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

UNITED STATES OF AMERICA, : Docket No. CR 16-62
 :
Plaintiff, : Lexington, Kentucky
 : Thursday, April 13, 2017
versus : 1:00 p.m.
 :
DERIC LOSTUTTER, :
 :
Defendant. :

- - -

TRANSCRIPT OF BOND REVOCATION HEARING
BEFORE DANNY C. REEVES,
UNITED STATES DISTRICT COURT JUDGE

- - -

APPEARANCES:

For the United States: NEERAJ K. GUPTA, ESQ.
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For the Defendant: FREDERIC B. JENNINGS, ESQ.
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Official Court Reporter
35 W. Fifth Street
Covington, KY 41011

Proceedings recorded by mechanical stenography,
transcribed via computer-aided transcription.

1 (Proceedings commenced at 1:00 p.m.)

2 THE COURT: Thank you. Madam Clerk, if you would
3 call the matter scheduled for 1:00, please.

4 DEPUTY CLERK: Yes, Your Honor. Lexington criminal
5 action number 16-62, United States of America versus Deric
6 Lostutter, called for a bond violation hearing.

7 THE COURT: Thank you. And if counsel could state
8 their appearances, please. Mr. Gupta, we'll begin with you.

9 MR. GUPTA: Neeraj Gupta for the United States.
10 Sitting next to me is Mandy Poynter.

11 THE COURT: All right. Thank you.

12 MR. JENNINGS: Frederic Jennings for Deric Lostutter,
13 who is here with me today.

14 THE COURT: All right. This matter is scheduled for
15 a hearing on the United States' motion to determine whether
16 the defendant has violated the conditions of release prior to
17 his reporting to the institution to be designated by the
18 Bureau of Prisons for service of sentence that was previously
19 imposed. The report date that was announced at the time of
20 the sentencing hearing was May 8th.

21 Mr. Gupta, I'll hear from you at this time.

22 MR. GUPTA: We would start by calling Probation
23 Officer Mark George to the stand.

24 MARK GEORGE, GOVERNMENT WITNESS, SWORN

25

George - Direct

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1 THE COURT: Thank you. Mr. Gupta, you may proceed.

2 DIRECT EXAMINATION

3 BY MR. GUPTA:

4 Q. I think it's clear on the record, but can you just start
5 off by stating your name, where you work, and what your
6 connection to this case is?

7 A. Yes. My name is Mark George. I work for the United
8 States courts as a federal probation officer, and I'm
9 responsible for the supervision of Mr. Lostutter's pretrial
10 release on this end. And I say that to mean because he lives
11 in North Carolina, there's also a Pretrial Services there that
12 is more directly responsible for the day-to-day supervision of
13 his case in North Carolina.

14 Q. Okay. Last week, on April 6th, did you send a letter to
15 the U.S. Attorney's Office, or a report, describing a
16 potential violation?

17 A. Yes, sir.

18 Q. I'm going to hand you what's been marked Government
19 Exhibits 1, 2, and 3, and ask you to take a look at them.

20 Is Exhibit 3 the letter?

21 A. It is, sir, yes.

22 Q. And is another one of those exhibits the picture that you
23 attached as part of your e-mail?

24 A. Yes, sir.

25 Q. And then that CD, do you believe that that CD is a video

George - Direct

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1 that you sent us?

2 A. It's marked as such, so yes.

3 Q. We'll show those to the Court and then move to admit
4 them, if that's okay.

5 Before we show the picture and the video, can you just
6 describe to the Court what release condition you think
7 Mr. Lostutter violated and how he violated it, and then we'll
8 show the video with the picture.

9 A. There was a condition imposed back in September. I think
10 the report reflects September the 21st, the Magistrate Judge
11 Robert Wier, wherein, at the end of my report, first page, at
12 the end of the first page there, stated at the finish, an
13 unuser access, directly or indirectly, the internet or any
14 other electronic communication device or mechanism. And then
15 it gives some examples to include cell phone, text messaging,
16 a computer, or any other electronic communication avenue,
17 except to contact counsel of record, the USPO, any immediate
18 family or household member, and regarding medical care. He
19 may use a computer to review stored electronic discovery or
20 case information supplied to him by counsel.

21 And then it says the Court intends this absolute
22 prohibition with only these carve-outs to be broadly construed
23 and cover all of Lostutter's use of any electronic
24 communication device or mechanism.

25 That would be the condition that he has potentially

George - Direct

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1 violated.

2 Q. And how did he potentially violate it?

3 A. We received, or I received, our office received, an
4 e-mail message on April the 6th from Alexandria Goddard. And
5 in that e-mail, there was a shot, a Twitter video, from
6 Mrs. Lostutter's, his wife's, Twitter account apparently,
7 showing primarily her in a car that appeared to be moving,
8 traveling. And she thinks it's about a 45-second video. She
9 thanks viewers for their support. In my letter, I assume that
10 to be financial. I don't know. I'm sure financial plus any
11 other support.

12 In that video, at one point, she references
13 Mr. Lostutter, and the camera goes around, or the phone in
14 this case, goes around, shows him briefly driving the vehicle,
15 what appears to be him, to me, driving the vehicle, and states
16 something to the effect that, This is Deric. He's doing well.
17 You can see that he can't talk right now, or he can't talk
18 about it, something along those lines.

19 Q. What about this video did it seem like a possible
20 violation to you of this release condition?

21 A. Well, a couple of things. The e-mail -- in the Twitter
22 shot that is sent via e-mail, there's a date, April the 2nd,
23 2017. That's one thing.

24 The other thing that kind of lent some credence to the
25 possibility that it was after the condition was imposed is

George - Direct

6

1 when it's referenced that this is him and that he can't talk
2 about it.

3 So those two factors, the date on the Twitter and then
4 that kind of interaction between he and his wife there.

5 Q. So that shows that it happened after the September
6 release conditions. So they were aware of these release
7 conditions; is that right?

8 A. In my eyes at least, yes, sir.

9 Q. And what about this video was in violation of his
10 condition directly or indirectly using or accessing the
11 Internet or a communication device by Mr. Lostutter?

12 A. Well, I construed that to mean that he was indirectly
13 using Twitter, or social media, to communicate; that it was
14 prohibited by this condition.

15 Q. By being there in the car as his wife showed him on the
16 video and posted to the Internet and addressed the Internet?

17 A. Yes, sir.

18 MR. GUPTA: I'm going to try to show that video now,
19 if we can.

20 THE COURT: All right. Is this Exhibit 1 or 2?

21 BY MR. GUPTA:

22 Q. Mr. George, what is the CD labeled?

23 A. It is labeled 2.

24 MR. GUPTA: It's Exhibit 2, which hasn't been
25 formally admitted.

George - Direct

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1 THE COURT: All right. Thank you. You may proceed.

2 (The video was played in open court.)

3 Q. Was this the video that was sent to you and you've
4 attached as a part of your report?

5 A. Yes, sir.

6 MR. GUPTA: Move for the admission of Government's
7 Exhibit 2.

8 THE COURT: Any objection?

9 MR. JENNINGS: No, Your Honor.

10 THE COURT: Government 2 will be admitted.

11 BY MR. GUPTA:

12 Q. You have in front of you what's marked as Government
13 Exhibit 1. Is that the photograph you attached as part of
14 your report?

15 A. Yes, sir.

16 MR. GUPTA: Move for admission of Government's
17 Exhibit 1.

18 THE COURT: Any objection?

19 MR. JENNINGS: No, Your Honor.

20 THE COURT: Exhibit 1 will also be admitted.

21 BY MR. GUPTA:

22 Q. Mr. George, this photograph, did you see this as a
23 separate violation, as a different violation of the bond
24 release conditions?

25 A. I saw it more in support of the original violation, what

George - Direct

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1 we're talking about with him using, or indirectly using,
2 social media. So kind of in a combination of both the video
3 and disk. They appeared in the same e-mail message from
4 Ms. Goddard, video and a picture right below it.

5 Q. Is Mr. Lostutter wearing different shirts in the picture
6 and the video?

7 A. Yes.

8 Q. So they would have been -- it could have been taken at
9 different times?

10 A. Yes. Most likely, yes.

11 Q. Because he's wearing different clothing?

12 A. Yes.

13 Q. Could you describe the photograph and why you consider it
14 evidence of a violation?

15 A. Well, it's a photo of him with his wife in a car. The
16 car, the interior seems to be that of which they were in in
17 the video. That's kind of speculative. He is flipping off or
18 showing his middle finger to the camera.

19 Q. Why don't I stop you. Can we go ahead and show the Court
20 Government's Exhibit 1, please. I didn't realize it wasn't
21 up. I'm sorry.

22 A. Okay. And that's pretty much the picture.

23 Q. So this is an example of using or accessing, directly or
24 indirectly, the Internet?

25 A. Yes, sir. This, I think, was an Instagram photo.

George - Direct

9

1 Q. And that would have been posted on the Internet?

2 A. Yes. I mean, obviously, it would have had to have been
3 for it to have made its way to my e-mail address.

4 Q. Do you know from this photo who he's giving this gesture
5 to?

6 A. Pardon?

7 Q. Do you know from this photo who Mr. Lostutter is giving
8 this gesture to?

9 A. I do not in particular, no.

10 MR. GUPTA: No further questions.

11 THE COURT: Okay. Mr. Jennings.

12 MR. JENNINGS: Thank you, Your Honor. I've got a
13 brief housekeeping question before I do my cross-examination.

14 THE COURT: Yes, sir.

15 MR. JENNINGS: I have some exhibits that are, at this
16 point, duplicative of what the government introduced. Would
17 you like me to re-mark my exhibits in sequence or not?

18 THE COURT: Are you saying they're the same as the
19 exhibits the government just offered?

20 MR. JENNINGS: And I have some other exhibits that I
21 may offer, but they are, at this point, not going to be
22 Defense A, B, C. They'll be Defense E, F, G, et cetera.

23 THE COURT: However you'd like to offer them. They
24 don't have to be in the same sequence.

25 MR. JENNINGS: Thank you, Your Honor.

George - Cross

10

1 CROSS-EXAMINATION

2 BY MR. JENNINGS:

3 Q. Good afternoon, Mr. George.

4 A. Afternoon.

5 Q. I have a few questions for you about this conduct and
6 about, in particular, I want to be sure that we all understand
7 what you believe to be the interpretation of "indirectly using
8 or accessing the Internet or any electronic communication
9 device." Let me start there.

10 In your view, is there a distinction between indirectly
11 accessing the Internet or indirectly accessing an electronic
12 communication device or mechanism, per this order?

13 A. No distinction.

14 Q. And so if there's no distinction, I'll proceed with
15 hypothetical indirect uses or accesses of the Internet with
16 the understanding that, you know, it would be the same if the
17 object in question was a computer or a cell phone, et cetera.

18 Hypothetically, would any reference to Mr. Lostutter by
19 anyone on the Internet, on social media, be indirect use or
20 access?

21 A. No, not necessarily.

22 Q. Okay. Would a reference by someone on social media
23 expressing support for Mr. Lostutter be indirect use or
24 access?

25 A. No, sir.

George - Cross

11

1 Q. Would it be indirect use or access violative of this
2 order if Mr. Lostutter directed this to be made on social
3 media?

4 A. If he insisted, yes, I would think so. Yes.

5 Q. And would it matter whether that direction was vague;
6 i.e., hey, could you post about my support, or very specific,
7 such as spelling out exactly what the message should say?
8 Would that make a difference?

9 A. I don't think so, no.

10 Q. Okay. And it would be the same for, say, a photograph
11 taken on a cell phone, correct?

12 A. If he's taking the photo or someone's taking the photo of
13 him and he's there, yes.

14 Q. Okay. But anyone taking a photograph of him would not be
15 a violation?

16 A. True. That's right.

17 Q. And that would be true even if they posted that to social
18 media?

19 A. Yes.

20 Q. Same for a video?

21 A. Yes.

22 Q. Okay. So it's your position that if someone posted a
23 photograph or a video to social media and Mr. Lostutter did
24 not urge or direct or otherwise influence that posting, that
25 wouldn't be a violation, right?

George - Cross

12

1 A. Well, it would be a violation if he's a part of it and
2 aware that it's going out. Or at least that's how I interpret
3 it.

4 Q. So if he's aware that someone had taken a photo or video
5 of him and did not act to stop it, it's your position that
6 would be a violation?

7 A. That would cause concern. In this case, it kind of goes
8 a little bit more than that. If it was a random person off of
9 the street, so to speak, taking a picture and posting,
10 probably not. In this case, it's his wife, kind of an
11 intimate, ongoing relationship, where he could have easily
12 said, you probably shouldn't do that. Then that would make a
13 difference in my mind.

14 To answer your question, if just anyone posted a picture
15 of Mr. Lostutter randomly, it would not necessarily mean he's
16 violated this condition.

17 Q. Okay. Let me cut an example somewhere in the middle
18 there. Let's say it was a friend of Mr. Lostutter's who was
19 within earshot, otherwise in a situation where Mr. Lostutter
20 could say, Hey, don't post that. If the friend -- if Deric
21 did not say that and the friend posted it, would that be a
22 violation?

23 A. You're getting into some muddy waters there, but I would
24 say not necessarily --

25 Q. Okay.

George - Cross

13

1 A. -- in that case.

2 Q. And I want to be clear that I understand where you're
3 locating the violation, because the order prohibits both
4 access of the Internet and access or use of an electronic
5 device that could communicate.

6 If Mr. Lostutter had suggested that his wife and he take
7 a photo together, would that be a violation of the order, in
8 your mind?

9 A. If it's posted to the social media, the Internet, one or
10 the other, or any other communication device, then I would
11 think that that's a possible violation, yes.

12 Q. That wasn't my question.

13 A. Okay. I'm sorry.

14 Q. My question was if he suggested to his wife that they
15 take a photo together, regardless of whether it's posted or
16 not.

17 A. Okay.

18 Q. Assume he has no knowledge of that.

19 A. Okay.

20 Q. Would that be a violation of the order itself?

21 A. No, sir.

22 Q. Okay. If Mrs. Lostutter, at some later point, decided to
23 post that photo without consulting Deric, would that be a
24 violation?

25 A. No, I don't think I would consider that a violation, if I

George - Cross

14

1 knew those to be the facts.

2 Q. Okay. And that would be the same for videos, right?

3 A. Again, the question would be does he act to prevent it.

4 And in the case that he was not aware that his wife was
5 posting the video, I would say that would not be a violation.

6 Q. Okay. With the video, obviously, there would be the
7 added aspect of his potential to communicate through the
8 video. Let me phrase this as a question so I'm not just
9 rambling here.

10 Do you think it would be a violation if a video was taken
11 of Deric and he spoke words to the video with knowledge that
12 it would probably be uploaded to social media?

13 A. I think that would be a violation.

14 Q. Okay. If he spoke words and didn't know it was going to
15 be uploaded but later it was, what's your position on that?

16 A. That being the case, no, it would not be a violation, in
17 my mind.

18 Q. And does it matter what he says in the video, if
19 anything? Does that make a difference in that regard?

20 A. No, sir.

21 Q. Okay. So I guess to recap and summarize, to locate the
22 violating conduct that you see, I'm going to ask a few
23 questions. Tell me if you think that this would be allowed or
24 disallowed behavior under this order.

25 If another person, whether it's a total stranger or a

George - Cross

15

1 family member or somewhere in between, takes a photo or video
2 of Deric without Deric's knowledge, permission, or awareness,
3 that wouldn't be a violation, correct?

4 A. Correct.

5 Q. If they then post that photograph or video to social
6 media without Deric's knowledge or participation in that
7 posting, that wouldn't be a violation, correct?

8 A. Correct.

9 Q. And that would be true -- sorry, withdrawn.

10 If a photo or video was posted to social media and
11 Mr. Lostutter had urged that to be posted, or suggested it be
12 posted, or directed the composition of it, that would be a
13 violation, correct?

14 A. I think so, yes, sir.

15 Q. Okay. And if someone took a photo or video of Deric and
16 later decided to post it to social media, would it be a
17 violation if Deric didn't tell them not to at the time the
18 photo was taken, whether or not they knew it was going to be
19 posted?

20 A. If those are the facts of the case, the scenario you're
21 foreseeing, it would not, if he told them not to or asked them
22 not to.

23 Q. Okay. Thank you. I want to turn to this specific
24 photograph and video and how you learned of them.

25 You said that you were notified of these two pieces of

George - Cross

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1 media by a Ms. Alexandria Goddard, correct?

2 A. That's how I received it.

3 Q. And that was via e-mail?

4 A. Yes, sir.

5 Q. Okay. And the photo and video were attached to that
6 e-mail, right?

7 A. Yes.

8 Q. Okay. Were there other statements or content in that
9 e-mail from Ms. Goddard that contextualized them or gave you
10 information about the photo and video?

11 A. There was more information. In the Twitter one, the
12 video, there was a date, April the 2nd. And I apologize that
13 that's not included here, but April 2nd, 2017 under the video.
14 There was not a date under the photo, but it was indicated
15 that it was taken -- there was some language. And I believe
16 that would have been from someone other than Ms. Goddard.

17 It appeared to me that an individual by the name of Holly
18 Briley had sent the post or the screenshot out to the media
19 world, or the social media world, and Ms. Goddard received it
20 and sent it via e-mail to me. That's how it appeared, my
21 limited knowledge of how all that works.

22 And in that subscription, or a note under that, that it
23 was taken hours before it was seen on social media.

24 Q. I believe what you're referring to is there's a mark on
25 the photograph that says 13 hours or 13 h; is that right?

George - Cross

17

1 A. No. I mean --

2 Q. Or is there something else?

3 A. There was just some typing under both the picture and the
4 video, as I recall.

5 Q. Okay. And that was in the body of the e-mail from
6 Ms. Goddard?

7 A. The e-mail from Ms. Goddard had a note from her,
8 something to the effect -- I may have it here. No, sir, I
9 don't. I'm sorry. Something to the effect that, Deric once
10 again violating the conditions of his release, for your
11 information. Please see the video and the picture in this
12 Twitter, this Tweet.

13 Q. Okay. But other than the photograph and the video, was
14 there anything in the e-mail that contextualized the conduct,
15 or was your determination made just off the photo and video?

16 A. Other than those dates that were underneath the Tweet, or
17 the Tweets. I think I'm using that term right. Other than
18 those dates, no.

19 Q. Okay. So there wasn't additional content that informed
20 your decision?

21 A. No.

22 Q. Okay. And even though that photo and video appeared
23 together in the e-mail, you're aware that they were posted on
24 different days, correct?

25 A. It appears to be different days, yes, based on the

George - Cross

18

1 clothing.

2 Q. And you said in your letter that you received other
3 messages from Ms. Goddard regarding alleged violations. Is
4 that right?

5 A. Well, she seemed -- yes, pretty frequently. And we try
6 to analyze those and determine, you know, when something was
7 taken or something was posted. And we also try to make sure
8 that there's no way, there's no suggestion, that Mr. Lostutter
9 could be a part of it.

10 In other words, you know, she might send us some shots of
11 Twitter messages that Mrs. Lostutter is having. And in
12 reviewing those, there's no, you know, information or no way
13 of telling that Deric is a part of it, directing it, anything
14 like that. So we kind of -- I, myself, along with some
15 technology folks in our office, kind of look at it and
16 evaluate it that way.

17 Q. Okay. And with those past messages or other messages
18 from Ms. Goddard, you said you chose not to act on those,
19 correct?

20 A. Yes.

21 Q. And I believe you said that was because of a lack of
22 information to support?

23 A. Yes.

24 Q. And that was the process you just described or you'd
25 investigate, or other offices investigate, right?

George - Cross

19

1 A. Yes, um-hmm.

2 Q. Okay. Are you aware that Ms. Goddard, along with others,
3 is a defendant in a civil suit in another district that is
4 being brought by the defendant?

5 A. I am, yes, sir.

6 Q. Okay. Are you aware that Ms. Goddard, along with others,
7 including those in that civil suit and beyond it, are engaged
8 in, I would say an ongoing dispute at best and an ongoing
9 harassment at worst, against Mr. Lostutter? Are you aware of
10 that?

11 A. Based on e-mails our office received and other
12 information that our office received, I would say yes.

13 Q. Okay. All right. About how familiar would you say you
14 are with that back story? A little bit, somewhat, very?

15 A. I would say very limited.

16 THE COURT: How is this relevant to this proceeding?
17 Other than to try to develop some information to use in
18 another action, a civil action, how is this relevant to
19 whether this defendant violated the conditions of his release?

20 MR. JENNINGS: Your Honor, I believe part of the
21 concern is that Ms. Goddard has an ulterior motive in sending
22 these things.

23 THE COURT: So what if she does?

24 MR. JENNINGS: So if she's interpreting things like
25 these --

George - Cross

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1 THE COURT: She doesn't interpret whether he
2 violated. This Court does. Probation officer doesn't
3 interpret whether he violated. This Court does.

4 MR. JENNINGS: I understand.

5 THE COURT: Ms. Goddard's belief has nothing to do
6 with this proceeding.

7 MR. JENNINGS: But as she was the source of the
8 video, I want to make sure that there was not other content or
9 context --

10 THE COURT: Are you challenging whether the video is
11 either accurate or for some other reason? If so, you've
12 established that she may have some motivation. But I don't
13 know that you're doing that. I don't know that you're
14 challenging either the date which the video was taken or the
15 photograph, or that it's an actual photograph or video.

16 MR. JENNINGS: No, Your Honor, I don't intend to
17 challenge the validity or accuracy of either of those pieces
18 of media. My concern is to the extent that the prosecution's
19 argument --

20 THE COURT: Prosecution's argument doesn't hinge,
21 quite frankly, on what Mr. George believes is a violation or
22 not a violation. It depends on whether this Court believes
23 that it is, based upon the clear language of the magistrate's
24 order.

25 MR. JENNINGS: Yes, Your Honor.

George - Cross

21

1 THE COURT: Following several violations of the
2 conditions of release.

3 MR. JENNINGS: I'll rephrase. My concern is that, to
4 the extent that there is an allegation that Mr. Lostutter
5 indirectly urged or intended for these pieces of media to be
6 posted, this dispute is relevant because the media could be
7 seen, especially with the rude gesture in the photograph, as
8 directed at Ms. Goddard or others involved in this dispute
9 that is separate from this matter.

10 So to the extent there is an argument that Mr. Lostutter
11 would have urged this to be posted with the rude gesture to
12 say send that indirectly to these other individuals, I want to
13 cut off that argument by making clear that Mrs. Lostutter
14 would have sufficient reason to on her own.

15 THE COURT: Your argument's been made. Whether you
16 do it through hypothetical questions of this witness is
17 another matter. It's really argument. This witness is able
18 to testify about what he observed, what he received; and
19 beyond that, I don't know that this is relevant, this
20 argument.

21 MR. JENNINGS: All right, Your Honor. I do have some
22 exhibits to bolster this argument. I could submit them on
23 cross through this witness or during argument, whichever you
24 prefer, Your Honor.

25 THE COURT: Go right ahead and introduce any

George - Cross

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1 additional exhibits you wish to introduce. My point is that
2 his interpretation of what Ms. Goddard believed or didn't
3 believe is not relevant here, and this is not a proceeding or
4 a platform to develop information that will be used in some
5 collateral litigation, some civil litigation. That's not the
6 purpose of this hearing.

7 MR. JENNINGS: I understand, and I agree completely,
8 Your Honor.

9 THE COURT: If the parties are smart, that would stop
10 their bickering back and forth on both sides.

11 MR. JENNINGS: I agree, Your Honor.

12 THE COURT: As a matter of fact, there's some
13 language to that effect in the conditions of supervision that
14 I've imposed that will go into effect after Mr. Lostutter
15 serves his term of incarceration. He would be well advised to
16 read that carefully and not to try to mince or parse words
17 about that, because I intend to enforce it strictly.

18 MR. JENNINGS: Yes, Your Honor.

19 THE COURT: I intend to enforce the magistrate's
20 order and directive strictly, as he intended. So if you want
21 to introduce exhibits, go right ahead.

22 MR. JENNINGS: Yes, Your Honor.

23 BY MR. JENNINGS:

24 Q. Are you aware, Mr. George, that that harassment campaign
25 has also targeted Mrs. Lostutter?

George - Cross

23

1 A. I'm not aware of that, no.

2 Q. All right. Just one moment.

3 Mr. George, I'd like to show you what's been premarked as
4 Defense Exhibit K.

5 MR. JENNINGS: Your Honor, may I approach the
6 witness?

7 THE COURT: Security will pass it over.

8 MR. JENNINGS: I'm sorry. That should go to the
9 Court. It's got a proper marking on it.

10 BY MR. JENNINGS:

11 Q. Mr. George, are you familiar with this document? Have
12 you seen it before?

13 A. I have, yes. Um-hmm.

14 Q. Okay. And do you --

15 A. Maybe just yesterday or the day before. Recently.

16 Q. Okay.

17 A. Or at least part of it, I'll say.

18 Q. I see. Does it display a conversation on Twitter between
19 two accounts?

20 A. It appears to, yes.

21 Q. Okay. Do you recognize the owners or controllers of
22 these accounts?

23 A. Not -- you know, I mentioned Holly Briley earlier.

24 Perhaps that's her. I'm not sure. The other one down below
25 that one, no. To be honest, when I received it, I don't look

George - Cross

24

1 particularly at the details of those; you know, who's writing
2 them and who's responding. I basically just look to see if
3 there's any indication that Mr. Lostutter is a part of it.

4 MR. GUPTA: Judge?

5 THE COURT: Yes, sir.

6 MR. GUPTA: I'm just trying to choose a time. I'm
7 going to choose now. I'm going to object to this. Defendant
8 has, I think, demonstrated that the person who reported this
9 photo and video to Mr. George has an ulterior motive or a bias
10 or some sort of incentive, and that has been established.

11 This appears to be correspondence with third, fourth,
12 fifth parties between each other, and I don't know what more
13 this is going to prove except that people on the Internet
14 sometimes disagree.

15 THE COURT: I agree with you. I'll sustain the
16 objection. I don't see its relevance.

17 MR. JENNINGS: All right. In that case, Your Honor,
18 I'll move on to my next exhibit on this issue.

19 BY MR. JENNINGS:

20 Q. Mr. George, you said you're a little bit aware of this
21 back-and-forth dispute and harassment that's going on between
22 these otherwise uninvolved parties, right?

23 A. At least on e-mails sent and what I read out of those
24 e-mails and kind of the object of those e-mails, yes, sir.

25 Q. Okay. Have you seen references to Mrs. Lostutter in

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1 those e-mails, or any things attached to them, et cetera?

2 A. Well, obviously, the video, the picture. There have been
3 occasions -- I remember one -- that said basically something
4 to the effect, why do you continue to call me a he in the
5 Tweet; I'm a she. Perhaps her name Jenny I've seen a number
6 of times, yes. But other than that --

7 Q. Okay. And would it surprise you to learn that the
8 derogatory remarks coming from Ms. Goddard had targeted not
9 only Mr. and Mrs. Lostutter, but their infant child as well?

10 A. It wouldn't surprise me, no.

11 Q. I'd like to show you what's been premarked as Defense
12 Exhibit L.

13 MR. GUPTA: Judge, I'm going to object to this for
14 essentially the same reason as I've previously objected. I
15 think the state of mind of Mr. Lostutter is relevant. I'm not
16 sure the states of minds of people who are in this picture or
17 post are relevant.

18 THE COURT: Agree and I'll sustain the objection.

19 MR. JENNINGS: Can you hear the argument?

20 THE COURT: No. The motivation of these individuals
21 is not relevant here. It could be the best motivation in the
22 world; it could be the worst motivation in the world. The
23 question before the Court is whether the defendant violated
24 the conditions under which he is allowed to remain out.

25 One of the conditions was that he not use or access,

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1 directly or indirectly, the Internet or any electronic
2 communication device, and that includes a cell phone. The
3 question, therefore, becomes whether he violated that
4 condition by using the communication device or the Internet
5 after the imposition of this condition in September of last
6 year.

7 You've indicated that he does not contest that the video
8 and photograph are accurate or that they were, in fact, taken
9 after that date. His motivation may be that he was attempting
10 to defend his wife, his child, his whatever, is not relevant
11 if, in fact, he violated this condition by using, directly or
12 indirectly.

13 Your questions have demonstrated to me that you're
14 attempting to parse or ignore the language of the magistrate
15 judge when he indicated that he intended this to be an
16 absolute prohibition with only those carve-outs that are set
17 forth in the order itself be broadly construed to cover his
18 use of any electronic communication device.

19 MR. JENNINGS: Your Honor, I'm making no such
20 argument. My argument is that Mrs. Lostutter would have had
21 sufficient reason to make these posts on her own.

22 THE COURT: It is apparent to the Court that the
23 defendant was aware that this photograph was being taken.
24 He's staring to the camera, to the cell phone, at the time
25 it's being taken. So that, to me, is an indication he's aware

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1 that the photograph is being taken.

2 Because the video indicates that the wife was
3 communicating to Twitter followers and then shows the
4 defendant driving and then indicates that he can't say
5 anything is an indication that he knew that he was not allowed
6 to violate the order directly but he's doing it indirectly
7 through her. So that may be the issue that you want to
8 address, is whether he's doing indirectly what he knows he
9 can't do directly.

10 MR. JENNINGS: Yes, Your Honor.

11 THE COURT: In these communications.

12 Now, if I'm subject to a directive that I'm not allowed
13 to communicate electronically, and my wife attends hearings
14 with me and knows that, and she then posts a Twitter account
15 or posts a video on Twitter and has my picture in it, to me,
16 that's a pretty strong indication that I have indirectly
17 violated an order of the Court and now I'm trying to be cute
18 about it through these hypothetical questions that are not
19 relevant to this proceeding.

20 It is an indication to me that I'm really going to have
21 some problems with Mr. Lostutter on supervision because he's
22 going to attempt to push everything to the line, everything up
23 to the line, push the envelope as far as he can, see what he
24 can do and get away with it. He doesn't seem to understand at
25 this point in these proceedings that I'm not going to allow

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1 that to happen, directly or indirectly.

2 MR. JENNINGS: Your Honor, Mr. Lostutter understands
3 that. My concern --

4 THE COURT: I don't think you do. I don't think he
5 does, and I don't think you do.

6 MR. JENNINGS: My concern is that Mrs. Lostutter is
7 not subject to this order; and if Mr. Lostutter did not urge
8 this to be posted, I do not see a violation here. And it
9 sounds as though --

10 THE COURT: That's argument.

11 MR. JENNINGS: Yes.

12 THE COURT: That is argument for you to make to the
13 Court. You don't have to be able to convince me of that.
14 You're convincing me just the opposite through your questions.

15 MR. JENNINGS: Yes, Your Honor.

16 THE COURT: So continue. You've got a shovel and dig
17 the hole as deep as you want to dig it. Keep going.

18 MR. JENNINGS: Thank you, Your Honor.

19 BY MR. JENNINGS:

20 Q. Mr. George, after receiving the e-mail from Ms. Goddard,
21 did you or anyone else in your department perform an
22 independent review of the posts on that Instagram account?

23 A. We reviewed it, we meaning myself and another officer and
24 one of our IT persons, or information technology persons there
25 in the office; but we didn't do any analysis, forensics,

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1 anything like that.

2 Q. Of course. I'm asking specifically about the account
3 itself, not just the photo. Someone in your office reviewed
4 the account?

5 A. I don't know. I don't think so, no. If I'm
6 understanding the question correctly, no.

7 Q. Well, what you were e-mailed was a screenshot, right?

8 A. Yes.

9 Q. And, as you said, it had it written in a caption of the
10 date but no information about exactly when it was posted. It
11 was just a picture of a picture, correct?

12 A. Correct. True. Yes.

13 Q. So reviewing the account would show you, for example,
14 what was posted around that time, right?

15 A. Yeah, I suppose it would if I had access to the account,
16 yes, but we didn't go there. We didn't do that.

17 Q. Okay. And so as far as you know, you didn't look at the
18 Instagram account itself; is that right?

19 A. No, I didn't. No.

20 Q. Okay. Do you know if anyone in your office did?

21 A. I don't think so.

22 Q. Okay. Would that be the same for Mrs. Lostutter's
23 Twitter account?

24 A. I'm trying to think if our information technology guy
25 sent him or forwarded to him the e-mail. I don't think he

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1 did, but I don't know for sure. If he did, you know, he
2 didn't report anything back to me regarding the video or the
3 picture.

4 Q. Okay. In that case, I won't ask you about those. I'll
5 save that for my argument section.

6 Without looking at those accounts, you wouldn't know,
7 say, the context in which it was posted, say the preceding or
8 following those, would you?

9 A. I don't.

10 Q. And could that potentially help the context to know
11 whether this post differed in some way that would suggest
12 other parties' influence?

13 A. I don't know. I don't think so. With what we're dealing
14 with here, this condition, I don't think it would make any
15 difference as to why, what came before or what came after
16 that, in my mind anyway.

17 Q. I believe you testified it would make a difference as to
18 whether Mrs. Lostutter posted this independently or whether
19 Mr. Lostutter directed its posting, correct?

20 A. If I did, I didn't mean to. What I meant to say was, he
21 was aware of the video being taken and didn't stop it from
22 being posted.

23 Q. Okay. With the photograph example, you said earlier
24 hypothetically it would make a difference if he knew it would
25 be the case that that photograph was posted at some later time

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1 when Mr. Lostutter wouldn't know whether or not it was posted.

2 A. That's true, if he didn't know.

3 Q. Okay. I'd like to show you that photograph from a
4 printed page off of the Instagram account itself with the full
5 context. Is that all right?

6 A. Sure.

7 Q. Now, Mr. George, this might be a little skewed in this
8 printout, but the first page shows what we call the hash tags
9 or tags in that photograph?

10 A. Okay.

11 Q. The second page contains the photograph.

12 A. Yes, sir.

13 Q. The third page reiterates the hash tags?

14 A. Yes, sir.

15 Q. And the third and fourth pages show individuals who have
16 commented or, I believe, liked the photo on Instagram,
17 correct?

18 A. It would appear, yes.

19 Q. Okay.

20 MR. JENNINGS: At this time, I'd like to move this
21 photo into evidence.

22 THE COURT: Any objection?

23 MR. GUPTA: No objection.

24 THE COURT: Defendant's Exhibit D will be admitted.

25 BY MR. JENNINGS:

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1 Q. So Mr. George, you didn't see this version of the
2 photograph before, correct?

3 A. All I got was the photograph.

4 Q. Okay. Let me briefly reiterate the question I was trying
5 to ask earlier. It may be easier with the exhibit here. That
6 first page displays and third page displays what are called
7 tags or hash tags. They're often used to popularize the photo
8 or give people searching ways to find the photograph.

9 My question, one form of my question, is, wouldn't it be
10 useful in that type of context to see if there were
11 differences between that post and others that were typical of
12 the account, to see if it was a third party or the account
13 holder making that post?

14 A. I don't think it would be useful. I mean, it would give
15 some context to it, but it, in my mind, would make no
16 difference. Again, this is, for me, pretty -- as a nonsocial
17 media user, it don't mean much to me.

18 Q. I understand. I guess what I'm trying to understand is
19 how you determine that Deric had some hand in the crafting of
20 this photograph or some knowledge it was going to be posted.

21 A. Well, he had some hand in crafting it because he's in it.
22 And as far as posting it, it got posted I guess would be the
23 reason that led me to believe that he had something to do with
24 this posting.

25 Q. I see. I want to revisit something you said earlier that

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1 may also get me to this question. You said if it was just
2 some random person off the street taking a photograph, that's
3 no violation, right?

4 A. Yes.

5 Q. But you expressed some concern because these are accounts
6 that are in his wife's name or under his wife's control,
7 correct?

8 A. Yes.

9 Q. Is a part of your concern these accounts are controlled
10 by his wife?

11 A. No, because he's aware. He knows what's going on. He's
12 aware of what is being videoed in the picture that's being
13 taken. He knows what's going on with it. So it's not -- it
14 don't really concern me that much that it's her account.

15 I've seen accusations from Ms. Goddard and from others
16 referencing her account, and in those, there's no indication
17 to me that Deric is aware and knows what's being said,
18 primarily. There's been no other pictures. So it didn't
19 concern me, because I've seen her accounts through other
20 people. I don't go to her Twitter account or her Instagram
21 account.

22 Q. I understand. But a photograph posted by another person
23 who was not his wife or was not associated with Mr. Lostutter
24 wouldn't merit the same concern?

25 MR. GUPTA: Judge, I'm going to object to these

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1 continued hypotheticals.

2 THE COURT: It is sustained. I've tried to send
3 counsel the strongest message I could possibly send about who
4 makes a determination as to whether there's a violation and
5 the Court's concern with using an electronic device such as a
6 camera, directly or indirectly, which would include taking a
7 photograph.

8 It doesn't matter what Mr. George thinks if there's a
9 violation. His duty is to report violations to the Court and
10 allow the Court to make the final determination.

11 I told you what my concerns are in this case. It is not
12 with Mr. George's interpretation of who takes the photograph.
13 It's whether your client did something indirectly to avoid
14 doing it directly. It appears that he did. It appears he
15 allowed photographs to be taken using a cell phone. That is
16 the exact thing that the magistrate judge was attempting to
17 avoid, using third-party accounts to communicate, other than
18 very limited circumstances such as communicating with his
19 attorneys about the case.

20 That's what the magistrate judge was attempting to avoid,
21 this exact situation, and that's why he included the language
22 that he did, very strict and very broad.

23 MR. JENNINGS: I understand the order, Your Honor.
24 This is not that situation.

25 THE COURT: I'm not sure you do understand the order.

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1 I'm not sure you understand the order. I'll read it again.

2 The defendant shall not use or access, directly or
3 indirectly, the Internet or any electronic communication
4 device or mechanism, except under very limited circumstances,
5 including to communicate with his attorney.

6 And in this case, we have a defendant allowing the cell
7 phone to be used, after the order was entered, for messages to
8 his followers and his wife's followers.

9 MR. JENNINGS: To his wife's followers, not his own.

10 THE COURT: That's your argument. That is your
11 argument. But quite frankly, it doesn't matter who the
12 followers are. He allowed this to take place indirectly.
13 It's clear that he did from looking at the video. He allowed
14 it to take place directly. He's in the photograph. He's not
15 saying no in the photograph that was taken. He wasn't saying,
16 no, don't take this photograph. I'm not allowed to do this.
17 This is an indirect communication and, therefore, a violation
18 of Magistrate Wier's order.

19 So you're not getting what I'm trying to tell you. And I
20 told you earlier, you can dig the hole deeper if you want to.
21 That's an indication that you're going in the wrong direction.
22 You're not helping your position. Now, that's the plain way
23 to say it. You're not helping your client's --

24 No, put your hand down. You can talk to your attorney
25 here in just a moment.

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1 How much longer do you want to go on with Mr. George
2 along these lines?

3 MR. JENNINGS: I have one more question to clarify,
4 because he's gone back and forth on a question I asked before
5 and I'd like to understand exactly --

6 THE COURT: One more question. Go ahead. Go ahead.
7 One question.

8 BY MR. JENNINGS:

9 Q. Mr. George, is it your position that if a photograph was
10 taken by Mrs. Lostutter of Mr. Lostutter, with his knowledge
11 that it was being taken at the time, and Mrs. Lostutter
12 independently then decided to post it to social media -- not
13 the video. I'm specifically talking about the photograph
14 where he has no implied awareness of the potential that it may
15 be posted -- if she decided on her own to then post it, would
16 you consider that a violation?

17 A. Those being the hypothetical facts, I would not.

18 MR. JENNINGS: Thank you.

19 THE COURT: I assume there's no redirect?

20 MR. GUPTA: No further questions. Thank you.

21 THE COURT: Thank you. You may step down.

22 Any further proof on behalf of the United States?

23 MR. GUPTA: No, Judge.

24 THE COURT: Thank you. I'll give counsel a moment to
25 speak with Mr. Lostutter before we continue.

1 (The defendant and counsel conferred.)

2 MR. JENNINGS: Your Honor, I have two additional
3 exhibits I'd like to submit.

4 THE COURT: All right. Very well.

5 MR. GUPTA: United States has no objection to either
6 one of these.

7 THE COURT: Very well. These will be Exhibits A and
8 B will be admitted for purposes of this hearing.

9 All right. Thank you. Any other proof to be offered?

10 MR. JENNINGS: Proof, Your Honor, or argument as
11 well?

12 THE COURT: Proof.

13 MR. JENNINGS: No, Your Honor.

14 THE COURT: All right. I'll allow the parties to
15 summarize their position briefly. The United States has the
16 burden in the case.

17 MR. GUPTA: The test that we think applies is under
18 3148(b). 3148(b)(1)(B) requires that the Court find by clear
19 and convincing evidence that the person has violated any other
20 conditions of release. We believe that there's clear and
21 convincing evidence that Mr. Lostutter indirectly accessed the
22 Internet or any electronic communication device.

23 This doesn't fit into one of the hypotheticals. It's
24 clear Mr. Lostutter did know what was happening. His wife,
25 being in the video, announced what she was doing. He sat

1 there in silence.

2 In the photograph, same way. He gestured at the camera
3 and posed. That's active encouragement of what she's doing.

4 THE COURT: When someone -- let's talk about the
5 photograph for just a moment. When an individual,
6 Mr. Lostutter, and his wife are in a car, the two of them --
7 there's no indication anyone else is around taking the photo,
8 the wife's doing it -- and he makes a gesture, he flips off
9 the camera, he's not doing that toward his wife, is he?
10 That's an indication he's trying to communicate with a third
11 party at some point?

12 MR. GUPTA: That's right. I think there's a
13 possibility that's a picture that was intended for private
14 use; and that while that would also violate the terms of the
15 release conditions, I think it would be an important fact in
16 weighing the next step, what the consequences should be.

17 Here, in context, it's complete similarity to the video,
18 which was intended to go to the Internet. Here it's the same
19 pose, the same position, the same type of image or photograph.
20 In fact, I thought it was the same until I realized that
21 Mr. Lostutter was wearing a different shirt. It's clearly
22 intended as part of this series of uploads to her feed. It
23 was a gesture that was intended toward the electronic device,
24 not his wife.

25 THE COURT: Apparently he's involved in these

1 disputes with these third parties that he's identified. He
2 wants to bring all this out. And his gesture, in my opinion,
3 would indicate he's communicating with the people that he has
4 this dispute with.

5 MR. GUPTA: That's right. In context, it's clear
6 that that's who the gesture is intended toward. This is
7 indirect, or perhaps direct, in terms of being a gesture,
8 communication with the internet.

9 THE COURT: Which distinguishes this from just a
10 family photograph that's taken that somehow happened to get
11 posted without his knowledge or encouragement or
12 participation.

13 MR. GUPTA: That's right. It's a violation either
14 way. The type of violation here is communication with others,
15 perhaps even harassing others, provoking others.

16 The next step under 3148(b) is what to do. 3148(b)(2)(B)
17 provides that revocation is appropriate if the person's
18 unlikely to abide by any conditions or combination of
19 conditions of release. We think that standard has been met
20 here.

21 This is not a trivial release condition. This was a
22 release condition that the magistrate judge did on his second
23 round of orders because the first round of orders didn't
24 prevent Mr. Lostutter from publicizing his case or
25 misrepresenting his case to raise money and cyber bullying

1 somebody that he considered to be a potential trial witness.
2 So this set of conditions was carefully considered and crafted
3 and shaped around Mr. Lostutter's behavior.

4 It's reasonably related to the nature of the offense and
5 the characteristics of the defendant. Mr. Lostutter is a
6 provocateur. He's a harasser. He's a bully. He uses the
7 Internet for this bullying.

8 This is a serious offense. And I think the reaction to
9 both this violation and the previous violation back in
10 September demonstrate that Mr. Lostutter is not taking these
11 conditions seriously; that he believes that by sitting in a
12 car silently, he's somehow evaded these release conditions.
13 And that's just not true. The release conditions were written
14 with that sort of behavior in mind.

15 I think revocation is appropriate that these conditions
16 are taken seriously. Mr. Lostutter's going to have, I
17 believe, a three-year term of supervised release, and he's
18 going to have to find a way of either not engaging with these
19 online provocateurs that he engages with, or else do it in a
20 way that doesn't violate his release conditions. And if he
21 isn't revoked now, I think he'll continue to do these
22 technical violations and his behavior may even escalate to
23 additional crimes. Thank you.

24 THE COURT: All right. Thank you. Mr. Jennings?

25 MR. JENNINGS: Your Honor, it's our position that

1 failure to stop another from posting on their own account, of
2 their own volition, is not a violation of this order. It
3 prohibits direct or indirect use or access, that's correct;
4 and I and Mr. Lostutter and his family understand the
5 seriousness and strictness of those prohibitions. It does not
6 prohibit him from appearing on the Internet, and such a
7 prohibition would be impractical, if not impossible.

8 These are Mrs. Lostutter's accounts. It was her
9 determination to make these posts. And, in fact, in the
10 photograph at least, the post was not made until roughly ten
11 days after the photograph itself was taken. For detail on
12 that, you can see page 2 of Mrs. Lostutter's declaration.

13 THE COURT: I just read it.

14 MR. JENNINGS: Had Mr. Lostutter known that failure
15 to stop another from independently making posts that featured
16 his appearance, had he known that that could be interpreted as
17 a violation, he would not have permitted those to be posted.
18 He would have vigorously urged Mrs. Lostutter not to post
19 those.

20 THE COURT: I have two questions for you about that.
21 The first one is, would it be very easy, very simple, if he
22 had questions about this, since this language is so clear, to
23 call the probation officer and talk about it, rather than
24 taking a chance of having photographs taken that might be
25 posted, since he obviously is aware of his wife's ongoing

1 desire to post everything to the Internet? Because she says
2 she posts lots of stuff. He knows that she does that. He
3 allows these pictures to be taken knowing that she's likely to
4 post. Wouldn't the easy answer be to call the probation
5 officer and say, my wife's going to take these pictures and
6 post them; is that going to be a problem?

7 MR. JENNINGS: Your Honor, may I? I lack personal
8 knowledge as to whether he made those calls or not.

9 THE COURT: No. It's a hypothetical. You asked
10 some. I'm going to ask you some. Wouldn't that be the
11 easiest way to avoid this problem?

12 MR. JENNINGS: Yes, I believe we answered the
13 question.

14 THE COURT: Now, the second question is, I'm
15 wondering what the magistrate could have done in September,
16 other than what he did and the strong language that he used,
17 to prevent this type of activity from occurring?

18 What could he have possibly put in his order that's any
19 clearer than this that would have stopped Mr. Lostutter from
20 attempting to evade the language of the order, or his wife
21 from evading the language of the order?

22 MR. JENNINGS: If your question is how could Mr. Wier
23 have --

24 THE COURT: It's Judge Wier.

25 MR. JENNINGS: My apologies, Your Honor. If your

1 question is how could Judge Wier have structured the order
2 that would have let Mr. Lostutter know that his friends and
3 family also should not post his appearance or that he knew --

4 THE COURT: Other than using the words "directly or
5 indirectly," which could include second cousins, second uncles
6 twice removed, whoever it may be. The language "directly and
7 indirectly" is intended to be all encompassing.

8 MR. JENNINGS: I agree, Your Honor, but also there
9 are complications on use and access.

10 THE COURT: Of a cell phone. Cell phones can be used
11 to take photographs, which are not permitted under this order.
12 Under this order, he couldn't take a photograph of himself
13 using a cell phone.

14 MR. JENNINGS: Yes, I agree.

15 THE COURT: And he couldn't allow someone to do it
16 indirectly.

17 MR. JENNINGS: I believe that is where the defense
18 respectfully disagrees.

19 THE COURT: All right. The language, the defendant
20 shall not use or access, directly or indirectly. Defendant
21 may not use or access, directly or indirectly.

22 MR. JENNINGS: In which use and access are
23 intentional acts by the defendant.

24 THE COURT: And they can be acts by other parties if
25 he's aware of it and has a good idea of what the consequences

1 would be, such as posting.

2 MR. JENNINGS: I, again, believe that is where our
3 interpretation and understanding differs.

4 THE COURT: Well, the problem that you have, though,
5 is it's my interpretation that counts.

6 MR. JENNINGS: Yes, Your Honor.

7 THE COURT: And I've talked to the magistrate judge
8 throughout the course of this proceeding, and I know that
9 Mr. Lostutter has pushed the limits as much as he could. This
10 is not the first time there's been an alleged violation of
11 conditions of his release.

12 MR. JENNINGS: That's correct, but those situations
13 were very different. Those involved acts by the defendant
14 directly. This is an act by a third party --

15 THE COURT: Which makes it worse. Makes it worse
16 because of what the magistrate judge included this language
17 because of those problems, to avoid that situation. We have
18 these problems and he keeps pushing it and pushing it. The
19 magistrate modifies the language to make it really clear,
20 really broad, don't do any of this stuff.

21 MR. JENNINGS: Your Honor, if there was an iota of
22 evidence that Mr. Lostutter sought these things to be posted
23 online or urged for them to be posted or suggested that they
24 be posted --

25 THE COURT: Or knew that they would be posted.

1 MR. JENNINGS: -- I would agree completely.

2 THE COURT: Such as a person holding up a cell phone,
3 talking to Twitter, thanking the followers, and saying, Deric
4 can't talk right now, showing Deric, but thank you for your
5 support. And I'm supposed to think that Mr. Lostutter doesn't
6 know that that's going to be posted, number one; and number
7 two, that he can't say to his wife, better not post that. I'm
8 not allowed to do this indirectly. I can't do it directly,
9 and I certainly can't do it indirectly either?

10 MR. JENNINGS: Your Honor, I'm not asking for the
11 incredulous notion that he would not know that that was going
12 to be posted, nor the equally incredulous notion that he would
13 be unable to tell his wife, Hey, please don't post those; that
14 could be a violation.

15 My point is that there is a distinction between indirect
16 use or access of a device or the Internet and failure to stop
17 another's use or access of a device or the Internet. And if
18 the latter is the extent of this order, then the number of
19 people that need to be warned or told not to post about or a
20 photograph or video of the defendant balloons in number to a
21 near impractical level.

22 THE COURT: You have to be really careful, don't you?

23 MR. JENNINGS: Indeed, yes.

24 THE COURT: In fact, since you started the
25 hypotheticals, let me continue the hypotheticals.

1 You agree with me that if Mr. Lostutter was holding the
2 camera or the cell phone in the car doing the video, intending
3 to post that, or intending to have someone else post it, that
4 would be a violation?

5 MR. JENNINGS: If he were holding it and intending to
6 post it, yes.

7 THE COURT: And if he hands it to someone else and
8 says to that other person, You do this for me, that would be a
9 violation?

10 MR. JENNINGS: Yes.

11 THE COURT: Or if he knows that that third party will
12 end up doing that, that would be a violation?

13 MR. JENNINGS: Not if he has done nothing to
14 encourage them to do so.

15 THE COURT: Here's where we differ.

16 MR. JENNINGS: Yes, Your Honor.

17 THE COURT: Here's where we differ. That is indirect
18 use. There's circumstantial evidence in the case that the
19 defendant knew that his wife liked to post and would post,
20 knew she was taking something for the Internet. And,
21 therefore, it's fair to assume he knew that it would be
22 posted. He was doing indirectly what he could not do
23 directly, and he's in violation of the conditions of this
24 Court's order.

25 The question becomes the remedy. As Mr. Gupta properly

1 points out, the Court's analysis is guided by 3148(b) (1) (B)
2 and (b) (2) (B) .

3 There is clear and convincing evidence of a violation of
4 conditions of his release. And there's also a likelihood that
5 he will not abide by the conditions or a combination of
6 conditions of release until such time as he's required to
7 report to the Bureau of Prisons.

8 You've established the second part. You've established
9 that he's not likely to abide by conditions because he's not
10 willing to follow the language of the order. He wants to
11 parse everything. He wants to push it as close to the edge as
12 he can. And when I give you an example, you say, no, no,
13 that's not going to be a violation. And, quite frankly, I
14 don't know what language -- I've given you the opportunity to
15 tell me. You haven't. I'm not sure what language could be
16 included that would stop this type of activity and behavior.

17 You seem to think that this criminal action is the
18 pregame for some civil litigation. I'm here to tell you that
19 this is a serious proceeding. Mr. Lostutter is going to have
20 to spend 24 months in jail, in prison, because of his actions
21 in this case, in the underlying case. He has some very
22 serious conditions of supervision that he's going to have to
23 follow when he's released, and I don't think he's going to
24 follow those conditions.

25 I think there is a condition that I've included -- and I

1 intended it to be pretty strict. It's in the judgment. I
2 don't think he's going to follow it. I think he's not going
3 to be out a month until he has a violation of this condition.

4 It's number 12, Special Conditions: Defendant shall not
5 communicate or attempt to communicate, either directly or
6 indirectly, in any form, to include through Internet web sites
7 or services, any messages, content, information, or other
8 communication that has the purpose or intent to be
9 threatening, harassing, or intimidating to another individual,
10 to include the individual's family, a corporation, an
11 organization. Threatening or harassing communications include
12 any communication that has the intent to inflict punishment,
13 loss, pain, or damage to another individual, include the
14 individual's family, a corporation, an organization, or to the
15 individuals, to include the individual's family, corporation,
16 or organization's property meant to cause distress or alarm to
17 an individual, including the individual's family, corporation,
18 or an organization, or is meant to coerce an action took place
19 under duress, whether emotionally, physically, or financially,
20 any individual, to include the individual's family,
21 corporation, or organization.

22 I don't think he'll follow it. Because I think that
23 you'll talk to him and you'll try to parse that language and
24 you'll say, well, maybe you can get away with it this way. Or
25 maybe he thinks that he can get away with it this way. And

1 that's intended to be broad. It's intended to stop this type
2 of behavior.

3 The government has shown that he's a bully. He's an
4 Internet bully. He likes to pick on people. That's his
5 business. That's his trade. And I don't know that he's going
6 to stop doing that, whether it's with these people that you
7 want to talk about with the probation officer or somebody else
8 that he gets into some dispute with.

9 You have demonstrated to me, by attempting to parse the
10 clear language of this release condition, that he's not going
11 to follow it. I'm just really disappointed that we're here
12 today. You know, I would hope that one with Mr. Lostutter's
13 intelligence would know better than this stuff, but apparently
14 not.

15 So the only remedy that I see is revocation, remanding to
16 the marshal, until such time as he's transferred over to the
17 Bureau of Prisons. And once he's released, hopefully he'll
18 understand from this hearing today, he'll understand that
19 these conditions are to be followed and I mean business. And
20 if there's a violation, the probation officer is expected to
21 advise me of those violations, and I make the decision as to
22 whether there's a violation.

23 I set the conditions and I decide whether they've been
24 violated or not. And that's why I want the Probation Office
25 to advise me if there's a possible violation.

1 Now, what about that is unclear? What I've just said,
2 what part of that is not clear?

3 MR. JENNINGS: I do want to clarify for the record,
4 first off, I have no interest, nor any involvement, in his
5 civil suit. My questions regarding actors involved was only
6 to bring out the motivations behind how this came to be and
7 the light in which it was presented to Probation.

8 Second --

9 THE COURT: Motivation shows knowledge and intent.
10 He may have been motivated to respond to these other folks,
11 but that shows that he did it intentionally, knowing what his
12 conditions were.

13 MR. JENNINGS: I'm sorry, I wasn't speaking of the
14 defendant's motivations.

15 Second, I have offered no instruction to Mr. Lostutter on
16 how to parse or navigate this document that sets his pretrial
17 release or his release conditions, other than to caution him
18 to take this with the strictest and most serious and most
19 broad reading possible.

20 THE COURT: All right. Now, in answer to my
21 question, what I just said, in terms of the violation, I found
22 the violation has occurred, found that there's no remedy,
23 nothing that I can do -- and you haven't suggested it. I've
24 offered you the opportunity to tell me how this language could
25 have been altered or amended to avoid this situation. You

1 haven't told me how that can be done.

2 MR. JENNINGS: Your Honor, may I answer that question
3 as to what language could have been included?

4 THE COURT: Yes.

5 MR. JENNINGS: If it prohibited not only direct or
6 indirect use or access, but instructed against allowing the
7 knowing use by others, or similar language, that would put the
8 defendant on notice that third parties within sort of his zone
9 of influence should be warned of that potential violation.

10 What troubles me is that it seems that a violation is
11 being found here where the defendant's only wrong was
12 inaction.

13 THE COURT: Well, you see, the problem is I can also
14 rely upon not only direct or indirect, but also circumstantial
15 evidence. And the circumstantial evidence in the case --
16 you're expecting me to believe all the information that you've
17 tendered; the statement, not the testimony, but the statement
18 of Mrs. Lostutter's wife.

19 My conclusion is that this was done knowingly, willingly,
20 and voluntarily, and that Mr. Lostutter participated; that he
21 knew about it and he really wanted this to take place, these
22 postings to take place. That's consistent with his actions in
23 this case to this point.

24 And so what you suggest really doesn't change the
25 language that was used of "direct and indirect."

1 So the Court does find that a violation of the conditions
2 of release, two violations, have occurred, as demonstrated by
3 the video and also by the photograph. They were knowing,
4 intentional, and willing violations, inasmuch as the Court
5 finds this defendant had knowledge the photograph and video
6 were being taken and that it was his intention to have these
7 matters posted.

8 The Court also has considered whether there are any other
9 conditions that may be imposed to prevent this type of
10 activity between now and the time the defendant would report
11 to the Bureau of Prisons and, again, I don't find any. I
12 don't find that the defendant is willing or likely to abide by
13 conditions; that he's more than likely going to continue on
14 his present course of attempting to bully and attempt to
15 intimidate individuals through social media and Internet
16 postings. And, therefore, his conditions of release are
17 revoked and he will be remanded to the United States Marshal
18 pending designation, the location where he will serve his
19 sentence by the Bureau of Prisons.

20 I'll provide the clerk with the exhibits that were
21 provided to me and have been introduced into evidence.

22 We have a 2:00 hearing, and we'll take that up in
23 approximately five minutes. We're in recess.

24 (Proceedings concluded at 2:30 p.m.)

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C E R T I F I C A T E

I, JOAN LAMPKE AVERDICK, RMR-CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled case.

\s\ Joan Lampke Averdick
JOAN LAMPKE AVERDICK, RMR-CRR
Official Court Reporter

April 25, 2017
Date of Certification

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