panel...."

7 Later on, on page 14, I noted:

8 "So that's one alternative. You get another lawyer.
9 But you get that lawyer, and it could be a man or woman, on the
10 basis and in the manner I just described. In principle, the
11 alternative to you of having another lawyer derived from that
12 method is to represent yourself. I don't know whether that's
13 what you're seeking."

14 And I'm digressing from the reading of the transcript
15 to note that on more than one occasion, in my presence,
16 Mr. Sutcliffe, in my view, played a very coy, manipulative game
17 of refusing to waive his right to counsel, while at the same
18 time refusing to allow the court to appoint counsel in his
19 behalf.

20 So then I continued at the hearing, and I said:

21 "I really don't understand what you're seeking. But
22 if that's what you're seeking, then I would do my best" -- that
23 meaning to represent himself -- "then I would do my best to
24 bang you on the head and kick you on the shins" -- it should
25 say shins -- "and I'm speaking figuratively" -- that's what I

1 said at this hearing -- "I'm speaking figuratively, I don't
2 mean that literally, talk you out of that. Because it would be
3 totally against your interests. I would have to go through
4 certain measures to make sure you understood what you want to
5 do, if you proceed on your own, without a lawyer.

6 "Now you really need to tell me what you want as
7 between those two alternatives."

8 The transcript continued on, and Mr. Sutcliffe was
9 asked again:

10 "Do you want another lawyer?"

11 This is on page 16. He said:

12 "That's not what I want. I want this case dismissed.
13 How many lawyers do I have to go through? If Your Honor were
14 sitting in a prison, where I'm sitting right now, waiting for
15 me to find you a competent lawyer, I think the shoe would be on
16 a different foot.

17 "I have gone through three lawyers now. How many do
18 I have to go through?

19 "I'm expected to go through another couple lawyers."

20 "THE COURT: You won't have a couple lawyers" --
21 this is on page 17 -- "but you would have a right to another
22 lawyer."

23 "THE DEFENDANT: Another one? Another one? When
24 does it stop? When does it stop?

25 "THE COURT: Now let me try to answer that question.

1 It stops when you proceed to trial, if that is what you choose
2 to do."

3 And I'm skipping over some other comments that were
4 made. I then noted to Mr. Sutcliffe that he could make motions
5 himself, if he were representing himself. I said, "I have
6 given you" -- this is a quote:

7 "I have given you extra latitude by allowing things
8 you have submitted to me directly, which is not your right to
9 do, to be filed, including today's document.

10 Then I continued on page 18 to note:

11 "You don't think you have the ability to defend
12 yourself against the United States of America, and you're right
13 about that. I agree with you 100. That means that if you
14 don't defend yourself, which in principal would be your right,
15 it would be crazy to do it, but it would be your right, then
16 you're going to have to have another lawyer. That other lawyer
17 is going to have to go through the same learning curve that all
18 the previous lawyers went through. There's going to be a delay
19 in the trial.

20 "You may have a view at any time, and may be every
21 time, that whoever happens to be your lawyer is not doing the
22 job the way you want that person to do it. But that doesn't
23 mean that the lawyer is not doing the job that is your
24 constitutional right to have done. It happens all the time,
25 Mr. Sutcliffe, that clients and lawyers disagree about

1 strategy, about tactics, about how to respond to something
2 that's said in court, about the little picture and the big
3 picture."

4 A few lines later I noted:

5 "When differences arise about things which don't get
6 necessarily to the particular crime that's alleged or what is
7 necessary to prove the crime, by how best to help yourself win
8 the case, such as what clothes you wear"-- that had been the
9 subject of a dispute with one of the lawyers -- "when you come
10 to court and sit before a jury, that suggests to me that you
11 are not thinking very clearly.

12 "I am going to subject you to a competency exam, to
13 be sure," I said.

14 And I went on to note that he has to have the ability
15 to confer with the lawyer with a reasonable degree of rational
16 understanding. I now find that he has the ability, but often
17 he chooses not to display or exercise it for other devious
18 purposes. I then noted:

19 "If a person doesn't have that ability to consult
20 with counsel, then one of two elements of competence may be
21 lacking. The other is that the person has a rational as well
22 as a factual understanding, rational as well as factual
23 understanding of the proceedings."

24 I said at the time that I wasn't convinced that under
25 that standard he was competent. I proceeded on page 21 to

1 note, nevertheless, that I was going to appoint another lawyer
2 -- and that lawyer ultimately came to be Mr. Nicolaysen -- to
3 represent you. And here's what I said:

4 "Secondly, I'm going to appoint another lawyer to
5 represent you because I construe your comments to be a
6 perfectly correct statement to me that basically boils down to,
7 Judge, I want to be able to help call the shots. But I need a
8 lawyer to do the job. And I said help call the shots. I
9 didn't say call the shots.

10 The client has a right to communicate information and
11 to communicate requests, even demands, to the lawyer.
12 Communication is a two-way thing, Mr. Sutcliffe. But the
13 client has the duty, if he wants a lawyer, to understand that
14 the lawyer has the ultimate responsibility to decide what
15 happens. If the lawyer is halfway good, that lawyer will
16 listen carefully to what the client says."

17 I then proceeded to tell him how often it happens
18 that clients and lawyers get involved in differences and
19 disputes. And I said:

20 "If your lawyers do that to you, don't be surprised.

21 And then I said -- and this, again, is a quote:

22 "But I'm not going to allow you to go through the
23 same thing you told me a moment ago, you don't want to do,
24 which is five lawyers and the tenth. And in the year 2010 we
25 would still be trying to figure out if you've got a lawyer

1 that's going to be okay for you the way you see it. That's not
2 going to happen because at some point I have the power and the
3 obligation to find that you have waived your right to have a
4 lawyer represent you. And then you're going to trial on your
5 own."

6 A few lines later, I said:

7 "Now you asked for the opportunity to respond.
8 Please do."

9 And Mr. Sutcliffe said he was firing Mr. Harris
10 because he was incompetent. He explained why he accused Hilary
11 Potashner of malpractice. And that, I think, was the relevant
12 portions of the January 14th hearing. The transcript will be
13 made available for the parties in this case.

14 And on page 30, I asked:

15 "Do you understand what I just explained to you?"

16 His response:

17 "I understand that I've been prejudiced to an extreme
18 amount by having a new lawyer appointed, against my objections,
19 come in and try to get up to a speed with a half-million pages
20 of discovery, 50 plus CD-Roms, ad nauseam. How is that not
21 prejudicing me?"

22 And I responded:

23 "Okay. We're not going to have a debate about it.

24 It was your choice to fire Mr. Harris and to create the
25 circumstances where I was compelled to grant your request, and

1 now his.

2 "And it's your choice, a sound one, not to do battle
3 on your own. So that's where we're at, Mr. Sutcliffe."

4 And at that point, I said, "Let's bring in the
5 prosecutor" because in all these prior proceedings that I've
6 been reciting, the prosecutor had not been present. Now, in
7 the order that I issued in writing recently in preparation for
8 this hearing, I recited several cases -- I cited several cases:
9 U.S. versus Moore; U.S. versus Fazzini; U.S. versus Kneeland;
10 U.S. versus McLeod; and also a reference to U.S. Kelm, for the
11 proposition that the defendant will be deemed to have waived
12 his right and to have exercised his Faretta right to represent
13 himself. If competent, he will proceed to trial pro se. Now,
14 I'm making findings in this regard.

15 Mr. Sutcliffe, as the record amply demonstrates, has
16 gone through four attorneys; he's fought with all of them; he's
17 insisted on firing all of them. He has, in a devious and
18 manipulative way, at the same time refused to waive the Sixth
19 Amendment right to counsel. He has actually sued at least one
20 lawyer, the fourth one, as the record today establishes. There
21 is every reason to believe he would continue to do that with
22 additional lawyers who are appointed to represent him in a
23 conventional basis.

24 A defendant has no right to both self-representation
25 and the assistance of counsel, although I do have the

pg 65, lines 12-16

1 authority, and I intend to exercise it, to appoint standby
2 counsel.

3 Now, I'm going to, as I've tried to do throughout
4 this proceeding -- which, I think, by virtue of your conduct
5 and your decision, has gone on for quite a little while -- tell
6 you about the consequences of representing yourself in even
7 greater detail.

8 Because you have one choice to representing yourself,
9 and that is to hire a lawyer at your expense or a lawyer who
10 will agree not to charge you for fees. You have a lawyer that
11 you wanted to represent you today, Mr. McAfee, and he is here.

12 Do you want to retain him?

13 THE DEFENDANT: I didn't even know you were talking
14 to me. I'm sorry.

15 THE COURT: Do you want to retain Mr. McAfee as your
16 lawyer?

17 THE DEFENDANT: I'm indigent. The government -- I'm
18 flat --

19 THE COURT: Answer my question: Do you want to
20 retain Mr. McAfee?

21 THE DEFENDANT: No.

22 THE COURT: No.

23 THE DEFENDANT: I just want effective counsel, which
24 I've asked this court to appoint me all along.

25 THE COURT: Mr. McAfee, are you prepared to represent

1 Mr. Sutcliffe at no expense?

2 MR. McAFEE: Your Honor, I have issues of legal,
3 ethical problems that I think the court is aware of. And I
4 don't believe at this state that I could make that
5 representation to the court.

6 THE COURT: I'm not sure what you're talking about.
7 You think you may be a witness?

8 MR. McAFEE: I don't want to discuss it in open
9 court.

10 THE COURT: You have legal and ethical problems? Are
11 you being investigated?

12 MR. McAFEE: Again, Your Honor, I'm not at liberty to
13 discuss that in open court.

14 THE COURT: Okay. Well, I already told you, as you
15 acknowledged earlier today, Mr. Sutcliffe, that any individual
16 who chooses to proceed on his own was taking enormous risks and
17 subjecting himself to a considerable disadvantage.

18 I've already found that you know the nature of the
19 charges. That's been implicit and explicit in the valuation of
20 you by Dr. Patenaude. But you will have to do your best to
21 understand the range of the penalties, the fines, whether
22 there's supervised release, what it is, any risks of
23 restitution, license loss, any effect on any sentencing of you
24 in the event that the jury convicts you.

25 You will have to learn and comply with the Federal

1 Rules of Criminal Procedure; the Federal Rules of Evidence;
2 The local rules of the court; the U.S. Sentencing Guidelines,
3 if it gets down to that stage; the Federal Rules of Appeals.

4 You need to understand that a lawyer who would
5 otherwise have been available -- and we tried to have four --
6 would understand all of those rules, would understand how to
7 impanel a jury and the tactics of picking a jury, how to
8 conduct voir dire on a jury, how to assist the court in its
9 conduct of voir dire.

10 You will have to comply with all rules from here on
11 in relating to the form and the content of motions, any
12 discovery you seek to undertake, any other kind of motions you
13 want.

14 There are going to be limitations imposed upon you on
15 how you ask questions, how you voice objections, how you deal
16 with experts, what is permissible and not permissible in
17 opening statements and closing arguments. You will be at a
18 considerable disadvantage because, to the extent you wish to
19 testify, you will have to determine an effective and
20 appropriate way to ask questions of yourself that you can
21 answer.

22 By assuming such a paramount role at the trial, your
23 personality is going to be a bigger impact on the jurors than
24 ordinarily is the case with the defendant. Maybe that will
25 help you; maybe it won't. I'm not making any findings in that

1 regard.

2 But if experience is correct, and the personality of
3 lawyers and of the judge and of witnesses and of parties, all
4 the personalities that jurors perceive, have a likely impact on
5 their evaluation of the evidence and on their verdict. So you
6 need to be aware of that. If have you any limitations on the
7 capacity to function physically, that could be a factor as
8 well.

9 You should not think that the jury would think you
10 were stupid or nasty if you have an attorney, but you also
11 should not think that they're going to consider you the
12 underdog if you don't, because experience suggests that all the
13 jurors know that you would have a right to an attorney.

14 You have had four attorneys; your right has been
15 exhausted. You were previously warned that you can't play
16 these games. You have brought many motions, and I understand
17 some lawsuits, claiming that your right to a speedy trial has
18 been violated. To the extent that there has been delay, it is
19 almost entirely attributable to the course of conduct that you
20 systematically, right through today, have engaged in.

21 I have never doubted -- and I've told you many
22 previous times -- that you have lots of smarts. Probably have
23 more smarts than is good for you. So I make that reference
24 because I think everything you've done has been intentional
25 delay. Maybe you like staying at MDC because you think that

1 the outcome of the trial is foreordained. So you'd rather stay
2 there than some other institution. I don't know what your
3 underlying motive will be.

4 But your conduct triggers the application of all the
5 cases I cited, and for those reasons, I deem that you are now
6 required to proceed pro se.

7 Now, there is a procedure under which the court has
8 authority to appoint what is called standby counsel. Standby
9 counsel remains present in the courtroom, and even if not
10 solicited by the individual indigent defendant, or other
11 defendant, that lawyer can assist with courtroom mechanics and
12 practical matters, would be available to assist you in some
13 very basic and important aspects: Where to stand, how to deal
14 with the courtroom deputy clerk, how to function appropriately
15 in questioning witnesses and in addressing the court or
16 addressing the jury in opening or closing arguments.

17 Given the circumstances of this case, I am going to
18 appoint standby counsel. But I am advising you that the
19 authority that the standby counsel has, and the requirement
20 that standby counsel remain available, is also subject to your
21 displaying reasonable efforts to enable that lawyer to carry
22 out the advisory role.

23 And that is another way of saying that appointment of
24 a standby counsel is not necessarily permanent or open-ended,
25 but it's designed, as I've tried to make all of my rulings

1 designed, to make sure that you get the fair trial, that you
2 claim to be yearning to have, as quickly as possible.

3 Please understand, Mr. Sutcliffe, that at the trial,
4 that in the process of representing yourself, I will not come
5 to your aid because I don't come to either side's aid.

6 You're the advocate. You have chosen to be the
7 advocate by your conduct. You have insisted on carrying out
8 that role even today. Now we'll see what the trial will be
9 like as you engage in that process.

10 Mr. Brennan, will you approach the lectern, please.
11 Please state your name for the record.

12 Mr. BRENNAN: Michael J. Brennan.

13 THE COURT: Good morning, Mr. Brennan. You're a
14 member of the court's indigent defense panel?

15 MR. BRENNAN: Yes, I am.

16 THE COURT: Are you also a member of the faculty at
17 U.S.C. Law School?

18 MR. BRENNAN: Yes, I am.

19 THE COURT: What do you teach, please?

20 MR. BRENNAN: I teach post-conviction remedies and
21 trial advocacy.

22 THE COURT: For approximately how many years have you
23 been engaged in the defense of criminal -- of individuals
24 accused of crimes?

25 MR. BRENNAN: Since 1973.

1 THE COURT: Okay. Some 30 years or so?

2 MR. BRENNAN: Yes.

3 THE COURT: All right. I have arranged for your
4 presence today through my courtroom deputy because I told him,
5 the deputy, to arrange, in the usual and ordinary course, to
6 have a lawyer selected from the indigent defense panel to serve
7 in the standby capacity that I've just explained to
8 Mr. Sutcliffe. You are that individual. And I will allow
9 Mr. Sutcliffe and you to determine to what extent, if any, he
10 wishes to communicate with you at points where he seeks the
11 assistance of standby counsel in his own self-defense.

12 Now, do you want to be heard about something?

13 THE DEFENDANT: Yes, Your Honor. Thank you very
14 much.

15 I'd like know, on the record, the court's authority
16 to foist further counsel upon me after it's failed to protect
17 and do its duty to protect my rights by making an inquiry into
18 previous counsel when they were violating my rights. I'd like
19 the record to clearly reflect -- where is your authority coming
20 from to foist somebody else upon me? What statute, what law?
21 God? I don't -- please put something on the record.

22 THE COURT: Okay. That's something you can look into
23 in your own self-defense, but there's no issue and no question
24 that I have the authority. I am not going to debate the law
25 with you, Mr. Sutcliffe; I'm not going to trot out law books.

1 But I'm telling you I have the authority, and now I've
2 exercised the authority.

3 THE DEFENDANT: Thank you very much, Your Honor. I
4 appreciate that, but that didn't answer my question. And I'm
5 just asking you to do your job and inform me where in the law
6 you have the authority --

7 THE COURT: Okay. Now, Mr. Sutcliffe, I'm telling
8 you now that henceforth -- and I've had to tell you this in the
9 past when I've responded to some -- something I've permitted
10 you to say or you've chosen to say, and you don't like the
11 answer -- I am not going to involve myself, and I'm not going
12 to permit you to try to create a circumstance where there is
13 some kind of protracted argument or discussion, no matter how
14 civil the voices may be, no matter how hard each of us may try
15 to be. That's not my function, and that's not your right. So
16 if you don't like my answer, that's just too bad.

17 Now, is there anything else you want to add that is
18 different?

19 THE DEFENDANT: Well, yes. I appreciate that, Your
20 Honor. Thank you for giving me the opportunity to respond.
21 But you haven't answered my question.

22 THE COURT: Okay. If you continue to assert that in
23 the form of an objection, because at this point you are
24 representing yourself, the objection is overruled. Now please
25 be seated.

1 THE DEFENDANT: Thank you, Your Honor.

2 THE COURT: Okay. Mr. Brennan, Mr. Sutcliffe, as I
3 understand it, is currently scheduled to proceed to trial --
4 what is trial date?

5 MS. DUARTE: September 9.

6 THE COURT: The prosecutor has come to court this
7 morning with a status of -- the document that I'm looking at
8 now called "Status Filing re Speedy Trial Calculations and
9 Exclusions."

10 Have you served this on any lawyer?

11 MS. DUARTE: Your Honor, I served it on
12 Mr. Nicolaysen this morning. I just provided a copy right now
13 to Mr. Brennan.

14 THE COURT: Do you have another copy available here?

15 MS. DUARTE: I do not.

16 THE COURT: Show it to Mr. Sutcliffe. Let's not
17 waste time.

18 THE DEFENDANT: Your Honor, just for the record, I'd
19 like to note that on -- reading on page 3 -- and I see this
20 September 23rd date, where the office of the federal defenders
21 were removed from my motion for ineffective assistance.
22 However, I don't see the reflection in there that I demanded
23 speedy trial right as opposed to Speedy Trial Act. And I'd
24 like the record to reflect that speedy trial right has been
25 demanded in September, as well as in November of the previous

1 year, 2002.

2 THE COURT: So noted. The record will reflect your
3 views.

4 THE DEFENDANT: And I renew that demand today. Thank
5 you. Under the right, not act.

6 THE COURT: According to the status report that
7 Mr. Brennan and Mr. Sutcliffe have had a chance to look at, and
8 I've glanced at, and based upon calculations -- are these
9 calculations that your office and only your office made, or has
10 any other officer or jurist made these calculations?

11 MS. DUARTE: The calculations were made, originally,
12 by myself and were submitted as part of a response to a habeas
13 petition filed by Mr. Sutcliffe and/or Mr. McAfee, which has
14 now been -- the finding -- proposed findings have been issued
15 by the magistrate judge, wherein he concurred with the
16 calculation.

17 THE COURT: Who is the magistrate judge?

18 MS. DUARTE: Judge Wistrich. And that is pending
19 before Judge Morrow.

20 I should say, Your Honor, that he didn't actually --
21 Judge Wistrich's order, which is part of the public record of
22 that case, which I believe is CV 03-1781-MMM.

23 But he actually didn't take it to the extent that he
24 calculated 31 days remaining. What he said was that 38 days
25 had passed, and then he went ahead and adopted my same

1 calculations as to the additional day passing. He cited the
2 same record. So he didn't make any findings that were not in
3 line with what I submitted.

4 THE COURT: Okay. Well, I propose to continue this
5 case from the current trial date, which is September 9, I
6 think. Is that right?

7 THE CLERK: Yes.

8 THE COURT: To October 7th, which is within the
9 applicable requirements of the Speedy Trial Act, which I agree
10 with Mr. Sutcliffe's right to have applied. The trial in this
11 case will begin October 7th --

12 ~~MR. McAFEE~~: Excuse me. I'm sorry.

13 THE COURT: Yes.

14 ~~DR. PATENAUDE~~: On October 7th, I'm acting as counsel
15 for the University of Southern California in an administrative
16 grievance hearing. It's a one-day hearing. I would be
17 available on the 8th. But this is a hearing that's been set
18 for some time. It involves quite a few witnesses and has taken
19 quite a bit of time to get that date set just because of the
20 schedules of the potential witnesses. But it is just a one-day
21 hearing and will not continue onto the 8th.

22 THE COURT: Mr. Sutcliffe, would you like to proceed
23 on September 30th?

24 THE DEFENDANT: I want to proceed last
25 September 30th, but I guess, since I don't have much choice in

1 anything anymore, I'd ask for -- let me check my calendar.
2 Nothing but free time.

3 Can I have moment to confer with Mr. McAfee --

4 THE COURT: No, he doesn't represent you for these
5 purposes.

6 MS. DUARTE: After Mr. Sutcliffe, may I be heard --

7 THE DEFENDANT: I'd go for the September 9th date
8 that we've already got set.

9 THE COURT: Yes, Mrs. Duarte.

10 MS. DUARTE: Your Honor, I have a teaching
11 obligation on October 7th, which I can miss, but September 30th
12 is better for the government because of that.

13 THE COURT: Let's make it September 30th. That will
14 work with the court as well. And you'll be able to -- both of
15 you will be able to recess for the October 7th date to carry
16 out your respective commitments.

17 MS. DUARTE: Thank you.

18 THE COURT: Okay. The trial in this case is
19 continued on the court's own order until September 30th.

20 Let the record reflect that Mr. Sutcliffe has not
21 agreed to that, so there is no waiver of the running of time
22 under the Speedy Trial Act. But I'm confident the Speedy Trial
23 Act will be complied with in any event, although the additional
24 period of time between September 9th and September 30th will
25 count against the time requirements.

1 Now, Mr. Sutcliffe, one reason why I think it's wise
2 to continue it for those three weeks is that your interest in
3 representing yourself and your commitment to represent yourself
4 may be slightly enhanced.

5 I do want the record to reflect, because I am quite
6 familiar with the record in this case, that Mr. Sutcliffe has
7 already demonstrated a commitment and -- I can't evaluate it --
8 but an apparent capacity to understand and make effective in
9 his own defense whatever aspect of technology or the mechanics
10 of Internet websites may be relevant in this case.

11 But, Mr. Nicolaysen, I want you to turn over your
12 file to Mr. Sutcliffe. I want that -- can you do it tomorrow?

13 MR. NICOLAYSEN: I cannot. I can do it Friday. I'll
14 change my weekend plans, and I will do it Friday, if that is
15 acceptable to you.

16 THE COURT: Yes. I want the material brought down to
17 the MDC. I want you to speak to the appropriate person there
18 and, if necessary, call, because I'll get the warden there. I
19 want you to physically turn over that file to someone --

20 Are you willing to go downstairs and pick up the
21 file, Mr. Sutcliffe?

22 THE DEFENDANT: No, I want no further contact with
23 this man. I'm afraid of him.

24 MR. NICOLAYSEN: Your Honor, may I be heard? Let me
25 ask Your Honor for permission to go through the protocol at the

1 institution, which means I'll have to probably work through the
2 legal department there.

3 THE COURT: You do that. You do that. But I don't
4 need to know the details.

5 MR. NICOLAYSEN: I don't want to meet with
6 Mr. Sutcliffe in the sense that the visiting room is not set
7 up --

8 THE COURT: He doesn't want to meet with you. So
9 you're not going to meet with him, okay? But you're going to
10 turn over the file in the tip top shape that you described.
11 Do it through the legal people. That file will be there on
12 Friday. Let the record reflect that will be Friday, the 25th
13 of August --

14 MR. NICOLAYSEN: 29th, Your Honor.

15 THE COURT: -- 29th of August, pardon me, and you can
16 proceed accordingly.

17 Now, I want you to speak with Mr. Brennan, who is in
18 the difficult position of having had to make a commitment where
19 he isn't really in control, but I know he'll carry out his
20 obligations. Brief him to whatever extent he thinks is
21 appropriate in the manner appropriate for standby counsel. He
22 is not going to be trial counsel, as such, for Mr. Sutcliffe.
23 Make sure that you carry out the even continuing obligations of
24 loyalty that every lawyer has to any client he or she once
25 represented.

1 MR. NICOLAYSEN: Your Honor, I'd be very happy to do
2 that.

3 One inquiry of the court, if I may. Once I turn over
4 the file on Friday, I won't have it, and I wonder if Your Honor
5 wants duplicates provided? It's a very voluminous file. But
6 should it be the case that Your Honor revokes pro se status
7 during the trial and asks standby counsel to take over, if I
8 turn over the file as directed on Friday, Mr. Brennan --

9 THE COURT: No, I would like -- I should have thought
10 that myself.

11 MR. NICOLAYSEN: But I can't comply with Friday if
12 that's --

13 THE COURT: You make a duplicate copy; you give it to
14 Mr. Brennan, okay? That way there is a duplicate copy.

15 MR. NICOLAYSEN: May I be excused from the Friday,
16 though, because physically I can't do it to the degree and the
17 size of this trial.

18 What I can do is be selective and get Mr. Sutcliffe
19 started on the salient portions of the file, such as the
20 witness interview reports, since I do have the government's
21 witness list, and things that can certainly get Mr. Sutcliffe
22 focused in terms of trial preparation --

23 THE COURT: All right. You have that permission, but
24 make sure that by early next week -- and I know that Monday is
25 a holiday -- by early next week, the complete file has been

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19 started on the salient portions of the file, such as the
20 witness interview reports, since I do have the government's
21 witness list, and things that can certainly get Mr. Sutcliffe
22 focused in terms of trial preparation --

23 THE COURT: All right. You have that permission, but
24 make sure that by early next week -- and I know that Monday is
25 a holiday -- by early next week, the complete file has been

1 made available both to Mr. Sutcliffe and to Mr. Brennan.

2 MR. NICOLAYSEN: Complete file would include
3 duplicates of CD-Roms and disks. Is that what Your Honor is
4 also ordering? Because that's an enormous undertaking.

5 I will do whatever the court wants, but I just want
6 to make sure I understand the scope of my obligation. It is a
7 big file, and it involves, as I say, CD-Roms and diskettes as
8 well. Would it be better, Your Honor --

9 THE COURT: Does the government have the CD-Roms and
10 cassettes?

11 MS. DUARTE: Well, Your Honor, I hate to complicate
12 things, but you'll remember at the last hearing we had a
13 discussion over what allegedly were missing CD-Roms and --

14 THE COURT: Yeah, I vaguely remember that part.

15 MS. DUARTE: That said, I certainly to have all the
16 evidence. I would have to also get it copied, which would take
17 some time.

18 MR. NICOLAYSEN: May I make a suggestion and have my
19 CDs and diskettes given to Mr. Brennan. He can have them
20 available as needed by Mr. Sutcliffe.

21 THE COURT: No, no. I want Mr. Sutcliffe to have
22 them. As needed, Mr. Brennan can get them from the prosecutor.

23 MR. NICOLAYSEN: Very good.

24 THE COURT: But you don't have to duplicate the
25 CD-Roms and the diskettes.

1 THE DEFENDANT: Written motion?

2 THE COURT: Yes.

3 Anything else, Counsel?

4 MR. GONZALEZ: Thank you, Your Honor.

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8 C E R T I F I C A T E

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10 I hereby certify that the foregoing is a true and
11 correct transcript from the stenographic record of
12 the proceedings in the foregoing matter.

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Deborah K. Gackle

Deborah K. Gackle
Official Court Reporter

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7-22-04

Date