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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON, KENTUCKY

UNITED STATES OF AMERICA,) Lexington Criminal
) Action No. 16-62
Plaintiff,)
) At Lexington, Kentucky
-vs-)
) September 21, 2016
DERIC LOSTUTTER,) 1:25 p.m.
)
Defendant.) BY ECR

TRANSCRIPT OF INITIAL APPEARANCE ON BOND VIOLATIONS
HEARING PROCEEDINGS
BEFORE THE HONORABLE ROBERT E. WIER
UNITED STATES DISTRICT MAGISTRATE JUDGE

Appearances of Counsel:

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Proceedings recorded by Electronic Court Recording,
transcript produced by computer.

1 (Whereupon, the Initial Appearance on Bond Violations
2 Hearing proceedings commenced on Wednesday, September 21,
3 2016, at 2:25 p.m., on the record in open court, by
4 Electronic Court Recording, as follows.)

5 THE COURT: Thank you very much.

6 Good afternoon to everyone.

7 If the clerk would call the 1:30 matter,
8 please.

9 THE CLERK: Yes, Your Honor.

10 Lexington Criminal Action Number 16-62,
11 United States of America versus Deric Lostutter, called
12 for initial appearance on bond violations.

13 THE COURT: Thank you very much.

14 The Court recognizes Mr. Gupta for the
15 United States.

16 Good afternoon.

17 MR. GUPTA: Good afternoon.

18 THE COURT: Mr. Jennings.

19 MR. JENNINGS: Good afternoon, Your Honor.

20 THE COURT: Good afternoon, sir, and you're
21 here for Mr. Lostutter?

22 MR. JENNINGS: Yes, Your Honor.

23 THE COURT: And are you Mr. Ekeland's partner;
24 is that correct?

25 MR. JENNINGS: I'm one of his associates, yes,

1 sir.

2 THE COURT: Okay. Very good. Thank you.

3 Welcome.

4 MR. JENNINGS: Yes, sir.

5 THE COURT: Mr. Lostutter, good afternoon to
6 you.

7 DEFENDANT LOSTUTTER: Good afternoon, sir.

8 THE COURT: All right. We're here today to
9 take up the issue of the defendant's bond compliance and
10 just review the chronology.

11 And, of course, the defendant was indicted
12 back in July, had his initial appearance in early
13 September. I released him on conditions on that day,
14 September 7th.

15 The ink was barely dry on that release order
16 when I started getting rumblings of violations,
17 ultimately a notice from the government on 9/9. That's
18 docket entry 22, and then a formal report of a violation
19 or violations on 9/14 from the probation office.

20 And I decided to set a hearing and try to get
21 to the bottom of it and get things resolved one way or
22 the other so that's why I set the hearing. I did adjust
23 the defendant's conditions in the interim, just to try to
24 head off any problems that either were developing or
25 might develop in the interim, until we could get -- get

1 to the bottom of what's been happening. So that's what
2 brings us to today.

3 Mr. Gupta, is the government intending to try
4 to establish bond violations today?

5 MR. GUPTA: Yes, Judge.

6 THE COURT: Okay.

7 MR. GUPTA: Do not seek detention.

8 THE COURT: All right. So let me make sure,
9 Mr. Jennings, that you received the violation report. I
10 know you got the government's notice that was prior to
11 the report, but have you gotten the September 14th
12 report?

13 MR. JENNINGS: Yes, Your Honor. We've received
14 Mr. George's report, along with the attached screen
15 shots.

16 THE COURT: Okay. And you've had an adequate
17 chance to go over that with Mr. Lostutter?

18 MR. JENNINGS: Yes, Your Honor.

19 THE COURT: Okay. Thank you.

20 Mr. Lostutter, let me remind you that you do
21 have the right to remain silent today and throughout the
22 entire case as I've told you. Specific to today that
23 means that you would not be required to answer questions
24 about any potential violation. You can't be required to
25 make a statement of any kind. If you begin a statement,

1 you can stop, but anything you say in open court can be
2 used against you by the prosecution.

3 Do you understand that?

4 DEFENDANT LOSTUTTER: Yes, Your Honor.

5 THE COURT: Okay. Thank you.

6 Then the violations at issue, alleged, would be
7 the ones set forth in the September 14th report. That
8 really builds on the government's original notice
9 concerning violation number 1, so that's what we'll take
10 up.

11 It sounds like the government is ready to
12 proceed today.

13 Mr. Jennings, are you ready to proceed?

14 MR. JENNINGS: Yes, we're -- yes, we're ready.
15 I apologize in advance I can clear my throat, I'm a
16 little allergic today.

17 THE COURT: Everybody in Kentucky has that
18 problem, so you'll fit right in.

19 We're going to proceed under Section 3148
20 within the Bail Reform Act. That statute governs the
21 mechanics and framework for bond violation hearing.

22 The first question is whether there has been a
23 violation. That's question A. The burden of proof is on
24 the government to prove a violation.

25 When the alleged violation is non-criminal

1 conduct, and I don't see anything here that would be an
2 allegation of a crime at this point, then the burden is
3 on the government to prove a violation by clear and
4 convincing evidence.

5 I borrow the hearing mechanics from 3142. So
6 it's a trial type hearing in the sense that both sides
7 have the right to put on evidence that -- those in the
8 context of the hearing where the rules of evidence don't
9 apply. So the evidence can be witnesses, it can be
10 documents. If there are witnesses presented, then the
11 other side would have the right to cross-examine
12 witnesses, to give testimony.

13 Under 3142 it is appropriate to proceed by
14 proffer, and to other vehicles, and to present
15 information. So I really will take information in any
16 form as part of the hearing.

17 So question one is whether the government can
18 prove by clear and convincing evidence a violation.

19 If so, then the second query, or question,
20 would be is the effect of any violation. There I have to
21 apply the 3142(g) factors and determine the effect of the
22 violation on Mr. Lostutter.

23 If in that context I find that no conditions
24 will assure that the defendant appear in court and not
25 pose a danger, or if I find the defendant is simply

1 unlikely to abide by any condition or set of conditions,
2 then I must revoke the defendant's bond and place him in
3 custody.

4 The burden on that second tier, or questioning,
5 part B, is on the government, and that is to prove -- to
6 prove the standard by a preponderance of the evidence as
7 to the second query.

8 So that's -- that's where we are. The
9 government has already said it's not seeking detention,
10 and I would say that's instructive to the Court but not
11 binding on the Court. Ultimately, the remedy would be up
12 to the Court, but I certainly would take account of the
13 government's posture if a violation is proven. So that's
14 where we -- that's where we stand.

15 Mr. Gupta, if you're ready to proceed, you may
16 do so.

17 MR. GUPTA: I'd just -- I'll just want to start
18 by describing what has happened very briefly.

19 THE COURT: Okay.

20 MR. GUPTA: Our goal here is to set release
21 conditions that Mr. Lostutter can understand and follow.

22 As you said, on September 3rd there was an
23 arraignment, or three -- or release -- where release
24 conditions were set out. That's record number 18. I'm
25 going to list three relevant release conditions.

1 One is that defendant can use Internet for
2 purpose of business, family, and defense lawyer,
3 speaking to his defense lawyer. This is record
4 number 18.

5 The second, that the defendant can crowdsource
6 only for how to distribute to his defense fund.

7 And, three, that the defendant can't post
8 anything regarding case details or case specifics or --
9 and that was also in record 21, page 2. I was repeated.
10 There were two separate documents that listed
11 conditions.

12 So the use of the Internet for business,
13 family, defense lawyer only, crowdsourcing only for the
14 defense fund, and nothing -- no postings regarding case
15 details or specifics.

16 Now, on to the violations of those release
17 conditions. The first one we found out on September 9th,
18 which was two days afterwards, about a violation of
19 these -- the second and third condition listed, the
20 limitation on crowdsourcing, and the limitations on
21 posting case specifics.

22 We saw that there have been public Tweets every
23 day following the arraignment posting links to a website,
24 and that's Exhibit -- Exhibit 1 in our filing, which is,
25 I think, record number 22.

1 The website crowdsources for his personal
2 living expenses, which is a violation of the release
3 condition. And if the document is unclear, that's
4 Exhibit Number 2 in that filing record, number 22. I can
5 go through that with you.

6 And the website also discusses case details and
7 specifics and subject matter. And, again, I can cite you
8 to pages of paragraphs.

9 On that day we talked to probation. We emailed
10 with defense counsel, I believe, Mr. Ekeland, and he --
11 and we were told -- and I have the emails with me, that
12 he understood that the link that he was Tweeting, that
13 Mr. Lostutter was Tweeting, was for donations to
14 Mr. Lostutter's defense fund.

15 He also said that he had spoken with his client
16 on the telephone and told that he got permission from
17 probation for these Tweets.

18 Now, we've looked at the website, and we know
19 that it's not soliciting donations to the defense fund.
20 It's soliciting donations for his personal living
21 expenses. There is in the fine print at the very bottom,
22 an alternative link to his legal defense fund, but that's
23 not what that website is about.

24 We've spoken to probation and found out that
25 it's not true that anyone in probation or anyone I've

1 spoken to gave him permission for these Tweets.

2 Now, separate and apart from that, on
3 September 15th we all received this bond violation
4 report from Mark George. And you can -- I don't know
5 this information firsthand so we can have Mr. George
6 speak to it, or you can just read the report, as you
7 wish, Judge.

8 THE COURT: Well, I mean, I think you're the
9 master of your case, Mr. Gupta. I certainly would think
10 since probation authored the report, it would make sense
11 for them to author -- to speak about it. So if you want
12 to call him as a witness, that's certainly fine.

13 MR. GUPTA: Well, then with your permission I'd
14 like Mark George to step into the witness box.

15 THE COURT: Very well.

16 MR. GUPTA: Just briefly.

17 THE CLERK: Subject to the penalties of
18 perjury, do you swear or affirm to tell the truth, the
19 whole truth, and nothing but the truth?

20 THE WITNESS: I do.

21 THE CLERK: Thank you.

22 MARK GEORGE,
23 having been first duly placed under oath, was examined
24 and testified as follows:

25 DIRECT EXAMINATION

1 BY MR. GUPTA:

2 Q. Could you just state your name for the record?

3 A. Mark George.

4 Q. And do you work at probation here in Eastern
5 Kentucky?

6 A. That's correct.

7 Q. Are you one of the probation officers assigned to
8 supervise Mr. Lostutter?

9 A. Yes.

10 Q. And did you -- did you write a report on
11 September 15th about a bond violation?

12 A. Kind of a clarification on that. It is actually
13 September the 14th. In the process of redistributing
14 then to defense counsel, on the 15th we didn't go back
15 and change the date that -- the original report actually
16 went out on September the 14th. So I apologize for
17 that -- that difference.

18 Q. I think that's clear. There was a report
19 September 14th, and also September 15th there was --
20 there was another version of it?

21 A. We sent out a correction, yes, sir.

22 Q. Well, what version? What's the date on the version
23 you have in front of you?

24 A. September the 15th, corrected to the -- to the 14th.

25 Q. I think it's the version that all parties have.

1 THE COURT: Is the only difference the date
2 change?

3 THE WITNESS: Yes.

4 THE COURT: All right. Is that clear enough to
5 you, Mr. Jennings?

6 MR. JENNINGS: Yes, Your Honor. That's quite
7 clear.

8 THE COURT: All right. Thank you.

9 BY MR. GUPTA:

10 Q. All right. Just briefly, without using any victim's
11 name or potential victim's names --

12 A. Yes, sir.

13 Q. -- can you just describe the conversation you had
14 with somebody that led to this second violation as
15 described on page 2?

16 A. Yes, sir. On September the 13th we received an
17 email, our office received an email, that contained a
18 voicemail message directed to the United States
19 Attorney's Office, an assistant U.S.A., and in that
20 message, individual, the subject indicated that the
21 person had been, quote, harassed and threatened by the
22 defendant.

23 And listening to that in those -- that language --
24 of course, there was other language besides that, but
25 those particular words drew my attention obviously.

1 I then telephoned that individual later in the
2 afternoon on September the 13th and spoke to her about --
3 about what that was about, and she referenced basically
4 a -- an incident -- a friendly or a relationship that
5 she had previously had with the defendant, and -- and in
6 that conversation indicated that he had threatened to sue
7 her, or involve her in a civil suit of some nature, not
8 that at that time he had threatened to harm her
9 physically.

10 And as a result of that information, I asked her to
11 forward me the screen shots of what he had sent to her,
12 according to her, earlier that morning on September 13th,
13 and she did so, again, later in the afternoon on that
14 date.

15 The following date, Wednesday, the 14th, I viewed
16 those screen shots that appear as part of my revocation
17 packet, and seemingly the defendant had kind of stepped
18 across the line as far as what the Court had intended
19 with the original conditions imposed back on September
20 the 7th. Therefore, I -- I did this violation report.

21 Q. Okay. So in your conversation and looking at these
22 posts, do you believe that Mr. Lostutter was threatening
23 this person?

24 A. Not physically, no, no. There was indication in
25 there that he was going to make her a part of a civil

1 litigation, a lawsuit, but as far as any -- any physical
2 harm, there was none there.

3 Q. Okay. But so the threat was to sue her?

4 A. That's how I read it, yes.

5 Q. And this was after September the 7th, these
6 conversations?

7 A. According to her, yes, sir.

8 Q. And did these conversations -- did these
9 conversations indicate that Mr. Lostutter was using the
10 Internet as part of this process, that he had tracked her
11 down through the Internet?

12 A. Well, from the screen shots, from the -- from a
13 messaging, a phone, apparently, yes, it appeared that he
14 was using the Internet.

15 Q. Did he explicitly say that he was allowed to do this
16 sort of Internet work, that this was -- that he was
17 framing this as investigative work, that this was work
18 related, and therefore not a violation of his conditions
19 of release?

20 A. That's how I read it, that opening -- kind of an
21 opening statement in that information that I sent out,
22 yes, sir.

23 Q. But you interpreted it as a condition of -- as a
24 violation of his release conditions, that he wasn't
25 allowed to do this?

1 A. I did consider -- I don't consider that to be
2 employment at the time anyway.

3 MR. GUPTA: All right. I don't think I have
4 anything else for Mr. George.

5 THE COURT: Thank you.

6 MR. GUPTA: Thank you.

7 THE COURT: Mr. Jennings?

8 MR. JENNINGS: Yes, brief cross. I'll try and
9 keep it short.

10 THE COURT: Take as long as you need.

11 CROSS-EXAMINATION

12 BY MR. JENNINGS:

13 Q. All right. Mr. George, you said you received the
14 phone message, the email, on the 13th of September;
15 correct?

16 A. That's correct.

17 Q. All right. And, again, not naming names, but that
18 person reported receiving a threat of civil litigation;
19 is that correct?

20 A. Yes.

21 Q. Did that person describe the context of that
22 litigation or give you anymore details about her
23 involvement with this case or with other matters relating
24 to the facts of this case?

25 A. She did not, no, sir.

1 Q. All right. Are you familiar with a civil suit that
2 is currently pending filed by Mr. Lostutter in
3 North Carolina?

4 A. When I spoke to Mr. Lostutter on the phone probably
5 September the 8th, maybe the 9th, I'm not real certain,
6 he mentioned that there was a lawsuit in North Carolina.
7 Other than that I have no idea really the nature of the
8 lawsuit or anything about the lawsuit.

9 Q. All right. And did you ask the individual you spoke
10 with on the 13th, whether she had any involvement with
11 the individuals in that lawsuit or in this case?

12 A. Other than her involvement with Mr. Lostutter, no, I
13 did not.

14 Q. All right. And you said you spoke with
15 Mr. Lostutter on the phone on September 8th; is that
16 correct, or about that?

17 A. September 8th or 9th. I'm not real sure which date
18 that was.

19 Q. During that phone call, if you recall, did he ask
20 you about public posts or fund raising posts online?

21 A. No. No, we didn't -- we didn't talk about that.

22 Q. And did you speak with other officers in the
23 probation department that might have spoken with him
24 about those, those issues at some time between
25 September 8th and now?

1 A. I have spoken with Officer Chad Moss regarding
2 Mr. Lostutter's case. He did not -- in fact, I asked him
3 if he had given permission for Mr. Lostutter to do
4 anything other than what is in the Court's directives,
5 and he had not. But that's the only other officer I've
6 spoken to about that issue.

7 Q. I see. So you didn't speak with Mr. Whitley in
8 North Carolina?

9 A. I have not spoken with Mr. Whitley. I've spoken
10 with a Mr. Jim Long, but nothing regarding that other
11 than asking him to assume supervision, what we call
12 courtesy supervision of the case. But, no, no Whitney, I
13 haven't spoken with a Whitney.

14 Q. Okay. And did you ask Mr. Long if he and
15 Mr. Lostutter had spoken to what online postings exactly
16 were permitted or not permitted in Mr. Long's opinion?

17 A. I did not ask him that question, no, sir.

18 Q. Okay. That's fine.

19 And referencing the condition orders, docket entry
20 number 18, the minute entry from the initial
21 appearance -- and if I can find it, docket entry
22 number 21, the written conditions of release order. Is
23 there anything in those orders, as you understand them,
24 that prohibits Mr. Lostutter from using the Internet for
25 work in his investigative business?

1 A. Just rereading the conditions.

2 Q. Take your time, that's fine.

3 A. The condition we're referring to is kind of the
4 second -- well, it would be the third paragraph. It
5 looks like down from the docket entry dated September
6 the 7th, talking about the Court withholding permission
7 for the defendant to publish articles, et cetera.

8 And it says, the second -- the second sentence in
9 that paragraph, the Court instructed USPO to investigate
10 the activity of publishing and so forth and what specific
11 activities that the defendant can have, and a footnote to
12 that as well --

13 Q. Uh-huh.

14 A. -- where it says, the Court assumes the defendant
15 operates a legitimate business. The prosecutor, during
16 this hearing, proffered concern and allegations of
17 third-party complaints. The Court has no proof or
18 details as to any of those things at this point. The
19 Court clearly expressed to Mr. Lostutter that his freedom
20 to use the Internet for purposes of his business does not
21 include permission to transgress the law or engage in any
22 improper business activities. Use of the Internet for
23 Mr. Lostutter to threaten or harass any person or entity
24 would not be permissible within the limits of the Court's
25 release conditions.

1 So that kind of -- that footnote is pretty much the
2 basis of what I consider to be that he's crossing the
3 line of what the Court had directed.

4 Q. All right. Now, since you mentioned the footnote, I
5 want to address this now while it's come up.

6 MR. JENNINGS: May I approach?

7 THE COURT: You may.

8 BY MR. JENNINGS:

9 Q. Mr. George, that footnote mentions third-party
10 complaints and thus far allegations questioning the
11 legitimacy of Mr. Lostutter's business; correct, in that
12 first sentence there?

13 A. Yes.

14 Q. What I've provided to the Court and move into
15 evidence as Defense Exhibit A is a business registration
16 page from the North Carolina Department of the State.

17 MR. JENNINGS: May I approach the witness?

18 THE COURT: You want him to see it, the witness
19 to see it?

20 MR. JENNINGS: I would like for him to see it.

21 THE COURT: Well, the clerk has the one you
22 tendered so we'll give that to Mr. George.

23 MR. JENNINGS: Oh, I can tender this one. I
24 have more copies here.

25 THE COURT: Okay. That's fine.

1 BY MR. EKELAND:

2 Q. I'm handing you Defendant's Exhibit A.

3 A. Thank you.

4 Q. As you'll see on that document, this was printed
5 on -- or this was retrieved on September 19th of 2016?

6 A. Yes.

7 Q. And lists Mr. Lostutter's business as a current
8 active North Carolina business, LLC?

9 A. Yes, sir.

10 Q. All right. I didn't have more on that. I just
11 wanted to cover it while we were on the topic.

12 As to the restrictions of defendant's Internet use,
13 that third paragraph on ECF -- on docket number 18,
14 states that the Court withheld permission for defendant
15 to publish articles and/or log posts on online forum; is
16 that correct?

17 A. That's correct.

18 Q. Now, I think this -- I think this likely bolsters
19 the need for more clarity about the details of that. Are
20 you familiar with the Twitter social media platform?

21 A. Yes.

22 Q. And you're familiar with blogger and WordPress and
23 other Internet media platforms?

24 A. Familiar with them.

25 Q. In your opinion is a Twitter post equivalent to

1 something like a WordPress or blogger -- blogger form
2 post?

3 MR. GUPTA: Objection. I don't -- is he
4 qualified to answer that, and what is the relevance?

5 THE COURT: I'll overrule the objection. He's
6 just asking the understanding of the officer who has
7 authored the report claiming Mr. Lostutter's in
8 violation. I think it's fair for him to probe the
9 officer's understanding of what the terms mean.

10 THE WITNESS: From limited knowledge I would
11 say yes to your question, I would consider that.

12 BY MR. JENNINGS:

13 Q. All right. And you're aware that a Twitter post is
14 limited in size to maybe a few sentences at most?

15 A. I'm going to say I wasn't aware of that, but okay.

16 Q. Okay. I won't bother you with more details of
17 something that you're -- on that.

18 My next question is on the second paragraph of
19 docket number 18. It says, "The defendant may use the
20 Internet and devices to access the Internet for purposes
21 of his business," with a parenthetical saying, "That
22 includes servicing clients and communicating with
23 prospective clients."

24 Correct?

25 A. Yes.

1 Q. Do you have a full list of the defendant's clients
2 or prospective clients at this time?

3 A. I do not.

4 Q. Do you know if anyone in probation does?

5 A. No.

6 Q. Do you know if that was ever requested of him?

7 A. I don't think our office did. Whether or not
8 Mr. Long did down in North Carolina, I'm not sure.

9 Q. Okay. So if the individual mentioned in these
10 September 13 matter where a -- were relevant to work
11 that Mr. Lostutter was doing or were relevant to this
12 case, would probation have a way to know that at this
13 time?

14 A. No.

15 MR. JENNINGS: Nothing further.

16 THE COURT: I just have a few questions.

17 EXAMINATION

18 BY THE COURT:

19 Q. Officer George, do you have a copy of the report,
20 the September 14th report, with the attachments?

21 A. Yes, sir.

22 THE COURT: Okay. Counsel, I feel like that
23 ought to be an exhibit to the hearing since we're talking
24 about the content of it.

25 Is there any objection to that being a hearing

1 exhibit, Mr. Gupta?

2 MR. GUPTA: No objection. I'm a little
3 confused. I think the September 15th report, which we've
4 previously been discussing, is the same as the
5 September 14th report, but the September 15th report has
6 attachments that were inadvertently removed from the
7 September 14th report. I'm seeing nods. Can you just
8 say that?

9 THE WITNESS: That's correct. At least -- the
10 way it happened was the report was originally disclosed
11 to the Court and to the government with all attachments
12 with one error on it, and then that error --

13 BY THE COURT:

14 Q. The error being?

15 A. The error was on the second violation, the alleged
16 second violation, that reads, "Additionally on
17 September 13th, 2016." Originally that read,
18 "Additionally on September 13, 2013." I got a little
19 happy with the number 13.

20 Q. I see.

21 A. And we corrected that, and then the next day sent
22 that out to all parties.

23 Q. With the attachments?

24 A. With the attachments.

25 Q. Okay. Well, that's the one I'm intending to be part

1 of the record.

2 MR. GUPTA: That's the September 15th one.

3 THE COURT: Okay.

4 MR. JENNINGS: We have no objection. I just
5 wanted to note that we all have been a little bit
6 circumspect with naming names. I don't know whether
7 there was -- attachments were fully redacted.

8 THE COURT: Well, and I -- I don't -- I'm not
9 sure I understand the reluctance to name the person
10 involved since this -- it's about Mr. Lostutter's bond
11 violation. Now, I'm willing to listen if there's a
12 reason for that redaction. I mean, you don't have to use
13 her name, but I don't know a basis for redacting a
14 document referring to her.

15 Mr. Gupta?

16 MR. GUPTA: Is this bond violation report going
17 to be part of a public record?

18 THE COURT: It would be a hearing exhibit
19 because I want to ask him questions about the attachment
20 so...

21 MR. GUPTA: If we can ask Mr. George, maybe he
22 would be the one to tell us whether this person would
23 have a problem with their name being in the record. I
24 assume -- my reflex is when I come across somebody who I
25 perceive to be a victim, my reflex is to avoid using

1 their name in publicly-filed documents unless it's
2 required to.

3 So that was -- that was why I proceeded that
4 way, but I don't have a specific reason why her name
5 can't be used if you wish it to be, unless Mr. George
6 does.

7 THE COURT: Let me see what Mr. Jennings has to
8 say.

9 MR. JENNINGS: Yes. I was going to request a
10 brief sidebar on this before we proceed with
11 Mr. George's --

12 THE COURT: Okay. Come forward.

13 (Whereupon, a bench conference was had with the
14 Court and counsel out of hearing of the open court, is
15 under separate cover, and remains SEALED until further
16 orders of the Court.)

17 BY THE COURT:

18 Q. All right. So, Mr. George, we're going to use your
19 copy of the report. Does it have all the attachments?

20 A. Yes, sir.

21 Q. Okay. And would you just -- I just want to make
22 sure that that is a true and correct copy of the report
23 that you submitted to the Court concerning
24 Mr. Lostutter's compliance.

25 A. It is.

1 Q. Okay. I'm going to have that marked and admitted
2 as Court Exhibit 1 to the hearing today. That will be
3 without redaction for the reasons stated at the sidebar.

4 So you talked to the -- to the -- who I'll call the
5 complaintant regarding the contact between her and
6 Mr. Lostutter; is that correct?

7 A. That is correct.

8 Q. Well, the screen shots you attached they look sort
9 of like iPhone screen captures. Is that what those are?

10 A. Yeah, that's what it appears to me it is.

11 Q. Okay.

12 A. Yes, sir.

13 Q. And is the number that's listed at the top of those
14 pages, does that match probation's contact information
15 for the defendant?

16 A. Yes.

17 Q. That's the number that he gave you?

18 A. That's the number he gave me on that telephone
19 conversation I had with him on either the 8th or 9th of
20 September.

21 THE COURT: Okay. All right. Thank you.

22 Mr. Gupta, any further questions?

23 THE WITNESS: I should say that that's one of
24 two numbers he gave.

25 THE COURT: Okay. Fair enough.

1 MR. GUPTA: I'm just trying to make sure that
2 her number is not on this. I have no questions. That's
3 what I was looking at -- or for.

4 THE COURT: Okay. Anything on my questions,
5 Mr. Jennings?

6 MR. JENNINGS: Yeah, I have just a couple
7 questions for Mr. George.

8 THE COURT: Limited to my questions.

9 MR. JENNINGS: Yes, limited to these screen
10 shots.

11 RECROSS-EXAMINATION

12 BY MR. JENNINGS:

13 Q. Just so it's clear, the number at the top is the one
14 you have associated with Mr. Lostutter; correct?

15 A. Yes, the 33 -- well, yes.

16 Q. And in this layout that would indicate that these
17 are screen shots from Jenna's phone to Mr. Lostutter;
18 correct?

19 A. I took that first page down through about the --
20 toward the bottom of the second page to be a screen shot
21 from Mr. Lostutter to her.

22 Q. Sir, I'm not -- my question is about who provided
23 the screen shots, not about the conversation themselves.

24 A. Oh, I'm sorry. She provided those screen shots to
25 our office.

1 Q. So this was a conversation via SMS text message, not
2 through the Internet; correct?

3 A. Yes, that -- yes, I would say so, not email, text
4 messages is what -- well, it says text message, yes.

5 MR. JENNINGS: Okay. Thank you. Nothing
6 further.

7 THE COURT: Thank you. You can step down,
8 Officer George.

9 Further proof, Mr. Gupta?

10 MR. GUPTA: We have no further proof to
11 discuss. We could respond, if you wish, to the defense
12 objection or response, record number 25. We can do that
13 later, if you want us to do that, or --

14 THE COURT: All right.

15 MR. GUPTA: -- we can talk very briefly right
16 now.

17 THE COURT: Well, let's see if there's anymore
18 formal proof, and then we'll go to argument.

19 Mr. Jennings?

20 MR. JENNINGS: Sir, you're asking me if I have
21 formal proof?

22 THE COURT: Yes, proof to offer today.

23 MR. JENNINGS: On the first violation as well
24 as the second?

25 THE COURT: Yes.

1 MR. JENNINGS: Yes, I do, though may I request
2 a brief bathroom break?

3 THE COURT: Well, okay. Five minutes.

4 MR. JENNINGS: I'll be quick. Thank you.

5 THE COURT: All right. We'll take a
6 five-minute recess.

7 (Whereupon, a recess was taken at 2:07 p.m., and the
8 proceedings continued at 2:13 p.m., on the record in open
9 court, as follows.)

10 THE COURT: Okay. Did we get that report from
11 you, Officer George, your report to be submitted? That's
12 the one I made with the --

13 THE WITNESS: Yes.

14 THE COURT: That's just a -- that's going to be
15 Court Exhibit A.

16 (Whereupon, Defendant's Exhibit A was admitted into
17 the record.)

18 Okay. Thank you.

19 Mr. Jennings, your proof?

20 MR. JENNINGS: Yes, Your Honor. And just so
21 I'm clear, we're doing argument after this. I'm just
22 submitting proof relevant to our points?

23 THE COURT: Well, that's correct.

24 MR. JENNINGS: All right.

25 THE COURT: I mean, in a hearing without the

1 rules of evidence there is some blending and overlap,
2 and -- but, yes, I intend for this to be documents or
3 testimony, and then if you've got arguments that would
4 include proffers to some extent, you can blend that into
5 your overall argument section.

6 MR. JENNINGS: Okay. Thank you, Your Honor.
7 Just wanted to be clear.

8 THE COURT: Of course.

9 MR. JENNINGS: May I approach?

10 THE COURT: Yes. Do you have a document to
11 tender?

12 MR. JENNINGS: Yes. I'm tendering what's
13 been marked as Defense Exhibit D, which we can renumber,
14 if that makes it easier. This is the defendant's civil
15 lawsuit filed in the Middle District of North Carolina.

16 THE COURT: Okay. We should probably call that
17 2 because you had -- or B. What was the first one?

18 MR. JENNINGS: First one was A or should have
19 been.

20 THE COURT: Okay.

21 MR. JENNINGS: So we can call that B. That's
22 fine. Since it came up during Mr. George's testimony, I
23 wanted to address this as relevant to --

24 THE COURT: All right.

25 MR. JENNINGS: -- the notice of second

1 violation, and I can expand on that more when we get to
2 argument stage.

3 THE COURT: Okay.

4 (Whereupon, Defendant's Exhibit B was admitted into
5 the record.)

6 MR. JENNINGS: I believe that's all we have at
7 this time, but we may need to submit one other piece of
8 evidence during argument, but I'll wait until it comes
9 up, if it does.

10 THE COURT: Okay.

11 MR. JENNINGS: Thank you, Your Honor.

12 We shall see.

13 Mr. Gupta, first, let's just have argument on
14 whether a violation has occurred. You can proceed.

15 MR. GUPTA: Separated from what the future
16 conditions should be?

17 THE COURT: Yes.

18 MR. GUPTA: Your Honor, I think the -- I think
19 what we talked about speaks for itself in some ways.
20 I'll structure what I'm saying about -- around the
21 defendant's response, which is record number 25.

22 I'm troubled by that response. I'm troubled by
23 that response because I think it -- it indicates that
24 this hasn't been taken seriously, and that future
25 conditions are going to be evaded with technical

1 arguments. I have a list of five or six things to say,
2 one of which came up just now.

3 This business claim, this is record number 25,
4 and I think it's all on page 2, I'm not sure. This claim
5 that Tweeting links to existing web pages that's not
6 posting that web page. That's not how the Internet
7 works. Tweeting a link to a web page is the same thing
8 as posting that web page.

9 There's a -- there's a claim in here that -- in
10 this filing that release conditions permit Mr. Lostutter
11 to crowdsource for living expenses, that's not a
12 violation. It's clearly a violation. It's explicitly --
13 record number 18 explicitly limits what he can
14 crowdsource for, and it's for his legal defense fund. It
15 can't be clearer.

16 There's a claim that this website does not
17 contain details and specifics of the case in this filing.
18 Clearly it does. I can go through it page by page. I
19 highlighted it.

20 There's mentions of the law. Multiple mentions
21 of the prosecutors and their names, essentially inviting
22 people to hack us, mentions of the facts of the case, his
23 version of the facts of the case, his false hero
24 narrative. There are details and specifics of the case
25 on this web page.

1 There's a claim in this filing, record number
2 25, that probation expressly approved these Tweets.
3 Clearly they did not. It says that Mr. Lostutter spoke
4 with Mr. Moss and Mr. George, and they approved these
5 Tweets, which we just heard they haven't.

6 I'm also troubled that there's a filing where
7 this information is presented as fact when -- when it's
8 just Lostutter lying to his defense lawyers. I think the
9 defense lawyers have a responsibility to investigate the
10 truthfulness of something, at least minimally, before
11 they put it in a filing.

12 Related to that, there's an exhibit there,
13 Exhibit -- I know this is getting confusing, but
14 Exhibit A to record number 25, called Exhibit 1. That
15 somewhat technically and confusingly claims that this
16 post was published July 12th, 2016, and, therefore, it's
17 not a violation of the September 7th condition, which
18 again uses this argument that Tweeting every couple of
19 hours after the -- after the hearing is not posting this
20 website.

21 I'm not going to get into RSS feeds. It's not
22 necessary. Just plain fashioned com -- plain
23 old-fashioned common sense. If you look at this
24 document, if you look -- I'm sorry, if you look at the
25 website that they're claiming was posted on July 12th,

1 2016, if you look at record 22-2 on page 7 of that, so
2 record 22-2 is my notice. That's the second exhibit,
3 which is this website. If you look at page 7 of that, it
4 lists his court date as September 7th, 2016. Now, that
5 September 7th court date was set in August. So we know
6 that this was edited sometime in August. I don't think
7 it's really relevant whether it was edited in August or
8 June or July or September. What I think it shows is that
9 Mr. Lostutter is lying to his defense lawyers, and they
10 are credulously reporting his lies to the Court as if
11 they're truths.

12 And I think that that has some bearing on what
13 these restrictions going forward are. If we're going to
14 sit around, and here's my final point, litigating whether
15 threatening this woman whose name is in Mr. George's
16 report, whether threatening this women constitutes
17 investigative report -- or investigative work, and
18 showing us some Secretary of State document that a
19 company was once registered or incorporated and,
20 therefore, any threatening of harassing acts is somehow
21 investigative work, that are within the conditions of
22 release.

23 I think -- I think that's pretty much my
24 argument. That's it for what I have now.

25 THE COURT: Okay. We'll just take them one at

1 a time.

2 MR. JENNINGS: Yes, Your Honor. If we're
3 taking them one at a time, should I just discuss the
4 first notice of violation here and respond?

5 THE COURT: You should discuss violation
6 number 1.

7 MR. JENNINGS: All right. Your Honor, before I
8 address the prosecution's statements, the defense
9 maintains that there is no violation of conditions in
10 either of these notices of violation, certainly not in
11 the first notice. I think some of this may be that we
12 are reading the term log post or article differently. My
13 understanding is that a Twitter post is not a blog post,
14 but we can refer to the dictionary on that.

15 Secondly, if the alleged violating conduct is
16 the content of the website, I've read through this. I
17 see no details or specifics of this case, and the only
18 place I see that term defined with more specificity is in
19 the order setting conditions of release, which I'll refer
20 to as case subject matter and references witnesses,
21 claims, and defenses.

22 One could argue that defenses are alluded to
23 here, but as far as specifics or details of how this case
24 is going to proceed, they're not present in this website,
25 at least as far as I see.

1 Even if it did reference details or specifics,
2 this website was -- this article -- and I do want to
3 clear up the incongruously that the prosecution mentioned
4 about Defense Exhibit A attached to docket number 25, our
5 opposition.

6 The bulk of this post was written, as that
7 exhibit indicates, on or about July 12th and published at
8 that date. It was at some point in August it made the
9 front page of the website, and I believe upon further
10 review of those posts individually, there were some
11 details added at the bottom of the page.

12 The prosecution claims that it does not provide
13 a link to the defense fund for Deric's legal expenses.
14 It does. It's at the bottom just below and in the same
15 page in the page as the link to Deric's support fund.

16 The prosecution also claims that the order of
17 release limits to what Deric is able to fund raise for.
18 I simply don't read it that way.

19 The section on docket number 18 in the second
20 paragraph states that the Court also approved defendant
21 posting regarding crowdsourcing only information, such as
22 this is how to contribute to my defense found. It does
23 not state that he is unable or not permitted to raise
24 funds to cover his own life expenses or to keep a roof
25 over his head during the pendency of this trial. It does

1 not limit that to specific legal expenses, and that the
2 website has decided to partition those funds to two
3 different accounts, I don't see this as violative of this
4 order as written.

5 THE COURT: All right. Anything else on
6 number 1?

7 MR. JENNINGS: Yes. Also on number 1 the
8 prosecution argues that it's not relevant whether this
9 post was written and published in July or August or
10 September. It is absolutely relevant. The order and the
11 entreatments don't limit defendant's prior speech acts.
12 They don't instruct him to remove publications that he's
13 already written.

14 And it's simply incorrect that posting a link
15 to a pre-existing article, repeating the ability to find
16 that source information is certainly not the same as
17 republishing that information, post-arraignment. He has
18 made no content changes to that site, and, in fact, as I
19 understand and correct me if I'm wrong, is not the one
20 currently managing that site or the defense fund.

21 So the -- certainly improper, and I would argue
22 not allowed under U.S. versus Ford and it's progeny to
23 limit defendant's retroactive speech or general
24 statements about the case or to rebut the claims the
25 prosecution has levied at this time based on this -- on

1 this set of facts. There's no clear and present danger
2 of tainting a jury pool. There's no risk under the 3142
3 elements of safety or flight.

4 I think what we would ask for, as I believe
5 probation and the prosecution are asking, is more clarity
6 around the conditions, and more clarity around what the
7 defendant is and is not permitted to do and say, and
8 then, you know, we can revisit it from there if there
9 needs to be further negotiation or briefing on the limits
10 there.

11 That is all I have on the first notice of
12 violation.

13 THE COURT: Okay. Thank you.

14 Number 2.

15 MR. GUPTA: Judge, I have nothing on that that
16 I haven't already -- that we haven't already discussed.
17 I think the violation report speaks for itself that this
18 is a -- this is harassing behavior. I think that
19 threatening and harassing people is not part of his --
20 his employment. If it is, then we need to make clear
21 that he can't be employed. And while I'm not sure that
22 any of these exhibits have affected -- affected that
23 basic point.

24 THE COURT: All right. Thank you.

25 Mr. Jennings.

1 MR. JENNINGS: Your Honor, on the second
2 violation, first off, I point out that at this time no
3 one from the prosecution or from probation has
4 demonstrated that this is not related to Mr. Lostutter's
5 investigative work. Rather, no one has indicated that
6 the investigation elements of this second alleged
7 violation is relevant. Is not -- I'm sorry, is not
8 relevant to Mr. Lostutter's investigative work or his
9 assistance with preparing a defense.

10 As to the threatening or --

11 THE COURT: I don't know that he had freedom to
12 investigate just for the purpose of his defense. He's
13 got the freedom to use the Internet to contact and
14 communicate with defense counsel or to investigate for
15 his work. But if you're saying it's for his case --

16 MR. JENNINGS: I think part of the issue here
17 is that the line between Mr. Lostutter's investigative
18 work and this case is complicated by some of his clients,
19 the civil suit, and the intermingled facts common to
20 those and the criminal case. I can discuss this further
21 with probation and prosecution. We are happy to brief on
22 it if necessary, and we would certainly be -- you know,
23 we certainly would not oppose a no contact order with
24 this individual or others there, especially if that's a
25 two-way no contact. But --

1 THE COURT: Well, the other person is not
2 before the Court. I'm not sure I would have the power to
3 order that person to have no contact with him.

4 MR. JENNINGS: I see. Additionally --

5 THE COURT: But I can read, Mr. Jennings, and I
6 can read what's happening here, and Mr. Lostutter is
7 upset with this person over something -- something that
8 she posted about him. And if -- if what she posted is
9 false, I can understand why he'd be upset. But he's
10 upset and communicating to her a threat based on
11 information he gathered obviously on the Internet. He
12 mentions Facebook as part of how he got to it or got to
13 her, and he's upset, and unquestionably threatens her,
14 not just for the civil suit but with criminal
15 prosecution.

16 And so it might be legitimate if he feels
17 wronged to call Mr. Ekeland or you and say, look, this
18 person is saying things about me, and I need -- I need
19 you to do something to help me make it right. That would
20 perhaps be legitimate. Making this direct threat though
21 given the restrictions he's under, I'm deeply concerned
22 about, and so that's what you need to talk about, if you
23 would.

24 MR. JENNINGS: Sure. I'll -- I'm happy to
25 address that. I don't condone the tone of that threat,

1 but I do want to make clear that it takes place in a
2 context of an ongoing campaign of harassment that has
3 been levied against Mr. Lostutter, Mr. Lostutter's
4 family, and Mr. Lostutter's business over a course of
5 years.

6 This person and their associates have had a
7 significantly negative impact on Mr. Lostutter and his
8 business and on prospective clients. And I don't read
9 these text messages as anything -- as Mr. George said,
10 beyond a threat of a civil lawsuit.

11 Additionally, they are SMS text messages, not
12 sent through or sent via the Internet. So I think if
13 there's a limitation on the defendant's contact, that
14 would need to be through a separate set of conditions as
15 that's not Internet conduct.

16 THE COURT: What do you say to that, Mr. Gupta?
17 Is SMS texting, does that involve the Internet? I feel
18 like a significant portion of our docket says, yes, in
19 terms of the commerce clause, but it might not be the
20 Internet. What do you say to that?

21 MR. GUPTA: I don't think I want to answer that
22 and be collaterally estopped next time I move for
23 something under ECPA. I don't really know -- I don't
24 know whether that's relevant to this inquiry. He's using
25 the Internet, he admits to it, he's doing it, and he's

1 threatening people. I'm not sure -- I'm not --

2 THE COURT: But his particular point is if
3 you're SMS texting a threat, or whatever the content is,
4 if you're SMS texting --

5 MR. GUPTA: Yeah.

6 THE COURT: -- that's not the same as the
7 Internet, and he would say it's relevant. Mr. Jennings,
8 I'm making the argument for you, because the limit is the
9 defendant may use the Internet and devices to access the
10 Internet only for particular purposes, and he's saying
11 this is outside that limitation.

12 MR. JENNINGS: Well, Your Honor, I'm not sure
13 I --

14 THE COURT: I'm sorry?

15 MR. JENNINGS: I just was going to say that
16 that's correct, Your Honor. I think to clarify, there is
17 a question of Internet use here, which is shown in some
18 of the Facebook screen shots attached on that violation
19 notice.

20 Our argument is that those are within purposes
21 permitted under the general statement that the defendant
22 may continue to serve his clients through his business.

23 Then there are the SMS text messages, which our
24 argument is are not connected to the Internet. They
25 travel over the cell phone network, not -- not the

1 Internet.

2 MR. GUPTA: I don't know whether these are
3 iMessages, which are over the Internet, or SMS text
4 messages, which apparently aren't. I don't really look
5 at my phone bill very carefully enough to distinguish
6 these things. I'm not sure that -- I'm not here today
7 asking for detention where I'm trying to forensically
8 prove that the Internet defined in a certain narrow way
9 was used. I believe -- I believe there was cause for
10 alarm, and I don't want to get involved in a technocratic
11 discussion unless you really want it -- unless you want
12 to.

13 THE COURT: Well, I'm not sufficiently armed to
14 be in a technocratic discussion. I'm just asking for
15 information the best you can give it to me. So I -- go
16 ahead.

17 MR. JENNINGS: May I briefly clarify the
18 iMessage?

19 THE COURT: Yes.

20 MR. JENNINGS: iMessage is an Apple IOS
21 application. The defendant uses an Android phone, so it
22 could not have been an iMessage, message at least on the
23 defendant's end.

24 THE COURT: Okay. What else would you like to
25 say about number 2?

1 MR. JENNINGS: Other than what I've already
2 said as to the Internet-related conduct, again number 2
3 being part of the defendant's work, and that has -- is a
4 point that has not been rebutted as far as I see it.

5 Again, because of the interrelated nature here,
6 I think we're all in agreement that a clearer set of
7 terms of the conditions would be helpful, but at this
8 point I -- at this point I don't see the violation is
9 shown here, as this is someone who is a potential witness
10 to this case and who is associated with potential
11 witnesses and someone who he has been requested to
12 investigate my client.

13 I think the problem is we just need a more
14 clear boundary of what is and is not permitted.

15 THE COURT: You're saying she might be a
16 witness in this case?

17 MR. JENNINGS: It's within the possibility. I
18 don't know at this time.

19 THE COURT: Okay. Well, I don't want you to
20 walk into -- unintendedly into an additional violation
21 because I'm certain I restricted him from any contact
22 with witnesses.

23 MR. JENNINGS: No, my point is only that the
24 facts around the business, the civil case, and this case
25 are quite interrelated, and additional guidance would be

1 helpful.

2 THE COURT: Okay. Anything else you want to
3 say, Mr. Gupta?

4 MR. GUPTA: She's not a -- she's not a witness
5 for the prosecution, but if he's admitting that he's
6 harassing witnesses, well, that's obviously a different
7 violation.

8 MR. JENNINGS: I'm certainly not admitting
9 that.

10 THE COURT: Okay. Well, the first question is
11 whether violation has been proven. I think on the first
12 one -- of course, I wrote the order, and, Mr. Jennings,
13 you weren't here, but Mr. Gupta was -- he states his
14 position that trying to carve out sort of areas of
15 permitted use would not work ultimately because we'd be
16 back litigating over the meaning, and so I ignored
17 Mr. Gupta and tried to craft a way to give Mr. Lostutter
18 some interim freedom to use the Internet and Internet
19 access devices but still protect the things I feel like
20 needed to be protected in my conditions.

21 And so on the first limitation, you know, what
22 I was really doing there was I typically do restrict
23 defendants from communicating with anyone about the case,
24 and that really is a broad limitation; anything to do
25 with the case, any details, anything about the merits,

1 the schedule, the posture, the history, the defenses,
2 anything, typically limit defendants from communicating
3 about that except involving counsel and with counsel
4 present.

5 And I think it was in that context that the
6 question was brought up about the crowdsourcing, and I
7 wanted to be very careful not to impede Mr. Lostutter's
8 ability to fund his defense if he's doing it through some
9 public request for help, but still protect the subject
10 matter that that prohibition typically is aimed at
11 protecting. That's really what that was getting at. And
12 so I'm not so concerned with, you know, give me money to
13 help live. That part doesn't strike me particularly as a
14 violation.

15 I am concerned about the linkage to even the
16 historic -- the historical summaries of the dispute
17 because the idea was, and I clearly said it, you can
18 still say this is how to help me with my defense and to
19 say give money.

20 I did not say you compare that with a
21 chronology, a history, a description of the dispute, and
22 that's not what I intended for him to be able to do.

23 Now, he did not -- he did not parrot with a
24 current summary this is what happened in court, this is
25 what the Judge has done, this is what, you know, he

1 didn't do anything like that. It is stuff that
2 apparently is pre-arraignment, and so it's not something
3 I'm particularly exercised over. That's not what I
4 intended to permit though. That I think I can address if
5 needed through conditions.

6 So, number one, I do -- I do think a violation
7 has been proven because I do think those are details and
8 specifics about the case. I did not give him
9 authorization to link to his crowdsourcing.

10 But I do think there's some gray in that, and
11 so I don't think it's a violation that -- that is one I
12 would hold -- hold against Mr. Lostutter in any liberty
13 threatening way at this point.

14 Number two is more concerning to me because
15 I -- I was trying to let -- without knowing as much
16 perhaps as I should have about Mr. Lostutter's business,
17 I was trying to let him continue to pursue the
18 livelihood, and at the same time Mr. Gupta was sort of --
19 without a lot of details, was sort of describing these
20 problems in the background and advocating that I not do
21 that, but I wanted to give Mr. Lostutter a chance to keep
22 doing whatever he was doing if it was legitimate. And I
23 carefully crafted this language in the footnote to try to
24 do that, and I tried to make clear that he -- I would let
25 him use his computer and be on the Internet, and by that

1 I really would intend to mean any electronic access,
2 electronic communication that would involve any -- any
3 use of a reliance on a computer network. And that I
4 would intend to include text messaging. If I was
5 technically inaccurate on that, I'll be much clearer
6 going forward.

7 But certainly I intended and said clearly that
8 he was not to use that access for purposes that were not
9 legitimate, and I said -- I staked out that use of the
10 Internet by Mr. Lostutter to threaten or harass any
11 person or entity would not be permissible, and that's
12 what he's done in this these texts. He is threatening
13 this person in these texts, and there's some -- certainly
14 some connection to the Internet on how he got the
15 information, how he got the contact information.

16 Looking up things for himself is not part of
17 his business. I don't intend for him to be able to say I
18 am the business that I'm operating, and so if I
19 investigate things about myself, I'm operating within my
20 business. That's a sharp reading of what I was giving
21 him the right to do, and I do find that to be a violation
22 proven by the government.

23 Now, that was more -- more serious to me and
24 more concerning because it does involve a threat against
25 another person. I don't know the whole history,

1 Mr. Jennings. I don't know the whole history. It's not
2 before the Court. I'll just say this case involves
3 allegations and probable cause to believe that
4 Mr. Lostutter did use the Internet as part of the charged
5 conspiracy to threaten and harass other people. That's
6 part of the core of the conspiracy he's charged with, and
7 so I very particularly wanted him not to be using the
8 Internet for anything of that variety. And that seems to
9 me is what has happened.

10 Now, I am going to find the violation on the
11 number two, and I do want to talk about what we should do
12 in response to that. And, again, I have to look at the
13 3142(g) factors.

14 Mr. Lostutter, I do not want to revoke your
15 bond. I don't want to have to do that.

16 DEFENDANT LOSTUTTER: Yes, sir.

17 THE COURT: I'll just warn you and admonish
18 you, you're already back here once. I've already found
19 violations. If you come back again, and there are
20 violations, then you're probably going to be revoked at
21 that point.

22 DEFENDANT LOSTUTTER: Yes, sir.

23 THE COURT: I'm just not going to put up with
24 continued problems with compliance on bond. Because I --
25 listen, I know you're going to appear. You've shown you

1 will appear. The question ultimately is whether --
2 whether you get to a point where I'm of the belief -- I'm
3 not there yet, but if I get to the belief that you're
4 just not going to follow the Court's conditions, then I'm
5 going to have to revoke you because you have to follow
6 the rules on bond.

7 Do you understand that?

8 DEFENDANT LOSTUTTER: Yes, sir. And can I
9 speak on that for a second?

10 THE COURT: Well, talk to Mr. Jennings first
11 before you say anything to me.

12 Let's turn the sound up on him.

13 (Whereupon, an off-the-record discussion was had
14 with Mr. Jennings and Defendant Lostutter.)

15 THE COURT: Yes. Anything else?

16 MR. JENNINGS: No.

17 THE COURT: Okay.

18 MR. JENNINGS: That will be it.

19 THE COURT: All right. And so the second query
20 is the affect and violation, and when you -- when the
21 Court finds a violation, it's very important that counsel
22 remember the change in the language under 3148. And so
23 when you're setting original bond conditions, you're
24 looking for what conditions will reasonably assure
25 appearance and safety. When there's a violation, then

1 the question becomes what conditions will assure safety
2 and appearance.

3 And so that reasonably, which is kind of a
4 pro-defendant modifier, that drops out, and it becomes
5 one of assurance. I have to be assured of safety and
6 appearance. And I'm not concerned about appearance, but
7 the safety aspect I am concerned about. And danger under
8 the Bail Reform Act has a very broad definition. It's
9 much broader than just physical violence. It's any kind
10 of threat to the process, integrity, economic harm,
11 anything that can be a negative ramification can be
12 within the danger rubric.

13 So looking at that, looking at 3142 factors and
14 the history of Mr. Lostutter in his bond report, which I
15 know everybody has seen, Mr. Gupta, what's the government
16 advocating for in terms of conditions?

17 MR. GUPTA: We want, I think -- I think it's
18 clear now. We want restrict -- we want some sort of
19 conditions that can't -- the conditions can't be a list
20 of what he can do because he'll distort that, and,
21 seemingly, encouraged by counsel will redefine anything
22 he wants to into that category. And before two weeks ago
23 I gave you the conditions from New Jersey and the
24 Auernheimer case. I brought it with me. Mr. Ekeland
25 said he was familiar with it. And those restrictions are

1 a different orientation, which is that it's a blanket
2 restriction, except for legitimate and necessary purposes
3 pre-approved by pretrial services.

4 So I request that some sort of heavy
5 restriction with specific approvals, and if that were to
6 be used, then probation would need to know what devices
7 Mr. Lostutter has, what accounts he has. This -- this
8 Exhibit B indicates that he has multiple accounts. We've
9 also been told that he's now posting from a Twitter
10 account called "Say-Wut, underscore -- S-A-Y, underscore,
11 W-U-T.

12 THE COURT: What's Exhibit B?

13 MR. GUPTA: This Middle District of
14 North Carolina complaint.

15 THE COURT: Oh the lawsuit? Okay. I'm sorry.

16 MR. GUPTA: I'm glad you asked.

17 United States is hearing all of these
18 complaints about violations. We don't want to be in the
19 middle, but we're in the middle because we have to
20 enforce these release conditions.

21 So what we want are release conditions that are
22 clear and that probation can -- can monitor in the first
23 instance and give Mr. Lostutter the opportunity to obey
24 them, pending trial so that United States has to stop
25 deciding what to do when we get complaints, whether it's

1 talking to probation or talking to the defendant --
2 defense lawyer or filing something in court, and in this
3 case we did all three obviously.

4 So I think he needs to give his accounts to
5 probation, and there should be some blanket
6 prohibition, and then probation can selectively
7 approve certain activities based on what you think is
8 appropriate.

9 THE COURT: Well, I mean, there would be --
10 certainly you would not oppose him being able to
11 electronically communicate with his counsel; right?

12 MR. GUPTA: Correct. That either cell phone or
13 Internet he should be able to communicate with his
14 counsel.

15 THE COURT: And his family members?

16 MR. GUPTA: Whatever you think is fair on that.
17 He lives with his family. I don't have an opinion either
18 way. I defer to you.

19 THE COURT: All right.

20 MR. GUPTA: But certainly I don't want a new
21 situation where we redefine the word family and everybody
22 is a member of his family, and then we start harassing
23 everybody doing that. I don't see that happening, but
24 that would be my anxiety. We certain -- if you, for
25 example, said, friends, who's a friend? He can start

1 harassing friends and say that is part of his release
2 conditions.

3 THE COURT: Yeah, I didn't say friends.

4 MR. GUPTA: Yeah, that's my point.

5 THE COURT: Yeah. Let me let Mr. Jennings
6 react.

7 MR. JENNINGS: Sure. I mean, I think we are
8 all on the same page that more detailed conditions with
9 more clarity to them would be beneficial, providing
10 Mr. Lostutter a clear opportunity to conform with those
11 conditions would be helpful.

12 I object to prosecution's reading of -- the
13 description of my reading of the current release -- of
14 the prior release conditions. All I have to go on is
15 the papers as they're written, the minute entry, and
16 the order. So more clarity there certainly would be
17 helpful.

18 I think it is overbroad and extreme at this
19 time to pull from a New Jersey example of a wholesale
20 seizure of defendant's accounts, but I think as far as
21 contact conditions that limit him to contacting counsel,
22 family, the probation office, that that is not objected
23 to by us, and we'd certainly be open to working with the
24 probation office to develop some sort of approval
25 procedure if that's beneficial.

1 THE COURT: Okay. Anything else that you want
2 to say?

3 MR. JENNINGS: Not at this time, no.

4 THE COURT: Okay. Mr. Gupta.

5 MR. GUPTA: Could I respond very quickly?

6 THE COURT: Of course.

7 MR. GUPTA: Again, I am troubled by that
8 response. I don't think it's relevant, whether who was
9 here from defense counsel. And if we have another one of
10 these hearings, with a third lawyer from defense counsel,
11 then they can admit -- then they can say that they're
12 ignorant of these acts specifics, and these restrictions.
13 I don't think that that's a defense.

14 THE COURT: I hear you, Mr. Gupta, but I'm
15 going to be here every time, and I know my order, and I
16 was at the hearing, Mr. Lostutter. And so I think
17 Mr. Jennings is doing the best he can, and, you know, I
18 encourage -- you guys quit focusing on that other lawyer,
19 just focus on the situation at hand.

20 Go ahead.

21 MR. GUPTA: And then I don't -- I do like the
22 New Jersey restrictions, the Auernheimer restrictions.
23 I've looked in the Eastern District of Kentucky. I found
24 restrictions that Judge Van Tatenhove did that were
25 extraordinarily broad, computer restrictions, three

1 paragraphs he set out. So I can pass those up to you if
2 you want to look at those as an example. It was in
3 United States versus Sungkook Kim case, if any of the
4 language is helpful to you here.

5 THE COURT: Okay. All right. As long as
6 Mr. Jennings can see the -- can see the example. I'll be
7 glad to consider that.

8 MR. GUPTA: Page 4.

9 THE COURT: Okay.

10 All right. What I'm going to do,
11 Mr. Lostutter, is I did alter your interim conditions
12 before the hearing today, and that barred you from the
13 use of or access to the Internet and any electronic
14 communication device or mechanism. I'm intending that
15 to be as broad as possible, okay. That includes cell
16 phone use, text messaging, any other electronic
17 communication avenue, except contact counsel of record,
18 the probation office, or any immediate family or
19 household member.

20 I'm going to think about the best way to craft
21 a revision to your original conditions, but I'm going to
22 keep the interim conditions in place until I issue that
23 new order.

24 Do you understand that?

25 DEFENDANT LOSTUTTER: Yes, Your Honor.

1 THE COURT: So essentially that's a complete
2 and total prohibition on Internet use or electronic
3 communication device use, except for the very limited
4 categories that I've given you permission, counsel,
5 probation office, and any immediate family or household
6 member.

7 Do you understand that?

8 DEFENDANT LOSTUTTER: Yes, Your Honor.

9 THE COURT: Okay. Now, I'm not going to
10 revoke your bond. I am going to modify the conditions.
11 And what I try -- again, what I tried to do before
12 was -- maybe it wasn't the clearest order in the world.
13 I try really hard to make those clear, but I was
14 trying to carve out an area of freedom for you while
15 still protecting the things that I have to protect.

16 DEFENDANT LOSTUTTER: Yes, Your Honor.

17 THE COURT: I think now that hasn't worked, and
18 so I'm going to have to be clearer, and that clarity is
19 probably going to be to your detriment because to be
20 clearer I have to be more prohibitory. And so I'm going
21 to evaluate kind of where things stand and issue the
22 language that will be the limitation, and your lawyer
23 will get that.

24 And, Mr. Jennings, you need to communicate
25 that, of course, to Mr. Lostutter, and --

1 MR. JENNINGS: Absolutely, Your Honor.

2 THE COURT: -- make sure he understands it.
3 And I'll do that as promptly as I can. I do want to
4 consider it carefully, and I'll do that and get that out
5 as quickly as I can. But until that order comes out,
6 you're under the modification affected by docket entry
7 number 26.

8 Do you understand that?

9 DEFENDANT LOSTUTTER: Yes, Your Honor.

10 THE COURT: All right. What else do we need to
11 take up today, Mr. Gupta?

12 MR. GUPTA: Nothing, Your Honor. Thank you.

13 THE COURT: Thank you.

14 Mr. Jennings, what else for you?

15 MR. JENNINGS: We have nothing more today,
16 Your Honor.

17 THE COURT: Okay. Thank you, both counsel.
18 And Mr. Lostutter.

19 DEFENDANT LOSTUTTER: Yes, sir.

20 THE COURT: I can tell you're an intelligent
21 man, and, again, your liberty in this case pretrial is up
22 to you.

23 DEFENDANT LOSTUTTER: Yes, sir.

24 THE COURT: And I strongly encourage you to
25 abide by not only the letter of the orders that you're

1 under but also the spirit of those orders. And every
2 limitation in bond has some aspect that requires good
3 faith compliance by a defendant and a willingness to be
4 compliant.

5 And so I don't know that this has happened, but
6 if you're sort of the kind of person who would tend to
7 push and test boundaries, I would discourage you from
8 doing that going forward because now you've gone through
9 one revocation scenario. You haven't been revoked, but I
10 have found violations.

11 If you're back again and I find violations
12 again, as I told you, then I'm going to be thinking is
13 this a person who I just simply cannot trust to follow
14 the conditions? Is this person thumbing his nose at the
15 Court? I'm confident you're not doing that.

16 DEFENDANT LOSTUTTER: No, sir.

17 THE COURT: But I'm beginning to doubt it, and
18 if you're back again and the government proves a
19 violation, then I'm really going to be considering
20 whether I need to take your liberty to keep you compliant
21 and protect the public.

22 Do you understand that?

23 DEFENDANT LOSTUTTER: I do, Your Honor.

24 THE COURT: Okay. Very good.

25 That will conclude matters in his case for

1 today.

2 He'll remain on the conditions as stated.

3 And we'll be in recess pending the 3 o'clock
4 matter.

5 Thank you.

6 (Whereupon, the Initial Appearance on Bond
7 Violations Hearing proceedings concluded at 2:53 p.m.)

8 C E R T I F I C A T E

9 I, Peggy W. Weber, I do hereby certify that the
10 foregoing is a true, correct, and complete transcript of
11 the audio-recorded proceedings in this matter, recorded
12 on Wednesday, September 21, 2016, and transcribed from
13 the audio recording to the best of my ability, and that
14 said transcript has been compared with the audio
15 recording.

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August 31, 2016
DATE

s/Peggy W. Weber
PEGGY W. WEBER, RPR

W I T N E S S E S

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Admitted

DEFENDANT'S EXHIBIT:

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COURT EXHIBIT:

Exhibit B 31