No. 04-50189

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEVEN WILLIAM SUTCLIFFE,

Defendant-Appellant.

GOVERNMENT'S ANSWERING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

ISSUES PRESENTED

A. Whether the district court erred in finding that, through his conduct, defendant had implicitly waived his right to counsel, after defendant caused the withdrawal of six defense attorneys, declared that he would keep "go[ing] through" counsel, and was warned by the district court that his continued antagonism toward his appointed counsel would result in his self-representation.

B. Whether federal jurisdiction existed, where the evidence demonstrated defendant transmitted threats in interstate commerce by sending them over the Internet while living in California and New Hampshire via computer servers located in other states.

C. Whether section 875(c) of the criminal code is vague in criminalizing the interstate transmission of a "threat to kidnap any person" or a "threat to injure the person of another."

D. Whether the district court erred in finding that there was no selective prosecution of defendant.

E. Whether the district court erred in failing to dismiss the indictment on speedy trial grounds, where the pretrial period included five changes of counsel, two interlocutory appeals, two competency examinations of defendant, and many defense motions.

F. Whether a district judge abused her discretion in failing to order the recusal of the presiding judge in this case.

G. Whether the district court abused its discretion in denying defendant's motion in limine seeking reconstruction by the government of the website "evilgx.com," after defendant had been provided with all preserved electronic copies of the website, and where the court found that the reconstruction was neither necessary nor feasible.

H. Whether the district court abused its discretion in denying defendant's motion in limine to exclude evidence of defendant's ownership and possession of a rifle.

I. Whether the district court clearly erred in refusing to dismiss the indictment for failure to state an offense, where the indictment gave defendant notice of the crimes he was charged with by alleging the particular threats he made.

J. Whether the district court clearly erred in denying defendant's motion for judgment of acquittal on various grounds.

K. Whether the district court erred when it instructed the jury using objective test for true threats, where it also required defendant's subjective intent by instructing the jury that defendant must have the specific intent to threaten.

L. Whether the district court plainly erred when it sentenced defendant to the high end of the then-mandatory United States Sentencing Guideline range.

II

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF THE PROCEEDINGS, AND DISPOSITION IN THE COURT BELOW

Defendant Steven William Sutcliffe ("defendant") appeals his conviction and sentence on eight of nine counts charging him with making interstate threats over the Internet, including death threats, following a four-week jury trial. Defendant raises an assortment of claims, including that the district court clearly erred in finding that defendant had waived his right to counsel (AOB 25-39),[1] that the district court clearly erred in exercising

[1] "AOB" refers to defendant's opening brief, followed by the applicable page number. "CR" refers to the Clerk's Record and is followed by the document control number. "ER" refers to defendant's Excerpt of Record; "GER" refers to the Government's Excerpt of Record; "GSER" refers to the Government's Sealed Excerpt of Record, followed by the applicable page number. "RT" refers to the Reporter's Transcript of Proceedings, preceded by

jurisdiction under the Interstate Commerce clause (AOB 39-43), that 18 U.S.C. § 875(c), which criminalizes the interstate transmission of threats, is unconstitutionally vague (AOB 43-47), that he was selectively prosecuted (AOB 47-49), that there was a speedy trial violation (AOB 50-58), that the district court abused its discretion in failing to order the recusal of the presiding judge (AOB 58-63), that the district court erred in denying two motions in limine (AOB 63-69), that the indictment failed to state an offense (AOB 70-75), that the district court erroneously denied his motion for judgment of acquittal (AOB 76-87), that the district court committed reversible error in instructing the jury (AOB 87-89), and that the district court erred when it sentenced defendant to the high end of the then-mandatory United States Sentencing Guideline range. (AOB 89-95).

On January 10, 2003, defendant was charged in a first superseding indictment with four counts of violating 18 U.S.C. § 871(c) (interstate threats to injure) and five counts of violating 18 U.S.C. § 1028(a)(7) (transferring social security numbers with the intent to aid and abet a felony). (CR 117; ER 183-87). Trial began on November 12, 2003. (CR 294). On

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the hearing date and followed by the applicable page number. "PSR" refers to the Presentence Investigation Report, followed by the applicable paragraph number.

December 4, 2003, the jury convicted defendant on eight of nine charged counts. (CR 325).

On April 15, 2004, the district court sentenced defendant to 46 months imprisonment. (CR 390; ER 475; 4/15/04 RT 70-71; GER 449-450).

B. JURISDICTION, TIMELINESS, AND BAIL STATUS

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. The judgment and commitment order was entered on April 19, 2004. (CR 391; ER 475). On April 15, 2004, defendant filed a timely notice of appeal. (CR 393). See Fed. R. App. P. 4(b). Defendant is currently on supervised release, having completed serving his 46-month sentence.

C. STATEMENT OF FACTS

1. The Offense Conduct

Defendant was hired as a contract employee in November 2000 to work in the Information Systems Department at Global Crossing, a telecommunications company located in Beverly Hills, California. (11/13/03 RT 319-22; GER 170-73). Defendant was assigned to work on several Global Crossing computers that contained information regarding many Global Crossing employees, and he also had access to other personal information of employees. (11/13/03 RT 335-41; 11/14/03 RT 624-25; GER 180-86, 256-57). He was terminated after a dispute with Human Resources over whether he needed to provide a social security number to Global Crossing in connection with his hire. (11/13/03 RT 322-25, 357-60; 11/14/03 RT 627; GER 173-76, 187-190, 259). In addition to that dispute, defendant omitted criminal convictions on his job application. (11/13/03 RT 361-62, 382-86; GER 191-92, 201-05). While Global Crossing was reviewing these matters, defendant threatened the head of Human Resources. (11/13/03 RT 363; GER 193).

After he was terminated, defendant began picketing in front of Global Crossing with a sign that referenced "www.evilgx.com," where "gx" was the stock ticker symbol for Global Crossing. (11/13/03 RT 325-26, 364-65, 401; 11/14/03 RT 628-29, GER 176-77, 194-95, 209, 260-61). The website www.evilgx.com ("evilgx") displayed many of Global Crossing's employees' names and social security numbers, salary tables, and more. (11/13/03 RT 326-28, 365-70, 401-02; 11/14/03 RT 630, 632; 11/19/03 RT 1031; GER 177-79, 195-200, 209-210, 262-63, 342). At any given time, evilgx publicly displayed as many as 8,000 social security numbers of Global Crossing employees. (11/17/03 RT 799; 11/18/03 RT 844-45; GER 313, 321-22). Evilgx also displayed payroll records that had been kept secure in a stand-alone computer that defendant had repaired. (11/13/03 RT 397-99, 401-02; GER 206-210).

Evilgx placed an article concerning identity theft near, or "linked" electronically to, many different references to personal information, in a manner that suggested to a viewer illegal use of the social security numbers. (11/14/03 RT 472-74; 11/17/03 RT 662-63, 678-81; GER 232-34, 268-69, 280-83). The practical effect of the placement of the article, at least as viewed by the victims, was to provide a "step by step how to commit identity theft." (11/18/03 RT 830; GER 320). Employees had reported incidents of identity theft and fraud thought to be in connection with the postings on evilgx. (11/18/03 RT 848-49; GER 323-24).

Evilgx consisted of many different webpages that were hosted by different servers, a "spider webbing" technique that made tracing the website or removing it from the Internet exceedingly difficult. (11/13/03 RT 413-14, 434-35, 438-39; 11/18/03 RT 911; 11/19/03 RT 1114, 1206; 11/24/03 RT 1242, 1256-57, 1282-93, 1304-05, 1311-12; GER 211-12, 222-25, 330, 350, 358, 368-87). The servers were located in different states than those from which defendant transferred the information; thus, the contents were uploaded to the Internet website into interstate commerce and actually transmitted from state-to-state. (11/19/03 RT 1107-08; 11/24/03 RT 1239-40, 1282, 1308; GER 348-49, 365-66, 371, 385). The evilgx website was electronically copied (or "captured") periodically in whatever was its current form at the time by investigating agents and Internet security specialists from Global Crossing; they attempted complete captures of all the webpages and hypertext links at least weekly, though they were not always successful. (11/13/06 RT 419-24, 429-31; 11/14/06 RT 479-81, 489-91, 603-609; 11/19/03 RT 1031-33, 1043-45; GER 209-17, 231-36, 245-51, 342-47).

Evilgx also displayed threats, composed of text, sound, and pictures. (11/13/06 RT 435, 442; 11/14/06 RT 509, 518; 11/19/03 RT 1031; GER 219, 222, 237-38, 342). One of defendant's main targets was Elizabeth Greenwood, then-Assistant General Counsel at Global Crossing. Defendant had possessed Greenwood's computer overnight for repairs. (11/14/03 RT 625-26; GER 257-58). On her computer at that time was a picture of her and her young daughter. (11/14/03 RT 626; GER 258). Evilgx displayed Greenwood's name and home address, with a link to a map to her home, her signature and social security number, and picture of her and her daughter, along with threatening text, music, and voiceovers. (11/17/03 RT 699-707; 11/18/03 RT 973-74, 982-84; Ex. 19; GER 294-302, 333-37, 515-528).

Gary Winnick, the Chairman of Global Crossing, was also targeted, and his personal information was displayed on evilgx, along with a warning from defendant to "keep your dogs at bay; I am now armed." (11/17/03 RT 688-91; Ex. 17; GER 290-93, 504-14).

Tracy Hall, who had been retained to serve process on defendant in the civil suit Global Crossing brought against him, was also targeted by name and threatened. (11/17/03 RT 675-78, 681-85; 11/24/03 RT 1321, 1330-40; GER 277-280, 283-87, 388, 391-

401). The threats began with the posting of her name and license plate number, and then escalated to threats to kill. (11/18/03 RT 893-94, 899-900; 11/24/03 RT 1325-26, 1330-40; Exs. 13, 15; GER 326-29, 389-401, 480-503).

Defendant also targeted Mark Block and Mark Labaton, who were the outside counsel representing the company in civil litigation against defendant, with death threats and by posting their personal information on evilgx. (11/17/03 RT 671-74, 685-86; 11/18/03 RT 861, 912-13; Exs. 13, 15; GER 273-76, 287-88, 325, 331-32, 480-503).

Defendant lived in Los Angeles when the website was established, but moved to New Hampshire in November 2001. (11/14/03 RT 582, 601; GER 244, 248). While in both Los Angeles and New Hampshire, defendant used the computer at his residence every day. (11/14/03 RT 581, 584; GER 243, 245). Defendant had a rifle and ammunition in both Los Angeles and New Hampshire. (11/14/03 RT 588-89; 11/19/03 RT 1117, 1124-28; GER 246-47, 351-56).

2. Jury Instructions

On December 4, 2003, the jury returned guilty verdicts on eight of the nine charged counts. (CR 325). Prior to the jury's deliberations, the district court instructed it. Among the instructions were the following:

In order for the defendant to be found guilty of [violating 18 USC 875(c)], the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly and intentionally transmitted a communication in interstate commerce.

Second, that communication threatened to injure a person.

Third, the defendant had the specific intent to threaten.

The government is not required to prove that the defendant intended to carry out the threat, or had the ability to do so, but it must prove that the defendant had the specific intent that the communication would threaten.

(12/4/03 RT 2124-25; GER 416-17).

The First Amendment to the United States Constitution provides that the government may not abridge a citizen's right to speech and expression. Not all forms of written, printed, or oral speech are protected by this provision, however. As to [the threats charges], the government has the burden of proving beyond a reasonable doubt that the alleged threats posted on the evilgx.com website are not protected speech and expression.

True threats are not protected by the First Amendment and are not free speech or expression. A statement is a true threat where a reasonable person would foresee that the listener will believe he or she will be subjected to physical violence upon his or her person.

Alleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners. An absence of explicitly threatening language does not preclude the finding of a true threat.

The mere fact that a communication actually induces or coerces action in the person to whom it is

> directed does not remove it from First Amendment protection, so long as the speaker does not threaten that he, or someone acting in concert with him, will resort to violence if the warning is not heeded.

(12/4/04 RT 2126-27; GER 411-12).

3. Sentencing

a. Representation

Immediately after the jury returned its guilty verdicts, the district court addressed standby counsel David Reed, telling him that he would remain standby counsel through sentencing, should offer to prepare defendant's sentencing filings, and that his doing so would be in defendant's interest. (12/4/03 RT 2194; GER 420).

On January 7, 2004, the district court ordered Reed to prepare and file a sentencing memorandum and respond to whatever the government might file, regardless of whether defendant authorized the filing. (CR 335). On March 1, 2004, the district court reiterated that it had appointed Reed to represent defendant at sentencing, although both Reed and defendant were permitted to file independent pleadings. (CR 357). On March 11, 2004, defendant filed an objection to the language in that minute order, and "renewing" his motion for "assistance" of counsel (presumably in lieu of "appointment"). (CR 370; ER 454-60). That same day, the district court clarified that defendant was still free to conduct his own defense at sentencing as he saw fit. (CR 369; ER 462).

b. Presentence Report and Position Papers

The PSR determined the applicable guideline range to be 37 to 46 months imprisonment, based on a total offense level of 21 and Criminal History Category I. (PSR ¶ 149). The government filed a sentencing memorandum asking for additional upward adjustments and departures, resulting in a requested sentence of 71 months in prison. (CR 352; ER 413-33). Defendant, through standby counsel Reed, filed a position paper arguing for a sentencing guideline range of 18-24 months, which translated to a request for time served. (CR 366; ER 437-52).

c. Imposition of Sentence

At the April 15, 2004, sentencing hearing, the district court determined that for defendant's identity fraud, he was subject to a base offense level of 6 under USSG § 2B1.1, as well as two additional levels for relocation and sophistication under USSG § 2B1.1(b)(8). (4/15/04 RT 16-17; GER 423-24). In doing so, the district court found that the trial evidence:

> clearly and convincingly demonstrated that defendant . . . possessed at the time he committed these crimes, a technological prowess relating to computer skills and computer software, computer hardware, the internet, the various unusual and sophisticated applications of those skills over the internet that go way beyond what is the

> usual manner in which crimes of . . . this nature typically are committed.

(4/15/04 RT 17; GER 424).

The district court continued:

> The means that [defendant] used to carry out the scheme reflected remarkable sophistication . . . . It included creating web sites, switching them around, relocating them, having multiple access to other sites . . . which it took me a while to understand but I think I do and I think the jury did . . . .

(4/15/04 RT 18; GER 425).

The district court then addressed the threat to victim Greenwood, and imposed a 6-level increase for "conduct that evidenced an intent to carry out the threat" under USSG § 2A6.1(b)(1). (4/15/04 RT 21; GER 428). Finding defendant's challenge to the increase "unpersuasive and unwarranted," the district court found "on a clear and convincing basis" that there was conduct consistent with and suggesting an actual intent to carry out the threat proven at trial. (Id.). The court continued:

> And here, in the case of Greenwood [], when the defendant who knew her specifically referred to her, posted her address, attached a map, included a picture, added to the level of objectively indisputable and subjectively apparent, because she did testify at the trial, fear, . . . [defendant] said that he was coming to collect from her personally and the fact that he was armed was not in question.
>
> The evidence would prove beyond a reasonable doubt that the weapon that was seized in New Hampshire [defendant] had had for some time while he was in California. It was a rifle with a bayonet capacity

> . . . this is conduct that shows an actual intent . . . .

(4/15/04 RT 21-22; GER 428-29).

With grouping of the multiple counts, the court arrived at a total offense level of 20. (Id.). The district court granted the government's motion for upward departure one criminal history category pursuant to USSG § 4A1.3, because category I under-represented defendant's criminal history and the likelihood for recidivism. (4/15/04 RT 24-26; GER 431-33).

The district court then sentenced defendant to 46 months, the top of the applicable guideline range. In imposing that sentence, the district court noted that:

> it's a reflection of my very considered view that the offenses that [defendant] committed warrant very firm punishment and that he, even through this afternoon, continued to display a refusal to acknowledge that, like every other citizen in this country, he is subject to the evenhanded application of all the laws. If there were a crime . . . that consisted of arrogance, I would depart upward to sentence [defendant] to a much longer sentence.

(4/15/04 RT 75-76; GER 454-55).

III

ARGUMENT

A. BY HIS CONDUCT, DEFENDANT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVED HIS SIXTH AMENDMENT RIGHT TO COUNSEL

After defendant caused his sixth appointed attorney to move to withdraw from the case, the district court properly found that defendant, through his refusal to work with any counsel, had waived his right to proceed with one. Indeed, defendant himself stated -- after his third lawyer was dismissed when defendant caused a complete breakdown of communication -- that he was going to keep going through lawyers. (RT 1/14/03 RT 17; GER 51). The tortuous pretrial record in this case demonstrates that there was no error in determining that defendant had knowingly and intelligently waived his right to counsel.

1. Standard of Review

Whether or not a defendant's Sixth Amendment right to counsel has been violated is a question of law reviewed de novo. United States v. Ortega, 203 F.3d 675, 679 (9th Cir. 2000). Whether or not a defendant has effected a knowing, voluntary, and intelligent waiver of the right to counsel is a mixed question of law and fact also subject to de novo review. United States v. Percy, 250 F.3d 720, 725 (9th Cir. 2001). The district court's factual findings in support of its ruling are reviewed for clear error. Id.

2. The Series of Six Trial Counsel

Defendant accused his first appointed attorney, Assistant Federal Public Defender Hilary Potashner, of obstructing justice, announcing that he considered himself a "political prisoner." (8/22/02 RT 6-7; GER 3-4). The court found no evidence of obstruction but agreed to shift primary responsibility for the case to co-counsel Marilyn Bednarski, continuing the trial for two months from the switch, until October 22, 2002. (8/22/02 RT 17-19, 27, 34; GER 10-12, 15, 19). Even at that time, defendant was alluding to representing himself as a potentially viable option. (8/22/02 RT 20-21; GER 13-14). From this first change of counsel, the district court demonstrated it intended to do everything in its power to ensure that defendant's case promptly proceeded to trial. (8/22/02 RT 31-35; GER 16-20) ("I would be willing to put some pressure on the government . . . I want [the trial] date to be a firm date. So if . . . [the prosecutor's] schedule changes then line up somebody else from [that] office because I don't want to have a continuance brought by the government. We're going to go to trial on October 22nd [2002].").

On September 23, 2002, Bednarski moved to be relieved and the district court granted that motion. (CR 45; 9/23/02 RT 4; GSER 2). Stating that her "ability . . . to effectively represent" defendant had been impaired, and referring generally to "past events" and "past communications," Bednarski refused to go into detail due to her expressed belief that detail would reveal privileged communications. (9/23/02 RT 7; GSER 5). Referring to Bednarski's motion as "nothing more than a tacit admission of [her] incompetence" (9/23/02 RT 10-11; GSER 8-9), defendant claimed that Bednarski had accused him of threatening

Potashner. (9/23/02 RT 15; GSER 13). After allowing defendant to express his dissatisfaction with his attorneys, the district court noted the problems defendant was causing:

> [W]hat you're telling me is that they're not doing the job but you want them to finish the job they're not doing. What that suggests to me is that you are inviting a huge problem that you could otherwise avoid and you're also creating the risk that I would be making a big mistake by allowing you to do this inconsistent and, I think, prejudicial act.

(9/23/02 RT 18-19; GSER 16-17). The district court relieved Bednarski and appointed William Harris, defendant's third attorney. (CR 44).

On December 4, 2002, defendant moved to dismiss Harris for ineffective assistance, alleging that Harris was not technologically adept. (CR 71; ER 131-38). After a series of fruitless exchanges with defendant, during which time defendant refused to provide answers to the district court's questions -- responding, for instance, to the district court's inquiry as to whether defendant wanted a new lawyer by stating "[i]t doesn't really matter what I want" -- the district court denied the motion. (CR 73; 12/4/02 RT 16-18, 26-28; GER 28-33). On January 10, 2003, defendant and Harris participated in a lengthy pretrial hearing. (CR 104). The court made in limine rulings, and it discussed voir dire, jury selection, and scheduling with the parties. (Id.). From the hearing, it appeared that the trial would proceed as planned. (Id.). The government was ready for trial and all pertinent documents had been filed. (See CR 94-102, 108-09). On January 14, 2003, the parties appeared for what was to be the first day at trial. (CR 113)

That morning, defendant filed pro se a lengthy "writ of mandamus," again requesting, among many other remedies, dismissal of Harris for ineffective assistance. (CR 110; ER 188-93). The district court's attempts at the hearing to ascertain what relief defendant actually was seeking, and what representation he wanted, led to several confusing exchanges, wherein defendant asserted that he had "summarily" dismissed Harris "with extreme prejudice." (1/14/03 RT 3-6; GER 37-40).

Harris explained that defendant had created a situation where Harris no longer could function as defendant's lawyer:

> despite my best professional efforts to help this gentleman, there has been a complete breakdown in the attorney-client relationship, which makes it impossible to proceed further. He's basically made it absolutely clear he does not want me to represent him . . . he seems to be on a self-destructive path . . . [he] seems to be wanting to steer this [case] towards some sort of train wreck. And he's accused me multiple times of incompetence. Now he raises malpractice. There's only so much I can do.

(1/14/03 RT 8-9; GER 42-43).

After addressing defendant and listening to his complaints about Harris, the district court asked: "You want another lawyer?" (1/14/03 RT 17; GER 51). Defendant replied in a manner that suggested he would not accept any lawyer:

> I want this case dismissed. How many lawyers do I have to go through? . . . I've gone through three lawyers now. How many do I have to go through?

(Id.). After a lengthy discussion with defendant, the district court warned defendant that he could not forever keep rejecting lawyers:

> I'm not going to allow you to go through . . . five lawyers and the tenth lawyer. . . . that's not going to happen because at some point I have the power and the obligation to find that you have waived your right to have a lawyer represent you. And then you're going to go to trial on your own.

(1/14/03 RT 22-23; GER 56-57). The district court subsequently issued an order requiring a competency examination, citing defendant's consistent refusal to cooperate with his appointed attorneys. (CR 114; ER 194-96).

On January 17, 2003, the court appointed Gregory Nicolaysen, in large part because of his technical proficiency. (CR 113; 1/17/03 RT 3; GER 78). From the beginning, defendant was obstreperous and refused to work with Nicolaysen. (1/17/03 RT 5-13, 17-18; GER 80-88, 92-93). On March 14, 2003, after defendant's competency evaluation, defendant attended a status hearing in which he refused to participate, refused again to work with Nicolaysen, became disruptive, and was removed from the courtroom. (3/14/03 RT 5-13; GER 100-08). The district court subsequently ordered another, more comprehensive, competency evaluation. (CR 114; ER 224-233). Nicolaysen did not move to withdraw from the case, and in fact indicated that he planned to be ready for trial. (3/14/03 RT 78-79; GER 109-10).

On July 17, 2003, defendant sued Nicolaysen, also naming Harris in the complaint and alleging both were part of an ongoing conspiracy to violate his civil rights, of which the district court and prosecutor were also a part. (ER 235-61). On August 4, 2003, Nicolaysen moved to be relieved, noting that defendant had sued him and also had refused to speak to him from the start of his appointment; Nicolaysen also noted the general interference of defendant's acquaintance, attorney Leslie McAfee, who had filed the lawsuit on defendant's behalf. (CR 170; ER 262-82). On August 27, 2003, the parties appeared for hearing, and defendant again was obstructionist. (8/27/03 RT 9-11; GER 113-15). After finding defendant mentally competent to stand trial, the court granted Nicolaysen's motion, finding that Nicolaysen had "done a salutary job under difficult circumstances" but that there had been a "total breakdown in communication" due to defendant's actions. (CR 188; 8/27/03 RT 46, 51; GER 120, 122). The court queried defendant regarding McAfee, who was present at the hearing; defendant declined to retain McAfee, and McAfee declined to represent defendant. (CR 188; 8/27/03 RT 61-62; GER 132-33). The district court then required defendant to proceed pro se, making extensive reference to defendant's hostile and uncooperative interactions with his previous four counsel. (8/27/03 RT 52-60, 64-65; GER 123-131, 135-36).

Attorney Michael Brennan was appointed as standby counsel. (8/27/03 RT 66-67; GER 137-39). On September 2, 2003, after meeting once with defendant, Brennan informed the court that scheduling conflicts would not allow him to serve as standby counsel for defendant and requested that the court appoint another standby counsel; the district court relieved Brennan and appointed David Reed. (CR 191-93).

On September 24, 2003, the government requested that Reed be appointed as trial counsel. (CR 224). The court granted this motion at a September 26, 2003, hearing, and again advised defendant regarding a potential decision to proceed pro se. (CR 236; 9/26/03 RT 63-68, 77-82; GER 140-151). Five days later, at a status hearing, Reed orally moved to withdraw as counsel. (CR 242; 10/1/03 RT 4-5, 31-32; GER 155-58). Reed proffered that defendant had refused to work with him, stating "I needed his assistance, and I've never obtained it, Your Honor." (10/1/03 RT 11; GSER 33). Reed then confirmed that it was his understanding that defendant wanted him to go to trial as scheduled, knowing that Reed was not prepared, in order to establish a basis that Reed was not competent and create an issue for appeal. (10/1/03 RT 19; GSER 41). Defendant also threatened to sue Reed, as he had sued Nicolaysen before him. (10/1/03 RT 20; GSER 42).

Defendant demonstrated that he could not work effectively with Reed, accusing him of perjury and other "lies." (10/21/03 RT 48-53; GER 161-66). The district court granted the motion in part in an October 7, 2003, written order, retaining Reed as standby counsel and making detailed findings. (CR 246; ER 379-85). The district court that defendant demonstrably made it "impossible" for any competent lawyer to represent him:

> from virtually the inception of this case defendant has manipulated the proceedings and his relationships with five appointed lawyers so as to be able to claim that he wants to be represented by counsel while at the same time making it impossible for any competent lawyer to carry out his professional responsibilities.

(ER 381). As ordered by the district court, defendant proceeded to trial pro se with Reed as his standby counsel.

3. The District Court Did Not Err When it Found That Defendant's Obstuctionist Conduct Constituted a Waiver of His Right to Counsel

A court may force a defendant to proceed pro per if his conduct "hinders the efficient administration of justice." United States v. Kelm, 827 F.2d 1319, 1322 (9th Cir. 1987). In Kelm, the Ninth Circuit rejected the defendant's claim that the district court denied him representation of counsel. The defendant stated that he did not waive his right to counsel and wanted to hire his own attorney; nevertheless, he failed to do so despite the district court affording the defendant three continuances for him to find suitable counsel. Kelm, 827 F.2d at

1321. In those circumstances, the court held that the district court's refusal to grant further continuances was reasonable. Id. at 1322. The court also held that the defendant's actions were an effort to effect delay and "[u]nder the circumstances of this case, we conclude that the district court properly treated [defendant's] failure to retain counsel as the waiver of his right to counsel of his choice." Id.

The instant case reflects even more egregious actions by defendant than those supporting the Kelm waiver. Here, defendant announced his intention on multiple occasions not to cooperate with any of his appointed attorneys, such as by stating, "I want this case dismissed. How many lawyers do I have to go through? . . . I've gone through three lawyers now. How many do I have to go through?" (1/14/03 RT 17; GER 51). The record thereby demonstrates defendant's intent to stall and confuse the proceedings, as do his multiple last-minute filings and objections as trials were approaching. (See, e.g., CR 71, 72, 79, 110, 125-35, 183, 199, 228-30, 273, 276, 283).

Defendant cites United States v. Meeks, 987 F.2d 575 (9th Cir. 1993), in support of his argument. However, in Meeks, the defendant was represented in succession by three lawyers: (1) the first lawyer was appointed but was replaced by (2) retained counsel, whom defendant then fired, and (3) the succeeding appointed lawyer sought and was granted leave to withdraw. Id.

at 577. The district court refused to grant the defendant's motion for another appointed lawyer, noted the delays caused by the "continual changing of attorneys," and ultimately ordered that the defendant appear pro se at trial, unless he retained counsel. Id. When, on the eve of trial, the defendant brought in a fourth lawyer, who sought a continuance, the district court denied the continuance and the defendant represented himself at trial. Id.

In reversing the district court, this Court noted that a defendant may waive the right to counsel if he is "aware of the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation." Id. at 579; see also United States v. Farhad, 190 F.3d 1097, 1099-1100 (9th Cir. 1999) (describing warnings). This court stated that "[i]n rare cases, we will find a knowing and intelligent waiver by looking at the record as a whole." Meeks, 987 F.2d at 579. Meeks distinguished Kelm as a situation where the defendant "was in control of whether or not he had counsel. He chose not to retain counsel to frustrate the judicial process." Id.

Here, unlike Meeks, defendant was advised several times of the nature of the charges against him, the penalties, and the risks of self-representation. (See 8/27/03 RT 48, 61-65; 9/26/03 RT 78-82; GER 121, 132-36, 147-151). Further, unlike the defendant in Meeks, who had a history of mental illness and was therefore possibly unable to understand the consequences of waiving counsel, defendant twice was found competent to stand trial and participate in his defense. (8/27/03 RT 45-46; GER 119-120). Finally, unlike Meeks and like Kelm, defendant's conflicts with his court-appointed attorneys were of his own making in an attempt to frustrate the judicial process. It was a psychiatrist's opinion that defendant had been manipulating the proceedings and that these manipulative acts, including the refusal to cooperate with his court-appointed attorneys and the resulting disruptive behavior in court, were deliberate delaying tactics. (8/27/03 RT 41-42; GER 117-18).[2]

Lawyers Potashner, Bednarski, Harris, Nicolaysen, and Reed were forced to move to withdraw closer and closer to the series of then-pending trial dates, strongly suggesting defendant's behavior was motivated by a desire to delay the proceedings and frustrate the judicial process. The district court found that "to the extent that there has been delay, it is almost entirely attributable to the course of conduct that [defendant]

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[2] This case also differs from Plumlee v. Sue Del Papa, 426 F.3d 1095 (9th Cir. 2005), also cited by defendant. In Plumlee, the district court forced defendant to represent himself after he accused two public defenders of leaking information, and this Court held that the district court should have appointed substitute counsel. Plumlee, 426 F.3d at 1107-08. Defendant's obstreperous behavior, his refusal to cooperate with his own defense, and the number of attorneys he, in his own words, had to "go through" in the instant case demonstrated a waiver of counsel, unlike the actions of the Plumlee defendant.

systematically . . . have engaged in." (8/27/03 RT 64; GER 135).

When the conflict between a defendant and his appointed counsel is solely of defendant's making, defendant's Sixth Amendment right to counsel is not violated by a refusal to appoint substitute counsel. See Schell v. Witek, 218 F.3d 1017, 1026 (9th Cir. 2000) (suggesting that "conflict of [defendant's] own making" would not violate Sixth Amendment); United States v. Robinson, 913 F.2d 712, 714-16 (9th Cir. 1990) (finding knowing, voluntary, and intelligent waiver of right to counsel where defendant indicated he felt "forced" to proceed pro se because only alternative was to proceed with appointed counsel with whom he had disagreements); Hudson v. Rushen, 686 F.2d 826, 831-32 (9th Cir. 1982) (finding no error in denial of substitution of counsel where "[t]he reason for this complete breakdown was the voluntary conduct of defendant" and "the defendant merely wanted someone other than [appointed counsel]"). The district court also cited two out-of-circuit cases that firmly support its decision. (ER 381-82). In United States v. Fazzini, 871 F.2d 635, 641 (7th Cir. 1987), the defendant became embroiled in conflict with three successive court-appointed attorneys. Prior to appointing a fourth attorney, the trial judge warned the defendant that "this is it," and no further new counsel would be appointed should he encounter similar problems with the fourth attorney. When the fourth attorney moved to withdraw based on an irreparable conflict with the defendant, the court ruled that the defendant had knowingly and voluntarily waived his right to counsel, and the Seventh Circuit agreed. Id. at 642.

In United States v. Moore, 706 F.2d 538, 539 (5th Cir. 1983), the trial court appointed three successive attorneys, each of whom the defendant deemed unsatisfactory. Upon appointing the fourth attorney, the trial court warned the defendant that a failure to cooperate with this attorney would signal a waiver of his right to counsel. After the defendant again moved for substitution of counsel, the court refused and forced the defendant to proceed in pro per. On appeal, the Fifth Circuit held that "a persistent and unreasonable demand for dismissal of counsel and appointment of new counsel. . . is the functional equivalent of the waiver of counsel." Id. at 540. See also United States v. Irorere, 228 F.3d 816, 828 (7th Cir. 2000) (defendant's refusal to cooperate with four successive court-appointed attorneys following warning that no further substitution of attorneys would be allowed amounted to knowing and intelligent waiver of right to counsel); United States v. Harris, 2 F.3d 1452, 1455 (7th Cir. 1993) (finding voluntary and informed waiver where defendant refused to cooperate with lawyers and was told that no substitute counsel would be appointed).

Defendant's case is analogous to those of the defendants in Kelm, Fazzini and Moore. By his own conduct, defendant compelled a series of his attorneys to withdraw. The district court correctly found that defendant had caused his relationship with lawyer after lawyer to fail, demonstrating it was impossible for a competent lawyer to represent him. (ER 381). As in Fazzini and Moore, defendant was explicitly advised by the trial judge, upon the dismissal of Harris, that he would only get one more lawyer to represent him, and should he behave similarly with his new lawyer, he would have waived his right to counsel and would have to proceed in pro per. (1/14/03 RT 14, 18-23; GER 48, 52-57). He was similarly advised after Nicolaysen withdrew. The district court was well-supported by the record when it advised defendant at trial: "You [Defendant] are proceeding without counsel because your conduct, although not your lips and your words, clearly and persistently reflected a refusal to be represented by counsel." (11/19/03 RT 1213-14; GER 360-61). The district court did not err when it found it had no option but to require that defendant proceed pro per.

B. FEDERAL JURISDICTION EXISTED OVER THIS CASE, WHERE THE EVIDENCE DEMONSTRATED DEFENDANT'S THREATS WERE IN INTERSTATE COMMERCE AND TRAVELED BETWEEN STATES

1. Standard of Review

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

2. The District Court Had Jurisdiction

Defendant argues that the government proved neither state-to-state transmission nor interstate commerce at trial and the district court therefore was without jurisdiction. (AOB 39-43). This argument is meritless because the government proved both.

The trial evidence showed that defendant was living in Los Angeles at the time the website was first established, but moved from Los Angeles to New Hampshire in November 2001. (11/14/03 RT 582, 601; GER 244, 248). The evidence also demonstrated that the various hosts of evilgx.com at the relevant time periods were located outside of California and New Hampshire; thus, the contents of the Internet website were uploaded in interstate commerce and from state-to-state. (11/19/03 RT 1107-08; 11/24/03 RT 1239-41, 1282, 1308; GER 348-49, 365-67, 371, 385).

By transmitting his writings and other components of his web pages from his home computer to his various Internet Service Providers and onto the Internet, defendant not only transmitted his threats from state-to-state but also in interstate commerce by virtue of his use of the Internet, an instrumentality of interstate commerce. See United States v. Ripinsky, 109 F.3d 1436, 1444 (amended on denial of rehearing at 129 F.3d 518 (9th Cir. 1997) (in money laundering case, where interstate nexus was essential jurisdictional element of offense, finding that transaction utilized instrumentalities of interstate commerce sufficient to satisfy jurisdictional element); United States v. Jackson, 155 F.3d 942, 946 (8th Cir. 1998) (satisfying requirement of Section 1028(a)(3) that transfer was "in or affects interstate or foreign commerce" does not require proof that every transfer or transaction was in interstate commerce; requirement not that "stringent"); United States v. Pearce, 65 F.3d 22, 24 (4th Cir. 1995) (government need not prove that every document-making implement entered interstate commerce to meet jurisdictional element); Brown v. Investors Mortgage Company, 121 F.3d 472, 476 (9th Cir. 1997) (". . . the connection to interstate commerce is supplied by the highly interconnected nature of the nation's home financing system").

Defendant argues without authority that the fact that a message was posted on the Internet is not necessarily in interstate commerce, see AOB at 43, but he is mistaken. See United States v. Pirello, 255 F.3d 728, 729-730 (9th Cir. 2001) ("The Internet engenders a medium of communication that enables information to be quickly, conveniently, and inexpensively disseminated to hundreds of millions of individuals worldwide . . . . This quality makes the Internet a well-known and valuable tool . . . in today's commerce."); United States v. Ellyson, 326 F.3d 522, 533-34 (4th Cir. 2003) (in conviction for possessing child pornography, transporting in interstate commerce element satisfied by evidence that images had been downloaded from Internet); United States v. Runyon, 290 F.3d 223, 239 (5th Cir. 2002) (holding that transmission of photographs by means of Internet sufficient to satisfy interstate commerce element of sexual exploitation of child); United States v. Kilmer, 335 F.3d 1132, 1139 (10th Cir. 2003) (evidence of interstate transmission over Internet constituted transport in interstate commerce); ACLU v. Johnson, 194 F.3d 1149, 1161 n. 9 (10th Cir. 1999) (citing favorably parties' agreement that "even 'non-commercial, recreational use' of the Internet is communication that can affect interstate commerce . . . ."); United States v. Hersh, 297 F.3d 1233, 1254 n. 31 (11th Cir. 2002) (receiving photographs in interstate commerce adequately proven by circumstantial evidence of photographs' receipt over Internet).[3]

Thus the trial court thus properly exercised jurisdiction in the instant case.

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[3] See also ACLU v. Pataki, 969 F. Supp. 160, 173 (S.D.N.Y. 1997) ("The inescapable conclusion is that the Internet represents an instrument of interstate commerce . . . ."); United States v. Kammersell, 7 F. Supp. 2d 1196, 1200 (D. Utah 1998) ("[T]he use of an Internet server by defendant for the transmission involved in this case was the use of an instrumentality of interstate commerce.").

C. THE FEDERAL INTERSTATE THREATS STATUTE IS NOT UNCONSTITUTIONALLY VAGUE

1. Standard of Review

Whether a statute is unconstitutionally vague is reviewed de novo. Planned Parenthood Federation of America, Inc. v. Gonzalez, 435 F.3d 1163, 1171 (9th Cir. 2006).

2. The Statute Is Not Vague

Defendant next argues that the interstate threats statute is unconstitutionally vague. (AOB 43-47). 18 U.S.C. § 875(c) reads as follows:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

Defendant contends that because the statute does not contain a definition of "threat" or "true threat," or state an intent requirement, it "fails to provide fair warning of prohibited conduct to those it regulates." (AOB 45).

A statute must "'(1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner.'" Planned Parenthood, 435 F.3d at 1181 (quoting Nunez by Nunez v. City of San Diego, 114 F.3d 935, 940 (9th Cir. 1997)). "A challenged statute enjoys a presumption of constitutionality."

Forbes v. Napolitano, 236 F.3d 1009, 1012 (9th Cir. 2000) (citing Baggett v. Bullitt, 377 U.S. 360, 372 (1964)). Section 875(c) does not fail either prong of this test.

Section 875c) is sufficiently definite that ordinary citizens can understand what conduct is prohibited. "Threat" is a term commonly used in everyday speech. An ordinary person can understand the meaning of a "threat to kidnap any person" or a "threat to injure the person of another." A further definition of the word is not necessary for an ordinary citizen to be able to determine what conduct is prohibited. "Statutes need not be written with 'mathematical' precision, nor can they be thus written." Forbes, 236 F.3d at 1011 (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)). For example, as a factual matter, defendant's posting of statements on his website such as "I will kill you" clearly fell within the bounds of what an ordinary person would deem a "threat." Likewise, the statute need not spell out the intent requirement in order for it to make clear what conduct is prohibited.

Defendant cites cases that cite to the meaning of "threat" and specific intent, but these cases do not render the statute vague; rather, they merely provide a narrowing of the ordinary definition of a "threat," thereby ensuring that section 875(c) does not violate the First Amendment. Virginia v. Black, 538 U.S. 343, 359-60 (2003) ("'True threats' encompasses those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat."); United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990) (whether defendant's words constitute true threat "should be considered in light of their entire factual context, including the surrounding events and the reaction of listeners."); United States v. Kelner, 534 F.2d 1020, 1023 (2d Cir. 1978) (requiring government prove specific intent for section 875(c) conviction, upholding statute as not violating First Amendment); Watts v. United States, 394 U.S. 705, 707 (1969) (distinguishing true threats from constitutionally protected speech). The absence of a definition of the word "threat" or an intent requirement in the text of the statute is therefore insufficient to render it void for vagueness.

Section 875(c) also satisfies the second prong of the Planned Parenthood test in that it establishes standards sufficient to allow police and prosecutors to enforce the law in a non-arbitrary, non-discriminatory manner. Although defendant points to the actions of "Shmoe," who was not prosecuted (ER 35; AOB at 46), the comparison is uninstructive. The unidentified "Schmoe" sent a single email; as argued in the following section, defendant cannot show that a decision not to prosecute "Shmoe" was anything more than any exercise of prosecutorial discretion. Defendant was charged with multiple threats to injure and kill, over a period of five months, in conjunction with posting personal information of others (including, evidently, that of "Shmoe"). Because "Shmoe's" actions were not analogous to those of defendant, clearly the government's failure to prosecute "Shmoe" is not an example of arbitrary or discriminatory enforcement of Section 875(c).

D. THE DISTRICT COURT DID NOT CLEARLY ERR WHEN IT DENIED DEFENDANT'S CLAIMS OF SELECTIVE PROSECUTION

On several occasions, defendant alleged selective prosecution, arguing that the non-prosecution of "Joe Shmoe" showed that defendant was unfairly targeted. (CR 59, 283; 11/17/03 RT 768-770, 788-94, 806-08; GER 303-16; ER 23-55). The unidentified "Shmoe" had threatened in an Internet posting that defendant would "get [his] ass kicked" if he posted more personal information on his website. The district court consistently found no evidence of selective prosecution. (CR 73, 303; 12/4/02 RT 4-7; 11/19/03 RT 1010, 1211; GER 24-27, 341, 359).

1. Standard of Review

The denial of a selective prosecution claim is reviewed for clear error. United States v. Wilson, 639 F.2d 500, 503 n.2 (9th Cir. 1981). "In cases where invidious selective prosecution is alleged, we view the evidence in the light most favorable to the government." United States v. Culliton, 328 F.3d 1074, 1080-81 (9th Cir. 2003).

2. The District Court Correctly Determined That Defendant Could Not Meet His Burden in Proving Selective Prosecution

In United States v. Armstrong, 517 U.S. 456 (1996), the Supreme Court confirmed that the standard for a defendant's claim of selective prosecution is a demanding one, with the burden on the claimant to demonstrate by clear evidence that the enforcement "had a discriminatory effect and that it was motivated by a discriminatory purpose." Id. at 465 (citation omitted); see also Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 489 (1999) ("we have emphasized that the standard for proving [selective prosecution claims] is particularly demanding, requiring a criminal defendant to introduce 'clear evidence' displacing the presumption that a prosecutor has acted lawfully"). "In the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." Armstrong, 517 U.S. at 464; United States v. Nelson, 137 F.3d 1094, 1105 (9th Cir. 1998).

Specifically, a defendant must establish that (1) other similarly situated individuals have not been prosecuted for conduct similar to defendant's, and (2) the government's selection of defendant was based on discriminatory grounds such as race, religion or exercise of constitutional rights. Wayte v. United States, 470 U.S. 598, 608-09 (1985). Both prongs must be demonstrated in order for the selective prosecution claim to succeed. See United States v. Turner, 104 F.3d 1180, 1184 (9th Cir. 1997). This showing is to be conducted against the "background presumption" that the Attorney General of the United States and the United States Attorneys are properly discharging their official duties and not acting with a bias contrary to the commands of the Constitution. Armstrong, 517 U.S. at 465.

Here, defendant cannot show that other similarly situated individuals were not prosecuted for conduct similar to defendant's. Defendant argues correctly that "Shmoe" threatened him and was not charged, but this fact lends no support to his argument. First, "Shmoe's" single posting was not even remotely similar to defendant's conduct, and it would have been within the government's discretion to choose not to prosecute it. Second, even if this conduct could be viewed as similar, it does not show selective prosecution. Indeed, there is no evidence that the government ever even identified "Shmoe," which alone would explain the non-prosecution.

This Court has recognized that there is a high threshold for showing that similarly situated defendants were treated differently. See Turner, 104 F.3d at 1182-85 (statistical information that 83% of those charged with sale of crack cocaine were African Americans combined with newspaper articles and hearsay insufficient to establish selective prosecution); United States v. Estrada-Plata, 57 F.3d 757, 760-61 (9th Cir. 1995) (fact that there may be undocumented aliens working for United States Forest Service does not establish selective prosecution of other aliens); United States v. Bourgeois, 964 F.2d 935, 940-41 (9th Cir. 1991) (rejecting argument that defendant was selectively prosecuted after two-day investigation of gun shops, noting two-day focus too narrow). Defendant has not met and cannot meet this threshold.

Even if defendant were to establish similar conduct, he remains unable to demonstrate that there was a discriminatory motive or purpose in bringing this indictment. Discriminatory purpose implies more than simple awareness of the consequences. Wayte, 470 U.S. at 610. It implies that the decision-maker selected, or reaffirmed, a particular course of action at least in part because of, not merely in spite of, the adverse effects upon an identifiable group. Id.

Defendant has not shown that he is part of an "identifiable group" that can claim equal protection violations in this context. Identifiable groups include groups exhibiting identifying factors such as gender, race, religion or exercise of constitutional rights. See id. (prosecutor's charging decision cannot be judicially reviewed absent prima facie showing that it rested on impermissible basis, such as gender, race, or denial of constitutional right); United States v. Davis, 36 F.3d 1424, 1432 (9th Cr. 1994). Defendant is apparently alleging selection for prosecution based on what he deems his "right to First Amendment. . . freedom of speech by protesting the improper termination of his employment." (AOB 48). But no authority even suggests that this classification, even if accurate, which it is not, places him in an identifiable group; thus, his claim must fail.

Nor can defendant demonstrate that the government had any discriminatory intent or purpose in bringing the indictment in this case. Defendant's offer of proof consists of the "Shmoe" posting. In sharp contrast, the defendants in Armstrong produced statistics showing that the overwhelming majority of defendants federally prosecuted for crack cocaine were minorities, as well as a study comparing statistics for federal and crack cocaine prosecutions which purported to show a correlation between race and federal prosecution. Despite these substantial submissions, the Armstrong defendants' selective prosecution discovery requests were held invalid. Defendant has failed to approach even remotely the inadequate showing made by the defendants in Armstrong, and the district court did not err when it denied his motions.

E. THE DISTRICT COURT DID NOT ERR IN ITS CALCULATIONS OF EXCLUDABLE TIME UNDER THE SPEEDY TRIAL ACT

Defendant originally was indicted on April 5, 2002, the superseding indictment was filed on January 10, 2003, and trial began on November 12, 2003. Throughout this time period, complex pretrial proceedings amply supported the district court's findings of excludable time under the Speedy Trial Act, as the district court found. Among other things, the pretrial period involved five changes of counsel, two interlocutory appeals, two competency examinations, and numerous pretrial motions. Not only was there no speedy trial error, but defendant himself prompted the delays in his trial.

1. Standard of Review

A district court's application of the Speedy Trial Act is reviewed de novo. United States v. Daychild, 357 F.3d 1082, 1089 n.5 (9th Cir. 2004); United States v. Lam, 251 F.3d 852, 855 (9th Cir. 2001). A district court's factual findings under the Act are reviewed for clear error. Id.

2. The Pretrial Proceedings and the District Court's Exclusion of Time

The original indictment in this case was filed on April 5, 2002. (CR 11). Defendant made his first appearance in the Central District of California on April 9, 2002. (CR 7). At defendant's arraignment, held on April 15, 2002, jury trial was set for June 4, 2002. (CR 20). On May 16, 2002, the parties agreed by stipulation to continue the trial date to September 3, 2002, and exclude time from calculation under the Speedy Trial Act, 18 U.S.C. § 3161 et seq., from May 16 though September 3, 2002. (CR 23). The district court so ordered, based on the complexity of the case (18 U.S.C. § 3161(h)(8)(B)(ii)) and defense counsel's need to prepare (18 U.S.C. § 3161(h)(8)(B)(iv)) given the large volume of electronic evidence seized (125 gigabytes), the somewhat novel Internet-based nature of the prosecution, and various other reasons. (CR 23). At this point, 38 days of the 70 days permitted by 18 U.S.C. § 3161(c)(1) had passed.

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

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

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

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[4]It appears that the issue of excludable time was not addressed in writing by the parties or the district court at the time of this continuance to December 3, 2002. In any event, as time previously had been excluded through October 22, 2002, and as defendant filed a pretrial motion on October 23, 2002, only one day was not excluded from calculation, even assuming that no specific finding re: excludable time was made on September 23, 2002.

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

On January 14, 2003, what was to have been the first day of jury trial, defendant moved pro per to "dismiss" Harris and the district court granted defendant's motion, appointed new counsel, continued the trial to March 25, 2003, ordered defendant to undergo a 30-day competency evaluation pursuant to 18 U.S.C. §§ 4241(b)& 4247(b) and excluded time from computation under the Speedy Trial Act pursuant to 18 U.S.C. § 3161(h)(1)(A). (CR 113-115, 118). On March 14, 2003, the parties appeared for a hearing on defendant's competency; at the conclusion of the hearing, the district court ordered defendant to undergo a four-month evaluation pursuant to 18 U.S.C. § 4241(d), continued the trial date to September 9, 2003, and excluded time from computation under the Speedy Trial Act pursuant to 18 U.S.C. § 3161(h)(1)(A) and (h)(8)(A). (CR 139, 144, 145, 154, 157, 158). On March 20, 2003, defendant (pro per) petitioned for emergency mandamus relief from several of the district court's orders (CR 135, 144, 145); the Ninth Circuit granted a temporary stay of the orders through March 28, 2003, but then denied defendant's requests in their entirety on March 28, 2003. (CR 148, 159). Therefore, March 24 through March 28, 2003 was also excluded from calculation as delay resulting from an interlocutory appeal (18 U.S.C. § 3161(h)(1)(E)).

Additional motions had also been filed during that time; the time of the motions' pendency was also excluded from calculation (18 U.S.C. § 3161(h)(1)(F)) above and beyond the order already in place excluding time through September 9, 2003 (CR 145). On August 1, 2003, the district court referred defendant's Motion to Recuse, pending since February 4, 2003 (CR 132), to Judge Phillips for determination; the motion was denied on August 6, 2003. (CR 171). On August 4, 2003, defendant filed a motion seeking relief from appointment, which was resolved on August 27, 2003. (CR 170, 188). On September 4, 2003, defendant filed two motions. (CR 197, 199). This Court ordered the government to respond to one of the motions (defendant's motion for reconstruction of evilgx.com) within the same week, and noted that is would take both motions under advisement upon receiving the government's filing. (CR 195). The government filed its opposition to defendant's motion on September 9, 2003. (CR 201).

On September 24, 2003, defendant filed an addendum to this motion. (CR 223). On that same day, this Court denied one of defendant's motions and issued a tentative ruling regarding the other, indicating that the motion to reconstruct evilgx.com would be denied at the status conference scheduled for September 26, 2003. (CR 216). On September 26, defendant filed three additional motions, two to dismiss the threats counts of the indictment and one "renewed" motion for reconstruction of evilgx.com. (CR 217). These motions were denied on October 20, 2003. (CR 262). In the interim, on October 7, 2003, the district court issued an Order continuing the trial to November 12, 2003, and excluding time from STA calculation pursuant to 18 U.S.C. 3161(h)(8). (CR 246; ER 379-85). On October 21, 2003, defendant filed additional motions, which were denied on October 28, 2003. (CR 261, 263, 273). On October 28, 2003, the district court denied defendant's motions that had been filed in pro per on February 6, 2003. (CR 273; ER 386-89). On November 7, 2003, defendant filed additional motions in limine that were decided on

November 11, 2003. (CR 303). The next day the trial began. (CR 294). Thus, only 39 of the 70 days available under the STA passed while defendant was pending trial; all other time was excluded on multiple bases including stipulation, order, and pendency of motions.

3. <u>The District Court Properly Excluded Time From Calculation Under the Speedy Trial Act</u>

The district court correctly denied defendant's motions to dismiss the indictment on alleged speedy trial violations. In fact, time was carefully and properly tracked and excluded from calculation when warranted on proper grounds. Defendant argues that because he did not consent to every continuance necessitated by his five "incompetent" counsel, such time was improperly excluded. (AOB 56). But the record reveals that the district court was aware of defendant's rights and made every attempt to safeguard them and get the case to trial; defendant caused the delay about which he now complains.

In general, trial must commence within 70 days of the filing of the indictment or the defendant's initial court appearance, whichever is later. 18 U.S.C. § 3161(c)(1). Time for delays caused by continuances, the filing and disposing of motions, and proceedings to determine a defendant's competence to stand trial are excluded from the calculation. 18 U.S.C. §§ 3161(h)(1)(F), (h)(8)(A), (h)(1)(A). Under 18 U.S.C. § 3161(h)(8)(A), "the district court may exclude from the 70-day calculation any delay resulting from a continuance granted by the judge upon the motion of either party <u>or on his or her own motion</u> 'if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interests of the public and the defendant in a speedy trial.'" <u>United States v. Lewis</u>, 980 F.2d 555, 560 (9th Cir. 1992) (emphasis added) (quoting statute). Section 3161(h)(8) specifically permits the exclusion of "any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government . . . on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A); <u>United States v. Lloyd</u>, 125 F.3d 1263, 1268 n.6 (9th Cir. 1997).

In this case, pretrial motions were almost constantly pending, or under submission during the pendency of the case. Time is automatically excluded from calculation under the STA for pending motions. 18 U.S.C. § 3161(h)(1)(F). Further, exclusion of time under the Act is proper for up to 30 days for matters under advisement, even if the parties have concluded their briefing, particularly if there is an ongoing dispute between the parties (as there virtually always was in this case). <u>See</u> 18

U.S.C. § 3161(h)(1)(J); United States v. Sutter, 340 F.3d 1022, 1031-32 (9th Cir. 2003). Only where motions were not pending was the propriety of exclusion on any other basis, such as the "ends of justice" provision, even relevant.

Although the "ends of justice" exclusion should be "used sparingly and only when necessary," Lewis, 980 F.2d at 560, the plain language of the provision does not require the defendant's concurrence in order to make the necessary findings and resulting exclusion. Section 3161(h)(8) is "a safety valve provision that permits the district court to toll the speedy trial clock while granting a continuance . . . ." Lloyd, 125 F.3d at 1267. The two requirements that need be met by the district court in order to properly grant an "ends of justice" continuance are to ensure that "(1) the continuance is specifically limited in time; and (2) it is justified [on the record] with reference to the facts as of the time the delay is ordered." United States v. Clymer, 25 F.3d 824, 828 (9th Cir. 1994) (quotations omitted). Whether defendant agrees with the district court's findings and continuance order is relevant only to the issue of whether defendant's objection to the exclusion of time from Speedy Trial Act computation is properly preserved for appeal. See United States v. Hall, 181 F.3d 1057, 1060-61 (9th Cir. 1999) (defendant preserved objection by objecting to continuance).

Further, where defendant's own actions contribute to the need for an "ends of justice" continuance under the Speedy Trial Act, "defendant cannot complain that a continuance violates his or her speedy trial rights." Lewis, 980 F.2d at 562-63 (citing cases) (where defendant provided inadequate handwriting exemplars and then asserted speedy trial rights, leaving prosecution unprepared for trial, district court properly found that delay was excludable time in interest of justice).[5]

Defendant also cites Barker v. Wingo, 407 U.S. 514, 530 (1972), but the results of the Barker balancing test weigh in the government's favor. In Barker, the Court stated that "different weights should be assigned to different reasons" for delay. Barker, 407 U.S. at 531. The bulk of continuances defendant opposed were necessitated by his continual dissatisfaction with counsel, which escalated to the point of filing lawsuits against

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[5] See also United States v. Bolton, 905 F.2d 319, 322 (10th Cir. 1990)(need for continuance due to defendant's last minute vacillations regarding representation and waiver of speedy trial rights attributed to defendant); United States v. Brooks, 697 F.2d 517, 520-22 (3d Cir. 1982) (holding that, where trial court sua sponte ordered "ends of justice" continuance of trial date, Section 3161(h)(8)(A) permitted trial court to continue trial on own motion, and stated grounds justified continuance); United States v. Edwards, 627 F.2d 460, 461 (D.C. Cir. 1980) (court's sua sponte grant of "ends of justice" continuance proper where counsel for co-defendant stated he was ill, and prosecutor had conflicting trial schedule); United States v. Crane, 776 F.2d 600, 605 (6th Cir. 1985) (finding continuance improper, but noting that in appropriate circumstances "[d]efense counsel's unpreparedness, even if due to a lack of diligence, could be a valid reason for finding that the failure to grant the continuance would have resulted in a miscarriage of justice.")

them in order to force conflicts from which they then had no choice but to remove themselves. At no point did the government request a continuance to better prepare its case or otherwise to gain an advantage, nor did the court cite a neutral reason such as overcrowded court dockets. As the Court noted in Barker:

> [d]elay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so.

Id. at 521. Defendant, by his conduct, compelled the delay of which he now complains.

Further, defendant's requests for a speedy trial "must be viewed in light of [defendant's] other conduct." United States v. Loud Hawk, 474 U.S. 302, 314-15 (1986) (applying Barker test to find no speedy trial violation by defendants who simultaneously asserted their speedy trial rights and "consumed six months by filing indisputably frivolous petitions for rehearing and for certiorari" and "filled the district court's docket with repetitive and unsuccessful motions"); Lam, 251 F.3d at 859 (9th Cir. 2001) (no speedy trial violation where defendant asserted speedy trial right after series of continuances requested by counsel with defendant's consent). In this case, defendant was warned repeatedly by the district court that each attorney he appointed would have to go through the same "learning curve" in order to be ready to proceed to trial. Defendant thus was clearly aware that his conduct would result in delay. Just as defendant "manipulated the proceedings" so as to be able to claim that he wanted to be represented by counsel "while at the same time making it impossible for any competent lawyer to carry out his professional responsibilities" (ER 381), he asserted his speedy trial rights while simultaneously behaving so as to make it impossible for the proceedings to go forward.

Finally, there was no prejudice to the defendant. "Actual prejudice is typically demonstrated in three ways: 'oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the [accused's] defense will be impaired.'" United States v. Gregory, 322 F.3d 1157, 1163 (9th Cir. 2003) (applying Barker test to reverse district court's dismissal of indictment). Although defendant well may have become "increasingly anxious and concerned" (see AOB at 57), the record shows that the delays were reasonable and necessary to avoid the impairment of defendant's defense. Time after time, shortly prior to the trial date, defendant insisted on new counsel. Had the district court insisted on proceeding to trial without allowing new defense counsel time to learn the case, defendant's defense almost certainly would have been impaired. Because the delays were necessary to enable him to mount a proper defense, defendant has not shown prejudice. Thus, defendant cannot show that he was denied his right to a speedy trial under either the Speedy Trial Act or the Sixth Amendment, and the district court properly denied his motion to dismiss the indictment due to delay.

F. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN REFUSING TO ORDER THE RECUSAL OF JUDGE MATZ

1. Standard of Review

The denial of a recusal motion is reviewed for abuse of discretion. United States v. Martin, 278 F.3d 988, 1005 (9th Cir. 2002).

2. The District Court Did Not Err When It Found No Valid Reason To Recuse The Presiding Judge

Defendant moved multiple times to recuse the presiding judge, the first motion made 11 days before his then-pending trial date. (CR 79, 132, 183; ER 157, 198-205, 297-303). The Honorable Virginia A. Phillips, District Court Judge, consistently and correctly denied the motions in written orders. (CR 89, 171, 187; ER 174-76, 304-07). 28 U.S.C. § 455(a), which states that "any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," is satisfied only when a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. United States v Wilkerson, 208 F.3d 794, 797 (9th Cir. 2001) (emphasis added).

Defendant argues, without any specific authority, that the district court was not impartial due to its "refusal" to appoint "competent" counsel, as well as its alleged participation in a conspiracy to violate defendant's civil rights, and its adverse rulings on defendant's "meritorious" motions before and during the trial. (AOB at 61-63). But the record is clear that Judge Matz made every effort to appoint competent counsel for defendant and did, in fact, appoint competent counsel time and time again.

Further, although defendant argues that Judge Matz "unnecessarily" delayed the trial to his detriment (AOB 61), as argued above, the record is clear that defendant deliberately acted to delay the trial by his continual changing of attorneys and filing of meritless pre-trial motions. Nor did the district court err when it found that the allegations of a conspiracy were not grounds for recusal, because "the mere existence of these as-yet unproven allegations would not cause a reasonable person to question the impartiality of the trial judge." (ER 306). A judge is not to be disqualified merely because a litigant has sued him. United States v. Studley, 783 F.2d 934, 940 (9th Cir. 1986) (judge's adverse rulings, among other considerations, did not provide basis for recusal).

Further, absent some extrajudicial source of bias or partiality, "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." Liteky v. United States, 510 U.S. 540, 555 (1994). The totality of the record shows a presiding judge that did everything in its power to provide defendant with a fair trial. Here, as in Studley, the district court displayed "admirable patience." Studley, 783 F.2d at 939. Thus, a reasonable person would not construe the actions or inactions of this presiding judge to evidence of a lack of impartiality and Judge Phillips did not abuse her discretion in so finding.

G. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO "RECONSTRUCT" EVILGX.COM

1. Standard of Review

The district court's ruling on a motion in limine is generally reviewed for an abuse of discretion. United States v. Ross, 206 F.3d 896, 898 (9th Cir. 2000).

2. The District Court Properly Denied Defendant's Motions for "Reconstruction"

During the course of the investigation into defendant's conduct, defendant's website evilgx periodically was electronically "captured" in whatever was its current form at the time by investigating agents as well as Internet security specialists from Global Crossing, who attempted complete captures of all the webpages and hypertext links at least weekly, but not always successfully. Defendant was provided with all of these versions, copies, and exhibits. (CR 234; 11/14/03 RT 463; GER 230).

Defendant sought pretrial to force the government to "reconstruct" the website, arguing the relevance of context. (CR 197; ER 325-30). The pretrial motion and a subsequent motion filed on the third day of trial were denied by the district court. (11/14/03 RT 463-64; GER 230-31). In its final denial of the motion after having seen the display of evidence from the website, the district court determined that the reconstruction of the website was neither necessary nor feasible, and defendant was free to elicit evidence about what was on the site and free to argue from the evidence:

> the material that is being displayed and pointed to by any witness here is readily available to you, all of it . . . you can argue context to the extent that there are or were, at one earlier previous time, materials on a website that are no longer accessible or retrievable . . . you can . . . try to elicit . . . evidence that you think is relevant about what was on or could have been on those websites. But your opportunity to address the charges directly and to represent and present a defense for your ownself is in no way circumscribed. Reconstruction of evilgx.com is not necessary. It isn't even feasible.

(11/14/03 RT 463-64; GER 230-31). These findings, made by a district court that had already seen much of the evidence at issue and was in the ideal position to determine prejudice to defendant, were not an abuse of discretion. Defendant presents no authority or reasoning to the contrary.

H. THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF A RIFLE

1. Standard of Review

The district court's ruling on the admission or exclusion of evidence is reviewed for abuse of discretion. United States v. Beckman, 298 F.3d 788, 792 (9th Cir. 2002). With respect to Federal Rule of Evidence 404(b), even if a violation occurred, reversal is warranted only if the error was not harmless. United States v. Romero, 282 F.3d 683, 688 (9th Cir. 2002).

2. Defendant's Firearm Possession Was Properly Admitted as Evidence of Defendant's Specific Intent to Threaten

Defendant moved pretrial to exclude evidence of his possession of a rifle at trial and the district court twice denied his motions. (CR 83, 104, 107, 281, 303; ER 143-48, 390-98). At trial, the testimony and display of exhibits demonstrated that defendant had a rifle with a bayonet in Los Angeles as well as New Hampshire, together with ammunition. (11/14/03 RT 588-89; 11/19/03 RT 1117, 1124-28; GER 246-47, 351-56). After the testimony was elicited, the district court instructed the jury that defendant was not charged with any weapons violations, and to consider the evidence of weapons and ammunition only for the limited purpose of determining whether the government had proven defendant's specific intent to threaten. (11/14/03 RT 588-89; 11/19/03 RT 1126-27; GER 246-47, 354-55). Because evidence of the rifle and bayonet was properly inextricable intertwined with the charged offenses, and was admitted to show defendant's intent, the district court did not err in allowing the testimony and evidence. Further, even if there somehow were error, the error was harmless as the jury acquitted defendant of the only charged count that referenced the firearm. (CR 328).

The evidence showed that Gary Winnick, the Chairman of Global Crossing, was targeted on evilgx, and Winnick's personal information was included on the website, as well as a warning from defendant to "keep your dogs at bay; I am now armed." (11/17/03 RT 688-91; GER 290-93). This threat was charged in the indictment. (ER 184). Evidence that defendant in fact had a gun when he said he was "armed" thus tended to show that defendant was the person who made the threat and that the threat referred to a weapon.[6] Defendant's gun ownership would evidence to the jury that defendant, by saying he was "armed," meant to communicate that he had a gun, thereby communicating a specific threat to injure.

he context of the threat to Winnick also referenced Hall and the attorneys representing Global Crossing, by adding "[t]hat

[6]Defendant suggested below in questioning and argument that he used the term "armed" to describe himself as "armed with information."

goes double for the psycho chick, and the 450.00 an hour attorneys." (Ex. 17; GER 504-14). The fact that defendant actually possessed a gun when he warned Winnick, Hall, Block, and Labaton that he was armed tended to prove that defendant actually had in his mind an intent to make a specific, realistic threat that corresponded to his actual circumstances, and was properly admitted for that purpose. See Beckman, 298 F.3d at 793-94 (admission of "other acts" permissible where acts are part of a single criminal transaction, or necessary to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of a crime).

Even were this Court to conclude that the ownership and possession of the gun were not inextricably intertwined with defendant's threats, the evidence of the gun was properly admitted under FRE 404(b) to show defendant's specific intent to threaten. See Beckman at 794 (where other act evidence established intent, knowledge, and lack of mistake, evidence of prior drug running properly admitted to show defendant was knowing participant in drug running scheme); Romero at 688 (prior drug sales properly admitted to disprove defendant's defense that he did not intend to distribute cocaine, but rather to steal money.)

Further, defendant addressed Hall with "I will kill you," a threat placed in the same paragraph as defendant's rather graphic description of his survival of a knife attack and query to Hall as to whether she had ever been stabbed. (ER 184; Ex. 15; GER 494-503). Again, the fact that defendant's threat referred to something the defendant in fact owned -- a knife specifically designed to be used as a weapon (the bayonet) - made it more likely that defendant intended a threat. Nor was the evidence was not overly prejudicial in light of its significant probative value. It offered the jury insight into defendant's state of mind when making the threats -- crucial evidence in that the government was required to prove specific intent to threaten. Moreover, there was nothing inherently prejudicial about defendant's ownership of these items, and defendant was free to argue that he had some legitimate purpose for owning them, such as hunting or collecting. Defendant was free to point out to the jury that there is nothing per se illegal about owning a gun, bayonet, and ammunition, and requested and received limiting instructions to that effect. (11/14/03 RT 588-89; 11/19/03 RT 1124-28; GER 246-47, 352-56).

Furthermore, the jury acquitted defendant on count three of the indictment, the count charging "I am now armed." Had inclusion of the evidence resulted in any actual prejudice to defendant, he surely would have been found guilty of the very count that the firearm was admitted to support. Because this evidence was relevant, inextricably intertwined with the threats charges, and its probative value clearly outweighed its prejudicial value, the trial court acted within its discretion in denying defendant's motion in limine. Further, any error was harmless.

I. THE INDICTMENT WAS SUFFICIENT TO PROVIDE DEFENDANT NOTICE OF THE CRIMES CHARGED

1. Standard of Review

The sufficiency of an indictment is reviewed de novo. United States v. Fleming, 215 F.3d 930, 935 (9th Cir. 2000), as is the district court's denial of a motion to dismiss the indictment. United States v. Marcucci, 299 F.3d 1156, 58 (9th Cir. 2002).

2. The Indictment Was Sufficient as Charged

Indictments are "legally sufficient if, as a whole, they adequately apprise[] the defendant of the charges against him." United States v. Severino, 316 F.3d 939, 943 (9th Cir. 2003) (quotation omitted). Because a defendant can be put on notice of a charge despite certain mistakes, "minor or technical deficiencies in the indictment will not reverse a conviction if there is no prejudice." Id. (quotation omitted). The indictment need not allege exceptions to criminal liability that the defendant might choose to assert. United States v. Green, 962

F.2d 938, 941 (9th Cir. 1992). The first superseding indictment meets this standard, and consequently the district court properly denied defendant's motion to dismiss.

Defendant first argues that the indictment "fails to state an offense because none of the alleged threats are alleged with a statement of the facts and circumstances sufficient to inform Mr. Sutcliffe of the offense under section 875(c)." (AOB 73). This claim is belied by the plain language of the indictment itself. The indictment clearly stated that defendant was a former employee of Global Crossing, and listed the names of his alleged victims and the nature of their associations with Global Crossing. (ER 183-84). It also listed the threats verbatim, as well as the date, victim, and manner delivered (all were posted on evilgx). The threats charged in counts 1-2 and 4 were explicit, direct, and personal, and did not require more "context" or explanation than was charged in the indictment. (ER 184-85). The law requires no more, and the district court did not err when it so found.

Although defendant argues at length what these threats "could" be interpreted to mean, see AOB 74-75, this is not a matter of the sufficiency of the indictment but a matter for argument, and defendant's argument was rejected by the jury when it convicted defendant of the threats charged in counts 1-2 and 4 and correspondingly found that defendant had the specific intent to threaten.[7] The fact remains that these statements were sufficiently pled as threats to injure, and the district court did not err when it so found. (See 12/4/02 RT 5 (finding that the threats counts charged "inherently threatening" conduct and finding no basis for dismissal); GER 25).

Defendant also argues that the indictment is insufficient as to counts 5-9, which charge defendant with transferring Social Security numbers with the intent to aid and abet unlawful activity -- identity fraud -- in violation of 18 U.S.C. § 1028 (a)(7). (AOB 75; ER 186-87). Defendant argues that the indictment "fails to identify any principal whom [defendant] intended to aid and abet [in committing] a criminal offense by transferring the Social Security Numbers," and "fails to allege that someone actually committed [the crime of identity fraud]." (AOB 75). This argument is, however, based on a fundamental misunderstanding of the actual charges against defendant.

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[7]Defendant's arguments are, in any event, specious. Upon hearing that they would be "sent back to Hell," a reasonable person would foresee that the listener would believe he would be subjected to physical violence upon his person (in this case, perhaps even killed, as Hell is commonly thought of as a place where dead people go) as required of a true threat. Similarly, "I will kill you" taken at its plain and literal meaning clearly indicates a threat. Defendant's contention that the statement "this is all far from over" with the words "Dead-icated to Elizabeth Greenwood" in count four did not suggest physical harm (AOB 82)is similarly unconvincing.

Defendant was not charged with a violation of 42 U.S.C. § 408(a)(7)(B) (false representation of social security number with the intent to deceive). He was charged with conduct that he clearly did himself -- the transfer of social security numbers with the <u>intent</u> to aid and abet these social security numbers' fraudulent use by others. Although defendant makes much of the fact that there was no evidence that defendant actually aided and abetted anyone, he cites no authority (and the government can find none) that supports his theory that the element of 18 U.S.C. § 1029(a)(7) requiring the government to prove <u>intent</u> to aid and abet imposes the same requirements as would the charge of aiding and abetting -- that is, a principal to be pled and proven.

The simple language of the charge, requiring only proof of the transfer itself and the corresponding intent, while not requiring that actual aiding and abetting occur, reveals that no such evidence is necessary to plead and prove a violation of 18 U.S.C. § 1029(a)(7). Had the government put on proof that the crime of 42 U.S.C. § 408(a)(7)(B) (false representation of social security number) fraudulent use of the social security numbers was actually committed, then doubtless defendant would have also been charged with aiding and abetting that crime. However, he was <u>not</u> charged with aiding and abetting that crime, therefore the government was not required to plead and prove aiding and abetting. The indictment was thus sufficient to allege an offense under Section 1028(a)(7).

Because the indictment contained the elements of all charged counts in adequate detail to inform defendant of the charges and to enable him to plead double jeopardy, the district court properly denied defendant's motion to dismiss.

J. THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO ALL COUNTS

At the close of the government's evidence, defendant made a Rule 29 motion for acquittal on all counts. (11/25/03 RT 1612; GER 402). Defendant moved for acquittal on counts 1-4 based on the credibility of the witnesses and argued that the government had failed to prove specific intent. (11/25/03 RT 1612-13; GER 402-04). As for counts 5-9, defendant argued that the evidence did not show intent to aid and abet identity theft. (11/25/03 RT 1614-16; GER 404-06). Finding that "for [defendant] to be guilty of aiding and abetting . . . he has to have intended that whoever would have access to this information would have the requisite intent to use it fraudulently" (11/25/03 RT 1617; GER 407), the district court denied the motion after hearing argument from the government. (11/25/03 RT 1620; GER 409). After the close of defendant's case, he renewed his Rule 29 motion, this time arguing lack of jurisdiction, among other things, and the motion was again denied. (12/4/03 RT 2108-09; GER 414-15).

1. Standard of Review

A trial court's ruling on a Rule 29 motion for judgment of acquittal is reviewed de novo, but the test to be applied is the same as that for sufficiency of the evidence, which is satisfied if after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. United States v. Tisor, 96 F.3d 370, 379 (9th Cir. 1996) (cit. omitted).

2. There Is No Recognized First Amendment Protection for True Threats

Defendant first argues that the charged threats are "protected speech under the First Amendment," because they were "made in the context of a labor dispute." (AOB 79). The district court previously found: "I don't think that this qualifies remotely as a labor dispute. And certainly not as a labor dispute that is something that creates an issue of speech as opposed to and in delegation of a true threat." (12/4/02 RT 4; GER 24).

Because the charged threats were true threats, defendant's argument is without merit. The threats to victims Hall and Greenwood are clearly true threats, particularly when considered in the context in which they appeared. (See Exs. 13, 15, 19; GER 480-503, 515-528). These threats included "I will send you back to Hell," "I will kill you," "I am coming to collect from you personally," "This is all far from over," a webpage "dead-icated" to Greenwood, and other text messages, together with frightening music and voice-overs that are difficult to demonstrate without an electronically-based presentation. (Id.). The communications were true threats -- serious communications of intent to harm and/or assault, intended by defendant to threaten his victims.

True threats are not protected by the First Amendment, regardless of where they originate, in a labor dispute or otherwise. United States v. Cassel, 408 F.3d 622, 627 (9th Cir. 2005) ("The Supreme Court has recognized that certain categories of speech are of such low value and inflict such serious harm that they are outside the protection of the First Amendment. One such category is composed of 'true threats'); United States v. Hanna, 293 F.3d 1080, 1084 (9th Cir. 2002) ("[T]he Court [has] left no doubt that true threats could be criminalized because they are not protected speech."); Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058, 1075 (9th Cir. 1990) ("True threats are not protected by the First Amendment and are not free speech or expression."); United States v. Orozco-Santillan, 903 F.2d 1262, 1265-66 (9th Cir. 1990) ("true" threat, where reasonable person would foresee that listener will believe he will be subjected to physical violence upon his person, is unprotected by First Amendment).

Defendant cites Watts v. United States, 394 U.S. 705 (1969), and argues that because the full text of the statements contained conditional language, the statements were not true threats. (AOB 81). Watts, however, is not on point. Watts turned on whether or not the defendant's statement to a small group of fellow teenagers at a political rally protesting the Vietnam War and the draft that "if they ever make me carry a rifle the first man I want to get in my sights is L.B.J." was a "true threat." Watts, 394 U.S. at 708. The Supreme Court distinguished that statement from a true threat on the ground that it was "political hyperbole" meant to convey "political opposition to the President" that provoked laughter from surrounding listeners. Id. Although the conditional nature of the statements in Watts was a factor in determining whether or not they constituted "true threats," conditional language alone was not dispositive.

In the instant case, unlike in Watts, defendant was not charged with making statements attacking Global Crossing in general, or expressing opposition to its policies. Rather, defendant was charged with making threats of a direct, explicit, and personal nature toward Hall and Greenwood -- threats which they testified caused them to feel fear and, in Greenwood's case, break down on the witness stand. (11/17/03 RT 700, 704, 707; GER 295, 299, 302 (Greenwood); 11/24/03 RT 1333-35; GER 394-96

(Hall)). The statements' use of conditional language, in the absence of any of the other Watts factors, is insufficient to alter their status as threats. Indeed, it is easy to imagine conditional statements that, like the statements defendant made, are true threats (e.g., "if I see you, I will kill you.").

Defendant's postings were not protected speech under the First Amendment, and the district court did not err when it so found.

3. Defendant's Motion For Judgment of Acquittal Was Properly Denied On Counts Five Through Nine

The district court was also correct in denying defendant's motion for judgment of acquittal on counts 5-9, which charged defendant with transferring social security numbers with the intent to aid and abet their unlawful use, in violation of 18 U.S.C. § 1028(a)(7). Defendant's argument is the same that he advanced in purported support of his insufficiency claim -- and again it rests on a misunderstanding of the charges and elements of proof. As argued supra in support of the government's sufficiency argument, the evidence clearly showed that defendant was guilty as charged of transferring social security numbers, in violation of Section 1028(a)(7), and the evidence also showed his corresponding intent to expose those numbers to nefarious use by unknown actors, the final element of that same statute.

Defendant was not charged with the crime of actually using the numbers fraudulently, nor aiding and abetting that use.

Ample evidence was presented at trial that defendant possessed the requisite intent under Section 1028(a)(7). Defendant indicated on his website that Global Crossing employees whose information was posted would feel "uncomfortable," and that "as time passes, this will only get worse," and acknowledged that publishing their Social Security numbers could have detrimental effects by linking the relevant page to an article outlining the dangers of identity theft. (Exs. 9, 13, 15, 17, 19; GER 459-528). He taunted his perceived adversaries with the spectre of revealing their account numbers and other personal information, indicating on evilgx that additional information as to certain individuals was only "omitted for the time being." (Ex. 13, GER 480-493). He allowed them to "opt out" by quitting Global Crossing. (Ex. 15, GER 494-503). He published a 285-page list of names and corresponding dates of birth, proclaiming that "we will be publishing everyone's SSN whose names appears (sic) on the pages below shortly. Stay tuned." (Ex. 17; GER 504-514). Everything about the way he expressed and published others' personal information indicated that he was threatening to see it used, and intending to see it used, for a bad purpose, namely, its fraudulent use by someone else. (Exs. 15, 17; GER 494-514). Some employees were merely threatened with release of personal information, and did not actually see that information placed on evilgx, but they still understood that same message and intent. (11/24/03 RT 1334-35; GER 394-95). The district court correctly determined that there was enough evidence of the charged crimes to require submission to the jury.

Nor was defendant entitled to acquittal based on the alleged lack of an interstate threats/interstate commerce nexus. The evidence at trial showed that defendant was living in Los Angeles at the time the website was first established, but moved from Los Angeles to New Hampshire in November 2001. (11/14/03 RT 582, 601; GER 244, 248). The evidence also demonstrated that the various hosts of evilgx.com at the relevant time periods were located outside of California and New Hampshire; thus the contents was uploaded to the Internet website in interstate commerce and from state to state. (11/19/03 RT 1107-08; 11/24/03 RT 1239-41, 1282, 1308; GER 365-67, 371, 385). By transmitting his writings and other components of his web pages from his home computer to his various Internet Service Providers and onto the Internet, defendant not only transmitted his threats from state to state but also in interstate commerce by virtue of his use of the Internet, an instrumentality of interstate commerce.[8]

[8]Likewise, defendant's argument that the website disclaimer can somehow exempt him from criminal liability (AOB 86-87) is made without authority and is meritless.

K. THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN INSTRUCTING THE JURY REGARDING THREATS

1. Standard of Review

Whether a jury instruction misstates elements of an offense is reviewed de novo. United States v. Phillips, 367 F.3d 846, 854 (9th Cir. 2004). Improperly instructing the jury on an element of the offense is subject to harmless error review. Neder v. United States, 527 U.S. 1, 15 (1999).

2. The Instructions in Their Totality Were Correct

At sentencing, the district court instructed the jury as to the charged threats counts:

> In order for the defendant to be found guilty of [violating 18 USC 875(c)], the government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant knowingly and intentionally transmitted a communication in interstate commerce.
>
> Second, that communication threatened to injure a person.
>
> Third, the defendant had the specific intent to threaten.
>
> The government is not required to prove that the defendant intended to carry out the threat, or had the ability to do so, but it must prove that the defendant had the specific intent that the communication would threaten."

(12/4/03 RT 2124-25; GER 416-17).

In clarifying the applicability of the First Amendment to the charges, the district court added, in part:[9]

> True threats are not protected by the First Amendment and are not free speech or expression. A statement is a true threat where a reasonable person would foresee that the listener will believe he or she will be subjected to physical violence upon his or her person.

(12/4/03 RT 2126-27; GER 418-19).

Defendant argues that this additional instruction did not contain the proper definition of a true threat. (AOB 87-89). Under Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058, 1075 (9th Cir. 2002), this instruction contained a correct statement of the law as to true threats at the time it was given. Although the Supreme Court's opinion in Virginia v. Black, 538 U.S. 343, 359-60 (2003), contained dicta defining "true threats" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," this "subjective test" for true threats was not formally adopted by this Court until 2005, well after defendant's conviction. See United States v. Cassel, 408 F.3d 622, 633 (9th Cir. 2005) (noting that Black's subjective test was "in tension" with prior holdings, and concluding that Black's definition must

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[9]The complete instruction is set forth at pp. 10-11, supra.

control). Indeed, this Court in United States v. Stewart, 420 F.3d 1007, 1017 (9th Cir. 2005), observed that prior to 2005, some form of the objective test had been used in this circuit for more than 30 years.

In this case, the jury was properly instructed that they must find specific intent to threaten in order to convict. See United States v. Twine, 853 F.2d 676, 679-81 (9th Cir. 1988); United States v. King, 122 F.3d 808, 809-810 (9th Cir. 1997). Therefore, the jury necessarily found that defendant met the subjective intent test laid out in Black, 538 U.S. at 359-60, and adopted by this Court in Cassel, 408 F.3d at 633. Because the district court also provided the objective-test instruction, the jury here effectively found that defendant made true threats under the objective test, and he also had the subjective intent to make the threats. Thus, any error in instructing the jury was harmless.

L. DEFENDANT'S CASE SHOULD NOT BE REMANDED FOR RESENTENCING

1. The Trial Court Did Not Violate Defendant's Sixth Amendment Right to Counsel at Sentencing

a. Standard of Review

Whether a defendant was denied his Sixth Amendment right to counsel is reviewed de novo. United States v. Ortega, 203 F.3d 675, 679 (9th Cir. 2000). A district court's denial of a request for substitution of counsel is reviewed for abuse of discretion. United States v. Moore, 159 F.3d 1154, 1158 n.3 (9th Cir. 1998). A district court's decision to allow a pro se defendant to proceed with co-counsel or advisory counsel is also reviewed for abuse of discretion. United States v. George, 85 F.3d 1433, 1439 (9th Cir. 1996).

b. Argument

Immediately after the jury returned its guilty verdicts, the district court addressed standby counsel Reed:

> Mr. Reed, I am not going to relieve you of your duties as standby counsel. I am requesting that you discuss with [defendant] whether he wants you to prepare the appropriate materials, or any materials, for purposes of sentencing. And if he agrees to have you do so, then I think it would be in his interests and I would prefer that you do so.
>
> I will allow you to confer with him about that aspect of the remaining part of the case. And whatever the signal is . . . just let the clerk know whether you have been engaged to handle the sentencing materials.
>
> Even if his decision is to not request [or authorize that you] handle the materials on sentencing, I may do some research and determine whether that's a right that he has. If he has that right, I'll respect it. If not, I may require you to perform additional services for purposes of sentencing.

(12/4/03 RT 2194; GER 420).

Thus the district court, in the presence of both defendant and Reed, encouraged defendant to utilize Reed as his counsel.

On January 7, 2004, the district court ordered Reed to prepare and file a sentencing memorandum and respond to whatever the government might file regardless of whether defendant authorized the filing. (CR 335). On March 1, 2004, the district court reiterated that it had appointed Reed to represent defendant at sentencing, although both Reed and defendant were permitted to file independent pleadings. (CR 357). On March 11, 2004, defendant filed an objection to the language in that minute order, and "renewing" his motion for "assistance" of counsel (presumably in lieu of "appointment"). (CR 370; ER 454-60). Since defendant already had counsel available to him in the form of Reed, his motion for assistance was actually yet another request for appointment of yet another attorney. Construing it as such, the district court issued an order clarifying that defendant was still free to conduct his own arguments at sentencing as he saw fit. (CR 369; ER 462).

Despite the availability and assistance of Reed at sentencing, defendant now argues that he was denied counsel at sentencing. A pro se defendant's failure to utilize an advisory or standby counsel, with full knowledge of the right to do so, amounts to a waiver of the right to counsel. United States v. Hodge, 414 F.2d 1040, 1044 (9th Cir. 1969). Furthermore, it is constitutionally permissible for a defendant to be given a choice between representing himself and proceeding with appointed counsel with whom the defendant has disagreements. Robinson, 913 F.2d at 716; United States v. Flewitt, 874 F.2d 669, 672-73 (9th Cir. 1989). Having validly waived his right to counsel at trial, defendant faced a constitutionally permissible choice between representing himself at sentencing, or requesting that his pro se status be terminated and appointed standby counsel David Reed be made full counsel of record. Hodge, Robinson, and Flewitt make it clear that the trial court had no duty to appoint yet another (seventh) attorney more to the defendant's liking. The record indicates that even had the Court considered making such an appointment, defendant would not have made a good faith effort to work with counsel. Therefore, the trial court was within its discretion in denying defendant's motion, and defendant's right to counsel at sentencing was not violated.

2. Defendant Cannot Show A Reasonable Probability That His Sentence Would Have Been Different Absent *Booker* Error

a. Standard of Review

Unpreserved error in applying the mandatory sentencing guidelines in effect before United States v. Booker, 543 U.S. 220 (2005), is reviewed for plain error. United States v. Ameline, 409 F.3d 1073, 1079 (9th Cir. 2005). A district court's application of the Sentencing Guidelines to the facts of a particular case is reviewed for an abuse of discretion. United

States v. Miquel, 368 F.3d 1150, 1155 (9th Cir. 2004). A district court's factual findings in the sentencing phase are reviewed for clear error. United States v. Nielsen, 371 F.3d 574, 582 (9th Cir. 2004).

b. Argument

Well after the imposition of defendant's sentence and the filing of his notice of appeal (CR 393), the Supreme Court decided Blakely v. Washington, 124 S. Ct. 2531 (2004), which led to the elimination of the mandatory federal sentencing guidelines in United States v. Booker, 543 U.S. 220 (2005). Because defendant was sentenced pre-Booker and did not raise a Sixth Amendment objection at sentencing, defendant's sentence only violates his Sixth Amendment rights and merits relief if it constitutes "(1) error, (2) that is plain, and (3) that affects substantial rights." Ameline, 409 F.3d at 1078 (citing United States v. Cotton, 535 U.S. 625, 631 (2002)). The first and second prong are satisfied by virtue of the sentencing judge's enhancement of defendant's sentence based on judicial findings of fact under the then-mandatory guidelines. Id. In order to satisfy the third prong, "[defendant] must demonstrate a reasonable probability that he would have received a different sentence had the district judge known that the sentencing guidelines were advisory." Id. Defendant has not made this demonstration, and thus the instant case should not be remanded to the district court for resentencing.

Nowhere in his opening brief does defendant provide any indication, nor even argue that his sentence would have been different had the district court construed the Guidelines as advisory. Although "the record in very few cases will provide a reliable answer to the question of whether the judge would have imposed a different sentence had the Guidelines been viewed as advisory," Ameline, 409 F.3d at 1079, the district court's findings and observations from defendant's sentencing hearing completely belie the assertion that a lower sentence would have resulted absent mandatory guidelines. The district court was free to sentence defendant anywhere in the applicable guideline range, yet the court chose to sentence defendant at the highest available point, suggesting that if unconstrained by the Guidelines it would have sentenced defendant more harshly.

Now that defendant has served the 46-month sentence previously imposed, the only relevant issue is whether the district court might shortened defendant's three-year supervised release term. But defendant never argued for such a reduction, and the circumstances of this case, involving a defendant eminently in need of supervision, indicate it would not have done so.

At the sentencing, the district court took particular notice of defendant's "pervasive attempts to avoid detection" by law enforcement, the "remarkable sophistication" defendant showed by the means he used to carry out his scheme, and that defendant's challenge to the enhancement based on an intent to carry out his threats was "unpersuasive and unwarranted." (4/15/04 RT 16-22; GER 423-29). The court even chose to depart upward and increase defendant's criminal history category, noting defendant's background of "bizarre," "chilling," and "facially unlawful" acts that had not resulted in prior criminal convictions, and stated "[t]his case is <u>so beyond the heartland</u> of category one criminal history offenders . . . that I have no doubt that increasing it is the appropriate and warranted thing to do." (4/15/04 RT 25-26; GER 432-33) (emphasis added). On its decision to impose a sentence at the high end of the Guideline range, the district court commented: "it's a reflection of my very considered view that the offenses that [defendant] committed warrant very firm punishment." (4/15/04 RT 75; GER 454). The district court added: "[i]f there were a crime . . . that consisted of arrogance, I would depart upward to sentence you to a much longer sentence." (<u>Id.</u>).

In sum, there is nothing in the record to indicate defendant's substantial rights were affected by the <u>Booker</u> error in his sentence, nor is this a case where the record is simply silent on the issue. This is one of the few cases where the record provides assurance that the district court would not have imposed a lower sentence[10] had it known the guidelines were advisory. Defendant's sentence should stand.

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[10]The government is not seeking an Ameline remand.

V

CONCLUSION

For the reasons set forth above, defendant's conviction and sentence should be affirmed.

Dated: August 21, 2006

Respectfully submitted,

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STATEMENT OF RELATED CASES

The government is not aware of any related cases currently pending.

Form 8. **Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number** 04-50184

(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant ***and attached to the back of each copy of the brief***

I certify that: **(check appropriate option(s))**

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

☑ Proportionately spaced, has a typeface of 14 points or more and contains 18,175 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

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__2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

❑ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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9/21/06 ____________________ [signature] ____________________

Date | Signature of Attorney or Unrepresented Litigant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEVEN WILLIAM SUTCLIFFE, Defendant-Appellant.	)	C.A. No. 04-50189 D.C. No. CR 02-350(A)-AHM CERTIFICATE OF SERVICE BY MAIL

I, Arthur Moreno, declare:

That I am a citizen of the United States and a resident of Los Angeles County, California; that my business address is 312 North Spring Street, Los Angeles, California 90012; that I am over the age of 18 years, and am not a party to the above-entitled action; that on August 21, 2006, I caused to be deposited in the United States mails in Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of: **GOVERNMENT'S ANSWERING BRIEF**

Addressed to: **SUNG B. PARK, ESQ.**
17620 Sherman Way
Suite 211
Van Nuys, CA 91406

at his last known address, at which place there is a delivery service by United States mail.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: This 21 day of August 2006.

Arthur Moreno