

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA

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4 HONORABLE A. HOWARD MATZ, JUDGE PRESIDING
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6 UNITED STATES OF AMERICA,

7 Plaintiff,

8 vs.

No. CR2002-350 (A) -AHM

9 STEVEN WILLIAM SUTCLIFFE,

10 Defendant.
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15 REPORTER'S TRANSCRIPT OF PROCEEDINGS

16 Los Angeles, California

17 November 7, 2003
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COPY

1 APPEARANCES:

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7 On behalf of Defendant:

8 STEVEN WILLIAM SUTCLIFFE
9 In propria persona

10 **Advisory Counsel:**
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1 LOS ANGELES, CALIFORNIA; NOVEMBER 7, 2003; 10:18 A.M.

2 THE CLERK: Item number 1, CR2002-350(A), U.S.A.
3 versus Steven William Sutcliffe.

4 Counsel, state your appearances, please.

5 MS. DUARTE: Good morning, Your Honor.

6 Elena Duarte for the Government, with special agent
7 Jeffrey Cugno from the F.B.I. as case agent.

8 THE COURT: Good morning.

9 THE DEFENDANT: Good morning, Your Honor. The
10 Defendant is present.

11 MR. REED: Good morning, Your Honor.

12 David Reed, advisory counsel. And present in the
13 courtroom is Armando Cruz, private investigator.

14 THE COURT: Good morning to both of you.

15 We're here to prepare for the commencement of trial
16 next Wednesday, November 12. I issued an order on October 28
17 for this status conference and specified on it a number of
18 different agenda items. 12 were enumerated there. There are a
19 few more that we're going to address. I'm not necessarily
20 going to stick to the sequence that was set forth on the status
21 conference order that was filed on October 28.

22 One of the items on that order happens to be the last
23 one, happens to do with something that came up in at least one
24 previous proceeding, that being the communication that
25 Mr. Sutcliffe referred to in open court that he had sent to

1 Mr. Reed. As a result of various requests and rulings, I
2 ordered that that be filed under seal, and that was done. I
3 think it would be advisable to have it unsealed and made
4 public, but I wanted to explore Mr. Sutcliffe's views in
5 particular.

6 Do you have any objection to that, Mr. Sutcliffe?

7 THE DEFENDANT: No, Your Honor. Actually, I sent a
8 letter to you dated November 3 where I asked that it be entered
9 to -- filed in this case.

10 THE COURT: That will be done.

11 I am looking at a copy I brought out to the bench
12 that shows it was filed. It has the file stamp. And it also
13 shows it was filed under seal. I'm ordering that the seal be
14 lifted and that the document be filed on a regular basis and
15 available for appropriate purposes to members of the public.

16 I brought copies so that the parties and counsel can
17 have copies if they want.

18 Do you have any objection to my making the copies
19 that were Xeroxed available to the prosecution?

20 THE DEFENDANT: I believe I sent the prosecution a
21 copy of this letter I sent to you, which included in that
22 letter to you was the October 22nd correspondence, as well as
23 the 9-29 2003 correspondence in question.

24 THE COURT: Oh. All right. We'll just stop there.
25 The order is that the document be filed for all purposes and

1 not under seal.

2 Now I think the next thing we should do is address
3 the question of how evidence will be presented, and
4 particularly with respect to the equipment and facilities and
5 arrangements that have been made to protect the rights of both
6 parties in a case which is heavily dependent upon electronic
7 evidence, especially evidence relating to the Internet.

8 I'd like to call forth and ask to stand at the
9 lectern, Mr. James Settle, who is the chief of the court's
10 telecommunications system and to whom or about whom I
11 previously issued an order designed to make sure that we're
12 ready to go on Wednesday.

13 In the courtroom, as everyone knows or has realized,
14 is a considerable array of equipment.

15 Mr. Settle, would you please be good enough to
16 explain what you've done and what is in the courtroom, whether
17 there are any additional either pieces of equipment or
18 arrangements that have to be completed in order to enable both
19 sides to have access to and free use of evidence that's being
20 either introduced or admitted. And I will just refer by
21 reference to the minute order that was sent out October 28
22 which has to do with much of what you're about to tell us. So
23 please proceed in your own words.

24 MR. SETTLE: Thank you, Your Honor.

25 We have provided, for the Defendant's exclusive use,

1 a 200 gb external hard drive that is tied to a Pentium III-500.

2 THE COURT: Speak up more clearly, please.

3 MR. SETTLE: A Pentium desktop computer provided with
4 a 200 gb external hard drive. On that 200 gb hard drive we
5 have copied all files that have been provided to Mr. Sutcliffe
6 as Exhibit LA 1-A, LA 1-B, LA 1-C and LA 1-S, with a mirror of
7 a SCSI drive that he had in his possession.

8 THE COURT: For the benefit of a clear record and to
9 assist our court reporter, who is new, I think, to this
10 courtroom, SCSI is an acronym and you should print it out as
11 S-C-S-I.

12 Go ahead, Mr. Settle.

13 MR. SETTLE: We also have provided a 250 megabit zip
14 drive which is available and is loaded onto a PC that's
15 available to Mr. Sutcliffe at this time.

16 THE COURT: Available here in the courtroom.

17 MR. SETTLE: In the courtroom.

18 THE COURT: Everything you've been describing and are
19 about to describe is here in the courtroom. Is that correct?

20 MR. SETTLE: That's correct.

21 THE COURT: When I say, "here in the courtroom," and
22 you say that as well, we're referring to the desk and table at
23 which Mr. Sutcliffe will be sitting during the course of the
24 trial. Is that correct?

25 MR. SETTLE: That is correct.

1 All the drives have been labeled as previously
2 described. The drive labeled LA 1-A was partitioned and we
3 built a partition folder on the copy drive so that when
4 Mr. Sutcliffe uses it here in the courtroom, it will be very
5 similar as he would have had it available to him at MDC or
6 anywhere else he was using it.

7 THE COURT: Okay. Using what? That drive?

8 MR. SETTLE: Using that particular hard drive.

9 THE COURT: Okay.

10 MR. SETTLE: All the devices are tied into the
11 courtroom system, which would allow them to be displayed around
12 the courtroom on the various monitors at counsel table, for the
13 jurors, at the judge's bench and CRD desk.

14 THE COURT: So there is a monitor at Mr. Sutcliffe's
15 table?

16 MR. SETTLE: Yes. In fact, he has two monitors, one
17 that will be allowing him to view everything that's displayed
18 in the courtroom and one that's exclusively tied to his system.
19 That will allow him to work offline when other evidence or
20 exhibits may be presented to the court at large.

21 THE COURT: In other words, if he wants to tap into
22 the evidence to find something that he wants to review while
23 the trial is underway or that he may consider displaying as
24 evidence in questioning he may conduct, he can do that?

25 MR. SETTLE: That is correct. He can retrieve and

1 display any evidence or exhibits that are on any of the hard
2 drives.

3 And that's about it.

4 THE COURT: What about the Elmo?

5 MR. SETTLE: We provided, also, a digital document
6 camera for his exclusive use, as well.

7 THE COURT: Just describe how that will be worked.

8 MR. SETTLE: That allows him to take hard copies and
9 display it to everyone in the courtroom without passing the
10 document itself around.

11 THE COURT: Okay. He can accomplish that through
12 equipment that's available on his table?

13 MR. SETTLE: He has an actual document camera in
14 front of him at the counsel table. It would require him to
15 request that the courtroom deputy activate it. The control of
16 all the equipment is under the control of the deputy.

17 THE COURT: Let me stop there. I take it that you're
18 referring to what I understand should be called the switcher.

19 MR. SETTLE: That is correct.

20 THE COURT: Now the switcher will be and has been
21 mounted at the table immediately in front of me where the
22 courtroom deputy will be sitting. Is that correct?

23 MR. SETTLE: That's correct. We've mounted and
24 labeled it with -- currently it has five ports on it that are
25 active for different input devices around the courtroom.

1 THE COURT: All right. Now in order for the evidence
2 to be presented smoothly, I take it that directions have to be
3 given to the CRD as to which set of equipment should be
4 activated for use and especially for presentation of evidence
5 to the jury. Is that correct.

6 MR. SETTLE: That is correct?

7 THE COURT: So the way to do that -- and I think I
8 want to make this simple and clear and I want both counsel for
9 the Government and Mr. Sutcliffe to follow this instruction --
10 is that if it's your turn to be presenting evidence or
11 displaying evidence or otherwise arguing about evidence or in
12 closing argument before the jury, you will be required to
13 simply say the following, "Your Honor, I request that the CRD
14 switch on the medium that I need," or words to that effect. I
15 will not be issuing that direction every single time the need
16 may arise or someone else's turn may kick in. I will be as
17 helpful as I can be, but I'm relying on those who are
18 presenting or using evidence to simply say, "Your Honor, I
19 request the CRD to switch on the medium I need." And that will
20 be the signal for the CRD to activate the particular button
21 that will enable that person to access evidence.

22 Is that understood, Mr. Sutcliffe?

23 THE DEFENDANT: Clearly.

24 THE COURT: Ms. Duarte?

25 MS. DUARTE: Yes, Your Honor.

1 THE COURT: Okay. The material -- not the material,
2 but the equipment you've been describing, the tower for the
3 computer and the various means and facilities necessary to
4 activate these hard drives and the zip drive, have they been
5 loaded with the evidence that you're aware of has been made
6 available to Mr. Sutcliffe?

7 MR. SETTLE: Yes, Your Honor. We had technicians
8 actually go to MDC and copy directly from the hard drives that
9 were previously described LA 1-A through C plus LA 1-S. All
10 have been copied in entirety directly from the IDE drives to
11 the external Maxster (phonetic spelling) drive we're using, and
12 they are labeled and made available in its entirety now.

13 THE COURT: Is it correct, then, that the -- is a
14 duplicate set here in the courtroom that doesn't have to be
15 removed or lugged back and forth of the evidence that you're
16 aware of the Government has turned over to Mr. Sutcliffe,
17 including evidence the Government doesn't intend to use?

18 MR. SETTLE: That is correct. We copied the entire
19 drive in its entirety and it will not have to be moved back and
20 forth. It is a complete mirrored set of the drives that were
21 housed at MDC that he's currently using in preparation.

22 THE COURT: Okay. Now the order that I issued on
23 October 28 included a requirement that a printer be available
24 for the Defendant's use in the courtroom so that if he wanted
25 to download from the electronic evidence a certain portion or

1 item that would be a document that would be introduced into
2 evidence so that the jury could take it back during its
3 deliberations because they will not have this electronic
4 evidence back there. Where is the printer? Or is there one?

5 MR. SETTLE: There is a printer and it will be
6 installed directly to the PC that will be available to
7 Mr. Sutcliffe and it will be sitting on the end of the counsel
8 table. There is not one here at this time, but there will be
9 one here this afternoon.

10 THE COURT: Now have you tested this equipment in the
11 courtroom?

12 MR. SETTLE: Yes. We have actually went through and
13 selected sample files and displayed them, switched back and
14 forth from the different mediums, including the Government's
15 laptops, Mr. Sutcliffe's PC, and both document or Elmo cameras.

16 THE COURT: Is there any aspect of the October 28
17 order that you have not yet been able to complete installing or
18 accomplishing?

19 MR. SETTLE: No. We were able to accomplish all the
20 goals set forth in the order.

21 THE COURT: Before I explore with Mr. Sutcliffe and
22 counsel for the Government whether they want to have any of
23 this evidence tested right now so that the sailing will be
24 smooth once we start the trial, let me first ask whether there
25 are any questions.

1 Do you have any questions about what Mr. Settle has
2 said so far, Ms. Duarte.

3 MS. DUARTE: I do, Your Honor. I wasn't aware if he
4 made mention of any write protect or write device that might be
5 present to insure that the drives can't be written to.

6 MR. SETTLE: The drives were copied as they were. We
7 copied the files just as they were. If they were write
8 protected prior to, they're still write protected. There was
9 nothing changed.

10 THE COURT: That's write spelled w-r-i-t-e. Is that
11 correct?

12 MS. DUARTE: W-r-i-t-e.

13 THE COURT: Okay. That's for the purpose of a clear
14 record.

15 Does that answer your question and address your
16 concern?

17 MS. DUARTE: Actually it does not, Your Honor,
18 because it's my understanding that the file itself is not --
19 the drive itself is not write protected as to the data. You
20 can write protect a drive which protects it from alteration as
21 you read it through use of a separate device. There was a
22 device, I understand, that provided for that at MDC.

23 THE COURT: Provided for what?

24 MS. DUARTE: For the write protect block to be on at
25 MDC. What I was inquiring as to is whether there is a similar

1 device provided on this computer set that would insure that the
2 evidence could not be changed.

3 THE COURT: Before I hear from Mr. Sutcliffe, who has
4 risen and I will allow him to speak in a moment, did you
5 understand what she said?

6 MR. SETTLE: Yes, I do, and we have not provided for
7 that. There's not an external or a separate write protect
8 device put on it. The only write protection would be if the
9 files currently had on it write protection, they were copied
10 with that same write protection. There was an external
11 device -- there is an external device that's available to
12 protect the data from being written, but we did not provide for
13 one of those.

14 THE COURT: There's an external device at the MDC.
15 That's what you're saying. Right?

16 MR. SETTLE: Yes.

17 THE COURT: What would it take to attach one or
18 install one --

19 MR. SETTLE: Just a matter of purchasing it and
20 installing it.

21 THE COURT: How much does that cost?

22 MR. SETTLE: I'm not aware of the cost of that, but I
23 can certainly have it within the next 30 minutes or so.

24 THE COURT: Mr. Sutcliffe, did you want to say
25 something?

1 THE DEFENDANT: Yes, Your Honor. Thank you.

2 Is it my understanding that the drives here that I'm
3 looking at on the screen are mirror images of the drives from
4 MDC?

5 THE COURT: That is correct.

6 THE DEFENDANT: I would like the record to reflect
7 that I've had access to most of those drives on a continued
8 basis without write protection afforded the device they're
9 speaking about. It was put on the first drive. After that it
10 kind of got: Well, here. I'm in a hurry. Here's your drive.
11 Here's your next drive you requested. Hook it up yourself.

12 THE COURT: That's what you were being told by
13 someone at the MDC?

14 THE DEFENDANT: Yes. I've been hooking up the drives
15 by myself now. I've had ample opportunity to change any file I
16 wanted on there. I just want the record to reflect that's
17 what's occurred since I've been there.

18 Furthermore, as in my papers I filed, one of those
19 drives is mysteriously missing. It turned up missing on the
20 SCSI, along with who knows what else, you know. I just want
21 the record to reflect that. If that's her concern, it's too
22 late.

23 THE COURT: Okay. The record will so reflect that.
24 I construe what you're saying to be consistent with your
25 representing that you don't intend to screw around with the

1 hard drives, you haven't done it so far, even though you are
2 representing that you could have done it, and you don't intend
3 to do it in the future. Is that all correct?

4 THE DEFENDANT: That's correct. I even found an
5 unsecured file on one of the computers they brought down and
6 brought it to the MDC's attention that had -- showed the list
7 of a whole bunch of separatees (phonetic spelling) who are not
8 even supposed to be in the same building or same rooms, and
9 things like that, and I told them you shouldn't have this file
10 on there. I opened it by accident, totally inadvertently. I
11 just want the record to reflect that, too, in case it's ever
12 brought up.

13 THE COURT: All right. Well, thank you for doing so.
14 I think although it doesn't seem to be a problem and I'm
15 reassured that there won't be a problem, I would, in the
16 interest of being protective of the system itself, which is
17 what I'm here to do, note that if there had been some kind of
18 tampering with evidence that was actually being presented in
19 the courtroom during the presentation of the trial, that could
20 invite some very serious questions as to whether or not that
21 would itself constitute apparent criminal behavior. I'm not
22 suggesting it's going to happen. I'm not suggesting it has
23 happened. But that, too, is a break.

24 In any event, to avoid these issues, to avoid further
25 expenditures of very precious time on all of these logistical

1 arrangements, I'm directing and ordering the clerk of the
2 court, through you, Mr. Settle, to attach that write protect
3 mechanism --

4 MR. SETTLE: I understand.

5 THE COURT: -- on the equipment here in the
6 courtroom. All right?

7 Yes, Mr. Sutcliffe.

8 THE DEFENDANT: My concern is not the write protect
9 drive being attached at this point. My concern that I raised
10 is the issue and I brought forth to the Court's attention what
11 I just explained is that the fact that one of the SCSI drives
12 has been represented to me to have been stolen from within MDC,
13 from within the room, allegedly, that I go into to examine this
14 data that's being provided to me. There is a lot of people
15 that seem to be going in and out of that room unauthorized. In
16 fact, one of the personnel told me the other day that it's my
17 job to make sure they don't come in this room now.

18 The point is anybody could have come in that room and
19 deleted or altered a file that's on this computer now that
20 we're discussing. So before we go forward, I think it would be
21 very wise upon everybody in here to cross check to make sure
22 that what is on the original drives is actually what is on here
23 and that there's not stuff missing because I can't go
24 through -- I'm too busy preparing for my defense to go through
25 every single file in multi gigabytes' worth of data here to see

1 if some clown who might have stole my hard drive has also
2 deleted some file which is necessary in my defense. That's the
3 reason I brought it up for Your Honor's attention. Thank you.

4 THE COURT: Thank you. I'm not going to order that
5 very time-consuming comparison be undertaken because I don't
6 see that there's any factual basis to make some kind of
7 presumptive finding that anyone has tinkered or tampered with
8 the evidence and with the material that was on the hard drive.
9 You certainly told us that you haven't. I don't have any basis
10 to know what happened to the item you say is missing, but I
11 would like the record to reflect, as the files would anyway,
12 that the Government filed a document on November 34 entitled
13 "Status Filing Re Replacement of Defendant's Copy of SCSI Drive
14 LA 1-S," and it sets forth the Government's understanding as to
15 the need to replace or install something that for some reason I
16 don't fully understand it had discovered wasn't among the
17 equipment then available to Mr. Sutcliffe. Whether somebody
18 inadvertently lost it or what, I don't have a basis to find.
19 But I don't have any concern about the fact that all of the
20 evidence based upon that filing and other things that have been
21 represented to the Court has been available to the Defendant.

22 So you'll get the write protect mechanism and that
23 will address Ms. Duarte's concerns.

24 Any other concerns before I hear from Mr. Sutcliffe
25 about what Mr. Settle has said and what has been described for

1 the record?

2 MS. DUARTE: If I could have just a second.

3 (Pause in the proceedings.)

4 MS. DUARTE: None, Your Honor.

5 THE COURT: Okay. Mr. Sutcliffe.

6 THE DEFENDANT: Yes, Your Honor. I bring the Court's
7 attention to the minute order on October 21 wherein on the
8 second paragraph in response -- it says, "In response to the
9 Court's questions, Mr. Cevera confirms the receipt of the SCSI
10 drive and assures the Court that it will be working by today."

11 It was not working by that day. It was not working
12 until just a couple days ago. I just received that drive in an
13 i.d. format, as I mentioned in the paperwork I filed this
14 morning in my motion in limine.

15 I just want the record to reflect I haven't had
16 anywhere near ample opportunity to examine that because of the
17 failure on the Government's part to provide that drive to me or
18 to keep it in a secure place so that it would be available to
19 be installed and available so I can look at it as they assured
20 it would be on the 21st of October.

21 THE COURT: The courtroom deputy told me that you had
22 filed certain motions. I haven't read the motions. I don't
23 even know what the titles are on the motions. Are you seeking
24 in the filing of those motions a continuation of the trial?

25 THE DEFENDANT: Oh, not at all. I just want the

1 record to reflect on the 21st they assured the Court it would
2 be available. It was not. And, further, it was represented to
3 me that that drive had been lost, stolen, destroyed, who knows
4 what. And you told them to get it working that day. And it
5 says one SCSI drive, not SCSI drives.

6 THE COURT: Okay. I will look at what you filed, and
7 to the extent the motions require a ruling, I'll make a ruling
8 before we bring the jurors down on Wednesday morning. If the
9 Government thinks that it has a need to respond -- today is
10 Friday -- the Government better respond on Monday. We're
11 closed on Tuesday, although I know I and my staff will be here.

12 Let's move on. Do you want any of this system to
13 be -- and if so, it will have to be done very briefly -- to be
14 tested in your presence this at status conference?

15 MS. DUARTE: There's no need for that, Your Honor.

16 THE COURT: Okay. Mr. Sutcliffe, do you?

17 THE DEFENDANT: Yes, Your Honor. I noticed quickly
18 as I was looking through here, I will require Microsoft Front
19 Page to be installed on this machine and I will need a brief
20 period of time to configure this machine to my needs. Other
21 than that, it looks okay.

22 THE COURT: What is the Microsoft software that
23 you're talking about? Why do you need it?

24 THE DEFENDANT: It is what I created all my websites
25 in. It's what I used to -- I need it for display purposes. It

1 gives multiple displays of pages. Instead of looking at it in
2 1D flat format, you can look at it and get almost like a two-,
3 three-dimensional view of the web page where it's pointing to,
4 where it goes, what the code is behind what you don't see.
5 It's all very relevant to the defense.

6 THE COURT: It sounds like it might be helpful. I'm
7 not sure that it's required and I'll take your request under
8 consideration.

9 Do you have any of that software already available to
10 the Court?

11 MR. SETTLE: Yes, we do, Your Honor.

12 THE COURT: Do you have any objection to having it
13 loaded onto the laptop?

14 MS. DUARTE: May I have just a minute, Your Honor?

15 THE COURT: Yes.

16 (Pause in the proceedings.)

17 MS. DUARTE: No objection, Your Honor.

18 THE COURT: That will be done later today.

19 MS. DUARTE: Your Honor, may I ask a point of
20 clarification about an earlier ruling?

21 THE COURT: Yes.

22 MS. DUARTE: When you indicated that I should answer
23 the motions in limine to the extent I feel the need by Monday,
24 if these motions have been previously made by previous counsel,
25 should I just refer to that date in filing or need I answer

1 them again?

2 THE COURT: If you think that's sufficient, you can
3 do that and I can find the earlier date in the filing. There's
4 going to be an army of lawyers in here on a civil case on
5 Monday and I'm going to chew them out for raping the forest by
6 dumping on the Court mountains of unnecessary material. So
7 that's my view on an ongoing basis. If you don't think I need
8 to see it, fine, but I'm not going to tell you how to file your
9 papers.

10 MS. DUARTE: Understood.

11 THE COURT: Do you want to go through a very quick
12 test of anything right now? Because if you don't, then we can
13 move on.

14 THE DEFENDANT: No. It looks fine. Thank you, Your
15 Honor.

16 THE COURT: All right. Then let's move on.

17 Mr. Settle, you're welcome to stay, and I would in
18 fact prefer that you stay, but if you have some kind of
19 pressing obligation, we have addressed the matters that are
20 specifically dependent upon you, so I would not insist that you
21 stay here.

22 MR. SETTLE: Thank you, Your Honor.

23 THE COURT: But I would prefer.

24 MR. SETTLE: I will be here.

25 THE COURT: Now let's go down the October 28 order

1 that set forth the agenda for this session. And I think I can
2 do it fairly efficiently.

3 The first item was attached to that order so that the
4 parties -- and I will be using the word "parties" just as a
5 shorthand way to refer to both the prosecution and the
6 defense -- would have a basis to understand what this trial
7 will require in terms of their conduct and the arrangements
8 that will be made. But there are some changes.

9 The first item referred to this Court's standing
10 criminal order. And I want to just -- I'm not going to read
11 the order and I'm not going to go down every provision in the
12 order, but I'm going to tell you what is different about how
13 this trial will be conducted.

14 I will expect the parties to be here at 8:00 in the
15 morning. And I'm directing the marshal to arrange for
16 Mr. Sutcliffe to be available at counsel table, having taken
17 care of all the necessary arrangements before then, including
18 bathroom usage, if possible, obviously if someone needs to use
19 the bathroom at any given time, that request will be
20 accommodated whether it's a juror or a witness or the parties.
21 But I prefer to have him here and have use of the equipment and
22 the evidence available to him here in the courtroom by 8:00.

23 The jurors are going to be told that they are going
24 to be in the box by not later than 8:30, not a minute later.
25 I'm going to go over with them on a continuing basis that they

1 are to make all plans, including at a time when traffic is
2 backed up because of the strike, so that there is not any
3 occasion when any of them is even a minute late. And the clerk
4 will bring them out and they will be in the box at 8:30 and
5 I'll come out and the trial will start at 8:30.

6 Now most days -- but I reserve the right to make
7 changes dependent on a number of factors, primarily my other
8 responsibilities. Most days the trial will continue to
9 1:30 without a lunch break and there will be two 15-minute
10 breaks. During that period between 8:00 and 8:30, if there are
11 issues that need to be addressed outside the presence of the
12 jury, that's when they'll be addressed. I can't be sure that
13 on a good faith basis there might be other occasions where
14 something has to be addressed outside the presence of the jury,
15 and I'll talk about that a little bit more later, even at a
16 time when the trial is under way, in which case, of course,
17 I'll have to excuse the jury.

18 But I am setting aside 8:00 to 8:30 for counsel and
19 the parties to get ready, to have their witnesses ready. At
20 the time that the jury walks into the jury box at 8:30, if
21 there's a witness who was previously sworn and who had begun to
22 testify the previous day but hadn't yet completed his or her
23 testimony, I want the witness in the witness seat. I'll remind
24 the witness that she or he was previously sworn and we'll zoom
25 right in.

1 So if there's a need to vary the schedule, and in
2 particular to have proceedings in the afternoon -- and I can
3 easily see that there would be -- I'll give you at least a
4 day's notice, at least. And I'll try to give you more than
5 that. And I think I can.

6 On the first day, the schedule will be a little bit
7 different because I want to complete the selection of the jury
8 that day and we'll never do it because of the unusual features
9 of this case, which I'll talk more about in a minute. So that
10 first day will be a full day and there will be a lunch break,
11 but the same arrival time will apply. And before the jurors
12 are brought down -- and I hope very much that those jurors will
13 be outside the courtroom and ready to come in by not a minute
14 later than 9:00 -- we will go over the motions in limine, or
15 whatever they are that you filed today, and I'll issue my
16 rulings on those and make sure that any other last minute
17 adjustments are explored. So the Wednesday, when we start
18 trial on November 12, will be a full day.

19 Item 2D on the Court's standing trial order is not
20 applicable. We're not going to have a conference in the jury
21 room the way I ordinarily do. And I've already drafted a
22 statement of the case. I asked the clerk to show the draft to
23 the parties. And I hope that you've had a chance to read it.
24 I gave you ample time.

25 This is something, Mr. Sutcliffe, that the jurors

1 will be told about almost immediately after entering the
2 courtroom before the process of picking a jury goes on. It's a
3 customary thing. If it were a civil case, I would tell them
4 about what kind of case it is. This is intended to be a
5 neutral statement just so they know a little bit about the
6 case.

7 Any objections to the statement of the case,
8 Ms. Duarte?

9 MS. DUARTE: Your Honor, the second paragraph, I
10 think, needs to be reworked a little bit.

11 THE COURT: Why?

12 MS. DUARTE: I don't think it's an accurate statement
13 of the charge. The Government's actually alleging that
14 Mr. Sutcliffe transferred the Social Security numbers by virtue
15 of their posting on the Internet, and that's actually within
16 the definitions section of the statute. And then that he had
17 the intent, at the time that he did that posting or
18 transferring, to aid and abet another felony, that is the use
19 of the Social Security numbers.

20 I could grab my instructions. I don't have them --

21 THE COURT: I don't know if I -- I see your point and
22 I think you're probably, in principle, right.

23 MS. DUARTE: I can either keep going right now and
24 look at the jury instructions briefly and let the Court know or
25 I could submit, immediately after the hearing, a proposed

1 revised paragraph.

2 THE COURT: You do the latter. I may have already
3 fixed it by then.

4 Any other objections?

5 MS. DUARTE: No, Your Honor. The first paragraph, no
6 objections, nor to the last.

7 THE COURT: Mr. Sutcliffe?

8 THE DEFENDANT: Yes, Your Honor. Regarding the
9 limiting instructions on killercop.com --

10 THE COURT: I'll get to that later. Just on the
11 statement of the case. I am going to change, to a slight
12 extent, paragraph 2.

13 THE DEFENDANT: No objections.

14 THE COURT: Ms. Duarte, if the first sentence --
15 first three lines of the first sentence in the middle paragraph
16 on the statement of the case read as follows, would I correctly
17 state what the Government's charge is?

18 Here's what they would say. "Second, the Government
19 alleges, in counts 5 through 9, that Mr. Sutcliffe obtained and
20 transferred to the Internet the Social Security numbers of
21 various individuals and that in doing so he intended to aid and
22 abet the making of a false representation."

23 MS. DUARTE: Yes, Your Honor, if I could just have a
24 minute.

25 Yes, Your Honor, false representation of a Social

1 Security number.

2 THE COURT: And the portion that relates to the
3 persons not being the ones to whom they had actually been
4 assigned, you're moving to strike?

5 MS. DUARTE: Yes, Your Honor.

6 THE COURT: Okay. I'll do that. You don't have to
7 submit anything. That's going to be the statement of the case.

8 Turning back to the standing criminal trial order,
9 paragraph 5 is inapplicable. We won't have that last
10 conference. You can disregard that. Some of the provisions,
11 particularly, for example, 13, 14 and 15, in the Court's
12 standing order are applicable. I may go over that ground again
13 in setting forth what the requirements are for particularly
14 Mr. Sutcliffe, who is in the unusual position of representing
15 himself. But I admonish him to read those provisions as well
16 as some others that are attached to this order that I sent out
17 for today's conference.

18 On paragraph 19, which relates to stipulations, are
19 there any stipulations?

20 MS. DUARTE: No, Your Honor.

21 THE COURT: Okay. That's what I assumed.

22 THE DEFENDANT: Excuse me, Your Honor. I was given
23 two documents this morning by Ms. Duarte regarding some
24 apparent stipulations that she said that she conferred with
25 Mr. Harris. I object to any stipulations that have been

1 entered by previous counsel without my knowledge.

2 THE COURT: They won't be used. You can sit down.
3 We have no stipulations. Whatever Mr. Harris may have agreed
4 to or signed, I'm not going to impose on you.

5 THE DEFENDANT: Thank you, Your Honor.

6 MS. DUARTE: Your Honor, Defendant is actually
7 speaking of 90211 declarations which were made earlier and
8 turned over earlier when Mr. Harris was representing
9 Mr. Sutcliffe, which the Government intends to ask the Court to
10 introduce the records which speak for themselves based --

11 THE COURT: If there's an independent evidentiary
12 basis for that evidence to be admitted and you just made it
13 available to show the opposing side, at an earlier stage, the
14 opposing lawyer, that's fine.

15 MS. DUARTE: Correct.

16 THE COURT: Mr. Sutcliffe has it now. I'll make a
17 ruling at the appropriate time.

18 MS. DUARTE: Your Honor, may I ask a question based
19 on that?

20 Does the Court prefer that -- if I'm moving something
21 for a 90211, does the Court want the affidavit with the exhibit
22 or for a separate determination?

23 THE COURT: Separate determination.

24 MS. DUARTE: Thank you.

25 THE COURT: Attachment B to the October 28 order that

1 I issued is a different iteration of another judge's
2 instructions for how criminal trials are to be conducted in
3 that judge's courtroom I incorporated into this order. There's
4 a lot of overlap, so I'm not going to touch on that.

5 But in the case of Mr. Sutcliffe -- and this is very
6 important to understand -- the Court has gone to extraordinary
7 steps, that I'm not aware of any precedent for, to make sure
8 that you have the opportunity to access evidence, review
9 evidence, and present evidence at counsel table and to defend
10 yourself in the maximum and most appropriate and efficient way
11 possible.

12 Consistent with that, Mr. Sutcliffe, you are not only
13 authorized but directed to, throughout the trial, remain at
14 counsel table. You're allowed to stand. You're allowed to
15 shift from one side of the table to the other to access any of
16 this elaborate equipment that I'm now looking at that has been
17 installed.

18 We have put skirts all around the visible portions of
19 the counsel table that jurors could see. You will be required
20 to continue to wear the restraints around your feet or your
21 ankles -- I'm not sure exactly how they are rigged up -- during
22 the trial. You have a right not to have any juror or
23 prospective juror see those. When the jurors come in the
24 courtroom and when they're sitting in the process of jury
25 selection, I'm going to make sure they sit in places where they

1 won't be able to see those restraints.

2 You also have an independent duty -- and I am
3 instructing you to do your level best to carry this out
4 consistently -- not to wander around in any way that
5 intentionally or inadvertently would enable jurors to see that
6 you have those restraints.

7 So we have installed this equipment within easy arm's
8 reach. If you need to rise to make an objection, of course
9 you'll be able to do that. I don't think there's anything that
10 you need that is not available to you at counsel table.

11 Consistent with that approach, you may address the
12 Court from counsel table, you may question witnesses from
13 counsel table, you may deliver opening statement from counsel
14 table, you may deliver closing argument from counsel table.
15 You not only may do all those things, but that's what I'm
16 ordering you to do. So to the extent one of these orders said
17 something about counsel approaching the lectern, it doesn't
18 apply to you. It does apply to the Government.

19 Any questions about that?

20 THE DEFENDANT: Yes. That's going to make side bars
21 very difficult.

22 THE COURT: Yes. And I'll talk about side bars
23 later.

24 THE DEFENDANT: One other point, Your Honor.

25 In here under instruction E, it says that -- that's

1 the lecturn you were speaking about. All right. Under
2 subsection E of E, I notice it says speak up when making an
3 objection. I'm just concerned -- I notice that in the standing
4 order of October 28 under number 10, it said, "Potential
5 consequences of disruptive behavior." I know in the past the
6 Court has been concerned about the volume of my voice. I'd
7 like this Court to please define and provide a written
8 definition of what constitutes disruptive behavior.

9 The Defendant recognizes the trial is an adversary
10 proceeding and the defense needs guidance on how to
11 aggressively advocate on his own without being considered
12 disruptive.

13 Also, the Court rarely if ever immediately recognizes
14 nor permits the Defendant to speak up when the issue is ripe
15 and before the Court and requiring the Defendant to wait
16 lengthy periods of time before he's permitted to make an
17 objection, during which time additional objections might arise,
18 making it impossible for me to remember all of my objections.

19 My concern is I would like that to be done before
20 trial starts so that I have a clear, unvague --

21 THE COURT: Okay.

22 THE DEFENDANT: -- theory I'm going here.

23 THE COURT: It's a sound proposal. I'm about to do
24 it now. I'm not going to do it in writing, so just listen
25 carefully.

1 First of all --

2 THE DEFENDANT: Excuse me, Your Honor. I need to
3 write this down, please. One second. Thank you.

4 THE COURT: Okay. In terms of your behavior,
5 Mr. Sutcliffe --

6 THE DEFENDANT: In terms of what constitutes
7 disruptive behavior.

8 THE COURT: I will get to that. Just listen
9 carefully because these are the ground rules that you have to
10 follow.

11 Either intentional or persistent or flagrant --

12 THE DEFENDANT: I'm sorry. You're going to have to
13 slow down, Your Honor.

14 THE COURT: I'm not going to slow down to the point
15 where you take down every word. I think it's sufficient if you
16 just listen. I am going to give you something to take back to
17 the prison afterwards. But just listen. I'm not going to read
18 and recite this as slowly as necessary, but I'll send a copy to
19 you of the core of this if you just want to be able to have it
20 back there to review and consider.

21 First of all, when you need to object or feel you
22 have a right to object, you stand up. That's the eye signal
23 that lawyers provide to the judge. You permit the questioner
24 to finish the question before you voice your objection. You
25 can rise if you think it's an objectionable question that the

1 prosecutor is trying to ask. Stand up, let the prosecutor
2 finish the question, say, "I object," and just give a very
3 brief basis. "I object. Hearsay." "I object. Leading." No
4 speeches. No references to unfair, no references to the
5 prosecutor knowing better, no references to a kangaroo court,
6 nothing like that because no lawyer could ever get away with
7 that and you're going to be required to adhere to the same
8 standards as lawyers.

9 When you object, I'll rule upon your objection. If I
10 deny the objection, please sit down. That's what lawyers will
11 have to do, including Ms. Duarte or anyone else on her team.
12 You don't argue with the judge after the judge has issued a
13 ruling.

14 THE DEFENDANT: Doesn't that defeat the purpose of a
15 timely objection, Your Honor, to preempt the words of the
16 document that's being introduced before it can prejudice the
17 jury?

18 THE COURT: No, it doesn't, not at all. The jury
19 will be told that questions are in evidence and they're not
20 allowed to take into account what a lawyer says, including in
21 the process of framing a question. No documents will be shown
22 to the jury unless they are already admitted into evidence.
23 You may be dealing with a situation where you and I see a
24 document that the Government is offering into evidence but the
25 jury doesn't because we will have a capacity to mute the

1 screens before the jury. Until a document is in evidence, it
2 isn't going to be displayed to the jury.

3 And I'm not going to go through a long course in
4 Evidence 101, but I'm telling you that your rights are going to
5 be exactly the same as every other defendant's and every other
6 litigant's rights and this is the way you have to assert your
7 objections.

8 The volume of your voice just has to be sufficient so
9 that the jurors and the witnesses and the Court and counsel can
10 hear you. And I think it would be helpful to have the
11 microphone close to you. I'm not worried about you shouting
12 unless you get so belligerent that I'll deal with that on a
13 different basis. And I'll turn to that a little bit later.

14 You are required to adhere to all of the requirements
15 that lawyers are required to adhere to when it comes to
16 delivering opening statements and closing arguments.

17 Opening statements in general are previews of the
18 evidence and they have to deal with what the elements of the
19 allegations in the indictment are and what the anticipated
20 theories of the defense will be, if you choose to give an
21 opening statement. You're not required to, but you're entitled
22 to. You can give one when the Government finishes giving its
23 opening statement or you can reserve one until the Government
24 rests its case if you decide to put on your own case. But
25 you're going to have to be bound by the same restrictions on

1 opening statement and you can't attempt to suggest that the
2 jury is going to hear about evidence that you have no good
3 faith basis to believe will be received.

4 On closing argument, you're going to have to argue
5 what the evidence was. You're going to have to argue about
6 what the evidence was, not about what it could have been if I
7 had made rulings allowing some evidence to get in that I in
8 fact excluded. You can argue about inferences that a jury
9 would be reasonably entitled to draw from the evidence, but
10 you're going to have to stick to the evidence and the charges
11 and take measures to try to persuade the jury why the
12 Government failed to prove what it's alleging against you.

13 You won't be entitled to introduce any kind of
14 defenses that you didn't give proper notice for. I don't think
15 you're planning to. But that would include entrapment and
16 duress and alibi defenses. If you rely on a theory of advice
17 of counsel, and there's been some reference to that, it may be
18 your right to show that you lacked the specific intent that the
19 Government is going to have to prove you had as to some of
20 these allegations. But that is not a defense that would
21 entitle you to acquittal just because you received information
22 from a lawyer. And if you invoke information from a lawyer
23 that gets to the question of what your state of mind was and
24 why it was not a criminal state of mind, why you did not have
25 the specific intent, I already told you once that you are

1 likely to be opening the door, as a matter of law, to
2 examination of both you and that lawyer by the Government about
3 things that you didn't want the jury to hear but that may be
4 related to the communications you had with that lawyer.

5 You are not to address anybody in the courtroom
6 except me or a witness that you're questioning. If you have a
7 gripe with the prosecutor or even a proposal that may help the
8 smooth presentation of evidence and the efficient use of time
9 in the trial, do it when the jury is outside of the room and
10 not when the court proceedings are under way.

11 You don't talk to witnesses, you don't talk to
12 Government counsel, you don't talk to the Court when other
13 people are talking. If you do that, that, too, would be
14 disruptive behavior.

15 You may choose to testify. If you testify, you'll be
16 allowed to testify from the witness chair, but you'll be
17 required to ask questions and then answer the questions.
18 Before you can say anything that is consistent with whatever
19 your theory of defense is or whatever your position is that you
20 want the jury to hear from your lips and your mouth, you'll
21 have to ask a question. And the purpose of that is to give the
22 Government an opportunity to object to your question along the
23 same lines and in the same manner that I already told you you
24 will be required to follow.

25 And I'll rule on the Government's objections if there

1 are any. And if I say the objection is sustained, then you
2 won't be permitted to answer it. You should -- it's going to
3 be awkward, but you should say, "Mr. Sutcliffe, did you ever
4 tell Miss Smith that you really meant it when you put that
5 statement on the Internet?" I'm making up this question.
6 Okay?

7 That's the way you would ask the question. You
8 wouldn't say, "Did I ever intend -- did I ever say that to Miss
9 Smith?" You would refer to yourself as a third person. And
10 you would answer the question. You would say, "No, I did not."
11 And you would move on to the next question. That's the way
12 you're going to be required to engage in questions and answers
13 if you testify.

14 You will have the choice, if you want -- I'll
15 consider entertaining this choice -- of writing down the
16 questions that you propose to ask Steven Sutcliffe in his
17 capacity as a witness and have Mr. Reed, who will be stand-by
18 counsel -- and I'll be talking about his role in a minute --
19 ask those questions from the lecturn table. If you prefer to
20 have him be the person, the vehicle through whom your written
21 questions are voiced so it comes over in a more conventional,
22 natural basis and it doesn't seem awkward, I'll consider
23 allowing you to do that. It's your choice.

24 Now disruptive behavior, in addition to violating
25 these standard provisions and others -- I'm not attempting to

1 exhaust every possible conventional rule of order, decorum,
2 respect that a Court is entitled to, every court.
3 Conventional -- I mean disruptive behavior would include
4 shouts, interruptions, threats, facial gestures or body
5 language that display either contempt or were in some way
6 menacing.

7 You and I have worked out a good relationship.
8 You've been admirable in the way you've handled yourself today
9 and in recent appearances. If you just take that approach, we
10 will not have a problem, you'll get a fair trial, there won't
11 be any need to revisit these issues.

12 In order to give you the guidance you wanted to have
13 and in anticipating, because I think you are a smart guy, you
14 would ask that question, I asked the clerk to prepare a
15 document. It's entitled "Disruptive Defendant." I had it
16 marked hearing Exhibit A. It's not Court Exhibit A. You don't
17 have to read it now, but it will tell you -- and you can have a
18 copy. And I'm directing the clerk to give it to you -- what
19 the measures are that would be available to me if I make a
20 finding that you -- or if I made this finding for anybody
21 else -- had been disruptive. And those measures can be very,
22 very extreme, including ejecting you from the courtroom and
23 even permitting the trial to proceed in your absence or
24 temporarily ejecting you from the courtroom. I could hold you
25 in contempt. I could gag you. I don't want to do any of those

1 things. I'm kind of hopeful that none of them will even cross
2 my mind. But you can read what the measures are that are
3 available to the Court in the document you've now been given
4 called Hearing Exhibit A.

5 THE DEFENDANT: Thank you, Your Honor.

6 THE COURT: All right. Here are the procedures we're
7 going to use for selecting a jury. When the jurors first come
8 in the courtroom, I will read the statement of the case, I will
9 describe who the parties are, I will ask the -- I will have the
10 prosecution -- the prosecutor introduce herself and whoever is
11 with her at counsel table. I guess it's going to be you,
12 Mr. Cugno?

13 MR. CUGNO: Yes, Your Honor.

14 THE COURT: I'll ask the jurors if they know either
15 of those people. Then I'll do the same with you,
16 Mr. Sutcliffe, and also with Mr. Reed.

17 More than once I will have both occasion and, I
18 think, the need to instruct the jurors about the unusual
19 circumstance -- although by no means unprecedented. This
20 happens many times -- that the Defendant in the case is
21 representing himself. So I prepared a draft document. It's
22 entitled "Statement Re: Pro Per/Logistics." And I asked the
23 courtroom deputy to give it to both sides before I came out on
24 the bench this morning. I'm not going to invite any comment on
25 this document. I'm not going to sit here and cause anybody to

1 edit it. This is my obligation, my responsibility. This is
2 what I came up with last night. And it's the gist of what I'm
3 going to tell the jurors when they're in the back of the room.

4 In the process of questioning them a little later on
5 in the stage of picking a jury, I will go over some of this
6 ground, as well, to make sure that no jurors are placed on the
7 ultimate jury panel who are going to be sidetracked, much less
8 prejudiced by the fact that Mr. Sutcliffe is representing
9 himself.

10 After I explore with the jurors a number of factors
11 common to them all before any particular jury is identified by
12 name or asked to answer any questions, after I finish doing
13 that, we'll go to what we can consider to be stage two of the
14 process of jury selection.

15 Now when I ask questions in the back of the room,
16 they will be designed to weed out prospective jurors who
17 clearly are not in a position to be considered for service or
18 to be picked.

19 If, for example, by coincidence, it turned out that
20 one of the jurors was Mr. Cugno's sister -- I don't know if he
21 has a sister -- I would obviously excuse that juror. The way I
22 intend to exercise my authority basically to weed out jurors
23 who ought not even be called for further questioning is to look
24 down at counsel table and say -- listen carefully to this,
25 Mr. Sutcliffe -- "I intend to proceed accordingly," or words to

1 that effect. "I," meaning me, "intend to proceed accordingly.
2 Any objections?" In other words, I'm about to say to this
3 juror, "Go back to the jury room. We don't need you here."

4 I would do it if it was Mr. Cugno's sister. I would
5 do it if a juror was about to deliver a baby the next day. I
6 would do it if a juror had unquestionable and not contrived
7 financial hardship. I would do it if a juror had heard
8 anything about this case. I would do it if a juror knew any of
9 the names of the witnesses. All the names of the witnesses
10 will be read -- of the witnesses on the Government's list --
11 and I need an extra copy of that.

12 MS. DUARTE: I have it.

13 THE COURT: -- will be read to the jurors when
14 they're in the back of the courtroom. And if I think that
15 there's a basis to excuse a juror for cause before anybody gets
16 into the question of specific questions, I will say, "I intend
17 to proceed accordingly and if there's no objection, I'll excuse
18 this juror."

19 After that, we start at stage two. Here's how that's
20 going to work for this trial only. The names of 30 jurors will
21 be called. You will have, both of you, at your counsel table,
22 the list of individual persons who were sent down to this
23 courtroom. And each of them will be listed numerically.
24 Somebody will be number 1 and somebody will be number 42. I
25 think that's how many we're going to have all together. 42?

1 45 or so.

2 The first 30 in numerical order -- and the numerical
3 order is determined absolutely randomly up in the third floor
4 jury room -- will be called to sit elsewhere from where they
5 may have been sitting as they entered the courtroom. Fourteen
6 of them will sit in that box which has 14 chairs in that jury
7 box. Six will sit behind that monitor. And I want the monitor
8 removed during the process of jury selection or put against the
9 wall so I can see those people. Six will be on the front bench
10 near the door with the seal. And ten will either sit in the
11 center row there or the first two rows. I need to see how they
12 squeeze in to make sure that Mr. Sutcliffe's rights are
13 protected.

14 And I will do the questioning of all 30 of those
15 people in round two. And I will use the standard jury
16 questionnaire form. And I want the clerk to give that form to
17 Mr. Sutcliffe. I think the Government is familiar with it.
18 They've seen it before.

19 And now I'm going to tell you the additional
20 questions I'm going to ask, not the precise questions, but the
21 topic. In an earlier stage in the case, the Government issued
22 proposed voir dire questions, and so did one of Mr. Sutcliffe's
23 previous lawyers, Mr. Harris. And both of those proposals
24 contained certain questions tailored to this case that the
25 jurors have to answer in addition to the questions that I'll be

1 asking them again about the circumstances of Mr. Sutcliffe
2 representing himself.

3 From the Government's proposed voir dire questions I
4 will ask number 4 and 5 relating to experiences with law
5 enforcement, and particularly with the FBI. I will ask
6 questions 7 through 10. 7 has to do with computer proficiency.
7 8 has to do with organizations that advocate rights to privacy.
8 I'm not going to ask about "belong to." I'm going to ask
9 whether they contribute to or advocate. And the same with
10 question 9. The mere fact that somebody belongs to groups that
11 advocate that position will not be cause for excusing that
12 juror, but may warrant further question.

13 I'm going to give the gist of what the Government
14 proposed in number 10, but it's going to be much more neutral.
15 The Government wanted me to ask whether somebody had any
16 unpleasant experience with Global Crossing. I'm not going to
17 do it that way. The question is going to be has anyone or have
18 you had any experience, period, not pleasant or unpleasant or
19 favorable or unfavorable, just any experience with Global
20 Crossing, any impressions of, feelings towards Global Crossing,
21 anybody own any stock in Global Crossing.

22 Those were some of the areas that Mr. Harris
23 proposed. He asked some questions about familiarity with the
24 Internet.

25 Questions 1 through 3 I'm going to ask. Question 6

1 I'm going to ask. Question 7 I'm going to ask about law
2 enforcement contacts. Question 6 has to do with disputes with
3 employers. Question 10 has to do with crime victims. I'm
4 going to ask that.

5 All of the questions in 11 through 13 I'm going to
6 ask, with slight variations, to make sure that if there are
7 ties with Global Crossing, including people who may have used
8 the services provided by Global Crossing or businesses with
9 Global Crossing, I'm going to ask those questions.

10 Okay. After I finish asking those questions -- and
11 it's going to take a long time. It's going to be 30 people.
12 And I'm doing this differently so we don't have to have people
13 going to the lecturn at the point when they're going to
14 exercise their challenges -- I will excuse all the jurors from
15 the courtroom with certain instructions to remain outside.
16 I'll ask both sides whether there are additional questions you
17 want me to ask a particular person among those 30, some
18 follow-up questions I didn't ask, some different questions
19 specifically tailored to something that juror told me about her
20 profession or something else.

21 I will also ask, outside the presence of the jurors,
22 whether any of the answers that any of those 30 jurors gave in
23 your opinion provided a basis to excuse that juror for cause so
24 you don't have to use up one of your available peremptory
25 challenges. And if you say so, I will then rule -- hear from

1 the other side, and then I'll rule upon whether I think that
2 juror should be excused for cause.

3 If a juror tells me something that to me, one of
4 those 30 people in stage two -- that to me does constitute
5 grounds for excusing that juror for cause, I'm going to look
6 down on you, just the way I did in stage one, and I'm going to
7 say, "Counsel, I intend to proceed accordingly." I'm going to
8 say, "I intend to proceed accordingly." If I say, "Counsel,"
9 it's not going to be a big deal.

10 That's what I'm going to say. That's my signal to
11 you. If you don't think that it would be a correct decision
12 exercising my discretion to excuse that prospective juror for
13 cause, then you stand up and say, "May I be heard." In which
14 event, you'll be heard, maybe not then but later on, at a time
15 when I think it's most efficient, about whether or not that
16 juror should be excused for cause.

17 After we review what your positions are about
18 follow-up questions and objections for cause to those jurors,
19 then I'll invite them back in. They will resume their seats.
20 Thirty people is a lot to keep track of. I won't do the pace
21 too quickly. You'll both be taking notes. You'll both be
22 eyeballing these people.

23 To help you out, at end of my questioning of the 30,
24 before I send them out to the corridor, I will review, just so
25 you hear their names again, and I'll say, "Just so the parties

1 can keep track, juror number 1 is Ms. Smith, who works for
2 AT&T," and just three seconds of capitulation, but not more
3 than three seconds. So you have it fresh in your mind about
4 which ones you think you want to strike.

5 They come back in. The defense has ten peremptory
6 objections. The Government has six. That's 16. If you both
7 have used up all your peremptories and there has been no juror
8 among those 30 struck for cause, that would leave 14 jurors and
9 that will be our jury panel. The first 12 in number will be
10 the -- meaning the ones with the lowest 12 numbers who weren't
11 struck, will be the regular jury, and the remaining two
12 individuals, who may have been jurors numbers 23 and 29, will
13 be the two alternates. We'll have our jury.

14 Depending on what time we achieve that result, we'll
15 then proceed to opening statements after a break. People need
16 to use the bathroom, jurors need to get sworn, all that. I
17 hope to get to opening statements -- I think we can -- on
18 Wednesday morning.

19 There's a doctrine called Batson. I'm not going to
20 tell you all about it, but I will provide you this much
21 guidance. It's meant to provide protection to both sides that
22 nobody on the other side excuses the jurors for reasons that
23 would be unconstitutional, such as race or religion, although I
24 don't inquire about religion, or some other factor that is a
25 constitutionally protected status.

1 If you think that the other side is going to be
2 violating that doctrine, here is how you're going to tell me
3 about it. Before those jurors come back in is when you'll be
4 taking turns outside their presence. I should have said this a
5 moment ago, but I forgot to. They're out in the corridor and
6 they've finished all the questioning, and if I bring them back
7 in, it's because you persuaded me I need to question them
8 further. Or possibly juror number 31 has to go through the
9 same series of questions because somebody got dismissed for
10 cause. Okay?

11 Then when all the questions are finished, I excuse
12 them again and you just sit here and tell me which juror, by
13 name and by number. The Government goes first. You get two
14 turns. The Government goes again. You get two turns. Okay?
15 That way if somebody says, "I want to dismiss juror number 5,"
16 and somebody thinks that that would violate the Batson doctrine
17 because people with green hair have a right to serve on the
18 jury and that's the only reason a dismissal is really being
19 proposed, you'll be able to state your position from where
20 you're seated without the jurors hearing it. And that's the
21 way we're going to pick this jury.

22 Any questions?

23 Any questions?

24 THE DEFENDANT: No, Your Honor.

25 THE COURT: Okay. So we covered items 1, 2, 3 and 4

1 and 5.

2 Civilian garb. This is something I've already
3 explored with you, Mr. Sutcliffe. It would be in your interest
4 to wear a white shirt and a regular pair of slacks. What's
5 your position on whether you want to and available means for
6 you to do so?

7 THE DEFENDANT: My position on that, Your Honor, is I
8 would love nothing more than to be able to wear slacks and a
9 shirt and a tie and a suit, but unfortunately I have none of
10 those and I'm indigent. I have no money to my name. I have
11 about 20 bucks in my account. I notice that you did recommend
12 it. I contacted Mr. McAfee and others about providing it.
13 Unfortunately, Mr. McAfee is a very busy man. When he comes to
14 see me regarding my habeas corpus motions, the last thing I
15 have on my mind is bothering him further, begging him for more
16 help. I don't think it's his responsibility to provide me
17 clothing. I have no family out here. It's my understanding
18 from the Government that I have no more worldly possessions,
19 thanks to my wife. So that's pretty much where I am.

20 THE COURT: Mr. McAfee, would you stand up, please.
21 Is your name Wesley McAfee?

22 MR. MCAFEE: That's correct, Your Honor.

23 THE COURT: Have you appeared as a lawyer on a
24 limited occasion on behalf of Mr. Sutcliffe in this courtroom
25 previously?

1 MR. MCAFEE: In one singular occasion under some
2 rather tight restrictions, I did.

3 THE COURT: You're his friend. Is that correct?

4 MR. MCAFEE: I don't know how you define friend. I'm
5 his attorney.

6 THE COURT: Okay. Mr. McAfee, as his attorney and as
7 somebody who took time out of his busy schedule to come here
8 today, are you willing to assist Mr. Sutcliffe in obtaining at
9 least a minimal amount of civilian garb?

10 MR. MCAFEE: I don't have the opportunity to do so
11 nor am I willing to do so under the circumstances.

12 THE COURT: The opportunity doesn't exist because you
13 don't have time to buy a shirt at a store. Is that right?

14 MR. MCAFEE: Are you asking me if that's right or are
15 you asking me if that's my position?

16 THE COURT: I just want to understand what you told
17 me.

18 MR. MCAFEE: I'll be happy to explain. I don't know
19 Mr. Sutcliffe's sizes, number one. I don't have the
20 opportunity to buy him clothing. I'll be in Clark County on
21 Monday on a federal matter. I won't be back until Thursday of
22 next week. Plus, I don't have the financial ability to buy
23 Mr. Sutcliffe clothes, nor do I think it's appropriate for me
24 as his attorney to do so.

25 THE COURT: Okay. I'm not going to direct you to do

1 so. It's your choice and Mr. Sutcliffe's. Let the record
2 reflect you've had the opportunity and you declined the
3 opportunity for the reasons stated.

4 MR. MCAFEE: May I be seated?

5 THE COURT: You may be seated.

6 Okay. What are your garment sizes?

7 THE DEFENDANT: Large, extra large. I don't know.

8 THE COURT: How tall are you?

9 THE DEFENDANT: Six foot four.

10 THE COURT: Okay. Item 7 on the agenda is the role
11 of Mr. Reed of stand-by counsel, who has an obligation that the
12 Court has imposed and has been professional in carrying it out.

13 Mr. Reed, I want you to be able to view the evidence
14 that is presented at the trial. The role of stand-by counsel,
15 even if the client turns to stand-by counsel for any kind of
16 assistance, is inherently limited and a person representing
17 himself at trial doesn't have the right to shift back and forth
18 between proceeding through a lawyer and proceeding on his own
19 during the course of any given trial. But you are available to
20 respond to questions about courtroom procedures and logistical
21 questions to provide some kind of logistical assistance,
22 getting a refill of water, or anything else that Mr. Sutcliffe
23 might request and that a lawyer might do.

24 I don't know what will happen in the course of this
25 trial, but I want you to be prepared to view and be familiar

1 with the evidence as it's being presented. It has not been
2 your duty, and Mr. Sutcliffe's letter made it very clear that
3 he didn't want you to exercise that duty, to determine what's
4 to be done with the evidence, what evidence to introduce, or
5 anything else. That's been established very clearly, including
6 the letter that's now been unsealed.

7 I think that the most appropriate place for you to
8 sit would be behind the electronic equipment that the Court has
9 positioned next to the lecturn for use by the prosecutor and by
10 lawyers generally. That way, as I understand how the system
11 has been set up, if material is being displayed on the monitors
12 that are available at counsel table and to the jury, you'll be
13 able to see it.

14 Am I correct about that, Mr. Settle?

15 MR. SETTLE: Yes.

16 THE COURT: That's where you should sit.

17 MR. REED: I should sit back on the bench, Your
18 Honor?

19 THE COURT: Yes.

20 MR. REED: Very well.

21 THE COURT: Actually, I think it would be better for
22 to you sit where you are right now, at the end of the table.
23 That way you can actually have clearer access to what's on the
24 monitor. And if you need to use it, Ms. Duarte, you angle it
25 slightly differently. So why don't you sit where are you. Is

1 that acceptable to you, Mr. Reed?

2 MR. REED: It is, Your Honor.

3 THE COURT: Okay. That's what we'll do.

4 You don't have a duty to call upon Mr. Reed for
5 assistance of this limited nature, but you have a right to do
6 it, and I've already told you, Mr. Sutcliffe, that I would be
7 inclined to direct him to ask you the questions that you want
8 to ask yourself if you choose to testify. And you don't need
9 to tell me now and you shouldn't. That's not your obligation.
10 And you may choose to make a decision later on and disclose it
11 later on. But you have that right.

12 Okay. I have discussed with the -- now turning to
13 number 8, security arrangements, I have discussed with the
14 representatives of the Marshals Office --

15 THE DEFENDANT: Your Honor, I'm sorry. May I be
16 heard?

17 THE COURT: Yes.

18 THE DEFENDANT: Before we move on to number 8,
19 there's a couple points I would like to bring up to the Court
20 for clarification, if I may.

21 THE COURT: Go ahead.

22 THE DEFENDANT: Thank you, Your Honor.

23 I filed a letter to you asking for reconsideration.

24 THE COURT: I'm going to turn to that. It's on my
25 list. It's an additional item, your motion for

1 reconsideration. I will address that later.

2 THE DEFENDANT: Okay. I also sent another letter
3 also requesting clarification on the ruling regarding removal
4 of Mr. Reed as appointed counsel based on several factors that
5 the Court had elicited from appointed counsel at the time. And
6 I requested clarification on the reasoning behind that. Has
7 the Court reflected upon that letter?

8 THE COURT: Yes. I don't think any clarification is
9 necessary. The basis for my findings and statements and
10 rulings concerning Mr. Reed and his status and his relationship
11 with you are sufficient and complete and I don't intend to
12 revisit that. Your motion for reconsideration on the
13 allegations in the indictment I'll turn to in a couple minutes.

14 THE DEFENDANT: I just want the record to reflect I
15 object. I didn't understand a word you just said there, Your
16 Honor. I asked a very simple question in the letter, which was
17 did you or did you not rely upon certain statements reflected
18 from Mr. Reed as to your decision to remove him as my counsel.

19 THE COURT: Okay. This is the kind of thing that if
20 it happened during the course of a ruling on an evidentiary
21 objection would be totally inappropriate for you to do. You're
22 now arguing with me. I gave you an answer. I can't ever be
23 sure whether what I say to somebody is going to be
24 comprehensible to that person, but the bottom line on this
25 particular inquiry concerning Mr. Reed's status is finished.

1 It's over. We're not going over that ground again If you don't
2 understand what I ruled on before, I'm sorry, but I'm not going
3 to go over that ground again.

4 Turning to the security arrangements, I reviewed with
5 a representative of the Marshals Office the provisions, and I
6 don't think they have to be discussed again. But I have stated
7 to the Marshals Office, and I know that it's their intention
8 anyway, that all steps, all steps be taken to assure that
9 there's no inadvertent display of the leg restraints that
10 Mr. Sutcliffe will be required to wear in the courthouse that
11 jurors may see. Jurors come and go in the hallways, they use
12 the bathrooms, although sometimes once they've been empaneled,
13 they use only the ones in the jury room. Make sure the
14 corridor is checked before Mr. Sutcliffe is out there and that
15 no jurors are present, and take all steps to make sure that his
16 rights are protected in that regard.

17 The marshals have represented to me -- and this is
18 another display of their admirable professionalism -- that they
19 will determine whether if by chance there is available at the
20 MDC civilian garb that might fit Mr. Sutcliffe, and if there
21 is, they will arrange to have it brought to court.

22 Is that correct?

23 MR. MARTIN: That's correct, Your Honor.

24 THE COURT: That was the voice of Mr. Martin.

25 We've done number 9. We've done number 10.

1 Did you circulate to the Court -- the hearing Exhibit
2 A to Mr. Sutcliffe?

3 The clerk says yes.

4 The Government's witnesses and exhibit lists, I think
5 you have supplemented those recently. Right?

6 MS. DUARTE: Yes, Your Honor. Yesterday I filed
7 second amended as to both.

8 THE COURT: Okay. Now that we're on the eve of trial
9 and with all the different rulings and directions I've issued
10 today, what is your presumptive schedule, which may vary from
11 day to day, of time that we'll devote to this trial? What is
12 your estimate as to how long it will take, assuming we pick the
13 jury the first day? How many days thereafter until the
14 Government rests?

15 MS. DUARTE: Assuming --

16 THE COURT: No stipulations.

17 MS. DUARTE: Assuming no stipulations and a
18 reasonable amount of cross-examination, four to five court
19 days, Your Honor.

20 THE COURT: I'm going to tell the jurors when they
21 assemble in this courtroom that the trial, including
22 deliberations, is likely to take eight calendar days. I always
23 tell them it's no guarantee. I don't know what the defense
24 will consist of and I hope there won't be cumulative evidence
25 and waste of time. But you're assuming that the schedule is

1 8:30 to 1:30. Right?

2 MS. DUARTE: 8:30 to 1:30, pick the jury one day and
3 do witnesses every day.

4 THE COURT: It's not going to be less than an
5 eight-day trial. It could be a ten-day trial. So if there are
6 jurors who have preplanned and prepaid vacation plans -- and
7 I'll tell them about days when we won't be trying the case --
8 oh, and I should tell you both now. I serve on the Model Jury
9 Instructions Committee for the Ninth Circuit and I am required
10 to attend a meeting elsewhere on November 20 and 21, Thursday
11 and Friday. We will be dark those days. We will, of course,
12 be dark on Thanksgiving, the 27th, and the next day, the 28th.
13 So those are days where -- and I will tell the jurors that.

14 MS. DUARTE: Your Honor, if I may.

15 THE COURT: Yes.

16 MS. DUARTE: Along the same lines, I can't find it
17 right now, but I know the Court has a sheet that it attaches
18 where it asks the parties to --

19 THE COURT: Trial witness estimate.

20 MS. DUARTE: Trial witness estimate. Is the Court
21 requiring that in this case?

22 THE COURT: Yes, I'd like to see it. You don't have
23 to get the cross-examination from Mr. Sutcliffe.

24 MS. DUARTE: I'll do my estimate, Your Honor. I
25 still think we can do it in five court days because a number of

1 the witnesses are fairly brief.

2 THE COURT: Good. If we do it faster, fine. We'll
3 see what happens. I don't want to have jurors told they're
4 going to be gone in six days when that's not going to be likely
5 at all.

6 Okay. Here are rulings, including on the motion for
7 reconsideration, that need to be made at this hearing. I
8 already issued a minute order reflecting rulings on motions in
9 limine that were made a long time ago. I'm not going to
10 reiterate what's in that ruling, but there was a notice of
11 ruling that was filed on January 13, 2003.

12 In connection with proceedings that occurred at that
13 time, there was discussion, colloquy and argument about other
14 areas of inquiry that were informally referred to in that
15 notice of ruling. So these are additional rulings
16 supplementing my prior written rulings relating to motions in
17 limine.

18 First, no party may inquire about any witness's
19 current employment, where that person works. You can inquire
20 what kind of position they have, what kind of occupation or
21 profession, but not who the employer is unless you establish,
22 based upon a showing of relevance and that probative value of
23 knowing exactly who the employer is exceeds the risk of
24 prejudice or confusion or waste of time, that such an answer is
25 important. And it would be highly unlikely that I would say it

1 would be. So nobody is to inquire about where a particular
2 witness works unless it's a law enforcement agent. Anybody can
3 inquire about that.

4 Nobody is to ask any inquiries about any witness's
5 children, whether they have any, how many, what their names
6 are, what their ages are.

7 Nobody is to ask for any kind of personal information
8 that has no bearing. And this is true in trials generally, so
9 these aren't unique rulings, but I'm making it specifically
10 clear.

11 Deliberate or persistent failure to abide by those
12 restrictions would constitute disruptive behavior.

13 No party may elicit evidence and ask questions about
14 business developments at Global Crossing that go beyond the
15 story, whatever it will consist of, that unfolds about
16 Mr. Sutcliffe's relationship with Global Crossing. And that
17 specifically involves matters that affected him or that he got
18 involved in, specifically to the extent that there may have
19 been investigations of other Global Crossing employees for
20 actual or apparent misconduct on the job, viewing pornography,
21 engaging in sexual harassment, or anything else like that.
22 That is not a basis of inquiry that I will permit. It would
23 not provide impeachment value unless it were established and I
24 ruled in advance that it could prove motive or bias on the part
25 of that witness against the party in this case.

1 There have been a lot of rulings by other judges, and
2 by me, for that matter, on issues before the trial including
3 bail and detention, findings that were made, findings that were
4 changed, findings about competency. Nobody is to inquire about
5 any of those. That's off limits.

6 Now in your motion for reconsideration,
7 Mr. Sutcliffe, I read the motion, I'm not sure exactly what
8 relief you're asking for. If you want to tell me pithily, I'll
9 give you that opportunity now.

10 THE DEFENDANT: Could you point to me exactly what
11 you're referring to as far as the motion for -- I asked you in
12 a letter to reconsider the four previous motions that were
13 filed February 4.

14 THE COURT: I ruled on those. I set out an order on
15 those. Those have been denied.

16 THE DEFENDANT: I'd like clarification on the second
17 ruling, which you stated on page -- on October 28, the Court
18 denied defense motion. On the second page, line 22 through 26,
19 you said that "The Court has gone to extraordinary lengths to
20 assure that all the evidence Defendant's previous lawyer
21 obtained is made available to Defendant, and the Court is
22 satisfied that such evidence has indeed been made available."

23 Can this Court please point me to any declaration
24 under penalty of perjury from any lawyer that is signed stating
25 that they have delivered and they are assured that all of the

1 evidence has been turned over to me.

2 THE COURT: That's an inappropriate question to ask.
3 That's clarification --

4 THE DEFENDANT: Is that --

5 THE COURT: -- that isn't necessary. Don't
6 interrupt. That's a no-no. I'm not going to be providing
7 clarification about statements, particularly ones in writing,
8 that I made previously. You may either not understand or not
9 agree with what I've said, but that doesn't give you a right to
10 have me go back and try to persuade you. These are rulings
11 I've made. These are not arguments and they're not debates.

12 When you make a motion for reconsideration, as you
13 did a different motion, then you have a right to a ruling on
14 that. And that's what I was turning to. But I'm not going to
15 start going over ground that I previously considered and
16 resolved. So don't go down that path.

17 Now in your motion for reconsideration, the one that
18 I was referring to that I thought you were asking about before
19 says, "Motion for reconsideration," and underneath it it says,
20 "Motion to dismiss counts 1 through 4 as vague and overbroad as
21 a matter of law. Memorandum of law attached exhibits."

22 That's a document that was filed on or about
23 November 3, I think. I could be wrong about the date. It had
24 various attachments, Exhibits A through F.

25 If you want to tell me in a very pithy, meaning get

1 right to the point, fashion what is it that you are seeking in
2 the way of relief, I'll give you a brief opportunity to do so.

3 THE DEFENDANT: Yes. Thank you, Your Honor.

4 I'm looking to dismiss counts 1 through 4 as being
5 unconstitutional on their face based on this law that was
6 passed in 1934. Its application in today's day and age is, I
7 believe, unconstitutional in that it fails to assert specific
8 intent, which leads naturally to a difference in application.
9 It fails to give adequate notice to people concerning the
10 conduct that the statute prescribes.

11 It's so overbroad that the chilling effect it can
12 have upon speech -- and I can speak firsthand as to that
13 chilling effect because I am about as cold as you can get now.
14 I don't speak unless I preface or end my sentences with,
15 figuratively speaking, of course, anymore.

16 But in that document I've given examples as to people
17 whose very behavior, very words could technically be arrested
18 for their speech under this vague and overbroad law. And I
19 would respectfully ask the Court to give that some serious
20 consideration and consider dismissing counts 1 through 4 based
21 on that that law is unconstitutional on its face due to the
22 overbreathe and chilling effect it poses to the people of this
23 country.

24 THE COURT: Okay. I have given it careful thought
25 and I gave it careful thought early on, and I think it was in

1 early 2003. In fact, the minute order that I referred to --
2 not the minute order. The notice of ruling. No. It's a
3 different order. Let me find it.

4 There was a minute order that was filed on
5 December 4, 2000, which in writing denied the motion to dismiss
6 counts 1 through 4 that had been made at the time. That was
7 based on -- the caption said, "Selective Prosecution." And
8 thereafter, the argument -- I'm not sure if it was on that day
9 or not -- got to the issue of vagueness and First Amendment
10 overbreathe.

11 We had, as I recall -- "we" meaning the parties. And
12 at the time Mr. Sutcliffe was represented by Mr. Harris -- an
13 extensive colloquy about the constitutionality of that
14 provision as applied to facts alleged in this indictment. And
15 I read a lot of cases then. I read them again. The Planned
16 Parenthood case makes it clear that there is no constitutional
17 infirmity in 875(C). The facts of this case will warrant a
18 prosecution. The Government will have to prove the specific
19 intent required under the statute.

20 Speech does not -- protected speech does not
21 encompass threatening speech. And if it's used in the
22 facilities of interstate commerce, as the Internet is, such
23 threatening speech can violate the law.

24 The motion for reconsideration is denied. And I
25 think that's all that needs to be said about that.

1 Now you did ask for a change or some kind of
2 clarification in one of the documents, I think the limiting
3 instruction about killercop.com, and I said we'll talk about
4 that later. You may be heard.

5 THE DEFENDANT: Thank you, Your Honor.

6 Before we get there, I also have a motion to dismiss
7 counts 1 through 9 for lack of jurisdiction. Has the Court
8 received that? Is the Court ready to rule on that?

9 THE COURT: I'm not sure when you filed that one.

10 THE DEFENDANT: That was filed at the same time or
11 shortly thereafter. It should have been.

12 THE COURT: What's your theory that I lack
13 jurisdiction?

14 THE DEFENDANT: Not you, personally, Your Honor.
15 Basically, I have a document here, if the Court would like to
16 examine or make copies for the Government. I believe it was
17 filed.

18 THE COURT: Take the copy.

19 THE DEFENDANT: The theory is that this Court -- the
20 Government lacks jurisdiction as a matter of law in that the
21 Government, under the Commerce Laws, Article 1, I believe it's
22 clause A, section 3, has to show interstate movement, at the
23 minimal, to suffice jurisdiction over the accused. I don't
24 believe the Government can prove that and I demand that the
25 Government have to prove that before they try me.

1 THE COURT: Your demand that the Government have to
2 prove that is granted. The Government will have to prove that
3 the facilities of interstate commerce were used in connection
4 with the conduct alleged in the indictment. If it proves that,
5 there's no jurisdictional barrier to an otherwise valid
6 conviction.

7 THE DEFENDANT: Thank you, Your Honor.

8 THE COURT: Let's talk about the killercop.com
9 instruction. What's your objection to that?

10 THE DEFENDANT: I received a letter from the
11 Government dated November 4, signed by Elena Duarte. In there
12 she says, under three sections -- in the second section, she
13 says, "Enclosed please find the following: Five packets of
14 material recently provided by the LAPD containing downloads of
15 and information for the killercop.com website. The Government
16 is not planning on using any of this material at trial. I
17 think that this material is contained on the CD marked
18 "Killercop" already in your possession. Nevertheless, as
19 printouts were given to me, I'm passing on copies to you."

20 These are what was represented to be from
21 killercop.com.

22 THE COURT: Let the record reflect there that
23 Mr. Sutcliffe is holding onto a --

24 THE DEFENDANT: I have no objections. And in fact --

25 THE COURT: Don't interrupt me.

1 THE DEFENDANT: I'm sorry.

2 THE COURT: I'm making a record favorable to you.

3 Now don't interrupt me.

4 Mr. Sutcliffe was displaying in his hand a sheaf of
5 papers.

6 Now continue, Mr. Sutcliffe.

7 THE DEFENDANT: Thank you, Your Honor. I wasn't
8 intending to interrupt you. I thought you had stop speaking.

9 I would like these documents marked as exhibits and
10 entered as defense.

11 I further would like the Court to take a good hard
12 look at the amount of Brady material -- Brady violations that's
13 been conducted by the Government in these drips and dribbles of
14 things that are coming in and are not coming in, specifically
15 requested by the defense from the Government.

16 I objected to the wording of the jury instructions
17 that you're putting on there. I don't see the relevance
18 of instructing other than -- only for the fact to show that the
19 Defendant can create a website. I'll stipulate that I can
20 create a real good website. I'll even demonstrate it for the
21 jury. I'll give them ABC's on how to create a website.

22 THE COURT: Okay. You've raised different issues.

23 First of all, I'm not going to mark as an exhibit the
24 pieces of paper that you referred to, but you can offer them as
25 evidence, if you want, at the trial, and if they're otherwise

1 admissible, your motion will be granted and they'll be received
2 into evidence. If you think that they're helpful to your
3 defense, that should be what you do.

4 On the so-called Brady violations, I'm not aware of
5 any evidence establishing that the Government has failed to
6 carry out its constitutional obligations under Brady. I don't
7 know if that was a motion for dismissal based upon that theory,
8 but if it was, I deny it.

9 On relevance and the limiting instructions on
10 killercop.com, this was something that was touched on a long
11 time ago in an earlier hearing. This limiting instruction I
12 will use, although I'm willing to consider slight variations of
13 the language if somebody establishes it would improve it.

14 I'm going to use this instruction if and only if and
15 only when there is reference to killercop.com. The minute that
16 evidence and inquiry is raised is when I will give this
17 limiting instruction to the jury. I have already found that
18 evidence relating to the Defendant's involvement in
19 killercop.com is relevant and can be introduced, but only for
20 limited purposes. This limiting instruction is designed to
21 make it clear to the jury what those limited purposes are.

22 Do you have any response to the limiting instruction,
23 Ms. Duarte?

24 MS. DUARTE: No, Your Honor.

25 THE COURT: Now what in the limiting instruction --

1 assuming that I denied, and I have denied, your anticipatory
2 motion to exclude that evidence -- I'm telling you now I'm not
3 going to exclude it, but I am going to limit its use and
4 purpose. With that guidance that I now just reiterated, is
5 there some objection you have to the particular language here?

6 THE DEFENDANT: No, but I'm concerned about your
7 saying that you're going to limit it.

8 THE COURT: When the jury receives information about
9 killercop.com, they're going to be told what I wrote down here
10 that I gave to you. They're going to be reminded about that in
11 a general way when they're instructed at the end of the case,
12 that if evidence was admitted for a limited purpose only, it
13 can be used only for that purpose. They can't consider
14 whatever the evidence may show about your involvement with
15 killercop.com to reach some conclusion that you were
16 inclined -- that is what the propensity means -- to commit a
17 crime. They can consider it for other reasons. That's what
18 this says. That's what's going to happen.

19 THE DEFENDANT: Thank you, Your Honor.

20 I'd like to make at this time, Your Honor, a motion
21 to dismiss for Brady violations. I've also -- in that letter I
22 just read to the Court from the Government, I was provided, in
23 the first paragraph, two additional documents entitled
24 "Probation Reports" redacted as to personal information
25 regarding the Hall conviction.

1 I'd also like to make, at this time, a motion to
2 dismiss counts 1 through 4 for grand jury misconduct and
3 outrageous Government misconduct. If the Court would like to
4 hear from that.

5 THE COURT: No. I think I understand the basis that
6 you make the motion and the theory that supports it. I deny
7 both motions.

8 THE DEFENDANT: Can you articulate why, Your Honor.

9 THE COURT: They lack support, factual support,
10 evidentiary support, and they lack merit.

11 THE DEFENDANT: May I be heard on it?

12 THE COURT: That's my reason for denying.

13 THE DEFENDANT: May I be heard on the second motion?

14 THE COURT: Which one?

15 THE DEFENDANT: The motion to dismiss counts 1
16 through 4 for grand jury misconduct.

17 THE COURT: Grand jury misconduct?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: What's your theory?

20 THE DEFENDANT: Grand jury misconduct and/or
21 outrageous Government misconduct, prosecutorial misconduct,
22 however you want to phrase it, Government misconduct.

23 THE COURT: What's your theory for that?

24 THE DEFENDANT: My theory, Your Honor, is that the
25 first year I was incarcerated, everybody was proceeding under a

1 general intent crime. The Government finally superseded the
2 indictment when the defense raised up that this was not a
3 general intent crime, this was a specific intent crime. The
4 Government, on that theory, then, went back to the grand jury
5 and was supposed to apprise them that this was no longer a
6 general intent, but a specific intent crime.

7 I have read the transcript of the hearing of the
8 superseding indictment, and it failed to note any mention of
9 anyone informing the grand jury that this was all of a sudden a
10 specific intent crime. Therefore -- I believe that the Fifth
11 Amendment requires that defendant be convicted only on a charge
12 considered by the grand jury. And I would cite U.S. versus
13 Dubo -- that's spelled D-u-b-o -- 186 F. 3d, 1177, 1179, which
14 is a Ninth Circuit case in 1999 holding that indictments
15 failure to specify mens rea require dismissal, the requirement
16 insuring that defendant is prosecuted, quote, "on the basis of
17 the facts presented to the grand jury." And I would cite U.S.
18 versus Rosi, R-o-s-i, 27 F. 3d, 409, at page 414, which is,
19 again, a Ninth Circuit.

20 I don't believe the grand jury was ever told that
21 this was a specific intent crime. At least I didn't see it in
22 the transcript.

23 THE COURT: Okay. I haven't read the transcript, but
24 I can tell you that the motion lacks merit. The superseding
25 indictment contains, as part of its language, the necessary

1 allegation -- whether it can be proven or not, we'll see -- of
2 mens rea, which addresses that case you talked about.

3 Do you want to be heard about the rest of what
4 Mr. Sutcliffe said?

5 MS. DUARTE: We oppose the motion, Your Honor. As to
6 the rest of what he said -- I'm sorry. Regarding?

7 THE COURT: His theory that you had a duty to
8 specifically say something about --

9 MS. DUARTE: I don't have the transcript in front of
10 me, but I don't recognize and am not aware of the legal duty
11 he's talking about. Generally I read the statute and the
12 elements to the grand jury. I then present the indictment. So
13 they had it from several sources that that was the requirement.

14 THE COURT: I have considered and I reject that
15 motion, as well, both motions, Mr. Sutcliffe.

16 Now I think the one remaining thing that was reverted
17 to before but we haven't explicitly established is something
18 that we may have to play by ear, which is whether, and if so,
19 how to conduct sidebar conferences.

20 The only way I would consider conducting a sidebar
21 conference is if somebody requests one and I conclude, under
22 the context of the circumstances, that one would be warranted.
23 We will not be conducting sidebar conferences the way I usually
24 do, which is to invite those participating in the conference to
25 get up from where they're sitting and join me on the side of

1 the courtroom in the presence of the court reporter. Instead,
2 the conferences would either have to be done right at defense
3 table, assuming that we just kept the jury in the box, so that
4 the court reporter would move over to where Mr. Sutcliffe will
5 be sitting and we would conduct the sidebar conference there,
6 or we'll have to excuse the jury.

7 More likely than not, if I really thought that a
8 sidebar was warranted, I would excuse the jury. If I thought
9 that warnings and admonitions relating to the issue, which I
10 hope will not surface, of disruptive behavior was warranted, I
11 would probably dismiss the jurors, as well.

12 So I'm not making a final determination as to whether
13 I would ever, in the presence of the jury, permit sidebar
14 conferences and if so where and under what circumstances, but
15 I'm telling you both that I'm disinclined to do it. So be
16 very, very measured in wondering to yourself whether you should
17 even ask for one.

18 Is there any issue that I haven't covered in this
19 lengthy hearing with all the items on the agenda that either
20 side wants to raise before we adjourn?

21 Ms. Duarte?

22 MS. DUARTE: No, Your Honor.

23 THE COURT: Mr. Sutcliffe.

24 THE DEFENDANT: Thank you, Your Honor. Yes, there
25 is.

1 First off, let's talk about the jurisdictional
2 challenge. When will that be heard on? I assume prior to
3 trial beginning.

4 THE COURT: The jurisdictional motion has been
5 denied. It's not going to be heard.

6 THE DEFENDANT: You denied it?

7 THE COURT: I denied it.

8 THE DEFENDANT: Based on what law, authority?

9 THE COURT: The motion lacks merit, Mr. Sutcliffe. I
10 already told you. If the Government establishes that the
11 facilities of interstate commerce were used, the jurisdictional
12 element has been established and your rights have been
13 protected. Now I'm not going to go over that ground a third
14 time.

15 What else do you want to raise?

16 THE DEFENDANT: I have six to seven large boxes of
17 discovery in my cell. I'll require the Court to order the DOP
18 to assist in carrying those boxes down into this courthouse in
19 a timely fashion so it's all here. I won't be able to do that
20 because I'll be handcuffed. I'd like the Court to please make
21 sure that that's taken care of.

22 Also --

23 THE COURT: Are you asking that the boxes be brought
24 to the courtroom before the start of the first day and then
25 just kept here thereafter?

1 THE DEFENDANT: I don't know if I feel comfortable
2 leaving them here. It's a lot of my defense and a lot of my
3 personal notes on individual witnesses and legal discovery.

4 THE COURT: I'll tell you, Mr. Sutcliffe, I'm not
5 going to order anybody to lug it here and lug it back on a
6 daily basis. That's out of the question. I have gone to
7 extraordinary steps to make available to you a duplicate set of
8 the evidence that I understand the Government will be relying
9 on, and we've gone over that ground.

10 If you want to have these other items, whatever they
11 may consist of, I will require that they be brought over at the
12 start of the first day of trial. And your concern about
13 whether other people are going to rifle through those boxes and
14 see something they're not entitled to, I understand why you
15 have the concern. I don't fault you for expressing it. But
16 it's not going to happen. You don't have to worry about it.
17 Those will be available to you and only to you unless you ask
18 Mr. Reed, and I agree, that Mr. Reed look at it as well.
19 They'll be right near you. Tell me whether you want that done.

20 THE DEFENDANT: Yes, I want that done.

21 THE COURT: Okay. I'm issuing an order. I
22 understand that Amy Standifer is here.

23 MS. STANDIFER: Yes, I am, Your Honor.

24 THE COURT: You work with the MDC. And you have been
25 cooperative and professional thus far. Will you arrange to be

1 sure that come Wednesday morning, not later than 8:00, those
2 boxes are brought over here.

3 MS. STANDIFER: Yes, Your Honor.

4 THE COURT: Thank you.

5 THE DEFENDANT: Your Honor, I object to that. I
6 already accused this woman of perjury. I filed a letter to the
7 AUSA requesting, under Title 18, Section 3232(A), that an
8 investigation be opened up into her alleged perjury in front of
9 this Court, as well as an investigation into obstruction of
10 justice by the other legal staff member of the BOP.

11 So I don't trust -- and that's not paranoid. I don't
12 trust the BOP to handle my property, especially now in light of
13 the fact that another SCSI drive has turned up stolen, lost,
14 missing, whatever. I object strenuously on that.

15 THE COURT: Okay. Your objection is noted and
16 denied.

17 BOP is ordered, and Ms. Standifer will communicate
18 and see to it that it's implemented, the order, so the boxes
19 will be here.

20 You are ordered to cooperate. If you don't agree to
21 turn over to the people who are designated to lug these boxes
22 over here, those boxes, then you'll have no basis to object to
23 their absence. So it's going to be your choice. Your concern
24 about issues of perjury, I don't respond to. I don't conduct
25 investigations. I'm not going to evaluate those. That's the

1 way it's going to be. Boxes will be here provided you
2 cooperate in turning them over.

3 What's next on your agenda, Mr. Sutcliffe?

4 THE DEFENDANT: When does the Court want me to turn
5 those over?

6 THE COURT: You should probably turn them over on
7 Tuesday afternoon so you have use of them between now and the
8 start of trial.

9 THE DEFENDANT: Will the Court ask or order the BOP
10 to provide fresh boxes which can be taped up? Mine can't be
11 taped up. They're just big boxes. I'd feel much safer if they
12 were packed and taped.

13 THE COURT: Fine. They'll be packed and taped.
14 They'll be kept physically secure.

15 What's next, Mr. Sutcliffe?

16 THE DEFENDANT: I notice the Court keeps saying it's
17 gone to extraordinary lengths to show all the evidence is in my
18 hands. In your motion where you denied order requiring me the
19 production of audio tapes, you again stated that you've gone to
20 extraordinary lengths to show that all the evidence has been
21 provided to me and that you're satisfied that such evidence has
22 indeed been available. Then you went on to say, "Indeed, on
23 October 23, 2003, Defendant sent a letter to the Court
24 confirming that he had recently received four audio tapes from
25 one of his prior lawyer's paralegal."

1 Well, I would point the Court back to that letter and
2 I would again tell the Court that I am not in possession of all
3 my discovery, that I did not receive the four audio tapes, and
4 I did notify the Court in that letter on October 23 that the
5 Court is referring to where in that letter that was sent to me
6 from Sara Ritz, it says, "I unfortunately have received --"
7 This is her speaking. "Dear Steven, I have unfortunately
8 received the tapes and other information that we discussed."
9 And she goes on to say, "I just wanted you to know I tried to
10 get the tapes to you as you have requested for quite some time.
11 I will see if there is any way to get the information to you
12 through the MDC channels."

13 So with all due respect, Your Honor, the Court is
14 incorrect. And that it would be so satisfied so quickly to
15 waive away my rights under Brady, under due process, you know,
16 it really upsets me, Your Honor.

17 THE COURT: Okay. Well, I understand your position
18 and it's noted.

19 Anything else, Mr. Sutcliffe?

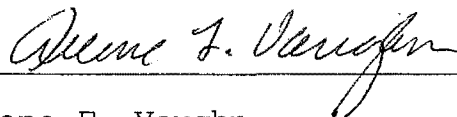
20 THE DEFENDANT: No, Your Honor.

21 THE COURT: We're adjourned. We'll see you on
22 Wednesday morning.

23 (Proceedings concluded at 12:13 p.m.)
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I certify that the foregoing is a true and correct transcript of the stenographically recorded proceedings in the above-entitled matter.



August 18, 2004

Arlene F. Vaughn
Official Reporter