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2 IN THE UNITED STATES DISTRICT COURT

3 CENTRAL DISTRICT OF CALIFORNIA

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

CASE NO. CR 02-350-AHM

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16 REPORTER'S TRANSCRIPT OF PROCEEDINGS
17 LOS ANGELES, CALIFORNIA
18 APRIL 16, 2002
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23 LYNNE SMITH
24 OFFICIAL COURT REPORTER
25 UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

APPEARANCES:

ON BEHALF OF PLAINTIFF:

OFFICE OF THE UNITED STATES ATTORNEY

BY: ELENA DUARTE

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ON BEHALF OF DEFENDANT:

FEDERAL PUBLIC DEFENDERS OFFICE

BY: HILLARY POTASHNER

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321 NORTH SECOND STREET

LOS ANGELES, CALIFORNIA 90012

1 TUESDAY, APRIL 16, 2002; LOS ANGELES, CALIFORNIA

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3 THE CLERK: Item Number 4, CR 02-320-AHM, United
4 States of America versus Steven William Sutcliffe. Counsel,
5 please state your appearances.

6 MS. DUARTE: Good afternoon, Your Honor. Elena
7 Duarte on behalf of the government.

8 MS. POTASHNER: Hillary Potashner for
9 Mr. Sutcliffe who is present.

10 THE COURT: We're here on the government's
11 application for review of the terms of at we're previously
12 accepted or proposed by Judge Woehrle. I have read the
13 government's memorandum, the indictments, pretrial services
14 report which I think was virtually identical to the one
15 previously submitted to Judge Woehrle who cover page says
16 there's no new information and contains the same
17 recommendation that pretrial services previously reached
18 which is that there no circumstances six that secure the
19 defendants appearance at future court proceeding for safety
20 of people in the community. I have also read the complaint.
21 That was before the indictment was filed, declaration of FBI
22 agent Jeffrey Cutrow. And finally the indictment, if I
23 didn't previously mention that.

24 Are there any additional papers that are
25 applicable to this particular motion that I haven't recited

1 already?

2 MS. POTASHNER: The preliminary hearing transcript
3 that was considered but I'm not sure if Your Honor has a
4 copy.

5 THE COURT: I don't have a copy. I saw there was
6 a 171 page transcript that Judge Woehrle allowed each of
7 you, I'm not sure who was at the hearing before her, allowed
8 both sides to present a proffer of their effort to summarize
9 what that transcript reflected. Is that correct?

10 MS. DUARTE: That's correct.

11 THE COURT: Do you either of you think that would
12 be helpful to me?

13 MS. POTASHNER: I do think that would be helpful.

14 MS. DUARTE: The proffer or the transcript?

15 THE COURT: The proffer. I don't have time to
16 read a 171 page transcript.

17 MS. DUARTE: Your Honor, the government set forth
18 its proffer in its memorandum which the court indicates it's
19 read. To the extent -- I tried to set forth the defense
20 proffer.

21 THE COURT: I saw that footnote where you
22 apologized in advance. I doubt if there is anything to
23 apologize for. You have right to be heard about your
24 proffer. Let's start with that. Why don't you address me
25 from the lectern, please.

1 MS. POTASHNER: Yes, Your Honor. Your Honor, if
2 the court just wants me to address exactly what I took out
3 or explained to Judge Woehrle from the preliminary
4 examination I will limit my comments to that. What I tried
5 to --

6 THE COURT: Start there. I don't know if I need
7 to limit you there but feel free to start with that.

8 MS. POTASHNER: I proffered that if the court
9 looks at the indictment and compares it to the complaint and
10 then compares it to the preliminary hearing where the
11 allegations of threats and the comments that were made on
12 the Internet were explored in the greatest depth, I think
13 the court can see that the indictment puts in it the worst
14 possible light. What I went through previously, and it did
15 take some time, was comparing the three documents.

16 When you look at the indictment, Counts 1 through
17 4, the list four alleged threats. When you compare Count 1
18 which appears that it's being alleged that Mr. Sutcliffe
19 stated on the Internet: I will personally send you back to
20 hell from where you came.

21 When you compare that to the affidavit supporting
22 the initial complaints you will see that's taken out of
23 context. That's on page nine of the complaint. When you
24 look at the context what it says is there's two paragraphs
25 and in the second paragraph it says: To close Tracy Hall,

1 if you call my house again if you threaten me or my family
2 or I will -- and then that quote follows. So really --

3 THE COURT: Why do you think it's either out of
4 context or somehow that even though it was proceeded by the
5 conditional word "if" it mitigates the seriousness of the
6 allegation?

7 MS. POTASHNER: When you take that in context with
8 what Mr. Sutcliffe did at the time. What was going in this
9 case, Your Honor was there was a civil case proceeding.

10 THE COURT: Hall was trying to serve him with a
11 subpoena.

12 MS. POTASHNER: Yes. At that time, during that
13 time period rather than Mr. Sutcliffe trying to contact or
14 get close to anyone connected to the Global Corporation he
15 did exactly the opposite. He moved to New Hampshire to get
16 away from them because he perceived they were a danger to
17 him.

18 THE COURT: You know, danger takes on more than
19 one form. Danger can consist of violence and can consist of
20 other kinds of incredibly disruptive intrusions. Getting
21 the way in this world of computers and the Internet also has
22 more than one meaning. I get your point that he was no
23 longer in California. And no longer, for example, picketing
24 or demonstrating as was his right probably in front of
25 Global Crossing headquarters. But getting away is something

1 of an allusion when the form or mechanics that someone
2 chooses to engage in to either issue threats or engage in
3 other forms of non-immediately physical assault is the
4 computer and the Internet. You are not away from anybody.
5 Being in New Hampshire is not different than being next
6 door.

7 I don't really see that it's being taken out of
8 context, nor do I think it's a mitigating consideration that
9 it happened while he was maybe trying to build a new or
10 different life for himself in New Hampshire.

11 MS. POTASHNER: My point, Your Honor, was that if
12 the court is looking at whether he is a physical dangers to
13 the persons in this community, I think it's important to put
14 it in context to what he was doing at the time, rather than
15 physically threatening them or trying to get closer to them
16 or post some sort of immediate danger of the level where
17 detention would be required in this case.

18 I think it's important to look at what his actions
19 were, that he was not on the Internet just spuing these
20 threat. That he was in a responsive position saying stay
21 away from me.

22 On top of his position being a responsive position
23 that he was physically removing himself from the local
24 environments because that to me speaks to how dangerous he
25 is, physically dangerous. I would think that would be an

1 important consideration when detaining someone if they're
2 actually posing a physical danger. Otherwise, if it's more
3 a threat where it's not of such a physical nature I believe
4 the conditions previously set could be conditions that
5 adequately insure the safety of the community.

6 My point was that that sentence truncated the
7 way it is, makes it, puts it in a different light than what
8 was actually going on. I also highlighted that Count 3,
9 when you look at keep your dogs at bay, I'm now armed. If
10 you look at the affidavit, page 14, what he's referring to
11 being armed with is information. It makes it appear that
12 he's armed, physically armed and physically threatening with
13 a weapon.

14 I don't read that, when you look at the context I
15 don't read that that way. It appears to me he's armed with
16 information about Class 1 security regions, Class 2 security
17 regions. That's information and maybe that's information
18 that could be used against someone but it's not the same
19 sort of immediate physical threats.

20 THE COURT: Well, I agree with that proposition
21 that it's a different kind of threat and there may not be a
22 physical threat if indeed that's what armed refers. You may
23 be right, that's what it refers to. It's not entirely clear
24 from the context. But it's an inherently threatening
25 communication.

1 MS. POTASHNER: Yes, Your Honor. I'm not saying
2 that there's not an issue that the government can say that
3 that's threatening. I agree with that. But again, what I'm
4 trying to say --

5 THE COURT: Isn't that correct -- I'm going to
6 interrupt you because there's so much on my calendar that I
7 want to make sure I give you a chance but I have to be
8 focused on this. Am I not correct that at the time that
9 Mr. Sutcliffe was arrested weapons were in fact found in his
10 residence?

11 MS. POTASHNER: When he was arrested in New
12 Hampshire I believe there was a rifle of some sort in his
13 residence, yes.

14 THE COURT: And ammunition.

15 MS. DUARTE: Yes, Your Honor, found together
16 behind his bedroom door.

17 THE COURT: That's what I thought.

18 MS. DUARTE: It was an SKS rifle, Your Honor.

19 MS. POTASHNER: Your Honor, if I could have a
20 moment.

21 (BRIEF PAUSE)

22 MS. POTASHNER: I think it's also important to
23 note, yes, there was a weapon, apparently it was boxed and
24 there was ammunition in a different box. But in the hearing
25 that took place in New Hampshire, the full day hearing, the

1 court did make a finding. Of course this court is not bound
2 by that court's finding but by looking at whether Mr.
3 Sutcliffe posed a danger to the people in New Hampshire,
4 knowing that information and reviewing and listening to the
5 witnesses the court did find that he would ot pose a threat
6 to New Hampshire. The quote is on page 163 of the
7 preliminary hearing, line 11, says, I wouldn't find him a
8 danger to this community. That's where the rifle was found,
9 that was where the ammunition was found.

10 So I think yes, it's true that he did have a
11 weapon but there's no indication that he ever physically
12 threatened anyone with that weapon or there was a problem of
13 a prior use of that weapon.

14 THE COURT: You know, I'm not sure of where that
15 argument takes you or takes me. I'm looking at the written
16 order that the magistrate judge issued that said at the end
17 of the complaint apparently was filed in the district New
18 Hampshire March 29, it states very clearly that the
19 magistrate judge there after this apparently unusually
20 lengthy hearing concluded by clear and convincing evidence,
21 or found by clear and convincing evidence that Mr. Sutcliffe
22 is a danger to those in California to whom he has posted
23 threats and there is no combination of conditions which can
24 assure the safety of the California community.

25 Why would it be appropriate for me to disregard

1 that danger, if it does exist, to people in this community.
2 The indictment has been returned here. And the issue of
3 flight or appearance, which we haven't yet addressed, would
4 make it extremely ill-advised I think and it wasn't within
5 Judge Woehrle's contemplation either that your client would,
6 pending trial, be situated anywhere else.

7 So this is the community that I really need to
8 evaluate.

9 MS. POTASHNER: I agree. And I believe in Judge
10 Woehrle's evaluation -- of course it's Your Honor's
11 evaluation that counts, but in Judge Woehrle's evaluation
12 she had a lengthy conversation with Leslie McAfee who is an
13 attorney in this community, who is willing to act as a
14 custodian and a surety. And in terms of the papers that
15 were filed by the government, I received a copy a few
16 minutes before this hearing, for whatever reason I just got
17 it. I would disagree.

18 THE COURT: Got what?

19 MS. POTASHNER: The paper.

20 THE COURT: The memorandum?

21 MS. POTASHNER: Yes.

22 THE COURT: Did you have a chance to review it?

23 MS. POTASHNER: I did review it right before the
24 hearing. What I would like to say about that is that I
25 disagree with the characterization of what Leslie McAfee

1 said to the court.

2 THE COURT: Tell me, in what respect you disagree.
3 I think her characterization begins on Page 6.

4 MS. POTASHNER: Thank you, Your Honor. I disagree
5 of the characterization of his fitness as a surety. I would
6 respectfully submit I think he's a good surety, that he's a
7 good custodian. He's been in our community practicing law
8 with no discipline and good standing with the bar. He's
9 been evaluated as a person of good moral turpitude to the
10 level where he can practice law in our community. I believe
11 that he would act as a good surety.

12 THE COURT: Turn to Page 7.

13 MS. POTASHNER: Yes.

14 THE COURT: Is it correct that at the hearing
15 before Judge Woehrle Mr. McAfee disclosed that he has many
16 guns at his home and is himself a collector?

17 MS. POTASHNER: Yes. He also stated he would
18 remove all the guns from his home prior to Mr. Sutcliffe
19 being put into his home.

20 THE COURT: That's not in here. The gist of what
21 I construed this account to reflect was that he was opposed
22 to removing them because it says he argued against their
23 removal.

24 MS. DUARTE: He did argue against their removal
25 and Then he told the judge that it was a 3,000-pound safe

1 and he didn't know how he could move it. And then the judge
2 said, Mr. McAfee I understand your concerns and I'm not
3 asking you serve as a surety. But I all telling you that if
4 you're going to serve as a surety you're going to have to
5 get rid of those guns, to which he replied he wasn't sure he
6 felt comfortable.

7 That's when they went into the conversation about
8 the second thing he didn't feel comfortable about, which Ms.
9 Potashner may degree with me on as well.

10 THE COURT: Having Mr. Sutcliffe be confined to
11 his home?

12 MS. DUARTE: Correct.

13 THE COURT: Were there any other people living at
14 that home?

15 MS. POTASHNER: Yes. His wife lives with him
16 and their 20 year old child, adult child. What, I have had
17 many conversations with Mr. McAfee, unfortunately because he
18 had a family emergency on such short notice he was not able
19 to be here today.

20 What he advised me and what he would like me to
21 advise Your Honor, is that he is 100 percent willing to
22 remove the weapons from his home. He is a gun collector
23 which is within in his rights but he understands and
24 respects the court's order.

25 So the court made it very clear last week that he

1 could not have guns in his home and that's not a problem.

2 In terms of his characterization of whether we
3 feel comfortable with him remaining at his home, what Mr.
4 McAfee was trying to advise the court and ask the court, as
5 posed to object to the court's conclusion was he thought it
6 would be a more constructive use of Mr. Sutcliffe's time to
7 come with him to his office every day and work at his
8 office, rather than just be left under electronic monitoring
9 at his home. That would be a more constructive positive use
10 of Mr. Sutcliffe's time.

11 He did not mean that to imply that he could not
12 stay at his home. Of did not want him to stay at his home.
13 He was merely as an officer of the court engaging in a
14 pretty long conversation with the court, trying to come up
15 with suggestions for the court.

16 THE COURT: Did Mr. McAfee refuse to provide
17 justification as a surety?

18 MS. POTASHNER: There was a justified bond ordered
19 and he signed it. The court did not order a full deeding of
20 the house but it is a justified property.

21 THE COURT: In the amount of \$10,000?

22 MS. POTASHNER: No. That's Mike Sutcliffe was
23 ordered a \$10,000 appearance bond, unjustified. Leslie
24 McAfee, the order was a \$75,000 justified bond, which I have
25 the signed bond.

1 MS. DUARTE: That's on here.

2 THE COURT: I see that. The only account I have
3 in writing of what Judge Woehrle ordered is on the first and
4 second pages of the government's memorandum. Is there a
5 bail order or form that she signed?

6 MS. DUARTE: Not that I have seen, Your Honor. I
7 did make a couple calls trying to get the tape so at least I
8 could provide it where we may disagree. I was unable to
9 that today again.

10 MS. POTASHNER: There was a bond filled out and
11 Mr. Sutcliffe signed the bond. And then it was returned to
12 the court's clerk. So I would think it would be in the
13 court file.

14 THE COURT: Well, I don't really have to address
15 the question of flight and terms of release if I conclude
16 that there's a danger to the community, correct?

17 MS. POTASHNER: That is correct.

18 THE COURT: Have you given me all of the arguments
19 that you want me to consider as to why there is not a danger
20 to the community?

21 MS. POTASHNER: Your Honor, I didn't have a chance
22 to thoroughly read the government's papers. I can tell you
23 that previously in addressing the court I went through
24 talking about the -- there were three things. The first one
25 was the KILLERCOP.com. I know that was an issue previously.

1 I don't know if it's an issue for the court. But what I
2 thought was important at the preliminary hearing, that came
3 out in the preliminary hearing, on the bottom of every
4 single page, except for the opening page it said this is a
5 fiction, and I'm paraphrasing. I believe the quote was,
6 Fiction and/or personality parody, on every single page.

7 I also pointed out that that the quote/unquote
8 weapons that were available for, apparently available to
9 purchase, that there was no indication that they were
10 actually ever available. No one every tried to buy any of
11 them. And the weapons were ridiculous and obvious a parody
12 in and of themselves.

13 Of the final one being The Bee Stinger, which is
14 on Page 65, preliminary hearing, which purports to be a
15 weapon where you can shoot bees at somebody. It's obviously
16 a parody, obviously ridiculous.

17 The other thing I pointed out on that site, there
18 was an opening legal statement talking about how this offer,
19 this site does not advocate, encourage or condone any
20 conduct that is illegal at any time. I thought that was
21 significant and that came out in the preliminary hearing. I
22 also thought it was significant --

23 THE COURT: Ms. Potashner, if you have an
24 intelligent, sophisticated, deliberately functioning
25 individual who can incorporate those kinds of qualifying

1 terms and disclaimers into anything that's posed. And the
2 mere fact that they are included and incorporated would be
3 on its face sufficient to take away the potential and
4 otherwise clear significance of the threats or the
5 invitations or the means of communicating danger to other
6 people or subjecting other people to invasions of their
7 security and privacy.

8 Then what would be the capacity of law enforcement
9 and of the courts to prevent this kind of conduct? One
10 could be an open invitation to simply put the disclaimers in
11 every single time.

12 MS. POTASHNER: Of course. The disclaimers in and
13 of themselves does not make something that is dangerous not
14 dangerous. But I think the disclaimers in connection with
15 the site itself, which is obviously a parody, which is
16 obviously, I don't think that a weapon could be created to
17 shoot bees across a space, to train bees to go after a
18 particular target. It's a ridiculous weapon. It's not a
19 weapon that exists.

20 I also think it's important that looking at that
21 site that these weapons were not actually -- there was no
22 evidence that anything was ever means or way to buy these
23 weapons. And lastly, that he was never prosecuted. That it
24 was something that was investigated and apparently deemed
25 not a serious threat because he could have prosecuted and

1 was not prosecuted.

2 THE COURT: Where is the information about the
3 investigation of that, where in the record is that?

4 MS. POTASHNER: I don't have a cite for where it
5 is.

6 MS. DUARTE: Your Honor, you mean in the
7 preliminary hearing?

8 THE COURT: Before me.

9 MS. DUARTE: In the complaint about the
10 KillerCop.com investigation.

11 THE COURT: Where?

12 MS. DUARTE: Toward the end, Page 20 of the
13 complaint, Paragraph 28, previous threatening activity.

14 THE COURT: And KILLERCOP.com is on Page 21. Top
15 of page 21.

16 MS. DUARTE: Yes, Your Honor. Begins on Page 21.

17 THE COURT: It's consistent with what you say,
18 Ms. Potashner because it looks like the LAPD was successful
19 in having the KILLERCOP website removed from the host site.
20 Is that correct?

21 MS. POTASHNER: I believe so, yes.

22 MS. DUARTE: I believe that's correct, Your Honor.
23 I don't know details about if and why the case was reviewed
24 or declined by the DA'S office.

25 THE COURT: Anything further, Ms. Potashner?

1 MS. POTASHNER: Not in comparing these different
2 records. I did make a statement as to Mr. Sutcliffe's prior
3 criminal record and what I extracted from that, if the court
4 wants to hear that.

5 THE COURT: I do because I was quite concerned
6 about that. Let me look at the portion of the pretrial
7 services report where that's set forth. It's beginning on
8 Page 6. And what did you want to tell me about those
9 various convictions, many of which were violent crimes.

10 MS. POTASHNER: If I can have a moment to find it,
11 Your Honor.

12 THE COURT: It's on Page 6 on the report that was
13 submitted to Judge Woehrle.

14 MS. POTASHNER: Thank you, Your Honor. The first
15 thing I wanted to tell Your Honor is in the last 13 years it
16 appears that he's been convicted of one crime and one crime
17 only, infraction of disturbing the peace.

18 Any record, I think it's fair to say is nearly
19 ancient. It's over 13 years old.

20 THE COURT: Was Mr. McAfee part the scene on the
21 occasion where he was arrested for that offense; was he
22 physically there?

23 MS. POTASHNER: I don't know the answer to that,
24 Your Honor.

25 THE COURT: Do you?

1 MS. DUARTE: I don't know either, Your Honor.
2 Mr. McAfee did indicate in the hearing yesterday that he'd
3 known Mr. Sutcliffe for approximately three years, which
4 seems to indicate that any conduct he spoke about would have
5 happened within the past three years.

6 THE COURT: But I think you told me that he made
7 some kind of cryptic statement.

8 MS. DUARTE: Yes, he did. That was a concern.
9 That is on page --

10 THE COURT: It's on your Page 6. He commented
11 that he had never known the defendant to be violent, even
12 when both he and the defendant were faced by LAPD officers
13 pointing guns at them.

14 MS. DUARTE: He did make that comment, Your Honor.
15 And the case agent who was present remembers it as well. I
16 couldn't offer it verbatim to the court. But I remember
17 that very vividly because that's one of the occasions where
18 I asked for cross-examination.

19 THE COURT: Okay. Please wait.

20 (DEFENDANT AND MS. POTASHNER CONFER)

21 THE COURT: Do you know anything about that,
22 Ms. Potashner?

23 MS. POTASHNER: About which one?

24 THE COURT: About McAfee being present when LAPD
25 had an encounter?

1 MS. POTASHNER: I believe there was a question of
2 making a civilian arrest. And when Mr. Sutcliffe was in
3 court he attempted, in court, to place the LAPD officers
4 under citizens arrest.

5 THE COURT: That was the offense when he was
6 thrown out of the criminal courts building?

7 MS. POTASHNER: I don't know if he was thrown out.
8 What I'm being told is that it was at the city attorney's
9 office during a deposition and at that point, upon him
10 trying to make a citizens arrest guns were drawn.

11 It does not sound like Mr. McAfee was in the
12 streets and in a position where he was being stopped at gun
13 point by the police.

14 THE COURT: Was that the offense that occurred on
15 March 2nd of 1997?

16 MS. POTASHNER: I don't believe so.

17 THE COURT: That was sometime later.

18 MS. POTASHNER: No, it was a different occasion.
19 Apparently the 1997 was at a beach at Venice Beach.

20 THE COURT: Okay. So relatively remote
21 convictions is one point you're making, except for the '97
22 one.

23 MS. POTASHNER: It's my understanding it was
24 resolved with a fine as an infraction.

25 THE COURT: I didn't have the time to do the

1 research but under 3142(e) what the convictions that he
2 incurred for assault and battery with a dangerous weapon,
3 for robbery, for assault and battery in 1985 and 1987, for
4 assault and battery in '86, would those constitute violent
5 crimes within the meaning of 3142(f(1), sub section A?

6 MS. POTASHNER: I don't know the answer to that,
7 Your Honor.

8 MS. DUARTE: I don't have any specific information
9 but just looking at 3156 which contains the definitions,
10 that would be (a(4) A and B, defining a crime of violence.
11 Would the court like --

12 THE COURT: I see it here. Your answer would be
13 yes.

14 MS. DUARTE: It does appear to be, Your Honor.

15 THE COURT: That's what I thought. I couldn't
16 find that definition section.

17 MS. DUARTE: It does not appear to require a
18 felony, Your Honor.

19 THE COURT: There are others I haven't mentioned
20 which apparently are not felonies.

21 All right. Well, is there anything further you
22 want to add, Ms. Duarte, that you didn't submit in your
23 memorandum?

24 MS. DUARTE: Your Honor, I'm prepared to submit it
25 on the memorandum unless the court has questions. I'm

1 prepared to proffer an answer to Ms. Potashner's answer if
2 the court is interested. But otherwise I will submit.

3 THE COURT: To which concerns?

4 MS. DUARTE: Any the court might have questions.
5 For instance, the comparison that she made with Count 1.
6 The answer to her argument that because defendant moved the
7 danger is abated. It's seemed though the court was quite
8 active in the discussion and didn't need to hear --

9 THE COURT: I think those questions have been
10 addressed. I don't think you need to address those
11 yourself.

12 MS. DUARTE: I have nothing but submitting on the
13 record as it is.

14 THE COURT: One question to you, Ms. Potashner.
15 Is the GX and the website identified the indictment
16 EvilGX.com, does GX stand for Global Crossing?

17 MS. POTASHNER: I believe so.

18 MS. DUARTE: That's the ticker symbol in the
19 financial world.

20 MS. POTASHNER: Your Honor, if the court is
21 inclined to detain Mr. Sutcliffe pending trial in this case
22 I would ask the court to at least, prior to making that
23 order, have an opportunity to hear from Mr. McAfee. I think
24 Mr. McAfee is an important component to this question of
25 whether or not there can be a situation where the court

1 could find that the community was not at danger.

2 I think Mr. McAfee's situation is significant, how
3 he lives, where he lives, how he could be a custodian. I
4 think that's important. I would ask the court, before the
5 court detained Mr. Sutcliffe to give Mr. McAfee a chance to
6 come to court and explain why he is reasonable custodian and
7 a reasonable surety.

8 THE COURT: Well, I'm going to detain
9 Mr. Sutcliffe. At the conclusion of my recital I will tell
10 you certain things I would want to have probably asked Mr.
11 McAfee. You can go back and you can explore those things
12 with Mr. McAfee. If you think that the answers that he
13 would give me, that he would give under oath and subject to
14 cross-examination would cause me to reconsider my ruling
15 then ask for a hearing and I will probably grant it.

16 But the ruling I'm about to make and now in the
17 process of making is not based only on the adequacy of
18 Mr. McAfee's surety to provide for Mr. Sutcliffe's presence.
19 It's based on both aspects of the considerations that I'm
20 required to address in ruling on an application for bail or
21 review of a prior ruling on bail.

22 So to start with, I do find that in agreement with
23 the pretrial services agency, there are no conditions, even
24 if he were to be released under changed circumstances
25 involving a surety that are reasonably likely to assure the

1 safety of people and institutions but individuals really in
2 this community.

3 For the reasons that were set forth in the
4 pretrial services report I will recite a few. In doing so
5 this is not meant to be an all-inclusive recital and I
6 incorporate by reference some of the points made in
7 government's memorandum as well as the complaint.

8 But we do have here to start with a pattern,
9 although you're right that much of it is relatively long
10 ago, of crimes of violence, and more than one. The
11 propensity to engage in violence has been established. The
12 capacity to engage in violence is current with the weapons
13 that were found in the defendant's home within the last
14 month or so at the point when he was first detained on these
15 charges.

16 The motive to engage in violence is sufficiently
17 established by the behavior that's the subject of the
18 complaint and that led to the charges in the indictment.
19 That's without finding that it has been proven. But
20 assuming that there is a factual basis in this very clear
21 one that's set forth in the FBI agent's complaint, it is
22 obvious that Mr. Sutcliffe believes that he's involved in
23 some kind of a pitched battle, to say the least, with people
24 acting on behalf of Global Crossing or previously associated
25 with Global Crossing.

1 I do not accept his attempts to minimize the
2 contents of the web sites by saying that they were parodies
3 or somehow not to be taken seriously. Because under these
4 circumstances and in this world one would have to be
5 remarkably naive and foolish to discount the possibility, I
6 think the likelihood, the clear and convincing likelihood
7 that they had some real bite and purpose to them.

8 In addition, the behavior that Mr. Sutcliffe
9 engaged in in connection with this particular series of
10 charges and his conduct after he was placed in custody
11 suggests that he has a strong view that these charges are
12 bogus and that his rights and dignity as an individual have
13 been compromised and invaded wrongfully.

14 That being the case, and he may be right, it may
15 be these charge are never successfully established, there is
16 a reinforced view on his part, at least I find that there
17 is, that he has to and is inclined to take whatever steps he
18 thinks are appropriate or necessary to protect his interest.
19 Those can include further assaults or threats of violence.

20 I don't know what to make of the allegation of
21 domestic violence. I realize that he told Judge Woehrle
22 that according to what he told you that charge or that
23 complaint by his current wife was withdraw; is that correct?

24 MS. POTASHNER: No, that's not correct. What I
25 told Judge Woehrle was that there was information proffered

1 at the preliminary hearing, there was a probation officer
2 who testified that the threat that was supposedly made to
3 his wife was made in a joking manner. There was testimony
4 from what I hear and what I told pretrial, and what I told
5 Judge Woehrle was I not sure of the current status of the
6 restraining order.

7 THE COURT: Are you sure now?

8 MS. POTASHNER: No. I still have no idea.

9 THE COURT: That reinforces what I had in mind in
10 incorporating by reference that developed. Even to someone
11 very close to him, a threat of violence was deemed
12 sufficiently real, despite the claim that it was a joke as
13 to warrant the issuance of a TRO, how far she would go under
14 these circumstances here.

15 Putting aside all the issues relating to flight in
16 terms of release, I find that by clear and convincing
17 standard the government has established that he is a danger
18 to the community. I'm going to supplement that finding with
19 certain comments about the terms and conditions that were
20 contemplated concerning sureties.

21 I would have, and if -- I'm at the point of
22 reconsidering my findings about danger, almost certainly
23 this would be my view as to issues of flight. I don't think
24 the terms and conditions that Judge Woehrle set are
25 sufficiently strong to assure that defendant's presence.

1 They include the unjustified surety for the appearance bond
2 of the brother. I would not have accepted that. And I
3 don't think on the current record that Mr. McAfee is an
4 appropriate surety. If he is an appropriate surety I would
5 tighten the terms and conditions.

6 I would require physical proof, not just a sworn
7 declaration but physical proof that every single weapon,
8 whether in the safe or otherwise, was removed from the
9 household. And that might deprive them of bread knives, for
10 all I know. But certainly the rifles.

11 I think that Mr. McAfee's capacity to function as
12 current counsel for Mr. Sutcliffe would be compromised. I
13 think that he may not have thought through sufficiently the
14 difficult position he would be placing himself in an effort
15 to be loyal to his client. That's commendable, in the view
16 that his client is worthy of that loyalty, and maybe his
17 client is. Mr. McAfee put himself in a position which is
18 very dubious at best.

19 The terms and conditions would have to involve the
20 most heightened degree of restraint. Usually -- I forget
21 what the enhanced form of monitoring is. It's not the
22 bracelet but it's a second and relatively recent monitoring
23 device that I have been informed of by the pretrial services
24 office. What is it called?

25 THE AGENT: Global position unit.

1 THE COURT: That would have to be a term and
2 condition.

3 I'm telling you these things so you can explore
4 with Mr. McAfee, if you wish to, Ms. Potashner, the issues
5 and concerns that I have.

6 And I want the surety, the bond to be increased
7 beyond 75,000.

8 So those are my findings. Anything further,
9 Counsel?

10 MS. DUARTE: No, Your Honor. Thank you.

11 THE COURT: The defendant is remanded to the
12 continued custody of the U.S. Marshal and Bureau of Prisons.

13 (PROCEEDINGS ADJOURNED)

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17 CERTIFICATE

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

21 Date: FEBRUARY 28, 2005

22
23 
24 LYNNE SMITH
25 OFFICIAL COURT REPORTER