UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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HONORABLE PERCY ANDERSON, JUDGE PRESIDING

- - -

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. CR 02-350-AHM
STEVEN W. SUTCLIFFE, Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Thursday, November 21, 2002

HEARING FOR REVIEW OF ORDER SETTING CONDITIONS OF RELEASE/DETENTION PENDING TRIAL

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LOS ANGELES, CALIFORNIA; THURSDAY, NOVEMBER 21, 2002; 3:00 P.M.

THE CLERK: Calling Item number 3, CR 02-350, U.S.A. vs. STEVEN WILLIAM SUTCLIFFE.

Counsel, state your appearances, please.

MS. DUARTE: Good afternoon, your Honor. Elena Duarte for the Government.

THE COURT: Good afternoon.

MR. HARRIS: Good afternoon, your Honor. Bill Harris on behalf of Mr. Sutcliffe. He is present, in custody.

THE COURT: Okay. And good afternoon to both of you.

We're here, of course, on the Application that Mr. Harris filed on behalf of Mr. Sutcliffe to set different terms of bail, and I regret having to cause you to wait, but the issues are interesting enough and important enough to warrant careful review, and I was reading several cases that I wanted to double check on.

I have read the papers carefully. I think, Mr. Sutcliffe, you will be inclined to agree that Mr. Harris has pursued your defense as vigorously as I assured you he would, and the arguments he makes are interesting.

But let's keep the issues in clear focus.

This is not a motion to dismiss the indictment.

And the findings I'm going to make may later have to be evaluated, maybe recited, if those were the real issues.

But I don't want anybody to construe this findings and

these rulings to be a definitive valuation of the propriety of the charges in the first place, although I do think that there is no constitutional impediment in principle to this statute, and I doubt if there is an application to these particular facts to these two statutes.

I'm going to deny the application.

I don't think that it would be necessary to have further argument, although I will permit it, particularly from you, Mr. Harris, in light of the findings I'm going to make, if you think there is some specific point or focus that you wish to address.

In case I would otherwise forget, with respect to the basis for my previous decision to remand Mr. Sutcliffe, I incorporate by reference the findings I made and the reasons I stated at the April hearing.

I will note that -- have you read the updated Pretrial Services Report, Mr. Harris?

MR. HARRIS: Yes, your Honor.

THE COURT: Okay. There's very little that's new in that report, but the little that is new would warrant reaffirming and reaching the same conclusions I reached last April. And I'm specifically referring to the fact that after that hearing in April, although not long after, a Final Order was issued -- a domestic violence Final Order was issued in New Hampshire. It seems to be in effect, does not expire until

April 26th of next year, and it reinforces the concerns that I express in the findings that I made about a danger to the community.

The interview with Gateways Hospital, which I had authorized, confirms that they perceive Mr. Sutcliffe, as I have always perceived him, as professional and pleasant and cooperative here in these proceedings, but nevertheless, for different reasons, a potential threat particularly with respect to access to computers, and they made the findings they did about whether he's eligible or ineligible.

So putting aside the legal issues, which are the core of Mr. Harris' motion -- and I'm referring to the claim that there's a high probability that Mr. Sutcliffe would not be found guilty of these charges, putting those aside for just a second, I want the record to reflect that I do find that the reasons for remanding Mr. Sutcliffe previously remain applicable and, if anything, have been reinforced or enhanced by the two particular later developments which I just recited.

Now, I also want the record to reflect my view that although the lawyers have gone through the charges in the indictment on a count-by-count basis and assessed their constitutionality or likelihood of success on a separate count-by-count basis, I don't think that's necessary, because even if there were some counts that are invidious and which I might later grant a motion to dismiss -- not that I'm necessarily

suggesting I would -- but if there are any that counts that would warrant, on a bail review hearing, a finding of likelihood of conviction or seriousness of the possibility of conviction, in other words, that would refute the core arguments that Mr. Harris is making, that would be sufficient to make the findings I previously made which I am reiterating.

So those are background general observations that I wanted to recite.

Let's talk about the particular arguments. And I think the starting place to go, because there could be some interesting colloquies and lots of analyses about the different cases, but I don't have, I don't think, the need for that, and I don't think any of us has the time for that -- and there are many other requirements on my calendar and a trial that has long since been under way, which I'll get back to, we do have to talk about the trial date for this case -- I start with the Ninth Circuit's recent decision, the *en bank* decision in the *Planned Parenthood* case at 290 F.3d. And as the lawyers know and perhaps Mr. Sutcliffe knows, in that case a large panel of the Ninth Circuit reached a conclusion different than the initial three-judge panel and found that, in the civil action that resulted in a judgment for the plaintiffs, application of the Freedom of Access to Clinic Entrances Act permitted the finding of liability based upon various kinds of threats. At issue in that case is what is a threat. I think that the

analysis and the language that the Court of Appeals used in that case, which involved anti-abortion activists posting on the Internet posters of physicians and coupling the pictures or the graphics with text that was inflammatory, was a sufficient basis for finding that there were threats that interfere with the rights of the physicians and, indeed, indirectly of the patients.

At page 1075 of 290 F.3d, the Ninth Circuit cited several cases that led it to reiterate its previous definition of what a threat is.

And I think that what the prosecutor said in her brief is unquestionably the case: The standard is whether or not a reasonable person would have the basis to conclude that what the speaker said would be perceived by the listener or the recipient or the person as to whom it's directed as a threat. And threats are not inherently protected under the Constitution. If coupled with threats of violence and the other elements, they can be proscribed, and they definitely can be the basis for a criminal prosecution.

So I want the lawyers to understand that without reciting everything that's already clearly Ninth Circuit precedent that's at page 1075, I am applying the Ninth Circuit's test and, in a nutshell, the only intent requirement for a true threat is that the defendant intentionally and knowingly communicate the threat once it's been defined to be a

threat.

The counts in question here, in my view, aren't even close. We're talking about, first of all -- and this is one reason why I think the cases you cite, particularly the labor cases, the NAACP case, the anti-draft cases, the flag cases, they're really very, very different.

The particular message was directed to particular recipients who had an existing, ongoing specific dispute with your client, with the defendant here.

To tell someone that she'll be "sent back to hell" is very different than an abstract statement of "going to hell." "You'll be sent back" is something far more focused and specific than an invitation to "get lost," which is what "go to hell" commonly is understood to mean.

A statement that "I will kill you," a statement to "keep your dogs at bay now I'm armed," a statement that "I'm coming to collect from you personally" when coupled with pictures of the recipients, of their children, information about their homes and addresses, is a direct threat that a reasonable person would perceive to be likely to be perceived by the recipient -- and these were specific recipients as well as the public generally -- to provide a risk of violence and a risk of injury.

The protection that Mr. Harris claims would arise out of the various cases he cited just simply doesn't apply, I

find, at least not at this stage, to these particular allegations in these particular counts.

If you look at *McCoy vs. Stewart*, that was a habeas case, you had a person convicted under Arizona state law of making abstract statements at a barbecue and at a party to a friendly audience, the Court found and, I think, for good reason, that the statements were general, they weren't particularized; totally different from the findings I've already made. At most, they advocated lawlessness at an indefinite and uncertain future time, and this was, in the *McCoy* case, speech that was directed at a friendly audience that may or may not have been construed as an invitation or a solicitation to engage in gang activity.

But that's not what Mr. Sutcliffe was doing; these were messages and communications directed at specific people as well as others who chose to log on to the *evilgx.com* website.

In the *Landham* case, in Count 3 -- there are only two counts in that case that were at issue -- in Count 3, the Court found the defendant could not be legally charged with kidnapping, so he couldn't have been properly convicted of threatening to kidnap because he was the natural parent of the child in question.

In Count 4 they threw out the conviction because, although again this, I think, was on a habeas case -- no, this wasn't a habeas case, this was a Title 18 case -- but that

count was thrown out because the threatening content or communication referred to past conduct. It really wasn't a threat because it wasn't directed at something that might happen in the future or the present.

I think that the context -- the factual context, the Court is very clear, the law is settled on this, that whether something is a threat and can properly be the basis for criminal prosecution and conviction has to be assessed in the context in which it's made -- I keep coming back to that in the context of Mr. Sutcliffe's alleged conduct, and in the context in which Charles Evers' comments were made in the NAACP case, in the absence of actual links of direct violence to what Evers said, which was years before the finding of damage liability that the Mississippi Supreme Court awarded, it's an entirely different situation. I don't think the NAACP case has any real bearing here.

It's true that it's a First Amendment case, and I am not at all indifferent, oblivious or unwilling to fully protect any citizen's rights of expression under the First Amendment; but that is not good authority for this case.

I already told you what my view is about the *Planned Parenthood* case. I think not only because it's probably the most recent case, but it's also because it's the most considered. And, of course, because it's binding on me as a lowly trial judge in the Ninth Circuit, I think that case

prompts the rather clear conclusion that the arguments that Mr. Harris made in his motion are really unpersuasive.

So for all those reasons, I deny the application.

Would you like to be heard about what I've said so far, Mr. Harris?

MR. HARRIS: Yes. Briefly, your Honor.

THE COURT: Go right ahead.

MR. HARRIS: My main point on the motion here is -- as your Honor pointed out, it's not a motion to dismiss, it's a bail motion. My point was that I think it's impossible to read the *Planned Parenthood* dissent and the *McCoy vs. Stewart* case with the denial of cert. and conclude that there are not substantial First Amendment issues at least raised by this, substantial First Amendment issues that need to be sorted out.

And my premise is that if that is the case, that's an argument for bail just out of an abundance of caution, because we're dealing with the First Amendment here, and that's paramount, seems to be even of greater import than some of the other amendments in the Bill of Rights. So that is the context of the arguments.

I submit that if the First Amendment has to be sorted out through the context of trial, that at least raises the theoretical possibility that that context will show that these were protected communications. And we're going to be bringing out that context. So --

THE COURT: And that will be your right. In the *Planned Parenthood* case, the Ninth Circuit reiterated it was for the jury to make the ultimate determination.

MR. HARRIS: Right. But as the Court may recall from the *Planned Parenthood* case, they said that the website was protected speech. *The Nuremberg Files*, even the majority agreed that *The Nuremberg Files* themselves, that is protected speech. It was only with the "wanted" posters in the context of the extrinsic violence of the three murders that stripped it of the First Amendment protection. So --

THE COURT: Mr. Harris, I think it's helpful to distinguish between the medium, which is what a website is, and the content, which is what this case is about. The Ninth Circuit, in *Planned Parenthood*, did not say, and I don't know of any court that has said, that a website is protected speech.

MR. HARRIS: Oh, no.

THE COURT: What's really at issue is what is disseminated on a website. That's what speech is. And then the question arises whether it's protected.

MR. HARRIS: Well, the point was that the content of *The Nuremberg Files* with the lines crossed out and the implicit argument that this is somehow an invitation to murder these abortion providers, the Court will note that the Ninth Circuit said *The Nuremberg Files*, that's protected speech. If they were limited to that, judgment for the defendant under the

First Amendment. It was only when they brought in the "wanted" posters that they said that, in context with the three murders, took it outside the First Amendment. And that's how they inferred a threat. But on the face of *The Nuremberg Files*, they said no threat. So --

THE COURT: Do you think that no reasonable person could construe Mr. Sutcliffe's postings on this website in the context in which they are posted and came about as a threat? As it would likely be perceived by the recipient?

MR. HARRIS: I don't know if I would go that far, because on some of them, there's a spectrum. Some of them, yes; others, no. And, you know, some are closer questions than others. But I think all of them present a First Amendment issue.

So it's -- I mean the Court has made its ruling on the First Amendment and I respect that. There's one other -- I'm just bringing out the practicalities of it that if it's the case that the context shows that some or all of this speech was protected, we would have been in a better position if he's outside on bail. That's a better First Amendment position to be in. If he's convicted, there will be plenty of time for him to serve his sentence after he's convicted.

But there's one other practical argument that I didn't really put in the papers that I'd like the Court at least to consider.

This is a computer case where counsel for Mr. Sutcliffe is like a child learning the scales and Mr. Sutcliffe is playing Beethoven piano sonatas. And that's about where it's at. And in MDC we cannot even have a computer unless I'm there, sitting there, with all my other cases, to allow Mr. Sutcliffe to have a computer. So with him --

THE COURT: Please explain to me why your ability effectively to represent him is dependent upon some level of insight or prowess concerning computer technology that you currently lack?

MR. HARRIS: Because these websites are on disks, it's a matter of manipulating the disks, going back and forth, pulling this out, pulling that out, cross-checking. If this second website is allowed to come in, the task is doubled.

THE COURT: Would your ability effectively to represent him be enhanced if, at Government expense, at public expense, you were allowed to retain an expert?

MR. HARRIS: You know, what it would really be -- an easier solution would be to direct MDC to let Mr. Sutcliffe have access to that computer in the visiting room without me being there.

THE COURT: That I will not do.

MR. HARRIS: I mean it's not an Internet where he can go to the outside; it's just a computer plugged into the wall.

THE COURT: But I thought you're the one who needs to

get the -- I don't mean to minimize what I think you're telling me because I'm in the same boat as you, but I construed you to tell me that you need some kind of tutelage about the niceties of computer technology and Internet usage; and I don't see how you'll get that when Mr. Sutcliffe has access to an MDC computer.

MR. HARRIS: If he was out, he could sit in my office and we could prepare for trial with the computer sitting on my desk, and he could go back and forth, and we would have some time to do that.

Now, the only way that we can actually -- I mean we've got a box of computer disks and floppies that -- there's not enough time if I did it 24 hours between now and December 3 that I'd be able to do this thing adequately.

But he knows what's there. And the only way to get Mr. Sutcliffe on a computer is for me to go down to MDC to the visiting room hoping --

THE COURT: In other words, what you're saying is that the evidence that has been turned over to you, you need your client to evaluate?

MR. HARRIS: Right. It's like if he spoke -- if it was in Chinese and he spoke Chinese and I didn't, and we're trying to go over and find the gems and uncover them.

THE COURT: Have you raised this issue with Ms. Duarte?

MR. HARRIS: No.

THE COURT: I don't know exactly what kind of access to mischief -- I'll put it in a neutral term -- might be feasible through use of that computer; but assuming there's none or the risk can be minimized, I would be inclined to let him have access. But I don't know enough about it to issue some kind of oral order now.

Why don't you and Ms. Duarte speak to the Warden?

MR. HARRIS: Okay.

MS. DUARTE: Your Honor, if I could just add something?

I did -- Mr. Harris may not be remembering this right now, but my expert, who I retained, has offered to sit down and have a meeting with Mr. Harris and go over all of his findings -- he's in the process of making them now -- and explain what --

THE COURT: Is he going to put them in a report?

MS. DUARTE: We've already turned over the report, and he's preparing spreadsheets. And as well today I have some disks that he prepared.

All they are is evidence that's been pulled off the electronic evidence that was turned over a long time ago, but it's what we're going to use in trial being pulled off. And he's happy --

THE COURT: Being pulled off of what?

MS. DUARTE: I'm sorry; pulled off of the original electronic copies. So in other words, it would be like if we turned over a thousand documents a long time ago, and the expert's pulled out 20 of them, he's offered now to sit down with Mr. Harris and go through the 20 that he pulled and explain to him what they are and why he pulled them. So we also have that available.

THE COURT: Well, it may be a generous gesture, and I'm not ruling out acceptance by Mr. Harris, but I wouldn't be surprised if Mr. Harris is thinking that if he asks questions to your investigator, then you're going to see where he's coming from when he propounds a defense to Mr. Sutcliffe.

Is that your concern?

MR. HARRIS: No, I mean I'm happy to talk to their investigator, and I don't think that's as big of a concern as the fact that -- the bigger concern is that it's tough enough to try represent a client and get ready for trial when they're in custody anyway, other things being equal; in a computer case where you've got all sorts of computer evidence coupled with the problem that the client has technical expertise that the lawyer doesn't, it just compounds the issue. And all I'm saying is if there's a way that we can address flight and danger where --

THE COURT: Well, that would be my ruling on it.

MR. HARRIS: -- where we can have Mr. Sutcliffe out,

he's got a better chance of defending himself in these charges. That's all I'm saying.

THE COURT: Look, it's inherently the case in every case that a client who's in custody finds it harder to communicate with his lawyer to that extent and makes it tougher for the lawyer. And there may be additional factors here, but that doesn't change my ruling on the issues relating to bail.

I'm reaching out for ways to make sure that you, who I know to be a very dedicated, skillful lawyer, will be able to get ready for trial and mount an effective defense.

So if you find that there is some kind of benefit that could accrue to your client if an expert were appointed, and you can locate one, and set forth standard information about why and what kind of expertise the individual has and what his hourly rate would be, I would be very inclined to grant that application and, as you know, that application doesn't have to be made available to the prosecution.

If you can meet with the prosecution's expert as an additional measure or an alternative measure, fine. If you can stipulate through intervention with the Warden about access to the computer, I have no objection in principle to that, although I want to make sure that it doesn't create some kind of unintended and very adverse precedent.

So there are three specific ways, and maybe you can exploit all three. It's up to you. But it doesn't change my

ruling today on the bail.

Now, if you're wondering whether it's an idle offer, given that the current trial date is December 3rd, that's a good segue into what the problem is with the December 3rd trial.

And the problem is I'm going to be in trial. And I've been in trial. And it's a criminal trial on a case that was indicted before this case, and that is taking a lot longer, despite my best efforts, to complete. The jury has been told that they're coming back on December 3rd, I'm not even sure we're going to finish that week, I kind of doubt it, but I may not know for sure.

So I think you need to consult with Mr. Sutcliffe and with my court clerk, and see what dates are available to you and to the prosecution.

How long do you anticipate the trial in this case will be?

MS. DUARTE: The Government's case, four to five court days, your Honor. At the most.

THE COURT: Really? Four to five court days?

MS. DUARTE: I can't anticipate cross; I can tell you that my case will be --

THE COURT: Let's see the trial schedule.

MS. DUARTE: -- relatively short.

THE COURT: Well, this case is my next trial. And I

committed to Mr. Sutcliffe today, and I could try it before Christmas and push back a number of other cases, a whole lot of them. But I think it's not going to be feasible to explore specific alternatives now. I think you should talk to the clerk afterward, talk to your client while he's here.

I'm prepared, if it's a -- Mr. Harris, give me a realistic estimate. Could this be a --

MR. HARRIS: This is a --

THE COURT: -- seven-day trial?

MR. HARRIS: Yeah. I would be surprised if it goes more than that.

THE COURT: Yes, I would too.

MR. HARRIS: We could probably get this whole thing done in a week.

THE COURT: Yes. I think so.

MR. HARRIS: Although it's a four-day -- yes, so -- I mean five court days.

MS. DUARTE: Well, your Honor, along those lines -- I'm sorry -- do you have a truncated schedule? Do you have a --

THE COURT: I don't consider it truncated, my court reporter doesn't consider it truncated. My court clerk --

MS. DUARTE: A more difficult. I'm sorry.

THE COURT: I go from 8:00 to 1:30 with two 15-minute breaks.

MS. DUARTE: Yes, I don't think that that changes my assessment.

THE COURT: And that's the way we've been going for a long time. So you talk -- those are my rulings. Anything else that needs to be addressed now?

MS. DUARTE: No, your Honor. Thank you.

MR. HARRIS: Thank you.

THE COURT: Okay. We're adjourned.

(Proceedings concluded.)

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CERTIFICATE

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

Date: 12-11-02

Emma Lestro, U.S. Court Reporter
CSR No. 2901