

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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THE ~~HONORABLE~~ A. HOWARD MATZ, JUDGE PRESIDING

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"Interrupt" @ 12

UNITED STATES OF AMERICA,)
 PLAINTIFF,)
 -v-)
STEVEN WILLIAM SUTCLIFFE,)
 DEFENDANT.)

CASE NO. CR 2002-350-AHM

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
TUESDAY, JANUARY 14, 2003

LYNNE SMITH
OFFICIAL COURT REPORTER
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 J. DUARTE

JASON GONZALES

ASSISTANT UNITED STATES ATTORNEY

312 NORTH SPRING STREET

LOS ANGELES, CALIFORNIA 90012

ON_BEHALF_OF_DEFENDANT:

WILLIAM S. HARRIS

150 EAST COLORADO BOULEVARD

#216

PASADENA, CALIFORNIA 91105

ALSO PRESENT: JEFF CUGNO, FBI CASE AGENT

TUESDAY, JANUARY 14, 2003; LOS ANGELES, CALIFORNIA

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THE CLERK: Item Number 1, CR 2002-350-AHM, United States versus Steven William Sutcliffe. Counsel, please state your appearances for the record.

MS. DUARTE: Good morning, Your Honor. Elena Duarte for the government along with Jason Gonzales and Jeff Cugno, who I ask be designated as the case agent.

THE COURT: Cugno?

AGENT CUGNO: Yes, sir.

THE COURT: How do you spell your last name?

AGENT CUGNO: C-u-g-n-o.

THE COURT: Okay. Good morning to all of you.

MR. HARRIS: Good morning, Your Honor. Bill Harris on behalf of Mr. Sutcliffe who is present in custody.

THE COURT: Good morning to both of you. Just before I was planning to come out I was handed a document that apparently Mr. Sutcliffe prepared and gave to the clerk. It's entitled Writ of the Mandamus to Compel and numerous other items are listed on the title.

I have looked at it and read it. You have gotten a copy, Mr. Harris?

MR. HARRIS: Yes, Your Honor.

THE COURT: You have gotten a copy, Ms. Duarte?

MS. DUARTE: Yes, Your Honor.

THE COURT: The way I want to proceed, to start with is to ask you in plain language, Mr. Sutcliffe, what are you asking for.

THE DEFENDANT: I'm asking for justice, first and foremost. Secondly, I'm asking for consideration of these motions contained within this document that I have handed to everybody.

Thirdly, if this court intends to proceed any further I ask that the Attorney General himself, John Ashcroft, be brought in to investigate these charges that I brought forth through this court and to my previous counsel and all parties involved.

THE COURT: Concerning Mr. Harris or your right to proceed as your own lawyer without a lawyer, what are you asking for?

THE DEFENDANT: I have informed Mr. Harris that he is forthwith dismissed with prejudice, based upon his actions at the hearing here Friday, when as I've outlined in this document, the prosecutor stood up and told this court a bald-faced lie.

THE COURT: Just tell me whether you're --

THE DEFENDANT: If I may finish.

THE COURT: No, you may not. You answer my questions. Now are you asking for the opportunity to represent yourself at this trial?

THE DEFENDANT: (NO RESPONSE)

THE COURT: Or do you want to have a lawyer represent

you? You have one choice. Meaning, there are two things from which you can choose. It's either Mr. Harris or yourself.

THE DEFENDANT: I will stand on my paperwork.

THE COURT: I don't understand your paperwork so you need to tell me what you're asking for.

THE DEFENDANT: I will stand on my paperwork.

THE COURT: Mr. Sutcliffe, don't make this into an unnecessary tussle between you and anyone else, including me. This is not a question of who has more patience or anything like ego. I'm simply trying to understand from you, giving you the opportunity to tell me what you want concerning your representation at the trial.

If you tell me you want to represent yourself because you think Mr. Harris can no longer function as your lawyer, then I have to go through certain steps. I think you may be familiar with those steps because I did them previously when you were represented by an earlier lawyer.

Then I would have to hear from both you and Mr. Harris and we would do that. I'm perfectly willing to do that in a confidential fashion outside the presence of other people except for the security officers.

If you tell me that you want to continue with the lawyer, keeping in mind that the trial is scheduled to begin today and the jury is expected to come down here today, then there are different measures and alternatives that I will follow

and that will be your right to have me follow. You need to tell me what you want. I do not understand your papers.

THE DEFENDANT: If I begin to tell you what I want are you going summarily cut me off again?

THE COURT: Mr. Sutcliffe, just answer my question as to your issue, not of jurisdiction and of the Attorney General. I will respond to that later. I'm talking about representation at the trial.

THE DEFENDANT: I cannot have a one-way conversation with myself. If you won't answer my questions I can't answer your questions.

THE COURT: Mr. Sutcliffe, I'm not going to have a debate with you. Now here's the question.

THE DEFENDANT: I will submit on the paperwork.

THE COURT: We'll proceed to trial with Mr. Harris as your lawyer.

THE DEFENDANT: I object to that. I summarily have dismissed him with extreme prejudice.

THE COURT: Extreme prejudice?

THE DEFENDANT: Extreme prejudice.

THE COURT: Then you're prepared to proceed on your own?

THE DEFENDANT: I'm standing on my paperwork.

THE COURT: Okay.

THE DEFENDANT: I will not accept those conditions. I

will not sign a waiver. I will not represent myself. And my conditions are spelled out within this paperwork.

THE COURT: They are not spelled out. Here's what we're going to do. I'm going to ask the prosecution team and all people, including potential witness, everyone other than court security officers and members of my staff to wait outside.

(MS. DUARTE, MR. GONZALES AND AGENT CUGNO EXCUSED)

THE COURT: All right. Now there are two representatives from the marshals here. Would you state your respective names, please.

MARSHAL DANIELS: Chris Daniels from the U.S. Marshals.

MARSHAL ARREDONDO: Jason Arredondo.

THE COURT: I instruct you both that the matters that we're about to explore at this closed hearing are confidential. You're not to discuss them with anybody, and I mean anybody, outside of this courtroom. Do you understand that?

MARSHAL DANIELS: Yes, sir.

THE COURT: Do you understand that, Mr. Arredondo?

MARSHAL ARREDONDO: Yes.

THE COURT: Mr. Harris --

MR. HARRIS: Your Honor, excuse me. Is this part of the transcript sealed?

THE COURT: Yes.

MR. HARRIS: Thank you.

THE COURT: Mr. Harris, let me ask you an open ended

question at the outset. And that is how you respond to the writings in this document. By the way, I will cause the document to be filed and be made an official part of the court record, even though it was presented improperly and without authorization.

It will be part of the record and on appeal, if it gets that far, it will be available to the Court of Appeals.

Mr. Harris, please tell me what your take is on the so called Writ of Mandamus.

MR. HARRIS: My take at this point is that despite my best professional efforts to help this gentleman, there has been a complete breakdown in attorney client relationship, which makes it impossible for me to proceed further. He's basically made it absolutely clear he does not want me to represent him.

He will not speak to me. He instructed me not to address him. He seems to be on a self destructive path that I'm not sure I want to be associated with anymore.

THE DEFENDANT: Objection.

MR. HARRIS: We lined up civilian clothes, for example, over the weekend and Mr. Sutcliffe nixed that one. I brought clothing from my own closet for Mr. Sutcliffe to wear this morning. Despite my advice, he won't put that on.

It's clear here that Mr. Sutcliffe seems to be wanting to steer this towards some sort of a train wreck. And he's accused me multiple times of incompetence.

Now he raises malpractice. There's only so much that I can do. I've given it my best shot and, you know, it's been about five or six years since the last time I came cross a client like this.

And you run into these once in a while. I don't want to say anything negative. I'm trying to be a professional here. I don't want to say anything against my client, but at the same time there's limits.

THE COURT: Do you have reason to question his competence to proceed to trial?

MR. HARRIS: You may recall that the magistrate in New Hampshire, Magistrate Muirhitz mused, he said this guy just may have a screw loose. I have thought about that a lot of times during this case. One of the things that I raised to Mr. Sutcliffe during one of the pretrial issues is there's --

THE COURT: Hold on a minute. There's another court security officer. Your name, please.

MR. MARINO: Lawrence Marino.

THE COURT: This proceeding is a closed proceeding. It's under seal and it's confidential. You're entitled to stay but you need to represent to me that you understand that what you hear you are not to discuss with anyone at all outside of this courtroom.

Do you understand that?

OFFICER MARINO: Yes, Your Honor.

THE COURT: Do you agree to that?

OFFICER MARINO: Yes.

MR. HARRIS: To answer your question, part of the discovery in this case included the fact that some years ago Mr. Sutcliffe received workers compensation benefits for a number of years for affective disorder, which I understand is a psychological dysfunction of some sort.

It apparently rose to the level of entitling him to obtain workers compensation benefits back in the eighties. I raised this issue with Mr. Sutcliffe simply because under United States versus Twine, the specific intent element of an 875C charge can be negated if there's mental problems.

And professionally I wanted to raise this and say Mr. Sutcliffe, here's the issue. You don't, I don't think there's, this is going to fly. I'm not going to present this but nevertheless, if you disagree with me on that point tell me and we'll raise a mental defense. We'll get a shrink and we'll proceed on that.

Mr. Sutcliffe didn't respond. I assume he agrees in his mind that he's competent here. I don't think it rises to the level of competence. Being a layman, I think having seen some of these clients in the past, I think it probably falls under the category of maybe some sort personality disorder. That's my -- not being a psychologist, that's my guess.

The problem is I'm on the receiving end of this

personality disorder. He's accused me multiple times of things that, unprofessional conduct, both unprofessional and dishonest. At some point there's limits. He's told me he won't talk to me. On a motion to substitute counsel, which at a minimum this qualifies for, one of the factors under the case law is the extent of the conflict and whether or not there's been a complete breakdown.

THE COURT: I'm quite familiar with them.

MR. HARRIS: I think we're there. When he won't put on court clothes I bring from my own closet, when he won't talk to me. When he stated here that I'm dismissed with extreme prejudice, it's kind of, it's kind of clear he doesn't want to deal with me anymore. He doesn't want to see me again in his lifetime, and certainly not sitting next to him at counsel table.

So I'm sort of at an impasse here. Now he's raising malpractice. I mean, what am I supposed to do with all this?

THE COURT: Mr. Harris, I think you have made a very compelling record to warrant relieving you of your responsibilities as counsel for Mr. Sutcliffe. I'm familiar with what the standards are relating to effective assistance of counsel, Sixth Amendment rights, rights of the lawyer and rights of the client to have the relationship severed based on a total breakdown of communication and absence of trust, recriminations, threats and the like. And the record --

THE DEFENDANT: Objection.

THE COURT: Don't interrupt the court.

Mr. Sutcliffe --

THE DEFENDANT: He said I threatened him. I never threatened him.

THE COURT: Don't interrupt the court. I will give you an opportunity to be heard.

THE DEFENDANT: Okay.

THE COURT: Now there are various measures that I will take at any stage --

THE DEFENDANT: I --

THE COURT: In the presence or outside the presence of other lawyer and jurors. You have a right to a fair proceeding and you will get that. But nobody has the right to interrupt the judge.

So I am going to make the finding, and I do make the finding that the basis for a further relationship between Mr. Harris and Mr. Sutcliffe has been shattered. And that it is no longer necessary for Mr. Harris to carry out any attempts at representing Mr. Sutcliffe and furthering his duties as a lawyer.

However, there are a couple of interim measures that before you're formally relieved and before you're allowed to leave the courtroom I want to explain to Mr. Sutcliffe.

You listen carefully, please, and then I will give you

a chance to respond. Your motion, this several page document, whatever it's intended to be, it's entitled Writ of Mandamus, says at page 5, "If this request" -- and it's not clear to what that refers -- "if this request, this previous request is denied the accused will stand sui juris without counsel and under the foregoing conditions. Only the accused may speak for the accused."

You then cite two cases, one of which is Veretta versus California. The accused will not sign a waiver of the counsel. Now you have already heard me relieve Mr. Harris of his duties. You have gotten part of what you came here today intending to get, Mr. Sutcliffe. The next question is what happens to you in terms of a lawyer.

And secondly, what happens to you in terms of your capacity to stay in this trial. You do not have the right, unless you have the funds available in your own right to do so, to select your own lawyer.

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

I will have to advise any new lawyer of the procedural

history of this case. The lawyer who would be appointed to represent you, if you choose to proceed with a lawyer, will be someone who is a member of this court's indigent defense panel, assuming you lack the funds to retain your own lawyer. That's the panel from whom Mr. Harris was selected. I don't know who that person will be but typically the individual is someone who has been designated to be on duty on the given day that the judge makes the decision to select somebody new.

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

I really don't understand what you're seeking. But if that's what you're seeking, then I would do my best to bang you on the head and kick you on the skins, and I'm speaking figuratively, I don't mean that literally, talk you out of that. Because it would be totally against your interests. I would have to go through certain measures to make sure you understood what you want to do, if you proceed on your own, without a lawyer.

Now you really need to tell me what you want as between those two alternatives. It's no longer a question of you or Mr. Harris. It's a question of you or some other lawyer.

Please give me guidance of what you want.

THE DEFENDANT: I just sat here and listened to my ex counsel imply that I'm not all there in the head. I take umbrage to that. I was very effectively able to assist my previous counsel in New Hampshire, which is why I previously requested he come back so we can work together as a team. I think we made short work of the FBI's testimony up in New Hampshire.

We quickly were able to dismiss the Counts 5 through 9 at the time they were raised back in New Hampshire. A good part of that was through my defense and my helping my counsel. I cannot work, as you're very well aware, to defend myself against the United States. I'm not qualified. I'm not a juris doctor. However, I can, I'm put in the position by my present counsel of doing just that.

When I asked my counsel for exculpatory material, and I have asked from the day I set foot in this California, in the State of California for certain discovery matters, and to this very day, not one hour, not a half hour ago I heard Mr. Harris sit here and talk to the U.S. attorney. And she's having to explain to him what a hard drive is. If that's incompetent, as I raised my previous time issue, that he's not computer literate. This is about computers. He doesn't even know what a hard drive is, has put me at a detriment.

Further, at the hearing on Friday, I asked him,

notwithstanding the other requests I have made to him in the past, I asked him to challenge when the U.S. attorney stood up and told this court a bald-faced lie regarding killercop.com and it's correlation between evilgx.com. This court then accepted her lie without a question. I asked him to challenge that. I said that was a lie. He shushed me. And I waited and I waited and then you ruled and you ruled in her favor, that this inflammatory irrelevant material could be brought into this case based on her lie.

So at that prejudice right there that was the last time. At that point he was in my mind summarily dismissed. I can't fight by myself. I'm not going to sit here with somebody who's incompetent and won't admit it and won't effectively assist me.

THE COURT: You want another lawyer?

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

I have gone through three lawyers now. How many do I have to go through? My liberty has been deprived based on my freedom of speech for nine months now. I have not seen my four year old daughter. Her birthday just passed. I have been withheld from my family and my friends, these heinous charges

are hanging over me. I'm expected to go through another couple lawyers.

THE COURT: You won't have a couple lawyers but you would have a right to another lawyer.

THE DEFENDANT: Another one? Another one? When does it stop? When does it stop?

THE COURT: Now let me try to answer that question. It stops when you proceed to trial, if that is what you choose to do. And you subject the government to the burden of proving you guilty. One thing I can tell you, Mr. Sutcliffe, is that the first thing you asked for when I gave you the opportunity to address me this morning, you will get. That's a fair trial.

THE DEFENDANT: No.

THE COURT: I don't expect you to agree with me but that's what you will get. Now let me explain something to you. You do not have a legal right, you have not established a legal basis and there is no legal basis to have these charges thrown out at this stage. Your lawyer made very hard hitting motions to dismiss the case and I evaluated those carefully. And I denied the motions.

So that effort has been undertaken. That's the way it's done. It isn't done by you telling me what you have just told me sitting there at the table. You could make motions yourself if you were representing yourself. I have given you extra latitude by allowing things you have submitted to me

directly, which is not your right to do, to be filed, including today's document.

That's not going to end the process. You're not going to get out of prison.

THE DEFENDANT: May I respond?

THE COURT: In just a moment. If you want to have a decision made as to your fate, it's going to be made by a jury. That's means you're going to have to undergo a trial. That means you'll remain in custody. This is going to happen, no matter what. This is no longer a question of choice. We cannot proceed to trial today.

You don't think you have the ability to defend yourself against the United States of America, and you're right about that. I agree with you 100 percent. That means if you don't defend yourself, which in principle would be your right, it would be crazy to do it but it would be your right, then you're going to have to have another lawyer. That other lawyer is going to have to go through the same learning curve that all the previous lawyers went through.

There's going to be a delay in the trial. And during the period that the new lawyer gets up to speed and tries to establish a workable relationship with you and you with him or her, you will remain in prison. At some point the keys to the kingdom you will recognize are in your hand, in the sense you have reached a point where you're ready, with the assistance of

effective counsel, to proceed to trial.

You may have a view at any time, and maybe every time that whoever happens to be your lawyer is not doing the job the way you want that person to do it. But that doesn't mean that the lawyer is not doing the job that is your constitutional right to have done. It happens all the time, Mr. Sutcliffe, that clients and lawyers disagree about strategy, about tactics, about how to respond to something that's said in court, about the little picture and the big picture. That happens all the time. That doesn't surprise me. It's nothing unusual and it doesn't reflect a "breakdown" in communications.

When a client starts making allegations about a lawyer such as those you've made here in court and that Mr. Harris confirmed you made in his statements to me, that's an entirely different and much more troublesome situation. When differences arise about things which don't get necessarily to the particular crime that's alleged or what is necessary to prove the crime, but how best to help yourself win the case, such as what clothes you wear when you come to court and sit before a jury, that suggests to me that you are not thinking very clearly.

I am going to subject you to a competency exam, just to be sure. You may be right. There's no doubt in my mind you're a very smart guy. The question of whether you're competent to proceed to trial has two parts to it. I want you to understand what they are. You can think about your own assessment as to

whether you're competent.

One of them gets to the issues that I have been patiently exploring with you. You and anybody, in order to be subjected to the risks and the tensions and the possible repercussions of a trial, have to have the ability to confer with a lawyer with a reasonable degree of rational understanding. Fancy word. But you've got to be able to listen, to react, and to act most of the time in your own self interest by accepting the advice of the lawyers, such as what clothes to wear.

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

You know what the trial is. You know who the prosecutor is. You know who the judge is. You know what a jury does. You know what testifying is about. But if you have a rational understanding then you will understand how to make all that work to the maximum extent available in your own interest.

And I'm not convinced that you, under that standard, are competent. I am convinced you're awfully smart. Sometimes people are too smart for their own good. I have had that said about me and other people in our lives. I know you understand.

I want to make sure that if you go through a trial,

you satisfy that test. So I'm going to appoint a psychiatrist to examine you. You may within 15 minutes sail through with flying colors. But I want the record to be clear about that.

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

The client has a right to communicate information and to communicate requests, even demands, to the lawyer. Communication is a two way thing, Mr. Sutcliffe. But the client has the duty, if he wants a lawyer, to understand that the lawyer has the ultimate responsibility to decide what happens. If the lawyer's halfway good that lawyer will listen carefully to what the client says..

- wrong!
see
[unclear]

It happens every day of the week, a hundred times a day that the lawyer will say to the client, you know, I can't do that. That doesn't make sense. That's against your interests or the judge won't allow it or you will look foolish, or it will backfire if we ask that question. They're going to come back with information that's going to be a bullet through our nose.

That's what lawyers do all the time. If your lawyers do that to you, don't be surprised. But I'm not going to allow you to go through the same thing you told me a moment ago, you

don't want to do, which is five lawyers and the tenth lawyer. And in the year 2010 we're still trying to figure out if you've got a lawyer that's going to be okay for you the way you see it. 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 trial on your own.

But either way, you're going to trial, unless you decided that there's an alternative thing you want to do, and I'm hoping you won't, which is plead guilty. You don't see yourself as guilty and I would never accept a guilty plea. I don't want you to plead guilty. I want you to get a [fair] trial. These are the ground rules. I didn't make them and you can't change them.

Now you asked for the opportunity to respond. Please do.

⊛ THE DEFENDANT: Thank you, Your Honor. All right. First off, Sixth Amendment of the Bill of the Rights says I have the right to effective assistance of counsel. That key word is assistance, to assist me. When I make multiple requests for assistance and they're summarily dismissed, ignored because of the lawyer's incompetence, that's not a, that has nothing to do with strategy or tactics.

So I deny that that's the reason that him and I are not getting along. He's incompetent. He refuses to admit this. I

know he is. I don't have to prove it to anybody else. He's proven it for me. He can try to cast aspirations (sic) on my competence and my mental ability all he wants and this court can try and subject me to a mental examination, which I object to, based on his aspirations against me, but that's not the case here.

It's a very clear case through our communications have broken down because he has, he put it to me very succinctly. He said after the first time I raised the issue of his competence when you brought up does he know anything about computers and whatnot at the hearing last month or month before, when I called him the next day he had quite an attitude. And I said, "Bill, are you taking this personal?" "You bet. You bet I'm taking it person. How can I not," he says. So as far as that, that's the real reason.

It has nothing to do with strategy or tactics. His inference that I have made threats or that I have, I have not accused him of malpractice. I accused Hilary Potashner of malpractice but not him. He's a very good lawyer. He's very good. But he's not competent in this case. He's not effectively assisting me. That's all I'm going to say about that.

I want a fair trial too. I don't believe I'm getting one from this court. I brought to the attention of this court that discovery matters that were supposed to be provided to me

by my counsel were stolen by members of the BOP. Somebody inside the BOP has stolen some of this court discovery matter. I have not been able to review this matter.

My counsel wanted me to review this discovery material and compare it to newly admitted discovery material. That's kind of hard to do when some of it is missing. I brought that to the attention of this court and nothing has changed.

So I don't see how I'm going to get a fair trial. If I was going to go to trial today anyway, when this court is very well aware that I haven't seen all of the discovery and has not made inquiry into has it been replaced, have I had a chance to look at it. Notwithstanding the fact that I've had barely enough time to look at what discovery was there. And of that, what I could review because I wasn't able to review all of it because of the lack of software, which I requested my counsel request this court to provide to me, which I doubt it was even done. I don't know because he hasn't told me.

But as far as a fair trial, I don't think I was going to get one, even if it did start today. As far as my clothes, again I'll stand on my previous statement, although I don't think it really matters because I didn't think I was going to get a fair trial today anyway. While I'm in their law library I'm reading due process, Fifth Amendment, Sixth Amendment, things like that, I've seen cases, I have some where it says that a man who went to court was in his jailhouse clothes, even

with the number on his shirt and pants, the court ruled that's not prejudicial. I don't believe it is either. People take me as I am.

But the clothes do not make the man. It's the man inside, not the clothes. With that I will stand on my paperwork and request that money be provided so I choose competent counsel.

THE COURT: That request is denied.

Mr. Sutcliffe, I don't have the authority and there aren't funds available to give you money to select directly and on your own whatever lawyer you would like to have represent you. But I will arrange, as I already explained, to appoint a lawyer for you.

(PAUSE)

THE COURT: Okay. Mr. Harris, with respect to this reference that Mr. Sutcliffe just made concerning stolen discovery, is it your understanding that refers to the redacted portions of the web site as opposed to the intact ones?

MR. HARRIS: No, Your Honor. I believe what he's referring to is the fact that when I brought down all this discovery for Mr. Sutcliffe to review, there were 52 CD-Roms, and I numbered them, and dropped them off at the front desk. And by the time Mr. Sutcliffe got them three of those 52 were missing somehow. There were others in there that were apparently not numbered that I must have missed somehow. He's

talking about three of them that somehow disappeared between the front desk and the time Mr. Sutcliffe looked at them.

THE COURT: What, if any, steps have you taken or can you take, can someone take to get second or additional copies of the three missing ones from the prosecution?

MR. HARRIS: I have not done anything on that because first of all, the MDC says that we didn't steal them. We didn't do anything. So I don't know, first of all, I'm pretty sure I didn't misnumber them. There were 52 there. So how they were misplaced, I don't know. *He gave them to the DOJ - FBI CO.* I gave it to Mr. Sutcliffe. Maybe my error, assuming they would not be mishandled. I did not make back-up copies. We got 52 CD's.

THE COURT: But the copies that you're explaining to me, the 52 were in fact duplicates of what the government had in its possession?

MR. HARRIS: Yes.

THE COURT: Can somehow the ones that evidently may not have wound up in Mr. Sutcliffe's physical custody be identified, do you know which ones are missing?

MR. HARRIS: That would be a laborious process. It would be a matter of going back and reconstructing everything that was provided. We basically got a Beacon's box full of floppies and CD's.

THE COURT: If I want to avoid consuming that amount of time for the new lawyer, I could order the government to turn

over the 52 CD's all over again, right?

MR. HARRIS: That would solve the problem.

Mr. Sutcliffe has some of this stuff that he hasn't given back to me. The original concept here was to let Mr. Sutcliffe look at all this stuff.

So I've got a box here of stuff, including two new CD's and five new floppies that I just got yesterday from Ms. Duarte.

THE COURT: Why were they turned over just yesterday, as far as you know?

MR. HARRIS: I think it's reconfigurations of stuff that previous, it's like final trial exhibits, something like that.

But I haven't had a chance to look at this stuff yet.

I was going to do that tomorrow or later this afternoon. I put Mr. Sutcliffe on notice we've got new discovery. We got a new video tape. We've got, I have subpoenaed MDC audio tapes with phone conversations between Steven Sutcliffe and Orley Mann in which Mr. Sutcliffe tells me that apparently Ms. Mann made statements to him that the domestic allegations are baloney. We've got that under subpoena.

I expect that to come. I've got Gary Winnick under subpoena. I'd like to tell Mr. Winnick he doesn't have to appear. That took a lot of hoops to get the CEO under subpoena. Mr. Sutcliffe wanted that.

THE COURT: I assumed that the government was going to

put him on the stand, no?

MR. HARRIS: I don't think so. This is an example, I don't know that I want Mr. Winnick. But Mr. Sutcliffe demanded it so I went through the process to get him under subpoena. He's available. So if this trial is going to be continued, one of the things that I'll want to do is somehow withdraw that in a manner that we can get Mr. Winnick again, if and when.

THE COURT: I can arrange that. He's not listed as a witness for the government. There are 24 people.

MR. HARRIS: Is he on the government's list?

THE COURT: No. I'm telling you that he's not, not the list I was just handed today. Now I want to know what happened with respect to these stipulations.

MR. HARRIS: Mr. Sutcliffe wouldn't cooperate and basically told me he didn't want to sign anything.

THE DEFENDANT: Objection.

MR. HARRIS: Some of them I think are non controversial. Probably that's better to take up with new counsel. I mean my --

THE COURT: Is Orley Mann still married to him?

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

THE COURT: Have you discussed with him the marital privilege?

MR. HARRIS: I believe we did touch on that, yes. I explained to him that exists under California law. I have

discussed that with Ms. Duarte. She understands it. They're not going to be asking for any confidential communications within the marriage. My understanding is that her testimony is going to be something like he had a computer in California, we lived at this address. He had a computer in New Hampshire, we lived at that address. They may ask her to confirm he had a gun in the closet. That sort the stuff. Not going to get into communications.

THE COURT: Okay.

THE COURT: Mr. Harris, have you ever prepared papers seeking appointment of a qualified psychologist to conduct a competency exam?

MR. HARRIS: Yes.

THE COURT: I think I will probably have the government file those papers, just so that the record is complete. You understand, Mr. Sutcliffe, that as a result of these proceedings this morning your right to a speedy trial is affected. And that the date for trial, which was today, is going to have to be continued and probably indefinitely. Not for very long.

But your new lawyer has to get up to speed. We have to complete the competency exam. I'm going to do my best to make sure these things are done quickly. But you will not have the trial today. And I know at earlier times you asked for a trial as quickly as possible, and complained when we had to have a continuance.

Sept 10 hearing

Do you understand what I just explained to you?

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

THE COURT: Okay. We're not going to have a debate about it. It was your choice to fire Mr. Harris and to create the circumstances where I was compelled to grant your request, And now his.

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

Let's bring in the prosecutor.

(MS. DUARTE, MR. GONZALES AND AGENT CUGNO RETURN TO COURTROOM)

THE COURT: I want the record to reflect I recognize the circumstances under which you've been doing your best to carry out your responsibilities and I think you deserve acknowledgment and credit and I'm delighted to give it to you. I think you have done an admirable job professionally.

MR. HARRIS: Thank you, Your Honor.

THE COURT: Counsel, I have explored with Mr. Sutcliffe and Mr. Harris a number of different considerations, and as a result and for sound legal reasons, Mr. Harris has been relieved of his responsibilities as counsel for Mr. Sutcliffe. The trial will not proceed today.

I want the government to file a motion, just to have paperwork available for Mr. Sutcliffe to respond to if he wants, with a proposed order calling for the appointment, at public expense, of a qualified psychologist or psychiatrist to conduct a competency examination, not an insanity examination, but a competency examination for purposes of confirming that Mr. Sutcliffe is competent to proceed to trial.

I am going to appoint, but not today, a new lawyer for Mr. Sutcliffe. That lawyer will be selected from the indigent defense panel. I have explained to Mr. Sutcliffe how that works and what the circumstances are. He's already familiar with that.

For purposes of having at least a clear record, I'm going to set the new trial date for ten weeks from today. That may not be final. But that conceivably could be sufficient to enable new counsel to get up to speed and to have a record that confirms what I think the record will ultimately establish, but I'm not sure, that Mr. Sutcliffe is competent to proceed to trial.

I have explored with Mr. Sutcliffe various potential scenarios as to what would happen with the next lawyer and I won't go into that now. The issue of the completeness of discovery has been raised again.

I'm ordering the government, as an entirely pragmatic solution to an otherwise potentially tangled supposed issue, to

make available to the new counsel, anew, each and every one of the computer drives, and apparently there were 52, but whatever was produced previously and obtained or generated or created thereafter is to be made available anew to the lawyer who will be appointed to represent Mr. Sutcliffe.

And the reason why that's necessary is that some of the material that was previously produced some many weeks ago may not have been maintained in a way that enabled Mr. Sutcliffe personally to review it. I also was informed that some additional discovery was made available to Mr. Harris yesterday. I don't know exactly what it is or why it was so late but I want, when the new lawyer is identified, and all of the discovery that has been the subject of discovery proceedings clearly must be known to the government, I want that lawyer to get it all right away.

I don't want any further incremental providing of discovery. I'm not suggesting that there's something that was improper. I really am not. But I don't want there to be anything coming in in bits and pieces.

Please prepare a speedy trial act oriented continuance with the necessary findings. You can recite in general terms the proceedings today, which in case there's any doubt, I make a finding, an explicit finding, constitute a waiver of the right to a speedy trial by Mr. Sutcliffe, even though he does not necessarily agree with that.

Mr. Harris, I know you already understand this but I want Mr. Sutcliffe to hear me say it. You have the continuing duty to cooperate completely, openly and promptly with the successor counsel to turn over not only your file but to make available to that lawyer your work product, to discuss in good faith with that lawyer your own perceptions about the issues in this case and the considerations that could affect the defense of Mr. Sutcliffe.

I think that covers everything. Ms. Duarte.

MS. DUARTE: Question, Your Honor.

THE COURT: There's one other thing, before you ask your question, before I forget. There is a subpoena that apparently has been served on Gary Winnick. I notice that Gary Winnick is not identified on the government's witness list. And I assume, correct me if I'm wrong, that the government has the ability to communicate with Mr. Winnick or with his lawyer; is that correct?

MS. DUARTE: I have that ability, Your Honor.

THE COURT: I want you to communicate to the lawyer or to Mr. Winnick or to both, that although he doesn't have to respond to the subpoena on the date or under the terms that it may have contained, he remains responsible to respond on whatever date he is later notified.

In effect, what I'm saying is that the subpoena, although it was issued and served through the auspices of

Mr. Harris, it's like a court subpoena. I don't want anybody to have to go through any protracted or new ground of efforts to subpoena him anew.

So the subpoena remains outstanding, although the trial date has been continued. Please communicate that to Mr. Winnick and his lawyer.

MS. DUARTE: I will, Your Honor. May I have a copy of that subpoena to facilitate the communication with his attorney?

MR. HARRIS: Yes, Your Honor. I might point out, the contact is Sean Riley at the Christianson Miller firm.

THE COURT: Give all that to Ms. Duarte.

MR. HARRIS: I shall.

MS. DUARTE: Your Honor, in order to facilitate regiving the electronic discovery, may we have back what we've given because I'm not sure what the issue is. There's not 52 --

THE COURT: There were three out of 52 -- were they hard drives?

MR. HARRIS: They were CD-Roms.

THE COURT: CD-Roms that apparently are missing. I'm not suggesting that it's because of the U.S. attorney's responsibility. But what is not clear, which ones they are.

MS. DUARTE: Okay. The issue about turning over the hard drives --

THE COURT: The CD-Roms.

MS. DUARTE: Okay. On the hard drives though, if I get

with Mr. Harris and find out what they think they're missing and look for it and try to find it, I understood from the court's order that you wanted a new discovery process for the electronic discovery. And I was wondering if that covers -- because there were six --

THE COURT: What I really should have said was the CD-Roms.

MS. DUARTE: CD-Roms. Just so I understand, Your Honor, there allegedly were three CD-Roms in that form, CD-Rom form, seized from Mr. Sutcliffe's home that never made its way back to him in any media.

THE COURT: No. I don't think that's quite the correct way of putting it. I don't know where the CD-Roms came from, I don't know from whom they were seized, it hasn't been told to me.

But at one point Mr. Harris obtained what he counted up to be 52 CD-Roms, arranged for them to be delivered directly to Mr. Sutcliffe for Mr. Sutcliffe's review, and only 49 wound up there. It would be an exceedingly difficult, laborious, time-consuming task for someone who has been relieved of his duties for sound reason to try to make an independent determination of which three are missing. Because there's no -- am I right?

MR. HARRIS: Correct. There's another missing piece of the puzzle. Mr. Sutcliffe has some of this stuff with him at

M.D.C. In order to do this right, Mr. Sutcliffe has to give me what he's got, so I've got the full story.

THE COURT: You'll get back 49 CD's, right?

MR. HARRIS: If he gives me what he has at M.D.C. He gave part of it back to me.

THE COURT: If you had 49 you would be rather easily able to determine which three are missing.

MS. DUARTE: Not necessarily, Your Honor. Could I have one second?

(PAUSE)

MS. DUARTE: We really don't know what he's talking about, 52 CD-Roms.

THE COURT: You don't know what the reference is to the 52 CD-Roms?

THE DEFENDANT: Your Honor, if I might, there's also another twist in this too.

THE COURT: Wait one moment, Mr. Sutcliffe.

THE DEFENDANT: There's 54.

THE COURT: Wait one moment and sit upright in your chair.

Mr. Harris, is there any further clarification you can give? I'm trying to be very pragmatic and practical about this issue to avoid any further complication in the record.

MR. HARRIS: If Mr. Sutcliffe returns to me everything that he has at M.D.C., then I will have everything I got from

the government, that I got from the public defender's office. I'll have the complete electronic data. Then I'll be happy to cooperate and show Ms. Duarte everything I have from every source. Then we can probably figure out what the three missing ones are. That might be the most pragmatic way to do it.

In order to do that I have to have Mr. Sutcliffe give me back what he kept at M.D.C.

THE COURT: Before I respond to that suggestion, what did you want to say, Mr. Sutcliffe?

THE DEFENDANT: When Mr. Harris delivered the discovery material to me at, or to somebody at the Bureau of Prisons, and brought it to me, his letter stated here is "X" amount of CD-Roms and floppy discs. It didn't categorize what was what. But it came out to approximately, I think it was 52.

When the box was given to me by the B.O.P., they produced another receipt where they had counted it out and they had counted out 54, and two floppies. There's a discrepancy of two additional CD-Roms.

THE COURT: I can't begin to make sense of the discrepancy or explain it, but here's what I'm ordering you to do, Mr. Sutcliffe. In your own interest and to cut through all this, you can go over there today because now your schedule is opening up, Mr. Harris?

MR. HARRIS: Yes, Your Honor.

THE COURT: You go over, I'm instructing the marshals

to do everything necessary to facilitate the speedy accomplishment of this order. And you give to Mr. Harris whatever he gave to you. And then you meet with Ms. Duarte, and I want you to be able to represent to whomever I appoint as successor counsel that to the best of your knowledge, relying on what the government tells you, you have gotten a complete array of discovery that the government has provided and is required to provide.

And then you turn that over, all of it, directly, to the new lawyer who will then communicate with Mr. Sutcliffe how she or he and Mr. Sutcliffe wish to work through that evidence. That's all I can say.

Do you have any other questions?

MS. DUARTE: No, Your Honor. I'll do my best to cooperate. I think there might, this might be a reference to original evidence, which we didn't even copy, so I returned.

And if that's the case, I will definitely need everything back because all did was give back the original because it was of no use to us. That's what I think this reference might be to.

THE COURT: You seem to be suggesting that some of what you turned over to Mr. Harris or to the public defender or to both, you don't even have copies back in your own possession, correct?

MS. DUARTE: That's correct. It was programs and the

like. And I told Mr. Harris we didn't copy this because we don't need it. Take it all back. We have a receipt from that. We'll go through it with him.

THE COURT: Okay. Work it out. These things happen.

MS. DUARTE: I would like to let the court know that I don't think there's any discovery issue. But if there is, we'll certainly work it out.

THE COURT: Okay. Anything further, counsel?

MS. DUARTE: Your Honor, in the proposed order, I don't quite know what to put.

THE COURT: You mean about the competency appointment?

MS. DUARTE: Yes.

THE COURT: Simply have recitals that the court, after exploring certain issues with Mr. Sutcliffe and his then counsel of record Mr. Harris, concluded that the circumstances warranted an appointment. I don't remember offhand what the applicable provision in Title 18 is. Please invoke that provision. Make it clear that the findings I made are limited only to competency to proceed to trial, not to any defenses under Rule 12, or issues of insanity. There are no such issues.

I think it's probably a standard order, but make it clear that the individual who was appointed will be compensated at the expense of the public, from public funds.

MS. DUARTE: So you want the appointment immediately or after the competency exam?

THE COURT: I want the order to arrange for the appointment so that the competency exam can be conducted thereafter. That individual will have to work out the circumstances and logistics with Mr. Sutcliffe and with M.D.C.

MS. DUARTE: Thank you.

THE COURT: Anything further, counsel?

MR. HARRIS: Nothing further. Thank you, Your Honor.

(PROCEEDINGS ADJOURNED)

C E R T I F I C A T E

I HEREBY CERTIFY THE FOREGOING IS A CORRECT TRANSCRIPT OF THE ABOVE-ENTITLED PROCEEDINGS; PAGES 1-38. DATED AUGUST 20, 2003; LOS ANGELES, CALIFORNIA.

LYNNE SMITH

OFFICIAL COURT REPORTER