

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

HONORABLE A. HOWARD MATZ, UNITED STATES DISTRICT COURT JUDGE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.) CASE NO. CR 02-00350 AHM
)
 STEVEN WILLIAM SUTCLIFFE,)
)
 Defendant.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Tuesday, October 21, 2003
3:00 p.m.

STATUS CONFERENCE

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P R O C E E D I N G S

THE CLERK: Calling Item No. 1: CR 02-350 (A)
U.S.A. versus Steven William Sutcliffe.

Counsel --

THE COURT: Wait a minute. Before we
have appearances --

(Pause)

THE COURT: Counsel, you can go ahead and announce
your appearances while we are waiting for the court.

MS. DUARTE: Good afternoon, Your Honor. Elena
Duarte for the United States, with case agent Jeffrey Cuno
from the FBI.

THE COURT: Good afternoon.

MR. REED: David Reed, advisory counsel.

THE DEFENDANT: Steven Sutcliffe, accused.

THE COURT: Okay. And with the government, I
assume, from looking out over the benches, there is some
additional people whom I had hoped would be here. Would you
identify who they are, please?

MS. DUARTE: Yes, Your Honor. Per the court's
order, Ms. Amy Standifer is here from MDC, legal counsel,
and also Mr. Armando Saavedra, S-a-a-v-e-d-r-a, with the
computer -- I'm not sure of his title, but with computers at
MDC.

THE COURT: He's responsible for the installation

1 and maintenance of the computers that are available to
2 inmates there?

3 MS. DUARTE: Yes, he is the computer systems
4 manager, I'm told.

5 THE COURT: Okay. Anyone else?

6 MS. DUARTE: Available by telephone, Your Honor,
7 is Mr. Jason Weiss, Special Agent Jason Weiss, W-e-i-s-s,
8 who is the computer analysis response team member from the
9 FBI, who has assisted Mr. Saavedra.

10 THE COURT: Are you already on the telephone line,
11 Mr. Weiss?

12 MR. WEISS: Yes, Your Honor, I am. Thank you.

13 THE COURT: All right. We have a number of things
14 to discuss. Here's what they are and here's the sequence in
15 which we will discuss them.

16 First is the status of the electronic evidence and
17 the facilities and equipment available to Mr. Sutcliffe at
18 the MDC. I'll be asking the government representative,
19 primarily Ms. Duarte, questions. I'll give Mr. Sutcliffe a
20 chance to respond.

21 Then I want to talk about pending motions; after
22 that, the state of discovery; and after that, the trial date
23 and the duration of the trial date and the impact on the
24 other counsels' schedules, including Mr. Reed; after that,
25 there are a number of miscellaneous items that I'll take up,

1 including one that, in fairness to Mr. Sutcliffe, I'll
2 request the government and other people to temporarily leave
3 the courtroom. So that's what we're going to cover.

4 Let's start with the electronic evidence.
5 Defendant sent me a letter dated October 5th. I caused it
6 to be filed and circulated and served on October 8th.

7 The government filed the following three items,
8 all in one way or another having to do with the state of the
9 electronic evidence and equipment: Ms. Standifer filed a
10 declaration on October 15th, and the government filed a
11 status filing -- I think it was filed on October 17th, and
12 the government also filed a response to the defendant's
13 October 5th letter. That last item was filed yesterday,
14 October 20th.

15 Now, working backwards, Ms. Duarte, what's the
16 state of the SCSI card and SCSI cable issue and the
17 availability of those two devices to enable Mr. Sutcliffe to
18 access those hard drives which are SCSI drives?

19 MS. DUARTE: Your Honor, I am informed that
20 Mr. Weiss, Special Agent Weiss, FedEx'd those materials
21 yesterday to Mr. Saavedra at MDC.

22 THE COURT: He did what to them?

23 MS. DUARTE: FedEx'd, that would be Federal
24 Express. And I'm advised by Mr. Saavedra that those items
25 in fact were received at MDC today and that he thinks he

1 will be able to install them, particularly with the
2 telephonic assistance of Special Agent Weiss, and it's my
3 understanding that he is going to attempt to install them
4 today and tomorrow at the latest, so that that remaining
5 drive with data on it, the one SCSI drive -- and that's
6 spelled S-C-S-I drive -- is going to be available no later
7 than tomorrow for defendant to view.

8 THE COURT: Okay. Mr. Saavedra, you can respond
9 to me from where you're sitting.

10 MR. SAAVEDRA: Yes, sir.

11 THE COURT: I don't doubt this, but do you confirm
12 the correctness and accuracy of what Ms. Duarte just told
13 me?

14 MR. SAAVEDRA: Yes, I do.

15 THE COURT: And you expect to have the SCSI card
16 and SCSI cable and any other devices necessary to access
17 that drive or those drives, all available on the particular
18 computer that I've already been told has been made
19 specifically and exclusively available to Mr. Sutcliffe?

20 MR. SAAVEDRA: Yes, sir.

21 THE COURT: Okay. And Mr. Weiss, are you
22 available to assist Mr. Saavedra tomorrow?

23 MR. WEISS: Yes, Your Honor.

24 THE COURT: Okay. And I am ordering you --
25 although I am sure it was your intention to do so, I'm

1 ordering you to assist and make sure that that task is
2 accomplished in one day, namely, tomorrow. Is there any
3 foreseeable technical difficulty in achieving that?

4 MR. WEISS: I provided everything that should be
5 needed to attach and view the SCSI drives. SCSI hard drives
6 can be write-protected at the hard drive levels, so there
7 shouldn't be any problem at all.

8 THE COURT: Okay. Before I continue with some of
9 these inquiries, let me acknowledge and thank Mr. James
10 Settle for joining us in the courtroom. As everyone knows,
11 he is the head of the district court's telecommunications
12 operations, which is a major responsibility, and he's been
13 helpful to the court in assuring that the technical means to
14 guarantee a fair trial will be carried out. So thank you
15 for coming, Mr. Settle. I may ask you some questions, I may
16 not.

17 All right. Now, on the bottom of page 2 of the
18 government's October 17th status filing, there is some
19 language that I don't quite understand, Ms. Duarte,
20 concerning at least one of the IDE drives, the other
21 category of hard drives. Here's is what I want you to
22 explain: Is there a hard drive or -- well, first answer
23 this question. Is there a hard drive that contains what you
24 believe -- and you're not the final determiner -- what you
25 believe to be the, quote, relevant evidence relating to the

1 charges in this case that has not been accessible to anybody
2 or to Mr. Sutcliffe or for any reason at all, defect in the
3 drive, an inadequacy of equipment?

4 MS. DUARTE: If I understand the question, Your
5 Honor, the single hard drive that currently is not
6 accessible to defendant and has not been -- which does have
7 evidence on it is the S-C-S-I, the SCSI drive that we have
8 been discussing, and that should be the sole drive with
9 anything on it that is not accessible to the defendant.

10 THE COURT: And when you say "anything," how
11 literally do you mean that? Any relevant thing or anything?

12 MS. DUARTE: Any data whatsoever is my
13 understanding.

14 THE COURT: And from what is that understanding
15 derived or from whom?

16 MS. DUARTE: Well, the sources differ with the
17 different aspects of the drive. Let me just outline it very
18 briefly.

19 As I've stated in previous declarations, there
20 appear to be two hard drives that were provided by the
21 federal defender but that were returned unused because they
22 were damaged. Those hard drives are not even part of the
23 equation because they have nothing on them. We were unable
24 to use them. My understanding of that is from the FBI
25 technicians who made the copies, as well as my -- the FBI

1 technicians that made the copies. There are also two
2 additional hard drives out of those ten which were returned
3 empty to the federal defender because the federal defender
4 had provided them in order to have the copies made and they
5 were simply not needed and not used.

6 THE COURT: So your office returned them to the
7 federal defender.

8 MS. DUARTE: The FBI returned them to to my
9 office, who then gave them to the federal defender. That's
10 correct, Your Honor. And it's my understanding and again
11 from the FBI, and this is well over a year ago that it's
12 documented, that there was nothing to them. There was
13 nothing ever put on them.

14 As I said in one of my filings, I believe I noted,
15 I don't know why those total of four drives, two damaged,
16 two empty -- actually all four empty, two of which are
17 damaged, has continued to make the rounds between attorneys.

18 THE COURT: Yes. You don't have to belabor that.

19 MS. DUARTE: Okay. As to the remaining six
20 drives, it's my understanding that one is completely devoid
21 of data and was copied that way and seized that way from
22 Mr. Sutcliffe's house. One additional drive has a very
23 minimal amount, traces of data, and he should be able to
24 view that. That is an IDE drive.

25 The remaining four drives with what I would

1 consider to be relevant data, the three IDE drives are
2 viewable, given the FBI's modifications to the computer, and
3 then the one SCSI drive is unviewable.

4 THE COURT: Okay. And apart from the access that
5 we expect will be accomplished through the installation of
6 the SCSI equipment tomorrow, that thus far having remained
7 inaccessible to Mr. Sutcliffe while he is attempting to use
8 it or has the right to attempt to use it at the MDC, apart
9 from that drive and that whatever is on it, is there any
10 piece of evidence that at any time the government made
11 available to any of the five prior lawyers who
12 represented -- or to Mr. Reed, including Mr. Reed, who
13 represented this defendant or that it intends to use that
14 has not been made available and made available in accessible
15 fashion at the MDC to Mr. Sutcliffe?

16 MS. DUARTE: Your Honor, not that I know of.
17 However, I did not inventory the items that went between the
18 attorneys and that went to Mr. Sutcliffe. So, frankly,
19 that's hard for me to say, but certainly not that I know of.

20 THE COURT: Okay. But all the evidence that was
21 discoverable and sought in discovery that you're aware of,
22 have you made it available directly to Mr. Sutcliffe?

23 MS. DUARTE: Not the documentary evidence, no,
24 Your Honor. Mr. Reed and Mr. Nicolaysen would have brought
25 him that.

1 THE COURT: Okay. Well, I have --

2 MS. DUARTE: If I understand the question.

3 THE COURT: Yeah. My question was very broad and
4 and all-encompassing. I already have declarations from them
5 as to the production of the documentary evidence.

6 Now, Mr. Reed, you're not aware of any documentary
7 evidence that was ever in your possessions or, to your
8 knowledge, in any of your -- any of the prior counsel's
9 possession that has not yet been made available to
10 Mr. Sutcliffe, are you?

11 MR. REED: No, Your Honor.

12 THE COURT: Okay. Now, on the --

13 THE DEFENDANT: Your Honor, may I -- sorry, Your
14 Honor, may I say --

15 THE COURT: I'll give you a chance to respond.
16 Let me finish going through all of this information.

17 On the October 17th filing, this is the status
18 filing, it's entitled, that you filed, Ms. Duarte, you seem
19 to be seeking some kind of an order invoking Rule
20 16(b)(1)(A) that I don't really fully understand, but I want
21 to make sure that this is resolved.

22 As I construe what you said in that document, your
23 principal objective is to make sure that during the trial
24 and in use here in the courtroom the evidence that
25 Mr. Sutcliffe wishes to either review or use for any purpose

1 be used in the form and on and be retrieved from CDs as
2 opposed to hard drives. Is that correct so far?

3 MS. DUARTE: That is correct.

4 THE COURT: Okay. Now, you're invoking 16(b) as
5 if I should order Mr. Sutcliffe to specify either to me or
6 to you or both what portions of the data on the hard drives,
7 the IDE drives or the SCSI drives, that he intends to use at
8 trial, and I don't think that that's the necessary or the
9 appropriate approach. 16(b) speaks in terms of discovery
10 obligations the defendant has for his own case-in-chief. If
11 Mr. Sutcliffe to have available for his use in the courtroom
12 any information that is currently on the hard drives --
13 could you ask the -- Mr. Weiss?

14 MR. WEISS: Yes, Your Honor.

15 THE COURT: We're getting some background noise
16 from your telephone line.

17 MR. WEISS: I apologize. Very loud.

18 THE COURT: Yeah. Well, please make sure that no
19 one else is speaking at your end so it doesn't distract us
20 here.

21 MR. WEISS: Yes, Your Honor.

22 THE COURT: Okay. Now, as I started to say,
23 Mr. Sutcliffe doesn't have any obligation to disclose to you
24 how and what he intends to use in cross-examining witnesses
25 the government puts on. That's not his case-in-chief.

1 That's not encompassed by the language in the rule. And I
2 did a little bit of research and there is a Seventh Circuit
3 case which specifically says that. It's called United
4 States versus Moore, M-o-o-r-e, 208 Fed.3rd 577. It's from
5 the Seventh Circuit, in year 2000.

6 But what is the problem, provided that the
7 necessary equipment is available on the computer that
8 Mr. Sutcliffe uses, in having him at his own leisure load on
9 to a CD whatever information from any of the hard drives he
10 is now about to have complete access to that he wishes to,
11 for use in court with those CDs that he loads up? And he
12 doesn't have to tell anybody what he chooses to put on.
13 What's the problem with that?

14 MS. DUARTE: Your Honor, without conferring with
15 the agents who have additional problems, the problem that I
16 see immediately is that if he does have the capacity to what
17 we call write to CD, in other words, put data from the hard
18 drive to the CDs, I don't think that there is a way to do
19 that without also giving him the capacity to alter the data.

20 Now, understood that he always retains some
21 capacity to alter data. We have put in place and plan to
22 put in place more write-protect or write-block systems in
23 his computer at MDC which at least prevents most attempts to
24 alter data. However, if he is given the capacity to
25 transfer data from hard drives to CDC B, that cannot be done

1 using these locks in place and he would then have the
2 capacity to alter data. That would be -- that would still
3 be okay, Your Honor, if there were a way for me to see that
4 data ahead of time, because all we want to do is confirm
5 with my copies and my experts that that data -- that the
6 integrity of that data is intact.

7 However, just so the court knows, without that
8 protection, if he is actually allowed, and only him, to
9 write on those CDs, that is the issue and I would want to
10 check these exhibits. I would not be able to agree to their
11 authenticity even though I would have in theory provided
12 them to the defendant, because I would not know that those
13 were the same items I provided.

14 May I have a moment to confer with Special Agent
15 Cuno.

16 (Pause)

17 MS. DUARTE: Your Honor, that is the concern.
18 I've confirmed that with Special Agent Cuno, that even
19 withn supervision, when given the ability to copy or to
20 transfer, the ability to alter is very real and we would
21 have a concern.

22 Again, if the court was inclined to give him that
23 ability, we would just ask that then we be permitted to see
24 in advance somehow and compare those exhibits, because I
25 don't want to make trouble by having to object to the

1 authenticity of something that at least in theory I
2 provided. I'm not going to do that; but unless I know it's
3 what I provided, I don't know how to not do that.

4 THE COURT: How many CDs do you understand it
5 would take to transfer or copy from the hard drives on to
6 CDs all of the evidence, whatever it is, in its aggregate
7 that are currently on hard drives, including both kinds of
8 hard drives?

9 MR. WEISS: Your Honor, may I say something?

10 THE COURT: Yes.

11 MS. DUARTE: May I defer to Special Agent Weiss?

12 THE COURT: Go ahead, Agent Weiss.

13 MS. WEISS: If we're dealing with specifically
14 text-oriented files, we can place almost 640 megabytes of
15 data on a CD, which is thousands of text files. Unless we
16 are dealing with like large image files or large executable
17 type files, we shouldn't have any problem getting everything
18 he wants on to one CD of just documents.

19 THE COURT: Well, how many CDs does the government
20 intend to bring to court?

21 MS. DUARTE: Your Honor, may I just speak to
22 Special Agent Weiss' response? We are dealing with large
23 image files, and it's my understanding from speaking with
24 the other agents already about this possibility that it
25 would take to put -- I don't think that Special Agent Weiss

1 understands that this court is asking for the contents of --
2 the entire contents of all four hard drives and that -- it's
3 my understanding that would take hundreds of CDs.

4 MR. WEISS: Yeah, that would -- if you're going to
5 copy all files on the CD, that would be impractical, because
6 you only --

7 THE COURT: You have to speak more directly and
8 slowly into the telephone, because I can't understand what
9 you're saying. So please try again, Agent Weiss.

10 MS. WEISS: Yes. If you want to copy all the
11 files on to CD to review them, yes, that would encompass
12 scores CDs. I thought you were only specifically referring
13 to --

14 THE COURT: You thought what?

15 MR. WEISS: He was only dealing with selected
16 files, Your Honor, but Ms. Duarte is correct.

17 THE COURT: Well, you say "scores" and I thought
18 that the prosecutor said "hundreds." There is a big
19 difference. Can you be more precise, Agent Weiss?

20 MS. WEISS: I can't because I wasn't originally
21 involved with the case so I don't know how much data we're
22 talking about on the hard drives, but Ms. Duarte is more
23 likely correct.

24 THE DEFENDANT: I concur with that analysis.

25 THE COURT: Okay. That was Mr. Sutcliffe. Did

1 you pick that up? He concurred with that analysis. Meaning
2 the hundreds of CDs?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: What's the purpose that you're trying
5 to achieve by requiring that the retrieval base or method
6 for the display of evidence in the use of evidence at trial
7 be only by way of CD rather than hard drives?

8 MS. DUARTE: To make it more manageable, Your
9 Honor. I think that it's going to be very difficult to
10 manage. I also think that the four hard drives contain a
11 great deal of relevant -- excuse me -- evidence that is not
12 relevant to the case. And if Mr. Sutcliffe is allowed to
13 just bring it up at will before the parties have seen it and
14 agreed on its admissibility, that creates another host of
15 problems.

16 THE COURT: So what does it take to determine its
17 authenticity in the sense that it hasn't been distorted or
18 nothing has been added, nothing has been changed, nothing
19 has been deleted? Simply take the practical electronic
20 equivalent of lining up of two versions side by side and in
21 an exact and scrupulous way, going through everything that's
22 on there?

23 MS. DUARTE: Well, Your Honor, you wouldn't do it
24 visually, but there is a way to do what we call "hash" or to
25 provide a mathematical -- not formula -- if I could have

1 just a minute.

2 (Pause)

3 MS. DUARTE: Like an algorithm, Your Honor, in
4 mathematics. There is a way to compare the two files that
5 the expert that I have hired is quite capable of doing or he
6 can run them both and he can say whether or not they are
7 identical.

8 THE COURT: And how long would that take?

9 MS. DUARTE: It depends. For a single file, not
10 long, Your Honor. You just have to have the ability to have
11 both the information on both files --

12 THE COURT: Okay. Because I'm not about to give
13 your expert or your office the information that you want,
14 because I think it would interfere with Mr. Sutcliffe's
15 rights, but I can use my inherent authority. Maybe there is
16 additiona statutory or precedential authority to appoint my
17 own computer expert at court expense.

18 Mr. Settle, do you have people who are capable of
19 performing that task of determining that materials
20 transferred from a hard drive to a CD hasn't been tampered
21 with?

22 MR. SETTLE: If they had access to the original,
23 to the original that the copy is made from, yes, they could
24 do a comparison.

25 THE COURT: Okay. I might want to just appoint

1 somebody from the outside and pay for them at court expense,
2 but that's an approach I'm likely to take, because that way
3 the person who does the determination reports only to me.

4 THE DEFENDANT: Your Honor --

5 MS. DUARTE: And, Your Honor, if I may, depending
6 on -- I haven't talked at length with Mr. Settle about the
7 feasibility of bringing in all four hard drives that
8 Mr. Sutcliffe wants access to. It sounds to me from what
9 the court is saying that, although I would have to defer to
10 the court and Mr. Settle on this, that it may be actually
11 more efficient time-wise to go ahead and stick with the
12 court's original plan, which was not allowing Mr. Sutcliffe
13 to burn CDs, bringing in the four hard drives and just
14 mounting those for trial and then we will deal with the
15 relevant aspects what we get there.

16 THE COURT: Well, why are you changing your view?

17 MS. DUARTE: Because I'm thinking about accessing
18 the original drive. First of all, if Mr. Settle means
19 original, like very first are seized, those are still with
20 the FBI. Those aren't even with my expert. And the
21 feasibility of, after they possibly have been altered, then
22 comparing them, the time to do that with an outside court
23 expert at the FBI and this would not be an extremely
24 workable solution. And that's why I'm backpeddling because
25 I am trying to assist, I hope, in finding the most workable

1 solution to get this trial done and done fairly.

2 THE COURT: Okay. Mr. Sutcliffe, would you like
3 to be heard?

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

5 First off, if that was her major concern to get
6 done quickly, she would have turned over this evidence when
7 she was ordered by this court two months ago. We wouldn't
8 be here today. If she had any concerns about my
9 manipulating any type of data, I will be willing to swear,
10 to be sworn under oath right now under any pain and penalty
11 of perjury, that I will not manipulate any data or tamper
12 with any data or alter any data from those drives. I simply
13 want to view that and find the data I need to defend myself.

14 THE COURT: Well, the access in the context of
15 viewing has already been provided, almost all of it.

16 THE DEFENDANT: Mrs. Duarte has produced, I
17 assume, to the previous defense counsels CD-ROMs like they
18 are little baby rabbits. They are multiplying faster than I
19 can keep count of them. I still do not have an inventory
20 list, which I have asked for in my October 8th letter to
21 Ms. Duarte which --

22 THE COURT: Let's not talk about that,
23 Mr. Sutcliffe, and just so you're --

24 THE DEFENDANT: I don't know what's missing. I
25 don't know what's here, what's not. Nobody made a list.

1 THE COURT: -- so you're not wondering whether
2 there is any open issue in that regard, you don't have a
3 right to an inventory --

4 THE DEFENDANT: I don't want a right to an
5 inventory. I want to know what was available, what is
6 supposed -- what is the count here. I still don't have my
7 ZIP disks. The ZIP drive that you ordered them to produce
8 for me to even look in the ZIP disk is a ZIP 100. My ZIPs
9 are ZIP 250. ZIP 250s will not fit into a ZIP 100, if I
10 ever get to see the disks.

11 You know, I've got this letter here in discovery
12 from Mrs. Duarte back in May 6, 2000, she's quoting me 53
13 CD-ROMs, 102 floppies --

14 THE COURT: You don't mean 2000 --

15 THE DEFENDANT: -- six hard drives. Things are
16 growing.

17 THE COURT: Just so the record is clear,
18 Mr. Sutcliffe, you don't mean May 6 of 2003, do you?

19 THE DEFENDANT: 2002. Excuse me.

20 THE COURT: Okay.

21 THE DEFENDANT: I can't defend myself in this
22 piecemeal fashion where nobody is keeping track of anything,
23 things are getting lost, things are getting broken,
24 things -- nobody knows what's going on. In her --

25 THE COURT: Okay. Now, Mr. Sutcliffe, let's talk

1 about this question of use in the courtroom and talk only
2 about that. I have read it carefully, everything you've
3 said. I have read carefully every response that has gotten
4 to us and I'm satisfied and I'm making a finding that all
5 of your contentions about lost, destroyed, unaccounted-for
6 evidence are unfounded.

7 THE DEFENDANT: Well, then, I would point --

8 THE COURT: Excuse me. I'm not finished. I'll
9 give you a chance. Do not interrupt me.

10 THE DEFENDANT: I didn't interrupt. I was making
11 an objection, Your Honor.

12 THE COURT: Now, the court has been working very
13 hard to make sure that under the unusual circumstances where
14 you are representing yourself and you are under -- in
15 custody, you have access to what there is. I am wholly
16 satisfied that what there is has been provided to you. And
17 once the SCSI is made available, I'm almost satisfied that
18 you have unmitigated access to it, except now I'm learning
19 that ZIP drives or ZIP disks.

20 Mr. Saavedra, what's the story on that?

21 MR. SAAVEDRA: Excuse me, Your Honor. He is
22 correct. They did send him a 100-megabyte ZIP. Now,
23 stating that his are 250, he is correct. He won't read it.

24 THE COURT: So how long have you known that the
25 ZIP disk has not been useable by Mr. Sutcliffe?

1 MR. SAAVEDRA: When he told me that a couple weeks
2 ago. He didn't even have a ZIP disk. And of the evidence
3 that I was sent in to MDC, there is not one ZIP disk
4 anywhere.

5 THE DEFENDANT: That's correct.

6 THE COURT: Now, I'm baffled here. We had
7 considerable colloquy about getting the necessary ZIP-type
8 equipment to Mr. Sutcliffe. And are you representing to me,
9 Mr. Saavedra, that there is no need for it?

10 MR. SAAVEDRA: As of right now, he has no access
11 to ZIP drive -- I mean disks.

12 THE COURT: That's not the question I asked.

13 Mr. Sutcliffe, what do you think you need a ZIP
14 disks to accomplish? How will a ZIP disk assist you in
15 defending yourself?

16 THE DEFENDANT: Well, it's kind of hard to day
17 without seeing them, isn't it, Your Honor?

18 THE COURT: If you had the 250 that you just told
19 me about, what would it enable you to do?

20 THE DEFENDANT: The ZIP 250 player, it would be
21 able to play ZIP 250 disks.

22 THE COURT: Ms. Duarte, are there any ZIP 250
23 disks in the array of evidence that's been made available in
24 the prison to Mr. Sutcliffe?

25 MS. DUARTE: Your Honor, I'm relying on memory

1 now, but I'm fairly certain that there were four ZIP disks
2 that in my earlier declaration I witnessed exchanged between
3 Mr. Nicolaysen's representative and Mr. Reed when Mr. Reed
4 assumed responsibility. And we did the inventory and I
5 presented the court with a declaration. That was not the
6 October 17th, that was the prior one, Your Honor, and it
7 should be in there. It's not in front of me right now, but
8 I believe there are four ZIP disks.

9 Your Honor, I do want to emphasize that these were
10 copies of ZIP disks seized from the defendant's residence,
11 so to the extent there is anything in them that he needs, he
12 would be aware of the content. However, I do remember there
13 were four ZIP disks. And my discovery letters and my
14 declaration should reflect that.

15 THE COURT: Mr. Reed, can you help me out?

16 MR. REED: Yes, Your Honor, there were four ZIP
17 disks in the boxes that I sent to MDC. I basically took all
18 the discovery, all the computer-based discovery from Mr.
19 Nicolaysen. We took it up to the U.S. Attorney's Office.
20 We spent a considerable period of time comparing all of the
21 materials. There were definitely four ZIP disks in the box.
22 I took those boxes to my office, didn't touch them and then
23 I did transfer them, however, everything from that box into
24 a new better box and I didn't leave anything out. And there
25 were four ZIP disks in the boxes that I delivered to MDC, so

1 I don't know what happened to them, Your Honor.

2 THE DEFENDANT: I am still not in possession of
3 the audiotapes either, Your Honor, that I believe he's
4 represented have been turned over to me. And I received a
5 letter from MDC that some audiotapes had been mailed to me
6 last week or just slightly before last week, but they were
7 returned to sender and it was -- his previous assistant,
8 what's her name?

9 MR. REED: Sarah.

10 THE DEFENDANT: Sarah Ribbs, thank you. So I am
11 still not in possessions of those either.

12 THE COURT: All right. Well, let the record
13 reflect that on September 29th, Ms. Duarte filed a
14 declaration. It was the subject of a previous hearing in
15 part. In paragraph 3 she accounts for the material that was
16 given to Ms. Potashner on July 29th. Among the recitals was
17 a reference to four ZIP disks. Paragraph 10, she said that
18 later on in this scenario she saw Mr. Nicolaysen's
19 representative provide to Mr. Reed a number of things,
20 including ZIP disks.

21 I don't know what happened between -- if anything,
22 between the delivery by Mr. Reed of the box in which there
23 were ZIP disks and today, and I'm not making a finding that
24 the ZIP disks are missing just merely on the basis of what I
25 am told, but either they are there or they are not there.

1 If they're not there, Mr. Sutcliffe can take appropriate
2 action relating to whatever rights he has and whatever
3 violations of his rights there may be from the missing ZIP
4 disks. If he could establish what happened, that they are
5 messing, then it's attributable to the government. But I
6 don't really want to waste any time on that, so I'm ordering
7 the government and you, Mr. Saavedra, to get the 250 ZIP --
8 what is it called the ZIP drive?

9 MR. SAAVEDRA: ZIP drive.

10 THE COURT: -- you get that over to at government
11 expense, because this is something I've already tried to
12 have happen before. I am very displeased that I issue
13 orders and they don't seem to be complied with because
14 people think that they are no longer necessary, they are
15 moot, I was mistaken in the first place. I want the 250 ZIP
16 drives to be made available to Mr. Sutcliffe as soon as
17 possible. When can you do that?

18 MR. SAAVEDRA: I can do that tomorrow morning,
19 sir.

20 THE COURT: Okay. That's an order that you do
21 that. And I'm not going to make any other changes in how I
22 plan for this with respect to -- in what capacity or through
23 what methodology and equipment the evidence is displayed at
24 trial.

25 I intend to speak separately and directly without

1 it being in a full courtroom to Mr. Settle, who can educate
2 me about the necessary features of the different choices I
3 have as to whether or not the evidence that Mr. Sutcliffe
4 already has and will have either to the availability of the
5 SCSI equipment or the ZIP drive should be accessed and will
6 be accessed either in the form of a CD, probably a lot of
7 them, or hard drives. I'll make that determination based
8 upon my best understanding of what is in the interest of
9 justice, and I will disclose my decision when I make it in a
10 court order and the parties will have to live with it.

11 All right. Now, there has been some suggestion, I
12 guess I would put it, Mr. Sutcliffe, that in your opinion at
13 least, based upon what you currently have in your
14 possession, evidence that would have been or is exculpatory
15 to you, exculpatory in the sense it would enable you to
16 establish your innocence or burdens on you to refute and
17 defeat the government's evidence on its burden to establish
18 your guilt, something inconsistent with guilt, something
19 that might be helpful at sentencing even if you are found
20 guilty. That's what exculpatory evidence is generally.

21 If you believe that there is exculpatory evidence
22 that once was on the array of evidence that has been at
23 considerable effort made available to you in prison, what
24 you should do is make an appropriate motion. You can
25 specify in camera and under seal so it's not reviewed by the

1 government what you believe that exculpatory evidence is.
2 I'll read what if anything you submit to me. The
3 government will have a right to respond. I may make a
4 determination that what you send to me needs to be unsealed.

5 You need to understand that if somebody is moving
6 to dismiss an indictment based upon misconduct involving the
7 destruction or culpable loss of exculpatory evidence, the
8 government has a right to know what it is that they are
9 being accused of destroying trying or losing or tampering or
10 is otherwise making unavailable to you. So almost certainly
11 whatever you would send me in camera I would have the
12 obligation to disclose to the government anyway. You might
13 just want to make a motion anyway and let's just get it out
14 there and have the government respond to it. So I will give
15 you that opportunity and we will talk about timing on that
16 little bit later on when we talk about trial date.

17 THE DEFENDANT: Thank you, Your Honor.

18 THE COURT: Okay. Now, an other thing that you've
19 adverted to and maybe this is exactly what I was just
20 alluding to, in one of the items you sent to me,
21 Mr. Sutcliffe, you said that you intended to make a motion
22 to dismiss based upon the destruction of evidence. Is that
23 what you had in mind?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: Okay. When were you planning to make

1 that motion.

2 THE DEFENDANT: Well, in light of what's going on,
3 I was trying to get the list -- Ms. Duarte, I believe she --
4 ten minutes ago she just said she made an inventory list.
5 So I'd like someone, anyone, please, to give me some kind of
6 definitive inventory list so I can calculate -- I know what
7 I owned. I know what was in my house. I seem to know what
8 she's created from these other experts, but I don't know
9 what's missing. She's -- in November -- in the November --
10 excuse me -- January 14th, on page 3 of the transcript of
11 that hearing that day, she said that there was original
12 evidence which we didn't even copy so it should be returned.

13 Now, I've brought up that Mrs. Rodell from BOP
14 brought to me discovery from Mr. Harris. Stuff was missing.
15 I brought it to their attention. Ms. Rodell came back two
16 days later, tried to get me -- tries to get me to antedate a
17 receipt to reflect -- so it didn't reflect stuff was
18 missing, and then when I said hey, (whistling), no, no, no,
19 no, no, she flew away. Now we can add to the other mix.

20 I -- there is stuff missing definitely. There is
21 stuff that's exculpatory, that's for impeachment, I could
22 definitely use for impeachment, but I don't know everything
23 that's been given to me.

24 THE COURT: Well, you know what's been given to
25 you because it's with you now.

1 THE DEFENDANT: No -- I know what I have now, yes.
2 I even have some of Mr. Nicolaysen's files.

3 THE COURT: That's what I arranged for.

4 THE DEFENDANT: No, no. I mean, Mr. Nicolaysen's
5 files.

6 THE COURT: I know what you mean, Mr. Sutcliffe.

7 THE DEFENDANT: I don't think you grasp the
8 meaning of what I'm saying right now.

9 THE COURT: The inventory to which you were
10 referring?

11 MS. DUARTE: Your Honor, I don't know what he's
12 referring to in the transcript, but I do know that in my
13 declaration filed September 29th, that attaches the
14 discovery letters as it goes to electronics evidence, each
15 and every item of electronic evidence that was ever turned
16 over is explained and categorized and the letters are
17 attached.

18 THE COURT: Yeah, I do see lots of items. They
19 are itemized.

20 MS. DUARTE: Yes, Your Honor.

21 THE COURT: Is that what you had in mind when you
22 were referring to inventories that you had either generated
23 or received or sent in dealing with opposing counsel?

24 MS. DUARTE: Without seeing the January 14th
25 transcript, honestly --

1 THE COURT: No, no, forget the January -- what's
2 said on January 14th. What you were just referring to a few
3 minutes ago here in court, Ms. Duarte, when you said that
4 you had generated an inventory for opposing counsel.

5 MS. DUARTE: Could I have just a moment, Your
6 Honor?

7 (Pause)

8 MS. DUARTE: Your Honor, I'm sorry. I don't
9 remember that, but to the extent that I meant inventory,
10 that I said inventory, I'm almost certain I meant the
11 September 29th description of everything.

12 THE COURT: Okay. Use that as your basis to
13 determine what's missing, Mr. Sutcliffe. That's all we
14 have. That's all the government --

15 THE DEFENDANT: Thank you.

16 THE COURT: -- is in a position to give you. And
17 if you think that it reflects any incursion or violation of
18 your rights, you should follow that up accordingly.

19 THE DEFENDANT: Thank you, Your Honor.

20 THE COURT: Now, in the category of motions, there
21 is one motion --

22 MR. WEISS: Excuse me, Your Honor?

23 THE COURT: Yes.

24 MR. WEISS: If you no longer need me, can I go?

25 THE COURT: We won't be very long, Mr. Weiss. And

1 I don't know what's going to happen at hearing, so I don't
2 think it will be prudent to let you go right now, so please
3 hang in there.

4 The motion to dismiss the threat counts, they were
5 actually two written motions, the government responded to
6 that and I haven't gotten a reply. I don't -- I'm pretty
7 sure you didn't intend to reply to the government. Am I
8 correct, Mr. Sutcliffe?

9 THE DEFENDANT: You lost me, Your Honor. I'm
10 sorry. We're on previous motions now?

11 THE COURT: Yeah, you filed in September some
12 motions to dismiss the threat counts. You filed them on
13 September 25th.

14 THE DEFENDANT: I'm actually -- I'm looking at the
15 February 4th, 2003 motion to dismiss counts -- or
16 actually -- I'm sorry, wrong court -- one through 4 as
17 unconstitutionally vague.

18 THE COURT: I've already ruled on that. We had a
19 hearing on that.

20 THE DEFENDANT: You did?

21 THE COURT: Yes, I did.

22 THE DEFENDANT: Where was I?

23 THE COURT: I don't know where you were, but that
24 has been reviewed. But now I'm asking you -- just listen to
25 me, Mr. Sutcliffe. You made renewed motions to dismiss the

1 875 counts, two different motions. You prepared them. They
2 were filed on September 26th. I gave the government --

3 THE DEFENDANT: Actually, Mr. Reed prepared them
4 for me.

5 THE COURT: -- time to respond. The government
6 opposed those motions and that was the October 6th. And
7 I've gotten a reply to the government's October 16th reply.
8 Did you want to reply?

9 THE DEFENDANT: I have never even seen a
10 government reply.

11 THE COURT: Well, it was served upon you by hand,
12 according to the proof of service.

13 THE DEFENDANT: Well, that's funny, because I
14 never got it.

15 What about the motion for hearing
16 regarding perjury by a prosecutor, Your Honor --

17 THE COURT: Mr. Sutcliffe --

18 THE DEFENDANT: -- has that been ruled on also?

19 THE COURT: Mr. Sutcliffe, answer my question. Do
20 you want to reply to the government?

21 THE DEFENDANT: I can't reply if I haven't seen
22 the law. How can I respond to it? I have been given no
23 notice, no due process.

24 THE COURT: I have a proof of service. Now, just
25 tell me whether you want to reply or not.

1 THE DEFENDANT: I can't reply, Your Honor. I have
2 not seen the government's.

3 THE COURT: Okay. Well, I'm going to deny the
4 motions. They are frivolous anyway, so I will issue an
5 order in that regard.

6 THE DEFENDANT: It was your court-appointed that
7 filed them, created them as frivolous.

8 THE COURT: I wouldn't say they're frivolous --

9 THE DEFENDANT: You said they are river lust.

10 THE COURT: That's really overstating it. They do
11 lack merit and one of them is premature. It's going to be
12 denied without prejudice to you renewing it at the
13 completion of the government's case-in-chief. The other one
14 I deny on the merits and you'll see an order that goes out.

15 You can go back and look through the file, and I
16 will too, but I'm confident, Mr. Sutcliffe, that motions
17 that were made so long ago as February 2003, and I remember
18 a hearing where Mr. Harris argued very passionately about
19 the supposed unconstitutionality of these statutes, the
20 vagueness of these statutes --

21 THE DEFENDANT: Mr. Harris was removed prior to
22 February, Your Honor.

23 THE COURT: -- and I denied those motions.

24 THE DEFENDANT: How could he argue these motions
25 when he was removed on January 10th? How could Mr. Harris

1 have argued those motion? Please answer me that question,
2 Your Honor.

3 THE COURT: I'm not going to debate things with
4 you. I'm not saying --

5 THE DEFENDANT: I'm not asking you to debate. I'm
6 just asking you how can a man who was removed on January
7 10th argue a motion for me in February, that was filed
8 February 4th. That's physically impossible unless there has
9 been another secret hearing. So I'd like my motions to be
10 ruled on, Your Honor. I filed this back in February 4th,
11 2003. There is three of them there. There is a motion to
12 dismiss counts 1 through 4, unconstitutionally vague; motion
13 for rehearing regarding perjury by the prosecutor; and there
14 is a motion to recuse the U.S. attorney general's office of
15 Central District of California and to recuse the assistant
16 U.S. attorney, with attached memorandum of points and
17 authorities. These have been pending now for many, many
18 months and one of them will -- if one of them is granted, we
19 can all go home.

20 THE COURT: Now, Mr. Reed, one of the items that
21 Mr. Sutcliffe has filed seems to suggest that he has never
22 received any investigative reports or any witness
23 statements. Among the material that you received from prior
24 counsel that you and Mr. Nicolaysen put together for
25 delivery at the MDC, do you recall whether any investigative

1 reports prepared by anybody acting on behalf of
2 Mr. Sutcliffe? You don't have to say who did it.

3 MR. REED: On behalf of Mr. Sutcliffe --

4 THE COURT: Yeah.

5 MR. REED: No.

6 THE COURT: By a lawyer, by --

7 MR. REED: Not that I recall, Your Honor.

8 THE COURT: -- by an investigator for a lawyer?

9 MR. REED: No. No witnesses were interviewed that
10 I remember. I don't remember anything like that.

11 THE COURT: Okay. Now, witness statements,
12 meaning 302s that the government would always turn over,
13 although sometimes at the last minute.

14 MR. REED: There were a significant number of
15 witness statements that the government took 302s that are
16 were turned over to Mr. Sutcliffe of various witnesses. In
17 fact, I recall that the exhibit book was arranged in such a
18 way -- which is something that I turned over to
19 Mr. Sutcliffe -- in such a way that the witness statements
20 that went to certain exhibits which were going to be
21 authenticated by certain witnesses, those categories of
22 exhibits were witnesses we called, the 302s for that
23 particular witness would contained right within that
24 section, so I remember it was organized that way. That's
25 why I remember it distinctly. There was a significant

1 number of 302s, Your Honor,

2 THE COURT: Okay. I'm not going to invite or rule
3 upon any motions related to discovery. I know what the
4 record reflects. I'm not aware of any discovery that's been
5 withheld or anything that's missing in the realm of
6 discovery. Other than access issues and maybe these missing
7 ZIP disks or ZIP drives, I think there is no reason for me
8 to conclude that there are any discovery issues or problems
9 in this case.

10 Do you agree, Ms. Duarte?

11 MS. DUARTE: I agree, Your Honor.

12 THE COURT: Do you want to be heard on that,
13 Mr. Sutcliffe?

14 THE DEFENDANT: Yes, I want to -- I would like the
15 court to give me a ruling on why it's refusing to rule on
16 these motions I have February 4th, 2003.

17 THE COURT: Okay. I'm not refusing to rule on
18 those. If I haven't ruled on those, I'll look at them
19 again. My understanding is I have, but if I haven't, I'll
20 look at those and I'll give you a ruling.

21 THE DEFENDANT: Then I would like to move this
22 court for a hearing Friday to rule on those motions, and I
23 would also like to incorporate the motions that I filed this
24 morning so that we can have an evidentiary hearing for
25 finding of fact at the same time, if that's convenient for

1 the court. If not, I'm open to any date, but as soon as
2 possible I'd like --

3 THE COURT: I'll review the docket and the record
4 and I will determine whether or not a hearing is warranted.
5 and if it is, I'll give you an opportunity to argue those
6 motions.

7 THE DEFENDANT: I appreciate that, Your Honor.
8 Thank you.

9 MS. DUARTE: Your Honor, if I may, Ms. Standifer
10 asked me if she could be heard on the issue of ZIP disks.

11 THE COURT: Yes.

12 MS. STANDIFER: Thank you, Your Honor. I would
13 just like to clarify the slight misunderstanding made by
14 Mr. Saavedra. He misstated that he has not personally seen
15 the four ZIP disks. That does not mean they are not in
16 Mr. Sutcliffe's possession. He just -- Mr. Sutcliffe as of
17 present has not brought them down to computer area.

18 THE DEFENDANT: Objection. Objection.

19 MS. STANDIFER: And concerning the ZIP drive,
20 Mr. Saavedra was not here in court when the court had
21 ordered standby counsel to send any ZIP drives, since he
22 wasn't aware of that issue. He just knew that they were
23 sent in to him to connect to the computer.

24 Mr. Sutcliffe did say to him that it was the wrong
25 ZIP drive, but Mr. Saavedra was not aware that it was the

1 government's responsibility to make sure that it was the
2 right whatever megabytes or, I'm sorry, I don't know the
3 lingo. But I just wanted the court to know that.

4 THE COURT: Okay. Well, thank you for the
5 clarification.

6 Mr. Saavedra, did Ms. Standifer state correctly
7 what I had not previously understood but now --

8 MR. SAAVEDRA: Yes, sir.

9 THE COURT: All right. Well, I'm not making a
10 finding that you were responsible for any loss or
11 destruction and I specifically said that I wasn't making any
12 finding that there was any losses or destruction, so the
13 record now would be clear.

14 You don't have to object. You can, if you want,
15 but you don't have to object --

16 THE DEFENDANT: Yes, I'm objecting to how she just
17 testified. I'd like her -- any time she's testifying, I
18 would like her under oath. She's made material
19 misrepresentations and statements in her declaration to this
20 court, and I would point out to the court to observe on page
21 4 of her declaration, Government's Filing of Declaration of
22 Amy J. Standifer Exhibits, on page 4, she said that
23 "Mr. Sutcliffe" -- this is on line 12. Excuse me --
24 "Mr. Sutcliffe has not offered any assistance in this
25 regard, nor is he attempting to mount and view the drives

1 again." And then again on page 6 she reiterates this and
2 she says: Inmate Sutcliffe is not offering any assistance
3 in mounting and viewing the hard drives."

4 Now, these are statements of fact. I spoke with
5 Mr. Armando I believe it was on the 17th of this month and I
6 specifically asked him did he remember me assisting him in
7 setting different jumpers on these drives, different
8 configurations, master versus slave hookups, and he
9 remembered very clearly my assisting him in trying to get
10 those drives to work.

11 So she's come in here now and told false
12 statements to this court under penalty of perjury and I take
13 great umbrage at that and now she's trying to spew the
14 information again. If she's going to testify, I want her
15 under oath.

16 THE COURT: Okay. I've heard what you said.

17 THE DEFENDANT: Thank you, Your Honor.

18 THE COURT: All right. Now, let's talk about the
19 trial date and the expected durations of the trial. In a
20 previous order, Mr. Sutcliffe, I gave you the choice of
21 November 12th or January 6th for the commencement of trial.
22 What is your choice?

23 THE DEFENDANT: I believe -- did Your Honor
24 receive my letter I sent dated October 16th?

25 THE COURT: Yes.

1 ~~THE COURT~~: Okay. I believe right in there I said
2 on page 3 November 12, to make sure there is no delay.
3 Yeah, sure did. I started again on page 2 to ensure that
4 she's available for my trial, November 12.

5 THE COURT: How many letters did you send on
6 October 16th?

7 THE DEFENDANT: I have --

8 THE COURT: I only have a letter dated October 9th
9 and was received October 16th.

10 THE DEFENDANT: No, I have one right here, if the
11 court would like to look at my copy.

12 THE COURT: Well, it will arrive, but is your
13 choice November 12th?

14 THE DEFENDANT: Oh, you bet.

15 THE COURT: Okay.

16 THE DEFENDANT: I'd like this entered into the
17 record anyway --

18 THE COURT: Now, Mr. Reed, let me bring up -- you
19 can give it to the clerk later on.

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: I didn't get that letter. I haven't
22 seen any choice exercised by you.

23 Mr. Reed, would you be good enough to let me know
24 about potential conflict? Is there any change in your
25 status in that trial?

1 MR. REED: Yes, Your Honor. We have the necessary
2 stipulation regarding the Speedy Trial Act and a stipulation
3 to continue that trial before Judge Morrow. We filed that
4 approximately two days ago. I don't know if Judge Morrow
5 has ruled on it, but in my talking about the various
6 parties, they don't think it's going to be a problem.

7 THE COURT: Good.

8 THE DEFENDANT: So I'm going to be able to proceed
9 with the trial.

10 THE COURT: Okay. While you're standing, Mr.
11 Reed, and thank you for that, I granted a motion concerning
12 an investigator that would be available on behalf of
13 Mr. Sutcliffe. I assume that he would be available to serve
14 any subpoenas. And I want you to understand that,
15 Mr. Sutcliffe, so that whether it's Mr. McAfee or anyone
16 else that you want to make sure is under a court order to
17 appear at the trial, you will have access to the issuance of
18 subpoenaes and they would be served appropriately through
19 the investigator that's been appointed.

20 With the trial slated to start on November 12, can
21 you give me an updated estimate as to the duration?

22 MS. DUARTE: Your Honor, under normal
23 circumstances, I would say the government's case-in-chief
24 would take four to five days. I'm not sure how --

25 THE COURT: It's going to take longer.

1 MS. DUARTE: I'm not sure how much additional
2 time. I would hope to get it done within a week and a half,
3 Your Honor, and also to remind the court the case agent has
4 to leave town, I believe, on Friday the 21st, so I would
5 certainly have to be done by then; but if not, I would be
6 seeking leave of the court to substitute in an additional
7 case agent.

8 THE COURT: Yeah, that will be granted.

9 MS. DUARTE: Okay. I hope to be done by November
10 21st, Your Honor.

11 THE COURT: Okay. We will have a status
12 conference, at least one, before that trial. At the status
13 conference I'll go over some of the things I intended to go
14 over at an earlier status conference about the procedures we
15 will follow. I'll have the marshals here to have an update
16 on aspects of the trial management that affect them. We
17 will talk about voir dire, about exercise of peremptories.

18 Mr. Sutcliffe, have you spoken to anybody about
19 arranging sufficiently in advance of November 12th for you
20 to have civilian garb, civilian dress that you could wear?

21 THE DEFENDANT: No, Your Honor. I'm more
22 concerned right now with my stolen property that Mr. Reed
23 has admitted to have taken from me and has yet returned to
24 me, that I've requested this court demand that he produce a
25 copy of it. Has he produced a copy of that yet to you, Your

1 Honor?

2 THE COURT: Okay. We'll talk about that shortly,
3 Mr. Sutcliffe.

4 THE DEFENDANT: Thank you, Your Honor.

5 In answer to your question, no, no.

6 THE COURT: Okay. I will not attempt to set a
7 status conference date at this point because I need to
8 resolve certain issues about the equipment that will be
9 available in court. I'll be speaking to Mr. Settle about
10 that and issue an order, but there will be a careful
11 opportunity to review with me the way the trial will be
12 conducted, the hours of the trial, special arrangements to
13 accommodate witnesses and the like. We will do all of that
14 not the morning of the trial, which is what I typically do,
15 but in advance of trial, so just be patient. I'll send out
16 an order on that.

17 At this point I'm going to ask all people -- I
18 want to thank Ms. Standifer and the representatives from MDC
19 for coming. This is an unusual case and it requires careful
20 attention and careful responses, so you're performing an
21 important function.

22 You can be excused now, Mr. Weiss. Thank you for
23 being patient.

24 MR. WEISS: Thank you, Your Honor. I will be
25 available tomorrow if anybody needs my help.

1 THE COURT: All right. Mr. Settle, you don't have
2 to remain. In fact, there are certain things I need to take
3 up with Mr. Sutcliffe and his standby counsel that you would
4 not be permitted to be present for anyway, so I will be in
5 touch with you at the appropriate time.

6 All people other than representatives of the
7 marshal's or the Bureau of Prisons and my staff need to be
8 excused.

9 You should wait outside, Ms. Duarte, in case there
10 is a need for anything else.

11 MS. DUARTE: Thank you, Your Honor.

12 (Government counsel excused)

13 THE COURT: Okay. Mr Sutcliffe, you had put
14 something in a recent communications to me about the advice
15 of counsel defense and I wanted to tell you, although I
16 would not be surprised that already understand it, that if
17 you in your own defense do assert advice of counsel, which
18 would be your right and if, in essence, you try to explain
19 that you thought you were doing things lawfully and in
20 compliance with the law, and you thought so because the
21 lawyer told you, you will be opening up to examination by
22 the government communications you had with that lawyer. In
23 other words, you would be waiving your attorney-client
24 privilege. Do you understand that?

25 THE DEFENDANT: Yes.

1 THE COURT: So the scope of examination or
2 cross-examination that the government would be entitled to
3 conduct is difficult to preview. It depends a lot on what
4 the lawyer would say, but it's not going to be narrowly
5 confined to just the precise questions that you elicited and
6 answers that elicited from that lawyer. It's an elastic
7 area that could misfire. You understand that?

8 THE DEFENDANT: I fully understand.

9 THE COURT: Okay. Now, the other thing that you
10 wanted me to inquire into, I don't understand what you're
11 talking about exactly, but my impression is that you gave a
12 letter to Mr. Reed that you want him to return. Is that
13 correct?

14 THE DEFENDANT: Yes. In this October 6 meeting --
15 I'd like to give Mr. Stephen (sic) sufficient time to enter
16 that into evidence.

17 THE COURT: Well, it may not be into evidence. I
18 will receive it as communications I sometimes -- I always
19 keep them but they don't necessarily go into to the court
20 file.

21 THE DEFENDANT: It's my only copy.

22 THE COURT: So --

23 THE DEFENDANT: Yeah.

24 THE COURT: So you gave Mr. Read a letter, you
25 say, and now you want him to return it. Is that what the

1 gist of it is?

2 THE DEFENDANT: Yes. He admitted he has it in his
3 possession. He admitted he took it that day we were in
4 court on October 1st.

5 THE COURT: We may or may not have an issue here,
6 Mr. Sutcliffe.

7 Mr. Reed, do you know what Mr. Sutcliffe is
8 referring to?

9 MR. REED: I think I do, Your Honor.

10 THE COURT: And do you have that letter with you?

11 MR. REED: I don't have it with me here. I didn't
12 bring my full file. I just brought a skeleton file with me.

13 THE COURT: Are you -- do you have any reason not
14 to return the letter to Mr. Sutcliffe?

15 MR. REED: No, not at all, Your Honor.

16 THE COURT: Can you arrange to have the letter
17 mailed to him promptly?

18 MR. REED: Yes, Your Honor.

19 THE DEFENDANT: I'm more concerned that Your Honor
20 does receive a copy of it --

21 THE COURT: Well, he --

22 THE DEFENDANT: -- and entered into evidence. And
23 I'm waiving my Fifth Amendment right of attorney-client
24 privilege with this man right here and --

25 THE COURT: Okay. Mr. Reed, mail me a copy or

1 lodge a copy with the court as well.

2 MR. REED: I will, Your Honor.

3 THE COURT: Okay. Is there anything else that
4 needs to be addressed?

5 THE DEFENDANT: Yes, Your Honor. I believe that
6 Mr. Reed made a false statement of material fact to this
7 tribunal October 1st and I would like a chance to address
8 and that to prove that, because that's a very serious issue.
9 I would like to have an evidentiary hearing, full-blown, on
10 this issue. I'd like a copy of the transcripts from the
11 October 1st sealed portion for use for appeal purposes. I'd
12 like that expedited, if possible.

13 And like I said, I'd like that letter to be
14 entered into evidence. It's not something I take lightly
15 and I don't think the court should take lightly either.

16 THE COURT: Okay. Let me look at this letter that
17 you sent.

18 THE DEFENDANT: Thank you, Your Honor.

19 (Pause)

20 THE COURT: Well, this letter doesn't tell me
21 anything about what's in the October 1st or whatever the day
22 the letter is. I'm not going to order Mr. Reed to respond
23 to something that I don't know anything about. If I see the
24 letter and I think there is any basis to have further
25 inquiry, I will so rule. If I think there is not, I will so

1 rule as well so you know where it stands.

2 THE DEFENDANT: It's a false statement not
3 contained in the letter. It's a false statement he made of
4 a material fact concerning the sealed hearing that we had.

5 THE COURT: Okay. Well, I'm not going to have a
6 hearing about something that almost certainly is no longer
7 material or relevant, but I will give you the opportunity to
8 give me your contention. You can do so now and don't expect
9 that there is going to be any upcoming examination, but
10 I'll consider it after you tell me what it is that you are
11 so upset about.

12 So go ahead and tell me.

13 THE DEFENDANT: Well, you're putting me in kind of
14 an untenable position here, Your Honor. You want me to
15 expose how I'm going to impeach his lies in front of him?
16 Is that what you are asking me to do?

17 THE COURT: No, I'm not.

18 THE DEFENDANT: Well, that's what it sounds like.

19 THE COURT: Look, Mr. Sutcliffe, this is a lot --

20 THE DEFENDANT: As long as he made a material
21 misstatement of fact to this court --

22 THE COURT: Tell me what it was.

23 THE DEFENDANT: -- you totally relied upon that
24 and then made a ruling based on that.

25 THE COURT: What was the misstatement of fact?

1 THE DEFENDANT: He said that I refused to assist
2 him up until our August -- excuse me -- September 26.
3 That's the first lie. The second lie was: I refused to
4 give him the name of any files, exactly any files to help
5 him with any discovery. That's the second miss -- second
6 fact that he lied about. Those two statements I can refute
7 and prove they were lies.

8 THE COURT: You don't want Mr. Reed to be your
9 lawyer. Right?

10 THE DEFENDANT: He's not my lawyer. He's your
11 counsel. I stressed that very closely in the letter to you
12 and I cited U.S. versus Mills. He's not my agent. Ye's
13 your agent.

14 THE COURT: Okay. Well, I think that's sufficient
15 basis to stop right here. I don't think there is any need
16 for Mr. Reed to respond. And the extent to which you and he
17 had a difference of opinion as to whether and, if so, to
18 what extent you've cooperated before, I relieved him in
19 large measure as a result of your refusal to communicate
20 with him.

21 THE DEFENDANT: That's exactly what I'm talking
22 about. Exactly. You removed him because he said that I
23 refused to assist him at all on October 26. That's a lie
24 and I'd like a chance to refute that.

25 THE COURT: Okay. Mr. -- we're not going to go

1 through that hearing again, Mr. Sutcliffe. I made findings
2 that based upon your own characterization of what any lawyer
3 who was your lawyer could do and and would not be permitted
4 to do and would not meet with your approval and whose
5 efforts on your behalf you would reject, I relieved him
6 of his duties. That ends it. That's my ruling. We are not
7 going into in any further. You have the basis on the record
8 to appeal me if you like, depending on what happens at the
9 trial.

10 Okay. There is no issue as to -- and no relevance
11 anymore and I don't think there is any basis for an issue as
12 to the accuracy of Mr. Reed's statements. Mr. Reed enjoys a
13 well-deserved reputation as an honorable, diligent and
14 careful lawyer, and I'm not going to subject him or other
15 lawyers of that nature to fishing expeditions that are no
16 longer material or relevant to any of your rights in the
17 trial. That's my ruling. I'm not going to hear any
18 arguments about it.

19 Okay. I think we're adjourned. I don't think
20 there is anything that you need to report to the
21 prosecutor --

22 THE DEFENDANT: Your Honor, I --

23 THE COURT: -- I will issue --

24 THE DEFENDANT: -- can I leave my subpoenas here?

25 THE COURT: You can give your subpoenas to

1 Mr. Reed. I will issue --

2 THE DEFENDANT: I don't trust him with -- I don't
3 even trust him with a piece of paper of mine. You
4 understand me?

5 THE COURT: We will not serve your subpoenas.

6 THE DEFENDANT: I'm not asking you to serve my
7 subpoenas. I'm just telling you I'm not giving this man a
8 shred of paper. He's already stolen my paper from that day
9 on the hearing.

10 THE COURT: Mr. Sutcliffe, I want you to
11 understand something real simple. If they are third parties
12 who you want to be subpoenaed, the one and only way that
13 that will happen is not through me and not through my clerk.
14 We are not process servers for anybody. You will give those
15 subpoenas to Mr. Reed --

16 THE DEFENDANT: I will not give those subpoenas to
17 Mr. Reed. He stole my copy and --

18 THE COURT: -- and he will give them to them to
19 the investigator.

20 THE DEFENDANT: You refused to give me any kind of
21 evidentiary hearing to investigate his material -- material
22 misstatements to this court upon which you relied to make a
23 ruling against me

24 THE COURT: Okay. Mr. Sutcliffe, by your choice,
25 I want you to understand, these people --

1 THE DEFENDANT: No, he's not my choice. He's your
2 choice of agent. You said our relationship has become
3 untenable.

4 THE COURT: Don't -- okay. We're at the point,
5 Mr. Sutcliffe, where you're interrupting me --

6 THE DEFENDANT: I'm sorry, Your Honor. I
7 apologize.

8 THE COURT: -- and I'm not going to permit that.
9 And I'm telling you if you want to get subpoenas served,
10 there is one and only one way and I'm not going to repeat
11 it. If you don't choose to give them to Mr. Reed, they
12 won't be served.

13 THE DEFENDANT: Okay.

14 THE COURT: All right. We're adjourned.

15 We're going to make a copy of your letter that I
16 will keep and give you back the copy so you will have the
17 one you just handed to the clerk.

18 THE DEFENDANT: You want me to file it as part of
19 the record?

20 THE COURT: And your motions that were lodged with
21 the clerk or given to the clerk, those will be filed too.

22 The letter, I may or may not file as part of the
23 official court record, but it will be part of the chamber's
24 records.

25 THE DEFENDANT: As I understand, Your Honor, are

1 we are or are we not going to have a hearing regarding any
2 previous motions filed?

3 THE COURT: I have to look and see what the status
4 of those motions are.

5 THE DEFENDANT: Thank you, Your Honor.

6 THE COURT: Okay. We're adjourned.

7 (Proceedings adjourned)

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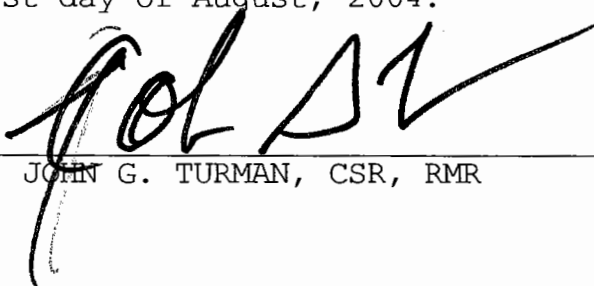
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C E R T I F I C A T E

I, JOHN G. TURMAN, Official Court Reporter herein,
do hereby certify that the foregoing transcript is a true
and correct copy of the proceedings in the above-entitled
case taken on the date and at the time indicated herein, all
done to the best of my skill and ability.

DATED this 21st day of August, 2004.



JOHN G. TURMAN, CSR, RMR