

1 IN THE UNITED STATES DISTRICT COURT

2
3 CENTRAL DISTRICT OF CALIFORNIA

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6 THE HONORABLE A. HOWARD MATZ, JUDGE PRESIDING
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11 UNITED STATES OF AMERICA,)
12 PLAINTIFF,)
13 -V-)
14 STEVEN WILLIAM SUTCLIFFE,)
15 DEFENDANT.)
16 -----

CASE NO. CR 02-350-AHM

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16 REPORTER'S TRANSCRIPT OF PROCEEDINGS
17 LOS ANGELES, CALIFORNIA
18 JANUARY 10, 2003
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23 LYNNE SMITH
24 OFFICIAL COURT REPORTER
25 UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

APPEARANCES:

ON BEHALF OF PLAINTIFF:

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1 JANUARY 10, 2003; LOS ANGELES, CALIFORNIA

2 -000-

3 THE CLERK: CR 02-350-AHM, United States of
4 America versus Steven William Sutcliffe. Counsel, please
5 state your appearances for the record.

6 MS. DUARTE: Good afternoon, Your Honor. Elena
7 Duarte for the United States. And with me at counsel table
8 is Jason Gonzalez, who is participating in the trial.

9 MR. HARRIS: Good afternoon, Your Honor. William
10 Harris present with Steven Sutcliffe.

11 THE COURT: Good afternoon to both of you. We're
12 here for a number of matters. And the sequence in which I
13 intend to address them is as follows: First of all, I will
14 handle the arraignment of what I understand is the First
15 Superseding Indictment returned; is that correct?

16 MS. DUARTE: Yes, Your Honor.

17 THE COURT: And then I will address the motions in
18 limine. I have read very carefully the papers that both
19 sides submitted, all of the papers. Both sides did an
20 excellent job in presenting their issues.

21 I think I know all I need to know to make an
22 informed ruling. I'm going to announce the ruling on each
23 of those motions. Only if there's something new that you
24 have to add will I permit argument. Then I want to turn to
25 the status of various matters, many of which are addressed

1 in the government's memorandum, concerning the parties
2 approach toward trial and readiness for trial. Then I will
3 address the issue related to theory, what Mr. Harris voiced.

4 Then we'll do what I typically do in other cases
5 in the early morning of the first day of trial. We will do
6 it today, which is address the way in which the trial is to
7 be conducted and what my requirements are for handling the
8 trial itself.

9 Are there any other matters, before I turn to the
10 issue of arraignment are there any other matters that either
11 side thinks should be addressed this afternoon?

12 MS. DUARTE: No, Your Honor.

13 MR. HARRIS: Yes, Your Honor. In that connection,
14 Mr. Sutcliffe has brought to my attention the date of
15 arraignment and the trial date based on the new indictment.

16 THE COURT: The date of arraignment, whether we're
17 in a position to proceed?

18 MR. HARRIS: To cut to the chase here,
19 Mr. Sutcliffe is asking for arraignment on Monday so that he
20 can study the indictment and refer to his notes. And based
21 on the new indictment, I am going to be asking for a one
22 week continuance until the 21st or because of the holiday --
23 you do motions on Monday -- I will be happy to address that,
24 the reasons for that request.

25 THE COURT: Why don't you do that now, please.

1 What are the charges in the indictment?

2 MS. DUARTE: If I may, Your Honor.

3 THE COURT: The additional allegations, and be
4 specific.

5 MS. DUARTE: Appearing on Page 2, at Line 16, on
6 or about the following dates defendant, starting with
7 willfully, with specific intent to threaten, and ending
8 right there, that new language inserted, lines 16 and 17.

9 THE COURT: Okay. Please proceed, Mr. Harris.

10 MR. HARRIS: Yes, Your Honor. Based on this First
11 Superseding Indictment that was apparently returned today
12 we're going to be asking for a one week continuance of trial
13 from the 14th to either the 21st or 22nd, depending on the
14 court's availability.

15 For three reasons: First of all, I think that
16 it's a reasonable request, given that four days before the
17 trial we have a new indictment which for the first time
18 appears to be a valid indictment on the serious threats
19 charges asserted against Mr. Sutcliffe.

20 So in light of the indictment being returned four
21 days before the start of trial I think one week to study
22 that and see what our current options are would be
23 appropriate.

24 Secondly, in light of the history of this case, I
25 want to make sure that I do the fullest most effective

1 possible job in representing Mr. Sutcliffe. I believe that
2 a one week continuance would help in that regard.

3 Third is just I have a Ninth Circuit argument
4 Monday afternoon. I have --

5 THE COURT: In Pasadena?

6 MR. HARRIS: In Pasadena at 1:30. If I didn't
7 have this case I'd still be holed up this week preparing for
8 a Ninth Circuit argument on a fairly significant case on a
9 habeas corpus where the guy's got life in prison and it's a
10 fairly complicated issue. That's how I will spend my
11 weekend if we get the continuance.

12 In addition, I was recently drafted in by Judge
13 King to take over for the public defenders office and I
14 promised Judge King that I would interview this witness and
15 give him some input by Monday at 11:00. So even without
16 this case I've got a full plate.

17 THE COURT: You substituted in for somebody?

18 MR. HARRIS: For a sentencing. The public
19 defenders office just discovered that they got conflicted
20 out. I got dragged in. I don't want to say I was drafted
21 by Judge King because it was my day to take this case. It's
22 Monday at 11:00 and I'm supposed to tell Judge King by that
23 time I have interviewed this witness and what we want to do
24 about it.

25 So I've got to fit that in somehow this weekend

1 also.

2 I'm asking the court, if possible, to cut the
3 defense some slack here, give us a one week continuance to
4 either the 21st or the 22nd for the three reasons that I
5 indicated, in addition to the fact that Mr. Sutcliffe has
6 made it a point to me that he wants to study the indictment.
7 He wants to go back to his cell and look at everything.

8 And he's indicated to me he's not ready to plead.
9 His preference is to on Monday, normal post indictment, we
10 do it in front of Your Honor on Monday if it's his position
11 that he's -- [Interrupt]

12 THE COURT: Well, let me make a couple responses.
13 I will talk to my clerk about whether I could be responsible
14 as to the rest of my calendar and I will rule on your
15 request momentarily.

16 If I grant the request, Mr. Harris, it's entirely
17 because I have been where you are and I know how awful the
18 pressures are for attorneys. It could be also sometimes the
19 case for a prosecutor to handle so many multiple conflicting
20 responsibilities. I also know how conscientious you are and
21 thorough you are, and I accept everything you tell me about
22 the burden you're dealing with.

23 I don't accept the notion that there is any need
24 for anybody to study this Superseding Indictment or prepare
25 for defense of trial in any alternative or different way.

1 The issue as to whether or not the Superseding Indictment
2 specifically contains allegations of specific intent were
3 addressed in one of your motions in limine.

4 The opposition that the government filed
5 demonstrated to me that even if they chose not to supersede
6 there would have been no impediment to proceeding. You
7 raised the issue so you were quite aware of the elements.

8 Jury instructions that both sides submitted
9 clearly reflected that Element 1 of these crimes was
10 specific intended threats. There's no bombshell here.
11 There's nothing new at all. There's a cosmetic change. And
12 I'm not going to pretend to allow anyone to build a record
13 based upon fanciful theories. What would the impact be on
14 the government if I grant this request for a one week delay?

15 MS. DUARTE: This is the first I have heard of it.
16 At this point, I haven't checked with the witnesses and I
17 honestly don't know. I have had trouble getting witnesses
18 together. Ten of them are from out of state.

19 I have done it for next week. I've got them on
20 board and coming out. Nobody is out here yet. I don't
21 know. In the past I have been amenable to a stipulated
22 continuance. This is the first I have heard about it, so we
23 oppose the defendant's request because I had no idea and I
24 have been surprised by this, Your Honor.

25 If it was truly a preparation issue, I have tried

1 to be reasonable in the past about this. But I don't know
2 what impact it would have.

3 What I could do, if the court could put this over,
4 would allow our case agent, Mr. Gonzales and I to go back
5 and actually make sure no one crucial to the case has such a
6 conflict to the degree they would be unavailable. I planned
7 for a fairly short trial.

8 THE COURT: Meaning how long?

9 MS. DUARTE: This next week and that we'd be
10 closing around the 21st or 22nd, like we projected to the
11 court.

12 THE COURT: What day is the 21st?

13 MS. DUARTE: The 20th is Monday, a holiday.
14 Tuesday, next Tuesday I had planned to present my evidence,
15 my case in chief Tuesday through Friday and I intend to be
16 fairly quick, usually quicker than I anticipate. Because of
17 that, I did not inquire about the following week.

18 Frankly, that's my biggest concern because there
19 are stipulations, but there are a number of witnesses still.

20 THE COURT: All right. Thank you. Please be
21 seated. You can be seated too.

22 (CLERK AND COURT CONFER)

23 THE COURT: Mr. Harris, and counsel for the
24 government, what I am able to do, and I think it serves
25 everyone's fair interest and accommodates all the legitimate

1 interests of the parties. I can deal with the arraignment
2 on Monday or Tuesday. I want to pick a jury but start the
3 evidence, opening statements and evidence Thursday of next
4 week. That way if have your witnesses who are available
5 next week then there's a compromise. Mr. Harris has a
6 little bit more breathing room to get past his Monday
7 urgency and that way we don't incur greater cost to the
8 public with respect to the jury pool.

9 Finally, that way, an otherwise harried schedule
10 can be adjusted and accommodated. Now do you want to be
11 heard about what I'm just proposing?

12 MR. HARRIS: No, I appreciate the court's
13 indulgence.

14 THE COURT: That's what we're going to do in terms
15 of the trial. Now that means you're to be here Tuesday
16 morning. And we're going to arraign Mr. Sutcliffe on
17 Tuesday morning. And we're going to arraign him and
18 anticipate he'll plead not guilty and we're going to do that
19 at 8:45.

20 He's to be in the courtroom at 8:00 prompt. The
21 jury panel will come down and we'll pick the jury at
22 9:00 o'clock. There is a high likelihood but no guarantee
23 that we will have a jury selected by the lunch hour.
24 Assuming that, if necessary, we postpone the lunch hour to
25 1:00 o'clock.

1 Once that is done and I will have instructed the
2 jurors when to return, which would be on Thursday morning,
3 counsel and Mr. Sutcliffe will be free to go about their
4 business until the following Thursday. But beyond that, I
5 still want to use the occasion that's upon us now to make my
6 rulings on the motions in limine. Those are not affected by
7 the return of the indictment, except the one you made to
8 dismiss, and the other matters that I talked to you about.
9 So that's what I'm about to do.

10 Any objection to that?

11 MR. HARRIS: No objection.

12 MS. DUARTE: No objection. May I ask for a point
13 of clarification? At this point there will be no further
14 motions in limine heard after -- in other words, if there
15 are more filings are they foreclosed by the court already
16 having decided the motions that are here today?

17 THE COURT: I'm not even sure I fully understand
18 your question. Once I rule on those motions they can't be
19 renewed. If there is some development in the future that
20 warrants the filing of some kind of oral or even motion in
21 limine that's different I wouldn't necessary preclude it.

22 MS. DUARTE: Thank you.

23 THE COURT: Motions in limine can come up during
24 the course of trial and can be made orally if necessary.
25 But you don't have any other motions in limine that you're

1 planning to make in writing, do you?

2 MR. HARRIS: No, Your Honor. Part of the problem
3 is I don't have an exhibit list and I don't have a witness
4 list. If I get the black binders of exhibits that I know
5 I'm going to get on the first day of trial that would be a
6 big help to go through. And there are possible issues,
7 since we're talking about electronic evidence here, assuming
8 there's anything different or new that the government has
9 not given to us will be a matter of going through some of
10 this stuff with our expert to see if it's the same that we
11 had before to see if it's complete.

12 THE COURT: Is there any reason why you can't make
13 your producible evidence available Monday or Tuesday?

14 MS. DUARTE: No, after the jury is picked. I was
15 planning on giving counsel -- the only thing I can think of
16 were some actual exhibits of precise web sites that are
17 charged in this indictment that I made. And I was going to
18 give them to him Monday already. I can make the binders
19 available which contain things he already has Tuesday.

20 THE COURT: That should do it.

21 MR. HARRIS: Well, if it would be the possibility
22 of having the actual electronic evidence over the web and
23 Mr. Sutcliffe's worry is that it's not going to be a
24 complete copy of the web site. And the only way to go over
25 that is to have Mr. Sutcliffe and our consultant, who's in

1 the courtroom today, also go over this stuff.

2 THE COURT: Go over what stuff? Tell me what
3 you're talking about.

4 MR. HARRIS: It will be -- we burned a copy of the
5 Evil.GX.com. This is as it appears on a CD. We'll want to
6 look at the CD and we'll be able to tell if that's complete
7 or not. It's just going to be jamming us if we get to the
8 first day of trial and we're picking a jury and going
9 through every --

10 THE COURT: I will listen to your response.

11 MS. DUARTE: Counsel has all the copies of EvilGX
12 we have. We've already given them to him.

13 THE COURT: Including the CD?

14 MS. DUARTE: Yes, Your Honor, all the copies we
15 have. If his concern is that the individual exhibit that
16 references it, he does not have a copy of, which again he
17 has in another form that they have pulled, his web site,
18 he's right. What I did for ease of entering evidence and
19 not having arguments on this superfluous thing, I pulled the
20 web pages that went straight to each count of the
21 indictment, precise display. And those are the actual
22 exhibits that I'm planning on exhibiting, not the entire
23 site.

24 THE COURT: Does he have the entire site?

25 MS. DUARTE: Yes.

1 THE COURT: Do you think, in the interest of
2 fairness and completeness or is there any tactical reason to
3 warrant subjecting the jury to evidence and possible
4 argument about the entire web site? You will have a right
5 to introduce it, and you will have a right to question about
6 it. There's no evidentiary reason why the government can't
7 take the web site, the portions that are specifically
8 relevant to this case and identify them and proffer them as
9 an exhibit. I know you realize that.

10 Look, there's not an issue here, Mr. Harris. If I
11 understand the crux of the thing, we may get back in, go
12 over the government's trial memo that you have and your
13 client has, what you need to prepare -- I'm giving you more
14 time anyway. You will get the stuff. Work it out with the
15 prosecution. I'm not going to micro manage what time and
16 what day you get the stuff but this trial is not going to
17 be -- clearly the government has not structured it as if
18 it's trying to make many of the issues in this case are not
19 really going to be, as I devine them, on the concrete
20 evidence.

21 It's going to be on more allusive questions such
22 as Mr. Sutcliffe's state of mind. That's really where the
23 battle ground is going to be anyway.

24 So that's all I'm going to say on that. Let's go
25 to these rulings. By the way, Ms. Duarte or Mr. Gonzales, I

1 would like you to prepare and file on Monday or Tuesday a
2 pithy, accurate, balanced neutral notice of ruling on the
3 rulings I'm about to articulate so that the rulings I make
4 on the motions in limine will be reflected in writing. I'm
5 not issuing a rush order. I will have them available as a
6 trial tool as well.

7 Let's start with the government's motions in
8 limine. The first motion concerns the KILLERCOP.com web
9 site. And I don't think that the government has
10 demonstrated, but I will give you a limited opportunity to
11 do so, what the similarity in the web site and what the
12 material amount is of the KILLERCOP web site. I think that
13 when you first spoke about the issue of who prepared the
14 EvilGX.com and whether the identity of the preparer or
15 person responsible for creation of KILLERCOP.com and the
16 EvilGX.com was the same. There was no question it would be
17 relevant for that purpose.

18 Other than that, it isn't entirely clear to me.
19 If I permit reference to KILLERCOP.com it would only be
20 pursuant to a limiting instruction. What I have done to
21 expedite the hearing here is to circulate a draft of the
22 limiting instruction. In that draft, which I think you
23 have -- you have it, right?

24 MS. DUARTE: Yes, Your Honor.

25 THE COURT: You can see in the portions that are

1 bolded, those are the areas I want you to know is your
2 opportunity to tell me what the relevance is within the
3 meaning of 404(b). Everyone is familiar with the provisions
4 of 404(b) and what the elements are and standards are.

5 MS. DUARTE: Your Honor, may I approach with a
6 copy of exhibits that we were planning on introducing? I
7 will give a copy to Mr. Harris as well.

8 THE COURT: What are you handing now, please?

9 MS. DUARTE: I'm handing a copy of several
10 documents. May I approach?

11 THE COURT: Give it to the clerk please.

12 MS. DUARTE: I would like to, if the court will
13 permit, go through them and describe what they are at the
14 same time. If I can find my copy.

15 Your Honor, Page 1 of this exhibit, continuing to
16 Pages 2 and 3, are items found in Mr. Sutcliffe's residence
17 at the time of the warrant. There's subscriber information.

18 THE COURT: Which residence, Los Angeles or New
19 Hampshire?

20 MS. DUARTE: New Hampshire. There was not a
21 warrant in Los Angeles, Your Honor. It appears to be a
22 subscriber, subscription form for the KILLERCOP.com web
23 site.

24 THE COURT: Form 14 I think.

25 MS. DUARTE: Yes, Form 14. And then there's also

1 a correspondence confirming registration on Page 2 of a FAX
2 transmission from ValueNet. And again, these were found in
3 the apartment. These aren't business records. These appear
4 to be FAX confirmations. They show Mr. Sutcliffe indeed was
5 a subscriber to, creator of the KILLERCOP.com site.

6 The next page, Your Honor, is copy of a newspaper
7 article. It appears, it's Page 4 but the page number is in
8 the middle. It was found in Mr. Sutcliffe's residence in
9 New Hampshire at the time of the warrant.

10 And the newspaper article was found, in the middle
11 there you see a picture from the web site who is KILLERCOP,
12 followed by the script, this is not a joke. I'm serious.

13 THE COURT: Then it says what? I'm offering a
14 thousand dollars reward for the first person who --

15 MS. DUARTE: Yes, that's what it says, Your Honor.

16 THE COURT: That's pretty potential, almost
17 inflammatory stuff.

18 MS. DUARTE: I agree, Your Honor. "This is not a
19 joke. I'm serious" goes directly to Mr. Sutcliffe's intent
20 to threaten in the present case. And as to the rest, I
21 would certainly be amenable to -- just bring that in, I
22 would be quite willing to do that.

23 MR. HARRIS: Could I comment?

24 THE COURT: Not yet. Let her finish. Go ahead.

25 MS. DUARTE: Proceeding to Page 5, Your Honor. I

1 apologize, these pages came out -- the whole E-Mail was
2 found -- this is Pages 5 through -- I'm sorry, Your Honor --
3 5 through 20. This was a group of E-Mails which were found
4 in Mr. Sutcliffe's apartment again in New Hampshire at the
5 time the warrant was served. They contain correspondence
6 between Mr. Sutcliffe and the systems administrator at the
7 web provider he was using for KILLERCOP. And I want to
8 point out specifically the page that I'm interested in, Your
9 Honor, from the E-Mail.

10 Again, I included the whole thing in case there
11 was an argument that I had not. Page 14 contains a section,
12 E-Mail which indicates the system administrator has written
13 to Mr. Sutcliffe and has insisted that he put a parody
14 disclaimer on his web site. Now the importance of that,
15 Your Honor, probative value is that Mr. Sutcliffe has
16 argued, and I anticipate will argue, again quite strenuously
17 that this whole thing was a joke and a parody.

18 Based on this evidence, it appears he was
19 characterizing early on in his web site operation, and by
20 the time he structured the current web site he would have
21 known what was necessary to make it a parody.

22 THE COURT: Wait a minute. On Page 14, that's
23 from the system administrator, SWS, Mr. Sutcliffe --

24 MS. DUARTE: Yes, Your Honor.

25 THE COURT: Addressed to Steve and in the sixth or

1 seventh paragraph there's a suggested disclaimer and that
2 was something that the evidence, you say would show was
3 suggested to Mr. Sutcliffe that he incorporate.

4 MS. DUARTE: Yes, Your Honor. It appears from the
5 E-Mail that he did not have his site as a parody. It wasn't
6 clear that KILLERCOP was a parody or any kind of a joke, if
7 you will, which he argued in the past to this court and
8 others.

9 THE COURT: The language on that page proposing
10 the disclaimer was suggested by the system administrator,
11 right?

12 MS. DUARTE: Correct.

13 THE COURT: What would the evidence be as to
14 whether Mr. Sutcliffe. on KILLERCOP.com accepted and
15 incorporated that disclaimer suggestion?

16 MS. DUARTE: It appears from further E-Mail that
17 he partially incorporated it. That resulted in the site as
18 it's exhibited. I have a few pages which follow.

19 THE COURT: Page 16 --

20 MS. DUARTE: Yes, Your Honor. And if you will
21 notice a little bit further down, the fifth full paragraph
22 which again as I stated, the third line reads "I want the
23 bad cops to believe it's real." Your Honor, I believe that
24 that goes to the intent to threaten as well.

25 Your Honor, on Page 17, further correspondence

1 indicates again that Mr. Sutcliffe kind of complied but he
2 didn't really. That goes toward the same questions you had
3 about page 14.

4 And lastly, on this E-Mail Your Honor, again,
5 appears at Page 19. I'm sorry, Your Honor. I already --
6 this repeats "I want the bad cops to believe it's real."
7 And Your Honor, on page, the next page, which bears a Bates
8 Stamp number on the bottom, 3069, and 3070, are pages that
9 were located that actually were downloaded from the web site
10 KILLERCOP.com in 2001 by LAPD. Drawing the court's
11 attention to the Bates Stamp 3069.

12 THE COURT: Just a second. I'm making some notes
13 about something. Hold on, please.

14 So you're on Bates 3069.

15 MS. DUARTE: Yes, sir.

16 THE COURT: What do you want me to look at?

17 MS. DUARTE: Top of the page, we will pay \$3,500
18 cash, no questions asked for home location of this officer.
19 And then he's soliciting a recent picture. That is very
20 similar, Your Honor. And I know the court spoke to
21 identity. But this is very similar to the solicitation for
22 address and information which was made for people on the
23 current web site, the EvilGX web site.

24 THE COURT: Just give me a proffer without any
25 documents. What do you represent the EvilGX web site would

1 say that's similar to this?

2 MS. DUARTE: Your Honor, I proffer that
3 Mr. Sutcliffe exhibited home addresses and home locations
4 and recent pictures. Did not actually offer money for them,
5 but exhibited the home addresses and recent pictures.

6 From what I remember right now -- I apologize, I'm
7 not sure, it didn't actually offer money for them. If I
8 could have one second I could check with the case agent.
9 All right.

10 (PAUSE)

11 MS. DUARTE: Your Honor, he asked that files be
12 sent to him. I believe offered money for files but he
13 didn't specify addresses and pictures.

14 THE COURT: What else?

15 MS. DUARTE: 3070, the next page, Your Honor.
16 Down near the bottom, about two inches up from the bottom
17 line, "Who is sleeping with one eye open besides Terry and
18 Lisa. Ha, ha, ha, ha." We propose shows intent to
19 threaten.

20 THE COURT: How so?

21 MS. DUARTE: Because he's put Terry and Lisa,
22 they're the two LAPD officers, he's put all the information
23 on the web. Now he's agreeing they're sleeping with one eye
24 open, which at least is the way I read it, indicates that
25 they're frightened. They wouldn't be frightened had they

1 not been threatened by him. That's the way I read it.

2 Then lastly, the next two pages, which are the
3 last two pages of what I have given the court, these are two
4 pages from, that were found in the defendant's residence in
5 New Hampshire which contained a printout apparently of the
6 web site back in 1998 and this is --

7 THE COURT: Printout of the KILLERCOP?

8 MS. DUARTE: Yes, found in his apartment. I can't
9 tell you whether or not it was complete because I don't
10 know, I haven't compared it. But it contained about 50
11 pages. These are only two of those pages. I pulled them
12 for our purposes.

13 And Page 1, "The price is wrong, bitch" at the
14 bottom, that is also exhibited on defendant's web site
15 EvilGX.com.

16 THE COURT: In what context? That precise phrase?

17 MS. DUARTE: That precise phrase, and it actually
18 appears as a sound file, multiple times on defendant's home
19 computer and also on the web site, web pages which will be
20 exhibited and which were charged in the government's case
21 for EvilGX.com.

22 THE COURT: Assume for the moment that there's no
23 factual dispute that Mr. Sutcliffe was at least responsible
24 for the creation of EvilGX.com, which is what his opposition
25 says, and I know that you would have replied and pointed out

1 that the statement in Mr. Harris' memo and Mr. Sutcliffe's
2 submission to me was qualified. It didn't say every single
3 thing was encompassed.

4 Assuming that issue of who was responsible is not
5 in dispute or even that it's stipulated to, "The price is
6 wrong, bitch" phrase no longer has any relevance, does it?

7 MS. DUARTE: You're correct, Your Honor. Assuming
8 that's stipulated, including his ownership and application
9 of the file, I believe you're correct.

10 Again, I prepared this before the court's ruling
11 and comments on the identity. So I just covered everything.

12 The last page, Your Honor, exhibits personal
13 information of Officer Ipolito. On his EvilGX web site he
14 exhibited personal information of the people that he
15 threatened. The court's comment will probably be that this
16 goes to identity.

17 I agree with the court. If identify is not in
18 dispute, this would also not be relevant.

19 THE COURT: Okay now --

20 MS. DUARTE: That's it, Your Honor.

21 THE COURT: Okay. Looking at this draft of the
22 limiting instructions, you have given me several reasons,
23 several examples, and they're pretty persuasive I think,
24 that the evidence would fall within the scope, the
25 permissible scope of 404(b) to show he intended to threaten.

1 Do you represent or argue at least that it does anything
2 more than that? Assuming identity is not an issue. What
3 does it show he knew, what does it show he planned over a
4 period to do?

5 MS. DUARTE: Well, it shows that he had the
6 ability, that he had the intent and knowledge on the web
7 site itself. And how to make it, how to craft it, how to
8 address people. Again, if identity, if he is the creator
9 and disseminator of everything as stipulated, I think the
10 court is correct it would not be relevant. But I certainly
11 think that it has relevance in that area, Your Honor.
12 Particularly with the little phrases that are similar. That
13 would be the knowledge prong. Then the intended to
14 threaten.

15 THE COURT: That you've demonstrated pretty
16 clearly.

17 MS. DUARTE: The plan and preparation to
18 communicate threats on his web site, he obviously knew how
19 to do it. He'd done it before. He knew how to do it with
20 parody or with some kind of qualifier, which I believe is
21 the subject of this motion for estoppel. He knew how to get
22 around it.

23 THE COURT: The estoppel filing, whatever one
24 wants to characterize it, really addresses a different issue
25 than parody. But anyway, thank you. That helps.

1 Now you want to be heard but only about this
2 question of whether or not a rational jury could evaluate at
3 least portions of this set of materials that Ms. Duarte has
4 just reviewed and rationally find it is probative on the
5 issue of Mr. Sutcliffe's intent to threaten. Why isn't it?

6 MR. HARRIS: Let's go back to the first -- the
7 third of the -- the fourth page of the first document where
8 there's the picture in the middle of the page, who is
9 KILLERCOP. It says this is not a joke, I am serious. Do
10 you have that, Your Honor?

11 THE COURT: Yes, I do.

12 MR. HARRIS: Well, it says "I'm offering not a
13 thousand dollars but a thousand dollars and five cents."
14 That's a little signal right there, what is going on.

15 THE COURT: What is the signal?

16 MR. HARRIS: That it's a spoof, that thousand
17 dollars and five cents. He's playing with them. If it was
18 not a joke it would be, it would be a thousand dollars. But
19 what is the possible interpretation, that five cents, other
20 than that he's winking at them.

21 THE COURT: I will tell you what. I'm not going
22 respond to a rhetorical question. Because I don't want to
23 be ever in the role of an advocate. But I've got to tell
24 you, I wouldn't be surprised if the government had a
25 response.

1 MR. HARRIS: It appears again on Bates 3069. It
2 says, right after the \$3500 cash, it says, for home location
3 of officer Terry Utley, the LAPD officer and/or a thousand
4 dollars and 27 cents for any recent picture of her. It's
5 the same subtext here. The point on the intent is what is
6 inferable really from the web site EvilGX.com.

7 THE COURT: No, that's not the law. The Planned
8 Parenthood case makes it clear that the concept of context
9 is not circumscribed to the particular offense that is the
10 subject of the lawsuit that was the civil case for the
11 prosecution. That's very clear. I know you know that,
12 Mr. Harris.

13 To suggest that whether the government meets the
14 burden of proof on intent is a question only of the evidence
15 narrowly confined to EvilGX is to misstate the law.

16 MR. HARRIS: The problem here is that it is
17 separated first of all in time. Secondly, it's separated in
18 terms of the legality --

19 THE COURT: How much time, Mr. Harris?

20 MR. HARRIS: I believe this was 1998, '99. What
21 we're arguing about in this case is communications between
22 October 2001 and March of 2002. So we've got a couple of
23 years of real estate in between these two web sites.

24 Secondly, it's separated in terms of legality.
25 First of all, nobody is alleging or has ever alleged that

1 Mr. Sutcliffe did anything illegal on KILLERCOP.com.

2 THE COURT: Yes. In my limiting instruction the
3 jury will be told that.

4 MR. HARRIS: But the premise here that it was a
5 threat at time one to show that he intended to threaten at
6 time two, if it had been a threat at time one he would have
7 been prosecuted by either the feds or the state government
8 for the threat of time one.

9 But they knew full well this was criticism of the
10 government. And it was First Amendment activity. And they
11 had no chance.

12 So you have got in terms -- if it shows anything,
13 it shows that he was -- the First Amendment. Why wasn't he
14 ever prosecuted for that one? So I don't think -- it's
15 pretty clear to me that it is a scary name. It is unpopular
16 to argue against the police and law enforcement. That's
17 really what is going on here, Your Honor.

18 THE COURT: I have heard enough. I'm going to
19 permit the -- I'm going to grant the motion with the
20 limiting instruction. It's going to be limited to evidence
21 within the prong of 404(b) that can be considered for
22 purposes of the element of intent.

23 If you can propose and if the government can
24 accept some kind of stipulation that would be signed by
25 Mr. Sutcliffe and that would basically establish that along,

1 something along the lines that Mr. Sutcliffe previously
2 created and communicated about a web site and described in a
3 fair but balanced way without using the KILLERCOP.com, what
4 the web site was about and that contained the statements
5 about his being serious and the like, I would consider, I'm
6 not necessarily requiring this of the government but I would
7 consider limiting the government to introducing that
8 stipulation. And thereby you can keep out, possibly keep
9 out reference to the admittedly volatile and potentially
10 explosive term KILLERCOP.com.

11 You said in your papers that's not the same thing
12 as COPKILLER.com. You can argue all the things that you
13 just argued to me. You can argue that 27 cents shows it was
14 a joke, that they can't regard that web site as evidence of
15 actual intent anymore than they could the EvilGX. All those
16 things are fair grounds for you to pursue.

17 This is an element of evidence that it's
18 permissible for the jury to consider and I grant the motion
19 under those terms.

20 Now let's turn to the government's next motion,
21 concerns Tracy Hall. And I'm going to deny that motion but
22 only as to the -- if it's still the case the current
23 pendency of the witness intimidation charge under Penal Code
24 136, but under certain limited conditions.

25 All you're going to be permitted to do,

1 Mr. Harris, is cross-examine Hall and establish that she's
2 currently the subject of a proceeding that may lead to the
3 filing of formal charges that are criminal in nature for
4 witness intimidation. That they arise out of an allegation
5 that she attempted to deter someone from testifying about
6 what he charged was fraudulent conduct.

7 And the government, of course, on redirect could
8 establish that there hasn't yet been a probable cause
9 hearing and she hasn't been held to answer and there is no
10 formal charge pending. The government would also have the
11 right, as any advocate would, to bring this out on direct
12 examination if it chose.

13 But I am not going to have either side explore
14 anything about an 88 year old man or false information
15 supposedly being communicated about what Hall was doing
16 there and who she was working for and what this lawyer was
17 all about. It's going to be two or three questions at most.

18 The other parts of the government's motion
19 relating to the 1988 misdemeanor conviction for grand theft
20 and the 1992 misdemeanor conviction for destroying evidence, *by Hall,*
21 I grant.

22 So those I think take care of the government's
23 motions. Now let's turn to Mr. Harris' motions.

24 The first motion to exclude evidence of firearms
25 is, the statements attributed to Mary Light are excludable

1 in any event. To the extent there would be a need to rule
2 on it in a motion in limine, I grant the motion. Those
3 would be hearsay. You're representing you're not going to
4 try to introduce that anyway, right?

5 MR. GONZALEZ: That's correct, Your Honor.

6 THE COURT: Okay. To the extent the motion
7 addresses the rifle and ammunition seized in New Hampshire
8 on March 26 of 2002, I intend to deny the motion subject to
9 a limiting instruction and any clarification or modification
10 of limiting instruction that I circulated. You have had a
11 chance to review that, Mr. Harris. It's entitled limiting
12 instruction re: weapons. Do you want to comment on that?

13 MR. HARRIS: Can I have a moment, please.

14 THE COURT: Sure.

15 (PAUSE IN PROCEEDINGS)

16 THE COURT: You don't have to give me your final
17 view.

18 MR. HARRIS: Do you want to talk about the merits
19 or remedy here?

20 THE COURT: It's not a remedy because that
21 suggests that there was a wrong. It would not be wrong. It
22 would be perfectly permissible and admissible to allow the
23 government to introduce evidence of the possession of the
24 weapons. You can -- I don't want to quibble with you. I'm
25 willing, I think it's necessary to provide a limiting

1 instruction.

2 You don't have to fiddle with the precise language
3 now. We could do that later on in the trial. But that's
4 what my ruling is. I don't want to hear from either side
5 any argument that has already been in your briefs. I read
6 your briefs. I hope you can see I read your briefs.

7 So I'm familiar with your position. That's my
8 ruling on Mr. Harris' first motion.

9 The next motion is his motion in limine to dismiss
10 Counts 1 through 4 of the indictment. That's been mooted by
11 the return of the Superseding Indictment, as to which we
12 will arraign Mr. Sutcliffe on Tuesday morning just before we
13 pick the jury.

14 The third motion that Mr. Sutcliffe made was to
15 exclude evidence relating to domestic violence. And his
16 disputes with his -- is she his former wife now, estranged
17 wife?

18 MR. HARRIS: I think they're still married.

19 THE COURT: And the government has essentially in
20 fact represented that it doesn't intend to introduce such
21 evidence in the case in chief. But I think that the
22 government's clear communication, I don't construe it as a
23 warning but I think it's a heads up to Mr. Sutcliffe and his
24 lawyer on Page 2, that to the extent and if in
25 cross-examination of any of the witnesses, the government

1 puts on a claim to testify to having construed the
2 communications to be in fact directed at them and meant to
3 threaten them, if there's cross-examination that opens the
4 door to why they felt that way, and what they had in their
5 minds, if anything, other than the actual text of
6 communications, then I think the government would be
7 permitted on redirect to explore that information. If there
8 are witnesses who are aware of such family violence.

9 MR. HARRIS: I want to make sure I understand the
10 court's ruling here. This will be a fine line I will be
11 walking. We can explore the text and I can point out that
12 line. Did you see that? Come on, you didn't really take
13 that as a threat.

14 That doesn't open the door. But I'm --

15 THE COURT: It's a little hard to conjure up every
16 possible scenario. If you were to ask a question along the
17 lines of what did you know about Mr. Sutcliffe that made you
18 interpret the text of the communication in this fashion.
19 Then an honest and responsive answer, if there's a witness
20 who knows about some incident of domestic violence would
21 permit that witness to answer that question.

22 And if you didn't ask something that frontal but
23 through the scope of your examination, and it is a fine
24 line, I will grant you that. But it's a fine concept too,
25 this question of exploring what was in someone's heart and

1 mind when he issued or was responsible for these
2 communications, if the evidence shows he was.

3 And if you open the door by suggesting that the
4 notion that these people in fact honestly and subjectively
5 felt threatened is ludicrous or false because their effort
6 to point to the communication as inherently threatening is
7 preposterous, I would have to play it by ear. But there
8 would be a risk of your opening the door.

9 I want the government to advise all witnesses that
10 they are not to volunteer, and make this very clear to them
11 and put it in writing if you think that's the best
12 communication, they're not to volunteer any knowledge they
13 have about his criminal history with the police department,
14 and his domestic violence. ^{What domestic violence???} I'm not necessarily saying it's
15 out of bounds.

16 MR. HARRIS: I want to just maybe give an example
17 to the court. Maybe I could get a feel for what's going to
18 open the door. Count 4 has Elizabeth Greenwood and the
19 government has made much of the point that on Count 4 there
20 is a picture of Elizabeth Greenwood and her daughter.

21 Later on the same page or the next page there's a
22 picture of Mr. Sutcliffe and his daughter. So you have got
23 the pictures of the alleged victim and the alleged
24 perpetrator on the same communication.

25 And if the government, if Ms. Greenwood tries to

1 argue that I was intimidated by seeing a picture of myself
2 and my daughter and I say madam, did you look a little bit
3 down the page. There was a picture of Mr. Sutcliffe and his
4 daughter on the beach. And didn't you take that as
5 somebody, parent to parent, trying to tell you to back off
6 on the litigation? Isn't that how you took it, ma'am?

7 Does that open the door? I think that's a valid,
8 based on the on text --

9 THE COURT: I don't think it opens the door.

10 MR. HARRIS: I don't think it does either. It
11 doesn't bring in all the extrinsic garbage.

12 THE COURT: I'm not trying to sandbag you at all.
13 But I want it understood that I can't anticipate exactly
14 what will and will not open the door. I'm not looking to
15 have some kind of door inadvertently opened.

16 I'm not going to permit and I'm not suggesting
17 this is what is suggested by the government, that they're
18 going to make an end run around this ruling, but you're
19 right. It's a tight line.

20 And if I think that an honest and responsive
21 answer to a question necessarily involves the disclosure of
22 information that otherwise is precluded, then before the
23 government starts its redirect, you ask for a side bar
24 conference and get a ruling from me as to whether or not you
25 can ask the question.

1 MR. HARRIS: I think I understand the court's
2 ruling. A purely textual analysis does not open the door.

3 THE COURT: Mr. Harris, you're a fine lawyer and
4 trying to get me to enter into some kind of stipulation in
5 effect that provides absolute guidance. I'm reluctant to do
6 that. You have a right in the interest of fairly
7 representing your client to try to figure out what works and
8 what doesn't. I think a purely textual approach is a wise
9 one to pursue. Let me stop there.

10 MR. HARRIS: Yes. But I just raise this point.
11 That for example, part of evidence will be that
12 Mr. Sutcliffe was picketing outside the Beverly Hills
13 offices of Global Crossing in Beverly Hills. That's not
14 text. There is a picture of him but it's saying she was --

15 THE COURT: That doesn't -- [Interrupt]

16 MR. HARRIS: I'm going beyond the text. I would
17 hope that doesn't open the door.

18 THE COURT: It doesn't.

19 MR. HARRIS: Okay. I think I understand the
20 court's ruling. Thank you.

21 THE COURT: Okay. Those are all the rulings on
22 Mr. Sutcliffe's motions in limine.

23 Now do you have, counsel for both sides, do you
24 have the government's trial memorandum?

25 MS. DUARTE: I do, Your Honor.

1 THE COURT: Do you have it, Mr. Harris?

2 MR. HARRIS: Yes, Your Honor.

3 THE COURT: Okay. I'm sort of winging it here. I
4 want to ask where things stand. So follow quickly because
5 I'm going to move fast.

6 The nine proposed stipulations that are referred
7 to on Page 2, Line 14, have they been accepted?

8 MS. DUARTE: No, Your Honor.

9 THE COURT: Has any been accepted?

10 MS. DUARTE: No, Your Honor.

11 THE COURT: Mr. Harris, what's the problem with
12 these stipulations?

13 MR. HARRIS: Mr. Sutcliffe basically wants the
14 government to prove its case. Mr. Sutcliffe and I for
15 example show some differing views on the law, on certain
16 elements, such as interstate commerce.

17 Mr. Sutcliffe feels strongly that that is a matter
18 subject to proof. And that he contests and he has his
19 reasons for that. I have a somewhat different view that
20 perhaps that's not a contested issue but I can't jam it down
21 his throat if he says make them prove it. He's got a right
22 to tell them to, make them prove it. I give that as an
23 example about why we haven't gotten real far.

24 THE COURT: So is it the case then there will be
25 no stipulations?

1 MR. HARRIS: I will go over them with
2 Mr. Sutcliffe between now and Tuesday.

3 THE COURT: Tell Mr. Sutcliffe that it's been my
4 experience both as a lawyer, tried a lot of cases, and as a
5 judge, that when jurors make important decisions they don't
6 tend to look sympathetically on parties who required the
7 other side to prove things that the jurors have reason to
8 think could not ever be subject to legitimate dispute. It's
9 seldom in the interest of somebody to require the other side
10 to go through the formalities of proof when the formalities
11 are easily going to be met. You just explain that to
12 Mr. Sutcliffe.

13 MR. HARRIS: Yes. I believe a number of the
14 stipulations can be dealt with as business records,
15 stipulations. They have a way to do that, that we may not
16 have to bring --

17 THE COURT: I've got to tell you that to have to
18 subject a jury to 23 witnesses in the government's case in
19 chief instead of 14, is a very unpalatable prospect.

20 But you're right, that the government has the
21 burden of proof and the defendant has a right to require
22 them to meet it. But if they're going to meet it anyway I
23 don't see what the point is.

24 MR. HARRIS: I will see what we can do between now
25 and Tuesday, Your Honor. I don't know if that helps the

1 government at this point or not.

2 THE COURT: Why don't you talk to each other.
3 You're both experienced lawyers. I don't know about
4 Mr. Gonzales. Maybe you're an experienced lawyer. You're
5 new to me. You work it out if you can.

6 Okay. On Page 5, line 13, what is spider webbing,
7 and is that going to be a term used in the trial?

8 MS. DUARTE: Your Honor, if it is witness Frank
9 Harrel will briefly explain the term. That's one of the
10 reasons he's taking the stand. But spider webbing is just
11 placing the web site over various hosts instead of choosing
12 only host to place the site on.

13 The thing that accomplishes, particularly in this
14 case, is that when you call one host to remove the site they
15 end up removing only their portion of what they're hosting,
16 which would be one or two pages of the site. And the site
17 still remains spider webbed and on the other hosts.

18 THE COURT: Okay. Now Mr. Harris, look carefully
19 at Page 6, concerning the victims' concerns. Okay. I'm not
20 going to permit inquiry by any side or any party into
21 personal information such as addresses, family members, and
22 possibly even employers where there's no independent
23 relevance, given the nature of the allegations in this case.

24 So if both sides have an understandable desire to
25 put a little bit of flesh on the skeleton of a witness and a

1 witness is for example a private investigator or a computer
2 programmer, questions like what do you do for a living. I
3 work for a private investigator. And where is that? It's
4 in Los Angeles County. That's the extent of it.

5 So I'm not making a formal ruling. Maybe I am. I
6 want this to be followed as if it's an order. So if you
7 think, Mr. Harris, that fores into that kind of data are
8 absolutely necessary for you to effectively represent your
9 client, you think about it. Talk to Ms. Duarte and
10 Mr. Gonzales about which witnesses you intend or think you
11 need to do that. And you bring that up with me on Tuesday.

12 MR. HARRIS: It might help -- there's only three
13 people we're talking about here. We're talking about -- [Exempt]

14 THE COURT: No, I don't construe this to be
15 confined to just the victims. You didn't mean it to be just
16 the victims, did you?

17 MS. DUARTE: No, Your Honor.

18 MR. HARRIS: It says victims of defendant's
19 threats. That's three people.

20 MS. DUARTE: As well as those who have had various
21 unpleasant contacts.

22 THE COURT: I want to tell Mr. Harris this
23 afternoon which witnesses you're talking about.

24 MS. DUARTE: Okay.

25 THE COURT: If there's a problem about this I want

1 to know about it Tuesday, not Thursday when the evidence
2 starts coming in.

3 Now on Page 7, the internal investigations at
4 Global Crossing that you're talking about are ones that were
5 conducted by Global Crossing?

6 MS. DUARTE: Yes, Global Crossing concerning its
7 own employees.

8 THE COURT: What exactly are you referring to when
9 you tell me that some of those witnesses are concerned about
10 forced disclosures of details and names of affected
11 employees. What are you talking about?

12 MS. DUARTE: There were some materials published
13 on the web site.

14 THE COURT: Published on EvilGX?

15 MS. DUARTE: Yes, Your Honor. Which the
16 government doesn't plan on introducing but the defense may.
17 Which were taken somehow directly from memoranda written
18 concerning a sexual harassment investigation done at Global
19 Crossing.

20 I believe, although I'm sorry if I'm wrong, I
21 believe there was also one of the employees' use, allegedly,
22 access of pornography while they were at work. There is
23 some internal memoranda and things written about the
24 investigation that ended up on EvilGX.

25 And there were, to the extent that the witness

1 would be asked about it and then asked who is it at the
2 company, who was the subject of this investigation. The
3 witnesses were concerned that, in particular Bruce
4 Weiseltier who was the head of the IT Department at the same
5 time Mr. Sutcliffe was there.

6 Then Richard Sailey who was the head of the HR,
7 Human Resources Department. These people had a lot of stuff
8 on their computers, particularly Richard Sailey, that ended
9 up on the Internet. And he was concerned about the privacy
10 concerns of those that he spoke about.

11 THE COURT: All right. You are not talking about
12 private, potentially embarrassing information about anyone
13 who is going to be a witness but about what was on that
14 witness's computer or otherwise a material generated by that
15 witness about some third party who may not even be in the
16 courtroom.

17 MS. DUARTE: Correct.

18 THE COURT: So what is the problem there,
19 Mr. Harris?

20 MR. HARRIS: I don't see a problem on this sort of
21 thing. I don't know if the government is going to try to
22 turn this into -- I'm trying to avoid trying a wrongful
23 termination case. If the government is going to say this
24 guy stole information and he was canned because he was
25 pilfering private information and redoing what they did in

1 the L.A. Superior Court, then --

2 THE COURT: Mr. Sutcliffe, when you say this guy
3 was terminated for that, you're talking about Mr. Sutcliffe?

4 MR. HARRIS: Yes, Mr. Sutcliffe. We have to have
5 a little context. He was terminated. But if we're going to
6 get into, if we're going to get Mr. Sailey for example, the
7 HR guy, testifying that he was a dirty employee and he was
8 doing this and doing that, that seems to me kind of opening
9 the door to going back to his motivations.

10 So if we tread lightly and just get the facts out,
11 Mr. Sutcliffe's dates of employment, his dates of
12 consultation, that he was he was terminated, that he didn't
13 like it. He picketed. And we keep just on that level,
14 that's fine.

15 But if we get into all the stuff where we have
16 to -- they're trying to cast aspersions at Mr. Sutcliffe
17 that during his employment, they're going to dissect that
18 and say he stole this and he stole that, then it seems to me
19 that opens up, I have to attack these people's credibility
20 or their motivations. I would like to avoid the whole
21 thing.

22 THE COURT: You always attack a witness's
23 credibility. That doesn't mean that the identification of
24 people that that witness wrote something about on his
25 computer or in some business records is fair game.

1 I don't see any basis at all, based on what you
2 just said, I'm not going to say what the government can
3 provide in the way of background context. It won't be a
4 wrongful termination case. Nobody is going to be permitted
5 to compare whether Global Crossing's employment decisions
6 concerning Mr. Sutcliffe were discriminatory because three
7 other people did the exact thing, none of them got fired.
8 He was fired because he has silver hair.

9 That's not what this case is about. That's not
10 what the government is going to be doing anyway. You don't
11 ask questions that get other people's access to pornography
12 of whatever it is out there in a way that identifies those
13 other people.

14 Okay. Now let's to go Mr. Harris' memo on
15 estoppel. And I'm not exactly sure how to construe what
16 you're trying to do here. But to shortcut this, Mr. Harris,
17 if there are victim witnesses who testify you have every
18 right to cross-examine them about what they read, and what
19 they thought about what they read.

20 So if they read something that was, as you like to
21 construe it, a contract or a provision or a condition that
22 estops somebody from something you can explore that on
23 cross-examination. The fact is that the language that you
24 cite is not by any means a, either in its actual text or in
25 its context or both consent to be threatened. There is no

1 notion of estoppel here. There is no preclusion of people
2 filing a complaint with the appropriate authorities.
3 There's no basis whatsoever to preclude the government from
4 pursuing it's allegations. So estoppel is misplaced.

5 On the other hand, if you want to talk about and
6 try to establish through anybody who read this EvilGX web
7 site that he knew that, she knew that if she went any
8 further that she might encounter things that were troubling
9 or somehow discomfoting and the person went ahead and did
10 it anyway so it couldn't have really been deemed to be
11 something that was subjectively or objectively threatening,
12 that's fair game for you to explore. I'm not granting any
13 motion arising out of the doctrine of estoppel.

14 Okay. Now on voir dire, you submitted your
15 various voir dire things. We're talking about the kinds of
16 things I typically discuss at the last conference. We're
17 not going to have a last conference.

18 We're going to arraign Mr. Sutcliffe on Tuesday
19 and we're going pick a jury. Then we're going to start the
20 evidence first thing on Thursday morning. So now is when I
21 want to tell you what to expect at the trial itself. I will
22 do all the voir dire.

23 And I have a more or less a recurring array of
24 questions I ask, which are not particularly unique. But
25 some that you proposed, each side, I will explore maybe in

1 slightly different language.

2 If you have your voir dire before you, Mr. Harris.

3 MR. HARRIS: Yes, Your Honor.

4 THE COURT: Paragraph two, specific questions,
5 familiarity of the Internet, one through three I will ask,
6 six I will ask, seven I will ask, 11 I will ask, and I'm
7 also going to ask whether perspective jurors ever did
8 business with Global Crossing or used the services provided
9 by Global Crossing.

10 Did Global Crossing have any direct ties to
11 consumers or do they just sell equipment to
12 telecommunications companies?

13 MR. HARRIS: Could I confer?

14 MS. DUARTE: May I as well, Your Honor?

15 THE COURT: Yes.

16 (BRIEF PAUSE)

17 MS. DUARTE: Your Honor, we're not quite sure. I
18 don't think they dealt directly with the customer, although
19 one of their subsidiaries may have. I don't know if -- I
20 know individuals own stock in the company.

21 THE WITNESS: I will ask the question anyway. If
22 they were providing -- what is it called, broad band access
23 or something like that. Maybe somebody on the jury dealt
24 with them. I will ask that.

25 As to the government's proposed voir dire, a lot

1 of that I ordinarily and routinely get into anyway. I will
2 ask questions that cover most of them, including Number
3 four, Number seven, and Number ten.

4 I don't know what to do about eight, belonging
5 to -- if I ask about organizational affiliations I usually
6 say do you contribute to, belong to or support, not just
7 whether you're a member. But what are you getting at with
8 Number eight and Number nine, rights of privacy and
9 advocates of free speech.

10 MS. DUARTE: There are people I know that feel
11 fairly strongly that whatever appears on the Internet should
12 be unrestricted in any form, and that the government
13 shouldn't even monitor or charge anything off the Internet.
14 They're kind of fringe groups. But some of them are fairly
15 mainstream. We know there's a group up at Stanford that has
16 a very broad view of privacy on the Internet.

17 THE COURT: Meaning that there should be none?

18 MS. DUARTE: Very few restrictions, yes. And so
19 there's some legitimate groups that also feel that way. In
20 asking the question it would be my intent to get a feel, and
21 I think I could by the person's response, for whether or not
22 that belief and that membership, I like the way the court
23 phrased it, membership, affiliation, support would be
24 something that they could set aside or not.

25 THE COURT: Okay. I'll get into it. And do you

1 have a counterpart request like some organization that
2 thinks that the Internet should be subject to the most
3 exacting restrictions about personal disclosures? Want me
4 to ask that too?

5 MR. HARRIS: Sure. If they have some opinion,
6 strong opinion on that, one way or the other. I don't know
7 of anybody like that, right now off the top of my head.

8 THE COURT: I don't know. I will probably learn a
9 lot from this case. That's my rulings on voir dire.

10 Now here's how we pick jurors. Mr. Harris has
11 tried at least one case before me. He's familiar but I will
12 go over the procedure again. When jurors come down here on
13 Thursday at 9:00 o'clock, and I hope that will be arranged
14 to have them -- I mean Tuesday at 9:00 o'clock, I hope we'll
15 have them in the back of the room when I walk out here.

16 They will be back there. I will explore general
17 questions about their suitability and availability for the
18 trial. And instruct them to answer only if they have a
19 answer by raising their hands. I'll tell them what the case
20 is about. You don't have to submit an agreed statement. I
21 will draft one myself. I will have the lawyers introduce
22 themselves and anyone else at counsel table.

23 Now what are we going to do about Mr. Sutcliffe's
24 handcuffs?

25 MR. HARRIS: I certainly hope he wouldn't be

1 shackled in front of the jury.

2 THE COURT: That's obviously not permissible. But
3 you're here from the marshal's office.

4 UNIDENTIFIED MARSHAL: Yes, Your Honor.

5 THE COURT: You understand that the cuffs are
6 going to have to be removed?

7 UNIDENTIFIED MARSHAL: Yes, Your Honor.
8 Absolutely.

9 THE COURT: He'll stand next to you and you have a
10 change of clothes for him?

11 MR. HARRIS: We're working on that, Your Honor.
12 He's been in custody since March. But he will have by
13 Tuesday.

14 One other point, my consultant who is here,
15 Mr. Zachary McCuhen, what I would ask --

16 THE COURT: He can sit at counsel table.

17 MR. HARRIS: Yes.

18 THE COURT: That's okay.

19 MR. HARRIS: Thank you.

20 THE COURT: But he'll have to be introduced. I
21 will ask whether -- somebody may be his nextdoor neighbor
22 for all I know. So have him at the conference table,
23 counsel table at 9:00 o'clock. You should have your case
24 agent there.

25 And I will explore whether the prospective jurors

1 know anything about the case, anything about the parties. I
2 will tell them that it's going to be a trial that will last
3 through Friday of the following week. We will resume the
4 trial on Tuesday of next week. I guess that's the 21st. So
5 we're starting Thursday but we'll have a full day Thursday
6 because the jury will have been picked. So that gives you
7 Thursday, Friday and four full days the following week. Is
8 that a realistic estimate?

9 MS. DUARTE: It is from the government's side.

10 THE COURT: You know what my trial time is. It's
11 8:00 to 1:30.

12 MS. DUARTE: It is from the government's side. I
13 don't know how long cross will be.

14 MR. HARRIS: I think that's realistic.

15 THE COURT: That's what I will tell them. Some
16 jurors will probably have compensation problems. I will
17 tell them about the trial schedule. I will in pretty
18 fervent terms tell them about a presumption of innocence.

19 I need a witness list. I need to tell them who
20 the witnesses are. I need that list by 8:30 on Tuesday
21 morning. Please give me a list in alphabetical order.
22 Before the trial begins I will need a trial witness estimate
23 list, which is slightly different and which you have seen.

24 Both of you should participate in the preparation
25 of that. If there are witnesses who regrettably, as it

1 would turn out, have to testify as custodians and you have a
2 witness who is a custodian of X, Y, Z web host, is that the
3 right term?

4 MS. DUARTE: Yes.

5 THE COURT: I want the person's name and not just
6 custodian of X, Y, Z web host. That should be on the list
7 of witnesses.

8 And after I explore all of those matters with the
9 prospective jurors and excuse any who warrant being excused
10 then we'll put some jurors in the box. If somebody says
11 something to me that I think warrants excusing that
12 prospective juror for cause, instead of having a side bar
13 conference, I hope you will all know that I don't like side
14 bars. I'm going to work very hard to avoid those.

15 What I would do, and listen carefully, you'll have
16 heard the same thing I'll have heard, what I will do is look
17 down, say to you Counsel, I intend to proceed accordingly.
18 Counsel, I intend to proceed accordingly. That's my signal
19 to you that I'm about to excuse that juror for cause. And
20 unless you request to be heard at side bar that's what I
21 will do. You will have no time to think about it and talk
22 about it. But it has never proven to be an issue.

23 Then we get them up in the box and we put 12
24 people in the box. The next six people, we'll have 28 names
25 called. First 12 sit in the box. The next six sit over in

1 the front row on the far side of the courtroom near the seal
2 on the door that I'm pointing to. During the process of
3 jury selection the monitor should not be there because I
4 have to eyeball these prospective jurors.

5 The next ten names will occupy the front row in
6 the center. The reason I call these many names is so you
7 know who's coming up and you can eyeball them as the process
8 is unfolding.

9 Then I will ask them and instruct them to look
10 at the standard questionnaire that I have that you have seen
11 or should have access to. And then I will question the
12 first 18 of them, including the ones in the back. That's
13 round two.

14 Then round three, will be questions that are not
15 focused and not directed to the jurors individually but to
16 the 18 jurors as a whole. Those will be the kind of voir
17 dire questions I just reviewed with you. So I would say do
18 any of you belong to an organization. I'm not going to ask
19 that question each time for each individual juror. That's
20 what I call round three.

21 When I finish round three I invite you to the side
22 bar and give you an opportunity to propose additional
23 questions to specific jurors among the 18 that I have
24 already questioned. At that time you make motions to excuse
25 jurors for cause. And I will rule on those, unless you need

1 some additional questions before you can determine whether
2 you think you have a basis to excuse jurors for cause. Then
3 the process of exercising peremptories will begin and you
4 start out with the people in the box, not the people in the
5 front row, not jurors 13 through 18.

6 And the process will be that each, one lawyer from
7 each side will go to the lectern when it's her turn or his
8 turn to exercise a peremptory and whisper the name and
9 number or some easy way to let the other lawyer know who it
10 is you're about to bounce. And if either of you think that
11 there's a Batson problem then you ask to be heard at the
12 side bar before the peremptory is exercised. If there's no
13 problem, signal it to the other lawyer.

14 Typically these conferences at the lectern,
15 neutral ground, take three or four seconds. Then go ahead
16 and you exercise the peremptories.

17 Now with the defendant having ten and the
18 government having six and the government going first, then
19 the defendant having two, then the government going again
20 and the defendant having two, it would be very helpful,
21 Mr. Harris, if you knew at any time when it's your turn
22 which two people you are proposing to strike, to mention
23 them both to Ms. Duarte. It's a way to save time.

24 Okay. Now if you need to discuss with your
25 clients what to do when it's your turn you don't have to ask

1 permission. I will know what's happening. I know a little
2 bit about Mr. Sutcliffe's perfectly legitimate desire to
3 have maximum input on the case. Just go over, talk to him
4 about it. But I don't want marathon conversations. But you
5 don't have to say may I be, have a moment with my client,
6 Your Honor. You have that time.

7 Now, if Juror Number Four, randomly selecting a
8 juror as an example has been stricken, then Juror 13 will
9 occupy Juror Number four's seat.

10 And I know that we are going to have more than six
11 jurors replaced, so that next -- when the six from the back
12 row have sat in the seats of somebody who was stricken, then
13 I move six more over and I go through the same process of
14 voir diring them that I did with the first 18. Okay.

15 Then you come up to the side bar. I give you the
16 opportunity to be heard as I just described and we go
17 through the same process again.

18 Now, if I am questioning Jurors 13 through 18, or
19 it could be questioning Juror 11, let's make it clear by
20 telling you if I'm questioning Juror 13 in this very first
21 go around with the first 18 names that are called and that
22 juror tells me something I think warrants excusing the
23 person for cause I will do the same thing. Counsel, I
24 intend to proceed accordingly.

25 And if you have a problem with that then you ask

1 for a side bar. If under that hypothetical, Juror 13 has
2 been excused, Juror 19 will immediately go over and sit in
3 Juror 13's seat. Okay. Follow? Because we keep filling up
4 the vacancies that way, until we have six back there and go
5 through the process.

6 MS. DUARTE: Why wouldn't it be Juror 14?

7 THE COURT: Because we already have 14 through 18
8 that are in the process of being questioned but we excused a
9 juror for cause. We need to have six in the back. The next
10 one available would be sitting in that center row and would
11 be Juror 19, slides over.

12 MS. DUARTE: Understood.

13 THE COURT: Okay. We'll have two alternates. And
14 I think that's all you need to know. If you pass, not often
15 does it happen but sometimes it does, if either side says we
16 accept the panel as constituted, that constitutes a turn.
17 You have used up a turn by saying accept. But if you have a
18 turn remaining and you want to in the next turn change your
19 mind and object or ask to have a juror excused who was
20 already in the box when you accepted the panel you're
21 welcome to do that.

22 Any questions about that?

23 (NO RESPONSE)

24 THE COURT: Okay. Mr. Harris, if you want to be
25 able to eyeball the people on the side and you can't do it

1 from where you are sitting, and this is true for either of
2 you or any of you, you can shift around where you are at at
3 counsel table. You can come here at the end of the table
4 and have eye contact with the people you're going to be
5 making judgments about.

6 Now, opening statements, are there going to be
7 Power Point demonstrations or some other technological
8 equipment?

9 MR. GONZALEZ: No, Your Honor.

10 THE COURT: Mr. Harris?

11 MR. HARRIS: No, Your Honor. But I would inquire,
12 does the court permit demonstrative evidence in opening
13 statements?

14 THE COURT: Yes but only if it's been proposed to
15 the other side, and disclosed in advance.

16 MR. HARRIS: Certain documents we all know are
17 going to come in, the printout of the communication in
18 question.

19 THE COURT: Well, as long as you have shown it to
20 the other side and they're not asking to have a ruling
21 before you deliver your opening you don't have to clear it
22 with me. You can do it. And that's reciprocal.

23 How long will your opening statement be?

24 MR. GONZALEZ: Less than 15 minutes, Your Honor.

25 THE COURT: We'll see about that. But okay. I

1 get the general idea here. Are you going to deliver an
2 opening at the beginning?

3 MR. HARRIS: Yes, I imagine I will.

4 THE COURT: All right. Now if there are witnesses
5 that need to be taken out of order, and I know about Rule 29
6 but if for some reason you have a witness whose only
7 available at a point when the government is still in the
8 process of putting on its evidence, you propose to take that
9 witness out of order, assuming you're going to put on that
10 case, I will give a clarifying instruction to the jury and
11 work it out with each other.

12 Accommodate each other. The clerk will give
13 you -- if you don't already have it, Mr. Harris, I know you
14 have seen it in other trials, my standard document that
15 permits the lawyers and the court to conduct these side bar
16 conferences directly with each other without the parties
17 present, not the agent, not the defendant. That's a
18 stipulation I want to be entered too.

19 I told you what my trial schedule is. If you're
20 going to start using Elmos, Power Points, some kind of
21 computer equipment, practice, practice, practice. Okay.
22 Get the use of it down pat. I like to have things going
23 quickly and smoothly, and without too many glitches.

24 It's never in the lawyers' interest, this happened
25 in some recent trials, to be fumbling around. I'm a

1 technically challenged person so I would have that challenge
2 myself if I were the trial lawyer. I hope you'll be
3 familiar with whatever you're using.

4 Jury instructions, I don't think they're going to
5 be difficult to settle here. In fact, I have started work
6 on them. We won't talk about those now.

7 When you address the jurors, either on opening or
8 closing you're welcome to tilt the lectern and have it
9 diagonally facing the jurors so that you can have steady eye
10 contact with them and not look over your shoulder. You
11 don't have to hug the lectern, just stay within arm's reach
12 of the lectern, and unless you're using an easel or
13 something to demonstrate something that has to be within
14 eyesight of the jurors.

15 We'll have monitors on both sides of the panel. I
16 see those are there. Ask for side bars very judiciously,
17 very rarely. I already gave some indications as to some
18 that might be warranted in this case.

19 I think that covers everything. Any additional
20 questions?

21 MS. DUARTE: Not from the government, Your Honor.

22 MR. HARRIS: When will we work out jury
23 instructions? Some of them that were submitted by
24 Ms. Duarte, I have just a problem with a few words.

25 THE COURT: I don't know when -- we might be able

1 to on Tuesday if I squeeze it in before then.

2 THE WITNESS: I usually don't do until after I
3 hear the evidence and understand the case more. But this
4 case, I'm inclined to do it early.

5 MR. HARRIS: All right. I would like to know what
6 the -- for example, I submitted a United States versus Watts
7 conditional threat instruction that I think correctly states
8 the law. I would like to know if we're going to get that
9 instruction or not because that might impact what I say in
10 opening statement.

11 THE COURT: Okay.

12 MR. HARRIS: That's an example.

13 THE COURT: All right. Have a good weekend.
14 We're adjourned.

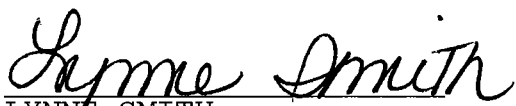
15 (PROCEEDINGS WERE ADJOURNED.)

16 -oOo-

17 CERTIFICATE

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

22 Date: FEBRUARY 28, 2005

23
24 
25 LYNNE SMITH
OFFICIAL COURT REPORTER