

Jury Selection Day 13

Dec. 3, 1997

SACRAMENTO, CALIFORNIA
WEDNESDAY, DECEMBER 3, 1997, 9:00 A.M.

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THE COURT: Let the record reflect all participants are present.

Are we ready to proceed?

MR. FRECCERO: Your Honor, if I could bring something to the Court's attention. There is a prospective juror coming in this afternoon, and we only received one questionnaire. And I think, based on that questionnaire we would be willing to stipulate to the excusal of that juror.

THE COURT: I'm aware of that.

MR. DENVIR: He thinks that Mr. Kaczynski should be executed without a trial.

THE COURT: I know. That juror will be excused.

MR. DENVIR: Thank you, your Honor.

THE COURT: We only have three jurors here this morning. For some reason they didn't show up. The marshals are waiting for them. So if for some reason they show up, we will bring them in late. I wanted to cover some other matters.

Juror 146 telephoned my deputy clerk, that's the physician who appeared yesterday. He stated that he thinks he knows the lady that's sitting next to Mr. Denvir. He is not certain, but he called to give us that information.

Juror 117 was directed to check with the airlines to see whether or not she would lose money if she changed her ticket reservations. She will lose money.

MR. CLEARY: We'd be prepared to stipulate to excuse her, your Honor.

MR. DENVIR: Yes, your Honor.

THE COURT: Okay 117 is excused pursuant to the stipulation of the parties.

Juror 134 called. I'm not certain that the information provided by Juror 134 should be discussed publicly, because it could lead to the identification of Juror 134. And because of that, I want to talk to you about the information that Juror 134 provided at the bench.

(Whereupon there was a side-bar discussion.)

THE COURT: Juror 134 is the juror that believes she knows a witness, and the witness' name is spelled [Witness' name redacted]. And the juror states that she works with this person's daughter.

Is this individual going to be a witness in this case?

MR. LAPHAM: Never heard of her.

THE COURT: Okay. So there's no reason why she shouldn't come in and state that publicly.

MR. DENVIR: Juror number 146 does not know Ms. de La Rue. She's sure of that. She's not from this area, and she has never met him. So he is confused on that.

THE COURT: All right. Thank you. I will state publicly the essence of what we just covered in private.

(Whereupon the sidebar discussion was concluded.)

THE COURT: Juror 134 gave the name of a person she thought would be a witness in this case. That individual will not be a witness in this case. At least that's what the Government has indicated and the defense.

We are now ready to call in the jurors.

Next time I want the Government to you call my chambers. If you discover information that you've discovered, such as on 194, call my chambers early in the morning because I analyze that issue.

MR. FRECCERO: All right.

THE COURT: Thank you.

(The prospective jurors entered the courtroom.)

THE COURT: I'd like my deputy clerk to please administer the oath to the prospective jurors.

(The prospective jurors were sworn.)

THE COURT: I think I'm going to move you closer to me. Okay. Thank you.

Good morning and welcome to the United States District Court for the Eastern District of California. My name is Judge Burrell. I will preside over this trial.

The person who just administered the oath to you is my courtroom deputy clerk. Her name is Shani Furstenau. On the same platform with her is a certified shorthand reporter who will assist the Court during the administration of this trial.

I trust that you will fulfill your civic duty during this voir dire or questioning process. I thank you for your presence and your anticipated cooperation. You're performing an important function in our justice system.

Under the principles of our constitutional democracy the parties in the case are entitled to a fair and impartial jury. The right would be meaningless without citizens such as you making themselves available for jury service.

The voir dire process, or questioning process, is an essential way of ensuring that such a jury is obtained. Please answer the questions as honestly as possible. Please don't be concerned about someone else's view of your answers. Each prospective juror is entitled to his or her own opinions. The parties value your opinions.

The voir dire process will require questioning the prospective jurors individually, which will commence after I question you first as a group. After a number of jurors are questioned in this manner, some of the jurors will be assembled later for further questioning as a group. Those required to participate in that questioning process will be notified as to when that will occur.

Our objective is to obtain a fair and impartial jury that will decide this case based on the evidence that is presented here in the courtroom and the law that I will instruct you on during the trial. I have decided to do individual voir dire, in part because the parties have requested it, and also because there has been some publicity about the case. During the individual voir dire we will cover the publicity area and other matters that will tell us whether you should sit as a juror on this type of case.

The defendant has been charged with transporting and mailing explosive devices with the intent to kill or injure others. The law of the United States provides that if the jury finds the defendant guilty of either of these offenses, and that a death resulted from the defendant's commission of the offense, it will be the responsibility of the jury to determine whether the defendant should be sentenced to death, life imprisonment without possibility of release, or a lesser sentence. This determination is made at the second phase of the trial referenced as the sentencing phase.

If there is anything about the charges that would cause you to prefer not being a juror on this type of a case, please indicate that fact by raising your hand now.

There is no response.

The first part of this trial, which will be referred to as the guilty or not guilty phase, will occur like any other trial in Federal Court. The Government will present its case first. The Government has the burden of proving every element of the crimes charged beyond a reasonable doubt. If it fails to do so, you must return a not guilty verdict.

The charges are not evidence. They are simply accusations, nothing more. Mr. Kaczynski is presumed to be innocent and does not have to testify or present any evidence to prove his innocence.

During the sentencing phase additional evidence may be presented by the Government or the defendant. At the sentencing phase the jury will be called upon to decide whether certain aggravating factors exist, and if so, whether those aggravating factors sufficiently outweigh all the mitigating factors or factor found to exist, or in the absence of mitigating factors, whether the aggravating factors alone are sufficient to justify a sentence of death.

An aggravating factor is a fact or circumstance which might indicate or tend to indicate that the defendant should be sentenced to death. A mitigating factor is any aspect of a defendant's character or background, any circumstance of the offense or any other relevant fact or circumstance which might indicate or tend to indicate that the defendant should not be sentenced to death.

At the conclusion of that hearing the jury would then deliberate again as to the appropriate penalty. Since one of the options to be considered at the sentencing phase includes the death penalty, you will

then be asked questions during voir dire about your opinions on the death penalty. We may ask questions in additional areas too.

During this questioning process we will be referring to you by your number as a randomly selected juror, rather than by your name. This is because I've decided to use an anonymous jury in this case in order to protect your privacy, as I stated to you in a previous communication.

I will now say a few words about your conduct as jurors. First, do not talk to each other about this case or about anyone who has anything to do with it until after you have been excused from service on this case.

Second, do not talk with anyone else about this case or about anyone who has anything to do with it until the trial has ended, and you've been excused as jurors. Anyone else includes members of your family and your friends. You may tell them that you are a juror, but don't tell them anything about the case until after you have been excused by me.

Third, do not let anyone talk to you about the case or about anyone who has anything to do with it. If someone should try to talk to you, please report it to me immediately.

Fourth, do not listen to any radio or television reports or access any Internet stories or comments on the Internet about the case or about anyone who has anything to do with it. Statements contained in news accounts may be inaccurate or exaggerated, and it would be unfair to the defendant, as well as to the Government, to permit such information to influence your decision in this case. It would also be unfair to your fellow jurors to base your decision in part on information which they may not have heard and which they have had no opportunity to discuss.

For this reason you should avoid listening to future news accounts during the time period which you're involved in this case. Justice requires strict adherence to this prohibition.

Fifth, if you need to communicate with me, simply give my deputy clerk a signed note to give to me.

The trial schedule I plan on having will be from

8:00 a.m. to 1:00 p.m. Monday through Friday. This means that the jury would assemble by 7:00 a.m. to be brought to the courthouse. Raise your hand if this poses a problem.

I will discuss that in a separate session.

I contemplate observing the holiday season as follows: We will not hold court December 24, 25, nor the 26th; nor on January 1st or 2nd. I contemplate holding court December 22, 23, 29, the 30th and the 31st. Please raise your hand if this poses a problem.

I will talk to you about that later also.

Please raise your hand if you do not understand the following: Your first duty as a juror will be to determine whether Mr. Kaczynski is guilty or not guilty of the charges without consideration of any penalty.

There is no response.

If you find Mr. Kaczynski guilty of the charges that I told you about in my opening comments to you, then we would proceed to the sentencing phase of the trial. At the sentencing phase a sentence of death would be among alternative sentences the jury would be asked to consider. Evidence would be presented, and the Court would provide the jury further instructions on the law. The law requires each juror to carefully weigh all the facts and circumstances presented.

The Government may focus on certain aggravating factors, things it will urge the jury to find to support the sentence it seeks. You will also have to listen carefully and weigh any mitigating factors, meaning anything that might explain the crime or put it in context, or anything that might lead you to believe Mr. Kaczynski deserves a life in prison without the possibility of release or some other sentence. Raise your hand if you do not understand this.

There is no response.

Raise your hand if you will be unable to reserve your judgment on the sentence you believe should be imposed until you have heard all the mitigating and aggravating evidence.

There is no response.

If you are selected to sit on this case, each of you will be required to render a verdict solely on the evidence presented at the trial and by applying the law I will give to you in my instructions, whether you agree with that law or not. If you are unable to do this because you have some belief that would preclude you from doing this, please indicate that fact by raising your hand.

There is no response.

During the individual questioning, if you conclude that any question unduly pries into your private affairs and you wish to discuss it privately, I'll respect that request. Although I'm required to respect your legitimate privacy interest, I may discuss it in a private setting to determine whether we can discuss aspects of the matter in open court without disclosing what you desire to keep private.

If this can happen, let me know so that I can determine if the matter should be covered in a more private setting. This is because the trial should be open unless I have a legitimate reason to close any aspect of it.

I'm now going to have my deputy clerk take the jurors to the adjoining room and to place the earliest randomly selected juror in the witness stand.

I'm going to ask you questions from the podium.

(The prospective jurors left the courtroom.)

(Juror No. 165 took the stand.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q. You're the 165th randomly selected juror. You raised your hand because you wanted to tell me something. Go ahead and tell me what you wanted to say.

A. I'm self-employed as a private state licensed instructor, and I have my own driving school. And I have scheduled a 30-hour course. The dates you spoke of during the Christmas holiday are in conflict with a schedule that I filled. I filled a class that I'm scheduled to teach the 29th, 30th, 31st, and 2nd. So that would cause some problem for me.

Q. What are the hours?

A. The hours would be 9:00 a.m. until 4:30 p.m.

Q. Is there any possibility of rearranging that schedule?

A. I don't believe so. Because it's for teen-agers who attend school, and that's precisely why the schedule is during the Christmas break. So those days have been on my schedule. I've been advertising those dates for some months, so it would be, I would think, very impossible to rearrange that.

Q. My impression, it could be wrong, is that you're involved in a business that could be flexible, that you could make adjustments. I'm just wondering – I'm asking you this question because I fully recognize that jury service causes hardships. It could cause hardships, but sometimes adjustments can be made. And I don't understand why you couldn't make an adjustment.

A. It wouldn't be a problem in my personal schedule. It's just that I have approximately 20 students who have signed up for these particular dates and these particular hours. I would have to contact each one of those. I don't know the availability of the classroom that I rent, which is prearranged, prescheduled. That's what the problem is. It's not a personal problem with me. It's a scheduling problem.

Q. Do you conduct business on the weekends?

A. Yes. I do.

Q. Is it feasible to make adjustments so that some of the teen-agers can fulfill their driving endeavor on the weekend?

A. It's possible. Yes.

Q. Is there anything else that would interfere with your ability to be a juror in this case?

A. Related to that reason is that I am self-employed, and I don't have an employer that I can depend on for income while I am away. I'm a single, individual operator of my own business, and therefore I don't have any employee to assign work that I would miss.

Q. I'm going to continue to ask you questions. I have to probe the things you tell me because I have a function here.

A. Uh-huh.

Q. The parties are entitled to select prospective jurors from what is called a fair cross-section of the community. That principle envisions not excluding a particular stratum of society from being considered for jury service. I know that jury service can interfere with one's life.

When I was a lawyer, at one point in my career, I headed up the civil division of the United States Attorney's Office. I was chief of the civil division there. I had to supervise lawyers in both Fresno and Sacramento, and I also had my own caseload. And I was called for jury duty. I didn't think I could do it, but I did do it. I was actually placed on a jury, and I had to do my other work still. But I was able to fulfill my civic responsibility.

As a judge, as a United States District Judge once I had to fill out a State initial questionnaire about my availability for jury service. I didn't flatly tell the State Judges nor their clerk that I couldn't do it, although I questioned whether I could do it. Congress hasn't elected, at this point, to exempt United States Judges from jury service. So we are still subject to being called in the State system for jury service.

One of my colleagues, in fact, went over to the State Court and was asked questions just as you're being questioned now. So all of us sometimes are called upon to make some adjustments.

A. I understand.

Q. Can you do it?

A. Yes.

Q. Okay. Is there anything else we need to know before I start asking you questions about other matters involved in this case?

A. Not that I am aware of. It's pretty open.

Q. Okay. It was open, and probably it wasn't a fair question. I'm concerned about your availability, and that was the thrust of the question. Anything else?

A. As you said, sometimes people have to make sacrifices, and I don't know to what extent this would confuse and complicate my life. But, of course, I could make some adjustments.

Q. Okay. I am assuming it will cause you to make some adjustments that you would prefer not to make.

A. That's correct.

Q. I'm also assuming that because of my schedule and because of your clientele, that you can make those adjustments. Because it's my assumption that most high school kids would prefer to do their driver's training after normal school hours, and you're going to be free after normal school hours.

A. I was quite happy to hear that, because the bulk of my business does take place in the afternoon hours.

Q. So it's my assumption you won't suffer a financial hardship given the schedule I've indicated keeping in this case.

A. I would agree.

Q. Okay. Did you appear at Cal Expo and fill out a juror questionnaire?

A. Yes, sir.

Q. Since you answered the juror questionnaire at Cal Expo, have you been exposed to information about this case?

A. Media information, mainly through radio broadcasts, news broadcasts about the jury selection, I'd say that was about it.

Q. Okay. Since Cal Expo have you discussed the case with anyone or overheard other people discussing the case?

A. In a very relaxed atmosphere with close friends, my wife. We have discussed the fact that I was called, not really details of the case or any specifics regarding the case itself, just the fact that I was called.

Q. Okay. I want to direct your attention now to the time period before you appeared at Cal Expo. I want you to provide as much information as you possibly can about everything you heard about this case. I'm asking that question for a purpose.

A. Sure. To the best of my recollection I heard news stories on TV regarding searches of a residence. A typewriter comes to mind. The defendant's brother, I believe I heard a story about his capture or his discovery. I believe I read a newspaper account after the arrest and the charges were filed. I don't recall any other details about my knowledge prior to being called.

Q. What do you think the case is going to be about?

A. In the time since Cal Expo most of what I have heard on the news has regarded the psychological circumstances of the defendant, and I suppose what I think the case would be about was whether or not the State could prove that the defendant was responsible for the accusations. And then on the defendant's side, whether or not he is psychologically responsible for his actions if they were proved.

Q. What do you consider to be the accusations?

A. Just as you stated earlier, that he was responsible for – or he is being charged with being responsible for mailing bombs with the intent to hurt.

Q. Have you read or heard of any information concerning those allegations before I read them to you?

A. No more than just the stated fact that he was charged with, you know, mailing and being responsible for bombs.

Q. Has the information you've received about this case caused you to form an opinion or a preconceived idea as to Mr. Kaczynski's guilt or innocence?

A. I don't think it would be totally accurate to say that I was absolutely unaffected by the news reports. I would say honestly that any charges that I would have read about any case, I would tend to believe that there must be something to them. As I understand it, in the trial the jurors' responsibility would be to ignore anything except what happens in the courtroom and base their decision about guilt or innocence on that only. But I would be inaccurate to say that I didn't believe in my heart that there must be something to these charges. There must be some evidence, or in my opinion there wouldn't be charges filed.

Q. You're absolutely correct. Our ultimate objective is to have a juror commit to making a decision about the case based upon the evidence that's presented during this trial. You mentioned your heart and something being in your heart. That's really what this whole process is about right now. That's why we are doing individual questioning, in part, because we want you to be in a position to tell us what's in your heart without being necessarily pressured by other jurors.

A. Right.

Q. So I really want to know what is in your heart as far as your opinions are concerned. You indicated that you have been affected by news reports. How have they affected you?

A. Not in a profound way. I just have the radio on, and a news report comes on. And I listen to it just like any informed citizen might do. I wasn't a big follower of the story from, you know, months or years ago. I had no special interest in it. It interests me – the whole process interests me, but I really feel like I could make an informed decision. And the only thing that bothers me, we have already covered, which is the hardship that it might cause me as an individual, and whether or not that would bias my whole attitude about the proceedings.

Q. Let's focus on that. Why would that bias your attitude?

A. Not wanting to be present only because, for instance, my six-year-old son and my three-year-old daughter didn't see me this morning because they were still in bed when I left, personal things like that. Just a personal feeling of, oh, this is a hardship on me as an individual and a hardship on my family to have me here. I think my character is such that I could get by that. But those are just my gut feelings.

Q. Okay. And my questions are not intended to question what you can in fact do as a juror if you are ultimately selected. I am trying to find out how you have been affected by the news reports you heard concerning the case. Specifically, I want to know whether those reports or any other information

you've received about the case caused you at any point in your life to suspect that Mr. Kaczynski is guilty or not guilty of the crimes that he is charged with.

A. I'll try and answer this the best way I can. When I've heard reports on the news or perhaps read stories in the newspaper, the only effect that they have had on me is that – certainly not guilt or innocence on the final decision about whether Mr. Kaczynski is guilty or innocent. Only, as I stated, that it wouldn't be a report in the newspaper. There wouldn't have been an arrest. None of this would be available for me to hear unless there must be something to it.

As far as, you know, whether or not – details about the evidence or the charges, I can't say I have any preconceived notion about whether he is guilty or innocent.

Q. You can understand that an individual faced with any type of a criminal charge would want to defend him or herself against that charge in a courtroom and not have to worry about publicity that surrounds the case outside the courtroom.

A. Absolutely.

Q. And based upon your responses you seem to indicate to me that you would allow Mr. Kaczynski to begin this trial, in your eyes, with a clean slate?

A. Yes, sir.

Q. And what does that mean to you?

A. That means that every day I'm sure people are charged with accusations that aren't true, and you have to clear your head and your heart before you take on this responsibility. And you simply cannot be – you can't have the opinion that just because charges are filed that that necessarily means someone is guilty or innocent.

Q. If you are selected as a juror in this case does Mr. Kaczynski begin this trial, in your eyes, cloaked with the presumption of innocence?

A. Sure.

Q. What does that mean to you?

A. That means that if we have a system that's going to work, that the jury members have to come in with a clean slate and make their decision based on what is presented rather than what they saw or heard on the, you know, the little 5 to 20 second story or headline.

Q. There is another – did I cut you off?

A. No. I just would not want to be in a position of being accused or charged without the members of my potential jury feeling the same way.

Q. There is another component to the presumption of innocence doctrine. When an individual is presumed innocent, he is in fact presumed innocent. He need not do anything to defend him or herself. He can sit through the trial and not present any evidence, never has to open his mouth.

And that presumption carries through all the way to the end of the trial, and he has the benefit of that presumption until or unless the Government proves each element of the offense charged against him beyond a reasonable doubt. If the Government does not meet that burden then you would have to find the defendant not guilty.

Is there anything about your belief system that would interfere with your ability to allow Mr. Kaczynski the benefit of that presumption?

A. No.

Q. Do you consider yourself a proponent or an opponent of the death penalty?

A. A proponent.

Q. Can you explain your response?

A. I believe that in all of nature and all of mankind certain acts require that the ultimate price is paid. So I believe in some cases that the death penalty serves a purpose, and that it has a place in our justice system and in all of humanity and the animal kingdom.

Q. I'm going to have you join me in a hypothetical.

A. Okay.

Q. Let's just assume that you were in fact selected to be on the jury, and you and your fellow jurors listened to the evidence presented during the guilt/not guilty phase of the trial. And you waded through all of the evidence and decided that Mr. Kaczynski was in fact guilty of the offense of deliberate, premeditated, intentional and cold-blooded murder of another human being.

A. Uh-huh.

Q. And that finding would take you to what I've told you about earlier as the sentencing phase of the trial. My question is: Bearing that finding in mind, would you still be able to consider during the sentencing phase of the trial voting for a sentence less than death?

A. Yes.

Q. Is there anything you can think of that could possibly interfere with your ability to be a fair and impartial juror to both sides?

A. No.

THE COURT: The parties may examine.

VOIR DIRE EXAMINATION

BY MR. DENVIR:

Q. Good morning. My name is Quin Denvir. I'm one of the attorneys for Mr. Kaczynski, the defendant. I'd like to ask you a few questions too, if I could.

A. Sure.

Q. The judge asked you a number of questions about your situation, your work situation and everything, and I think you were very candid in evaluating where it was and how you could do it or not do it. But you did say that you might feel some resentment, I think, if you were selected as a juror. And I guess I would like to explore how much resentment you might feel and whether that might affect your ability to be a juror.

A. Well, I've had weeks now to process the whole jury selection, my whole involvement in this. And the judge's remarks earlier about the schedule of 1:00 p.m., I believe that's new information for me, and so that definitely eases my burden. I believe those feelings are surface feelings, gut feelings, but I believe I have it within my inner self to excuse those feelings if I was to serve.

Q. Now, you understand that the parties are estimating that the trial could take from two to four months, and I guess I have to ask you, do you feel as it went on, if it took towards four months rather than two, that you might start to hold that against whatever party seemed to be taking up the time or not taking up the time?

A. Certainly as time pressed on if it became a greater burden on my financial life, my family life, I suppose I would direct some feelings toward whomever I felt was slowing things down, sure. I think that's an honest answer.

Q. But do you think that despite those feelings, which are understandable, that you would be able to judge the case on the facts and the law here?

A. Yes.

Q. And acknowledge those feelings and then just kick them out?

A. Yes.

Q. I think you said at some point you discussed with some friend or family that you had been summoned for this case. Can you tell me what any of them said about that? Did you get any reaction from them other than, "poor guy", or something like that?

A. I believe some people made comments about what I should say or do to get out of it, you know, not really what I would consider serious discussion, just, "tell them this", or, "tell them that", but just casual comments. They were interested.

Q. Let me ask you, you've described what you know about the case. As I understand it, you don't have any preconceived notion as you sit there about whether Mr. Kaczynski is guilty of being the Unabomber and committing the Unabomber crimes?

A. No more than a news story would say that someone has been arrested for the crime.

Q. And whatever that news story is, whatever feelings you have, you could put that aside and judge the evidence?

A. Yes, sir.

Q. As you sit there, based on what exposure you've had of any kind, do you have any preconceived notion or thoughts at all about what would be the proper penalty of someone convicted of Unabomber crimes?

A. I believe they are serious accusations, and I believe it would be a heavy decision to make about another human being. This isn't a parking ticket. So yeah, I feel strongly that there would be a serious nature about whether or not the person was guilty or innocent. I don't know if that answers your question.

Q. Well, I guess I wasn't very clear on it. The crimes that are charged against Mr. Kaczynski are at least two charges involving one incident, which are basically mailing a bomb with the intent to kill someone and then having the bomb go off and kill someone. Those two charges carry the death penalty under the law.

The law provides alternative sentences, and that's execution, the death penalty, or life in prison without the possibility of release, and that means exactly that. In the Federal system there is no parole. So life means life, nothing else. Or a lesser sentence.

And if you were to sit on a jury and convict a defendant of those charges, rather than having the judge impose a sentence, the same jury would have to deliberate and decide the sentence, which is unusual. Then I guess my question was just based on what you know about the nature of the crimes charged, as I have described them, or what you have read about them.

Do you have any kind of feeling at the beginning, or preconceived notion as to what would be the proper penalty among those three for someone convicted of those charges?

That it sounds like it should be death, or it sounds like it should be life? Do you have any feelings like that at all?

A. I think this is a pretty ignorant answer I'm going to give you, because it's a pretty lofty question to ask if someone has a preconceived idea about something that I know nothing about. But no, I think I would be largely affected by what I heard in the courtroom as to what sentence would be appropriate. Certainly I would think at this point that I have an open mind about what it would be, but I'm not ruling anything out either.

Q. Okay. That's exactly what I want to explore with you is that the trial would be unusual in the sense that you would first have a trial where the jury would determine guilt or innocence, would listen to evidence presented by the prosecution and the defense, if they elected to, would be instructed by Judge Burrell, and then determine whether the prosecution had met its burden of proving beyond a reasonable that the defendant was guilty of those charges.

And I take it you would not have a problem with sitting as a juror doing that or making your own call on that?

A. No, sir.

Q. If the jury were to find the defendant guilty of the charges that carry these alternative penalties then you would have a second trial. That's what's unusual. And the Government would put on evidence of what's called aggravating evidence. What that really is is any evidence about the defendant or about the crime that they think points to death as the right sentence, and that's kind of what we call pro-death evidence or factors or circumstances.

The defense would put on mitigating evidence, which is the reverse of that, any evidence that the defense felt about either Mr. Kaczynski or about the crimes or anything of that nature that pointed to life or an antideath sentence, if you want to call it that.

Then you would be instructed by Judge Burrell, but in the end you would be pretty well told you could make your own choice among those. Actually, there is three of them, and I just wanted to see whether you have any feelings about the death penalty, or what you have heard about the case that would make you lean one way or the other as you went into that second phase.

A. No. I don't have any preconceived.

Q. I think you said that your sense was that the case would be about whether Mr. Kaczynski – and I may not have these words right, was psychologically responsible for the actions. That's the impression you got from the newspapers or the media?

A. Recently.

Q. Let me ask you – do you have your questionnaire there, or maybe Judge Burrell has it?

THE COURT: Is this your questionnaire?

PROSPECTIVE JUROR NO. 165: Yes, sir.

THE COURT: Okay.

Q. By **MR. DENVIR:** If you could turn to page 24, and specifically question 95. Now, it may be that the prosecution and/or the defense might present the testimony of mental health professionals, psychologists, psychiatrists or other people to give their opinions on the question of the psychological responsibility in the guilt phase, or it could be the penalty phase if we reach one.

And you understand when I talk about a penalty phase you have to assume that we would be there?

A. Right.

Q. Do you have any problem, you think, in evaluating that testimony and weighing it and giving it whatever weight you felt it deserved?

A. No. That's exactly what I would do. Listen to it, become as informed as I could about it and make a decision.

Q. If you could turn to page 32, question 120, the first sentence you stated your thoughts and opinions about the case. You were surprised that law enforcement had such a hard time finding the source of the crime. Can you tell me what you were thinking about that?

Does that reflect on law enforcement or on the person that was portrayed as the source of the crimes? What was your thought?

A. I think I would be more inclined to say that it's my thought about the person who avoided detention – avoided arrest.

Q. And what were you thinking along those lines?

A. That whoever was responsible, if it is one person responsible, that they were talented in avoidance or talented in not being caught.

Q. And did you have any exposure in the media that you described to Judge Burrell as to how, what brought about the arrest of Mr. Kaczynski? Do you have any sense of how that came about?

A. I believe in the published manifesto that words or phrases or terminology was recognized by the defendant's brother, and that led to his arrest. That may not be accurate, but that's what I think. That's what I heard.

Q. If you could turn to page 26, I believe it is – actually it's probably 27. You were asked your views – or the extent of your agreement with some statements there. And I guess – and you said you disagreed somewhat with the first two, which was that anyone who plans and commits a murder should get the death penalty, anyone who deliberately murders two or more persons should get the death penalty. And the third one, anyone who commits an act of terrorism and gets the – should get the death penalty. You agreed somewhat. Can you tell me when you made –

A. Which, all three?

Q. No, the third one.

A. Well, keeping in mind that I didn't have time to process this with a great deal of thought, I believe I'm going to have to reference the first two in that I believe there are circumstances where I would not totally agree that the death penalty would be warranted. And in the third case it says, "A person who commits an act of terrorism." I believe I probably just thought well, the statement says the person committed it, did it, period. And it was terrorism. So I think that would – it doesn't leave very much room for others.

Q. That's the problem with multiple choice questions, I guess.

A. I think what I'm trying to say – I'm a little nervous, I guess. In that third statement there it doesn't leave any room for any kind of circumstances. It says that the terrorism was committed. So that sounds to me like it probably would warrant the death penalty if that was one of the decisions I had to make.

Q. And when you read that phrase, "act of terrorism," what came to mind? What did you think that covered? Because it's not totally clear.

A. No. Shooting down a plane with innocent people on it, or creating terror for innocent people.

Q. Did you think of that as covering mailing a bomb with the intent to kill someone and having it go off and kill someone?

A. Well, I don't think that specifically, but certainly that would terrorize people. Yes.

Q. Then I guess I should ask you this: If a person was found guilty beyond a reasonable doubt of mailing that bomb with an intent to kill and actually killing someone, you would think that anybody who committed that should get the death penalty?

Is that what you are saying? Because it didn't sound like it.

A. What I'm saying is I believe in the death penalty, and I believe there are times that the death penalty should be implemented. And I also believe, without full knowledge of the individual case that we are discussing, even in the third circumstance, that my opinion on the first two questions is that well, there might be some reason why the death penalty wouldn't be appropriate. But in the third case it says that the person committed terrorism, and for some reason I didn't read into that statement that well, there might be some circumstances why in this case terrorism was okay and shouldn't warrant the death penalty.

Q. I just have one more question. Am I correct, because I think this is your bottom line, that if you found someone guilty of mailing a bomb with the intent to kill someone and actually killing someone that you would be willing to consider all three penalties?

A. Sure.

Q. And you are not leaning towards one or the other?

A. Not – no, not without more information.

MR. DENVIR: Thank you.

VOIR DIRE EXAMINATION

BY MR. CLEARY:

Q. Good morning, sir. My name is Robert Cleary. I'm one of the prosecutors on the case, and I want to ask you some questions about the death penalty.

A. Okay.

Q. Could you tell us – let me do this. You've got your questionnaire in front of you; correct?

A. Yes.

Q. On page 28, question 108, you tell us that the death penalty may or may not be justified depending on the circumstances. And if you go to page 26, question 103, you tell us that you think it's okay in some cases.

Could you give us an example of the sort of cases in which you believe the death penalty is appropriate?

A. I believe if someone was found by a jury to be guilty of taking another person's life, and there were no circumstances in that party's life, perhaps up-bringing, some event in their life that would cause me to feel that there was a reason to spare that person's life, then I think the death penalty would be an appropriate sentence.

Q. And how about circumstances where you believe – in which there is a murder, in which circumstances do you believe that the death penalty is not appropriate?

A. I mean, there could be a million reasons why it might not be appropriate. I think that adults who have experienced circumstances in their lives, in their youth, that sometimes adults are not responsible in a way that would cause me to want to take their lives for some of their actions. I mean, I wish it was all cut and dry, and I could just say, if you kill someone then we are going to kill you. But I think that

some peoples' lives have been – perhaps they have lived in a state of terror, and then it caused them to commit perhaps murder. And I would – there would be a reason for me to find that person somewhat not responsible for their actions.

Q. You also wrote in the second part of question 103 that the basis for your opinion is that some people are beyond help, and as in nature, they should not survive.

What did you mean by saying some people are beyond help?

A. I mean that no matter what the rest of society does to try and help those individuals, that they will continue to act in a way that's unacceptable to the rest of us, and that we have to do something to protect ourselves.

Q. And that would be a situation in which, because of the character of the defendant, assuming there is a murder, that you believe the death penalty would be appropriate?

A. Yes.

Q. Now, we have been asking you about your views about the death penalty generally. I'm going to switch focus slightly now.

Should you be chosen as a juror in this case you are not going to be asked questions on the death penalty, but you are going to be asked questions first on the guilt or not guilty. And then you would be asked to decide whether the defendant should live or die. That's the perspective I want to question you from now.

Assuming you found a case like one of the ones you told us you think the death penalty is appropriate, and you were sitting in judgment in that case, would you be able to do the next step and sign a verdict form which would sentence that particular defendant to death?

A. Sure.

Q. One other question in this area, and then I think I'm finished. Again, I've been questioning you a lot, everyone has been questioning you about your own personal views on the death penalty. And I know you haven't sat as a juror before, but you seem to understand that the judge has a substantial role in this case, one of which is going to be telling you what the law is and the law you have to follow.

You understand that; correct?

A. Right.

Q. There may be circumstances in which what Judge Burrell tells you about the law, particularly the law concerning the death penalty, that may conflict or be different with your own personal views about the death penalty. Should you find yourself in that situation, the judge tells you this is the law you have to follow, and that just doesn't sound right to you, do you believe you will then be able to put aside your own views and follow the judge's instructions on the law and apply it to the facts that you find from the evidence in the case?

A. With my current understanding I would answer that yes.

Q. Do you feel confident you'll be able to do that?

A. I feel confident that I can follow the letter of the law and make my decision based on that.

MR. CLEARY: Can I have one second, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION (CONT.)

BY THE COURT:

Q. What do you reference by your current understanding? You said with your current understanding. Why did you preface it that way?

A. Because I want to conserve my own feelings, my own brain and heart to listen to what's presented, and I think what I don't want to do is say that the law is always so clear-cut, especially in the psychological area. One of my answers on this sheet is that it's subject to interpretation. It's not an exact science. And so I said with my current knowledge, without hearing what the circumstances of the case are that – I think what you are trying to ask me is perhaps not what I'm trying to answer.

If you gave me instructions about the law, I would follow the law as long as I felt in my heart that this law applies to this case.

Q. Can you elaborate on what you mean by that?

A. I hope so. If – can I give you an example perhaps?

Q. That's fine.

A. If you said that the law states that if you endanger another human being that this is the consequence for endangering that person, and I understand that. But it's my opinion whether or not the person endangers the victim. So a word like, "endangered", is a vague – I mean it's subject to interpretation. So even though the law is not vague, if the law said if you endanger here is the penalty, I would still have to make the decision about whether there was endangerment or not.

That's the best example I can give you at the moment for why I answered the way I did, is because I would be perfectly willing to follow the law as long as I agree that the laws that you were instructing me on about this case were met.

THE COURT: I'm going to probe a little bit further.

MR. CLEARY: Certainly, your Honor.

PROSPECTIVE JUROR NO. 165: I'm sorry.

Q. BY THE COURT: That's okay. And I appreciate your response. Let's use your example.

A. Okay. Not the best one.

Q. Your example deals with the concept of endangerment. A juror looks at the facts and is the judge of the facts, then applies the facts to the law that the judge instructs the juror on. If you felt that my instruction was ambiguous, which is what I'm hearing you say. You haven't clearly stated that, but are you indicating that there could be an ambiguity in the concept of endangerment?

A. I believe that's the way I'm headed, is that a word like endangerment is subject to interpretation in lay terms. Perhaps what you are trying – what I'm misunderstanding is that if you told me that this – or the jury decided that this was endangerment, then I would be beyond whether or not it's endangerment. And I would be to the point where I simply follow what you tell me about what endangerment – the consequences of endangerment are.

BY THE COURT: The parties will have an opportunity to comment on what I'm going to say right now.

Q. A judge does his or her best to try to give a juror a clear instruction and one that lacks ambiguity, but we don't accomplish that all the time. If you received an instruction that you felt was ambiguous you could write a note to the judge and basically tell the judge, "This word is vague. I don't know what this word means. I don't know what you think this word means".

Bearing in mind that you would have that liberty as a juror with that type of freedom of allowing you to ask, you could follow the instructions, and you would ask for clarity if you didn't think they were clear?

A. I think so far that's the best – that's the clearest statement that's been made about what I'm talking about, is that when vague terms are tossed around, either legal or lay terms, I want to preserve that right to say, wait a minute. I don't understand what you want me to believe about endangerment, or is this – in the eyes of the law is this endangerment. It has nothing to do with my interpretation.

Q. Okay. It is my duty as a judge to provide you with a clear instruction. I don't want jurors thinking about different things when they are back in the jury room. I want them thinking that they all have the same working definition. So if that was something that was troubling to you I would expect you to send me a note, or the jury to send me a note.

A. Okay.

THE COURT: Okay.

MR. CLEARY: I'm not going to follow up, your Honor. Thank you.

MR. DENVIR: I have nothing to follow up on, your Honor, unless your concerned about the juror's answers.

THE COURT: I'm not concerned. Thank you.

(Prospective Juror No. 165 left the courtroom.)

(Prospective Juror No. 170 entered the courtroom.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Thank you for joining us. You're the 170th randomly selected juror. Is there any reason why we shouldn't continue to consider you for jury service in this case?

A. None that I can think of, sir.

Q. Okay. Did you appear at Cal Expo and fill out a juror questionnaire?

A. That is correct.

Q. Since that time have you been exposed to information about this case?

A. No, sir.

Q. Since that time have you discussed the case with anyone or overheard other people discussing the case?

A. No, sir.

Q. I'm going to direct your attention now to the time period before Cal Expo. I want you to search your memory and provide us with as much detail as you possibly can about all the information you received about allegations concerning this case ever.

A. When I received the original questionnaire to fill out I somewhat suspected that this might be what it was for. So I severed myself from anything in the news media or the newspaper. I knew very little about the case beforehand, before I received the questionnaire.

Q. I'm going to ask you to search your mind, because even the little bit of information you knew about beforehand is what we want you to tell us about, and I'll tell you about the question.

Under the law I am obligated to find out what information a prospective juror received about a case so that the Court and the parties are in a position to objectively evaluate whether that information is likely to have had an effect on the juror. We also provide the juror the opportunity to do a self-evaluation as to how that information affected the juror, if at all.

Receiving information about a case doesn't necessarily eliminate a potential juror from consideration for jury duty, but we are absolutely – I am absolutely required to have the juror tell me as much information as the juror possibly can. So even the little information that you became exposed to, if you can provide me with specifics about it I'd appreciate that.

A. Okay. The only specifics I can recall is in the local paper up north when the incidents were occurring I may have glanced at it a little bit now and then. The only thing I can really recall is I saw a film on channel 3. I recall a young pilot losing part of his hand. They had a special on him. And I recall one incident where we had a fatality Sacramento, and that's about all I know about the case.

Q. Did you ever receive any information about a cabin?

A. I'm sorry?

Q. A cabin?

A. No, sir.

Q. Has the information you received about the case caused you to form an opinion or a preconceived idea as to Mr. Kaczynski's guilt or innocence?

A. No, sir.

Q. If you were selected as a juror in this case would Mr. Kaczynski begin this trial from your prospective on a clean slate?

A. Yes, sir.

Q. What does that mean to you?

A. That means I would have to listen to the evidence, and I would have to determine my own opinion after the Federal Government presents its case, and find that he is guilty. At the present time he is not guilty.

Q. Does Mr. Kaczynski come into this case cloaked with the presumption of innocence?

A. Yes, sir.

Q. What does that mean to you?

A. As far as I'm concerned he is innocent until proven guilty.

Q. You're right. That's what the doctrine means, that he is presumed innocent unless and until, should it happen, the Government proves every element of an offense charged against him beyond a reasonable doubt. And if the Government fails to meet that burden you would have to find him not guilty.

A. That is correct.

Q. Can you think of any reason that you could not be a fair and impartial juror in this case to both sides?

A. No, sir.

Q. Do you consider yourself a proponent or an opponent of the death penalty?

A. I could go either way with it.

Q. Are you in a position to explain your views on the death penalty?

A. I believe so.

Q. Go ahead and do that, please.

A. Well, I'm a firm believer that the death penalty is a deterrent to crime mainly because you don't get a second chance to do it again. There are crimes committed which I believe the death penalty covers it very well, and there are some crimes that the death penalty is an unacceptable penalty for that crime.

Q. I'm going to have you join me in a hypothetical. I'm going to ask you to assume certain things. I want you to assume for purposes of this hypothetical that you in fact are a juror on the case. You and your fellow jurors, during the guilt and not guilty phase of the trial, waded through all of the evidence, and to Mr. Kaczynski's disappointment you found Mr. Kaczynski guilty of the offense of premeditated, deliberate, intentional and cold-blooded murder of another human being. Then you would go on to the sentencing phase of the trial if you made that finding.

The question is: In the sentencing phase of the trial, in light of that finding, would you still be able to consider voting for a sentence less than death?

A. It's a possibility. Yes.

THE COURT: The parties may conduct examination.

VOIR DIRE EXAMINATION

BY MR. FRECCERO:

Q. Good morning, sir. My name is Stephen Freccero. I'm one of prosecutors in this case.

A. Good morning.

Q. I'd like to ask you some questions about the questionnaire you filled out.

A. Yes, sir.

Q. Is that your questionnaire?

A. That is correct.

Q. If I could, let me leave that with you. I'm going to ask you to look at it. If you could look at page 13, question 47, and in response to that question you noted that you have known a couple of D.A. investigators over the years.

Is there anything about knowing investigators for the DA's Office that you think could affect your ability to be fair and impartial in any way?

A. No, sir.

Q. I would then ask you on the next page, page 14, you note that you have a niece – I'm not going to say what the job is, but in a particular line of work. Anything about that situation that would make you look one – disfavor or favor one side or another in a criminal case?

A. No, sir.

Q. Did you feel because of that relationship that you somehow would have some inside information that would affect you in any way as a juror?

A. No, sir.

Q. Okay. If you could look at page 21, please, question 82. In your response you noted that quite sometime ago, many years ago, were aware of or knew a police officer that was killed in the line of duty. Was that someone you knew well?

A. Yes, sir.

Q. And now that was quite sometime ago, but I want you to tell us whether there is anything about that experience that you think would affect you if you were called as a juror in a case in which someone was charged with taking another person's life?

A. No, sir.

Q. You don't think there is any reason to think you would respond to that type of case in some manner that would affect your ability to be impartial?

A. No, sir.

Q. If you could look at page 11, please, and question 41. There you were asked what kind of things you did say to others, or did others say to you regarding your possible jury service. And you said that you said very little to others, and you noted that a variety of remarks were said back to you. Can you give us some idea of what type of remarks were said to you?

A. Typical remarks that people who knew nothing about it or could care less make remarks. That's totally unacceptable.

Q. Okay. Anything about those remarks affect your ability to be a fair and impartial juror?

A. No, sir. I ignored them as I heard them.

THE COURT: I'm going to have to ask you to make an adjustment so that your voice is amplified a bit more than it is by that microphone. Thank you.

Q. **BY MR. FRECCERO:** Let me ask you, are you the type of person that can set aside whatever anybody says to you and concentrate solely on the information you would receive in a court of law?

A. I believe I can.

Q. You noted on page 28 of your questionnaire, and I think you said it again here a while ago, that you had seen something – the question is 109 on page 28. You had seen something on TV about a pilot who had been injured?

A. Yes. I believe it was a young military pilot. I believe it may have been a National Guard pilot or Air Reserve, and he opened up a package. I believe he is a college professor. He teaches somewhere now, and he lost part of a hand. I believe that was the one. I believe he is in the Sacramento area also.

Q. Now, let me ask you something. You realize that if you were called as a juror your obligation would be to base your judgment solely on the evidence presented here in the courtroom?

A. That's correct.

Q. Now, do you think if you remembered something from that TV show that conflicted with evidence you saw here in the courtroom, do you think you would be able to say, well, that was on TV. I'm just going to put that out of my mind, and I can only go on what's presented here in court?

A. I believe I can.

Q. Okay. Now, what if you sat through a trial and you actually didn't hear any evidence concerning that particular subject, but you remembered somewhere on TV you had heard about that. Do you think you could put that out of your mind, or would you be wondering, well, how come I didn't hear anything about that incident I saw on TV?

A. I believe I could put it out of my mind.

Q. All right. You feel confident about that?

A. Yes, sir.

Q. If I could, I'm going to ask you a few follow-up questions about your views on the death penalty. If you could look at page 26, question 103. That question asks you what are your opinions and beliefs about the death penalty and its use in our society, and you responded you could vote either way.

Can you tell us, give us some idea of what you meant by that statement?

A. Well, I believe I would have to listen to the evidence presented and how it went about. And if a person is found totally guilty I could definitely vote for the death penalty if I had to, or if there was something that changed my mind a little bit I could vote against it.

Q. Okay. Now, before coming here to court today did you know anything about the law that governed a Federal death penalty proceeding?

A. No, sir.

Q. Okay. If you were called as a juror one of the things you would have to take an oath to would be that you would follow the instructions on the law. You would follow the instructions that came from the judge in the case. You would not be asked to create your own laws.

Do you think you could follow the instructions of the Court and apply the facts as you received them, as you understand them from the Court, use the instructions the judge gave you and base your decision solely on that?

A. Yes, sir.

Q. As the judge told you in the very beginning, in a Federal case in which the death penalty potentially applies there would be two proceedings. You would only get to the issue of the death penalty if the jury found the defendant guilty of a charge for which that penalty potentially applied. Do you understand that?

A. Yes.

Q. The question of the penalty would come at a separate proceeding where you would be given additional evidence. And I guess the question I want to put to you is: Do you have any view about the death penalty that would lead you to conclude that once you convicted a person of the crime of a deliberate, intentional taking of another person's life, do you have any view that would not allow you to go into that second phase with an open mind and be prepared to consider the death penalty or life in prison or some other sentence?

A. No, sir.

Q. Okay. You feel you would be able to wait and hear anything that might be presented by the Government as to all the aggravating reasons, either about the crime or the person who committed it, why the death penalty should apply, as well as any reasons the defendant could choose to present, wouldn't have to, as to why even though he had committed a deliberate, intentional murder, he should get some sentence less than death?

Do you think that – you know your own views. Do you have any view that's not going to allow you to sit through that second phase and hear whatever the evidence is before making a decision?

A. No, sir. I would go in with an open mind.

MR. FRECCERO: Thank you, sir.

THE COURT: We are going to take the morning recess. Court will be in recess until 10:50.

(Whereupon the mid-morning recess was taken.)

(On the record at 10:50 a.m.)

THE CLERK: You may remain seated.

Court is now in session.

THE COURT: Let the record reflect all participants are present, except for the juror.

The juror will be in the witness box in just a moment.

(Brief pause.)

(Whereupon, Prospective Juror Number 170 was seated on the witness stand.)

THE COURT: You may proceed.

MR. SOWARDS: Thank you, your Honor.

VOIR DIRE EXAMINATION

BY MR. SOWARDS:

Q Good morning, sir.

A Good morning. How are you?

Q Fine, thanks. And how are you?

A Fine, thank you.

Q Good. My name is Gary Sowards. I'm one of the attorneys for Mr. Kaczynski, and I wanted to ask you a few questions following up on what you discussed with the Court and counsel earlier.

A Okay.

Q You still have, sir, your questionnaire in front of you?

A Yes, sir.

Q Okay. Good.

Could I ask you, sir, to look at – over on page – I’m sorry – page 12, question 44.

A Yes, sir.

Q Without asking, sir, to – for your own privacy, not to discuss any names of any agencies, but might I ask, do you still have this professional or volunteer connection?

A No, sir. Not for the last six years.

Q And then looking over on page 13 to number – question number 48, with respect to the training that you have indicated there, within the last six years or so, have you had any other professional or volunteer connections that utilized that training?

A No, sir.

Q Then I just wanted to follow-up, sir, with a couple of questions that the Court and counsel discussed with you regarding some issues of your views about the possible sentences in this case and also some of the publicity information.

Okay?

I was not clear, just directing your attention to the information that I understand you didn’t voluntarily seek out, but may have received from some forms or others, you mentioned some individuals had made remarks to you about the prospect of you being a juror?

A No, sir. Not being a juror. No, sir.

Q No one said anything to you about it?

A No, sir.

Q Okay. Did anyone say anything to you about the – about the case, about either the Unabomber case –

A I’ve heard remarks at the health club. When I’m working out, people make remarks in the locker rooms, stuff like that. That’s the only thing I’ve heard.

Q Okay. But no one has made a remark back to you concerning your statement about possibly being a juror in this case?

A Very few people know about it.

Q I’m sorry?

A Very few people know about it.

Q When you say, very few people,” can you tell me what sort of circle of individuals that would be?

A Well, my family knows about it. My daughter, she got a questionnaire, but she never was called. Where I work, they know what I’m doing now. And my church group, very close church members that are very close friends, they know I was on the list to come down here.

Q Okay. And do you know of your knowledge how they know about that?

A Well, when I came down here to fill out the questionnaires on October the 6th, I believe, they knew I was coming down.

Q Okay. And do you recall, sir, how they knew that?

A I may have possibly told them. My wife may have possibly told them.

Q And then the remarks that that prompted, are you saying those are remarks that you heard them generally talking about within earshot of you, or these are comments they made directly to you?

A No comments directly to me. Just earshot where I can hear them in the locker room.

Q Okay. And again, just because this person here is taking down the record, and we have to be clear about things, when you now reference ”locker room,” I assume you are talking about health club?

A Yes. That is correct.

Q Not the church?

A That is correct.

Q Not the church?

A That is correct.

Q And then I was not – and I apologize for not being clear – you made a reference, as I understand it, to a film of some kind on Channel 3 which is a television station broadcasting out of Sacramento?

A That is correct.

Q And you mentioned both the story of a young pilot and a fatality here in the Sacramento area?

A Yes, sir.

Q Can you tell me, sir, were those all the subject of this same film, or are those three different bits of information?

A All in the same film – or the same showing at that time.

Q And when you refer to a "film," can you tell me what exactly you are talking about?

A It could have been a news short or something that someone had put together. This is before any arrest had been made. And just something they had on the local television, and I just happened to be watching it that night.

Q Okay. And do you recall, just in terms of it being a film, whether it was a news documentary or whether it was a dramatization?

A No. It was a news documentary.

Q And do you recall about how long – how long in length the documentary was?

A It was very short, if I recall correctly. I mean, it was probably less than 30 minutes.

Q And do you recall, sir, approximately when you saw that particular documentary?

A It was way over a year ago I would say.

Q Way over a year ago? And probably before or after – Do you remember where it was around the time of the arrest that you referenced?

A It was quit a bit before.

Q Okay. And as you sit here today, do you recall the approximate date of the arrest?

A No, sir.

Q And would there have been anything, sir, that would have, since the time that you appeared at Cal Expo to fill out the big questionnaire, have you had any discussions with anyone else about the documentary or the incidents that were reported in the documentary?

A No, sir.

Q And at the time of the documentary, did – I assume what you are telling us is because this was before the arrest, the discussion was about the Unabomber and Unabomber crimes without a naming of a specific individual?

A That is correct.

Q And do you recall, sir, when the first time is that you heard Mr. Kaczynski's name mentioned in connection with this case?

A It must have been shortly right after the arrest was made.

Q And do you recall the context?

A No, sir.

Q Okay. Do you recall whether it was someone that you know personally telling you, or whether it was something on the radio, TV, newspaper?

A I think it came out in the local paper.

Q And again, without giving away any details, it would be the local newspaper of your community or this local newspaper?

A My community.

Q Okay. And since filling out the form at Cal Expo, have you discussed with anyone else the contents of the documentary you saw?

A No, sir.

Q Are you aware of anything that – since filling out the form at Cal Expo, that would bring to mind those incidents that you saw in the film?

A No, sir.

Q And then you were explaining to Judge Burrell that when you received your summons, you took the precaution, as I understand it, of severing yourself from any possible exposure to information about the case?

A That is correct.

Q And can you tell me, sir, what steps you took?

A I don't read anything in the paper about it. Anything that comes out in our local paper, I skip over it.

If I'm listening to the news or anything that comes on, I totally ignore it. And I do not discuss it with anybody.

Q Okay. That would be listening it to both on news on the radio and TV?

A That is correct.

Q Okay. And before taking these precautions, sir, what would be your daily habit with respect to listening to news programs?

A Only at lunch time. Going to and from work.

Q That's on the radio?

A Radio, yes.

Q And what about television after work?

A I might watch a little television once I get home.

Q Television news?

A Yes.

Q Okay. And what about reading your local newspaper?

A I read it every night or early in the morning, whichever chance I have. Because I get – go to work very early, and I work very late so . . . But like I say, when I come to anything about this particular case, I do not read it.

Q Okay. And that was – That was in response to the fact that you might be a juror and didn't want to be contaminated by information?

A That is correct.

Q Okay. And you mentioned also, sir, that upon receiving some notice from the court, you had an inkling that it might have something to do with this particular case?

A The original questionnaire, yes. Because I never ever received a questionnaire from the Federal Government before.

Q Okay. You're lucky.

Do you recall that particular document that you received that first tipped you off that you might be lucky enough to be down here talking to us today?

A Nothing really tipped me off. I just suspected it because it came shortly after the arrest.

Q And do you remember anything that was in the document, other than the fact that it was from the Federal Government, that would have made you put – make the connection to this particular case?

A Not really. Just a good guess on my part.

Q And did you have any information that the case was being federally prosecuted as opposed to state prosecuted?

A I believe at that time something was said they was going to be federal.

Q And do you recall by whom it was said?

A I believe it was in the local newspaper.

Q In your community?

A Yes.

Q If I could then ask you also, sir, to turn your attention now to page 105 of your questionnaire.

THE COURT: Did you say page 105?

PROSPECTIVE JUROR NO. 170: You mean question 105?

MR. SOWARDS: Two questions pending. I did say page 105, and I do mean question 105.

Thank you, Your Honor, for that assistance.

With the help of the Court, we were able to reduce the size of the questionnaire so we only have 26 pages.

BY MR. SOWARDS:

Q You mentioned, sir, that one of the reasons you support or would be in favor generally of the death penalty, is that it's a way of preventing people from – the person who has committed the crime from committing another crime; is that correct?

A That is correct.

Q Okay. Have you also thought about the option of putting someone in prison for life without the possibility of release as a way of preventing that person from committing another crime?

A That's a possibility, yes.

Q And I hear you, the tone of your voice when you say "possibility," is there something that you think it's not quite as good a way to do it or give you the same assurance?

A Couldn't give you the same assurance, no.

Q Can you tell me what you are thinking?

A Well, the system permits these people out. You know, the life sentence is not always what they get. I mean, the system doesn't work that way.

Q Okay. And can you tell me, again, without naming any specifics as to your background or other sources, how you – how you come to understand that particular concern or the problem with the system?

A Well, you hear it and read it in the news all the time about someone who is given a life sentence, and they're out in six, seven years. So in other words, it's not the deterrent that the death sentence would be.

Q I'm sorry.

A It's not the deterrent that the death sentence would be to prevent someone from doing it a second time if they can't be held in the system.

Q All right. And I –

THE COURT: Thank you.

(Microphone is adjusted.)

PROSPECTIVE JUROR NO. 170: You're going to get me yet, right?

BY MR. SOWARDS:

Q And I appreciate, sir, your giving us these candid responses about your knowledge and understanding of the system.

Could I ask you, is this an opinion you have had of the unreliability or concern about the system, is this something you've had for a period of time, or is this just something you recently thought about?

A Oh, you might say it's been a period of time over the years. As I get older, I see more of it.

Q Learn from experience or life experience?

A That's correct.

Q Okay. Is there something about that concern that would make it difficult for you to ignore that concern, as you personally understand it or feel it?

A I don't think so.

Q If the – If your job as a juror, as Judge Burrell will talk to you about it, asks you to proceed on the belief, whatever your personal beliefs are, but the belief that should you, as a juror, sentence someone to life in prison without possibility of release, that that would actually be the sentence the person received, and they would not, in fact, be released, would there be anything about your life experience and your knowledge of the system that would make you doubt whether, in fact, that would really happen?

A I don't believe so.

Q Then you also mentioned in response to Judge Burrell's answer that you could – there is a possibility you would consider a sentence of less than death for a premeditated and deliberate murder; is that correct?

A That's a possibility, yes.

Q Can you tell me what you mean by that, when you say "there is a possibility" you would consider that?

A Well, I – First of all, I have to listen to the Judge's instructions. What he said is going to be number one what I go by.

Q Correct.

A But if you present something that puts any doubt in my mind, then I'm going to have to weigh it a little bit, but still I'm going to follow all in the instructions as given to me. So that's why I say I believe I can go either way.

Q Okay. And if evidence is presented to you that – that gives you no doubt – or would give you no doubt that an individual had committed a premeditated, deliberate and cold-blooded murder, all right – this is when you're asked to look at all of the facts and to find out whether the person before you is the person who committed this act and whether there is any reason to justify the act – and you hear all of that evidence, and you reach a determination that the person in your mind beyond a reasonable doubt is guilty of a cold-blooded and deliberate murder, is your feeling that there is still a possibility that the death penalty would not be the appropriate punishment?

A It's a possibility also.

Q Okay. And can you tell me what you would base that possibility or imagine that possibility to be based on?

A I really couldn't put it in words, no. It just would be, you know, if you presented something that puts some doubt in my mind, there might be a possibility you can sway me a little bit. But if the evidence is there that, you know, it's a hundred percent, then I would have to go with a hundred percent. But I like to keep an open mind if I can.

Q Okay. And I appreciate your willingness to do that, and let me say that everyone understands very seriously their obligation to do as Judge Burrell instructs them to do.

And what we are talking about now is how we go about doing that job. How we go about following those instructions and the other things we may have to address along the way.

And when you say that if we present evidence that raises a doubt in your mind, are you thinking in terms of whether there is still some doubt in your mind that an individual has actually done the crime of which you have already convicted him?

A If the evidence is there, and there is no doubt at all, I mean, it's been presented to me, and it's proven beyond a reasonable doubt that he is guilty or the suspect is guilty, then I would go along with whatever the judge says.

But if you presented something other than the evidence presented by the Government, that might put a little doubt in, the person's background, his personality, his mental condition, so forth, so on, there is a possibility that I could possibly go with life as the sentence.

Q As you sit here today, and I understand that we're asking you to look ahead – both look within yourself and look ahead, when you speak of terms of possibilities, is it possible to give us an idea of how big that possibility is?

In other words, are we talking about a percentage of a possibility you would consider a sentence other than death?

A I couldn't give a percentage, no. I would just have to wait and hear how it's presented. You know, if there is any doubt put there.

Q Okay. And would you have any idea – And again, this is just whatever you feel. There are no right or wrong answers. We're just trying to assess how you feel about this particular issue.

But if you found beyond all reasonable doubt in your mind that a person was absolutely guilty of a particular crime that involved the intentional killing of another person or a number of persons, that the killing was deliberate and intentional and cold-blooded, would it be your feeling, as you went in to decide what to do with that person, that we would have some – some heavy lifting to do to convince you death wasn't the appropriate sentence?

A Yes, you would.

Q Okay. And you have a certain emphasis on "Yes, you would." Can you tell me what you mean by that?

A Well, there again, I'm trying to quite – to understand what you really are trying to get me to say.

I would go along with the death sentence, you know, once I'm convinced that, and the jury is convinced, that it's beyond a reasonable doubt that the person is guilty of the crime, and it's all premeditated, so forth, so on, yes, I would go with the death sentence.

Like I've been trying to tell you, if you presented some doubt whatsoever, for whatever reasoning, the gentleman's background, other than – Well, his mental state, let's say for instance. If you presented something there that creates some doubt, even though it was premeditated, if something else could correct this, I could probably go with the life sentence.

I want to keep a very open mind here. It depends on how it is presented to me.

Q And I'm sorry, sir, when you say "something else could correct this," can you tell me what you mean by that?

A I don't recall saying to "correct" this.

Q I'm sorry. I thought that's what you said. If we could present things like background or something about the person's mental state that would correct this.

A Well, would put a doubt in – I guess I'm using the wrong words probably. You can open it up to me where, you know, if there was something other than the fact that he committed the crime, as you say, and proved beyond a doubt that he did it, but then with his background or something that – something else could have caused other than him just doing it, right now, off the top of his shoulders, like a lot of crimes are committed, then I could go the other way, or you know, at least I would consider it.

Q Okay. And after considering the, let's say, to use your example, the possible mental state evidence, you still felt, for instance, that this was intentional and premeditated and unjustified under the law, would there be anything that you could imagine that would make you think that the death sentence was not appropriate?

MR. FRECCERO: Your Honor, I would pose an objection to the word "unjustified" because I think that term encompasses issues that would be raised in a second proceeding.

THE COURT: Sustained.

BY MR. SOWARDS:

Q If you found, sir, that the – after hearing all of the evidence, when you're being asked to make a determination on sentence, that you still believe the person is guilty beyond a reasonable doubt, and it was an intentional, deliberate, premeditated murder or murders, would there be anything that you could imagine that would make you think that a sentence other than death was appropriate?

A At that point probably not.

Q Okay. And let me ask then just a follow-up to that. And that is, that if you were – and again I appreciate your candor with us in giving me information that we need to consider – but if we were to ask you to look at the possibilities of different sentences, okay, and to consider the fact that you have convicted somebody of premeditated, deliberate and intentional cold-blooded murder, and you're now being asked to decide whether that person should get the death penalty, and we as the defense said in looking at those two – those two alternatives, we want you to actually put the burden on the Government to convince you that death rather than life in prison without release is possible, do I understand you to say that as – as your own personal feelings in your heart, is that you would already be leaning towards death and waiting to see whether we could convince you otherwise for life?

A Well, if the judge tells us there is an alternative to the death sentence, and we should keep an open mind and review it, I'm quite sure I would do that.

Q And how strong would your feelings be, though, when you are making those considerations that, from where you sit, as you know yourself in your heart, that death is, in fact, the appropriate penalty for a crime like this, and it's up to us to convince you otherwise?

THE COURT: Rephrase it, sir.

BY MR. SOWARDS:

Q Do I understand your earlier answer, sir, to say that personally, this is just you personally, then we'll talk about the instructions later, but that if you found somebody guilty beyond a reasonable doubt of intentional, premeditated, deliberate murder, that you would expect us to convince you why the death penalty is not appropriate?

A Yes. I would expect you to prove that to me, yes.

Q And if we failed to do that, you would maintain your – your current personal position, that death is the appropriate judgment or sentence for a crime of that nature?

A That is correct.

MR. SOWARDS: Your Honor, may I have just a moment?

THE COURT: Yes.

MR. SOWARDS: Thank you so much.

(Brief pause.)

MR. SOWARDS: Thank you very much, sir.

PROSPECTIVE JUROR NO. 170: Thank you.

MR. FRECCERO: If I could follow-up, Your Honor?

THE COURT: Okay.

VOIR DIRE EXAMINATION

BY MR. FRECCERO:

Q Sir, you were asked some questions about your views on what would be the appropriate penalty based on the crime of intentional, deliberate murder.

One of the questions you were asked was, in your view, would you expect the defendant to prove something to you.

Now, my question to you is, if the Judge were to instruct you that the Government had to prove certain aggravating factors before you could even consider the death penalty, do you think you could follow the Judge's instruction and make the Government prove the aggravating factors before you considered whether to impose the death penalty?

A Yes, I do.

Q If you remember back, some of the first questions I asked you, when it comes to a proceeding here in court, in terms of who has to prove what to establish guilt or to establish whatever is necessary in a second phase, those instructions come from the Judge.

Is there any reason to think that you have any belief that would prevent you from following the Judge's instruction?

A No, sir.

Q Now, let me ask you, there is the – the crime – Let me first ask you, what does the word "cold-blooded" mean to you?

A Taking a human life without any remorse at all.

Q Without remorse?

A I mean, just – Well, maybe I'm using the wrong word.

It's something that someone has planned to do, I believe, to take another human's life. And they just can walk in and do it.

Q So for instance, if the Government, after a finding of intentional, deliberate murder, and you went to the second phase to consider what the punishment was, one of the factors you might consider would be whether the crime had been planned?

Would that be something?

A To be premeditated, I believe it has to be.

Q Okay. Well, you mentioned "remorse".

Would it make a difference to you whether the person who committed the crime felt bad about what they did or didn't feel bad about what they did?

A I don't believe so.

Q Okay. All right.

My final question is, sir, if you're sworn as a juror in this case, the ultimate issue that everybody is probing on is that can you wait before you make a decision as to either guilt or innocence or which punishment should apply.

Can you wait until you have heard everything from both sides before you make that decision?

A Yes, I believe I can.

Q Okay. Do you have any reason to think that any of your views, on either penalty or crimes, are so strong that in reality you will have already made up your mind before you hear all of the evidence presented to you?

A No, sir.

Q And again, is there any reason to think that any belief you have is so strong that you can't sit as a juror and listen very carefully to what the Judge tells you your duties are and your job is to do, with the evidence presented in court, and honestly follow those instructions?

A Yes.

MR. FRECCERO: No further questions.

Thank you.

VOIR DIRE EXAMINATION

BY THE COURT:

Q Sir?

A Yes, sir.

Q Is there anything about your pro death penalty views that would prevent you from having an open mind as you entered the sentencing phase of the trial?

A I don't believe so.

Q Are you in a position to share how you could have an open mind entering the sentencing phase of the trial assuming, hypothetically speaking, that you were on a jury that found the defendant guilty in the guilt/not guilty phase of the trial, of the offense of intentional, premeditated, cold-blooded murder of another human being?

I'm trying to have you tell me the workings of your mind, to the extent that you can at this moment, so that I can see whether you could, in light of that finding, go to the sentencing phase of the trial with an open mind willing to consider all sentencing options, which includes death, life imprisonment without possibility of parole – and that's exactly what that means in a federal system. It's unlike the state system that you may be familiar with. If you are sentenced to life in the federal system, you receive life – or some lesser sentence?

Do you understand my question?

A Yes. I believe I do.

I can honestly answer that 40 years ago, I'd probably say I would go with the death sentence. But as I've aged over the years, I've learned to sort of keep an open mind and listen to the facts and everything and go with it that way. So I really believe that I could keep an open mind and go either way with the death sentence or life sentence.

THE COURT: Have my questions prompted other questions by either side?

MR. SOWARDS: No, Your Honor.

MR. FRECCERO: None from the Government.

MR. SOWARDS: No.

THE COURT: Okay. Thank you.

(Whereupon, Prospective Juror Number 170 was escorted from the courtroom.)

(Whereupon, Prospective Juror Number 185 was seated on the witness stand.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q Thank you for joining us. You're the 185th randomly selected juror.

You raised your hand when you were out with the other jurors, I think in response to a scheduling matter.

Is it the holiday season?

A No. It was – It's the family pressures of being here at seven o'clock in the morning, five days a week. It was the first question.

Q I see.

A It was the first question about that. We have an eight-year-old son, and I don't have child care in the morning currently because I always take him to school. Then he has child care after school. And where I live is – in the wintertime, with this fog, it is a two-hour drive to get here. So that means that I will be leaving the house by 5:00 a.m. to get here at 7:00.

And I don't know what I'm going to do for child care five days a week for four months, or however long the trial lasts.

My baby sister told me yesterday that she is very happy taking care of our son the three days a week that she does take care of him, because I work three days a week, but she says she's not interested in full-time child care. So I'm – I'm very stressed out about this.

In addition, since we filled out the questionnaire in October, my dad, who is 85, had a stroke. And he's doing very well. He's back home. But he can't be left home alone. And my mom sort of counts on me coming over a couple days a week for a couple of hours so she can go out and do errands. And I just feel like everything is closing in here.

At the time we did the questionnaire, I thought, well, this would be a very interesting thing – the trial, and I'm a responsible person, and I think I would be a good juror, but I have a lot of family pressures. And I just don't know how I'm going to come to Sacramento five days a week for this time period.

Q Do you live over 80 miles from Sacramento?

A No. 72 miles.

THE COURT: Okay. (Looks towards counsel.)

MS. CLARKE: We stipulate.

MR. FRECCERO: Yes. The Government would stipulate.

THE COURT: In view of what you have stated, we're going to excuse you from further service on the case.

You are excused.

PROSPECTIVE JUROR NO. 185: Thank you very much. I really appreciate this.

(Whereupon, Prospective Juror Number 185 was escorted from the courtroom.)

THE COURT: Okay.

That's all we have for this morning.

Anything further to cover before 1:30?

MR. CLEARY: Your Honor, two matters if I could. One is having to do with scheduling.

I was wondering if at some point, as we approach the end of the voir dire process, the parties could meet with the Court and discuss scheduling issues.

Our concern, just so you know where we are coming from, is many of our witnesses, as you can imagine, are from throughout the country. We're going to need to give them some advance lead time to get them here to Sacramento for the trial.

So at some point, when it is convenient for the Court, if we can sit down and discuss what the Court's views are and how many more days we have in the voir dire process, that would be helpful.

THE COURT: Do you want to do it now?

MR. CLEARY: That would be fine, Your Honor.

THE COURT: Do you have any insight that you can share?

MR. CLEARY: Couple of questions really, Judge.

I know our ultimate number we have to start with for the next round would be 64. It seems to us that we would probably want to start with a larger number than that. Because assuming we're going to have further questioning in the next round, or general voir dire type questions, we may want to have some additional people in the pool should there be some hardship challenges, for cause challenges, and other problems keeping the jurors.

So I don't know what the Court has in mind, but I think we do need some buffer there, some additional people in the pool.

THE COURT: What is your idea?

That's a size of pool problem.

MR. CLEARY: Right. I would say somewhere between –

Can I have one sec?

THE COURT: Sure.

(Counsel confer.)

MR. CLEARY: Somewhere in the neighborhood of 70 to 72 jurors at the end of this round.

THE COURT: Defense concur?

MR. DENVIR: That's fine, Your Honor.

THE COURT: That's fine with the Court.

MR. CLEARY: Thank you, Your Honor.

MR. DENVIR: Can we decide which one of those, 70 or 72.

MS. CLARKE: We can split it with 71.

THE COURT: I think if we have 70, that will be sufficient.

MR. CLEARY: That will be fine, Judge.

THE COURT: However, if we have to communicate with 72 anyway, we end up with 72, then that's how many we'll end up with. But I think 70 will probably be the minimum.

MR. CLEARY: Then the next question, Your Honor, is really just to pick the Court's brain on this as to what procedure you're anticipating we'll be following in the general voir dire round.

In other words, will there be questioning by parties, or not, or will the Court do all the questioning. And if so, if you have a sense of whether you want to bring in all 70 jurors at once, or are we going to bring them in staggered over a certain period of time.

THE COURT: Well, let me get the parties input. I like to decide things after I give the parties an opportunity to give me their input.

I want your perspective as to what you desire to occur.

MR. DENVIR: Your Honor, can we suggest this is something – perhaps this is something we can discuss with the Government and see if we have a proposal for you, rather than trying to react on the spot to these questions.

THE COURT: Okay.

MR. DENVIR: Seems like we could maybe go through whatever these are and see if we have an agreement or disagreement and report to the Court.

THE COURT: You're right. But let's cover as many things as we can so we know what you are going to be working on.

MR. CLEARY: On that issue, Your Honor, you may want to inquire with the Marshal to see what sort of transportation issues it would create for them to bring 70 in or some smaller group of people each time.

THE COURT: We can bring 70 people into the courtroom.

MR. CLEARY: Okay. That's not a problem for the Marshal to transport them?

THE COURT: We can do it.

MR. CLEARY: Okay.

MR. DENVIR: One question may be, Your Honor, that's related to that, is is there a place where you could assemble all the people in one place. Would you use the – Or would you intend to bring them in in groups if you have 70 people?

THE COURT: These are things that we would typically discuss at a chambers conference, but I think the public has an interest in them, and I would make the chambers conference minutes or notes, I should say transcript, available to the public later anyway, so we might as well discuss them right now.

I am considering two options. One option is to bring – Well, let me back up.

It is my impression that one of the parties has asked the Court to have all 70 physically present at the time – they have to be physically present at the time we conduct examination. The question is whether they have to be physically present at the time you exercise your peremptory challenges.

I don't think they need to be physically present at the time you exercise your peremptory challenges because you will know who the 70 are because you would have examined them.

I mean, I will have examined them, and you will examine them. I'm going to give you an opportunity for some follow-up examination, because I assume you want that opportunity.

Is that correct?

MR. DENVIR: Yes, Your Honor.

MR. CLEARY: Yes, Your Honor.

THE COURT: All right.

I am inclined, though, to put time limits on the examination so that the process will end at a time certain. And I'm going to want your input concerning time limits.

My preference, I believe, is to bring the 70 into the courtroom, although we have the option of doing this at Cal Expo. But I'm not sure I like that option.

I think we could place 18 in the jury box area. There are 14 seats in the jury box itself, and place an additional seat in front of the jury box so there would be four seats rather than three that are presently there now. We would place them in sequential order, and then we would place the remaining jurors in the courtroom. And we would create a chart so that everyone would know where the jurors are seated.

They would assemble, perhaps in an adjacent courtroom, and then they would be brought into this courtroom. And they would take their assigned seats. That's assuming that we use the courtroom. And that is my leaning.

Then we would go through the voir dire process. I assume that you will be proposing voir dire, that you will be meeting and conferring on this. We had this type of discussion before in chambers.

I'm not sure the parties agreed on the Court's role before, but I'm going to have a role. I'm going to ask questions. And then I'm going to give you an opportunity for follow-up questions.

And so if you work together creating the questions that you know I'm going to ask, then that would give you an idea as to how much time each side should have for follow-up questions. And we would go through that process.

And then at the time we exercise – at the time you exercise your peremptory challenges, in every case I have presided over where I have used this system – This is sometimes referred to as the Arizona system. It's also, I think, in a case called the Strike Method. You use a sheet of paper, and you pass it back and forth. It is not unique to this case. And lawyers typically do not tell the Court how they have exercised a peremptory challenge. They just – They write the seat number of the juror sought to be challenged, and then they just pass that back and forth.

I question whether the jurors need to be in the courtroom when you do that. And that is something we probably should discuss now.

It seems to me that the juror administrator should tell the jurors to bring reading material so that they can be assembled some place else when you are in that process. Otherwise, they're just seated in the courtroom in silence, I presume, while you exercise your peremptory challenges.

I do want your input on that aspect of what I have stated.

MS. CLARKE: Your Honor, assuming that the challenge follows the general voir dire so that we see the entire panel one more time, we would have no problem with them being excused while the passing back and forth process goes on.

MR. CLEARY: That's fine with us, Your Honor.

THE COURT: Okay. With that in mind, then at the time you have finished exercising peremptory challenges, we would only bring into the courtroom those individuals selected to serve on the jury.

It's possible that I would bring the others ones in and that I thank them and excuse them, but we would initially bring in those that are selected to serve on the jury. And they would actually occupy their seats in the jury box.

MR. DENVIR: Can I make one inquiry, Your Honor, because it wasn't clear to me. In going back between the parties, as I understand it, if you pass, then you lose the challenge?

If you pass a challenge, then you lose it at that point; am I correct on that?

THE COURT: That is in our Local Rule.

MR. DENVIR: Right. I guess my question was, if both parties pass on a given round, does that end it? Or do we continue on to the next round?

Someone raised that question, and I said I don't know what the answer is.

If we were on round three, and we each had two challenges, and both passed the round, does that end the challenging and we take the first 18, or do we continue around?

THE COURT: That's the Jury Box System. In a Jury Box System, where you actually call people into the jury box, and you start with the amount that you are going to end up with, that would be the situation.

I don't think that's the situation using the Strike System.

However, if you tell me that you are finished exercising your peremptory challenges, then that would end it. But if you don't tell me that, you are to write the word "pass", and you will lose that particular peremptory challenge. But that doesn't mean you have lost the remainder of your peremptory challenges.

MR. DENVIR: I just wanted to clarify that. It came up, and I wasn't sure what the answer was. But I felt we ought to know.

THE COURT: All right. Does this system sound workable?

MR. CLEARY: It does, Your Honor.

If I can ask two things for clarification purposes?

Under this system, you can strike anywhere on the panel, correct?

In other words, we can choose to strike the 70th juror first, then later choose to strike the first juror?

We don't have to go in numerical order?

THE COURT: No, you don't. But we do need to focus on that question.

You will first select the regular juror because you will end up with 12 jurors as your regular jurors. Then you will select the alternate jurors. You can't use a peremptory challenge to strike a regular juror. Once you select the regular jury, that is your jury.

To me that relates to your question.

MR. CLEARY: Right.

THE COURT: Any questions?

MR. DENVIR: I guess I would like a little clarification on that.

I thought that we – There is 23 – There is 20 challenges to the regular jury, three to alternates. I thought your original proposal was that each side would go through the full 23. There would be 18 left or a little more. The first 12 in numerical order would be the jury, and the next six would be the alternates.

THE COURT: It's never worked that way in any case I presided over.

Congress gives you 20 to affect those that are going to be regular jurors for a purpose. And you only use the 20 to strike the regular jurors.

MR. DENVIR: Okay. Let me see if I understand that.

At the end of ten rounds of two strikes each, then you take the first 12 jurors that are there –

THE COURT: Right.

MR. DENVIR: – that are left. And they're – they're the regular jury.

THE COURT: Right.

MR. DENVIR: Then you continue on for this one round of two and one round of one, and then you take the next three that are left after that.

THE COURT: Right.

MS. CLARKE: So we would be striking from the first 52 for the jury – for the 12?

THE COURT: I'm not following that inquiry.

MS. CLARKE: You can strike anywhere in the 64, but –

THE COURT: You can strike anyone.

I mean, it's up to you who you strike when you are selecting regular jurors. But the first 12 that are – the first randomly selected 12 that are left after you have exercised your peremptory challenges for striking regular jurors, they are on your jury.

And once they are on your jury, that is your jury. That's your regular jury. Then you can proceed, and you can strike the other ones.

But you're not limited who you strike when you strike someone – when you're initially striking regular jurors. But you do have limits on you when you are exercising your peremptory challenges that are only given to you by Congress to strike alternate jurors. Because it's for striking alternate jurors. It is not for striking a regular juror.

Does that make sense?

Any questions?

MR. CLEARY: Nothing on that issue, Your Honor.

I do have one other point of clarification on voir dire itself.

What the Court is proposing is a general voir dire, all 70, or however many there are, the full pool of jurors, do that general voir dire at once, correct?

THE COURT: That is my idea, but you suggested another alternative in which we need to consider.

What you have suggested is bringing in the jurors in lots of 20 or lots of 23 so that it equals a certain amount so that we only make three trips.

I wanted to get the defense's input on that.

MR. DENVIR: Maybe we can think about it over the lunch hour. Running out of energy.

THE COURT: We need to cover another matter, though.

I'm certain you have been counting how many jurors we have, and you have a prediction as to when we will be finished, when we will reach 70.

I'm assuming that. I said I was certain, maybe I shouldn't say it that way.

MR. DENVIR: Assumes facts not in evidence, Your Honor.

THE COURT: It probably does, and I shouldn't do that.

But can you give me your projection?

I'm trying to figure out when we're going to start this process with the full pool.

MR. DENVIR: Your Honor, again, maybe we can – we can address that, try to figure it out.

One of the problems is we have, for instance, eight causes for – challenges for cause from last week that are pending before the Court.

The parties will be filing some presumably for the last couple of days. We don't even have a briefing schedule on that. And then, as you know – as you know, the number of jurors we seem to clear on any given day can go from a very small number to a very large number. But I they we can probably give some sense of that under different scenarios.

THE COURT: I think you're right. We should include this as a topic when we meet.

Also, a proposed schedule – briefing schedule for dealing with all challenges for cause. And then we should have a projected date as to when we are going to assemble the full jury. I would like to get your input on that.

And your challenge for cause schedule may affect that date. However, I will make adjustments to my calendar to handle the challenges for cause as soon as I can so that we can immediately move into the peremptory challenge phase of the proceeding.

You would also need to consider when you would propose questions for the Court to ask the full group.

Have you thought about opening statements or the proximity of the opening statements to the selection process?

MR. CLEARY: Your Honor, it seems to me that's going to be guided by whether the Court wishes to have argument on the pending 404(b) briefs and our suggestion that the Court have a 104 hearing in advance of the trial.

If those arguments have not taken place, we could move right into opening statements, it seems to me, right after the jury is fully selected.

But there may be some delay for those two proceedings to take place if the Court wishes to have them.

THE COURT: I want your input, but I want to ask a question first.

Does the Government contemplate its opening statement including the sealed 404(b) material?

MR. CLEARY: It does, Your Honor.

THE COURT: Well, at the point you make an opening statement, there would be no need for a continued sealing order.

MR. CLEARY: That's correct.

MR. DENVIR: Your Honor, the only thing I wanted to advise the Court of is that we proposed to the Government a possibility of reaching stipulations that might change, number one, the length of the trial, and might also resolve some or all of the 404(b) questions. And we're still in the process of that.

The Government is – Government is considering that matter. So that also may affect some of those – those later two questions about the 404(b) motions and opening statements.

And I hope we'll be further along on that later in the week, early next week.

THE COURT: How about the Government's position on the 104 matter?

MR. DENVIR: Actually, that's another matter that may be stipulated.

We have proposed a number of stipulations. We've discussed it, and it might be that also will be resolved.

I don't know when we can get back on –

MR. CLEARY: Can I have one second to talk to counsel?

THE COURT: Yes.

(Counsel confer.)

(Brief pause.)

MR. DENVIR: Your Honor, what we were just discussing with the Government is that it is very possible that the 104 question will be resolved by stipulation. At least that's something we are discussing and hope to resolve.

It's something that we've discussed earlier, but we haven't had a chance to resolve it mainly because we've been in jury selection for a while so . . .

THE COURT: You also are indicating that it's possible that certain 404(b) issues could be resolved?

MR. DENVIR: Some or all. Possible.

MR. CLEARY: That's correct.

MR. DENVIR: Everything is possible.

THE COURT: All right. Bearing in mind that a possible resolution looms, is the Government in a position at this moment to estimate the length of its opening statement?

MR. CLEARY: We are, Your Honor. We guesstimate it will take about an hour for opening statement.

THE COURT: I'm going to let you meet and confer on these issues, give me your proposals. I hope it is a joint proposal, but give me separate proposals even if you can't agree.

All right. Thank you.

MR. CLEARY: One other issue, Your Honor, separate and apart from the scheduling matter, more a substantive issue.

We have objected on a number of occasions, once or twice anyhow, to the question that both the Court asked – has asked and the defense has asked of prospective jurors about premeditated, cold-blooded murder, and whether that would compel the juror to vote for the death penalty.

THE COURT: I never knew you objected to my question.

MR. CLEARY: Maybe we haven't objected to your question, but defense has asked that same question. And I think you are right, we have not objected to the Court's question.

THE COURT: You never told me you had a problem with it until now.

MR. CLEARY: We haven't. We objected to the defense. And we probably should have brought it to the Court's attention earlier.

But what prompted – What is prompting my statement today is, at this time, is that the last juror kind of hit the nail on the head for us. He was asked what does "cold-blooded" mean to him. And he said that it meant lack of remorse and that there was planning for the crime.

And frankly, for what it is worth, that's the way I've always looked at the word – the phrase "cold-blooded".

THE COURT: I want you to – I'm not saying you're not going to do this, but I want to have your position crystallized because you mention a number of terms, but now you are just focused on the term "cold-blooded"?

MR. CLEARY: That's correct, Your Honor.

THE COURT: Is that the focus of your –

MR. CLEARY: That is the focus of what I'm saying.

THE COURT: – argument?

"Cold-blooded"? You don't like that?

MR. CLEARY: That's right. "Cold-blooded".

THE COURT: Okay.

MR. CLEARY: And it seems to me that that term, "cold-blooded", incorporates at least two statutory aggravating factors; the lack of remorse and the planning or substantial planning.

And therefore, to ask the juror whether finding that there was a premeditated, cold-blooded murder, would that compel you towards the death penalty, is really not the issue.

It's a misleading question, quite frankly. Because for the juror to come back and say, yes, it would – well, there is nothing wrong with that.

THE COURT: Let me say something.

MR. CLEARY: Sure.

THE COURT: I'm not sure why the defense was using that term. Maybe the defense was using the term because I used the term.

I used the term because I have been trying to use as many terms as feasible to ensure that prospective jurors understand that there is no justification for the murder we are talking about. And I had assumed that that term would help jurors understand that. But I personally don't have to use that term.

I feel that I use more adjectives than I need to before the term "murder" for the same purpose, because I don't – I don't know what lay people know.

I mean, I assume they know what "deliberate" means, but "deliberate" and "intentional" probably mean the same thing. And then "premeditated", if something is premeditated, and if it's "murder", it probably means the same thing as some of the components of "intentional" and "deliberate".

But I don't think you need to use all of those terms. I added "cold-blooded" simply because I thought it made it graphically clear that there is no heat involved. There is no passion involved that's associated with manslaughter and other types of homicides where an individual perhaps has some recognized motive for a homicide.

You shouldn't call it a murder, because it is not called murder. It's called manslaughter.

MR. CLEARY: I think that question does accomplish exactly what the Court was setting out to do, to communicate that fact to the jury. The only problem we see is it can, I believe, communicate more, that is that phrase "cold-blooded".

THE COURT: "Cold-blooded"?

MR. CLEARY: It can communicate a statutory aggravating factor. And I know that is not what the Court is trying to do, but I'm assuming that you're trying to ask the juror a murder that takes place, without any aggravating circumstances, would you automatically vote the death penalty on that. And the – the juror says, yes, that's obviously problematic.

But if the question is interpreted by the juror as giving them an aggravator, we don't give them any mitigators, then their answer that they would vote for the death penalty is not a reason to exclude that juror for cause. And that's what my concern is, Judge.

THE COURT: To boil it down to its essence, you are stating that the word "cold-blooded" can be construed different ways by jurors, and you don't know how they are construing that concept.

MR. CLEARY: That's correct, Your Honor.

THE COURT: All right.

The defense?

MR. DENVIR: Well, Your Honor, I think that the Court first used that word, though we'd be happy to take credit for it.

I think the purpose was to get out of these situations where people were talking about self-defense, they were talking about spousal abuse type manslaughter, heat of passion and provocation type things.

"Cold-blooded" has been used a number of times, and I've yet to hear one juror who had a problem, except the last juror. And I think Mr. Cleary is wrong in suggesting that it encompasses statutory aggravating factors.

It certainly has nothing to do with remorse, because one can commit a cold-blooded murder, then feel bad about it afterwards. And it certainly has nothing to do with planning, because you can commit a cold-blooded murder without any planning. The planning is more caught up in the word "premeditated" and "deliberate".

So I don't think it encompasses statutory aggravators in any way at all. And it would be a rare juror that would ever – would ever think that was true.

I think the Court's question has been very helpful in letting the jurors focus on the type of crime that they – that the death penalty is an option for.

And we had before that, as you recall, a number of questions that were always going off into people really think of murder as encompassing what we know to be manslaughter, self-defense and a number of other kinds of homicides.

So I think it has been very helpful and certainly the basis for the objection is wrong. There is no way that that should – that "cold-blooded" means either without subsequent remorse or that it involved planning.

MR. CLEARY: May I reply, Your Honor?

THE COURT: Yes.

MR. CLEARY: Mr. Denvir says this has never been a problem until today. We don't know that as we sit here today whether it has been a problem for jurors or not because we have never asked a juror until today what "cold-blooded" means to them.

And the one and only juror we've asked that to says that it means planned and no remorse. And no remorse is an aggravating factor – a statutory aggravating factor. That's what it meant to that juror.

And we're both speculating, but I would bet there are other jurors who got the same connotation from the word. Certainly the connotation that I got – for what it is worth, that I got from the phrase.

Mr. Denvir also raises the question about planning. And he says that is incorporated in the phrase "premeditated and deliberate".

If that's true – and I haven't been thinking along those lines – but if that is true, that's not a good choice of words either for the same reason.

We don't want to be giving the jury things that they can interpret as aggravating circumstances without giving them mitigators, then asking them if the death penalty would be appropriate in those circumstances. That is not what we are shooting for.

THE COURT: Bearing in mind the defense's objective, what terms could be used?

MR. CLEARY: I think deliberate murder with – not in the heat of battle or heat of passion. Because I think that is precisely what the Court is trying to get at, that there is no heat of passion.

Maybe that's the best way to state it.

(Brief pause.)

(Counsel confer.)

MR. CLEARY: Your Honor, if I may?

One other suggestion would be to try to stay away from the legal terms entirely and do things like a deliberate, intentional killing of another human being without heat of passion. Murder itself is a legal conclusion.

THE COURT: The defense?

MR. DENVIR: We think the later suggestion, Your Honor, is just – it's not helpful. What we're trying to do is get the jurors to explain their feelings on the death penalty. And to start talking about a deliberate, intentional killing, I mean, that could be self-defense. It could be a number of different things. So I think this later suggestion makes no sense at all.

If the Court is not inclined to use the word "cold-blooded", I would suggest as an alternative that the Court could say "without justification or excuse", "without heat of passion or provocation". And premeditated, deliberate and intentional, without those four things, and that – that's a longer way of kind of giving them the same sense of it.

THE COURT: Government?

MR. CLEARY: Your Honor, the same problem with the terms "without justification and excuse". Those are legal concepts, and I'm not sure jurors understand what they mean.

Moreover, the excuse or justification may be interpreted as a statutory mitigator. Like duress. That is the excuse for him committing the crime. He's under duress at the time. So I don't think – I think those create the same problem where we started.

In addition, in connection with the statement that Mr. Denvir made about "killing" not being helpful, that is, in fact, the word we use in question 108.

We asked them on the death penalty: "Where one person intentionally kills another person." And that's been the starting point for a lot of the questioning of the prospective jurors.

MR. DENVIR: Well –

THE COURT: I understand this – the problem that was just stated.

You can intentionally kill another person in the heat of passion. It could be manslaughter. That's an intentional killing. And so that's the problem.

It basically doesn't concisely present the juror with the type of killing we are interested in.

In light of the Government's objection to the use of the term "cold-blooded", I'm inclined not to use that term. And I will try not to.

I would hope that you could discuss this issue and assist the Court so that I don't have to think about this alone, and see if you can't agree on terms that I could actually use.

MR. CLEARY: Fair enough, Your Honor. Thank you.

THE COURT: Thank you.

But I'm going to need your input at 1:30.

MR. CLEARY: Sure.

(Off the record at 12:05 p.m.)

SACRAMENTO, CALIFORNIA

WEDNESDAY, DECEMBER 3, 1997, 1:30 P.M.

—oOo—

THE COURT: Let the record show all of the participants are present. Ms. Clarke is not present.

MR. DENVIR: No, Your Honor. She may be – she’s doing something else.

THE COURT: Okay. Do we need to cover anything before we start? We do.

MR. CLEARY: I believe the Court wanted to hear from the parties on the change on that one question we were talking about. I think we’re close but we’ve not reached agreement so maybe we could tell you where we’re at and defense can tell you where they’re coming from.

The language we would suggest, Your Honor, is an intentional, unprovoked, deliberate killing of another human being. Not in self-defense.

MR. DENVIR: We still think that the initial phrasing the Court used is fine, and we would urge you to use that. If not, we think in addition to what the government suggests, premeditation should be in there, because it’s very clear that means something to the jury. We think murder should be in there instead of killing, and we think there ought to be something that says that it’s without justification. We think that’s the kind of – we’re trying to replace the word coldblooded with –

THE COURT: Unprovoked, wouldn’t that indicate without justification?

MR. DENVIR: In the heat of passion. There’s a number of different things people start thinking as pulling away from that. What we would be trying to do – I think cold-blooded did it, but if you’re not going to use it, we want to get that murder. That’s kind of a mainstream first degree.

THE COURT: I want to avoid controversy.

MR. DENVIR: We would suggest adding premeditated. Instead of killing put in the word murder, and then add without justification.

MR. CLEARY: As a compromise, we’ll go along with that, Your Honor.

THE COURT: Okay.

MR. DENVIR: The only other thing, Your Honor, we do have some thoughts as to the question you had about dates. We could deal with that at the end of the day. We did meet and confer and try to come up with some dates about voir dire and all those questions you wanted.

THE COURT: Okay. Let me ask you a question about juror 148. You may not have information available concerning the juror. The juror did not appear for voir dire apparently due to a medical excuse. I have the excuse in my hand. A physician wrote stating that at this time, the juror is unable to serve as a juror due to medical – due to his medical condition. I thought you would want me to call the physician to find out how long the disability would last, and, in fact, whether the nature of the disability disabled the juror from performing jury service.

I did call, I did receive information, the disability from the physician’s perspective is disabling, and it would disable the juror until next week or the week thereafter. The physician didn’t tell me for certain whether it’s one additional week or two additional weeks that the juror is disabled.

MR. DENVIR: We stipulate to excuse the juror, Your Honor.

MR. CLEARY: Your Honor, you may want to put that off until you hear what our schedule is, because of the proposal we’re going to make jointly, this would probably enable this person to serve.

THE COURT: We’ll put it off.

(Prospective jurors enter courtroom.)

THE COURT: Good afternoon, and welcome to the United States District Court. My name is Judge Burrell. I would like my deputy clerk to please administer the oath to the prospective jurors.

(Prospective jurors sworn.)

THE COURT: Good afternoon. Welcome to the United States District Court. My name is Judge Burrell. I will preside over this trial. The person who just administered the oath to you is Shani Furstenau, my courtroom deputy clerk. Next to on the same flat platform with Ms. Furstenau is Dennis McKinnon. He’s the certified shorthand reporter who will be participating in reporting this proceeding and helping the Court administer this trial.

I trust that you will fulfill your civic duty during this voir dire questioning process. I thank you both for your presence and your anticipated cooperation. You’re performing an important function in our justice system. Under the principles of our constitutional democracy, the parties in this case are

entitled to a fair and impartial jury. That right would be meaningless without citizens such as you making themselves available for juror service.

The voir dire or questioning process is an essential way of ensuring that a fair jury and impartial jury is obtained. Please answer the questions as honestly as possible. Please don't be concerned about someone else's view of your answers. Each prospective juror's answer is of no concern to anyone else. We value your opinions and we want your opinions. We want you to give us the most candid answer you can possibly give us to every question. If that causes you to stop and think and to ponder, don't worry about it, we've got all the time that's necessary so that you can take the time necessary to answer the questions and we can get the best answer you can give us. The parties value your opinions.

The voir dire process will involve questioning prospective jurors individually which will commence after I question you as a group. After a number of jurors are questioned this way, some jurors will be called back for further questioning as a group. We'll let those jurors know who are involved in that process by noticing them. Our objective is to obtain a fair and impartial juror that will decide this case based upon the evidence that is presented here in this courtroom and on the instructions that I will give you during the trial.

I decided to do individual voir dire in part because the parties have requested it, and also because there has been publicity about the case. During the individual voir dire, we will cover the publicity area and other matters that tell us whether you should sit as a juror on this type of a case.

The defendant has been charged with transporting and mailing explosive devices with the intent to kill or injure others. The law of the United States provides that if the jury finds the defendant guilty of either of these offenses and that a death resulted from the defendant's commission of the offense, it will be the responsibility of the jury to determine whether the defendant should be sentenced to death, life imprisonment without possibility of release, or a lesser sentence. Life imprisonment under the federal system means just that. It means life imprisonment. There is no parole under the federal system. If you're sentenced to life, you will spend the rest of your life in prison.

The next determination is made at the second phase of the trial which is referenced as the sentencing phase. If there's anything about the charges that causes you to prefer not being a juror in this type of case, please indicate that fact by raising your hand now.

There's no response.

The first part of this trial, which will be referred to as the guilty or not guilty phase will occur like any other criminal trial in Federal Court. The government will present its case first. The government has the burden of proving every element of the crimes charged beyond a reasonable doubt. If it fails to do this, you must return a not guilty verdict. The charges are not evidence. They are simply accusations, nothing more.

Mr. Kaczynski is presumed to be innocent and does not have to testify or present any evidence to prove his innocence. During the sentencing phase, additional evidence may be presented by the government or the defendant. At the sentencing phase, the jury will be called upon to decide whether certain aggravating factors exist. And if so, whether those aggravating factors sufficiently outweigh all the mitigating factors found to exist, or in the absence of any mitigating factors, whether the aggravating factors alone are sufficient to justify a sentence of death.

An aggravating factor is a fact or circumstance which might indicate or tend to indicate that the defendant should be sentenced to death. A mitigating factor is any aspect of the defendant's character or background, any circumstance of the offenses, or any other relevant fact or circumstance which might indicate or tend to indicate that the defendant should not be sentenced to death. At the conclusion of that hearing, the jury would then deliberate again as to the appropriate penalty.

Since one of the options to be considered at the sentencing phase of the trial includes the death penalty, you will be asked questions during voir dire about your views of the death penalty. We may ask questions in additional areas too.

During this questioning, we'll refer to you by your randomly selected number rather than by your name. This is because I decided to use an anonymous jury as I told you in the previous communication.

Now I will give you a jury instruction. I will now say a few words about your conduct as jurors. First, do not talk to each other about this case or about anyone who has anything to do with it until after you have been excused from service on this case.

Second, do not talk with anyone else about this case or about anyone who has anything to do with it until the trial has ended and you have been excused as jurors. Anyone else includes members of your family and your friends. You may tell them that you are a juror, but don't tell them anything about the case until you have been excused by me.

Third, do not let anyone talk to you about the case or about anyone that has anything to do with it. If someone should try to talk to you, please report it to me immediately.

Fourth, do not read any news stories, articles or listen to any radio or television reports or access any Internet stories or comments on the Internet about the case or about anyone who has anything to do with it. Statements contained in news accounts may be inaccurate or exaggerated, and it would be unfair to the defendant as well as to the government to permit such information to influence your decision in this case. It would also be unfair to your fellow jurors to base your decision in part on information which they may not have heard and which they had no opportunity to discuss.

For these reasons you should avoid reading or listening to future news accounts during the time period in which you are involved with this case. Justice requires strict adherence to this prohibition.

Fifth, if you need to communicate with me, simply give a signed note to my deputy clerk to give to me.

The trial schedule I contemplate having will be from

8:00 a.m. to 1:00 p.m. Monday through Friday. This would mean that the jury would assemble by 7:00 a.m. to be brought to the courthouse. Please raise your hand if this poses a problem.

We'll talk to you about it later. Juror 171 raised her hand.

I contemplate observing the holiday season as follows: We'll not hold court December 24, 25, nor the 26th; nor on January 1 or 2. I contemplate holding court December 22, 23, 29, the 30th, and the 31st. Please raise your hand if this poses a problem.

There's no response.

Please raise your hand if you do not understand the following: Your first duty as a juror will be to determine whether Mr. Kaczynski is guilty or not guilty of the charges without consideration of any penalty.

There's no response.

If you find Mr. Kaczynski guilty of the charges that I told you about in my opening comments to you, then we would proceed to a sentencing phase of the trial. At the sentencing phase, a sentence of death would be among alternative sentences the jury would be asked to consider. Evidence would be presented and the court would provide the jury further instructions on the law. The law requires each juror to carefully consider all the facts and circumstances presented.

The government may focus on certain aggravating factors. Things that it will urge the jury to find supports the sentence it seeks. You will also have to listen carefully and weigh any mitigating factors, meaning anything that might explain the crime or put it in context or anything that might suggest Mr. Kaczynski deserves a sentence of life imprisonment without possibility of release or some lesser sentence. Raise your hand if you do not understand this.

There is no response.

Raise your hand if you will be unable to reserve your judgment on the sentence you believe should be imposed until after you have heard all the mitigating and aggravating evidence.

There's no response.

If you're selected to sit on this case, each of you will be required to render a verdict solely on the evidence presented at the trial and by applying the law as I will give it to you in my instructions whether you agree with that law or not. If you have any belief that will interfere with your obligation to do this, please indicate that fact by raising your hand.

There's no response.

During the individual questioning, if you conclude that any question unduly pries into your private affairs and you therefore wish to discuss it privately, let me know of that request. While I'm authorized under law to protect your legitimate privacy interests, I may ask some questions in the area that you indicated a desire to keep private so that we can determine whether aspects of the matter can be discussed in open court and public. If this can't occur, let me know so I can determine whether the matter should be discussed in a more private setting. This approach is taken because the trial should be open unless I have a legitimate reason to close any aspect of it.

I'm now going to ask my deputy clerk take all but the earliest randomly selected juror to the adjacent room, and I'm going to have her place the remaining juror in the witness box.

(Prospective jurors left the courtroom.)

(Prospective juror number 169 remains in the courtroom.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Thank you for joining us. You're the 169th randomly selected juror. Is there any reason why we shouldn't continue to consider you for possible jury service on this case?

A. None that I know of.

Q. Okay. Did you fill out a questionnaire at Cal Expo?

A. I did.

Q. Since you answered your juror questionnaire at Cal Expo have you been exposed to information about the case?

A. No.

Q. Okay. Since you answered the juror questionnaire at Cal Expo have you discussed the case with anyone or overheard other people discussing the case?

A. Don't know enough about it to discuss it.

Q. I'm sorry?

A. No.

Q. Okay. I'm now going to direct your attention to the time period before you appeared at Cal Expo. And I'm going to tell you the reason why I'm going to ask you the question I am going to ask you. As a judge, I am required to find out as much information as I can for you have heard about the case as I possibly can. So I am going to ask you a question asking you to tell me all that information. Knowing about the case before you come into the courtroom does not prevent you from being considered as a juror in this case. But the law requires that we find out what information you have been exposed to for two reasons.

One reason, it allows us to objectively evaluate the possible impact that information could have on you, and we also will give you an opportunity to tell us from your own personal perspective how you believe the information has affected you, if at all. I want you to tell me everything you recall hearing about the case, this is in your whole life, and I want you to give me as many details as you possibly can.

A. I don't remember enough about the case to have any details because it's my philosophy in life, that which I have no control over, I don't pay it much attention.

Q. Okay.

A. So I seen it on T.V., but to pick out something, I wasn't that interested.

Q. Do you have on your mind what you think will occur in this trial, what type of evidence do you envision seeing during the trial?

A. Well, I deliberately try to become completely nil on that too and let the trial produce the material which I think about.

Q. Do you believe that the case involves bombs?

A. Oh, yes. Couldn't ignore that.

Q. What information did you receive in that regard?

A. Just over all the news reports I seen, and different ones talking about it. Nothing particular.

Q. How about a cabin?

A. I know there is a a cabin up in the mountains where he lived, and when he ceased to being an instructor, and that's about it.

Q. Did you receive any information concerning a search of the cabin?

A. Otherwise from what I heard on TV, that they went in there and found some material that might be pertinent to the case. I don't even remember what the material was.

Q. You don't remember any of it?

A. No.

Q. Okay. Anything else you can remember about the case?

A. No, except such – as I said before, I usually leave that up to the people who get paid to make the decisions.

Q. Has the information you received about the case caused you to form an opinion as to Mr. Kaczynski's guilt or innocence?

A. My opinion is whatever the Court decides, that's final.

Q. If you are selected as a juror in this case, do you have the personal capacity to leave out of the courtroom the information you received about the case outside the courtroom?

A. Repeat.

Q. Let me ask it another way. If you were selected as a juror in this case, is there anything that you know about yourself that would prevent you from making a determination as to Mr. Kaczynski's guilt or innocence based solely on the information that is presented during this trial in this courtroom?

A. No, I don't know of any influence that would influence me differently.

Q. Okay. If you're selected as a juror, would Mr. Kaczynski begin this trial, in your eyes, from your point of view cloaked with the presumption of innocence?

A. Innocent until proven guilty, right.

Q. Okay. You're right. That's what the doctrine states.

A. That's what I believe.

Q. A criminal defendant has no obligation whatsoever to present any evidence. It can rely on the presumption of innocence. And he is protected by that presumption unless or until the government proves his guilt beyond a reasonable doubt. And if it doesn't do that, you would have to enter a not guilty verdict in favor of the defendant. Do you understand that?

A. Completely in agreement.

Q. Okay. Do you consider yourself an opponent or proponent of the death penalty?

A. I believe in the death penalty.

Q. Okay. Have you thought about your views on the death penalty to the extent where you can share them?

A. Most of my life.

Q. What are your views on the death penalty?

A. It's a necessity in this society in which we live in.

Q. I want you to join me in a hypothetical. Assume that you were, in fact, selected to be on the jury. You and your fellow jurors during the guilt and not guilty part of the trial, to Mr. Kaczynski's disappointment, found Mr. Kaczynski guilty of the offense of intentional, premeditated, unprovoked, deliberate murder of another human being without justification and not in self-defense.

Do you have that finding in mind that I just said?

A. What's your question?

Q. You're right, I haven't asked the question yet. Despite that finding, when you go into the sentence phase of the trial, would you still be able to consider voting for a sentence less than death?

A. Go with an open mind.

THE COURT: All right. The parties may examine.

VOIR DIRE EXAMINATION

BY MR. SOWARDS:

Q. Good afternoon, sir. My name is Gary Sowards. I'm one of the attorneys for Mr. Kaczynski. Let me ask Your Honor, does the juror have his questionnaire?

THE COURT: Doesn't have it yet.

Is this your questionnaire, sir?

PROSPECTIVE JUROR NO. 169: Right.

Q. BY MR. SOWERS: I wanted to ask you a few questions to follow up on those matters that Judge Burrell has just been talking to you about and also some of the answers that you gave on your questionnaire.

With regard – if you could look at page 11, it's the second part there, question 41, near the top of the page. There's a question that asks about what sort of things you may have said to others or others said to you. Do you see that, sir?

A. Yes, I do.

Q. Okay. And you mentioned you had a conversation with one of your relatives about whether you should or should not be involved in this case.

A. Oh, you're on 42?

Q. Yes, sir. I may actually be there.

A. What's your question?

Q. I just want to ask you if you could explain to me what you meant by that answer when you said you had a talk about whether you should or should not?

A. Well, I felt I needed to in order to clear the way as to whether I would or wouldn't with those who were involved in my life.

Q. And is it comfortable for you to share exactly what concerns or questions you had in that regard?

A. Yeah.

Q. Could you tell me?

A. Largely the health of my wife, because I knew I would be without her for some time. We have reached the point of 80, and we don't have a teenager physical body anymore.

Q. I am sort of past that point myself. I know the feeling.

A. That's largely what it was. And health.

Q. Were you able to resolve those concerns to your satisfaction?

A. Probably resolved before I started talking. I just wanted to inform you.

Q. So even before you filled out this form that was all taken care of?

A. Probably in my way of life, before I knew there was such a form. I'm still capable of making up my own mind. I just – I like to inform people of what I did.

Q. We appreciate your effort in doing that, sir. But there's no problem in terms of your taking care of your wife or –

A. I got that taken care of now.

Q. Thank you for answering that. I just want to clear that up. Then also, sir, if you – if I could ask you to look over on page 28, I believe it is, right about in the middle of the page here after the beginning of question 109.

There was a question asking you about what you remember hearing and seeing about the case and in the press, and you indicated that in a sense there was too much news to give your opinions to that. And I just wanted to ask you do you recall as you sit there today hearing a lot of news about this case?

A. After I hear so much about an onrunning situation, I tend to hear nothing from then on till I'm sitting there staring at it on TV or in the newspaper, wherever, so I long since lost interest.

Q. So let me see if I understand. Kind of like an overload of just too much information, you hear it all the time?

A. It reached the point where we have to pay people to see after that, so it's none of my business.

Q. I didn't hear the last part?

A. We have paid people to reach decisions that should reach that decision, not me.

Q. But in terms of just you as a citizen – and I appreciate the fact that you think there are people whose job it is to sort this out, and that’s not – at least wasn’t your job before. But when you were in your role as an average citizen not having been called as a juror today, do you recall seeing or hearing a lot of information about this case?

A. A good while ago I paid attention to it, and I received a lot since then, but it didn’t penetrate.

Q. Do you recall about how long ago it was that you stopped paying attention to the information you were receiving?

A. It’s been going on so long now I forgotten that too. I don’t what date I began to dismiss it.

Q. You mentioned when Judge Burrell asked you about a – something about a cabin, you you said something about you remembered that he lived in a cabin. Can you tell me what you were referring to when you said he lived in a cabin?

A. The defendant.

Q. Mr. Kaczynski here in –

A. Right.

Q. Okay. And when you received that information, if you think back and recall the time when you heard that information, did you in your mind make a connection that Mr. Kaczynski was the so-called Unabomber?

A. Yes.

Q. Okay. And was that, as you think back to that time, was that something – did that opinion come from the information you had received before that time?

A. Accumulated information, yes.

Q. The accumulated information?

A. Yes.

Q. And could I ask you, sir, and I don’t mean to ask you to keep revisiting these things that you just heard too much about, but could you give me and Judge Burrell an idea of the accumulated information, the type of information you received up to that point when you made the connection between Mr. Kaczynski and the Unabomber?

A. I really don’t think I have enough registered information to answer that question because that’s how indifferent I became.

Q. If I asked you anything about whether particular writings, information from the Unabomber to newspapers or other sources played a part in this case, would that jog anything in your memory as to whether you heard something about that?

A. I’m so interested in the news till I don’t even take a newspaper. No, it wouldn’t. It wouldn’t matter to me. As I say, I leave it up to the authorities.

Q. And so your news about this case came primarily from radio and television?

A. Probably television, and I say probably.

Q. Can you help me out there, why you say probably?

A. Well, because it wasn’t that important to me. Again, I leaned on you fellas.

Q. I appreciate that. I hope we’re up to the burden. Let me ask ask in regard to the television coverage, if I may just ask a few more questions on this subject. Do you recall on the television news seeing any kind of a search being conducted of that cabin?

A. Can’t be specific, but I do recall someone going in there and looking in the cabin and finding materials they thought would be applicable to the case and then later moving it here to Sacramento.

Q. Moving the cabin or the material –

A. Yeah.

Q. And you got the idea, though, that the authorities were saying this was information – the stuff they were taking out of the cabin was pertinent to the case in terms of proving Mr. Kaczynski guilty?

A. That’s what they implied.

Q. They implied, meaning the reporters or the government officials or something?

A. Right.

Q. Okay. And on the television news reports of the case, do you remember seeing either any stories or pictures of people who were described as being members of Mr. Kaczynski's family?

A. Don't recall. Oh, yeah, I do, a brother that was involved in, I think, reporting him or something.

Q. Reporting Mr. Kaczynski?

A. Yeah. I remember that.

Q. Okay. And any other relatives?

A. Not that I know of.

Q. Okay. And any recollection – just by me saying it, do I bring to mind any recollections of television or news reports of actual crime scenes that were involved with the Unabomb offenses?

A. No, except the picture I can't erase, and that's the bombing of a building. I would be absent-minded if I still couldn't recall see the bombing of a building.

Q. And do you recall what you saw about that?

A. Oh, building – the federal building that was bombed.

Q. Okay. Let me see if I can ask a few questions about what Judge Burrell talked to you about about your views of the death penalty. Let me do that, move to that area.

Let me ask you, sir, if you could turn to page 26. Looking, sir, at question 104, which asks about religious, philosophical or other training and its relation to the death penalty.

Do you have that, sir? Do you see that?

A. Yes, I do.

Q. And your answer was that one of these sources of philosophical or religious guidance informs you that the death penalty is necessary?

A. The older I get, the more positive, yes.

Q. Can you tell me a little more about that, sir, about the evolution of your feeling in that regard as you get older?

A. Society has forced the average citizen to have to have some kind of means of control even to the point of death.

Q. It's where the death penalty comes in?

A. Right.

Q. Okay. And with regard to the types of – general type of crime that Judge Burrell described for you, a crime that would be briefly described as an intentional, premeditated murder, committed without justification, would that be a type of crime that you think the death penalty would be necessary for?

A. Yes.

Q. Would an act of, let's say, would be described as terrorism in which someone had sent a bomb in a package through the mail with the intent and the deliberation and the plan to kill someone without justification, and the person who received the package was killed, would that be a type of crime, type of murder you think the death penalty would be necessary for?

A. Yes.

Q. And, sir, you say the more life experience you accumulate the stronger that feeling is?

A. Right.

Q. And do I understand it to mean that that feeling is one that has become stronger over a considerable period of time?

A. That's what I just said.

Q. I am happy that I understood it. Sometimes I don't.

As you sit there today, sir – and I don't mean this as a trick question. If something doesn't come to mind, that's perfectly all right. But I was wondering as you sit there today, could you think yourself of any situation where you might not think the death penalty is necessary where someone has committed a deliberate, intentional, premeditated murder without justification?

A. I don't get your question.

Q. Okay. I'm sorry. It's probably a bad question. Would you, with your life experience or your philosophy leave open the possibility that there might be a situation in which a person has killed, has

committed a murder intentionally, premeditatedly, with planning, and with no justification, that that person shouldn't be given the death penalty?

A. I believe I could be open-minded.

Q. Open-minded to what, sir?

A. To whatever sentence I might adhere to.

Q. And in terms of just your personal beliefs – and I'm just asking as you know yourself and your personal beliefs, is a crime of that sort one that always makes the death penalty necessary?

A. Oh, I wouldn't say necessary. I would say it would be open. I think you pinning it down when you say necessary.

Q. I don't mean to pin you down. I'm just trying to find out what your thoughts are about it. If you heard of a crime, in other words, if you were asked to consider sentencing someone who had been convicted by you as a member of the jury of committing a deliberate, intentional, premeditated murder, involving an act of terrorism, going in to try to think about what penalty that person should suffer, do I understand it correctly that your personal philosophy is that probably that person should get the death penalty?

A. Probably, yes.

Q. And could you tell me, would it be fair to say that if I'm one of the attorneys defending a person like that, that I would have a fairly strong burden in trying to convince you not to impose the death penalty?

A. I think that would be your duty.

Q. That would be my duty and you would be open to my efforts to try to convince you not to impose –

A. Right.

Q. Okay. But do I understand it to mean that your philosophy and your personal belief is that you would be leaning strongly in favor of death penalty and it would be my duty to try to convince you otherwise?

A. No, I didn't say that.

Q. Okay.

A. I still would be open.

Q. And open to?

A. One way or the other.

Q. One way or the other. Okay. And if you had an – if you were on a jury and you decided beyond a reasonable doubt that a person had committed a deliberate, premeditated, intentional murder, and I or any attorney representing the defendant didn't present any evidence to you, in other words, you just had that crime all by itself to consider, would you be open to the possibility of not imposing the death penalty?

A. Right. Yes.

Q. Can you tell me what factors might influence that decision?

A. No. I couldn't tell you the factors. I'd say that any factor involved in the case on the why would be still open to me.

Q. If I could ask you, sir, to look at page 26, question 105, with regard to your discussion of the purpose that is served by the death penalty.

A. Repeat.

Q. Okay. On page 26 of the questionnaire, question number 105, the question is: In your opinion what purpose does the death penalty serve in our society. Do you see that down at the bottom of the page?

A. Yes, I do.

Q. Okay. Could you explain to me, sir, your answer?

A. I don't think I could explain it any better than what I got down there. Any member of society becomes hopeless, society would be better off without them.

Q. Can you tell me – I guess it's my fault not yours. Can you explain to me your use of the term hopeless, when a person is hopeless?

A. When you no longer fit into society, society has no use for you.

Q. And would the uselessness of a person, in your mind, be determined by the type of crime he commits, or there's some other factor you want to consider in determining whether he's useless?

A. Right now I'm just concerned about the crime he committed, because it – he can become useless in other ways, mentally, physically. You name it.

Q. Let me ask you. In your mind, if someone commits an intentional premeditated act of terrorism, and has planned to do it and actually does it, and intends to kill one or more persons and succeeds in doing that, does that meet your definition of someone being useless?

A. Right.

Q. Okay. Let me ask you if you could, sir – and I appreciate your cooperation in this regard. If we could look over at page – back a couple pages to 24. Looking at number 95, question 95. Just about the middle of the page there it asks for your opinion about psychologists and the like. You see that? Do I understand your answer, sir, to say that they seem to provide an answer that's favorable to whatever side is presenting them or hiring them?

A. Rarely and sometimes never have I heard of psychiatrists or psychologist say anything against who's hired him.

Q. And may I ask, sir, have you had prior experience as a juror or –

A. Yes, I have.

Q. In cases that involved mental health issues, psychiatrists testifying?

A. Yes.

Q. Is that part of the experience you're sharing with us now about not hearing psychiatrists saying something against –

A. No. What I'm saying here comes from my study of psychology and psychiatry as a school teacher.

Q. And with particular reference to the realm of psychiatrists being involved in legal proceedings or more general?

A. Yes. The longer I considered it, the more positive I am whichever side you're on, you're going to come up with a report in favor of that side.

Q. And is there anything in your experience that would lead you to at least be hopeful, if not expect, at least be hopeful that when a psychiatrist comes in the courtroom, he or she might testify in a way that's completely neutral without regard to which side has hired them?

A. Repeat your question.

Q. Sure. Let me simplify it. I'm sure that was much too long. If you were sitting as a juror in this case, and a psychiatrist came in to testify for one side or another, would your thinking as a juror reflect what you have just told us that that person is there to testify –

A. It would reflect it. I don't think it would be binding. I would listen too and consider.

Q. Would it be fair to say that you would have a frame of mind that's going to make you skeptical or make you question whether this person is actually testifying freely and neutrally or whether they're just testifying in favor of one side or the other?

A. I think I could weigh the evidence and reach my own decision.

Q. But do you have an idea what your attitude would be, any attitude at all, before that psychiatrist took the stand?

A. Have no way of knowing until I was there.

Q. Do you think it's a proper role for a psychiatrist to explain to you as a juror whether someone who has committed a very serious crime like the one we discussed is nevertheless an useful person?

THE COURT: That's a confusing question.

Q. BY MR. SOWARDS: Let me try to unconfuse it. I thank the Court for jumping in. I didn't want to say anything confusing.

You mentioned before, sir, based on the kind of crime that person commits, that person may be useless; is that correct?

A. Right.

Q. And one example we discussed a crime where someone commits an intentional, premeditated act of terrorism and kills one or more people?

A. Right.

Q. If you were a member of a jury that listened to evidence and found beyond a reasonable doubt that the defendant in your case had committed such a crime, can you imagine that a psychiatrist would have anything to offer you that would tell you that person is not useless?

A. Oh, definitely. They'd have some material to offer me, yes.

Q. Okay. Have you had – would you imagine you could listen to a psychiatrist or mental health person testify and decide despite your fact that the crime would make the person useless, they nevertheless should not be executed?

A. I don't understand your question.

Q. Okay. I beg your pardon. Would you be at all concerned that if someone came in and testified as a psychiatrist on behalf of the defendant, that that psychiatrist was just saying things for the benefit of the defendant because they had been hired by the defendant?

A. I would take that into consideration, but I would listen with an open mind.

Q. Could you as a juror decide that even though you think the crime makes someone useless, that the information the psychiatrist said about them makes them, nevertheless, useful enough not to be executed?

A. Your question?

Q. Yes. Do you think a psychiatrist could convince you that a person whose crime made you think he was useless is somebody who should be spared the death penalty?

A. Yes, I think it could be mentioned.

THE COURT: You been questioning for almost 30 minutes, not quite.

MR. SOWARDS: Thank you, Your Honor. I appreciate the Court's intelligence. If I may take one look to see if there's any other area.

THE COURT: All right.

MR. SOWARDS: May I have one moment, Your Honor?

THE COURT: Yes.

MR. SOWARDS: Thank you very much, sir.

MR. LAPHAM: No, questions.

THE COURT: Okay. Please bring in the next juror.

(Prospective juror number 169 left the courtroom.)

(Prospective juror number 171 entered the courtroom.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Thank you for joining us. You're the 171st randomly selected juror. You raised your hand in response to information I gave you about the trial schedule. What did you want to tell me?

A. It's not a legal excuse, I know. But I am not familiar with driving in fog and at those hours I will be driving in fog.

Q. How many miles do you stay from the courthouse?

A. From here, I don't know. But from Cal Expo it was probably 55. Probably be about the same. Through Ione, Drytown, Amador City. It's quite foggy.

Q. Is there anyone who can assist you in with the driving?

A. There would have been but my husband will have to take my place at work.

Q. Because you have a business?

A. Yes.

Q. So you have to do the driving yourself?

A. Uh-huh.

THE COURT: The parties want to question?

MR. CLEARY: We would be prepared to stipulate, Your Honor.

MR. DENVIR: We stipulate, Your Honor.

THE COURT: Because of what you stated, we're going to excuse you from further service on the case.

(Prospective juror number 171 left the courtroom.)

(Prospective juror number 172 entered the courtroom.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Thank you for joining us.

A. Yes.

Q. You can take a seat. You're the 172nd randomly selected juror. Is there any reason why we shouldn't continue to consider you for jury service in this case?

A. I might NOT be able to make it on time every time. I live in Pollock and we got El Nino coming. I do get snowed in once in a while. Other than that, no.

Q. How many miles is that from Sacramento, do you know?

A. It's right at 60.

Q. What are the chances of making it on time? I have to get it from your perspective.

A. Other than snow, it's just a matter of getting up early and getting here. Should be okay.

Q. Okay. Only you can tell us whether you believe you can make it on time. I know that will probably pose an inconvenience because it may cause you to get up earlier.

A. Other than the snow, sure, I can do it. But a snowstorm, I don't know.

Q. I see.

A. If IT snows heavily, they don't plow that early. I wouldn't make it on time. I would make it sometime during the day.

Q. Any other reasons that would interfere with your ability to be serve?

A. I'm in the process of starting a business right now, and extended time off would be a real detriment to that.

Q. Is there anyone assisting you with the business?

A. No.

Q. Are you doing that venture by yourself?

A. Yes.

Q. Can you share more information as the nature of that?

A. The hardship.

Q. I'm asking about the type of business.

A. No, income.

Q. Let me tell you what is ON my mind. I'm wondering whether it's something you could postpone, and if you can't postpone it, then I'm trying to determine if it's going to cause you any type of financial concern.

A. Okay. You say you were going to be running until

1:00 o'clock. I don't think I can honestly say I couldn't work around it. It would be just inconvenient.

Q. Okay. You probably would not be departing from the place where you're going to be dropped off until about 1:15, perhaps 1:30. Would that be okay?

A. Wouldn't like it, but, yes, I can't say it's really going to cause anything bad.

Q. Anything else?

A. No.

THE COURT: The parties want to converse about the snow problem?

MR. SOWARDS: May we have just a moment?

THE COURT: Yes.

MR. LAPHAM: Your Honor, we think the government doesn't need to inquire any further on the snow issue.

THE COURT: Meaning the government is willing to assume the risk?

MR. LAPHAM: We are.

MR. SOWARDS: We stipulate. Maybe we can question about that.

BY THE COURT: All right. Thank you.

Q. Did you appear at Cal Expo and fill out a questionnaire?

A. Yes.

Q. Since that time, have you been exposed to any information about the case?

A. Yeah, every once in a while.

Q. Tell me about the exposure, what information?

A. Just some things on the news media. Whatever they've said. To try and tell you what it was, I really couldn't do it. I think – I don't think I can think of a specific thing. But general stuff on the news.

Q. But you can't recall any specifics about any of the things you been exposed to?

A. Not really.

Q. I want to direct your attention – well, let me ask another question. Have you had discussions about the case, overheard other people discussing the case since Cal Expo?

A. I've not had discussions myself, I don't believe. I have heard other people discussing it, yes.

Q. Tell me what you overheard.

A. Again, I can't remember specifics, I just know that people are just going around all the time.

Q. You don't recall any of the details?

A. No, specific details, no.

Q. Do you recall –

A. I haven't tried.

Q. I'm sorry?

A. I said I haven't tried to.

Q. Okay. Do you recall where you were located when you overheard discussions?

A. No.

Q. Okay. I am going to direct your attention to the time period before you appeared at Cal Expo, which would basically cover every aspect of your life during which you were exposed to information about allegations involving this case. And I'll tell you why I'm asking the question. Under law, I am required to ask questions when a case has received some publicity, at least a lot of publicity like this one has received in the media, so that I can make a determination, objectively speaking, as to how the potential juror could possibly be affected by the publicity. I'm going to give you an opportunity to tell me from your own personal perspective how, if at all, you believe you have been affected by the publicity. We don't expect jurors to come in this courtroom unaware of publicity, but we have to know the nature of the exposure.

Can you tell me in as much detail as possible what you heard about the allegations involved in this case before Cal Expo, give me all the specifics you can give me.

A. Okay. Could I – the news media made it look very, shall I say, conclusive like Ted is the one that was the Unabomber. They made it look very much like that. I mean, all of it I saw, pictures of the cabin, pictures of the – I heard all the news up to that time.

And as far as details, what do you want? I mean, the news media made it look like he was the man, and that he is guilty. Now, that's what they made it look like. Do you want my reaction to that or –

Q. I'm going to want your reaction.

A. Okay.

Q. I want you to give me some of the concrete information you received that supports the statement you just made.

A. I think the most concrete thing is that – is a personal belief of mine, and it's that the FBI have concluded he is the man. I know our FBI doesn't go around randomly arresting people. I think they would have a real case before they got in to this. So I start off I figured about 98 percent chance that he's the man. And from what the news media report showing the spokesman from the FBI said and those kinds of things.

Q. You say the man, you're referencing the so-called Unabomber?

A. Unabomber, yeah.

Q. Did you receive information about the cabin where Mr. Kaczynski allegedly resided?

A. Just what the news media showed.

Q. What type of information did you receive about the cabin?

A. They showed the picture. They told about the explosives they found in there, the letter, showed some of his – talked about his past life-style there. What other kinds of – that's about as good as I can remember specifically.

Q. The opinion that you have indicated you have in certain percentages, I think you said something about 98 percent, is that your opinion? How strongly are you committed to that opinion?

A. Well, like I say, I don't believe that our law enforcement is a gestapo-type thing. I have faith they pretty well know what they're doing before they make an accusation. There are times that they're wrong, yeah. But I think that's pretty small or relatively small. So it's just a matter of faith in them and what I see.

Q. Is that an opinion that you are capable of setting aside if you were selected as a juror?

A. I would think I would listen to everything. But I guess I would have to have it proven that he's innocent, and I would be willing to do that, but they would have to prove that. That's not a good way to go according to our court system.

Q. All right. Our court system laws –

A. He's innocent.

Q. He's presumed innocent. Does the information you received concerning the case interfere with your ability to presume Mr. Kaczynski innocent?

A. I don't think so. I don't have a whole lot of confidence in the press, and I been involved with some things and they just don't – the press doesn't – they tend to make the news, in my opinion, tend to make the news more than report the news. So the press doesn't really impress me.

Q. But you indicated that the FBI does impress you.

A. Yeah. I think our law enforcement does.

Q. Does the fact that Mr. Kaczynski was arrested by the FBI interfere with your ability to allow Mr. Kaczynski to be presumed innocent?

A. That's hard to say. I would do my best to be objective as I could. I don't know.

Q. We need to know that. I appreciate your response, because I know that you are telling me what is in your heart, and that is exactly what we want to hear.

But under our system of justice, every defendant is presumed innocent unless and until the government proves the defendant's guilt beyond a reasonable doubt. And if there's something that you have been exposed to about this case that interferes with your ability to allow Mr. Kaczynski the benefit of that doctrine, it may be that's understandable from your perspective, but I need to know the answer.

A. Well, I would have a real hard time just coming in totally open and neutral. Yes, I would have a hard time doing that.

Q. You don't think you could do that?

A. Be very difficult.

Q. Would it be better for you to serve as a juror on another case?

A. Yeah.

THE COURT: Okay.

MR. LAPHAM: Your Honor, we stipulate.

THE COURT: Thank you for your candid responses, sir. You're excused.

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Thank you for joining us. You're the 174th randomly selected juror. I'm going to ask you questions from the podium. I'm just going to change locations.

A. Okay.

Q. Is there any reason why we shouldn't continue to consider you for jury service on this case?

A. I don't think so, no.

Q. Did you appear at Cal Expo and fill out a jury questionnaire?

A. Yes.

Q. Since you did that, have you been exposed to information about the case?

A. Not particularly. I tried to avoid – I haven't read anything and I haven't watched television. I hear news blurbs now and then on the radio. When they say something is coming up, I tried to avoid it pretty much.

Q. Despite that effort, have you still have been exposed to some information?

A. I heard – I've heard the defendant's name, but then when I hear that, I turn away or I turn it down, whatever is on.

Q. Since Cal Expo, have you discussed the case with anyone or overheard other people discussing the case?

A. No. I just had – I have a lot of people that are interested in the jury selection process. They know I been coming and they want to know stuff about it, and I said there's nothing to tell. I just filled out a form, and that's about it.

Q. Those people friends of yours?

A. My family and my coworkers.

Q. I'm now going to direct your attention to the time period before you appeared at Cal Expo. I want you to tell me in as much detail as you possibly can all the information you received about what you believe to be the allegations involved in this case.

I'm asking you this for a reason, and I'll tell you that so you won't speculate as to why I'm asking you this question. As a judge I am required to make a determination when the case involves a lot of publicity whether the publicity, objectively speaking, possibly has some type of an effect on the potential juror. And I'll give you an opportunity to tell me from your own subjective perspective whether you believe it has that effect. But we need to know what you have been exposed to so we can make the objective determination.

Go ahead.

A. I just as a habit do not read the newspaper. We haven't subscribed to the newspaper for years. I don't read news magazines. I watch the news. Actually, I more like listen to the news as I'm getting ready for bed. And so I've heard things over the years about the different incidents with the bombs. You know, just what you hear in everyday life, that they were looking for someone and who did this, and that sort of thing.

I never, from the time of the arrest and the manifesto and all that stuff, I have not – I never read that. I have not had any other – I haven't read anything about it. And I watch shows like 20-20 once in a while. I don't think there's been anything on it there. But I do watch news shows once in a while.

Q. Have you received any information about a cabin?

A. I know there was one.

Q. What do you know about the cabin?

A. That it was small, and that it was in Montana, I think.

Q. You receive any information about a search of the cabin?

A. Not particularly. I know that they went there. I don't know what was found.

Q. Has the information you received about the case resulted in your formation OF an opinion or a preconceived notion as to Mr. Kaczynski's guilt or innocence?

A. Well, not any more than anybody else that is accused of a crime. I feel like the justice system usually doesn't arrest somebody until they have some evidence. And I assume that since he has been arrested, there is some evidence against him.

Q. How strongly are you committed to that opinion?

A. I think I'm really a fair-minded person and real open-minded. Even if I have an opinion about something and I'm in a discussion with somebody, I'm willing to listen and hear all the information. I think it's a fool who believes after hearing only one side of the story.

Q. Could you set that opinion aside if you are in fact selected as a juror in this case and render a decision as to Mr. Kaczynski's guilt or innocence based solely on the evidence as presented here at the trial?

A. I think I could, yes.

Q. Is there anything that you could think of that would interfere with your ability to do that?

A. No.

Q. Could you do it?

A. I think so, yeah.

I hate to say that because only half of me wants to serve. It's a hardship in your life. But I feel like I probably could do a good job.

Q. Okay. Do I have your assurance that you will in fact set the opinion aside, whatever information you received outside this courtroom, and that you will allow Mr. Kaczynski to begin this trial on a clean slate?

A. I think that's what our whole justice system is based on. He has to be proven guilty to be convicted.

Q. Okay. Does Mr. Kaczynski begin this trial, in your eyes, cloaked with the presumption of sentence?

A. Yes.

Q. What does that mean to you?

A. Until evidence is presented to prove that he's guilty, I think our whole justice system is based on the fact that we have to assume he is innocent until it's proven.

Q. That's almost a perfect definition of the doctrine. It does in fact reflect the concept that a criminal defendant need not present any evidence whatsoever to defend himself.

A. Right.

Q. He's presumed innocent unless or until that should occur. The government must prove every element of the offenses charged against him beyond a reasonable doubt, and if the government doesn't meet that burden, you must enter a not guilty verdict in favor of the defendant.

A. That's what they taught me in civics. The burden was on the prosecution.

Q. In your eyes, does Mr. Kaczynski begin this trial with that presumption in place?

A. Yes.

Q. Can you think of any reason why you couldn't be a fair and impartial juror to both sides?

A. No.

Q. Do you consider yourself a proponent or opponent of the death penalty?

A. I wouldn't say that I'm against it, but I wouldn't say that I'm for it. I can see – I never had any personal dealings with someone being, you know, a crime victim. I can see how – I'm sorry. I'm getting emotional. I have a feeling I would definitely be for it if someone had hurt someone I love.

Q. I have to ask these questions.

A. Oh, yeah.

Q. I got to ask you another question about the same subject.

A. Okay.

Q. Okay. If you want to take a moment –

A. I'm fine.

Q. Okay. I want you to join me in a hypothetical. I want you just to assume for purposes of my question that you were in fact selected to be on the jury, and during the guilt and not guilty phase of the

trial, the jury listened to all of the evidence, and then concluded, to Mr. Kaczynski's disappointment, that he is guilty of an intentional murder of another human being without justification. It would take that type of a finding for the jury to go into the sentencing phase of the trial.

In light of that finding, going into the sentencing phase of the trial, would you still be able to consider voting for a sentence less than death?

A. Say it again. Would I still be able to what?

Q. Let me rephrase it. During the sentence phase of the trial, there would be three sentencing options in light of the finding I just told you about.

A. Right.

Q. A sentence of death, a sentence of life imprisonment without possibility of release, or a lesser sentence of prison time.

After making the finding I just told you about, would you be able to consider voting for all of those sentences?

A. Yeah.

Q. Which means you would consider voting for a sentence less than death?

A. Yes.

Q. You would wait until you heard all the evidence, the aggravating factors and mitigating factors before you made up your mind?

A. Right.

THE COURT: The parties may examine.

VOIR DIRE EXAMINATION BY MR. CLEARY.

Q. Good afternoon.

A. Hi.

Q. My name is Robert Cleary. I'm one of the prosecutors in the case. I'm going to hand you a copy of your questionnaire and ask you some follow-up questions to it.

A. Okay.

Q. You had indicated in your questionnaire that there was some concern you had should you be selected for the jury about being away from your job and family for –

A. Yeah.

Q. A period of time. I take it, though, that based on what you heard today, which is that you are only going to be sitting until 1:00 o'clock in the afternoon, those are no longer concerns for you?

A. Well, the morning is a little touchy because I live in Grass Valley, so I'm talking about a hour drive. So that's a little bit tough. But my mother lives within a mile of me and could come and get the kids to school.

The afternoons were my main concern.

Q. You'll be able to take care of the arrangements at home then?

A. Yes.

Q. If you look at page 12, please, question number 45. You indicated that you – you indicate that you have some acquaintances that used to be in a law enforcement capacity?

A. Yes.

Q. Is there anything about your relationship with those people that will make it difficult for you to sit in judgment and hear the evidence in this case?

A. No. I was just trying to make sure I disclosed everything. There are two men that go to my church that were Highway Patrolmen. So I know them in that social situation.

Q. You're not particularly close with them?

A. They're just people at my church.

Q. One of things you may be asked to do is judge the credibility or believability of law enforcement officers. I assume that your relationship with these two people is not going to affect your ability to judge the credibility of other law enforcement officers?

A. No.

Q. If you would to page 26. Directing your attention now to question 103. You tell us that you believe there's a place for the death penalty in our society, and later on you check a box which indicates that you believe the death penalty is justified in some circumstances but not in others.

Can you tell us what you had in mind; what sort of circumstances do you believe it's justified and where do you believe the penalty is not justified?

A. I think it depends on the crime committed and the mitigating circumstances. I can't think of any examples, but I think you have to look at it as a case by case. Just depending on the evidence that's presented in each case whether or not I would think it was a good idea in a specific – for a specific crime and a specific defendant versus another one.

Q. I take it you distinguish – in terms of your view of when the death penalty is appropriate, you distinguish between different types of crimes and different types of defendants, is that correct?

A. Yes, I think so.

Q. And those are some of the circumstances you would want to consider before making the decision?

A. Yes.

Q. Let's take murder. Do you think for a murder that the death penalty is an appropriate penalty?

A. Again, I would have the say sometimes. I think it depends on the circumstances.

Q. Okay. If you found some certain aggravating circumstances relating to the murder, might that be an appropriate murder in your mind to warrant the death penalty?

A. Probably. It would depend on what the law actually said about those circumstances.

Q. And conversely, if you had a murder and you found no aggravating circumstances but mitigating circumstances, that might be the sort of murder you would decide is not appropriate for the death penalty, is that right?

A. I think so, especially from what the judge said about federal cases, if there's life imprisonment, it really does mean life.

Q. What do you mean by that, especially in light of that instruction?

A. Because I think a lot of times you hear about a criminal who gets life in prison and then is out in a few years, and I wouldn't think that would be appropriate for murder.

Q. In a federal death penalty case like this one, you'll be deciding the question of death or a real life sentence of life without the possibility of release or parole.

Knowing that, knowing that you could sentence somebody to life and it was a real life sentence, would you automatically select that alternative over a death sentence?

A. No.

Q. Why do you say that?

A. Because I don't know the facts yet.

Q. What sort of facts would you be looking for to make that decision between a real life sentence and a death sentence?

A. I don't know if I know enough on my own, my own attitudes to answer that yet. I'm not sure.

Q. Would the number of criminal activities, the number of separate criminal activities that a defendant was involved in be a factor that you would determine could determine to be aggravating?

A. Maybe.

Q. And, conversely, if a defendant had no prior criminal activity, would that – might that be a mitigating circumstance that you would consider?

A. Could be.

Q. And I know these are difficult questions to put to you –

A. It's hard to do a hypothetical.

Q. But I'm just trying to get a better read on your view of the death penalty. If you had – just to follow through on those examples. If you had two defendant's who committed the same crime, the same murder, same type of murder, do you think you might draw a distinction between life and death because one had a prior series of violent criminal activity in his record and the other one did not?

A. I think it would be easy to say yes to that. But I'm not sure, again, until I would hear all the case.

Q. Okay. One of the statements you made in 103, the second part of 103, is that the basis for your opinion that the death penalty is appropriate in some places is that some people cannot be rehabilitated. What did you mean when you said that?

A. I didn't say – I didn't say they can't. I said I had a feeling that they can't. And I don't know – you know, I don't have – I don't have experience with criminals. I don't know. But just my gut tells me that some people just don't want to change the way they are.

Q. How does that feeling, assume it's true that your feeling in fact describes a number of people, how does that affect your view to the death penalty?

A. I'm not sure I understand.

Q. Let me tell you where I was coming from. I read your questionnaire, I was reading question 103, and I saw you said there is someplace for the death penalty in our society, and then you were asked, basically, why do you believe that, what is the the basis for that opinion, and you said you have a gut feeling that some people cannot be rehabilitated.

I'm trying to get what the connection is between those two things.

A. I guess I would say if I felt that someone would get out and get out of prison and would kill someone else, I think it would be – and it's happened, you know. I think maybe that that's a person that maybe wouldn't able to be helped by just being in jail the rest of their life and society wouldn't benefit from that.

Q. Even though you would know they would really be in jail for the rest of their lives?

A. I'm saying it's different now that I know about the federal system, because I didn't know that.

Q. Right. How does that affect your view on the death penalty and when it is appropriate?

A. I guess I would be less likely to vote for the death penalty.

Q. Knowing that the person would be spending the rest of their life in jail?

A. Yeah, because it would be hard to say kill them.

Q. This is obviously an emotional issue for you, I can tell.

A. Yeah.

Q. Are you all right?

A. Yes.

Q. Okay. If you want to stop at anytime, let me know.

A. I'm fine as long as you folks are okay.

Q. Okay.

THE COURT: We're fine.

Q. **BY MR. CLEARY:** Is there anything about your past, any particular event in your past that makes the question of the death penalty a particularly emotional issue for you?

A. I don't think so. I just think human life is precious.

Q. I take it that's a view that you had for a considerable period of time?

A. Yeah.

Q. Is that a product of a your religion or is it your own personal philosophy?

A. Probably both. I just – I just find people in my life to be very important to me.

Q. Do you think that feeling, the precious nature of human life, and recognizing that the one option you're going to have would be to sentence a defendant to jail for the rest of his life, do you think those two factors coinciding would make it – would impair your ability to vote for the death penalty?

A. I think it would make it very difficult, but I don't think it would be something that I couldn't do.

Q. We've been talking about your views generally about the death penalty. I want to make it a little more concrete for you now.

A. Okay.

Q. Should you been picked as a juror in this case, you will be seated right in this jury box, and you'll be deciding – you may be called upon to decide whether the defendant in this case lives or dies. So it's no longer a question of whether you believe in the death penalty or not, it's a question of whether you could vote for the death penalty, sign a verdict form which would sentence a man to death.

Under the proper circumstances, do you believe you could do that?

A. Yes.

Q. Do you think your ability to do that would be impaired in any way by the high esteem in which you hold human life?

A. Well, once again, I think it would be really hard, but sometimes in life you have to do things that are hard.

Q. I want to come back to something I asked you a few moments ago. Under what circumstances do you think you could vote for the death penalty?

MR. DENVIR: Your Honor, I would object to that question. I think he's asking the juror to prejudge the case.

THE COURT: You want to respond to his objection?

MR. CLEARY: I am not asking to prejudge the case because I'm not putting the facts in front of the juror, the facts of this case in front of the juror.

THE COURT: Okay. Haven't you already covered this area then?

MR. CLEARY: I have, Your Honor. And understandably the prospective juror said she did not know – she could not tell. We have now moved a little past that kind of academic discussion and now gone to the question of the more concrete discussion of the prospective juror being in the jury box and actually having to make the call on whether somebody lives or dies. And with that perspective in mind, I want to see if the juror has any views over which she would feel that she could sign a death penalty.

THE COURT: The question may elicit the type of information you indicated you desire, but you covered it.

MR. CLEARY: Okay. I'll move on then.

Q. You said in response to question 103 – we come back to this a couple times – that some people cannot be rehabilitated, and that's the basis for your views on the death penalty.

If a defendant could be rehabilitated, could you vote for the death penalty in that case?

A. Well, I think it's – I think it's kind of – sorry. I think it's kind of a moot point in this because rehabilitation or not, if I didn't vote for the death penalty, they still are not going to get out and affect society.

Does that answer your question?

Q. I'm not sure.

A. Well –

Q. Let me try again.

A. Okay.

Q. You say that your belief that there's a place in society for the death penalty, that that belief is born of the view that some people cannot be rehabilitated.

A. That's what I'm trying to answer. I think I wrote this thinking that there were two options in most cases, death or life, and life didn't really mean life in prison.

Q. That's precisely what I want to follow up on now.

A. Okay.

Q. Now that you know that life in prison does in fact mean life in prison, and you were to find, if you were to find, that the defendant could be rehabilitated, would you in that case always vote for the life sentence over the death sentence?

MR. DENVIR: Objection, Your Honor. He's asking the juror to prejudge the case. He's not asking about her general opinions on the death penalty.

THE COURT: Sustained.

Q. BY MR. CLEARY: I am going try to ask the question differently. I hope I'm asking it differently given the objection was sustained.

Could you vote for the death penalty only if you concluded that the defendant could not be rehabilitated?

MR. DENVIR: Same objection, Your Honor. I think again it's asking the juror to prejudge a case.

THE COURT: It is the same question.

MR. CLEARY: Withdraw it.

Q. Let me direct your attention to page 23, question 92, at the very bottom of the page. You said there that you would not want to be involved in convicting an innocent person.

What was it that concerned you about that; in other words, do you think that's a real possibility of happening in court here?

A. I think it's happened. I don't know that it would happen in this case. I think it's happened. This was, again, a hypothetical question, I thought.

Q. So you recognize, though, that, if you get to the guilt phase – I've just been asking about the penalty phase in the death penalty. In the guilt not guilty phase, when you're deciding whether the defendant is guilty or not guilty, if you felt that the government did not prove the crime, you would not vote to convict the person; you realize that, right?

A. Right.

Q. And, therefore, the defendant would not be convicted of that crime?

A. Right.

Q. Okay.

A. But, like I said to the judge, I don't – I believe strongly in the system that unless it's proven guilty, that they are innocent. But that's also theoretical, because I don't think that we would be at this point if the government didn't feel that there was some evidence.

Q. Say that again.

A. I don't think that there would be a trial unless the government felt that they could prove – I'm not really explaining myself well. I feel like at this point, you are now to the case, you have evidence you believe will convict, and I would be, at that point, willing to hear that evidence, see if it makes sense, if I believe it, and look for the truth.

Q. When you reach, should you reach, the penalty phase in this case, Judge Burrell is going to give you certain instructions on the law. And I believe you said earlier you were kind of anticipating that to give you some guidance to what law will control your decision on the death penalty.

If Judge Burrell instructed you, gave you some instructions on the death penalty that were at odds with, that conflicted with, your own personal views, maybe some of the personal views that make this a very emotional issue for you, would you nonetheless be able to set your own strong personal views aside and decide the death penalty solely on the law that Judge Burrell gives you and the facts that you find in the case?

A. I think I would have to.

Q. Okay. Do you think you can do that though?

A. Yeah.

MR. CLEARY: Can I have one minute, Your Honor?

THE COURT: Yes.

MR. CLEARY: Try one more question on the death penalty.

Q. If you found, it was your determination, that the defendant could not be rehabilitated, would that automatically override any other aggravating evidence the government might present?

A. There he goes again.

MR. DENVIR: Same objection, Your Honor. Third time we had this.

THE COURT: How can she answer if she doesn't know the other aggravating evidence.

MR. CLEARY: What I'm trying to get at, Judge –

THE COURT: Sustained.

MR. CLEARY: Okay. Nothing further. Thank you.

VOIR DIRE EXAMINATION

BY MR. DENVIR:

Q. My name is Quin Denvir. I'm one of the attorneys for Mr. Kaczynski, the defendant. I would like to ask you a couple questions, if I could. You certainly had enough questions asked. We won't be too long.

As I understand it, as far as you understand, there's two parts to the trial. There's the guilt phase and potentially a sentencing phase.

As I understand, as to the guilt phase, you are candid and say that you assume that there's some evidence against Mr. Kaczynski or he wouldn't be charged.

A. Right.

Q. But you're willing to wait and see if there is that evidence that you're assuming is there. That's where you base your suspicion of guilt, is on the fact you assume there's evidence?

A. I don't have a suspicion of guilt. I just have – I know – I know he or any other person is not usually arrested unless there's something that law enforcement feels points to their guilt, and then it's up to jury, the judge or whoever weighs the evidence to find out if that is valid evidence.

Q. Okay. Very good. Do you have, from what you've learned about the case, any either opinion or preconceived notion as to what would be the proper sentence for the person accused of the Unabomb crimes if they were convicted of those crimes?

A. No. I don't think I know enough yet.

Q. If you could look at question or page 24 – excuse me, question 95.

A. Uh-huh.

Q. You were asked your opinion about medical health experts that testified in court, and you said each side would look for expert to support their theory, and one would have to weigh their testimony carefully.

Do you feel you could play that role if either the government and/or the defense presents that type of evidence in either of the two phases that might occur?

A. Yes.

Q. You could weigh their testimony and make your best call as to what you weight to assign to it?

A. I think so. Uh-huh. That's your job for you guys. You're to defend and they're the prosecution.

Q. And the jurors are the judge?

A. That's right. You have to give us all the information you think we need, and it's going to be conflicting with the information they give us.

MR. DENVIR: I have no other questions. Thank you.

MR. CLEARY: Nothing further, Your Honor. Thank you.

THE COURT: We'll take the afternoon break.

The Court will be in recess until 3:30.

THE COURT: Let the record reflect all participants are present.

You can bring in the next juror.

(Pause in the proceeding.)

(Prospective juror number 176 was brought into the courtroom.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Thank you for joining us. You're the 176th randomly selected juror. Is there any reason why we shouldn't continue to consider you for jury service in this case?

A. Well, I really don't want to be here, number one. Number two, I think I answered on my questionnaire that it would be a financial hardship for me to be here for five months, as well as I have disabilities with my knees. Sitting for a long period of time creates pain. So if I'm sitting more than an hour, my knees start bothering me.

Q. Okay. Let's begin with the knee problem, and then we'll move to the hardship problem. So you've got two concerns.

A. Yes.

Q. If the parties remember to tell me, or you, if you are selected as a juror, what I typically do in cases is I allow jurors to stand up periodically if they want to do so, except for those in the front row. But if you have a knee problem, if you want to stand, if you're in the back row, then you would be permitted to stand.

A. Okay.

Q. As long as you don't block the view of your fellow jurors. And I assume that you could stand without doing that.

A. Right.

Q. If I allowed you to do that, would that take care of the knee problem?

A. It should. You know, as long as I – if I'm moving around, my knees are moving, then it doesn't bother me. It's only when I'm sitting in a stationary position for a long time that it bothers me.

Q. Those are swivel chairs.

A. Oh, then it wouldn't bother me.

Q. Only you can tell us about the financial hardship. I need to know more information. Let me tell you why you are here despite what you set forth in your hardship questionnaire.

It is clear that jury service interrupts people's lives, and it sometimes does cause a hardship and sometimes requires individuals to work extra hours so that they can fulfill that civic duty. I myself, when I was a lawyer at the United States Attorney's Office, I supervised lawyers in two cities, and I had my own caseload, and I was called for jury duty. And I, to my surprise, was selected and I actually sat on a trial. And I had to do my other work, even while I was serving my duty on the trial.

One of my colleagues who is a United States district judge, just as I am, had to go over to the state court – I shouldn't say "had to go over to the state court" – we could probably, as judges, we could probably respond to the questionnaire in such a way where they would probably leave us alone. But the judge elected not to do that and went over to the state court and had to respond to questions just as you are responding. I had to fill out a questionnaire from the state system, and I basically told them my predicament and I felt that if they thought I should still serve even though I explained my predicament, then I was going to serve.

So it does create hardships. Tell me whether the hardship you are indicating is one that you can make an adjustment for, and then still commit to service.

A. I don't know, Your Honor. My situation is rather unique. I've been through a – these last few years I've gone through a divorce, bitter custody dispute. It has colored my opinion on the system, on judges and attorneys. And to this point, at this point, without getting too much into my finances, if I don't work overtime – in my job I work overtime in my job and I have standby. So seven by 24, we support – I'm a data communications engineer. We support, you know, systems all over the state. My area coverage is all Northern California and all Northern Nevada.

With my situation the way it is now and the amount, the monies that I have to pay out from my paycheck, if I don't have standby pay or overtime, my take home pay is \$25 a week. Nobody could live on that. So I have to have overtime to survive. I have a home that I'm trying to keep, I'm trying to keep out of foreclosure. And all this has become a great deal of stress for me to deal with. And just the fact that I may, if I'm here from 8:00 to 5:00, I may not be able to do overtime –

Q. It wouldn't be 8:00 to 5:00.

A. 8:00 to 1:00.

Q. Right.

A. So the overtime I would be talking about would be at

5:00 at night till 6:00 in the morning. So obviously I couldn't work a bunch of overtime and then still be here awake during the daytime.

So if I were to lose my overtime basically I'm going to be losing my house, and I don't know where I'm going to go from there.

Q. All right. Thank you.

THE COURT: You don't have to tell me your position out loud, but I do want input.

MS. CLARKE: We would stipulate, Your Honor.

MR. LAPHAM: We would too, Your Honor.

THE COURT: In light of the difficulties you've indicated this trial would cause you, sir, we're going to excuse you from further service on this case.

PROSPECTIVE JUROR NO. 176: Thank you, Your Honor.

(Prospective juror number 176 left the courtroom.)

(Prospective juror number 178 entered the courtroom.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Thank you for joining us. You're the 178th randomly selected juror. Is there any reason why we shouldn't continue to consider you for jury service on this case?

A. No, there isn't.

Q. Okay. Did you appear at Cal Expo and fill out a juror questionnaire?

A. Yes, I did.

Q. Since that time, have you been exposed to information about the case?

A. Well, I've been exposed if I open the paper, I see the headline. But I have not read any articles and I try not to pay any attention to the TV.

Q. I appreciate your efforts. Despite those efforts, have you still become aware of information since Cal Expo?

A. Not really.

Q. Okay. Anything you can recall?

A. (Pause.) Not really. One of my family members told me this morning about starting with 600 and then down to like a hundred and sixty or something like that, as far as the jury process goes, but not really anything else.

Q. That gets into the next question I was going to ask you. Have you had discussions about this case or anything concerning the case since Cal Expo or overheard other people discussing the case?

A. Actually, no. Other than telling my family, of course, that I was summoned and that I went down, filled out the questionnaire, and that I was coming today. But other than that, not really.

Q. Did any of your family members respond to you and engage you in any conversation about the case when you did that?

A. (Pause.) I think more the discussion was I had never been called for a jury before, and the – you know, my family members thought it would be a very interesting process and I think we discussed that – I was a little nervous about the – getting into one's private life because, being exposed to what's happened to juries in the past and, you know, little concerned about media exposure and so forth. But I think that's about the only thing we've really discussed.

Q. Does the anonymous jury order alleviate your concern about –

A. Well . . . to a certain point. To be quite honest with you, I am right now reading Dominick Dunne's book, the novel about the O.J. trial, and in it – I don't know how true this is, but he did say there that the jury consultants knew everything about the jurors; they have private investigators and they knew everything about the jurors. And that kind of reinforced my worry about it, my private life. It's not that I have anything to hide in my private life. I just don't think that – you know, but it is my private life.

Q. Right. I'm going to explain why I'm going to ask you the next question, so that you won't be wondering why I'm asking the question; I want you to be able to focus on the question.

A. All right.

Q. As a judge I am required to find out all the information to the extent I can that a potential juror has been exposed to about allegations involved in the case. The next question will ask you questions about such information concerning the time period before you appeared at Cal Expo. And the reason why I'm obligated to do that is to place both myself and the parties in a position to objectively evaluate the possible impact that information could have had on you. And we will give you an opportunity to tell us your own perspective as to whether or not that information has an impact on you at all.

We don't expect jurors to come in this courtroom in a case such as this one that has received a considerable amount of publicity unaware of the publicity. But we do need to know what publicity you've been exposed to. So I want you to assert your mind and tell me as much detail as you possibly can about the information you received about what you assume to be the allegations involved in this case.

A. (Pause.)

Q. Should I provide you with more assistance?

A. You want me to tell you what it is that I know about the case up until the time that you had asked us to not let ourselves be exposed to any more information?

Q. Precisely.

A. Okay. How far back do we have to go?

Q. As far as back as you can go.

A. Well, I was aware that these bombs were being mailed, that that was happening, that the crime was happening; I was aware of the manifesto – as a matter of fact I read the manifesto when it was published in the paper. I was aware – and I don't know if I'm in the right chronological order here but I was aware after the Oklahoma City bombs that supposedly, supposedly, I had heard that this person had threatened the airlines because I made an airline trip, I went to visit my daughter on an airplane, and I was kind of taken aback when they asked me if anybody had given me anything to put on the plane, and then when had the ticket agent – I just was surprised, and then the ticket agent said, "Well, this is because of the scare with the Unabomber." So I was aware of that.

Then, of course, I was aware when the news came out that the brother had called – I believe it was the F.B.I. I'm not really clear on these details. I mean, I don't know all this for a fact but my impression was yes, the brother had called the F.B.I. and said that he had suspected when he read the manifesto, he suspected it was his brother, and of course I saw the pictures on TV of the cabin and when they led him out and later pictures when he was in the orange prison suit, being led out with the jacket over it.

I remember seeing a picture of – I can't remember if this was TV or the newspaper, but, like, the box and the description of the mechanism and so forth. But I didn't understand it. I just remember seeing that. I was amazed that they could create that if, in fact, it was a bomb and it exploded, that they could re-create how it looked. But I didn't know much about it.

I may have left out some things, but basically that's about what I remember.

Q. Did you ever become aware of information concerning a search of the cabin?

A. (Pause.) I think I'm aware of that, found bomb parts in the cabin. I'm not sure – I'm not sure if I'm aware – did they find part of the manifesto there? (Pause.) I know they found bomb parts there and I know they found that this person living in this cabin was living very primitively, didn't have a lot of comforts.

Q. Has the information you have received concerning allegations about the case resulted in your formation of an opinion or a preconceived notion as to Mr. Kaczynski's guilt or innocence?

A. (Pause.) I've thought about that a lot since I got the first jury summons. I don't know whether he's guilty or not. I don't know if what I know is accurate anyhow. And I, like, again, I'm confused on the chronology of the whole situation, and I just don't know if I've read accurate reports or enough of them. So I don't know how much I know, if it's accurate, and no, I don't think I really have formed an opinion.

Q. Do you have any suspicions in that regard?

A. Well, I do feel that – I do feel it seems coincidental when the brother called and then they went to where his brother’s place was that they found all this. I mean, that does seem pretty coincidental, and then they found the bomb-making materials there. That would give one to have a suspicion, of course. But on the other hand, nobody that I’m aware of has ever been an eyewitness and placed them anywhere where they’ve seen anything happen.

Q. The suspicions you’ve just related, are those suspicions things that you can leave outside the courtroom, that you can disregard if you were selected as a juror in this case?

A. (Pause.)

Q. I have a basic question I’m going to ask you.

A. I don’t know if I really understand that –

Q. Let me ask it another way. And if this isn’t clear, I’ll ask it another way.

A. Okay.

Q. If you were selected as a juror in this case, do I have your assurance that Mr. Kaczynski will begin this trial on a clean slate?

A. Oh, I think so, yes, absolutely, because – yes. I don’t think any of us know really the truth of the matter.

Q. What does that mean to you, that he will begin the trial with a clean slate?

A. That I don’t know if he’s innocent or guilty, so I have to listen to what the evidence is.

Q. If you’re selected as a juror, will Mr. Kaczynski begin this trial, in your eyes, cloaked with the presumption of innocence?

A. That’s what it is in this country, isn’t it? He’s presumed innocent until found guilty. So I have to presume he’s innocent.

Q. You’re absolutely correct. Under our justice system, a criminal defendant is presumed innocent and never has to present any evidence to defend himself. Doesn’t have to testify, doesn’t have to allow his counsel to present one item of evidence. He could sit and rely on the presumption of innocence unless and until, should it occur, the Government proves every element of the offenses charged against him beyond a reasonable doubt. And if it fails to do so, you must return a not guilty verdict.

Is there anything about your belief system that would interfere with your ability to allow Mr. Kaczynski the benefit of that doctrine?

A. No. I believe in the system. So . . .

Q. Mr. Kaczynski – no, let me rephrase it. No criminal defendant would want to defend him or herself against news media reports. You can imagine that that would be perhaps impossible to do. He’d only want to defend him or herself based on evidence presented here in this courtroom. Do you have the personal capacity to leave the news media reports outside this courtroom?

A. Absolutely.

Q. I have your assurance that you will make a determination as to Mr. Kaczynski’s guilt or innocence based solely on evidence that is presented in this courtroom?

A. Yes. Yes.

Q. You mentioned something about Mr. Kaczynski’s brother and information he allegedly provided the authorities. Can you just leave that out of your mind and not let that interfere with your determination of his guilt or innocence?

A. Well, if I presume he’s innocent, which I have to presume he’s innocent, then I have to put aside all those things that I knew.

Q. That’s exactly what I’m trying to see if you are able to do that.

A. Yes.

Q. Okay. Is there anything you can think of that would interfere with your ability to be a fair and impartial juror to both sides?

A. No.

Q. Do you consider yourself a proponent or an opponent of the death penalty?

A. (Pause.) I have never made up my mind on that subject. I have earlier in my life spent a lot of time thinking about it from both sides. And sometimes I can see one side and sometimes I can see another side. I honestly have to say in the last five, 10 years I've kind of stopped worrying about it, because I just really have never been able to make up my mind. Now, I'm talking about the concept of the death penalty, right?

Q. Right.

A. Yeah.

Q. Is there anything about your belief system that would prevent you from meaningfully considering each of the three sentencing options, should this case go to this, what I've characterized as the sentencing phase or penalty phase of the trial. The three options are: death, life in prison without the possibility of parole, or a lesser sentence than life in prison.

A. So the question is: is there anything in my belief system that would –

Q. That would interfere with your ability to meaningfully consider all three?

A. All three of those options? No.

Q. I want you to join me in a hypothetical.

Assuming you were, in fact, selected to be on the jury, and during the guilt and not guilty phase of the trial, you and your fellow jurors analyzed all of the evidence at the end of the trial; you listened carefully to my instructions; you went back in the jury deliberation room and you decided, to the disappointment of Mr. Kaczynski, that he is guilty of the offense of intentional murder of another human being without justification and not in self-defense.

Keeping that finding in mind – you can only go to the sentencing phase if you make such a finding – would you be able to go to the sentencing phase, in light of that finding, with an open mind, allowing you to consider all three sentencing options that I told you about?

A. Oh, I guess that's the job of the jury. So I'm not really clear about this. When you come back, then, for this sentencing phase, you come back – how – at what point do you –

Q. Let me help you.

A. Okay.

Q. Okay. You are with me in the hypothetical?

A. Yes, yes.

Q. Okay. You understand the finding that the jury made during the guilt/not guilty phase. Then there would be what is called a sentencing phase. And at the sentencing phase, the Government would most likely present what is called aggravating evidence.

A. Mm-hmm.

Q. That will be evidence that the Government thinks points toward a sentence of death. There could also be presented what is called mitigating evidence. And this is evidence which points toward a sentence of life. And then you, as the juror, you would have to decide whether the sentence – you would listen to that evidence; I would then instruct you on the law, and then you would go back into the jury deliberation room, and you would have to decide whether the sentence would be death, life in prison without the possibility of parole, or some lesser sentence.

Is there anything about the finding that I told you, hypothetically speaking, that you made during the guilt and not guilty phase during the trial, that would interfere with your ability to consider all three of those sentences?

A. Well, I don't know, because I don't know what I'm going to hear in the first part of the trial. I mean, we're supposed to come back with an open mind if you're on the jury, but I don't know. I don't know. I mean –

Q. Well, the first part – I'm sorry. I want to interrupt you for just a second. In the first part of the trial, based on the hypothetical, the jury would have found that Mr. Kaczynski committed a murder. And I'm really trying to see if you could go into the second part of the trial –

A. With an open mind.

Q. – with an open mind.

A. Yeah.

Q. You do that?

A. Yes. I mean, if you're on the jury, that is exactly what you're supposed to do, right? Is that correct? I mean, isn't that –

Q. That is correct.

A. – our system?

Q. Right.

A. Yes.

Q. An open mind willing to consider the evidence presented and you would be open to consideration of all three sentencing options I told you?

A. Yes.

THE COURT: Okay. The parties may examine.

VOIR DIRE EXAMINATION

BY MR. LAPHAM:

Q. Good afternoon. Ma'am, my name is Steven Lapham. I'm one of the prosecutors in the case. And let me just pick up on that last line of questioning that you had with the judge.

The question, as I think the judge explained it to you, how the trial would proceed, you would go through the first phase in which you would make the determination whether the defendant is guilty or not guilty. If you make the finding of guilt on the crimes that the judge indicated carry the death penalty, then we'd go into the second phase and you'd get additional evidence regarding how the crimes were committed, perhaps additional evidence about the character and background of the defendant, and you'd be asked to base your decision on those factors as to the ultimate penalty. You understand that?

A. Yes.

Q. Okay. And what I think the judge was trying to get at, what we're interested in knowing is whether you could give all three of those sentencing options –

A. Consideration.

Q. – due consideration?

A. Yes, I could do that.

Q. Okay. And really "due consideration" means that it would be a real live option for you, because of your belief system, that you wouldn't discount any one of those three because of some strong beliefs you have. Are you with me so far?

A. I don't – are you asking if, for example, I have such a strong belief against the death penalty that I could not consider it? I mean, is that what you're asking?

Q. Not really, because you've indicated that you don't really have a strong belief.

A. Right. Right.

Q. What I'm asking you, I think, is because of your uncertainty about the death penalty –

A. Could I consider that?

Q. Right, because you haven't resolved that issue in your own mind, perhaps.

A. Well, this probably would be the time then, wouldn't it?

Q. You're quite right. And the question is, do you think because you're uncertain about your views on this subject, do you think you'd have any impairment in making that determination?

A. Well, I've never had to make a decision like this before. And I think a lot of it has to be based on the evidence and how it unfolds in my own mind, whether I feel – which sentencing option I would feel would be appropriate.

Q. And that's exactly what the law says that you're to do. You're to consider the evidence presented by both sides, and that's what the judge meant when he talked about aggravating and mitigating factors. And you will get guidance from the judge on these issues, so you're not going to be out there by yourself.

Let me see if I can put it this way. The judge is going to instruct you, essentially, that you are to weigh aggravating factors against mitigating factors. Aggravating factors, in simplest terms, are just those factors that the government believes merit a death sentence; mitigating factors are those factors

which the defense believes warrant something less than the death penalty. And I'm not going to get any more specific than that. That's just the, in general terms, what we're talking about.

And you'll be instructed that if you find that if the aggravating factors outweigh all of the mitigating factors that you're presented with, then you can return a sentence of death. Do you understand that so far?

A. (Nods head up and down.) Yes.

Q. You need to answer audibly.

A. Yes. Sorry.

Q. So the question is, is there anything about your uncertainty about the death penalty that would cause you to not be able to do that weighing process?

A. No.

Q. Or to impair your ability to do the weighing process?

A. No.

Q. I'll tell you what I mean by that last question. If, for instance, you did the weighing process, whatever the aggravating factors were and whatever the mitigating factors were, you felt after due consideration in your heart that the aggravating factors outweighed the mitigating factors, would you be able to, in that circumstance, vote for the death penalty?

A. Yes.

Q. Okay. Because you're going to be asked in advance to take an oath as a juror that you'll follow the law and that ultimately means – and I want you to be aware of this if you weren't already, that that ultimately means that you might have to impose the death penalty should the facts and circumstances warrant.

MR. DENVIR: Objection, Your Honor. A juror never has to impose the death penalty. That's a misstatement of the law.

MR. LAPHAM: I'll rephrase the question.

THE COURT: Do I need to rule on the objection, in view of what counsel's doing?

MR. DENVIR: Not if he's going to rephrase it, Your Honor.

MR. LAPHAM: **Q.** You'll take an oath which indicates that you will – your agreement that you will follow the law as the judge gives it to you. And the law will require you to weigh the aggravating and mitigating factors as I've indicated. And you'll have to give due consideration to the death penalty as one of those options.

And you feel, notwithstanding your uncertainty about the death penalty, that you could do that?

A. Yes.

Q. Okay. You indicated in your questionnaire that you don't believe the death penalty serves any purpose. Do you recall that answer?

A. Not a hundred percent.

Q. Let me – if we could show you your . . .

THE COURT: Is this your questionnaire? (Indicating.)

PROSPECTIVE JUROR NO. 178: Yes, it is. (Examines document.) What –

MR. LAPHAM: **Q.** It's page 26. And specifically question 105, right down there at the bottom. The specific question was: "In your opinion, what purpose does the death penalty serve in our society?" And your answer was "none"; is that correct?

A. That's correct.

Q. Have you given it any more thought since you filled out the questionnaire?

A. (Pause.) I haven't given it any more thought. If the purpose – I don't know if the death penalty does – if the purpose is to remove a criminal who's a danger to society from society, then on the other side, life imprisonment could do it too. So I don't know exactly what service the death penalty – what service it provides.

Q. Right. And I understand, and that probably is reflected by your uncertainty about the death penalty.

A. Yes, exactly.

Q. Do you think that would have any influence on your decision when you're called upon to vote on the death penalty or some lesser sentence?

A. Well, I don't know what the law is. When you're asking me these questions, does the law say that if – I mean, I don't know what the law is about – you said when you would read us the law, then we would make our decision based on that. And I don't know what the law is.

Q. Well, and the law is that's one of your three options: the death penalty, life without possibility of release, or some lesser sentence.

A. Uh-huh.

Q. And this, I think, gets us right back to the question of could you give due consideration to the first of those three options, the death penalty?

A. Yes. I've already answered that I could give consideration to it.

Q. Yes, I know that you've already answered it, and I'm not trying to ask the same question. I've asked you in light of your belief that the death penalty serves no purpose in society, would you automatically choose a sentence of life in prison?

A. No, I wouldn't automatically. I haven't – no. It's like you're jumping way ahead. I haven't heard the evidence. I wouldn't automatically choose it.

Q. Okay. I'm not trying to put words in your mouth. I'm just trying to see what your views are on this.

A. Yeah.

Q. And I'll ask just one more question on this topic and then we can move on.

The judge explained to you that life imprisonment in the federal system actually means life –

A. With no parole.

Q. There's no possibility of parole. Now, knowing that, and knowing, again, your uncertainty about the death penalty, would you – would that affect your decision on whether to impose a death sentence?

A. I don't know. I haven't heard this evidence yet. I don't know – I can't come in here honestly say which – how – which way I would go. I'm honest in admitting that I'd really have to give this a lot of very hard thought and very close attention if I was on the jury.

Q. No, I understand that and I appreciate your honesty. I'm not trying to ask you to predict the future in how you would vote on this case. We've given you no facts about the case.

A. Yeah.

Q. And I don't intend to. My question is, would you automatically default to a life sentence, knowing, given your views that the death penalty has no –

A. No.

Q. – purpose?

A. Not if I was told to consider all three. No, I wouldn't automatically.

Q. Okay. And you could consider all the aggravating and mitigating factors?

A. Yes.

Q. Okay. We were talking about media coverage and your exposure to it, and you indicated your views or that you were aware that the defendant's brother had turned him in.

A. Mm-hmm.

Q. You also indicated in your questionnaire at question 120, and that's on page 32, that you noted that there have been no reported cases of mail bombs since the defendant's apprehension?

A. No, I said no heavily reported cases. It depends on – our only knowledge of this is what is reported, and I am not aware of any reported cases since he's been –

Q. Okay. Is that going to affect your ability to be a fair and impartial juror in this case?

A. No.

Q. You'll be able to put that out of your mind –

A. Yes.

Q. – if you were selected as a juror?

And you also indicated that you're aware of the security precautions that came about as a result of the Unabomber's activities. Do you think that would affect how you view the evidence in this case?

A. How I would view – you mean, about the airports and so forth?

Q. Right.

A. How I would view the evidence? No. It wouldn't affect how I would view the evidence.

MR. LAPHAM: Your Honor, may I have a moment?

THE COURT: Yes.

(Discussion off the record among the Government's attorneys.)

MR. LAPHAM: Thank you, ma'am.

VOIR DIRE EXAMINATION

BY MR. DENVIR:

Q. Good afternoon, ma'am. My name is Quin Denvir. I'm one of the attorneys for Mr. Kaczynski. I'd like to ask you just a few follow-up questions, if I can.

You said you were reading Dominick Dunne's book about the O.J. Simpson case?

A. Right.

Q. And evidently there was something in there about, evidently, that one or both of the parties investigating the jurors? Is that –

A. Right.

Q. Is it one party or both parties or –

A. Well, yeah. From – if – well, it's very sketchy. It's a novel, of course. It's not a historical record of the case.

Q. Oh, I see.

A. But he does claim in there that the jury consultant for the defense had hired a private investigator to investigate all the jurors so that they knew everything about them.

Q. You're not going to assume that's happening by either side in this case, are you?

A. I'm not going to assume it, but, you know, I'm just worried about media intrusion. I just think, you know, what happened – what happens after these high-profile cases, with these people going on Dateline or all, you know, or on TV, to me it's just sort of horrifying to be so publicly exposed like that.

Q. And does the judge's order for an anonymous jury where your name and occupation, actually all identifiers, are known only to the parties and the judge, not to the public and the media, does that resolve some of your concerns in the area?

A. Well, it does resolve some of my concerns, but that's why I brought up the Dominick Dunne book: because it seems to me that if that in fact would be the case, which I don't know it would be, but no matter how much you order anon- –anomin- – excuse me, for us to be anonymous, it wouldn't matter if private investigators are already looking into it, and then people talk, you know. So I guess – I guess that's –

Q. You've taken about three things together. And you won't assume that those are going to happen in this case?

A. I don't assume any of that's going to happen, but I certainly wouldn't feel very good if it did.

Q. I can understand that you wouldn't.

When you were talking about what you knew about the case, you said something and I wasn't sure what I understood about it. Was it re-creating a bomb explosion or something, that you had seen something that you had seen – was it on television? I didn't understand exactly what you –

A. I'm not sure whether I saw it on TV or in the paper, but somewhere I have this distinct memory of a picture of a wooden box with all these wires or whatever in there and said that this is what the bomb looks like, okay? And I didn't understand all the of it. But I was amazed that they were able to say that this is what the bomb looked like, because presuming a bomb explodes, you wouldn't – so you had to re-create what it looked like, because the material would be destroyed if the bomb explodes – in my own mind that's what I thought. I was just surprised.

Q. So your sense was somebody had been able to recover enough from an exploding bomb to make a replica of how it looked or how they thought it looked?

A. Maybe. Or maybe somebody just did a drawing.

Q. Oh, I see. Or it could have been a drawing. I thought –

A. Yeah. I mean, maybe somebody guessed. I don't know. It just amazed me that they said, "This is what it looked like."

Q. As I understand it, you said you don't have any opinion as you sit there now of whether Mr. Kaczynski is guilty of the charges against him, the Unabomber charges?

A. No, I presume he's innocent.

Q. Am I correct also that you don't have any preconceived notion or opinion as to what would be the proper sentence for someone convicted of those crimes? That's another – as you've said a number of times, you have an open mind on what would happen in the sentencing phase, if we reach that phase?

A. Right.

MR. DENVIR: Thank you.

MR. LAPHAM: No further questions.

THE COURT: Okay. Thank you.

All right.

(Prospective juror number 178 left the courtroom.)

THE COURT: That's all the jurors for this afternoon.

Is there other business to conduct?

MR. DENVIR: Your Honor, I think we had a proposal that we discussed over the noon hour as to those dates you were discussing.

THE COURT: Projected dates?

MR. DENVIR: Projected dates.

THE COURT: Right.

MR. DENVIR: Projected and set dates. I think what we thought, and this is just a projection, is that we would probably get finished with the individualized voir dire of jurors perhaps next Tuesday or Wednesday, the 9th or the 10th. That's just based on the number of jurors we have now and projecting how many – about half of them from here on, being available. So it might be the 9th or the 10th, and probably no later than the 10th, we would hope, somewhere in that range.

And what we were going to suggest, then, was a schedule for filing the challenges for cause. And we, what we were going to propose to the Court was that all, any challenges for cause for Monday and Tuesday of this week would be filed by Friday the 5th, this Friday, simultaneous filings, with replies on Tuesday the 9th.

Then any challenges –

THE COURT: What time on Friday?

MR. DENVIR: These would be all end of the day. 4:30.

THE COURT: 4:30. Okay.

MR. DENVIR: The challenges for today and tomorrow would be filed by Tuesday the 9th end of the day, simultaneously, with replies –

(Discussion off the record between Mr. Denvir and Ms. Clarke).

MR. DENVIR: The challenges would be filed by Tuesday the 9th, with replies on Thursday the 11th.

And then any challenges for next week, which we thought would probably include Monday, Tuesday and maybe Wednesday depending on where it came out, would be filed by the 12th, Friday the 12th, simultaneously, with replies on Monday the 15th.

We would then submit to the Court voir dire questions by the 15th, having met and conferred and see if we could agree on them. We would have met beforehand. But we would submit them on Monday the 15th and have the Court call in for general voir dire and, I take it, for the exercise of peremptories, what we were proposing was the 18th, or it could be the 19th, either of those two.

MR. CLEARY: Unless we need two days.

MR. DENVIR: Right, unless we need two days – well, it could be. Well, start on the 18th and, if necessary, go to the 19th.

And then I think then the proposal was that, rather than start the trial on the following Monday, which would be – and then two days of Christmas week, start the trial itself on the 29th, the following Monday, the 29th.

MR. CLEARY: (Nods head up and down.)

(Discussion off the record between the clerk and the Court.)

THE COURT: I'm inclined to do what you have suggested.

Your thought about group voir dire is that we will call all 70 or 72 prospective jurors into the courtroom at the same time, right?

MR. CLEARY: That's correct, Your Honor. The only thing I was wondering about is where we're going to seat them all, since I know there's been a number of seats allocated to the media and other parties, because we need room in the courtroom for them.

THE COURT: We're going to have to take seats from the media and from the public, so that we can –

MR. CLEARY: So they'll be sitting out in the gallery then, 18 here (indicating), and the rest in the gallery.

THE COURT: No. They'll all be seated in the courtroom. You will conduct voir dire in the courtroom.

MR. CLEARY: All right.

THE COURT: They will all have numbered seats. I think they will all fit on the right-hand portion of the courtroom. They'll probably have to occupy the bench immediately behind the prosecutor's table and all the other seats on that side of the courtroom, and then we will place 18 on the – in the jury box area.

What I plan on doing is getting portable microphones so that as you are questioning a juror, that juror will have a microphone and then counsel, in doing the questioning, will also have a microphone.

Is there a problem with that approach?

MR. DENVIR: No, Your Honor.

MR. CLEARY: No, Your Honor.

THE COURT: You would probably be in a better position to answer this question I'm going to ask you after you have presented the Court with proposed voir dire and you know whether I'm going to ask those questions, but I want you to assist the Court if you are able to do so by telling me how much time you think you need to conduct voir dire.

(Discussion off the record among the Government's attorneys.)

(Discussion off the record among the defense attorneys.)

(Discussion off the record among Ms. Clarke and the Government's attorneys.)

MS. CLARKE: Your Honor, perhaps it would be a good idea if the parties could meet and talk about it and get back to the Court. I'm sorry we didn't already do that. But it looks like there are a lot of questions in both of our minds about how long that would take.

THE COURT: Could you give me a rough idea as to what you are tentatively thinking? Or do you have tentative thoughts?

MS. CLARKE: That's the problem. We don't have any tentative thoughts.

MR. DENVIR: We're blank.

MR. CLEARY: Your Honor, I think one of the problems we are foreseeing is that I don't know that we would be questioning any individual juror all at once. They may be raising their hands at one particular question; we may have some follow-up questions for them there. And then, later on in the general voir dire, there may be another question that they raise their hand too, so we may have to question them on that.

THE COURT: I'm trying to discern whether this process can take place in one day, and that's one reason why I asked the question.

MR. DENVIR: I think – it seems to us that it should not take – no more than one day.

THE COURT: Okay. Which indicates that it won't take you that long to exercise your peremptory challenges.

MS. CLARKE: Well, now, isn't that a situation where the juror's going to leave anyway?

THE COURT: I hadn't thought about that. We could allow the jurors to leave and then call them back? Is that what you're thinking? Those that have been selected?

MS. CLARKE: (Nods head up and down.)
(Pause in the proceeding.)

MR. CLEARY: Your Honor, one idea might be to question the jurors on the 18th, as we've suggested, let them then go home, and allow the parties to come back the next day without the jurors present and exercise their peremptories at that point.

THE COURT: That's fine with me. I'm only concerned about the jurors, what we do with the jurors. But you have, you answered that question. You're indicating that after you've completed your questioning, they can be excused. And then they will be on call, and we will call back those individuals that have been selected and they will appear on the first day of trial, the 29th.

MR. DENVIR: Yes, Your Honor. I think that would work. And then you could renew the admonition about publicity and everything to all the jurors as they left that day, so they're again reminded not to be exposing themselves to publicity or discussing the case in the interim.

THE COURT: That raises, perhaps, another question. Do you contemplate having the Court to give preliminary jury instructions at that point, or do you believe that I will be doing that on the 29th?
(Discussion off the record among the Government's attorneys.)
(Discussion off the record among the defense attorneys.)

THE COURT: I think I've answered my own question. It appears that we would give preliminary jury instructions on the 29th, and you would – have you submitted those yet?

MR. DENVIR: I think we have. I'm not sure both sides have a submittal we agree on. But there was an initial submission, at least, of fairly standard ones.

THE COURT: All right. I want to you meet and confer on the preliminary jury instructions, but you've got some time. And then if you want me to give special jury instructions when they appear on the 18th, then you should propose those instructions, one of which is the one you just referenced.

MR. DENVIR: (Nods head up and down.)

THE COURT: Anything further to cover, from your perspectives?

MS. CLARKE: No, Your Honor.

MR. CLEARY: No, Your Honor.

THE COURT: I've got one more matter. Juror 148, in light of this schedule, I don't think you are going to be able to call in juror 148. Remember, that's the juror that –

MR. DENVIR: The one or two-week disability?

THE COURT: Correct.

MR. DENVIR: We would stipulate that. We offered to stipulate before.

THE COURT: His doctor has indicated to me that he has a disability that will disable him at least for a week, possibly for two weeks. And what we would have to do is we would have to – I'd have to have my staff to make another call to his doctor, require his doctor to tell us whether he's disabled for one or two weeks. And I presume we would need another note.

So the question is, what is your preference?

MR. CLEARY: Your Honor, I just had a question. Did he say one or two weeks from the date of the letter? Because the letter's dated November 24th.

THE COURT: One or two weeks from today's date.

MR. CLEARY: Oh, from today's date.

THE COURT: Right. That's how I understood it.

I just found my note. My note indicates that the physician told me the juror will be disabled until next week or the week thereafter.

MR. CLEARY: Under those circumstances we'd stipulate to his excusal, Your Honor.

THE COURT: Okay. We will excuse juror 148.

Thank you.

MR. CLEARY: Thank you.

MR. DENVIR: Your Honor, there was one other juror, and I don't have the number in front of me, that the Court directed to inquire. It was the juror who needed to get in hours to be eligible for medical condition and some other questions -

THE COURT: I know. I think I know what juror you're talking about. That's juror 98.

MR. DENVIR: (Nods head up and down.)

THE COURT: We have to make a call on that juror, right?

(Discussion off the record between the clerk and the Court.)

THE COURT: I've directed my staff to call that juror. I did that today.

Okay. Anything further?

MS. CLARKE: No, Your Honor. Thank you.

THE COURT: Okay. Thank you.

(Time noted: 4:28 p.m.) IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE GARLAND E. BURRELL, JR., JUDGE

- oOo -

UNITED STATES OF AMERICA,)) Plaintiff,)) vs.) No. Cr. S-96-259 GEB) THEODORE JOHN KACZYNSKI,)) Defendant.) _____)

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REPORTERS' DAILY TRANSCRIPT JURY TRIAL VOLUME 13, pp. 2397-2594 WEDNESDAY, DECEMBER 3, 1997

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Reported by: MARGARET McNAMARA, CSR No. 6729 CATHERINE E.F. BODENE, CSR No. 6926 DENNIS McKINNON, CSR No. 2223 SUSAN VAUGHAN, CSR No. 9673

A P P E A R A N C E S For Plaintiff UNITED STATES OF AMERICA: OFFICE OF THE U.S. ATTORNEY 650 Capitol Mall Sacramento, CA 95814

BY: ROBERT J. CLEARY STEPHEN P. FRECCERO R. STEVEN LAPHAM Special Attorneys to the United States Attorney General For the Defendant: OFFICE OF THE FEDERAL DEFENDER 801 "K" Street, Suite 1024 Sacramento, CA 95814 By: QUIN A. DENVIR Federal Defender, Eastern District of California JUDY CLARKE Executive Director, Federal Defenders of Eastern Washington and Idaho STERNBERG, SOWARDS & LAURENCE 604 Mission St., 9th floor San Francisco, CA 94105

BY: GARY D. SOWARDS Also Present: TERRY TURCHIE, Assistant Special Agent, F.B.I. Unabom Task Force ROBERT ROLFSEN, JR., Special Agent, F.B.I. DENISE DE LA RUE, Attorney at Law

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INDEX OF EXAMINATIONS By Page Voir Dire Examination of Prospective Juror No. 165 The Court 2407 Mr. Denvir 2418 Mr. Cleary 2428 The Court 2431 Voir Dire Examination of Prospective Juror No. 170 The Court 2435 Mr. Freccero 2439 Mr. Sowards 2246 Mr. Freccero 2464 The Court 2467 Voir Dire Examination of Prospective Juror No. 185 The Court 2468 Voir Dire Examination of Prospective Juror No. 169 The Court 2505 Mr. Sowards 2510 Voir Dire Examination of Prospective Juror No. 171 The Court 2526 Voir Dire Examination of Prospective Juror No. 172 The Court 2527 Voir Dire Examination of Prospective Juror No. 174 The Court 2535 Mr. Cleary 2542 Mr. Denvir 2556 Voir

Dire Examination of Prospective Juror No. 176 The Court 2558 Voir Dire Examination of Prospective
Juror No. 178 The Court 2562 Mr. Lapham 2574 Mr. Denvir 2582

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