Jury Selection Day 7

Nov. 21, 1997

FRIDAY, NOVEMBER 21, 1997, 1:34 P.M.

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THE CLERK: Calling criminal case S-96-259, United States vs. Theodore Kaczynski.

THE COURT: Please state your appearances for the record.

MR. CLEARY: Robert Cleary, Stephen Freccero, Steven Lapham and Douglas Wilson for the Government. Also at the counsel table is Terry Turchie of the F.B.I.

And Mr. Wilson will be arguing for the Government, Your Honor.

THE COURT: Thank you.

MS. CLARKE: Judy Clarke, Quin Denvir, Gary Sowards and John Balazs on behalf of Mr. Kaczynski. His presence has been waived, Your Honor.

THE COURT: Thank you.

Let's begin by having the defense tell me if you've received the letter the Government submitted to the Court dated November 21, 1997.

MS. CLARKE: No, Your Honor.

MR. DENVIR: No, Your Honor.

MR. CLEARY: I'm sorry, Your Honor. When we hand served it to the Court, we faxed it over to defense counsel, and maybe that was a half hour, 45 minutes ago. I can give them my copy.

THE COURT: I want to ask questions about that matter.

MR. DENVIR: Your Honor, I must say I'm a little disappointed. I spoke to Mr. Cleary about an hour and a half ago about some other matters. We would have thought we would have had some advance notice so we could have been prepared at this time.

MR. CLEARY: And I apologize. We were not done with the letter until when the Court got it. And as I said, we faxed it over at the same time.

(Pause in the proceeding.)

(Ms. Clarke, Mr. Denvir and Mr. Sowards examine document.)

MR. DENVIR: We've reviewed the letter, Your Honor.

THE COURT: Do you have a response?

MR. DENVIR: We're not requesting a competency hearing.

THE COURT: Is there any need for me to ask your client questions about that matter?

MR. DENVIR: Your Honor, we're convinced that Mr. Kaczynski understands the nature of the proceedings, the role of counsel in the Court, and we've been able to accommodate the effects of his illness in obtaining the information we need to evaluate and prepare his defense.

THE COURT: Okay.

The Government moves to preclude Kaczynski from presenting any expert testimony on his mental status defense during the guilt phase of the trial as a sanction for Kaczynski's refusal to submit to court-ordered mental examinations by the Government's experts. The Government also moves to compel Kaczynski to submit to

mental examinations by Government experts for the sentencing phase of the trial. The Government cited three district court opinions in support of that aspect of the motion.

As I read those district court opinions, each of those district judges required the defendant to provide notice of the intention to present expert testimony on a mental status defense. The Government has asked the Court to simply order an examination and has not addressed the notice issue.

I became curious about the notice issue. I questioned whether – if I were to use my inherent authority, as the Government has requested, to order Kaczynski to submit to a sentencing phase examination, I questioned whether I should require Kaczynski to provide some type of a notice, since, as I read the district court's decisions relied upon by the Government, notice was involved in each of those cases. One of those cases is Beckford. It's a Fourth Circuit decision.

I then looked at the statute to see whether it addressed the notice question, because I was trying to determine if I had the inherent authority to require such notice. When I saw nothing expressly provided in the statute, I looked at the legislative history. I haven't extensively reviewed the legislative history because, frankly, I just considered the matter this morning.

I found language in the legislative history that's somewhat troubling. The language indicates that Congress considered requiring a criminal defendant to provide notice of mitigating factors, reasoning that – I'm now quoting from the legislative history: "Defense notice is important . . . in relation to mental status mitigating factors (such as impaired capacity and mental or emotional disturbance) for which the Government will often need time to employ its own experts," close quote.

As is apparent from the statute as enacted, Congress ultimately rejected incorporating this change into the final bill. Thus I now must question whether I have the inherent authority necessary to require Kaczynski to provide notice.

I also looked at the Ninth Circuit decision in U.S. vs. Hicks, 103 F.2d 837. It's a 1996 decision. In essence, the import of the case is that it rejected the district court's use of its inherent authority in situations where that use is inconsistent with legislative history.

I then returned to the Beckford case, because it was clear to me that notice was required in that case. That case – at least – I should say it this way: Beckford was decided under Fourth Circuit authority, which the Ninth Circuit states in Hicks differs from the manner in which the Ninth Circuit approaches determination of the district judge's inherent authority. See Hicks at 103 F.3d at 841-842. I now question whether I have the authority the Government is asking me to exercise. Since the Government is asking me to exercise the authority, it seems to me it has the burden of showing the Court that it has that authority.

I am troubled by the idea of ordering an examination without requiring Kaczynski to provide some notice. Kaczynski may elect not to pursue the defense the Government assumes Kaczynski will pursue in the sentencing phase of the proceeding. And it seems

to me that the notice issue is important. So I need the Government to address that issue when I give you an opportunity to argue.

In determining the appropriate sanction for a criminal defendant's violation of a court order, the Court must exercise its inherent sanctioning authority cautiously. Even in the context of exercising this inherent authority in civil cases, a Court is required to ensure that – I'm now quoting from the Ninth Circuit decision in Zambrano vs. City of Tustin, 885 F.2d at 1480, a 1989 decision. Even in the context of exercising this inherent authority in civil cases, a court is required to ensure that "any sanction imposed" is "proportionate to the offense and commensurate with the principles of restraint and dignity inherent in judicial power." It appears to me that this principle has heightened applicability in the criminal context, where a defendant's liberty or life is at stake.

As the parties know, because I questioned whether your initial briefs on the Government's motion sufficiently addressed the factors, the Court is required to consider before entry of an evidentiary preclusion sanction. Earlier this week I requested the parties to file supplemental briefs addressing the applicability of the factors enumerated in Taylor vs. Illinois, a Supreme Court case, and Fendler vs. Goldsmith. It was my intention to see if you agreed with my impression that those factors applied to the Government's motion for sanctions. Your supplemental briefs indicate that you agree that those factors apply to the motion.

As I understand the law – and I'm sharing it with you because I want to tell you what I think before you argue so that you can tell me during your argument if your position differs from mine – as I understand the law, we are dealing with a Sixth Amendment constitutional principle here. The Sixth Amendment states, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right. . . to have compulsory process for obtaining witnesses in his favor."

Although the text of the Sixth Amendment does not provide for offering testimony of witnesses in court, the United States Supreme Court has interpreted it as providing such a right. A court must balance a defendant's Sixth Amendment right against "countervailing public interests," such as the "integrity of the adversary process, . . . the interest in the fair and efficient administration of justice, and the potential prejudice to the true determining function of the trial process."

In the Ninth Circuit, before a preclusion sanction can be levied, a court should consider the willfulness of the violation, the extent of prejudice to the prosecution, the materiality of the evidence excluded, and the effectiveness of less severe sanctions. Fendler at 1188-1190. That case was cited with approval in the Supreme Court decision of Taylor, 484 U.S. at 415, footnote 19.

The Supreme Court's decision in Taylor, which was obviously decided after Fendler and therefore is the precedent I'm bound to follow, squarely rejected the proposition that a less drastic sanction must be considered in every case by stating – I'm now quoting: "It may well be true that alternative sanctions are adequate and appropriate

in most cases, but it is equally clear that they would be less effective than the preclusion sanction," close quote.

Kaczynski argues that if a preclusion sanction is imposed, it should be limited to preventing him – I'm now quoting from his brief – "from presenting testimony from any expert who would rely on information from a psychiatric examination of the defendant in rendering an opinion regarding the defendant's mental condition." In essence, Kaczynski contends that since his experts "will not rely on any personal observations or communication" with him, a preclusion sanction is unnecessary.

Further, he asserts that any remaining detriment to the fact-finding process could be ameliorated by either permitting the Court to instruct the jury of his refusal to submit to the ordered examinations, allowing the Government to introduce evidence that its experts sought and were denied access, or allowing the Government to argue the inferences to be drawn from the denial of access.

My tentative thinking on the "willfulness" and "effectiveness of lesser alternatives," those two factors, follows.

To find Kaczynski's conduct was willful, the inquiry at this stage of the case is whether Kaczynski knew of his obligation under the Court's order to submit to the examinations and despite that knowledge chose not to comply with the order. Under this standard, it is pellucid that Kaczynski willfully disobeyed a court order. In Kaczynski's brief filed November 20, 1997, he stated that he "personally declined to endure the Government's examination" and argued that his non-compliance should be excused because it was "a function of his illness rather than intentional disrespect of the Court's order." While this excuse affects the degree of his willfulness, it neither dispels the willfulness of his conduct nor diminishes the impact that his conduct has on the truth-determining function of the trial process. Yet because of the nature of his willfulness, I think we should carefully consider the applicable factors and ultimately determine the effectiveness of less severe sanctions.

Kaczynski knew his obligation – knew of his obligation and nonetheless willfully defied my order. I personally asked him yesterday whether he understood the consequences of his continued refusal to undergo the examinations, and I allowed him to respond through his counsel. I saw him communicate his response to his counsel – at least what I assumed was his response; it appeared to be his response, because he had communicated with his counsel right after I asked him the question; because I couldn't hear the response, I am guessing. He spoke to Ms. Clarke, who spoke to, appeared to speak to him, and then she responded to my question.

I'm now going to address the "effectiveness of less severe sanctions" factor. The Supreme Court stated in Taylor that the "severest sanction is appropriate" where the misconduct is willful. However, Taylor stated that when contemplating the appropriate sanction, "a trial court may not ignore the fundamental character of the defendant's right to offer testimony of witnesses in his favor." Fendler reveals that because of the importance of Kaczynski's Sixth Amendment right to present a defense, the availability of alternative sanctions must be considered to ensure that the least restrictive sanc-

tion is imposed that would remedy the potential prejudice caused by the sanctionable conduct.

That really covers my tentative comments, provides you with my thinking on the law. I believe the Government should argue first.

MR. WILSON: Your Honor, would you like me to use the podium?

THE COURT: I think that's advisable. There's no microphones at counsel table.

(Mr. Wilson came to the podium.)

MR. WILSON: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. WILSON: As a preamble to addressing the Fendler/ Taylor factors –

THE COURT: No. Let's start with the notice issue, on the sentencing phase issue.

MR. WILSON: Well, first of all, Your Honor, the reason we did not ask the Court to order the defendant to provide notice is because we think it's clear from the record that the defendant intends to rely on some sort of mental health evidence at the sentencing phase. He has –

THE COURT: Let's start right there. If you don't show me I have authority to do what you're asking me to do, I'm not going to do it.

MR. WILSON: Well, Your Honor, we're –

THE COURT: I think it's inappropriate for the Government to ask the Court to order something without showing the Court it has authority to order what the Government has requested. And you didn't do that.

And I just explained what I found in my research, and you're not dealing with that research. I want you to deal pointedly with the comments I made to you on the notice issue, and I want the Government's response.

MR. WILSON: I understand, Your Honor. I took your comments to be, however, that you thought it was necessary to – that before the Court could –

THE COURT: Let me interrupt you.

MR. WILSON: Okay.

THE COURT: Mr. Kaczynski is presumed innocent. He need not present any evidence. That's a principle of law. You agree with that?

MR. WILSON: Absolutely.

THE COURT: And at this point he hasn't been convicted. You agree – I mean, that's obvious, right?

MR. WILSON: Yes.

THE COURT: How do I know what he's going to do in the sentencing phase of the proceeding, if we have a sentencing phase? And why should I allow you to conduct an examination of him if we don't know what he's going to do?

MR. WILSON: Well, our answer, Your Honor, is that we think we do know what he's going to do. He has told Magistrate Judge Hollows –

THE COURT: Let me ask it another way.

What if Mr. Kaczynski decides to rely on the same type of experts that he's seeking to rely on during the guilt phase? That's assuming that he doesn't get his way, because

he actually wants the Court to do other things. But assuming he loses the position he has articulated and the Government wins, and I then impose a sanction and I find that what Mr. Kaczynski proposes as a sanction is the less restrictive approach – and assuming that Mr. Kaczynski is unfortunate enough to be found guilty, yet continues in his position that he does not want to be examined by any psychiatrist. Then, with that in mind, Mr. Kaczynski decides that he does want to present some type of a mental status defense, but not the type you're thinking about, that he doesn't want anyone to examine him. Then why would I order the examination you are requesting? I think that's the importance of the notice, because it provides the Government with notice; it allows the examination to be tailored to the defendant's defense. Otherwise, how can you put limits on the scope of the examination?

MR. WILSON: So, essentially, Your Honor is positing that the defendant is not allowed to put on expert testimony during the guilt phase –

THE COURT: No, I didn't posit that, because Mr. Kaczynski is indicating that he does desire to put on expert testimony during the guilt phase. He appears to recognize that he faces a sanction that could exclude experts who have examined him. So what I understand Mr. Kaczynski to offer – he will be offering non-examining experts in the guilt phase. And my question to you is, how do we know that that's not the type of expert he will be offering, if he's unfortunate enough to be convicted, in the sentencing phase?

MR. WILSON: Well, Your Honor, our position is that if the defendant puts his mental condition at issue in the sentencing phase, he should be required to undergo a mental examination by Government psychiatrists.

THE COURT: How has he put his mental condition in issue in the sentencing phase? How has he done that?

MR. WILSON: He has conveyed to the magistrate judge that he will probably rely on two mitigating factors that involve mental health testimony, or mental health – that have reference to his mental health.

THE COURT: You're deeming that notice?

MR. WILSON: We think it's sufficient for us to go ahead and ask the Court for an order requiring him to undergo a mental exam prior to the sentencing phase.

THE COURT: What's the source of my authority?

MR. WILSON: Well, Your Honor, we don't believe that it's necessary for the Court to require him to provide notice before he is required to undergo a mental examination. The source of your authority to order him to undergo a mental examination is inherent authority.

THE COURT: I want authority for that point.

MR. WILSON: I believe that –

THE COURT: Just a moment, sir. Every case you've cited – you cited three cases in support of your position. Each of those judges required notice. Are you indicating that those judges required notice but they didn't have to?

MR. WILSON: Yes. They required notice in addition to requiring a mental exam, but they did not necessarily need to require notice. If the defendant had come in on the first day in any of those cases and said, "By the way, I'm not only going to introduce mental health testimony at the guilt phase but also at the sentencing phase – "

THE COURT: Are you familiar with the Ninth Circuit's decision in Hicks?

MR. WILSON: I did not read it for this hearing, but I'm generally familiar with it.

THE COURT: Well, you need to read that case.

MR. WILSON: Well, if I could just address the –

THE COURT: No. Before you argue your point on my authority, you need to read Hicks. Hicks is a Ninth Circuit case that explains the contours of the district judge's inherent authority, and you need to read it before you argue the position that I have the authority to provide the notice – or you're indicating I don't need to provide the notice. I disagree with you on that. You even need to prove that to me. The authority you cited involves cases where notice is present, yet you're telling me that I can ignore that. And I need authority for that proposition.

So at this juncture, I guess you can move to another point, because you have not supported your position with authority. We can go to another point.

MR. WILSON: Well, if I could just make one more point on this area.

THE COURT: No, you can't. I want you to move to another point.

MR. WILSON: Yes, your Honor. Then I'd move to address the motion to preclude, if that's acceptable to the Court.

THE COURT: Yes.

MR. WILSON: In going into that motion, Your Honor, before addressing the Fendler and Taylor factors, I'd like to just offer that this case is a little bit different than Fendler or Taylor or Zambrano, and it may be that it's different in a way that affects the degree of sanction, the amount or the effect, amount of coercive force the Court should bring to bear.

But the key fact about this case is that the Court is currently confronted with an ongoing refusal to comply with one of its orders. This is a situation that's much more like a contemptuous refusal to testify or an overt disobedience of the Court's injunction in a civil case, for example. And in cases like that, the Court is not issuing a sanction to punish the defendant for past behavior, as in Fendler or Taylor, or to deter future misconduct. The Court is levying its authority in a – as a remedial purpose to bring the defendant into line with his orders. And in that situation, it's our submission that the Court should impose the maximum coercion possible. In this case, that sanction is precluding the defendant from putting on any expert testimony whatsoever.

THE COURT: Assuming I disagree with you, then what is your position?

MR. WILSON: Well, I think that – well, our position is that the Fendler and Taylor factors also militate strongly toward that sanction.

THE COURT: What sanction?

MR. WILSON: The complete preclusion of expert testimony.

THE COURT: Right. I'm asking you to assume that I don't agree with that position. I want to know your next position.

MR. WILSON: Well, if the Court doesn't agree with that position, then our position is that the defendant should be precluded from putting on any expert who had any opportunity to observe the defendant or to interact with the defendant or who administered tests to the defendant. As the declaration filed by Dr. Resnick, our expert, indicates, even that amount of interaction with the defendant is enough to give a defense expert an advantage over a government expert who has had no opportunity to observe or interact with the defendant.

So if the Court has settled on a lesser sanction, then we think that that sanction should preclude the defendant from any, from putting on any expert testimony from an expert who observed, viewed, tested, had any interaction with the defendant whatsoever.

THE COURT: Considering that approach, tell me how would the Government be prejudiced if I embrace that approach.

MR. WILSON: If the Court embraces that approach, that is, that – well, again, Your Honor, I have to return somewhat to a discussion of Taylor, which I think makes clear that prejudice to the Government really isn't the central inquiry. The inquiry is interference with the truth-seeking process of the trial. I think Taylor is clear that prejudice – in fact, it says so –

THE COURT: Let's pretend that it is the inquiry, and tell me how the Government is prejudiced.

MR. WILSON: Well, the government is prejudiced, Your Honor, because the Government bears the burden of proof beyond a reasonable doubt. And when the defendant injects a mental defect defense, into a trial he is essentially augmenting the Government's burden of proof on the question of the element, the intent elements of the charged offenses. And by depriving the Government of expert testimony, the Government has essentially been deprived of the means to ascertain the truth of the defendant's assertion. And we think that is sufficient prejudice to the Government to justify a more extreme sanction.

But I don't want to be taken to concede that we think that prejudice to the Government is the –

THE COURT: I don't understand the prejudice. You are speaking in abstractions. I don't understand the concrete prejudice the Government would suffer. That's really what I want you to explain.

MR. WILSON: Well, the prejudice the Government would suffer –

THE COURT: It's clear that the Government has to prove its case beyond a reasonable doubt. You know I instruct juries about that all the time.

MR. WILSON: (Nods head up and down.)

THE COURT: I want to know: how will the Government be prejudiced if I sanction Mr. Kaczynski in the manner in which he has indicated?

MR. WILSON: Your Honor, our answer is that we would be prejudiced because we would be deprived of the most effective means of ascertaining the truth of his assertion that he suffers from a mental defect.

THE COURT: Well, sometimes things can be accomplished even though you don't have the most effective means to accomplish them. So I'm trying to determine if what the Government seeks to accomplish can be accomplished by something that is less than the most effective means. And if you don't tell me that, I'm not going to know whether the Government is prejudiced.

MR. WILSON: Your Honor –

THE COURT: I will leave the bench; I will go back and ruminate on this discussion, but I won't have any concrete information that tells me how the Government is prejudiced. I'm just trying to find that out.

MR. WILSON: Your Honor, if we are not allowed to examine the defendant, we will put on testimony rebutting his mental defect defense. But the cases make clear that the question is not whether we're on a level playing field with the defendant. The question is whether we, once the defendant has put his mental state at issue, whether we have the most effective means to rebut that defense. And it's our position that once he does that, he should not be allowed to dictate the conditions under which the inquiry is made.

So the prejudice is simply that we do not have the most effective means. We cannot bring to bear the strongest or most effective tools to determine whether he is, in fact, suffering from a mental defect. I can't really be more specific than that, Your Honor, because –

THE COURT: You could. I think you could, if you were really going to be prejudiced. I think you could be more specific, because you would explain to me how the Government is, in fact, prejudiced.

MR. WILSON: Well, let me – perhaps I can, Your Honor. In the declarations we filed on the motion to compel, our experts explained at some length why they needed the amount of time they did and the amount of interaction they did to rebut the defendant's – to assess the defendant's assertion that he suffers from a mental defect.

THE COURT: Just a moment. Their statements, though, were made in the context which assumed that Mr. Kaczynski's experts would have access to information they were seeking access to. That's not the context that we may be in at this point, and that's why I'm trying to determine how the Government would be prejudiced.

MR. WILSON: The context is different, but the – Dr. Dietz' and Dr. Resnick's explanations, that to determine whether the defendant's lengthy course of conduct was a result or was somehow affected by the mental defect he asserts, I think are relevant to the determination of whether the Government's been prejudiced.

In those declarations, they stated that because of the length of the course of conduct, because of the complexity of the behavior, because of the number of the defendant's writings, it would be difficult for them to come to a diagnosis without actually sitting

down with the defendant and analyzing him. And that's the sort of evidence that the Government has submitted in support of this showing of prejudice.

THE COURT: Okay.

MR. WILSON: Does the Court have any more questions?

THE COURT: I don't.

MR. WILSON: Thank you.

(Mr. Sowards came to the podium.)

THE COURT: Please begin with the sentencing issue.

MR. SOWARDS: Well, Your Honor, I must acknowledge that while we raised points on either side of the issue raised by the Court, that is, with respect to the Eighth Amendment implications of what could be introduced in the penalty phase and whether there was an Eighth Amendment loss on the Fendler analysis with respect to the sanctions, we frankly did not appreciate the analysis Your Honor has engaged in today with the Government. And while I would say – and I'm sure it's no surprise to the Court that we tracked it and understood it and agreed with it. We apologize for not having provided the Court with any briefing on that issue.

I do think the Court's analysis is absolutely correct with respect to the legislative history. We alluded to that both in our previous discussion of the Hicks case in the context of the general inherent authority – I believe it was in the context of the 12.2(b) notice and whether that applied under the circumstances here.

And we also invited the Court to consider the fact that, whereas here Congress has mandated a comprehensive legislative scheme covering a particular area, as the Court alluded to, this may be an inappropriate area to engraft different procedures by way of inherent authority. And, in particular, we pointed out to the Court that whereas there are notice requirements specifically indicated for the guilt phase and speak in terms of the guilt phase, there is no corresponding provision for penalty phase.

So we would agree with the Court on that one.

THE COURT: You can argue other points.

MR. SOWARDS: I did not want to – I have a point, Your Honor, to invite the Court's attention to, with respect to the weighing of the willfulness, and then I'm certainly prepared to answer any other questions the Court has with respect to alternative sanctions, if the Court has further questions with respect to those that Mr. Kaczynski or counsel on his behalf had proposed.

With respect to the Taylor and Fendler analysis, I would invite the Court's attention to the following analysis. And that is that in the context of Taylor, the notion of willfulness was one that they were describing that was exceedingly egregious, that it was one in which a witness was introduced – sort of an alibi witness was introduced mid-trial, and it was a witness as to whom the defense had given absolutely no prior notice, despite the fact that they had on two occasions purported to give the State of Illinois notice as to who they would be calling. The trial court – being concerned not only with the surprise aspect but also with other factors which indicated that this was a witness, in the trial court's words, that may not have actually been there, you may

be producing witnesses who really aren't witnesses – sought to conduct a hearing on this and found out that in, contrast to the defense counsel's representations, this was a witness to whom they had spoken weeks before.

THE COURT: There's a surprise element here too, isn't there? I didn't know that Mr. Kaczynski was going to make the arguments he's now making until he made them. And I didn't hear these arguments when we were talking about scheduling his examination. Can you explain why we didn't hear – I didn't hear the arguments then?

MR. SOWARDS: With respect to his inability to comply as a function of his illness?

THE COURT: Precisely.

MR. SOWARDS: And that, Your Honor, again, is a – I don't know if it's a failing or a deficit, but, in any event, the failing of counsel to appreciate the full significance and function of his mental illness. I believe Dr. Amador's declaration reflects he was someone who consulted with us and was provided with extensive information with respect to Mr. Kaczynski's mental condition and the circumstances of the noncompliance shortly before we provided the Court with this additional information.

We simply did not understand – we were aware of the writings, as the prosecution's expert has discussed them, in terms of Mr. Kaczynski's concern, his lifelong fear, indeed, of being considered mentally ill; we did not understand that was a function of his neurological condition.

THE COURT: But the Government's experts, as I understand the Government's position, they're not trying to find Mr. Kaczynski mentally ill. So why would he be fearful of the Government's experts? I think the Government's experts will be seeking to find Mr. Kaczynski sane. So why wouldn't he welcome that examination?

MR. SOWARDS: Well, that underlying premise, Your Honor, I think is one that I've been troubled with, because I think the way the prosecution has cast the debate here, it is that we have defense experts on one side who are trying to find Mr. Kaczynski insane, and in this corner we have Government experts who are trying to find him sane or memory healthy.

I can't speak for the Government experts. I can speak for our experts.

THE COURT: I'm not asking you to speak for them.

MR. SOWARDS: No, no, I'm not going to speak for them.

THE COURT: This doesn't make sense. Because I can understand your position conceptually, where you say that Mr. Kaczynski doesn't want to undergo an examination where a psychiatrist is going to opine that he is mentally ill. That's the position articulated in your declarations. But I don't understand why he wouldn't allow the Government's experts to examine him, because the Government's experts, will, I presume, try their best to portray him as sane.

MR. SOWARDS: And I think there are two answers to that, Your Honor. One is that what Mr. Kaczynski's mental illness, which comes from a neurological basis, what it has to do with preventing him from subjecting himself to a psychiatric examination

also prevented him from being examined in terms of his mental illness by our own experts.

That's why Dr. Foster explained in his declaration that what he had an opportunity to do was to assess his physical appearance, his prosody of speech and other factors in the context of a medical discussion about some of the ailments that Mr. Kaczynski was aware he had, such as insomnia and other matters. I think he was talking about a racing heart, his fear that his heart would burst as a result of the anxiety surrounding trial. Nevertheless, in the course of the medical physical discussion of these ailments, Dr. Foster was attempting to broach the subject of a perhaps underlying psychiatric condition, and it was at that point that Mr. Kaczynski terminated his examination.

So that – and the second answer, I guess, Your Honor, is – I don't mean this facetiously, but I assume that any expert who goes in – or at least the premise is that any expert going in to examine Mr. Kaczynski will not have a result-oriented agenda. In other words, the idea is to go in and see if there's something to this. And I would hope that that's what their experts would do.

And it is, I agree, the amazing paradox in this case that Mr. Kaczynski's illness is such that, if he is told someone is coming in to evaluate him with an open mind, that his fear is they're going to figure out there's mental illness there, even if that's a representative on behalf of the Government or the defense.

As Dr. Amador, though, points out, a further – and this is a further compounding condition or element, is that Mr. Kaczynski's mental illness is organized around a fundamental system of paranoid delusions, okay? The feeling that people are, you know, are out to get him, that the society is bearing down on him to destroy him. And this is particularly a sensitive subject with respect to contact by government agents. And so the writings that the Government has been alluding to, in some snippets, contain extensive references to concerns about satellites and surveillance, mind control, electrodes in his brain, that sort of thing.

THE COURT: Will Mr. Kaczynski allow the Government's experts to examine him for any period of time?

MR. WILSON: "Any period of time" with regard to –

THE COURT: With regard to his mental status defense?

MR. WILSON: As I stand here today, Your Honor, I don't know the answer to that. That's something I could ask him about and broach with him.

What I'm telling the Court, based on our experience with our own experts and particularly as we've been enlightened by the impact of his neurological impairments, what I would think is that there would be a much better chance if that examination were cast in terms of a medical evaluation, in other words, what they call a structured clinical interview, something like that that sounds like they're going to be talking to him about his sleep history and age, weight, that sort of thing. But it's the sort of interview that good clinicians can rely on, when they have access to this wealth of written information, to figure out if what was indicated in the writing is, in fact, what they see in front of them, because it – experienced clinicians who work with schizophrenia,

and I believe at least Dr. Resnick is one; I don't know Dr. Dietz' experience in this area, have things they're looking for that don't require them to personally discuss with the individual whether or not he endorses specific symptoms or whether or not he had a certain state of mind when things occurred. Just the give-and-take discussion can inform them, because the neurological – what they call neurological substrate or basis of the schizophrenic illness is such that it also manifests in voice, tone, pattern of speech and physical movement.

But whatever the Court wishes to do in terms of trying to inquire of Mr. Kaczynski and present it in a way that would make him accessible, we're willing to try.

What I emphasize for the Court, and with respect to consideration of the Taylor vs. Illinois factors, is the surprise in that kind of a case is seen to be a very deliberate, calculated pattern on behalf of a presumably mentally sound trial attorney to bring in perjured evidence, to bring it in at such a late state that not only is there willful non-compliance with the Court's discovery orders but all of the other factors simultaneously come into play, including the assault on the integrity of the truth-finding process, prejudice to the State, and the lack of any effective alternative sanctions, whereas here I think the Court, if I correctly understood the Court is acknowledging, is that there is some elements in the nature of the non-compliance that may be attributable, or are attributable, to an underlying mental condition.

THE COURT: I see that as a factual dispute. And that's why I characterized the willfulness as I did.

MR. SOWARDS: Yes.

THE COURT: Because I think I would have to resolve that factual dispute.

MR. SOWARDS: If I may address that, Your Honor, briefly?

THE COURT: Sure.

MR. SOWARDS: What I would like the Court to compare in that regard is really the declarations of Dr. Amador and Dr. Froming which we provided, and specifically as to Dr. Amador that would be paragraphs 8, 15, 22 and 25 – and certainly the entire declaration, but those particular paragraphs. And then with respect to Dr. Froming, it would be paragraphs 10, 11 and 12.

And just let me say that the sum of those two declarations and those paragraphs is to inform the Court that there is reliable, objective clinical data which is also directly available to the prosecution and has been in their possession for now over a month that demonstrates Mr. Kaczynski has, as a matter of a brain disorder, of physical brain disorder, the factors giving rise both to not only his schizophrenia but the pattern of conduct which is implicated in the willful refusal to see a psychiatrist.

They say that on the one hand. On the other hand, Dr. Resnick, who is the only one of the two mental health experts relied on by the Government to acknowledge both that this is, the non-compliance, is the result of Mr. Kaczynski's resistance – he also acknowledges that there is a possibility of mental illness, acknowledges without refuting or disputing the accuracy of the circumstances of the evaluation by Dr. Froming, including the fact that Mr. Kaczynski was interested in that evaluation in the hopes

that it would discount rather than find those neurological impairments and that he discontinued further evaluation once those impairments came to light. So Dr. Resnick doesn't disagree with any of that history.

And then most importantly, he acknowledges Dr. Amador's conclusion as to the existence of paranoid delusional thinking – in fact, an all-encompassing paranoid delusional system which dictates Mr. Kaczynski's life – and does not disagree with that. What he says only is that, well, on the other hand, normal people might also be fearful of consulting a Government doctor if it's on behalf of a Government that is attempting to seek their death.

But Dr. Resnick, having the same information available to him that Dr. Amador has, does not disagree with his conclusions as to either the neurological basis of the impairment, the fact that there's a delusional overlay, as reflected in the writings, and that the two of those things combine to produce the resistance to the evaluation.

So that's – and I think that's important, because the other conundrum in this case, really, is that the truth of Mr. Kaczynski's mental state is in fact the further explanation for the inability to comply with the Court's order.

THE COURT: Okay.

MR. SOWARDS: And if the Court has any other questions –

THE COURT: Not at this moment.

MR. SOWARDS: Thank you very much, Your Honor, for that opportunity.

MR. WILSON: Your Honor, just two short points.

First, the conundrum that was just identified is the conundrum that we face on the question of willfulness. The defendant's failure to comply with the Court's order rests on the same alleged mental disorder that we want our experts to evaluate. So we simply don't know whether that's valid or not. And I think that just sort of points up the need for a mental evaluation.

Secondly, the Court –

THE COURT: Excuse me. You heard defense counsel indicate that Mr. Kaczynski most likely will not comply with my order that requires him to submit to a Government's expert's mental evaluation. I asked defense counsel whether Mr. Kaczynski would be willing to be examined by the Government's experts in some other context. What's the Government's position on that?

MR. WILSON: Well, Your Honor, we – the declarations we submitted on the motion to compel convinced the Court that we needed an examination of the length that we –

THE COURT: Sir, sir.

MR. WILSON: I can't answer your question, Your Honor.

THE COURT: Well, you're not answering my question, because Mr. Kaczynski is not going to comply.

MR. WILSON: I understand that.

THE COURT: I ordered him to comply. He's not going to comply. I'm trying to understand if there are other options that the Government wants the Court to pursue.

MR. WILSON: And our answer is, Your Honor, we'll take what we can get. But we think for the reasons we stated in the motion to compel, we need –

THE COURT: You don't have to tell me what's in the motion to compel. I read the motion to compel. I'm here to explore alternatives.

MR. WILSON: Yes, Your Honor. And we will take what we can get. But we think if we are constricted or severely restricted in our examination, we think that should reflect in the sanctions the Court imposes or in the amount of expert testimony the defendant is allowed to introduce as well.

THE COURT: Okay.

MR. WILSON: Thank you.

THE COURT: I have a question, a few questions.

(Mr. Sowards returns to the podium.)

THE COURT: The Government just said something that reminds me that I should ask you, how many experts does Mr. Kaczynski plan on using? I'm talking about mental status type experts.

MR. SOWARDS: That he plans on using at the guilt phase, Your Honor?

THE COURT: Guilt phase.

MR. SOWARDS: Well, without presuming to know what the Court would have in mind with respect to –

THE COURT: Let me help you.

MR. SOWARDS: Okay.

THE COURT: Assuming that the expert would be an expert who did not examine Mr. Kaczynski.

MR. SOWARDS: Then we would probably be limited to . . . to one, Your Honor. And the reason I hesitated is, with respect to examination, and perhaps it's a point I should have addressed earlier, and I would hope that the Court would not encompass in that individuals who had to be with him in order to administer the testing, the objective neurological testing, which is available to the Government.

And the reason for that, Your Honor, is that the results of those tests and evaluation can be assessed by any qualified expert that the Government retains by review of the raw data and the test protocols.

THE COURT: What type of a physician administered those tests?

MR. SOWARDS: That was Dr. Froming, who was the neuropsychologist.

THE COURT: Okay.

MR. SOWARDS: And the information that she relied on has all been provided – that was provided to the Government last month.

THE COURT: I don't want you to leave the podium. I want to ask the Government's lawyer a question.

Does the Government desire to just use the testing he just referenced? Or do you have a desire to do your own testing?

MR. WILSON: Yes, we do, Your Honor.

THE COURT: Thank you.

Will Mr. Kaczynski allow the Government to perform its own neurological testing?

MR. SOWARDS: And that is a question, Your Honor, I will ask him and do my best to – and let me explain the hesitancy.

THE COURT: Let me tell you what I'm thinking.

MR. SOWARDS: Sure. I think I know what you're thinking.

THE COURT: If he doesn't, I wonder why I should allow it in.

MR. SOWARDS: No I was thinking that's what you were thinking, Your Honor. And let me say I appreciate the Court's creativity and patience in exploring this issue and trying to bring the parties together.

As reflected in the declarations of Dr. Froming and Dr. Amador and actually Dr. Foster, the problem is that Mr. Kaczynski was willing to cooperate with Dr. Froming in the expectation that he would get the, quote, right answer – in other words, that there was nothing neurologically wrong with him; there were no impairments. And as soon as he saw that was not how things were turning out, he stopped any further evaluations or any further discussion of the evaluation results with Dr. Froming.

Now, what I'm suggesting or what I'm thinking of, and perhaps the Court could give me guidance here, is – you know, would maybe be to allude to the Government's interest in arriving at an answer that would make him happy. Maybe that's one way to suggest that this is an opportunity to get the right result. I mean, that's not a reflection on their experts, but maybe that's – you know, if he wants to go best two out of three or something in that nature.

But I'm sincerely telling the Court that what Dr. Froming found was a concern by Mr. Kaczynski that she offered an objective, scientific way to put to rest any suggestions that he might have a mental illness and now he may be gun-shy of those testing procedures. But I'm not suggesting to the Court that I'm not willing or we're not willing to explore that with him. I just don't want the Court to think or overlook the information we've submitted to Your Honor that would indicate that, should he refuse, that's some sort of obstinate disrespect of the Court. It would, again, be a function of his mental illness.

THE COURT: This has a tendency to undermine the integrity of the judicial process when you have a criminal defendant that allows his own experts to do testing, and then when the Government wants to do the same testing, the criminal defendant then argues that he can't do that. It seems to me that if all criminal defendants did that, the Government would have a very difficult time prosecuting cases.

MR. SOWARDS: And I guess what I would say to that, Your Honor, is, as the Court indicated at the beginning of today's proceedings, is that all of this is a balancing analysis and certainly one that is uniquely case by case. And I would agree with you that if someone, all defendants blithely arranged for their own testing and then told the Government they can't have access to them, that would be a burden on the truth-seeking process.

But in this case I think what the Court needs to look at is the truth of the matter. The truth of the matter.

THE COURT: I'm not sure what you reference by "the truth of the matter." Experts disagree all the time. In the medical malpractice area, you typically have experts arguing over whether or not malpractice has been committed and you get reputable experts on each side. And what you seem to suggest is that this is an objective neurological testing.

MR. SOWARDS: Correct.

THE COURT: Well, the Government can have an expert that can disagree with that opinion that it's an objective neurological testing, that there's a subjective component to it, and that the Government wants to be able to explain the subjective component and the only way to do that is to conduct an examination of Mr. Kaczynski.

MR. SOWARDS: And what I would invite the Government to do, Your Honor –

THE COURT: It's quite troubling to me that Mr. Kaczynski would argue through counsel that he should be allowed to use that test and the Government cannot duplicate that test in any fashion.

MR. SOWARDS: And that's what I'd like to speak to, Your Honor, is there are a couple factors in the record reflecting that they can duplicate that. The nature of the neuropsychological testing that is involved is, in fact, designed to be reviewed by a psychiatric expert to determine whether it has been internally validated. There are a number of scores and scales that are used in the test results to show whether, for instance, there has been attempts to malinger or to exaggerate or to affect the results by the examinee. And so long as the test has been completed, the evaluation by the examiner, the person who administered the test, is merely one of evaluating the data.

And so what I would first ask, because I understand the Court is making a sincere – and I appreciate the effort to get the parties together, is to see whether in fact the Government's experts, as opposed to Mr. Wilson, feels that there is something about the test data they're looking at that gives them a concern that it may have been influenced by subjective factors.

The other thing I would point out – two other points, because I think this does go to Your Honor's concern about the integrity of the process and the accuracy of the truth-seeking function of the Court. And that is that, again, Dr. Resnick – I mean, not Dr. Resnick – Dr. Dietz says that he understands. His declaration which they most recently provided the Court says that he understands; he finds it understandable that Mr. Kaczynski, upon finding out that the neuropsychological test results were going against him, in his mind, would terminate further evaluation. Dr. Resnick says the same thing. So it's not us who are telling the Court that Mr. Kaczynski's resistance to further testing of this type is a function of his condition; it's the Government's own experts.

And the third point is that, as Dr. Froming points out, the results that she has obtained and reviewed from the neuropsychological testing with respect to the underlying neurological condition is wholly consistent with psychological testing that was performed on Mr. Kaczynski when he was a sophomore at Harvard back in 1959. So

it's not as if – I mean, I presume there wasn't any way that Dr. Froming could have influenced those results. I mean, she's looking at that information, and that's what the clinicians refer to as congruent data, data which is constant over time.

So I think if they've had an opportunity to look at this information and ask the good faith question of their – I mean, I understand there may be a tactical reason that they would say, "Oh, no, we definitely want it," because we know Mr. Kaczynski may not comply, but I think if they ask that question to a qualified neuropsychologist, they may find that in the effort of trying to advance this case and not have somebody be executed, or convicted or executed, because he can't comply with the examination, they may find that they can replicate those findings and do anything they need to do to challenge them.

And again, I would just emphasize that, again, neither Dr. Dietz nor Dr. Resnick again quibbles with the accuracy of any information that has come out of Dr. Froming's findings.

THE COURT: Okay.

MR. SOWARDS: Any other questions, Your Honor?

THE COURT: No.

MR. SOWARDS: Thank you very much, Your Honor.

MR. CLEARY: May I reply briefly on the battery of testing, the testing that counsel just referred to?

It's my understanding, Your Honor, that there's not a single neurological, neuropsychological test, but rather there are a battery of tests that the tester or examiner can choose from to administer. And it may be that one neuropsychological tester is going to choose a different battery of tests or a different collection of tests.

And that's really what we're talking about here. The defendant should not be in a position to dictate to the Government – given the Court's order, should not be in a position to dictate to the Government which tests the Government is going to be limited to drawing conclusions from. Rather, and the Court pointed this out, there is a subjective component to this. Different examiners are going to test – they're going to apply different tests. There are biases of examiners that may creep into their interpretation of results, and the results they get, the raw data they get from the subject of the examination.

And if the defendant is going to be allowed to put on in the case the interpretation of his expert test data, the Government should be allowed to do the same, to do its own testing, share it with the defense, and then both sides could interpret their own test data and opine on the test data of their opponent.

And that seems to me to be the fair way to handle this, Your Honor.

THE COURT: I agree.

MR. SOWARDS: May I speak briefly?

THE COURT: Yes, but I want you to know I agree with him.

MR. SOWARDS: Well, Your Honor, the point of – I mean, all the probabilities or possibilities that – it's Mr. Cleary now – Mr. Cleary explained to the Court are those

factors which should be first considered with a neuropsych specialist, if they have one. First of all, the question is whether there's anything about this data that they disagree with in terms of its reliability. Do they have, does either Dr. Res- –

THE COURT: That's not what he seemed to indicate. He just indicated that the criteria utilized by the examiner may be different than the criteria the Government's expert wants to look at. And he's indicating to me that the defense's expert, for some reason, has determined to look at certain things, and the Government may want to look at other things. And if I do what the defense is telling me, then I would – it's starting to really bother me.

MR. SOWARDS: Okay.

THE COURT: Then I would essentially be allowing Mr. Kaczynski, through counsel, to limit the Government's access to information, and then Mr. Kaczynski would present information to the jury that the Government simply can talk about by looking at the cold record.

MR. SOWARDS: And what I would –

THE COURT: The jury could view Mr. Kaczynski's evidence in a way that causes that evidence to have more probative value. That's quite troubling. That's not fair.

MR. SOWARDS: And to correct the unfairness, Your Honor, we were proposing a number of things.

One, we were willing to speak with Mr. Kaczynski and encourage him to engage in any testing which the Government experts find necessary, assuming there has been consultation and an informed representation to this Court that that additional testing, whatever it may be, is necessary. So I didn't want to suggest to the Court that we were foreclosing that at this point.

The more important issue, though, and I think one that should engage the Court's attention, is as to whether there is truth, because it has not been refuted at this point by any Government expert, that the fact of non-compliance is a function of the very neurological deficit that we're talking about. But if that's the case, and there is a possibility that for tactical advantage the Government could say, "Well, we want to test this fellow. We want to test him, knowing that he can't comply," the question is: do they have anybody who backs up what has just been represented to the Court?

And the reason I ask that is this. The battery of examinations, as Mr. Cleary presumably knows from the information provided to him, is a comprehensive multiphasic battery. The precise testing which was to further confirm the impairments in the frontal lobe, the temporal parietal lobes and the right hemispheric damage in Mr. Kaczynski, were the very tests suggested by the imbalance showing up on these larger screening examinations. This has been a comprehensive test. It is the nature of these tests that the information is either there or it's not there. It's not a matter of bias of the examiner or bias of the clinician in teasing this information out, because the results are there.

But the final point is, if, in fact, we are correct that the neurological deficit contributes to the non-compliance or causes the non-compliance, then I think Your Honor also has available the very arguments, if they exist – and we're not conceding that as

a matter of clinical science they exist, because we don't believe they do – but if what Mr. Cleary said is accurate as a matter of the clinical practice, then that's another way that the jury can be asked to evaluate the weight and the credibility of the data.

For instance, they come in and say, "Well, wait a minute. You're giving us just part of the picture of this man's impairment. We say, according to some expert, that there are a number of other tests which could have been administered, but Mr. Kaczynski wouldn't let us administer those tests." And the jury will, if it's persuaded by that information, if in fact it's backed up by expert testimony, will have the same sorts of concerns that the Court is identifying now.

But there is no one – I can assure the Court now, there is no one who is going this come in here on the basis of sound clinical information, research data or any other medical basis to tell the Court or a jury credibly that if someone has the already diagnosed constellation of impairments that Mr. Kaczynski has, has the complementary personality testing that he had as a 19-year-old and has engaged in this pattern of conduct, that that's attributable to anything other than schizophrenia. There's just no test available that says there's a different perspective or a different context.

And just one other point I wanted to apprise the Court of, because the folks at my table heard me discuss this with the Court – I may have misinformed or suggested to the Court that Dr. Froming would be the only person we would be relying on. If we're talking about non-examining experts, we had also proposed to provide the jury with testimony from experts generally in the field of schizophrenia who would have access to the writings as a basis of diagnosis.

But in that regard we particularly, because of the time spent and expense spent, had proposed a psychiatrist who had an opportunity to observe Mr. Kaczynski for an hour but not conduct any evaluation.

THE COURT: Okay.

I want to know if the parties have a suggestion as to what should occur. I have an idea, but I want to get your input first.

I will tell you my idea. The defense – I'm going to give you the background that gives rise to my idea. The defense cited the Taylor case in a footnote. I read footnotes, and I read cases in notes. I read Taylor, and then I read the footnotes, and that's when I found Fendler. And then I decided that, combined, Taylor and Fendler probably represents the law we have to follow.

Do you agree with that?

MR. WILSON: Yes, Your Honor.

MR. SOWARDS: Yes, Your Honor. And I would also just add in United States vs. Peters.

THE COURT: Correct. I've read it. That's a Ninth Circuit case.

MR. SOWARDS: Yes, sir.

THE COURT: Because that case deals with the willfulness issue.

MR. SOWARDS: Correct, Your Honor.

THE COURT: Right. You haven't had, perhaps, a lot of time to think about those factors. And you perhaps didn't have any idea as to how I would approach those factors. I've indicated tentatively how I think the factors should be approached. At this point, I think my tentative approach is the one that I should explore. And my thought is that you should meet and confer on this, recognizing I'm going to balance – I mean, first we have to figure out the components of each of the factors, and then I'm required to put the factors on a scale and I'm supposed to balance, and then I decide what sanction to impose.

It probably would assist the Court if the parties first analyzed those factors independently, with my thinking in mind, and then met and conferred to see if you could agree upon an approach, because my understanding is that the defense counsel is now thinking about talking to Mr. Kaczynski to see if Mr. Kaczynski won't allow the Government to examine him on something.

MR. SOWARDS: (Nods head up and down.)

THE COURT: And that may very well assist in the analysis.

Does that approach sound workable?

MR. CLEARY: Could we have just one minute, Your Honor?

THE COURT: Yes.

(Discussion off the record among Government counsel.)

MR. SOWARDS: Excuse me one moment.

(Discussion off the record among defense counsel.) //// (nothing omitted)

MR. CLEARY: Your Honor, the government thinks the Court's proposal is a good one, and I think maybe in a couple days we can meet with defense counsel and start talking about the various issues that have been put on the table.

MR. SOWARDS: That's acceptable.

THE COURT: That's the approach we'll use. You can tell me one day next week what the conclusion is.

MR. CLEARY: Certainly, your Honor.

THE COURT: All right.

MR. CLEARY: Thank you.

MR. SOWARDS: Thank you.

THE COURT: There are a number of jurors that have been challenged for cause. I have a ruling concerning all jurors that have been challenged for cause with the exception of one. I can issue an order that reflects my ruling, but I won't be able to issue that order until either Monday or Tuesday next week. I can orally tell you the ruling right now if you want to hear my ruling at this moment.

MS. CLARKE: Yes, your Honor.

THE COURT: You do. I wonder if there should be argument on the juror that I'm still pondering. That's the juror I asked my secretary to call the parties for the purpose of telling you I wanted you to argue a particular point.

Did you receive the call?

MS. CLARKE: Yes. And if that would be helpful to the Court, we'd be happy to.

THE COURT: Okay. That's juror 53.

MR. WILSON: Yes, your Honor.

THE COURT: Right.

MR. WILSON: Your Honor specifically directed the parties to a certain portion of the government's motion.

THE COURT: Actually, I want to hear from the defense first, because I know the government's position.

MR. WILSON: Okay.

MS. CLARKE: Thank you. What I received from chambers was an indication that the Court was interested in discussing lines 18 through 24 of page 8 of the government's brief regarding juror 53.

THE COURT: That's right.

MS. CLARKE: And that really is where the government says that that juror will consider only one of the government's aggravating factors.

THE COURT: That's right.

MS. CLARKE: Well, I remember that juror very well because I had an opportunity to question that juror.

THE COURT: Let me say something. I remember the juror very well too, and credibility is not an issue.

MS. CLARKE: If I could point the Court to information in the record, the juror came on the witness stand having filled out a questionnaire and having made statements that she was opposed to the death –

THE COURT: I don't need that. I have read the transcript. I take copious notes on the bench. This is a legal issue, I think. And if I'm wrong, if it's a factor issue, I want you to show me the facts. I want to know whether you agree with the government's point.

MS. CLARKE: Well, no, because I think factually they're wrong, and then the question is legally what does that mean.

THE COURT: How are they wrong factually?

MS. CLARKE: Well, because I don't believe that this juror said she could only consider that one instance. Because if the Court looks at the history of the juror – and I don't want to spend too much time on it – the juror came on antideath. She said I'm opposed to the death penalty. I can't imagine a circumstance in which I could apply the death penalty. Then she very thoughtfully went through a change in her opinion. It was almost an epiphany on the death penalty for her.

And what she said finally after considering the question of future threat, she finally said, well, I had not thought of those things. And at page 727, she was asked, "But when we think about having on a jury people of different viewpoints and know how important it is" –

THE COURT: I'm sorry. What lines?

MS. CLARKE: At the top of the page. The question put to her is line 4.

"QUESTION: It's important to know that you could sit and consider in a meaningful way the views of other people before making your judgment.

"ANSWER: Yes. Yes.

"QUESTION: So you could follow the Court's instructions to consider aggravating circumstances and weigh them against mitigating circumstances before you made your mind up?

"ANSWER: Yes, I think I could.

"QUESTION: You wouldn't go into that jury room with your arms folded and predisposed towards a particular penalty until you heard everybody else talk to you?

"ANSWER: I wouldn't go in with my arms folded, no. I would be open to what the others had to say.

"QUESTION: And you would consider it in a meaningful way?

"ANSWER: Yes. Yes."

Now, that followed the discussion of the future danger issue.

On questioning by government counsel, beginning at the bottom of page 730, line 25:

"But as you sit here today, do you think you could – you can imagine a situation in which you could too sign that verdict form sentencing the defendant to death?"

Top of page 731:

"ANSWER: Yes. I think now I could given the 'what if' ideas that are now going through my mind."

The juror then was questioned beginning at page 735, but ultimately the Court took the questioning then. And the question was, could you follow the instructions.

And at the top of page 736, line 7:

"I know now where he's going." This is the juror. "You're asking me if I would sacrifice what I morally believe to be right and wrong for the sake of following the law in a case."

"**THE COURT**: That's pretty much what I've asked you.

"THE JUROR: Well, I can follow the law, given the idea in my mind now these 'what if' circumstances that we're playing with. I could follow the law."

She goes on to say: "Well, there's probably a million different ones out there, but currently in my mind is what she's just posed to me; the threat to other people."

This juror did what the probing is supposed to do and what didn't work with a juror yesterday afternoon if the Court may recall. I went through the same series of questions with a juror yesterday afternoon, and she said, no, I can't buy that. I cannot be open to the death penalty, period. I don't care whether you're distinguishing between my role as a juror and my role has a legislator. I don't care if you're just asking me to follow the instructions. But this juror, 53, had that epiphany.

THE COURT: I understand.

MS. CLARKE: Thank you, your Honor.

MR. WILSON: Your Honor, briefly. I believe this is actually a legal issue more than a –

THE COURT: I don't think so now.

MR. WILSON: – a factual one.

THE COURT: I think it's a factual issue.

MR. WILSON: If I can just direct the Court to a passage in Wainwright vs. Witt.

THE COURT: No, I don't want you to. I want you to tell me what's meant on page 736, lines 18 to 20.

MR. WILSON: Well, I think what's meant is revealed in lines 21 through 24 where the juror says in response to a question from Mr. Freccero: "And if there wasn't a threat to other people, would that change your view?"

THE COURT: Okay. You won't convince me. I did not see what counsel just pointed out to me. I think the defense is right. The government's motion as to juror 53 is denied.

Kaczynski moves to excuse for cause jurors 11, 14, 17, 18 and 29. The government moves to exclude for cause juror 30.

For the following reasons the voir dire questioning establishes that the views of jurors 11 and 14 would not prevent or substantially impair the performance of their duties as jurors under the applicable death sentence statute.

Juror 11. Kaczynski argues that juror 11's views on capital punishment are so strong that she could not impartially consider a sentence less than death. However, the totality of juror 11's responses do not implicate that she would be unwilling to weigh and consider the relevant aggravating and mitigating evidence.

Although juror 11 stated that deliberate, intentional murder of another human would equal death for her, she did not state she would ignore relevant mitigating evidence or that she would automatically vote to impose death at the sentencing phase of the trial. She said she couldn't say exactly what sentence she would impose until she heard all the evidence and the judge's instructions.

See the transcript 132, lines 13 to 25; 133, lines 1 to 8; 135, lines 14 to 25; 136, lines 1 and 2; 138, lines 2 to 25; 139, lines 1 to 3.

The record should reflect that I have made credibility determinations as to all jurors. And sometimes I leave the position that I have here on the bench and I move to the podium if I believe it is important to make a credibility determination.

Juror 11's responses to questions when looked at in their entirety establish that she would lawfully perform her responsibilities under both the death penalty statute and her oath. Her answers make it clear that while she is a proponent of the death penalty, she would not automatically vote for the death penalty if the jury finds Kaczynski guilty of murder.

Specifically, she stated she would be able to vote for a sentence other than death if the mitigating evidence truly outweighed the aggravating evidence. Since juror 11 is not biased against Kaczynski and I believe she will carry out her oath as a juror, the challenge is denied.

Juror 14. Kaczynski challenges juror 14 by focusing on parts of the questioning that probed the likelihood of whether juror 14 would impose the death penalty for a particular killing.

Questions as to whether the death penalty is warranted for a particular killing is not necessarily relevant – I'm now quoting from McQueen, a Sixth Circuit decision 1996, 99 F.3d 1302. Questions as to whether the death penalty is warranted for a particular killing is not necessarily relevant "to the issue of whether a juror would consider penalties other than death in this case."

Juror 14's answers make it clear that his view on the death penalty does not result in an automatic vote for death should the defendant be found guilty of murder. See United States vs. Chandler, 996 F.2d at 1103, Fourth Circuit 1993. Also see the transcript at 169, lines 17 to 25; 176, lines 18 to 25; 177, lines 1 to 5.

Contrary to Kaczynski's indication, "jurors are not excludable for cause merely for a predisposition towards, or a belief in the appropriateness of, a capital sentence for a specific offense." I'm in the process of quoting. I didn't state that for the record. This is not my language. This is from Satcher vs. Netherland, 944 F.Supp. at 1281.

"Such jurors may remain death-qualified notwithstanding such predispositions or beliefs if voir dire questioning establishes that their views would not prevent or substantially impair the performance of their duties as jurors under the applicable death statute. This means, however, that a juror who is predisposed to impose the death penalty must signify the willingness and the ability to lay aside the predisposition and to decide the case on the mitigating and aggravating sentencing factors."

Since I believe juror 14 will discharge his oath, the challenge is denied.

Juror 17. Kaczynski also moves to excuse juror 17 for various reasons. Since I agree with one of those reasons, I need not reach the others. Following Kaczynski's examination of juror 17, I was left with the definite impression that juror 17 would be unable to faithfully and impartially apply the law that requires the juror to presume the innocence of Kaczynski.

See Wainwright, a Supreme Court decision, 469 U.S. at 426. Despite the lack of clarity in the printed record on this point, I have the definite impression that in the eyes of juror 17, Kaczynski has not been presumed innocent and does not start the trial with a clean slate.

As stated in Russell vs. Collins, 998 F.2d at 1294, note 50, the standard expressed in Wainwright "does not require that a juror's bias be proved with unmistakable certainty." Accordingly, juror 17 is excused for cause.

Juror 18. Next, Kaczynski challenges juror 18 on four separate grounds. I need reach only one ground. Juror 18 stated that approximately two years ago, her son was in a federal building where there was a bomb threat. She also spoke about a second incident involving a bomb threat at an airport where her son and daughter-in-law were present.

The juror indicated that she could reflect on these experiences when hearing evidence of bombings during the trial of this case, and that reflection could invoke in

her an emotional response that adversely affects her impartiality. The prospect of the juror's impartiality being undermined this way supports Kaczynski's challenge.

Based on the juror's responses to questioning and my observation of her demeanor when she related these experiences, I am convinced there is a real possibility that these prior experiences will adversely affect the juror's impartial participation in this case. Accordingly, the motion is granted.

Juror 29. Kaczynski also challenges juror 29, arguing that this juror was less than candid about his exposure to publicity in this case. I agree. The responses this juror provided in the questionnaire concerning exposure to pretrial publicity are not consistent with the responses this juror gave during voir dire.

This is troubling since the voir dire process I am using is designed to ascertain what information the jurors have been exposed to so we have a way of objectively assessing the impact caused by pretrial knowledge of this case on the juror's impartiality. This cannot be accurately assessed without knowing the publicity to which a particular juror has been exposed.

The jurors must be candid about this and forthcoming. Anything less undermines the defendant's right to obtain a fair and impartial jury. Although juror 29 assured he could render a fair and impartial verdict, this is not dispositive. A trial judge is required to make an independent assessment of a juror's ability to render a fair and impartial verdict.

Since I am left with a definite and firm conviction that juror 29 was not candid about his exposure to pretrial publicity about this case, he is excused for cause.

Juror 30. The government's motion to excuse juror 30 for cause is denied. The record does not support the government's contention that juror 30 is incapable of considering the facts impartially and conscientiously applying the law as charged by the Court. See Adams vs. Texas, 448 U.S. at 45. Nor did the juror's responses to questions leave the court with the "definite impression her views on the death penalty would substantially impair the performance of her duties as a juror."

Kaczynski also moves to excuse for cause jurors 13, 40, 51 and 62.

Juror 13. The Court reaches only one issue pertaining to Kaczynski's challenge to juror 13. While the record discloses that juror 13's final statements indicate she is a death-qualified juror, Kaczynski opines that something in the tone of the judge's questioning of that juror may have caused her to respond with those final statements and that those statements failed to reflect her true views.

While I doubt that the tone of my questioning, questioning that was designed to flush out the juror's true views, was inappropriate, I have no recollection of the precise tone I used. Since a microphone amplifies my voice, I am unable to judge the situation. Since this is the only time Kaczynski has complained about the tone I used during voir dire, I will assume he has reason to conclude that my tone prompted the response from the juror he challenges. Kaczynski is at the mercy of the Court to accept his perspective on this matter because he would have a difficult time proving his position based on the record.

Even though I doubt that the tone had anything to do with the juror's final statements, sometimes the perception of justice is just as important as justice itself. That is the situation here. For that reason, juror 13 is excused.

Juror 40. Kaczynski's argument that juror 40's views on the death penalty would prevent or substantially impair her ability to consider a life sentence is unsupported by the record. Juror 40 expressed the view that she would consider penalties other than death.

Juror 51. Kaczynski's challenge to exclude juror 51 on the grounds of partiality and because of his views on the death penalty is not supported by the record. I find the juror is impartial. Further, despite the fact that the juror indicated that the death penalty would be the appropriate punishment for certain types of murder, the record does not support Kaczynski's contention that he would automatically vote to impose a capital sentence and that he would ignore relevant mitigating evidence.

The questioning established that his views would not prevent or substantially impair the performance of his duties as a juror.

See the transcript at 678, lines 20 to 25; 679 to 681, at lines 1 to 9; 692 and 693, lines 1 to 6; 694, lines 18 to 25; 695, lines 1 to 3; 696, lines 19 to 25; 697, lines 1 to 2.

Juror 62. Kaczynski also moves to excuse juror 62 for cause, arguing that some of her answers reveal that her general assurances of impartiality do not apply to certain criminal acts. Since I conclude that her views on these matters –

I'm sorry. I'm going to have to rule on juror 62 on Monday. I have no recollection of this juror nor my ruling, and I'm not sure if what I'm looking at is a typographical error. So to be certain, I'll wait until Monday.

Juror 43. The government moves to excuse juror 43 for cause, arguing that his views on the death penalty will prevent or substantially impair his duties as a juror. Kaczynski rejoins that the Court should be mindful that even those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Juror 43 stated "in some situations," he would consider the death penalty more appropriate than a life sentence. See transcript at 602, lines 10 to 11.

The parties dispute the logical inferences that can be drawn from this statement and other views stated by the juror and whether juror 43 is a death-qualified juror. Although juror 43 indicated he has a predisposition towards imposing a sentence other than death, the totality of his views reveal that he would consider death as an alternative sentence.

The government suggests that juror 43 would only consider the death penalty in extreme hypothetical situations and that this disqualifies him from adhering to his oath as a juror, but the record does not support the government's argument.

As the Supreme Court stated in Witherspoon, "A prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of the juror in this regard is

that he be willing to consider all the penalties provided by state law" – in this situation federal law –"and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." That's 88 Supreme Court 1777, note 21.

While I recognize that the inferences the government seeks to have me draw from the juror's views are plausible, Kaczynski's position is equally plausible. Accordingly, the government's motion on this ground is denied, and the government's motion to exclude the juror on the basis of hardship is also denied.

Juror 53. The government also requests that juror 53 be excluded for cause. The motion is denied. Juror 53 remains qualified notwithstanding her views against the death penalty.

I ruled on all but one juror.

Anything further to cover before I adjourn?

MR. DENVIR: No, your Honor.

MR. CLEARY: Nothing for the government, your Honor.

THE COURT: Thank you.

MR. DENVIR: Thank you, your Honor.

(Court adjourned.)

—oOo— 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 7, pp. 1202-1267 GOVERNMENT'S MOTION TO PRECLUDE EXPERT MENTAL HEALTH TESTIMONY AT GUILT PHASE

AND HEARING RE: FOR CAUSE CHALLENGES FRIDAY, NOVEMBER 21, 1997

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Reported by: SUSAN VAUGHAN, CSR No. 9673 KELLY O'HALLORAN, CSR No. 6660

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BY: GARY D. SOWARDS Also Present: TERRY TURCHIE, Assistant Special Agent, F.B.I. Unabom Task Force DENISE DE LA RUE, Attorney at Law

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Jury Selection Day 7
Nov. 21, 1997

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