

Jury Selection Day 9

Nov. 25, 1997

SACRAMENTO, CALIFORNIA
TUESDAY, NOVEMBER 25, 1997, 9:00 A.M.

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THE COURT: Let the record reflect all the participants are present. Are you ready to proceed?

MR. CLEARY: We are, your Honor. There is one matter we'd like to put on the record at sidebar, but we can do it any time today that's convenient for the Court.

THE COURT: What's the subject matter?

MR. CLEARY: The subject matter is what the Court asked us to meet and confer on on Friday, and we'd just like the Court to know where we stand.

THE COURT: Why does it have to be at sidebar?

MR. CLEARY: Your Honor, the Court asked the parties to meet and confer on some compromised arrangement whereby the Government might be able to have some access to the defendant.

Yesterday afternoon at the lunch break I proposed five separate alternatives to the defense, ranging from an interview, a joint interview of the defendant by both Government psychiatrists at the same time in the room with the defendant with no restrictions on subject matter, but limited to a certain number of hours. Specifically, however many hours Dr. Foster had with the defendant. That was the most desirable situation for the Government.

The ranges from that to the fifth alternative, which is the least desirable, which would be that the Government's experts would have access to Mr. Kaczynski only through written questions. They would submit written questions and get written answers from the defendant.

And there are three proposals in the middle. If the Court wants to, I could go through them, but as an alternative what we propose is that if we are allowed to do that, if we had that access, then the defendant would be allowed to put on, in the guilt phase, experts who have had only that access, the matching degree of the access and no more. Those were five proposals.

As a separate issue we asked the defense if we would be allowed to have some psychological or neuropsychological testing of the defendant. I think it's fair to say they asked me which particular test we would want to run. I did not have a ready answer to that other than one particular test called the MMPI, the Minnesota Multiphasic something or other, and I have not given them any other details as to the testing.

It's my view that the ball is now in their court on the testing issue. They need to let me know whether Mr. Kaczynski would make himself available for the testing, which testing I told them would take approximately four hours. Just this morning they informed me they have rejected the first five proposals as to the type of access our psychiatrists would have to the defendant.

And on the testing issue they believe, and correct me if I'm wrong, that it's my burden to tell them precisely what tests we want to conduct on the defendant. My view is they should tell us whether he is going to be available or not. If he is not going

to be available for testing, refuse to make himself available for testing, it seems it's not worthwhile for me to try to figure out precisely what tests we want to administer. I think that's correct.

MR. SOWARDS: May I use the podium?

THE COURT: Yes. I'm interrupting jury selection because I am pondering this issue, and I am interested in knowing what the parties are doing.

MR. SOWARDS: Yes. In that light, your Honor, I would indicate that what we were seeking at this juncture was guidance from the Court with respect to the next step in what I would hope would be an ongoing meet and confer process with respect to the possibility of neuropsych testing. On Friday afternoon I recall we had gotten past –

THE COURT: Let's wait a moment. You want guidance from the Court on the question of neuropsych testing; is that what you just said?

MR. SOWARDS: Yes, as to the meet and confer issue, that was our understanding the Court wished us to meet and confer about on Friday. And let me just, if I could –

THE COURT: I think I'm going to want to probe what you just indicated, but I do think we are going to go on with jury selection. This is going to take some time. So the first opportunity we have to cover this matter today, we'll do that, but –

MR. SOWARDS: Okay.

THE COURT: Because I want to ask you some questions about what you indicated you want guidance from me on, and we are going to have an exchange that could be extended. So I'll have my deputy clerk to bring in the jurors.

MR. SOWARDS: Thank you very much.

(Whereupon six prospective jurors entered the courtroom.)

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

(Whereupon the jurors were sworn.)

THE COURT: 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 the certified shorthand reporter who will help the Court administer 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 legal system.

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

The voir dire or questioning process is an essential way of assuring 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 opinion. The parties value your opinions.

The voir dire process will involve questioning 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 prospective jurors will be assembled for questioning later. Those required to participate in that group questioning will be provided notice as to when the questioning will occur.

Our objective is to obtain a fair and impartial jury that will decide this case on the evidence that is presented to them in this courtroom and on the law given to them during my instructions. I have decided to do individual voir dire in part because the parties have requested it and also because there has been some publicity on this case. During the individual voir dire we will cover the publicity area and other matters that will tell us if 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 the 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 causes any prospective juror 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 the trial, which will be referred to as the guilt or not guilty phase, will occur just like any other criminal trial in Federal Court. The Government will present its case first. The Government has the burden of proving every element 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 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 any mitigating factor or 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 a 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 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 the voir dire about your views on the death penalty. We may ask questions in additional areas too. During this questioning we will refer to you by your randomly selected number as a 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 your 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, or 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 after you have been excused by me.

Third, do not let anyone talk to you about the case 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 read any news stories or 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 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 no opportunity to discuss. For these reasons you should avoid reading or listening to future news accounts during the time period in which you're 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.

There is no response.

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

There is no response.

Please raise your hand if you do not understand the following: Your first duty as a juror would 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 jurors 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 it will argue 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 in prison without release or some other lesser sentence. Does any juror not understand that?

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.

Juror 98 raised his hand. We'll talk to you about that during the individual session. Thank you, sir.

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. Do you – if you have any belief that will interfere with your obligation to do this, please indicate that fact by raising your hand.

Juror 81 raised his hand in response to that question. I'll give you an opportunity to respond later, sir.

During the questioning process, 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, I may ask some questions in an area you've indicated a desire to discuss in private so I can determine whether any aspect of the matter can be discussed in open court without disclosing what you desire to keep private.

If this can occur, let me know so I can determine whether the matter should be covered in a more private setting. This approach is taken because the trial should be open unless I have a legitimate reason for closing any aspect of it. I'm going to take just a moment to look through your questionnaires.

I now want my deputy clerk to escort all but the first juror to another room, and to place the earliest randomly selected juror in the witness stand.

(The prospective jurors left the courtroom.)

(Prospective Juror No. 81 took the stand.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Thank you for joining us. You're the 81st randomly selected juror. You had a response to question 7, which asked, "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 by applying the law as I will give it to you in my instructions, whether you agree with it or not."

And I inquired, I said if you cannot – if you have a belief that prevents you from doing that, raise your hand. And I believe that's the question your raised your hand to?

A. Correct.

Q. Okay. Explain your response, sir.

A. Well, in a high profile case like this, and the media grabs ahold of it, the evidence has to be so overwhelming before an individual is charged with a case, that I personally kind of lean towards his guilt before we even get started. You know, the greatest example of that in the decade is the O.J. trial, and that's kind of soured me to the whole system anyway.

Q. Okay. I appreciate your honesty. Having an opinion doesn't necessarily exclude you from being considered as a juror in this case.

A. No. I'm just responding to the question.

Q. I'm not being critical of your response. Please don't take it that way, because I am sincere when I say I appreciate your response. We want individuals to respond honestly to our questions, and I think that's exactly what you are doing. And I really do appreciate it.

I want to show you one of your questions, 92.

A. This is the same thing. It's the same topic. I think I just said what I'm going to say if you ask me that.

Q. Okay. I asked the juror at the bench whether he had any objection to discussing the question which asks, "How might your religious, philosophical or spiritual belief influence you if you were chosen as a juror in this case?" That's the reason why I approached the juror to ask him the question, is because he indicated he wanted to discuss that matter in private.

But you've already discussed the matter in public, and you just gave me your answer to it in public.

A. Right.

Q. Okay. Other than what you have just indicated, which I'll be asking you questions about, is there any reason why we shouldn't continue to consider you as a possible juror in this case?

A. Well, my capital punishment philosophies are very strong. I believe in the death penalty. I believe that we are behind in law enforcement. The criminals have had – I don't care what manner it is, it is almost impossible, other than martial law, to clean up some of the these problems we have in inner cities. And the death penalty is one of the best scare tactics that we have, or stricter penalties, and I'm very conservative in that manner. And I think that should be known.

Q. Thank you for sharing that. Sir, since you appeared at Cal Expo when you filled out the jury questionnaire, which I just showed you a part of, have you heard of or read anything about the case?

A. Not significant, no. Other than, you know, X number of jurors have been selected or dismissed. The channel 3 report, basic information.

Q. I didn't hear the last?

A. Channel 3 report news, basic news information that's been released.

Q. Can you provide me the substance of the information you're referencing?

A. No more than this activity that is going on, jury selection. Again, the O.J. trial soured me. I haven't paid hardly any attention to this case as far as media.

Q. Since Cal Expo have you discussed the case with anyone or overheard any discussions about the case?

A. No.

Q. Prior to Cal Expo can you tell me what information you received concerning the case?

A. Well, I didn't go to Cal Expo. I had the flu that day, and I called in sick, unable to attend. So I filled that form out yesterday – yesterday at 3:00. So nothing has occurred since I filled that out.

Q. Did you receive my summons that required you to appear? I'm not trying to find out why you didn't go to Cal Expo, but I just want to know if you received the admonition that was included in my summons that was asking you to appear at Cal Expo. Did you receive it before the Cal Expo appearance?

A. Yes.

Q. Okay. What information have you received about this case from any source any time since the case has been receiving publicity?

A. Since from the arrest, or where do you want me to start?

Q. I'll tell you my objective. I think I have a duty under law to ask prospective jurors such as yourself, and I'm asking every juror the same type of a question. I have a duty to find out what information a prospective juror has been exposed to so that we are in a situation to evaluate, objectively speaking, how that information possibly has an effect on the jury. And then we are going to ask you later, subjectively speaking, how you believe the information has an impact on you. And so I want to know everything that you have heard about the case that you can remember.

A. Well, we go back to the first thing of significance to me was the sketch that they were passing around of the Unabomber. Then the remoteness of Mr. Kaczynski's dwelling, the interview with his family afterwards, then some background on his, you know, earlier teaching in Berkeley and this stuff, and then just various appearances in and out of court and on television and a few newspapers, just basic stuff. And this is by osmosis. I had no interest. I mean, I would just see it, and it's not a lot.

Q. How about the cabin, have you heard anything about the cabin associated with this case?

A. Cabin?

Q. Yes.

A. Yes. I've seen photos of it from inside, some photos of various devices and pieces of electronics and different things that were supposedly found and that kind of stuff.

MR. DENVIR: Your Honor, can I just interrupt? There is one part of the questionnaire that you might want to address.

Q. BY THE COURT: What counsel just brought to my attention is a part of the response that you gave to the jury questionnaire where you indicate you may have a hardship that would prevent you from being able to serve as a juror on this case. Does my trial schedule relieve you from that hardship?

A. If this trial goes – how long do you think it will last?

Q. The parties have estimated that it could last between three and four months, possibly five. I think we are hopeful it will be over in three months.

A. I'm a farmer, sole proprietor, 400-acre ranch. It's rice. Two crops ago a fungal disease came into the north valley and devastated our crops. I lost \$55,000 that year.

Last year was okay. I still made a living, but I still have this debt. And four months away from what I do for a livelihood is just, in my estimation, not tolerable. And to be honest, if I'm selected, which I am – I mean, I'm a candid guy. I'll just tell you what I feel.

I'm going to sit here with a grudge, because I know what's very important to me and my family is being jeopardized. So three or four months away from my occupation, you wouldn't have a very happy juror, and I'm the kind of guy that would just have a problem with that.

Q. You're indicating that my trial schedule will not relieve you from the hardship you think you will experience; is that true?

A. Yeah. I mean, I can't afford to miss that much time. It's pretty close for me right now.

Q. It's pretty what?

A. Close, financial margins. And this would be something that, I mean, right now my intent is to expand my farming operation, and it's going to take a little extra time and management. And I just can't miss proper procedure of planting and agronomics because it's that critical. I mean, it used to be four years ago farming was a fantastic thing, but the margins have just dwindled.

Q. I don't know what's involved in farming, and I don't understand why you wouldn't be able to do what's involved if you could start doing it at 2:00. That's what I'm trying to find out. Can you tell me whether you would be able to do what you are indicating needs to be done if you were allowed to do that work at 2:00?

Let me ask another question. How far did you have to travel to get to Sacramento?

A. Eighty miles.

Q. Well, then you may not be doing it until 3:00.

A. Yeah.

Q. Would that work?

A. No.

THE COURT: Okay. Thank you.

MR. CLEARY: May I ask a few questions, just on hardship?

THE COURT: Yes.

MR. CLEARY: 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.

The crop that you grow, the business that you have, when is the growing season?

A. March to September.

Q. Are you very busy at other times of the year? For example, if this trial were to be concluded by March, would it still present a major hardship for you?

A. There is no time that I'm not – harvest and planting, spring and fall. Obviously, there is not enough time in the day. I mean, there is just not enough daylight hours. Yes, on a good rainy winter day there is no actual tillage, but I've got a lot of equipment that I have to repair and get into condition. I'm building a couple pieces of equipment.

There is a lot of paperwork done this time of year, and also I'm trying to expand my operation. And I'll just tell you, the kind of person I am, I feel it's important. And I'm under a financial burden right now, and if I was selected I would not be a happy guy.

Q. I understand that.

A. If you want an unhappy guy, and I'm the kind of guy that just holds a grudge. I'm just being honest. You guys make your decisions what you want to do, but I'm just telling you how I feel and how I think.

Q. During the time before the growing season, in other words before March, do you have some employees working for you?

A. Yes, one.

Q. One employee. Would they be able to take care of the business?

A. This person does odd jobs and things that, as I get older, I don't want to do. He is just a 21-year-old kid. His management capacity is zero.

Q. So it's your belief that you really have to be there throughout the day, and getting back to work at 3:00 is not going to be a big help to you prior to the growing season?

A. Not when the sun goes down at 4:55.

MR. CLEARY: Your Honor, we would stipulate to the excusal of the juror.

THE COURT: Defense?

MR. DENVIR: We would stipulate, your Honor.

THE COURT: We are going to excuse you from further participation in the trial, sir. You can join the other jurors in the adjacent room. Thank you. My deputy clerk will show you out. I appreciate your candid responses.

PROSPECTIVE JUROR NO. 81: Thank you.

(Prospective Juror No. 81 left the courtroom.)

(Prospective Juror No. 98 entered the courtroom.)

VOIR DIRE EXAMINATION

Q. BY THE COURT: Thank you for joining us. You're the 98th randomly selected juror. I may reference you by that number during this questioning process.

You raised your hand when I asked the question whether you would 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.

A. When I raised my hand, I really wanted you to repeat that because I didn't understand the question. So that's what it was about. I didn't know if I should speak up right then.

Q. Fine. I should have asked you. I assumed you had a response to it. Now that you've heard the question, are you able to reserve your judgment on the sentence you believe should be imposed until you have heard all the mitigating and aggravating evidence?

A. Yeah.

Q. You can. I'm going to ask you to raise your voice a little bit so it's amplified more than it is through that microphone.

Is there any reason why we shouldn't continued to consider you as a possible juror in this case?

A. No, not really.

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

A. Yes. I did.

Q. Since you answered the juror questionnaire at Cal Expo, have you heard of or read anything about the case?

A. No. I haven't.

Q. Have you discussed the case with anyone or overheard discussions concerning the case since you appeared at Cal Expo?

A. No. I haven't.

Q. Prior to appearing at Cal Expo what information did you receive about this case?

A. Just the letters that the Court has sent me, just these appearance letters.

Q. There has been a lot of publicity surrounding this case, a lot of news reports. It's been reported on the radio, on TV and in the newspapers. Have you been exposed to any of that type of information?

A. I've seen it on TV, you know, just a topic on the news or whatever, but I didn't really pay attention. I would just change the channel just in case.

Q. At what point did you start doing that?

A. After I filled out the questionnaire at Cal Expo.

Q. I'm trying to figure out what information you were exposed to before.

A. Oh, before this?

Q. Right.

A. Right. I just seen an episode on Unsolved Mysteries. I seen his picture around. I can't really recall, just not much though, not much in detail.

Q. What information do you recall receiving when you watched the episode on Unsolved Mysteries?

A. That was quite a while ago. Just that they were looking for this man, if anybody knew anything or anything about him or, you know, knew him. That's basically it, and, you know, what he has done, suspectedly done or accused of.

Q. Let me tell you my objective so you can understand why I'm asking you questions about what you have heard about the case before Cal Expo. Under the law, as I understand it, I'm required to know what type of information you have been exposed to about allegations involved in the case so that I'm in a position to objectively determine how that information could possibly affect you. And I will give you an opportunity to tell me later how you believe the information has affected you, if at all, but I would like you to search your mind and tell me what you know about the allegations involved in this case, what you recall being exposed to in the media.

A. Actually, randomly bombings, you know, that's – you know, what I mean. Just basically that's pretty much it, you know, to me basically. That I knew that they were just looking for this man. There was no – I guess, no motive maybe towards these people. You know, I really wasn't just – I don't know.

It was nothing really big to me at the time. I didn't really take it all that seriously. It was just curiosity. When are they going to find the man, or what – I mean, you know what I'm saying. So that's basically it. I really didn't have no deep views on it, you know.

Q. Did you ever receive any information about a cabin in connection with the allegations involved in the case?

A. About a what?

Q. A cabin.

A. Did I receive – no. I mean, on the news that he was at his cabin when he was arrested. And as a matter of fact, now when you say that, yes, and some of the evidence that they had found in the cabin. I recall that, and I believe, about his brother. I think his brother was the one that went ahead and turned him in or went to authorities.

Q. What do you recall hearing about the evidence found in in the cabin?

A. Well, they found – I guess they found a live bomb that was ready to be sent in a present or whatever, his manifesto, and I think that's pretty much what I remember right now.

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

A. Did I come up with – yes. Until he was proven guilty, you know what I mean. To me that doesn't mean nothing really, "until," because you just never know. You know, it could have been set up there, or what – you know what I mean. I just – the man wasn't caught in the act, as a matter of fact, so just with a bomb and his manifesto

also. But still, you know what I mean, I didn't say, "He is guilty. He did it," because I don't know.

Q. Do you have suspicions as to whether he is guilty or innocent?

A. Yes.

Q. What are your suspicions?

A. I would say that he was guilty.

Q. How strongly are you committed to that opinion?

A. I'd say pretty strongly, more so than he is not guilty.

Q. Is that an opinion that you're capable of setting aside, meaning leaving it outside this courtroom if you are selected as a juror in this case?

A. Yes.

Q. Do you think you could do that?

A. Oh, yes. Yes.

Q. Do you have the capability to, in fact, set the opinion aside, leave it outside this courtroom and provide Mr. Kaczynski the assurance that you will allow him to begin this trial on what is referenced as a clean slate?

A. Yes.

Q. Does Mr. Kaczynski have your assurance that he will begin this trial, in your eyes, cloaked with the presumption of innocence?

A. Yes.

Q. What are your views on the death penalty?

A. I am for it, as long as the crime fits the punishment. I am for it.

Q. If the jury should convict Mr. Kaczynski of the offense of deliberate, intentional and premeditated murder of another human being, would you still be able to consider voting for a sentence less than death?

A. Probably not, no.

Q. Explain your response.

A. Well, if he did it deliberately, knowingly, willingly taking other peoples' lives, I believe the same should happen to him.

Q. Do you understand that the law requires that before imposing the death penalty for the kind of murder I just told you about, the jury still must consider the facts and circumstances of the crime, the background and character of the defendant, and any other information that might tend to indicate that the death penalty should not be imposed?

Do you understand that?

A. Excuse me. I'm sorry. Can you repeat that, please?

Q. We were having a discussion in which I basically asked you to assume for purposes of argument that Mr. Kaczynski was unfortunate enough to be found guilty of intentional, deliberate, premeditated, cold-blooded murder of another human being, but despite that guilty finding by a jury, I'm asking you if you understand that even in the face of that guilty finding, do you understand that the law requires that before imposing the death penalty the jury must consider the facts and circumstances of the

crime, the background and character of the defendant, and any other information that might tend to indicate that the death penalty should not be imposed?

A. I am sure.

Q. Are your views in support of the death penalty so strong that you feel incapable of considering such information if there is a finding by the jury that Mr. Kaczynski, in fact, murdered someone?

A. No. Can you repeat that again? I'm sorry. You know what, I worked a double shift yesterday, and I just got off at like 6:00 this morning. So I'm kind of tired.

Q. Will this service – will service on this case interfere with your job?

A. At this present time the circumstances – the position that I'm in right now, I am hurting. I need at least 200 more hours before this year is up so I can go ahead and have my medical and dental, all my benefits for next year. And if I don't get this then I won't have no medical, no dental for next year. So my goal right now is to try to get 200 hours before the end of this year.

Q. Without telling me where you work –

A. Right.

Q. – can you give me an idea as to the typical work hours?

A. Well, like now that I'm in this position I can work day and night, at my choice pretty much, work permitting.

Q. Is your schedule flexible enough so that you could adjust it in a way that will allow you to be a juror on this case?

A. Yes.

Q. I had asked you to assume that Mr. Kaczynski was unfortunate enough to have been found guilty by a jury of the offense of deliberate, intentional and premeditated murder of another human being. And my question is whether your views in support of the death penalty are so strong that in the face of such a finding you would be incapable of considering the information I told you you must consider when you decide whether the defendant should be sentenced to death, to life in prison without the possibility of release, or some lesser sentence?

A. Yes.

Q. What does yes mean?

A. I thought you was asking me if I was for that.

Q. For what?

A. Obviously, I may have misunderstood you again. I'm sorry.

Q. I'm trying to determine whether your views on the death penalty are so strong that you would not consider alternative sentences if you found Mr. Kaczynski committed premeditated murder.

A. Oh, yeah. No. I could consider others. I don't believe in the death penalty that strongly. It all depends.

THE COURT: The parties may conduct their questioning.

VOIR DIRE EXAMINATION

BY MS. CLARKE:

Q. Do you want some water?

A. Yes, please.

Q. Good morning.

A. Good morning.

Q. Or good middle of the night, or however you are feeling.

A. Yeah. I should be in bed right now.

Q. I had a couple questions about that. My heart went out to you when you said you worked two shifts, and I think I'm aware of about how far it is that you have to work and would have to drive in. It sounds like quite a distance.

A. Yes. It is.

Q. And you have 200 hours that you need to get for the rest of 1997?

A. Right.

Q. So that's a pretty heavy work month coming up in December; is that right?

A. Yes. It is.

Q. Would you have to be working all night, and then come in for jury service during the day? How would that work?

A. Yes. I'd have to. If I was put in that position I would have to, but at that point I probably wouldn't be able to get the 200 hours.

Q. How would that affect you? It sounds like you kind of need that.

A. It would deeply affect me next year. Because the line of work I do could be pretty dangerous, and if I get hurt I have no medical.

Q. So you need this 200 hours during the month of December basically to ensure that you have medical for 1998?

A. Exactly.

Q. So it sounds like it would be kind of a hardship if you were selected to serve because you would start sitting sometime in early to mid December.

A. Yes.

Q. You would have to be at the place to meet up about 7:00 in the morning, and you'd probably get back there about 1:30 -

1:15 in the afternoon.

A. Yeah.

Q. Is that too much of a hardship?

A. Yes. It would be. Yes.

Q. You would basically have to be working after you got off of jury service, and then through the night, and then come back.

A. Right.

Q. You really wouldn't be able to sleep?

A. No, not really. No. We have two different shifts, but like I said, it's work permitting, as long as there is work there. You know, sometimes if there is not no work I can't work. They have two different shifts at night time, and I would only be able to work just the one shift. And that would put me with no sleep.

Q. So you would have to work the shift after court; right?

A. Right.

Q. Until early in the morning?

A. Yes, until 4:00.

Q. Until 4:00 in the morning?

A. Right.

Q. And then drive the hour, hour and a half, or whatever it is?

A. Yeah. It could be longer. Yes.

Q. Do you think you would be able to sit with that kind of hardship?

A. I don't think so. No.

Q. It sounds like it would be your druthers to just put this off and do another case, a shorter case at another time?

A. Yes, pretty much. Yes. Because I definitely need that dental and medical.

MS. CLARKE: Your Honor, I think a hardship would be appropriate.

MR. FRECCERO: Your Honor, if I could just probe with a couple questions?

THE COURT: A couple? Okay.

VOIR DIRE EXAMINATION

BY MR. FRECCERO:

Q. Good morning, sir.

A. Good morning.

Q. In reference to your work, do you know whether, if were you called as a juror, whether you would get any credit for that with your WORK?

A. I don't know positive. I'm sure I could ask. I don't know how my work goes about this situation, you know, if somebody is selected.

Q. Okay. Do you know whether your employer has any kind of policy covering jury duty?

A. I have no idea. As in crediting my hours if I should happen to be selected, I have no idea.

Q. Okay. And do you receive any kind of compensation from your employer if you have to serve on jury duty?

A. That I don't know either. It's out of a union hall. So everybody is pretty much random. I mean, if you want to work you can go to work. If not, you don't have to go. So I don't know if they would go ahead and still compensate.

MR. FRECCERO: All right. Your Honor, the Government – we would request perhaps we could find out if there was some alternative. If not, the Government would be prepared to stipulate.

THE COURT: I'm not clear as to what you are indicating by alternative. Do you want to be more specific?

MR. FRECCERO: Very well. The Government would request that perhaps this prospective juror could contact his employer and find out if in fact there is any policy that would first allow him to get the credit he needs if he were in fact called for jury duty, and confirm whether or not the company, the employer, that is, would provide any compensation were he to be called as a juror.

MS. CLARKE: Your Honor I don't believe there is one employer. It sounds like it's a union, and you get sent out on jobs.

MR. FRECCERO: That is correct. I wanted to phrase it in such a way as to not reveal the employer. I don't know if there is any such policy. / /

VOIR DIRE EXAMINATION

BY THE COURT:

Q. You've indicated that you have to work, I believe you said 200 hours during this year in order to be eligible for certain type of medical benefits?

A. Right, and dental.

Q. Okay. Who would you ask? Without telling me the name of the company involved or the entity involved, who would you ask in order to determine if you could receive jury service credit toward those hours if you were to serve here?

A. I probably would first go to the BA.

Q. The BA?

A. Yes, business agent, and then go ask him there. And probably wherever he would send me, either to the treasurer or maybe the president. I have no idea, but he would be the first one that I would go to. And I would go from there.

Q. Would you ask that same source the question as to whether you would receive some type of payment for jury service?

A. Yes. Yeah.

Q. But if you don't receive credit that would help you obtain the hours you need so that you're eligible for the type of health benefits you seek, that would cause you to experience a real hardship if you had to sit on this case; right?

A. Yes.

Q. I want you to give – or communicate with my deputy clerk. She is the lady to your left, and I want you to give her the answer that you receive. Because we are going to excuse you for hardship reasons if you do not receive the credit you are seeking.

A. Okay.

Q. And she will be the individual you will be calling with your answer. At this point you need not respond to further questions. She will escort you to the next room.

A. All right. Thank you.

(Prospective Juror No. 98 left the courtroom.)

THE COURT: Counsel, it appears that the next juror hasn't filled out a questionnaire. Is that true, from your prospective?

MR. DENVIR: Your Honor, I just wondered if we could go back to the juror before that?

THE COURT: What's the number, 98?

MR. DENVIR: Yes, your Honor. I think that you had two inquiries. I am not sure the juror understood there was two of them. As I understood it, you wanted to know –

THE COURT: Only one inquiry makes a difference. You're right. I have two inquiries, but if he doesn't receive credit that's going to allow him to satisfy the hours he needs to satisfy for health benefits, it is not going to help him to sit on this case.

MR. DENVIR: Right. But if he did get that credit but doesn't get paid after the first of the year while he is on jury service, I think he will have a second hardship problem. I was just going to suggest you might inquire as to both of those. I think either one of those would make him not be able to sit on the case, would be my impression.

THE COURT: I see. I thought I asked him to make an inquiry about both, but I concede that it is my feeling tentatively, that if his answer is negative as to the credit issue, he can't sit on this case. And you're indicating that I should have that feeling if his answer is negative as to the other inquiry too?

MR. DENVIR: It seems like he won't get paid if he doesn't work, but I don't know.

THE COURT: My deputy clerk will clear it up when she communicates with him. Juror 110 doesn't appear to have filled out a questionnaire. Is that true?

MR. FRECCERO: That's our understanding, your Honor.

MR. DENVIR: Should we discuss it at side-bar?

THE COURT: Is that going to take care of the problem?

MR. FRECCERO: If we could discuss it at side bar, I think there is a reason. There may be a reason for that.

THE COURT: Okay. Does it have to be discussed at side bar?

MR. FRECCERO: I think it pertains to the particular individual, I think. If I could have a moment to confer with counsel?

MS. CLARKE: If the Court can look at the hardship questionnaire.

THE COURT: I'm looking at it.

MS. CLARKE: Question five.

THE COURT: I see it. I see. Okay. Well, we don't have to discuss that at side bar.

MR. DENVIR: Your Honor, I believe based on the hardship questionnaire, particularly the answer to question 10, that the parties would be willing to stipulate to a hardship discharge. Apparently he runs a business and is the only employee.

THE COURT: Is that true?

MR. FRECCERO: Yes, and the fact that the answer to number 5.

THE COURT: That's not what I'm seeking to get a response to.

Is it true that the parties are willing to stipulate that this juror be excused for hardship reasons?

MR. FRECCERO: Yes, your Honor.

MS. CLARKE: Yes, your Honor.

(Prospective Juror No. 111 entered the courtroom.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Thank you for joining us. You are the 111th randomly selected juror. I may reference you by that number during this questioning process.

Is there any reason why we shouldn't continue to consider you for jury service on this case?

A. I don't know that I could make a judgment as to death. I've got a real strong religious background, and I may have a problem with that if it comes down to yes or no on that.

Q. Tell me, what is in your background that you believe would cause you to have a problem?

A. I just don't believe that anybody can judge another person as to whether or not they deserve death. I think that's God's decision only.

Q. We are not looking for jurors who are in favor of or against imposing the death penalty. We are looking for prospective jurors who would be willing to consider the death penalty as one of three sentencing options. The three sentencing options would be death, life in prison without the possibility of release, or a lesser sentence.

Do your beliefs about the death penalty prevent you from being able to consider each of these three sentencing options and imposing the one you conclude is justified based on the evidence and my instructions?

I'll ask it another way. If you understand the question, and you're just thinking about responding, I'll give you a chance.

A. I was thinking about responding.

Q. Okay. Go ahead.

A. I guess the answer to that would be no.

Q. What does no mean?

A. No means that I would be able to probably choose one of those.

Q. I'm sorry. I couldn't hear you.

A. No means I would probably be able to choose. I would be able to make a decision on one of those.

Q. You would be able to make a decision as to one of those?

A. Yes.

Q. One of those is the death penalty.

A. Well, obviously that one wouldn't be one of the ones I would choose.

Q. Would you automatically vote against the death penalty in any case where it is sought regardless of the facts and circumstances of the case?

A. Yes.

Q. Are your beliefs against the death penalty so strong that no matter what the circumstances of the offense, you would not be able to sign a verdict form sentencing a defendant to death?

A. I have a real hard time with this. Because although I myself cannot judge, I cannot make that judgment – this is real hard for me. I believe in the death penalty, but I don't want to be the one making the decision.

Q. So is your answer to my question that no matter what the circumstances of the offense, you would not be able to sign a verdict form sentencing a defendant to death?

A. That's correct.

Q. That you couldn't do that?

A. I could not do that.

MS. CLARKE: We stipulate, your Honor.

MR. CLEARY: So stipulated.

THE COURT: Thank you for your candid responses. I'm going to excuse you from further questioning in the case.

(Prospective Juror No. 111 left the courtroom.) <center> Prospective Juror Number 112 entered the courtroom.) <center>

VOIR DIRE EXAMINATION

Q. BY THE COURT: Thank you for joining us. You are our 112th randomly selected juror.

Are you a full-time college student?

A. Yes.

Q. Are you a full-time graduate student?

A. Yes.

Q. Would service on this trial interfere with your studies?

A. Yes.

Q. And how is that?

A. I have – my last semester of classes will be finishing up in mid December, and I still have to finish my project. And I was hoping to graduate next spring, and so if I'm here I can't attend classes.

Q. Your classes conclude in mid December?

A. Yes.

Q. What's the date of conclusion?

A. The 17th, I believe.

Q. How many miles away from Sacramento is your school?

A. About a little over 80.

Q. Eighty?

A. Yes.

Q. What is your schedule? What's your school schedule?

A. I have classes on Monday and Wednesday.

Q. Monday and Wednesday?

A. Yes, in the afternoon.

Q. What time?

A. From 2:00 to 4:00.

THE COURT: I want the parties' input on this matter.

MR. DENVIR: Could I just ask a couple questions, your Honor? / / /

VOIR DIRE EXAMINATION

BY MR. DENVIR:

Q. Good morning, ma'am. My name is Quin Denvir. I'm one of the lawyers for Mr. Kaczynski.

Your classes end on December 17; is that right?

A. Yes.

Q. And then do you have finals after that at some point?

A. That includes finals.

Q. When do the actual 2:00 to 4:00 classes end?

A. The last Wednesday of the week before, which is the 11th.

Q. And then you would have finals sometime later?

A. The next week, yeah.

Q. And do you know when the finals – are the finals morning, evening, afternoon?

Do you know what they are?

A. I don't know off the top of my head. No.

Q. Are they flexible at all if you asked them to move them?

A. Probably, yes.

Q. And this is one semester that ends, and I think you said that you had hoped to graduate – are you on semesters instead of quarters?

A. Yes, semesters.

Q. And you wanted to graduate at the end of the following semester. What did you have to do next semester?

A. I need to do a project, which there is no set times for classes. I just do that on my own free time.

Q. Only you know. If you were sitting as a juror would you drive down from 80 miles, or would you have to stay down here?

A. I would probably stay down here.

Q. Would that make it impossible then for you to do your independent studies? I don't know what type of studies they are.

A. It would make it difficult, but not impossible. I mean, I could do work wherever. I can work on it wherever, as long as I have a computer.

Q. Do you think if you were to sit as a juror for the following semester, and the trial could go, I guess, into February, maybe even into March, that you would be able to sit as a juror and take care of your work on your computer that you had to do, and still concentrate on what's going on here? I mean only you know that.

A. I might be able to serve on a jury and work on my project, but then I don't think I would have time to work.

Q. You have work responsibilities also?

A. Yes.

Q. And can you tell us what those are?

A. I am one of three partners in a software start-up company, and I think that doing all three of those things would impact one of them.

Q. And how many hours a week do you work at the start-up company, about?

A. When I'm in school, maybe 30 hours, and I was planning on putting more hours in starting over Christmas break and into next semester.

Q. So you can balance two out of the three, but you can't handle all three?

A. I really doubt it.

MR. DENVIR: We'd stipulate, your Honor.

MR. CLEARY: Your Honor, we'll stipulate.

THE COURT: Thank you for appearing. We are going to excuse you from further service on the case. My deputy clerk will escort you to the next room.

(Prospective Juror No. 112 left the courtroom.)

(Prospective Juror No. 113 entered the courtroom.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Thank you for joining us. You're the 112th – or is it 113th – 113th randomly selected juror. Is there any reason why we shouldn't continue to consider you as a possible juror in this case?

A. Yes. It would be an extreme hardship for me. I work in a business, my family business. My father runs the office. I run the projects in the field. For me to leave a project at this point this close to the winter, it's going to cost us, the company, some hardship, and myself. I cannot afford to be here. Even today I stand to lose a pretty substantial amount of time on a job, and so I really can't be here.

Q. How many employees do you have?

A. In the field we have approximately 30, and in the office it's my father, an accountant, about ten in the office, a couple estimators.

Q. Without telling me where the business is located, what do you do?

A. We do construction, highways, freeways. Currently we are working on emergency projects for the Federal highways, and they all have to be done before the winter season. And if they are not done we stand to lose liquidated damages, and I am the project manager on one of these projects. With me not being there I feel that the project won't get completed on time.

Q. Is there any individual that could serve that function other than yourself?

A. Not at this time.

Q. You said not at this time. That indicates maybe at some other time there can be someone?

A. Yes. We do have other project managers that do work for us, but like I said, we have other projects ongoing. This isn't just our only emergency project we have. There are two other projects that are also falling behind that our other managers are on. Right now I have my project superintendent running the project. He originally was just on-site. For him to be thrown on to run the whole project is now making one of my foremen do his phase of the work. The superintendent has to do my phase of the work. I'm having to bring everybody up. It's just retraining and retooling, and a delay of time and money for us.

THE COURT: Do the lawyers want to probe?

MS. CLARKE: We'd stipulate, your Honor.

MR. FRECCERO: If I could ask a few questions?

THE COURT: Okay.

VOIR DIRE EXAMINATION

BY MR. FRECCERO:

Q. Good morning, sir. I'd like to just ask you a few follow-up questions.

Without giving us specifics, but you mentioned there is a particular project you're working on right now?

A. No. We don't just have this particular project. I am working on this particular project. We also have a few other ones that are on the same time delays or the same time limits.

Q. What got my attention is you said there is a possibility of liquidated damages if you didn't complete it on time?

A. Yeah.

Q. When does that project need to be completed?

A. We are already five days behind, and we already assumed five days of liquidated damages on this project I'm working on,. And that is costing the company a substantial amount of monies.

Q. Okay. And this particular project, there is no one else that shares your responsibilities on it?

A. No. Nobody else shares my responsibilities on it. I am the project manager, and I have a superintendent and a foreman. And it's spread out over ten miles of highway. So I do all the timing, all the scheduling, all the ordering, all the upper management work. Without myself being there, if something doesn't get delivered, the project will be behind. I know what's going on, and I can't – my superintendent doesn't, not without me being there.

Q. Okay. Does the fact that the trial schedule – that trial would be completed by 1:30 or 2:00, would that allow you to get any of that done?

A. No. I'm up at 4:30 in the morning, don't get home until

8:00, stay up until midnight, and I do it all again the next morning. I work on Saturday's and Sunday's.

MR. FRECCERO: Okay, very well. The Government would stipulate, your Honor.

MS. CLARKE: Yes, your Honor. Thank you.

THE COURT: You are excused from further service on this case. We'll take the morning recess.

Court will be adjourned until 10:35.

(Whereupon the morning recess was taken.)

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

Are you ready to proceed?

MR. DENVIR: Yes, Your Honor.

MR. LAPHAM: Yes, sir.

THE COURT: Let's bring in the next juror.

(Pause in the proceeding.)

(Prospective juror number 138 entered the courtroom.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Thank you for joining us, sir. You're the 138th randomly selected juror.

I noted when I looked at your juror questionnaire that you indicated you had a hardship that should, in your mind, prevent you from serving as a juror in this case. I don't know if you still have the same hardship that you mentioned in the questionnaire or not. Do you?

A. The hardship mentioned is just the fact that I'm a substitute teacher and I work on a daily basis. I don't have a set schedule. So besides being a foster parent, that's my only other income. So my wife and I both depend on me to be working as a substitute teacher.

Q. That's the hardship you mentioned in the questionnaire?

A. Right.

Q. You heard the trial schedule I plan on keeping in this case. Does that provide you with enough flexibility so that you can still do substitute work and reduce the hardship?

A. My teaching is usually from 8:00 in the morning until 3:00 in the afternoon, so it would conflict with putting in such hours.

THE COURT: The parties can probe, if you desire.

VOIR DIRE EXAMINATION

BY MR. DENVIR:

Q. I take it you don't get paid when you don't work; you're not a full-time substitute?

A. No. Sometimes I'll get a call in the morning just to come to work. So my schedule is changing all the time.

Q. And when you don't work as a substitute, then you don't get paid?

A. Right.

Q. If you were on jury duty and couldn't be there, you wouldn't get paid?

A. Right. I wouldn't get paid.

MR. DENVIR: We'd stipulate, Your Honor.

(Discussion among Mr. Cleary, Mr. Lapham and Mr. Freccero.)

MR. LAPHAM: Your Honor, we'll stipulate.

THE COURT: Okay. We're going to excuse you from further service on the case, sir.

(Prospective juror number 138 left the courtroom.)

THE COURT: I only called seven jurors for the morning session, and unfortunately, we've completed examination of all the jurors. We didn't end up with one additional juror. I now want to cover the matter we were discussing this morning.

Go ahead.

MR. SOWARDS: Yes, Your Honor.

When we left off on Friday, and it appears approximately page 1241 of the reporter's transcript of our proceedings of that day, Mr. Cleary had interjected the Government's concern about perhaps having a basis for additional testing or examination of Mr. Kaczynski and had specified their request with regard to neuropsychological testing. And it was after that that the Court was good enough to explain Your Honor's approach to where we should go from here and had discussed – and had identified various components of the decision that it was going to be looking at, Your Honor was going to be looking at, and asked the parties to discuss that over the weekend. That appears around page 1243.

It was at the conclusion of Your Honor's remarks that both Mr. Cleary and I indicated that we would do our best to meet and confer over the weekend and perhaps reach an agreement as to how we would proceed on that score.

And as Mr. Cleary has indicated, what he primarily came back to us with was a discussion of the same interview format, although in different forums, that Drs. Resnick and Dietz wished to proceed on. We discussed that with Mr. Kaczynski and indicated that, as Your Honor had discussed with Mr. Wilson on Friday, that was something that had been decided and we couldn't comply with that.

I then asked Mr. Cleary if we could discuss specifically the issue of the neuropsychological testing that I thought we were going to be meeting and conferring on.

THE COURT: I don't understand the portion of your statement where you said, "That was something that had been decided." I don't know what the "something" is.

MR. SOWARDS: Oh, sure. As I understood the colloquy with Mr. Wilson, we were at the juncture the Court had been informed and had inquired of counsel on Thursday that there, for reasons discussed, there would not be an interview of Mr. Kaczynski, the extensive multi-hour interview of Mr. Kaczynski by either Doctors Dietz or Resnick.

And then the question was, how would the Government be prejudiced if experts who had not – psychiatrists who had not spoken with Mr. Kaczynski were to offer any opinions. And then the sticking point was, if they would be apprised of any information of a neuropsychological nature that the Government expert itself had not performed the testing on, that might be a disadvantage to them.

So what we were asked to do over the weekend was to see, because Mr. Cleary had said for all we know there could be the possibility of biased testing; there could be a possibility of bias in the selection of tests – a number of factors which would affect the reliability of any results that the Government experts would be relying on.

So what we asked Mr. Cleary to do is if he could check with his expert, and this is what I also said to the Court, if he could check with his expert and see whether, in fact, additional testing was necessary, and could we get an indication of what that was, and we would do our best to broach that issue with our client.

And after the weekend break, the only test that Mr. Cleary identified was the MMPI, the Minnesota Multiphasic Personality Inventory, which, as we informed Mr. Cleary

on Friday, is not neuropsychological testing; that is not in the battery of neuropsychological testing and was not one of the tests employed by any expert that we had consulted.

Then again today, when we spoke with Mr. Cleary again, that was the only test he had identified. So the only thing we were asking, and that's why I prefaced my remarks earlier this morning is I didn't see the status of things as one in which the meet-and-confer had broken down or yielded no agreement. It was just, from my perspective, the sticking point was could we either have their expert talk to our expert or in some way get an idea of what they would be proposing, because we just don't know what they're proposing.

THE COURT: This is how I see the situation.

The Government is obviously disappointed that Mr. Kaczynski does not agree to undergo an examination by Government experts. Therefore, the Government has asked me to impose the ultimate sanction, which would be to exclude all of Mr. Kaczynski's experts from the guilt phase of the proceeding.

As I understand the law, and I think the parties indicated to me last Friday that you agree with me, as far as the law was concerned, and you need to tell me during this hearing if you disagree with anything I state about the law, there does appear to be a circumstance where the Court could in fact order the exclusion that the Government has requested.

I see a factual dispute involved with one of the factors. Let me explain what I mean. I did it last Friday, but perhaps we should have further discussion, since we have time to cover the matter in more detail now.

The Court must balance a defendant's Sixth Amendment right against countervailing public interests in deciding whether to impose a sanction and what sanction to impose. And the countervailing public interests are things such as the integrity of the adversary process, the interests in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process. The Ninth Circuit reveals that 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.

The factual dispute I alluded to earlier in my comment deals with the willfulness of the defendant's disobedience of a Court order. During the hearing last Friday, I informed the parties of my tentative thinking on the willfulness issue. I indicated that the appropriate inquiry on the willfulness issue is whether Mr. 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. I stated – if I didn't state it clearly, I will state it clearly now – under that standard, it is pellucid that Mr. Kaczynski willfully disobeyed the Court's order.

Does the defense agree – well, let me back up again. I think willfulness you could characterize as a gateway finding, because there is a Ninth Circuit decision that indicates that willfulness should be found. It's the Ninth Circuit case of Peters, United

States vs. Peters. It indicates that in the absence of a willful or blatant violation, a preclusion sanction is impermissible.

What's your view on the willfulness issue?

MR. SOWARDS: I would agree, Your Honor, that the willfulness finding is gateway in the sense that it is a necessary prerequisite to a preclusion sanction. It is not a finding which then leads automatically to a preclusion sanction. So it's a necessary prerequisite, but under the Ninth Circuit authority, particularly under U.S. vs. Peters, its absence would prohibit a preclusion sanction. Its presence, as you have indicated, is then the gateway to consider the other factors. And I think also the point with respect to both Peters' treatment of it and the Rowan case, which comes out of the Seventh Circuit, which we also cited in our papers, looks to the proportionality of the sanction in view of even the circumstances of a willfulness finding.

And I think the reason that is important is that, as the Court just indicated, there's willful, and then there's also willful and blatant. And I think what was going on with other cases in which there has been a finding of willful and blatant that then further supports the total preclusion is where we not only – the courts not only see a willful activity but the Court can also make findings that it is calculated, calculated and motivated for the purpose not only of surprise but also for the purpose of, perhaps, introducing evidence of questionable integrity.

THE COURT: Are you indicating in your argument that there are degrees of willfulness?

MR. SOWARDS: I am indeed, Your Honor. And I think that those, the cases that we discussed and the fact patterns that we discussed in the papers indicate that where a judge, for instance, says, "Wait a minute. Why haven't we heard from this witness? Not only am I concerned about the untimeliness, but I'm getting the distinct feeling that this witness may not even be testifying truthfully," and then that information comes out, so that they're finding out that, frankly speaking, there have been shenanigans that have been played on the prosecution on the Court.

By contrast, here the information available to the Court is that there may be willfulness in the sense of noncompliance but it's not calculated, and it is mitigated to the degree there's even inability to comply.

THE COURT: The defense is not contesting the existence of willfulness, as I understand – and I want you to correct me if I am wrong.

MR. SOWARDS: Sure.

THE COURT: What you are indicating is that there's not a high degree of willfulness, but you concede that there's willful – that the presence of willfulness is there?

MR. SOWARDS: Yes, Your Honor, in the sense that there has been a stated inability or noncompliance with the Court's order, and that has come from Mr. Kaczynski through counsel both last Thursday and initially when the exam was ordered. That's correct. So we would say that that's there, and now the question for the Court in modulating the severity of the response is to look at the factors underlying that non-

compliance, and that's where I think the factual dispute the Court alludes to may also be relevant.

THE COURT: The principle that you've indicated the Seventh Circuit decision in Rowan stands for – is it the same as the principle the same articulated by the Ninth Circuit in Zambrano? And I will state it: "A court is required to ensure that any sanction imposed is proportionate to the offense and commensurate with principles of restraint and dignity inherent in judicial power."

MR. SOWARDS: Yes, Your Honor. I would say those are consistent –

THE COURT: Okay.

MR. SOWARDS: – both in terms of proportionate to the offense and then also modulated to the harm caused by the offense; I think that's correct.

And in that regard I think the other factors, as we look at the basis for the noncompliance, as we've previously discussed with the Court, indicates that the integrity of the judicial process, certainly the fair administration of justice and the truth-seeking function will actually be compromised by a preclusive sanction, as opposed to the reliance on less restrictive or less severe alternatives.

And I think an example of that certainly is –

THE COURT: You don't mean that? I mean –

MR. SOWARDS: Yes. Yes, I do.

THE COURT: When you say preclusion sanction, you're referencing the ultimate sanction of preclusion.

MR. SOWARDS: Correct. I beg your pardon; yes.

THE COURT: Because any sanction could be characterized as a preclusion sanction, to the extent Mr. Kaczynski is not allowed to introduce all of the expert testimony he desires.

MR. SOWARDS: Yes. And I beg the Court's pardon. That's correct, and I'll try to be more precise in the language.

I was using the preclusion sanction as what the Court had previously referenced as the ultimate sanction. But that's correct, because I think if this case, as to the guilt phase, went to the jury with no assistance of any kind from an expert, we would be talking about an unjustly skewed fact-finding process.

THE COURT: I wonder if at this juncture I shouldn't switch and have the Government communicate with me, because I was interested in whether or not Mr. Kaczynski was going to contest the willfulness finding, but since there's no dispute as to actual willfulness – there's only a question as to the degree of willfulness, then maybe I should have the Government address some of the other factors and get the Government's perspective on the willfulness issue.

But I don't want to cause you to go away if you have something you think I need to hear before I communicate with the Government.

MR. SOWARDS: Right. And I guess the thing that I would just emphasize and – two points, and then turn it over to Mr. Cleary.

One is the idea that I just wanted to emphasize and make sure that the Court at least understands my position, even if the Court finds it may not agree with it, is that it was – to the extent the willfulness is defined in terms of choosing a response to the Court’s order, that what I was referencing with respect to the other information presented to the Court, that it was not a malicious or vindictive or vexatious choice in that regard, that it was a response based on factors which not – which are not wholly volitional in nature. And so that’s why I was discussing the terms of mitigating the – at the outset, mitigating the willfulness finding but then agreeing with the Court that it’s correct the Court may now proceed to weigh the other factors.

THE COURT: You’re really addressing the concept of motive, aren’t you?

MR. SOWARDS: That’s correct, Your Honor. That may be a helpful way of looking at it, of motive or where the response emanates from, that’s correct, to see whether it’s one in which someone has carefully thought something through to embark upon a plan to mislead the Court or to present perjured testimony or to otherwise intentionally jeopardize the integrity of the fact-finding process, which is what we have in the other cases, versus is this something which is sort of actually bundled up in the very issue we’re trying to discuss with the jury? That’s one point.

And the second point, then, and this may assist Mr. Cleary in responding, is what we were trying to do with him is to pick up the point which the Court left us on on Friday and just try to figure out with some clarity, because he has previously indicated this is not his area of expertise, to indicate with some clarity what proposal we should be making to Mr. Kaczynski with respect to something else he may want to do. And that’s just the only thing we haven’t heard.

So I didn’t mean to broach it with the Court this morning that there had been some total breakdown in the meet-and-confer process; it was simply that he didn’t want to make inquiry of his expert as to what exactly it was he was proposing. And I think that would be a helpful next step for us.

THE COURT: The subject matter of the proposal you reference is the psychological-neurological area.

MR. SOWARDS: Yeah, the neuropsychological testing that they had been interested in. And so far the only test that they had specifically requested was not in the ambit of neuropsychological testing. So we were a little perplexed on that point.

The second point is we did not want replicative or duplicative testing to be done if we don’t know about it, which, as his own expert will tell him, would also compromise the validity of the results they would get because of what they call the practice effect.

So those are just some things that would help us to make a decision as to whether this is something we should be encouraging our client to go forward with. It would just help us with the meet-and-confer process and to perhaps resolve this without involving the Court in that aspect of the decision-making.

THE COURT: From the defense’s perspective, then, there has not been a breakdown in the meet-and-confer process with regard to whether Mr. Kaczynski should un-

dergo neuropsychological testing. The parties, however, debate at this juncture what testing's appropriate in that area.

MR. SOWARDS: Or whether they can just give us an indication of what they had in mind. Right. We're not even debating what testing's appropriate.

THE COURT: I see.

MR. SOWARDS: They just – Mr. Cleary, I think because of time constraints, didn't feel that he was at liberty to get that information from his expert. I also offered the possibility of perhaps his expert could talk to someone we could put him in touch with and they could fill us in, because I understand Mr. Cleary is in part saying that he doesn't want to keep translating from that language into English for us, and that's fine; we could have someone else do the translation. We just wanted to know what he had in mind.

THE COURT: Okay.

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

MR. CLEARY: May I respond, Your Honor?

THE COURT: Yes.

MR. CLEARY: Thank you.

Your Honor, we viewed the Court's directive to the parties on Friday as a general meet-and-confer to try to resolve the logjam we're at now. We tried to do that.

We proposed – I want to give you the specifics of what we proposed, because this will relate to the question of willfulness and prejudice to the Government. We made five proposals, separate and apart from the testing.

One is that our psychiatrists, Dr. Dietz and Dr. Resnick, be allowed to do a joint interview without restrictions as to subject matter, conduct a joint interview of Mr. Kaczynski for the same period of time that Dr. Foster, one of the defense psychiatrists, had access to Mr. Kaczynski. That was proposal number one. And the proposals I'm listing for the Court are in the order of preference for the Government.

The second proposal is a joint interview in which the subject matter is restricted, joint interview between Dr. Dietz and Dr. Resnick. In interviewing the defendant, they ask only about his philosophy and politics, his criminal acts and about any delusions he claims to be suffering from. They do not ask about other matters like his family, the operation of his mind beyond the question of delusions he claims to be operating from, or any specific other questions about a mental disorder or a diagnosis. So that was the second proposal.

The third proposal was that the Government be allowed – the Government's experts be allowed to interview Mr. Kaczynski without restriction as to subject matter by closed circuit TV or teleconferencing, so they would not be in his physical presence.

The fourth alternative recommended by the Government, requested by the Government, is that its experts be allowed to interview Mr. Kaczynski by telephone, so they would not even be able to see one another.

And the final proposal we offered, the least desirable for us, but the final proposal was that our experts be able to have access to Mr. Kaczynski by written questions. They submit written questions to Mr. Kaczynski and get written answers.

And what we proposed is if the defense would agree to any one of those, then we would agree they could put on their mental defect defense but be limited to putting on experts that had that same access, no greater, no less. That was our proposal. And that's what we understood the Court wanted us to do to try to resolve the logjam we're at right now.

In addition to those five proposals, we also told the defense that we did wish to do our own testing, which would be done by a psychologist or a neuropsychologist. And they asked which tests we would like to do. As we spoke, the only one I was aware of at the time was the MMPI, the Minnesota Multiphasic Personality Inventory. There are, however, other tests we would like to perform, and they want to know more specifically what those tests are. And I've said the ball should be in their court at this point, Your Honor, if they have – they have rejected all five proposals on the psychiatric front. They rejected that today.

THE COURT: Before you move on to explain the testing and other things, did the parties discuss the duration of the interviews that are connected with the five alternative proposals?

MR. CLEARY: The only limitation on time, Your Honor, that I proposed was on the first proposal, in which I said we would agree to limit the time frame to the same period of time that Dr. Foster, the defense psychiatrist, had with Mr. Kaczynski. And I believe that's somewhere in the neighborhood of 15 hours, but whatever it is, that's the limitation we would seek to impose on ourselves.

As to the other ones, we did not discuss hourly limitations. I did not propose hourly limitations.

But I think at this point, then having rejected each and every one of those proposals, including the proposal that the Government submit written questions to Mr. Kaczynski and he respond in writing, makes it pretty clear to me that they would also reject the proposal that we have a Government- retained mental health expert sit down and test Mr. Kaczynski.

THE COURT: Now, are you discussing the neuropsychological testing issue now?

MR. CLEARY: And psychological testing; that's correct, Your Honor. So what I'm loath to do – and I'll do whatever the Court wants. If you want us to do it, of course we'll do it. But I'm loath to start deciding and determining what specific tests

–
THE COURT: Let me interrupt you.

MR. CLEARY: Sure.

THE COURT: I'm focused on what you said you will do whatever the Court wants. I think I have an obligation. My obligation is to look at the willfulness of the violation, to assess the degree of willfulness, and then that's a factor that I'm to place on a scale when I balance that factor when I decide what sanction should be imposed.

The other obligation is to look at the extent of the prejudice to the prosecution. Now, that doesn't involve what the Court wants. That involves what prejudice the prosecution will suffer.

The other factor concerns the materiality of the evidence excluded. We haven't addressed that factor yet. But, again, it's not a question of what the Court wants. What the Court is to do, as I understand it, is to assess the evidence that is to be excluded as a sanction and look at its materiality, and that is another factor that is placed on this balancing scale that the Court is to use when assessing the sanction that should be imposed.

And the other factor is the effectiveness of a less severe sanction – or it's actually in the plural form: effectiveness of less severe sanctions. So the Court is to assess that.

So I'm not sure what you mean when you ask me, what does the Court want?

MR. CLEARY: Well, let me – I'm sorry.

THE COURT: I'm trying to get information from the parties that will help the Court evaluate these factors so that I can then decide what sanctions should be imposed. So the Court wants input from the parties. That's what the Court wants.

MR. CLEARY: Right. And the only reason I stated it that way, Your Honor, and it was maybe a slip of the tongue, was I was saying that, you know, we don't think we should have to tell them what neurological and psychological tests we want to conduct, because they have indicated, or it seems to me a fair inference, that Mr. Kaczynski would not submit to any testing. And as I said that, I realized it was a little bit too forward of me. That's all we're trying to do. We're not trying to countermand anything the Court has told us to do or any lawful order that the Court would enter. And that's the only reason I said that. It was more of a colloquial expression, to make it clear to the Court I'm not trying to be forward on this; I'm just telling the Court my view on it.

And with that I think what I should do is discuss the factors the Court has mentioned, prejudice and materiality, which I think are related. In my opinion, they are related. To the extent the evidence we're trying to gather is material, more material –

THE COURT: Let me share something else. And I don't know if this is the situation. I'm not aware of any case where these factors have been analyzed to the extent they're going to have to be analyzed in this case. And I assume the parties are not aware of any case or you would have given it to me.

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

THE COURT: I question whether the last factor, which is the factor that requires a determination of the effectiveness of less severe sanctions – I question whether that factor imposes a duty on the Court that would obligate the Court to in fact use the parties' input as it searches for whether there is an effective less severe sanction.

And I say that because of my awareness of a doctrine in the civil area. In the constitutional tort area, a judge has the obligation to assist a civil litigant do research. The Supreme Court, in the case called *Elder vs. Holloway*, holds that judges are required to do independent research to help a civil rights plaintiff find whether a particular law

is clearly established. And since a judge has that obligation in the civil area, since the Supreme Court has stated language to the effect that I'm to look at countervailing public interests and I'm to be engaged in this balancing process, I'll assume I have this, that same type of obligation here. That's on my mind. So you should bear that in mind.

But I engage in that analysis after receiving the parties' input. You were going to tell me about prejudice.

MR. CLEARY: Prejudice and materiality were the two.

THE COURT: You're going to mix them together?

MR. CLEARY: Yeah. I could try to separate them out, Your Honor, but I do think they're flip sides of the same coin. The more material the evidence – we're trying to get certain evidence, and the more material that evidence is, to the extent we can't get it, the greater the prejudice to the Government. So why don't I try it that way and if it doesn't work, I can back off and do it the other way.

THE COURT: I understand. I understand that approach.

MR. CLEARY: It's my view, Your Honor, that what we established for the defense was to establish a hierarchy, that's why I went through, took time to go through the five alternative proposals we made. It's actually a six-level hierarchy.

The first level, most important level to us, the Government, was the terms of the Court's order. The Court ordered the defendant to submit to the psychiatric examinations under certain terms and conditions which I don't need to repeat here. That was really the starting point for this.

And then what we've tried to do with the five additional alternatives I proposed to the defense yesterday was to work our way down the hierarchy to less valid and less valid forms of evidence by things that we could live with; we would do that if that's what the Court ordered us to do, but we're trying to rank them in terms of validity and reliability.

To the extent we are not allowed to get any one of those things, that works a prejudice, material evidence – works a prejudice to the Government, because we have the burden of proof on the issue that this is focusing on. The element that this debate is focusing on is the intent element, that the defendant had the capacity to form the intent to commit the crimes. That's our burden by a – beyond a reasonable doubt.

The prejudice, Your Honor, is that what the defendant has done by rejecting all of our alternatives, to the extent we get any evidence, speaking to the defendant's capacity to form intent, it is a lower form of evidence, a less reliable form of evidence than all the alternatives we've suggested.

And what they've done, then, is they call it leveled the playing field, that both sides have access to the same degree and quantum of evidence, but it's really not; it's skewing the system so the Government, on an issue that may become the focal issue in this case, does not have the most competent evidence to prove the element it's required to prove beyond a reasonable doubt.

I have thought about this myself in very simplistic terms, and maybe they're too simplistic, but the analogy I can think of, Your Honor, is that you have someone walking down the street with a limp and you have a doctor who sees him walking down the street. The doctor says, "That guy's got a broken leg." And another doctor says, "No, he's got a torn ligament." And that's all they see is this person walking down the street. The party that has the burden of proving in that case what the actual cause of the limp is going to want to take X-rays. If they don't take X-rays – if they're prohibited from taking X-rays, then you never can get to the proof of the issue, what caused that injury.

And I view that rather simplistic analogy as appropriate in this case, that we have the burden of proving what caused the limp. And what the defense has now enabled themselves to do is prevent us from getting the X-rays or examining the leg or doing any one of a number of series of other alternatives. They have gotten this case into the position where, to finish the analogy, two doctors are simply going to say that guy limping is, one, broken leg; other, torn ligament.

And I think that's the real prejudice to the Government here, Your Honor. And it is because, again, as I say, we have the burden of proof on that issue.

I can move on to the willfulness question, now if the Court wants me to.

THE COURT: You can address any issues you desire. You know the factors.

MR. CLEARY: Thank you, Your Honor.

On the willfulness issue, in my view, and I am no expert in this area, but in my view the question of willfulness is a question of intent, not a question of motive; it's a question of intent. In this context, did the defendant willfully, intentionally violate a known legal duty, the Court's order? The question of motive is beside the point in determining whether he is willful or not. The question in my mind as to the appropriate sanction turns on the question of willfulness – and the other factors the Court mentioned, but it turns on the question of willfulness. Did the defendant knowingly violate the Court's order? I believe the Court has found – and there's no dispute – that, in fact, he did.

I don't believe there's different degrees of willfulness. There may be aggravating and mitigating circumstances in this context, but I don't think there's differing degrees of willfulness. I think he either intentionally violated or he didn't. Be that as it may, I think what we have here is, assuming there are aggravating and mitigating circumstances that the Court needs to balance, we have a violation –

THE COURT: But there are degrees of difference, aren't there? If you have a defendant that purposefully waits until the eve of trial, knowing that the Government expects the defendant to undergo an examination, and then for purely tactical reasons the defendant does not undergo the examination, for the very purpose of surprise and ambush, to gain a tactical advantage over the Government – that seems to be a higher degree of willfulness than a situation – and I'm not deciding this issue when I say it like this – where you have a defendant that argues that his reason for not undergoing the examination is because of some mental defect.

Isn't that a difference in degree of willfulness?

MR. CLEARY: I agree with the Court that it may be outcome determinative, and I'll just use different labels. I think, to use the Court's example, that the willfulness is the same; it's an intentional violation of the Court's order. The difference between the two situations the Court posited goes to motive, what motivated the defendant to do that. I think it's a semantic difference, Your Honor.

THE COURT: At this point it appears that, given what you just stated, the defense appears to be stating the same thing. I mean, just using your last statement.

MR. CLEARY: Mm-hmm.

THE COURT: But I don't see the import of this discussion at this juncture, then. Can you explain that.

MR. CLEARY: Yes, Your Honor. The relevance of this is, the way I would encourage the Court to analyze this is he's willful and we move that aside. Now we've got to look at why did he do it, what was the motivation for doing what he's doing, refusing to comply with the Court's order. I believe what we have here, Your Honor, is a violation of the most blatant sort, which is something the Court can – should consider in fashioning the appropriate remedy, whether we call that "super willfulness" or whether we call that "contumacious behavior." However we label that, that should be considered by the Court.

And the defendant in this case, Your Honor, when confronted with the Court's order – and now I'm speaking to that question of how egregious and blatant is the violation. And in my view it's very blatant and the Court should issue the strongest sanction possible. When confronted with the order, the defendant offered initially no excuse, no reason for violating the Court's order. He simply did not want to go along with the Court's order. At a later date, we have the explanation that he is afraid of psychiatrists and that's why he could not submit to the Court's order. It is my recollection that it was subsequent to the claim that he's afraid of psychiatrists that we had a claim that he was afraid of Government psychiatrists, not all psychiatrists. The documents we submitted to the Court, letters from Mr. Kaczynski, we believe undercut that argument.

Furthermore, we have now proposed to the defense five alternative solutions which take the defendant and physically separate him from the psychiatrist. Indeed, in our least desirable alternative, the parties never even see one another; Mr. Kaczynski writes answers to written questions, which was, in fact, one of the proposals he made, the defendant made when he was corresponding, or trying to correspond, to get psychological or psychiatric treatment a number of years ago.

Since he has rejected each one of those alternatives, and they are alternatives that we designed to try to speak to the allegation that he is afraid of psychiatrists or afraid of Government psychiatrists, I believe suggests strongly that this is the most blatant form of contumacious behavior. There is no – under no circumstances is he going to submit to mental health professional testing, no matter how distant we try to make him, the subject, from the mental health professionals.

THE COURT: I understand.

MR. CLEARY: And I actually don't have any other comments, unless the Court has some questions for me.

THE COURT: I have some questions.

Your argument, if embraced by the Court, would support imposition of the ultimate sanction. Now, assume for argument purposes, that I don't embrace that argument. What is the Government's position on the sanction?

MR. CLEARY: Our position would be, Your Honor, that you should preclude the defense from offering any evidence – in the guilt phase – from offering any evidence from any professional, mental health professional, that had any greater access than the Government experts do to the defendant.

And that would preclude – our recommendation to the Court, our request to the Court, would be that that would preclude defense experts from relying upon, for example, test data generated by a defense psychologist or neuropsychologist if the Government is not allowed to do its own testing, neuropsychological testing of the defendant.

THE COURT: Question: does that type of a preclusion order extend to examinations which occurred before this case was pending in this court?

MR. CLEARY: If we had access to that material and – we don't have the Harvard material, right? There was some testing done 30 years ago or so when the defendant was at Harvard. That material has not been produced to us. But if it were, if we had that material and we had the same access to that material that the defense did, then it would be our recommendation that both sets of experts who have not seen or evaluated or observed the defendant could also rely on that material in formulating their opinions.

THE COURT: Mr. Kaczynski hopes the Court does not impose the ultimate sanction and listed a number of alternatives to be considered in absence of the ultimate sanction. What's the Government's position on those measures?

MR. CLEARY: Your Honor, I don't have the brief in front of me.

THE COURT: I may be able to find it.

MR. CLEARY: I could tell the Court that, generically speaking, if those proposals relate to or would allow the defense to rely on material that they got from observing, evaluating, examining, or testing the defendant, that we would object to that.

(Pause in the proceeding.)

THE COURT: As I understand Mr. Kaczynski's brief, he asserts that the detriment to the fact-finding process could be ameliorated by either of the following: 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. It's in the defendant's opposition at page 9, the supplemental brief opposition, page 10.

MR. CLEARY: Your Honor, I don't think that would be appropriate standing by itself. I was actually, if the Court went with our proposal – assuming the Court

was not going to issue the ultimate sanction, I made another suggestion to the Court. I was going to suggest that, under those circumstances, the Court also instruct the jury of the defendant's refusal to explain why it is that our experts have not examined the defendant. The reason why, standing alone, these proposals are not fair to the Government is you're going to have a jury of 12 citizens judging the case –

THE COURT: Let's see if we are on the same track. I assume that when Mr. Kaczynski proposed these alternatives it was with the understanding that the type of alternative sanction you have proposed would be in place.

MR. CLEARY: I see. So if that is true –
Can I have just one minute, Your Honor?

THE COURT: Yes.

(Discussion off the record among Mr. Cleary, Mr. Lapham, and Mr. Freccero.)

MR. CLEARY: I can respond, Your Honor.

If – and I just want to make sure I understand, and the defense understands, what the Court is saying. If the Court accepts what I'll call our alternative proposal, not the most severe sanction but basically both sides' expert have the same access to the defendant – basically no access to the defendant – and those experts can testify, if that were the case and the Court instructed the jury that the defendant refused to allow the Government to test, to examine him, allowed the Government to introduce evidence that they were denied access; they tried to get access to the defendant and were denied that, and allow us to argue the inferences that flow from that – that would be, in our view, a fair solution to the problem.

THE COURT: I didn't take notes quick enough. I identified three things, three alternative things that were proposed by Mr. Kaczynski. I know that you just mentioned two of them. Did you just mention two?

MR. CLEARY: I was trying to write down quickly when the Court was speaking. I think the three I heard, or at least the three I wrote down, was: instruction of the jury of the defendant's right – of the defendant's refusal; allow the Government to introduce evidence that they were denied access – and that may be the same thing, now that I think of it; and allow the Government to argue the inferences that would flow therefrom. Those are the three I have in my notes.

THE COURT: Those are the three that I mentioned. And did you mention all three of them just now?

MR. CLEARY: I tried to, Your Honor. I meant to.

THE COURT: I think I understand your position, unless you have something else to add.

MR. CLEARY: I have nothing further. Thank you, Your Honor.

THE COURT: Okay.

MR. SOWARDS: Just very briefly, Your Honor.

I would invite the Court's attention to the Ninth Circuit's analysis in Fendler for the proposition that, in contrast to what Mr. Cleary has said today, the materiality issue, the materiality factor is to be viewed in terms of the materiality of the evidence to be

excluded, the defense evidence to be excluded, and is further explained in the briefing where what they're proposing is essentially the exclusion of expert testimony, which in effect animates the defense. That is what the Ninth Circuit says is essentially the ultimate exclusion, the potentially disproportionate exclusion. That's how materiality is analyzed.

I did not hear Mr. Cleary then describe what he regarded as the flip side, that is, whether there would be prejudice to the Government were the evidence not excluded, because he had analyzed it in terms of materiality. The question is, assuming that the Court finds that the evidence is so material and so crucial to the defense that it would be disproportionate to exclude it, the next question then is, what would be the prejudice to the Government if they have to rely on other means of refuting it or rebutting it?

And I think implicit in Mr. Cleary's gradation of proposals for evaluating Mr. Kaczynski is the notion that the Government experts, if they have access to all of these writings and they're on the same footing as defense experts, will at least be not prejudiced in responding to exactly the same base of information that the defense experts have.

So I don't think, either in terms of the proposal or anything Mr. Cleary said here today, the Court has any more detailed description of prejudice than we did when Mr. Wilson was here.

The analogy which I thought was in the context of our discussion over testing that Mr. Cleary used was about diagnosing a leg injury, in deciding whether it was broken or a torn ligament – and I would say up front, for the Court's edification, I'm always loath to engage in pursuing someone else's analogy or metaphor, but at the risk of that, let me just say that I agree that one quick answer one might say is, well, why don't we look at an X-ray? And we've provided that information, in effect, as it relates in this context, to the Government.

The only thing we've asked them – two questions. One, is there something wrong with our X-ray? You've shown it to your technician; is there something wrong with it we can respond to you about? And if there is something wrong with our X-ray, what test would you like to do? What procedure would you like to do which would give you the same degree of confidence? And that's what we just haven't heard from him at this point.

So I'm addressing two separate issues. One is what the Court just left off with, which is, is there materiality here which weighs against any sort of exclusion but particularly the ultimate exclusion? The answer's absolutely yes.

The next question, is there something –

THE COURT: Wait a minute. I need to go back to materiality, because I think you're right; I think your analysis is correct. What is the materiality that's at issue, from your perspective?

MR. SOWARDS: The materiality, Your Honor, is that there is going to be a lot of argument about what the information that the prosecution introduces by way of voluminous writings means, what that means in terms of mental state.

THE COURT: I don't understand. I thought you just told me that the materiality is centered on the defense evidence to be excluded.

MR. SOWARDS: Correct, and it's –

THE COURT: The writings aren't – no one's talking about excluding the writings.

MR. SOWARDS: Right. And what we're proposing to introduce is expert testimony which would rely on an alternative clinical view of what the writings mean and how they support the defect evidence or defense that we would be presenting.

THE COURT: You used the term "clinical view," correct?

MR. SOWARDS: Clinical assessment. Expert assessment.

THE COURT: That's what you meant?

MR. SOWARDS: Correct.

THE COURT: Okay.

MR. SOWARDS: Yeah. I'm sorry.

THE COURT: "Clinical" is not needed for the explanation, right? Because all you're going to do, as I understand it – I just want to make sure – you're only talking about having your experts to look at writings. You're not getting information from Mr. Kaczynski.

MR. SOWARDS: Correct. In our proposal, that's correct.

THE COURT: Well, you disagreed with the Government's analysis of the materiality issue, and I think you're right. You jogged my memory, and that's my recollection of the law too, is just what you said.

But why did you tell me that? What is it that I'm supposed to do with that information?

MR. SOWARDS: Oh, I'm – two reasons. One was I didn't want the Court to think that it had to weigh the evidence that they wanted to get as a fact of materiality. And now I think the Court's next question is, so what's so material about what they want to exclude?

And what I'm saying is, as in the Fendler case, if the expert testimony is excluded, then a lay jury – it is our feeling that a lay jury will not be assisted to the degree necessary to understand the significance of the additional information we have that, in fact, shows absence of intent or capacity to form intent, despite what the Government's evidence may point to.

THE COURT: This is what I discern you to argue.

It appears that Mr. Kaczynski recognizes, through counsel, that the Government's alternative proposal is fair or is the way to resolve this matter. I'll stop there.

MR. SOWARDS: Okay. Thank you for stopping, Your Honor, because I didn't want to interrupt.

There was the further point, and this is picking up on the X-ray analogy, that what they also wanted to exclude was certain evidence that experts, even if they did not

speak to Mr. Kaczynski, might rely on. And that was what we had referred to as objective testing data.

THE COURT: I understand. We're going – we're going there.

MR. SOWARDS: Oh, I'm sorry. Okay. I beg your pardon. All right.

THE COURT: Because that's where the materiality argument should be centered.

MR. SOWARDS: I understand.

THE COURT: If we center the materiality argument on that type of evidence, then the Government doesn't convince me that the ultimate sanction should be imposed. And if, in lieu of that, I impose the alternative sanction which the Government articulated, which would in fact exclude the psychological testing you are referencing – I think you characterized it as neuropsychological testing – it would exclude that type of testing unless the Government is allowed to conduct the type of neuropsychological testing it wants, so that we could end up with what we have been generally referencing as an even playing field.

MR. SOWARDS: (Nods head up and down.) And what brought us here today was merely our request of, could the Government tell us what particular testing they had in mind so that we might obtain the assistance necessary to do that?

THE COURT: Okay.

MR. SOWARDS: That would be helpful to us if we could.

THE COURT: Okay. You heard the Government's argument. You heard the Court attempt to articulate what I consider to be alternative sanctions proposed by Mr. Kaczynski.

MR. SOWARDS: Correct, Your Honor.

THE COURT: And you heard the Government embrace those sanctions, and they wanted those sanctions added to this alternative sanction.

So the only question remaining, then, is whether Mr. Kaczynski will be permitted to use the neurological – neuropsychological test –

MR. SOWARDS: Right.

THE COURT: – that has already been generated.

MR. SOWARDS: Correct.

THE COURT: If I exclude that, assuming the parties can't agree – well, maybe I shouldn't rule. Maybe I should wait. I think the prudent thing to do is wait.

MR. SOWARDS: And certainly if we can work it out – that's what we're trying to do today, and I think that's appropriate.

THE COURT: Okay.

MR. SOWARDS: I would, if I could, just leave the Court with one thought on that issue, and the reason that I'm trying to work out whatever we can with the Government on that score is because I think that will also come into play with respect to the fairness of the sanctions, because what I understood Mr. Cleary to say, and I can understand his position, is that he would like to argue to the jury the absence of any explanation for the inability of the Government to have access to Mr. Kaczynski. So, again, it's to the extent those findings may assist in that, it might be unfair to keep

that information from the jury. So that's another weight of materiality on our side of the scale.

THE COURT: I need you to make that argument again, because I don't understand it yet.

MR. SOWARDS: Okay. If findings from the objective testing –

THE COURT: You're talking about the neuropsychological testing?

MR. SOWARDS: Correct. Correct. If that supports an inference of something less than blatant willfulness – in other words, if that goes to mitigate the concept of willful refusal to comply with the Court's order, then that is information which is not only relevant to the Court in assessing proportionate sanctions but it will also be important information in allowing the jury to make a rational and reliable inference as to what they're to conclude from the fact of noncompliance.

THE COURT: How does that finding, that testing result, mitigate the finding of willfulness?

MR. SOWARDS: To the extent it speaks to a nonvolitional or malicious intent in refusing to comply or declining to comply.

THE COURT: How is it probative on that issue?

MR. SOWARDS: Well, to the extent that other mental health experts may rely on that as explaining it as part of the overall picture or condition. In other words, if it's further confirmation of a particular defect, then it would be objective evidence in support of a non-malicious motive.

THE COURT: There must be a basic assumption to your argument. You must be assuming that the Government's experts will opine the neuropsychological testing you're referencing constitutes objective evidence –

MR. SOWARDS: Right.

THE COURT: – that can be used by both sides.

MR. SOWARDS: Correct.

THE COURT: That's the assumption?

MR. SOWARDS: That was my assumption based on my experience and familiarity with the science. And the point that I was trying to discuss with Mr. Cleary is if he has contrary information from his expert, I would like to know what that is, because that is in fact the facts.

THE COURT: Okay. I think I understand your position.

MR. SOWARDS: Thank you.

MR. CLEARY: May I have a second, Your Honor.

(Discussion off the record among Government's counsel.)

MR. CLEARY: May I reply briefly, Your Honor, on the testing issue?

THE COURT: Yes. Well, you're talking about the neuropsychological testing.

MR. CLEARY: Right, and psychological testing also. I don't think we should be in a position where we have to rely on their testing. We should be allowed to do our own testing, and I think the burden at this point, particularly since they have said Mr.

Kaczynski would refuse to answer written questions of our psychiatrist, they should just tell us is the defendant going to submit to the testing or not.

We've told them that one of them is the MMPI, which we don't have a current MMPI – we don't have any MMPI from the defense – and I'm informed that's one of the most reliable, most standardized psychological tests administered which is highly probative of schizophrenia. That is one of the tests we want to conduct. There are other tests we would like to conduct, but I think the ball is in their court to tell us whether the defendant is going to consent to testing or not. All indications are he's not going to. And if he is, if he would consent to it, then we would be happy to figure out precisely what tests we're going to take and tell them what tests we're going to take. But I think it's their burden at this point to tell us that.

The reason we want to do our own testing, Your Honor – and we talked about this Friday so I'm not going to belabor the point – but different people test different ways. Different people administer different tests. And we have a right, in my view, we have a right to get our own testing. It's not simply whether it's an X-ray or not an X-ray. This is the working of the mind. It's not a yes or no answer. And we believe we're entitled to do that, and we would ask the Court to allow us to do that or at least have the defense tell us whether they're going to allow – whether the defendant will allow us to test or not.

THE COURT: I want the parties to argue – not at the exact same time, but I want argument concerning this precise issue. So I want to hear your response to the Government. Well, let me tell you what he's told me already. At least this is my interpretation of what I think he's told me.

The defense is arguing that there may not be a need for more testing. In fact, their argument assumes that the neuropsychological testing already performed constitutes objective findings that any reasonable medical expert would conclude are, in fact, objective and that the Government can reach the same conclusion simply by looking at those findings, so there's no need for additional testing. That's the defense's first position.

And your response to that position is?

MR. CLEARY: Is that there are additional tests we would like to run that were not run by the defense: the one I keep coming back to, the MMPI; and there are one or two – I'm not quite clear on this so I don't want to state definitively, but I believe there are one or two tests that they did test on that we want to either do a more expansive test, same type of test or but more expansive test, or retest on that issue.

And I can't at this point give the Court any more specifics, but I could get the specifics for the Court if that's material.

THE COURT: I think it's material in the sense that I've got to balance factors. I have to know if the Government's prejudiced. The Government has to tell me that. I've got to evaluate the materiality of the evidence sought to be excluded. I need the parties to tell me whether the evidence is material from the parties' perspectives. I

think the defense was correct in what they told me about materiality. I think that's the focus.

And so I do need the parties' input. And it's not a question of the Court just figuring this out. I don't figure this out in a vacuum. I've got to get the parties' input. If the Government's not prejudiced, if they can't show prejudice, then that's going to affect how I balance things.

MR. CLEARY: Well, I'll get that information for the Court.

THE COURT: Let me turn to the defense.

The Government essentially is suggesting that it is doubtful, from the Government's perspective, that your client will submit to any neuropsychological testing and that the Government will be wasting its time by asking experts about various tests that are available. Is that correct?

MR. SOWARDS: I understand that to be their position, Your Honor. At least two of the responses I have to that are that there's the question about informally working it out with them, getting information from them, so we don't have to involve the Court –

THE COURT: Well, I still want that to be in process, but they're indicating that the process isn't going to work because of the reason I just articulated.

MR. SOWARDS: Right. And all I'm saying is – I think the short answer is if somebody has figured out what the testing ought to be, could he tell us that, and it would be incumbent on us to try to work around the question of the ability to give them that information, to speak with our client. I mean, I've always taken the position that the attorney doesn't answer for the client without talking to the client about what the particulars are.

The other point, though, that Mr. Cleary keeps coming back to is mentioning for the Court, and I think the Court – I agree one hundred percent – is correct in saying this isn't something you should be trying to figure out in a vacuum and, as you previously said, it's not something that you should rely on us as attorneys to fumble around about and try to tell you what we understand about the information.

But I do know this, and that is that there is a very big difference between the neuropsychological data that we're talking about as an objective point of data and what Mr. Cleary keeps referring to as the psychological data, and I think more precisely he's talking about projective personality testing, with such clinical instruments as the MMPI that do have problems with examiner bias and subjectivity and a lot of other problems.

We, as we have told them before, have conducted only the neuropsychological objective testing. So I think it is, again, unfair to the defense and unfair to the Court to try to expand –

THE COURT: Excuse me, sir. How is it objective?

MR. SOWARDS: Because it is a standardized testing based on a standardized testing protocol. So in other words, the individual gets either an answer sheet or the examiner has an answer sheet and then administers a number of tests, some of which

are timed, in which the person has to complete a series of tasks within a certain period of time and give answers.

THE COURT: Isn't that a subjective component?

MR. SOWARDS: No, that's the person – unless we're concerned that the examiner, whoever –

THE COURT: If the person has to complete a task within a specified period of time, and if the timeliness of completing the task is used to evaluate the person's performance on the test, isn't that a subjective component of the test.

MR. SOWARDS: Not in terms of the internal controls of the test. I mean, it's what they call congruent data, which means that over a series of tests in the battery you would expect to see certain patterns if you have certain results over certain time periods. So what's built into the test is the idea that someone doesn't come in and what they call "fakes bad," that someone comes in and – not that they're bad at faking but that they fake an impaired condition. And that's what's all internalized in the test controls.

THE COURT: Okay.

MR. SOWARDS: And that's why – you know, and again, in the Court's questioning, I should say I don't want to speak on behalf of the science, but I think that's exactly the point that we were asking Mr. Cleary is if his examiner – I mean, I can see that some people say, "Well, look, can't we do our own tests and see if we get more helpful information?" But if their concern is – if what they're telling him is no, this data is solid; this data is sound; there's no reason to believe it was administered in other than clinical protocol and the information is reliable, then I think that speaks not only to whether we're engaged in superfluous further discussions but also speaks to the very issue the Court's raised in terms of fairness and appropriate sanctions and the truth-seeking function.

So I just thought if we could discuss this informally and just ask him the question – the other thing that occurs to me is if Mr. Cleary spent the weekend organizing these five or six variables with the other experts, it's probably a three-minute phone call to say, "What tests do you want to run?" and "Is the stuff that the defense has given you reliable?" I mean, it doesn't take any time at all to answer that question, and it might save us all a lot of time in briefing and argument.

THE COURT: I'm ready to make some comments, unless there's further input from the Government.

MR. CLEARY: No, Your Honor. Thank you.

THE COURT: I don't know if the ultimate sanction will be imposed. I need to evaluate everything. Tentatively, I am leaning towards a lesser sanction. The Government articulated the lesser sanction I'm leaning toward, which means that if that sanction is ultimately embraced by the Court, Mr. Kaczynski risks having excluded the neuropsychological tests we've been discussing. Before that evidence could be excluded, I would have to evaluate the materiality factor, and I would need the parties' input on that issue.

I would also have to evaluate – and this is an overriding responsibility that the Court has – the effectiveness of less severe sanctions. And just by focusing on these two doesn't indicate my view that the other sanctions or factors are unimportant. I think they are all important, and I must give personal consideration to each one.

I do not think I should issue a ruling at this juncture. First, I haven't evaluated fully the full record, so I'm unable to reach a determination as to whether the ultimate sanction should be imposed. But I suspect that when I look at the full record, I will see a factual dispute concerning the willfulness issue. And I think that the degree of willfulness may very well indicate that I should use the Government's alternative approach.

I think a judge should be reserved in making rulings. You shouldn't make rulings unless you have to. If the parties can possibly agree on the issue and the approach, I should wait for the parties' input. That's what I'm going to do. I do want you to continue in the process of trying to resolve the issue, focused on the Government's alternative approach. And I assume I will hear from you next week on it during the trial?

MR. SOWARDS: I'm certainly available, Your Honor, any timetable Mr. Cleary wishes to meet.

MR. CLEARY: The only thing we would have to do, if I understand correctly, is figure out precisely what tests we want to take, correct? So we could probably –

THE COURT: I think there's another issue. And I'm not indicating that I agree, but the defense is arguing that the Government doesn't need to take any tests, that the neuropsychological data that exists constitutes the type of reliable, objective data that experts will all agree on. So the Government will have to – should respond to that argument.

MR. CLEARY: I think I can.

Just so I'm sure we're all talking about the same thing, the defense, I don't think, is arguing with our proposition that the MMPI was: a, not administered recently; b, was never provided to us – the 30-year-old one was never provided to us; and that it is among the most reliable standardized detectors of schizophrenia. I don't think there's a dispute on that score.

THE COURT: I don't know if there is or isn't. I'm only indicating what the defense is arguing. And I understand that the Government has a different perspective, that the Government believes that – I presume – that there could be disagreement as to the objectivity of the neuropsychological tests and that there's a subjective component involved and therefore the Government desires to either duplicate parts of that test or conduct additional testing.

And these are the things you're going to be meeting and conferring on, bearing in mind that I will ultimately look at each of the factors I've identified and I will make the balance I think I'm required to do under law.

MR. CLEARY: That's fine, Your Honor. And just so our position is crystal clear, we're saying there are some additional tests that may need to be taken. In other words,

it may not be all of the defendants' tests or that there's examiner bias that we're concerned about – indeed, there may be none of them we're concerned about. But we want to do some additional tests that have not been conducted by the defendant, and maybe some other things also. I just wanted to make that point clear.

THE COURT: I think it's clear.

Anything further?

MR. CLEARY: No, Your Honor.

THE COURT: Next week? Sometime next week?

MR. CLEARY: Your Honor, I'm hoping we could get back to the Court by tomorrow with the tests we would like to take.

MR. SOWARDS: It might be helpful, Your Honor, if they got back to us first.

MR. CLEARY: Fair enough.

THE COURT: My thought was you were going to be communicating with each other, trying to agree.

MR. CLEARY: And we will do that, Your Honor.

THE COURT: All right. Well, then, if not tomorrow, then next week?

MR. CLEARY: Sure.

THE COURT: All right. Thank you.

(The lunch recess was taken.)

SACRAMENTO, CALIFORNIA

TUESDAY, NOVEMBER 25TH, 1997 - 1:35 P.M.

—o0o—

THE CLERK: You may remain seated.

Court is now in session.

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

Are you ready to proceed?

MR. DENVIR: Yes, Your Honor.

MR. CLEARY: Yes, Your Honor.

THE COURT: I think I'm going to talk to the lawyers first.

Is it 119?

THE CLERK: Yes.

THE COURT: For some reason we're missing juror 119. The juror is on his way to the courthouse as we speak, I hope. So that means that we're going to have to cover some things twice today.

Bring in the rest of the jurors.

(Brief pause.)

(Prospective jurors brought in and seated in the jury box.)

THE COURT: Sir, could you walk down further.

Thank you. Probably the sixth seat.

I would like my deputy clerk to please administer the oath to the prospective jurors.

THE CLERK: Please stand and raise your right hand.

(Oath administered to the prospective jurors.)

THE CLERK: Thank you. You may be seated.

THE COURT: Good afternoon, 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 Shani Furstenau. On the platform with her is the certified court reporter who will assist in administering this trial.

I trust that you will fulfill your civic duty during the voir dire or questioning process. I thank you both for your presence and your anticipated cooperation.

You are performing an important function in our justice system. Under the principles of our constitutional democracy, the parties are entitled to a fair and impartial jury. The right would be meaningless without citizens such as you making themselves available to serve as jurors. The voir dire questioning process is an essential way of ensuring that such a jury is obtained.

Please answer the questions that will be asked as honestly as possible. Please don't be concerned about someone else's views of your answer. Each prospective juror is entitled to his or her own opinion. 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 in this manner, some of the prospective jurors will be assembled later for further questioning as a group. Those required to participate in the group questioning will receive notice as to when that will occur.

Our objective is to obtain a fair and impartial jury that will decide this case on the evidence that is presented to them in this courtroom and the law I will give them during this trial.

I decide to do individual voir dire in part because the parties have requested it, and also because there has been some pre-trial publicity about this 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 the 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 causes you to prefer not being a juror on this type of 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 guilt 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 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 any mitigating fact or 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 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 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 on the death penalty.

We may ask questions in additional areas, too. During this questioning, we will refer to you by your randomly selected number as a juror rather than by your name.

This is because I decided to use an anonymous jury in this case in order to protect jury privacy, as I have previously explained to you in an earlier 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 about anyone who has anything to do with it until the trial has ended or you have been excused as jurors.

Anyone else includes members of your family and your friends. You may tell them 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 read any news stories or articles or listen to any radio or television reports or access any Internet stories or comments on the Internet about the case, 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 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 admonition.

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.

PROSPECTIVE JUROR NO. 115: (Raises hand.)

THE COURT: The record will reflect that Juror Number 115 raised his hand.

We'll discuss it later, sir.

PROSPECTIVE JUROR NO. 117: (Raises hand.)

MR. DENVIR: Your Honor, there is another juror.

THE COURT: That's Juror Number 117.

MR. CLEARY: 116.

MS. CLARKE: 117.

THE COURT: 117. It's 117.

I contemplate observing the holiday season as follows:

We will 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.

PROSPECTIVE JUROR NO. 117: (Raises hand.)

THE COURT: Thank you.

That was Juror Number 117 that raised her hand.

Please raise your hand if you do not understand the following:

Your first duty as a juror would 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 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 jury – each juror to carefully consider all the facts and circumstances presented.

The Government may focus on certain aggravating factors, things that they will urge the jury to find supports the sentence it seeks. You will also have to listen careful 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 in prison without release or some lesser sentence.

Does any juror not understand that?

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 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 is 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, I may ask some questions in the area that you indicated a desire to discuss in private to determine whether we can discuss aspects of the matter in open court without disclosing what you seek to keep private.

If this can occur, let me know so I can determine whether the matter should be covered 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 have my deputy clerk to escort all but the earliest randomly selected juror to another room and to place the remaining juror in the witness stand.

(Prospective jurors exit courtroom.)

(Prospective juror number 103 takes a seat on the witness stand.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q Thank you for joining us. You are the 103rd randomly selected juror, and may I reference you by that number periodically.

I'm going to show you what I think is your questionnaire.

I want you to tell me if this is your questionnaire.

(Document shown to witness.)

A Yes.

Q You indicated on the hardship part of the questionnaire that you wanted to discuss something in private. I want to show that to you.

Is that correct?

A Yes.

Q I'm going to show you another portion of the more voluminous questionnaire. It's number 123.

A Uh-huh.

Q Is that the matter you wanted to discuss in private?

A Yes.

Q Let's see if we can discuss aspects of it without disclosing the contents of it.

A Okay.

Q Is that matter still a problem?

THE COURT: I was looking at – Okay.

(Checking with counsel.)

BY THE COURT:

Q Okay. Is that matter still a problem for you?

A Yes. It's on and off actually.

Q Okay. Given the schedule that I'm going to have in this case, is there any reason why you can't be considered as a juror?

A No. Because I don't know when – I mean, if it's on and off, I don't really know so . . .

Q I don't mean to embarrass you, and maybe I should stop. And you stop me if I am asking you something that is embarrassing.

If the problem is on, how would it interfere with the jury service?

A It might be difficult for me to concentrate, to be effective. Just because if, you know, the condition – just don't – you know, I'm not 100 percent.

Q How long does it last that – the symptoms that you're relating?

A It could be a day. It could be two days. I mean it just depends.

Q Although it presents problems that make it difficult for you to concentrate, are you able to overcome those problems and still concentrate despite the difficulty?

A I would be able to, I think.

Q Okay. Is there any other reason why we shouldn't consider you for service as a juror in this case?

A No, I do not believe so.

Q Okay. I'm going to ask you to use the microphone now so that your voice is amplified a bit more.

Since you answered your juror questionnaire at Cal Expo, have you heard of or read about this case?

A I have heard some information.

Q Okay. What type of information?

A I don't actually seek out the information, but just maybe having a glimpse at the newspaper sometimes, the headlines just really pop out at you. I mean, I'm not trying to read them. You just glance at the paper and it is there.

Or even on the radio, they might mention something. So it's hard to really be, you know, I guess away from that.

Q It appears as though you have been trying to avoid exposure?

A Uh-huh.

Q Despite your efforts, what type of things do you recall hearing or reading?

A Well, recently about the mental exam – the examination. A little bit about the jury selection process at this point. That's just recently. I mean, that doesn't include anything from prior. "Prior" meaning whatever I heard from before I knew.

Q Before Cal Expo?

A Before Cal Expo.

Q That's what you meant by "prior"?

A Yes.

Q Okay. What did you hear about the mental exam?

A Just that he did not want to submit to one right now.

Q And the other matter you indicated involved jury selection?

A Yes.

Q Do you recall what you heard about that?

A Just that, I guess, you're looking for 64.

64 is the lucky number.

Q Okay. Did the information you received about the mental exam have any kind of effect on you?

Did it cause you to think anything?

A No. Because I've been really trying to dismiss everything that I hear.

Q Okay. Since Cal Expo have you had any discussions with anyone about the case or overheard other people discussing the case?

A Yes. I don't engage necessarily in the conversation, but just people talking about it, co-workers, friends.

Q Were they talking to you, or did you just overhear their conversation?

A Both.

Q Tell me about those communications?

A Well, just overhearing, I guess. People just talk, you know, from whatever they, you know, hear or read in the paper. And just comments, you know.

And as far as conversations with myself, just – I don't know. I guess some of my friends that do know, I guess, just more in shock that, you know, out of how many people could be a potential, you know.

Q I'm prying –

A Not really trying to sway me or anything.

Q — I'm prying in this area. I have a reason for doing the questioning.

A Sure.

Q I'm required to, you know, find out what information you received and to get some details about the information you received so that the Court is in a position to objectively evaluate the possible impact that information could have on you.

I will be giving you an opportunity later to tell me from your prospective how you believe the information has an effect on you, if any.

A All right.

Q Just focusing on those communications, can you remember any of the details about the communications?

A Gosh. Talking about the jurors. Just the process you have already been going through since November 12th.

Gosh. I really can't. I mean, nothing really specific that stands out that maybe I already didn't know.

Q How about before Cal Expo; what type of information did you receive about the case before you appeared at Cal Expo?

A Just whatever – whatever was on TV. I mean, just the general. That he was arrested and charged with this crime.

Q Can you give me some specifics?

A That his brother turned him in. There is a cabin in Montana. Just bits and pieces.

There were two people that were – that were killed here.

Q What information do you remember receiving about the cabin in Montana?

A That it's small. There was a lot of stuff in there. I don't know. That's about all I remember.

Q Do you have a memory of any of the items that you're referencing as "stuff"?

A No. I just remember it was a lot of stuff for as small as it's supposed to be. I don't remember exactly what they found.

Q Based on the information you have received before coming to this courtroom, have you formed an opinion or do you have any preconceived notion as to Mr. Kaczynski's guilt or innocence?

A Not really. I mean, I don't know all the facts. And I know that the media and all that is pretty much hearsay.

Q I couldn't – I need you to use that microphone.

A Well, the media –

Q You can adjust it. Thanks.

A The media is – it's hearsay. You don't know if it's – They depict it one way to lead you to believe certain things, but you don't know until everything is put in front of you whether it's true or not.

Q Has the information you received from media sources caused you to lean a particular way on the question of guilt or innocence?

A Yes.

Q Which way is that?

A Probably guilty.

Q Okay. Do you have an opinion in that regard or have you stated it?

A Well, if it has to be – Is it, like, black or white?

I mean, is that what you are asking? No gray?

Q I'm just trying to get you to tell me what your opinion is.

If you've already stated it, then you need not say anything further. But if you do have more information that you could relate concerning your opinion, I would appreciate receiving it.

A I would say probably, but I don't know for sure.

Q Are you – Let me ask it another way: How strongly are you committed to that opinion?

A Not firm.

Q If you were selected to serve as a juror in this case, is that an opinion that you are capable of setting aside so that Mr. Kaczynski could be assured that your decision as to his guilt or innocence in this case will be determined based upon the evidence that's presented in this courtroom and on the instructions that I give you during the trial?

A Yes, I think I could.

Q Does Mr. Kaczynski begin this trial in your eyes cloaked with the presumption of innocence?

A No.

Q What do you mean by the "no" answer?

A Well, I guess it would have to be a little bit of a bias to not – I guess that I'm not leaning one way or the other.

Q If I give you an instruction – Well, let me ask it another way.

A criminal defendant in our justice system shouldn't have to defend him or herself against publicity that causes individuals to receive information and then subsequently form an opinion. That would be unfair because the defendant wouldn't have an opportunity to contest that publicity.

So under the law, a criminal defendant is presumed innocent and need not testify, need not present any evidence. The defendant has the benefit of that presumption of innocence unless and/or until the Government proves guilt in this courtroom beyond a reasonable doubt.

That's a principle of law that cloaks any criminal defendant in our society.

Is there anything that would interfere with your ability to be able to ensure Mr. Kaczynski that you will allow him to have that principle of law in this case?

A No. I would try to be objective.

Q Can you assure Mr. Kaczynski that you will leave outside this courtroom, if you are selected as a juror, whatever information you heard about this case, and you will allow him to start this trial on a clean slate?

A Yes.

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

A Proponent.

Q If the jury should convict Mr. Kaczynski of the offense of deliberate, intentional, and premeditated murder of another human being, would you still be able to consider voting for a sentence less than death?

A No.

Q Could you explain your answer?

A Well, to kind of explain, like the questionnaire, what those questions that were specifically asked on capital punishment, I felt strongly that I agreed with it. However, different – different cases, I guess, made me question otherwise my views on it. Because there is just different – everything is case by case.

I would have to see all the information and evidence in order to weigh it out.

Q Explain what the later part of your answer means. How does that relate to your other answer?

A Okay. Your question was that he – it was premeditated.

Q Yes. I basically asked you to assume that Mr. Kaczynski was unfortunate enough to be found guilty during the guilt phase of the trial – guilt or innocence phase of the trial of the offense of deliberate and intentional and premeditated murder of another human being.

And then I asked you based upon that assumption, that he was in fact found guilty of that offense, would you still be able to consider voting for a sentence less than death?

A No.

Q Then I asked you to explain your no answer, and –

A Well, the intent to harm other individuals, kill them, I mean that's – that's wrong.

Q Do you understand that the law requires that before imposing the death penalty for the offense I just told you about, the jury must consider the facts and circumstances of the crime, the background and character of the defendant, and any other information that might tend to indicate that the death penalty should not be imposed?

Do you understand that?

A Could you repeat that again.

Q You want me to read it again? Is that what you asked me?

I'm sorry. I didn't –

A Uh-huh. Yes.

Q Okay. Do you understand that the law requires that before imposing the death penalty, for the intentional murder we were just discussing, the jury must consider the facts and circumstances of the crime, the background and character of the defendant, and any other information that might tend to indicate that the death penalty should not be imposed?

A You mean how do I feel about that?

Q Well, that's the law. I'm asking you if you understand the law – that that is the law?

A Yes.

Q Are your views in support of the death penalty, for the offense we've been discussing, so strong that you feel you're incapable of considering the type of information I just told you you were required to consider under the law before you make your

decision as to whether the sentence should be death or life imprisonment without possibility of release?

A You're asking if I would consider something?

Q I am. I'm asking basically whether you would be capable of not making up your mind as to what the decision should be, even for the intentional murder offense I just told you about, if you would be capable of not making up your mind until after you received evidence concerning what is called "mitigating factors," factors that point in favor of a life sentence without, and not in favor of a death sentence.

Would you be willing to wait until you received that type of information before you made up your mind as to whether the sentence should be death or life imprisonment without possibility of parole?

A Yes.

THE COURT: Parties may question.

MR. DENVIR: This is not yours, is it, Your Honor?
This is ours?

THE COURT: It is not mine. Thank you, sir.

VOIR DIRE EXAMINATION

BY MR. DENVIR:

Q Good afternoon. My name is Quin Denvir. I'm one of the lawyers for Mr. Kaczynski.

I would like ask you a few questions, if I could?

A Okay.

Q Let me ask you, if I could, about your knowledge about the case.

You indicated that you, up until the time of Cal Expo, when you were told not to pay attention to the case, that you had some knowledge about the case from television and newspapers, as I understand it?

A Uh-huh.

Q And since Cal Expo, you have had some exposure to information about the case inadvertently; is that right?

A Yes.

Q And one of the things that I understand was about a mental examination. Can you tell me again what you – what you remember hearing about that?

A All I remember is that he didn't want to submit to one.

Q And what did you think when you heard that?

Can you tell me what your reaction was?

A Why.

Q Just kind of wondered why?

A Yeah. That's all I mean.

Q And let me ask you one thing, if I could, on the first question the judge talked to you about. This was the matter that you wanted to keep in privacy, so if there is any question that you feel is pushing too far, let me know.

As I understand, this is something that just happens every so often to you?

A Uh-huh.

Q And when it does, do you have to miss work?

Is it of that nature?

Is it something you can continue to be working?

A It depends. Not all the time, no.

Q But sometimes you do have to miss work?

A Yeah.

Q Is it generally you miss work, or generally you don't have to miss work?

A Oh, I guess it's 50/50. It's not necessarily all the time.

Q And is there some kind of, like, this happens so many times per week or month or some –

A No.

Q – average or something like that I mean?

A No. I mean, I feel fine now.

Q Okay. I guess our only concern, and you know the best answer to this, is that the trial could be somewhere from – estimated somewhere from two to four months. And you would have to sit five days a week, from 8:00 until 1:00. And obviously you have to be there all the time, and/or – and be able to concentrate and follow what is going on.

And you don't have any concern about that based on what you know about whatever?

A No. But I mean, what do you do when people are sick, though. I mean a cold or whatever. I mean, they still show up.

Q I guess you would have to ask the judge that. But I guess the bigger question is whether you think that is more probable than not?

I mean, we don't ask people to sit on the jury if they think they probably may have something that would happen to them that would make them miss a day or two or anything. That's what I'm asking you.

Normally, you know, everybody goes in hoping they can sit through. Maybe if they get sick for some reason and didn't know, that's one thing. If it's something you think, based on past experience, might recur and make you miss, then it might be a different matter, you know?

A But see, I don't know. That's the thing.

Q Yeah. So based on your past experience, you're not concerned about it at least?

A No. But I don't know. I mean . . .

Q Okay. Let me ask you, if I can again, then, about your knowledge about the case. As I understand it, you answered in your questionnaire that you were "somewhat knowledge about the case." Is that a pretty fair statement about it?

A Yes.

Q Okay.

A I mean, in my terms.

Q Right. Of the choices that's what you picked is "somewhat knowledgeable"?

A Yes.

Q And based on that, you have some feeling as to whether Mr. Kaczynski is guilty or not; is that right?

A Yes.

Q And as I understand it, you feel that he's probably guilty based on what you know about the case?

A Yes.

Q And as Judge Burrell – and, obviously, people can be exposed to a case like this. You know, jurors will vary how much they've been exposed to it or not, and whether it affects them or not. And all we want to do is explore whether that will affect their ability to serve as a juror and maybe somebody else should serve who wasn't as exposed or affected.

I guess what I want to know is Judge Burrell told you there is a – you would be instructed there is a presumption of innocence. That you would have to come into this courtroom presuming that the defendant was innocent, and if you walked in here, sworn as a juror, and were asked to return a verdict, you would have to find him not guilty based on that presumption.

Do you – Will you have any problem in abiding by the presumption of innocence? Is that something that is going to be difficult, something you'll struggle with?

A No.

Q You don't think that will be a problem?

A No.

Q Okay. Let me ask you, based on what you have learned about the case over this period of time, you know, either before or after Cal Expo, have you – have you come to some opinion as to what you think the proper sentence for the Unabomber, Mr. Kaczynski, should be, if he's found guilty of the charges that he's charged with?

A No. I haven't really thought about it.

Q You haven't thought at all about whether that would be the kind of case that should require the death penalty or not?

A No. I didn't really think about it.

MR. DENVIR: Your Honor, is the questionnaire available?

THE COURT: Right next to her on the ledge.

BY MR. DENVIR:

Q Okay. I wonder, did you – could you look at your questionnaire.

Could you turn to page 26, question 103.

You were asked, "What are your opinions and beliefs about the death penalty and its use in our society." And you said that you believe in capital punishment, but you feel that "If the Government sentences a person to death –" I want to see if it got this right – "then why does the criminal sit on death row for years."

As I understand it, your only problem with the death penalty is the fact that people who are sentenced by a jury to the death penalty are – sometimes there is a delay in how soon they're executed?

A Yes. I just – I mean, I know that’s a hard decision to come to, and I just didn’t understand maybe the process of when that verdict is given, then what’s, you know, the time span and why.

I just don’t understand it. That’s all.

Q Okay. And – But you do actually believe in capital punishment. You say that your opinion and belief hasn’t changed over time.

You believe in the death penalty; is that right?

A Yes.

Q Now, you were asked some questions – Well, let me ask you about number 106 on the next page. You were asked what articles and books, et cetera, that you had read about the death penalty. And you said the Chamber. And you said that you didn’t particularly care for the book and its depiction of an inmate on death row.

Can you tell me what you meant by that?

I don’t mean your literary criticism, but your thinking?

A Well, I guess I’m going – Well, it was also a movie too, so maybe I was basing it more off the movie.

I don’t know. I guess that’s – those are just some things that people would rather just not think about, and they push it to the farthest part of their mind just what death row is. And just –

Q I see. It wasn’t how the person was depicted, it was just the fact that they even went into that subject matter; is that what it was?

A Yes.

Q Okay. You were asked in the question right after that to express your extent of agreement with a number of statements. And you were given four choices on these.

The first one was: “Anyone who plans and commits murder should get the death penalty.” And you said that you strongly agreed that anyone who plans and commits a murder should get the death penalty.

I take it that is still your view?

A Yes.

Q Then you were asked the question – the statement was: “Anybody who deliberately murders two or more persons should get the death penalty.” And you said you also strongly agreed with that?

A Yes.

Q Then the question was: “any person who commits an act of terrorism in which someone dies should get the death penalty.” And you said you strongly agreed with that.

Is that right?

A Yes.

Q And I take it your feelings about anybody who deliberately murders two people or who commits an act of terrorism in which someone dies, these are still true today?

A Uh-huh.

Q You still feel that way, they should get the death penalty? You feel that strongly?

A Yes.

Q When you – When you were reading the third example, an act of terrorism, what did you have in mind?

What were you envisioning as that – as encompassed by that term?

A Terrorism?

Q Yeah. How did you read that phrase?

A I guess it would have to be bombing. Like –

Q A bombing?

A Yeah.

Q Would you – Would you consider that to include somebody mailing a bomb through the mail with an intent to kill somebody, then killing them?

A Sure. Isn't that considered terrorism?

Q Well, yeah. There is really no definition. More a question of what you read it to mean.

A Oh. Yes. Because it's not – I mean – Well, yes.

Q And – And can you tell me, as far as acts of terrorism in which someone dies, why you feel that you strongly agree anybody who commits that kind of act should get the death penalty?

Can you kind of give me some insight into that view?

A Well, I mean, the intent to kill, as I stated earlier, is wrong. I mean, taking another person's life. I mean –

Q Well, can I ask you, and it seems to be reflected in these – in these answers here, is your basic feeling that if someone intentionally takes a life of another person, without any excuse or anything like that, that they – they should get the death penalty?

They kind of forfeit their life when they intentionally kill another person with no excuse or justification?

A I guess, by the way I answered it, it looks that way. But I think you would have to you know the circumstances surrounding that.

Q How about an act of terrorism in mailing a bomb and intentionally intending to kill somebody, then actually resulting in the death of someone?

Is your feeling that, if it was done with no justification or excuse, that should merit the death penalty all the time?

A Possibly.

Q Does the nature of that crime sound to you, based on your views about the death penalty, something that justifies then – if the death penalty is available for that crime, that it should be imposed for that type of crime?

A Yes. I think so.

Q These are very hard questions. And I know, you know, you don't get a chance to think about this all the time. And we're asking you really to kind of look in your own heart and answer the questions as you sit there. And we're not trying to intrude on that. It's something we need to do.

What the judge told you is – Let me see if I can explain to you what a trial like this is like.

It's a two-phased trial, as the judge said. The first part of it is the guilt or not guilty part. That's like a normal trial where twelve jurors would decide.

There would be evidence presented by the prosecution. There could be evidence presented by the defense, but it's not required under the presumption of innocence.

Judge Burrell would instruct the jury. The twelve jurors would go and deliberate. And they would determine unanimously whether the Government had proved its case beyond a reasonable doubt.

Two of the charges – There is ten charges against Mr. Kaczynski. Two of the charges involve transporting or mailing a bomb with intent to kill that results in the death of a gentleman by the name of Gilbert Murray.

If the jury were to find Mr. Kaczynski guilty of those two crimes, there then would be a second trial, in effect, which is different from most cases, because the death penalty is available. There would be what the judge referred to as a sentencing or penalty phase.

And at that – In that separate trial, the jury would make its determination among the legally available sentences for those two crimes, which include death, execution of the person, and life in prison without possibility of release – and that means no parole in the federal system – or a lesser sentence. And the jurors – Unlike most cases where the judge makes the decision, the jurors would make that decision.

There would be – There would be evidence presented by the Government, which could be what they call aggravating evidence. That is any evidence that might point to what they feel supports the death sentence. It could be about the crime, it could be about Mr. Kaczynski.

Then there would be other evidence presented by the defense, what we call the legal term is mitigating evidence. That's all the evidence that points the other way, to life instead of death as the proper sentence.

You would be given instructions by Judge Burrell which would pretty well tell you you make your own decision between those. And that you have to be able – you should consider all the evidence.

And I guess what I would like to know is, I mean given your views on the death penalty that you feel and you thought about, would you be able to actually consider in that situation, sitting there, having found the defendant guilty beyond a reasonable doubt of intentionally mailing bombs – a bomb with the intent to kill and actually killing someone, could you actually consider the alternative of life instead of death as a sentence?

A I'm not sure. I don't know.

Q And you understand when I say "consider", consider is a word we use a lot, but what it means is this: It doesn't mean like sometimes I consider quitting my job and going to Hawaii, right, but it is not like a realistic thing to do.

But here you would have to really be able to say that I will actually consider and think that I would have an open mind and could vote for life instead of death for

someone who sent a bomb intending to kill someone, and actually killing someone with no justification or excuse, you would have to really be able to feel, yes, I could actually see myself voting something other than death for that?

A I don't know. I might be able to.

Q You think – But you think it would be difficult for you to do that?

A To consider it?

Q Yeah. Difficult to consider it as actually something you might actually do?

You might actually be signing it as opposed to just considering it in the abstract?

A Well, that's two different things, though. I mean considering is in the abstract.

Q I think you have to ask yourself – I think what the instructions say, you have to actually consider it in the sense that you would actually consider that as – you would think of that as something you could vote for as a possible sentence for that crime.

And the question is: Knowing yourself, do you think that's possible given your views about the crime?

A Maybe not.

Q And you understand that in doing this, we have to ask jurors – we don't ask jurors to do the impossible. What we ask them to do is measure their own feelings against what the law requires of them if they sat as a juror. Of course, no one has to sit as a juror.

I take it that you really feel that you might not be able to – you may not be able to consider that as something you might vote for as an alternative sentence for that kind of a crime; mailing a bomb with intent to kill and actually killing someone, no justification or excuse?

A I probably could consider it, but I don't know.

Q I don't want to put words in your mouth. It really is important that you try to tell us that.

I mean, as I say, the "consider" word is a – there is a consider like I wouldn't put my fingers in my ears, and there is actually the thought that I would be open to that, I could envision myself, under some circumstances, actually saying no death for mail – for mailing that bomb, life instead?

A Possibly. After hearing everything. Sure.

Q You think the best is about "possibly"?

You still have some doubt about whether you would be able to do that?

A I guess I'm not – I'm not two feet on the floor with that one. I just feel like I could, after hearing the evidence, possibly do that.

Q You possibly could vote for life for someone who did that crime?

A After hearing the evidence.

Q Right.

And I guess I would have to ask you, do you feel it would be hard for you to do that, to overcome this feeling you have that death is appropriate?

It would be hard to actually be able to chose that?

A I know you don't like the words "maybe", but . . .

Q Whatever word describes it is fine.

A Maybe.

Q Okay.

MR. DENVIR: Can I have one moment, Your Honor.

(Brief pause.)

MR. DENVIR: Thank you, Your Honor.

Thank you. ///

VOIR DIRE EXAMINATION

BY MR. LAPHAM:

Q Ma'am, good afternoon.

A Hi.

Q My name is Steve Lapham. I'm one of the prosecutors on the case.

You still have your questionnaire with you?

A Yes, I do.

Q Let me direct your attention to page 28 and the top question 108 where one person intentionally kills another person, and then you're given three possible boxes to check.

You checked the box that: "The death penalty may or may not be justified depending on the circumstances of the case."

Would you explain what you meant by that, or why you checked that box?

A Well, I guess it would just depend on the evidence and circumstances surrounding that. Even though I feel strongly for the death penalty, there could be, I don't know, one little something that might make me feel or believe that it's not justified.

Q And that's really what were getting at.

First of all, so you wouldn't automatically impose the death penalty; you would want to know more of the facts of the case?

A Yes.

Q And what the law says, and I know you don't – you're not trained in the law, but what the law says is that really no two crimes are the same.

Would you generally agree with that?

A Yes.

Q And the law also says no two defendants or no two criminals are the same.

You generally agree with that?

A Yes.

Q Can you – Can you conceive of even the same crime, let's take murder, can you conceive that the same crime may be committed in drastically different fashions?

You need to answer audibly.

A Oh. Okay. Well, yes. It can be.

Q Okay. Some – Some crimes, some murders might be committed in a more gruesome fashion?

A Yes.

Q And in some cases, the person who committed that murder might be sorry – genuinely sorry for what he did. And in other cases, another murderer might not be sorry at all, might be glad he did it.

A Okay.

Q Okay. Now, in a situation like that, can you see a reason why you would want to consider different types of punishment for those two types of murders?

A No. Well, yes, I would. Because if one is remorseful and the other is not, I – I think that would make my – I mean, I have a different opinion on it then.

Q Would you be willing to listen to evidence of that type and reserve your judgment on what the proper penalty should be until you hear that evidence?

A Yes.

Q That's really what we're getting at here.

And in talking about no two defendants being alike, the question is would you be willing to listen to evidence about the particular defendant to see what he's all about before you make up your mind as to what the appropriate punishment would be?

A Yes.

Q Can you – Can you think of the kinds of things that you would want to know about the defendant that would go into your decision?

A I guess just background information. Just, I guess, try to understand why. I guess – I guess that's where the mental exam came in. I don't know.

Q Okay. So – So if there was information about his psychological makeup, you would want to know about that?

A Yes.

Q Because I think Mr. Denvir pointed this out to you, the way this trial is going to proceed is in two stages. In the first stage is the guilt and innocence phase. And the second stage you're going to hear a lot more evidence that is going to go into your decision on what the appropriate penalty should be.

So the question is, if you finish that first stage of the trial where you have determined whether he is guilty or not guilty, would you just then close your mind to any additional evidence?

A No.

Q Would you be willing to listen to that evidence?

A Yes.

Q And it's not just listen to the evidence, but could you honestly and sincerely consider the evidence in determining what the alternative punishment should be?

A Yes. I mean, that's the only way it could be. I mean, to hear everything is – is fair.

Q Could you – Now, the possible punishments you would be considering is the death penalty, life without possibility of release, or some lesser form of punishment.

Would you have any problem, if the facts and the circumstances in your mind warranted this penalty, would you have any problem with imposing a life sentence without possibility of release?

A No. Well, that's kind of already what we were discussing already. I mean, no, I guess not.

Q You say you guess not. You don't sound like you're sure about that?

A Well, probably not. But I mean, I just don't feel one side or the other.

Q You don't feel strongly about it one side or the other?

A Correct.

Q You don't feel strongly about imposing a life sentence, and you don't feel strongly about imposing the death penalty?

A No. I do feel strongly about imposing the death penalty, but you're asking to impose life without parole, if I would have a problem with that?

Q Correct.

A That would depend on the evidence I would say. If that's what the evidence, you know, shows.

Q Now, the court is going to give you some instructions, if you should be selected as a juror, so you're not going to be on your own on this one. And in fact, it would be improper for you to bring your own view of the law into the courtroom.

The judge is going to indicate to you that there are certain aggravating factors. Those are factors which the Government believes merit the death penalty. And that there are mitigating factors, and those are any factors that the defense believes warrants some lesser punishment. And you'll be required to weigh those factors.

Do you believe that you can do that and follow the law that the judge gives you?

A Yes.

Q The question is, even though you have strong views on the death penalty, which is fine, a lot of people do, can you set those views aside and follow the Judge's instructions?

A To the best of my ability, yes.

Q Would you have any hesitation doing that?

A Maybe a little.

Q Do you think it would affect your ability to follow the Judge's instructions on what the law is?

A No. I would try to follow the law.

Q You said that you had developed an opinion on this case, but you also indicated that you have some skepticism for the media.

Could you explain your skepticism for the media?

A Just that – Well, it is hearsay. You don't know that – if it's true or not. Just over exposure, which – I don't know. It's just too much.

Q Again, we're getting at the same thing here. It's important that you be able to set whatever opinions or views about the case you have aside and come into court with a fresh slate.

Do you understand that?

A Yes.

Q And you told His Honor that you thought you could do that?

A Uh-huh.

Q But you hesitated on the question about presumption of innocence.
Do you remember that?

A Uh-huh.

Q You know the law requires that a defendant be presumed innocent?

A Yes.

Q That's your obligation when you come into the courtroom.

Do you have anything – any problem with that notion?

A What? To assume that he is innocent?

Q Yes.

A No.

Q You have heard no evidence in the case. As you sit here today, you have read articles in the paper perhaps, but you have heard no evidence?

A Uh-huh.

Q About the case?

A Uh-huh.

Q You won't hear any evidence unless you are selected as a juror and actually sitting in that box there.

A Uh-huh.

Q Are you going to let anything you have read outside the courtroom affect your judgment on how you would view the evidence if you were selected as a juror?

A No. I would try not to.

Q Do you think can you do that?

A Yes. I mean, I would try.

Q What if you heard – What if you heard evidence in this courtroom that conflicted with something you had read outside of the courtroom?

A Then obviously what I heard was maybe incorrect.

Q What you had heard –

A Heard outside. Yes.

Q Would you just assume that what you heard outside the courtroom was wrong, and you would believe what you heard inside the courtroom was correct?

A Yes.

Q What if you read something outside the courtroom and never heard anything about it when you got inside the courtroom?

A I would have a lot of preconceived thoughts, then, I suppose.

Q Would you be able to set those thoughts aside?

A I would try, yes.

Q Is that something that you think is going to affect your judgment on whether the defendant is guilty or not guilty?

A I would try to not let it affect me, but I mean, I don't think that I could say a hundred percent. It could. I mean, they're kind of already there.

MR. LAPHAM: Your Honor, may I have a moment.

THE COURT: Yes.

(Brief pause.)

MR. LAPHAM: Thank you, ma'am.

THE COURT: Thank you.

Bring in the next juror.

(Prospective juror number 103 exits the courtroom.)

(Prospective juror number 115 brought in and seated on the witness stand.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q Thank you for joining us, sir. You're the 115th randomly selected juror. I may refer to you by that number during this questioning.

Is there any reason why we shouldn't continue to consider you as a prospective juror in this case?

A Financial hardship.

Q Can you explain it?

A There is only two people at my office, and if I was unavailable to be at the office for two weeks, four weeks, or whatever, it would be a hardship on my family.

Q You raised your hand when I mentioned the work schedule, I think, correct?

A Right.

Q And what were you going to tell me?

A It was just that I wasn't able to make that time period from 8:00 to 1:00, or whatever it might be.

Q Well, why can't you make that time period?

A Because if I was away from the office, it would be a financial hardship.

Q Are you the only person in your household that brings in income?

A No.

Q Your spouse –

A That's correct.

Q – brings in an income too?

A Uh-huh.

Q Without telling me the exact nature of your business, can you explain why you couldn't work after your release from jury service during the day?

You would perhaps be able to get to work by about two o'clock. Why wouldn't working after 2:00 be sufficient to reduce the hardship you're relating?

A Well, normally we get most of our business done during the morning. And those are the most active hours of our business.

Q Don't tell me the name of the business, but tell me the type of business that we are involved with here in this communication?

A It's a contracting business.

Q Give me a little bit more information.

A We do granite and marble contracting.

Q It's not feasible to engage in such contracting activities from two o'clock into later in the evening?

A It's possible, but between – by the time you got back to work at 2:00 or 2:30, to five o'clock, isn't very much time to be able to do that.

I don't know how long the trial lasts, but if it lasts for two or three months . . .

Q I'm asking these questions because the parties are entitled to a fair cross-section of the community from which to select jurors.

A Uh-huh.

Q And if we automatically exclude individuals such as yourself, then that could be a whole stratum of society that is excluded.

A Right.

Q And sometimes individuals have to make sacrifices in order to fulfill this civic responsibility. But in saying that, I do understand that this may be more of a sacrifice than some individuals can make because of the length of the trial.

Is it conceivable that you could make a sacrifice, make adjustments, and make yourself available for jury service in the case without actually experiencing the financial hardship you are telling me about?

A I think that there is no doubt it would be a hardship.

Q When you make that statement, are you indicating to me that you can't make adjustments to avoid experiencing it?

A I don't think I can. Just because from 2:00 to 5:00, to be able to conduct business you normally conduct in an eight-hour-period or nine-hour-period, to be able to do that in two to two and a half hours a day, for two months, is pretty difficult.

MS. CLARKE: We stipulate, Your Honor.

MR. LAPHAM: I think so. If I could just ask a couple of questions.

VOIR DIRE EXAMINATION

BY MR. LAPHAM:

Q Sir, any chance you can extend your office hours?

Is there any reason you need to close at 5:00?

A That's certainly possible, but then we would have to pay overtime for other employees.

Q You have two other employees?

A That's correct.

Q What if they worked a full day until 5:00; could you then extend your hours after 5:00 to get what you need done?

A That is – That is somewhat possible, yes.

Q Nobody is asking you to do that at this point.

A Right.

Q We're just inquiring whether there is a possibility there?

A Uh-huh.

Q Now, during the day, if you were here in court, would those two other individuals be able to take over what functions, somewhat, you would have performed?

A No.

Q And why is that?

A Because I do all the estimating for our company, and – and actually line out the people to do their work.

Q And I confess, I don't know much about your business. So you tell me if I'm wrong.

A Right.

Q It wouldn't be possible for you to do the estimating in the afternoon and perhaps into the evening hours, and then line them up for the next day?

A Normally not. Because I need to be there and look at different items and things like that in the morning.

MR. LAPHAM: Your Honor, I would stipulate.

THE COURT: Defense, you already stipulated, correct?

MS. CLARKE: Yes, Your Honor.

THE COURT: We're going to excuse because of the financial hardship of the problems this case would pose to you if you were to sit as a juror.

Thank you for your cooperation. You are excused, but I'm just going to release you to the other room. They'll take you back to the other location later.

Bring in another juror.

(Prospective juror number 115 was excused and exited the courtroom.)

(Prospective juror number 116 was brought in and seated on the witness stand.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q Thank you for joining us. You're the 116th randomly selected juror. I may refer to you by that number during the questioning.

A Okay.

Q Is there any reason why we shouldn't continue to consider you for jury service on this case?

A No.

Q Since you answered your juror questionnaire at Cal Expo – You did answer a jury questionnaire at Cal Expo?

A Yes, I did.

Q Since that time, have you heard of or read anything about the case?

A Yes.

Q And what information have you received since that time?

A I haven't received any, but – I have tried not to read anything. I haven't really read anything, but in listening to television, there is blurbs all the time. Not just during the news, but during other programs.

Q Okay. I appreciate the effort you have made to avoid publicity. What information have you been exposed to despite that effort?

A I know there is – right now they’re trying to decide whether to let him plead insanity or not plead insanity, and it’s dependent upon will the prosecution be able to have their psychiatrists examine him.

I just know stuff is going on about that right now.

Q Okay. Anything else?

A That’s about it.

Q Since –

A I know his brother is coming.

Q I’m sorry.

A His brother is on his way or is here from somewhere else.

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

A A little bit. One of my friends at work, when I told her I was a potential juror, she said if she were a potential juror, she would have gotten excluded right away because she lived down the street from one of the guys that got killed.

Q Did that information have any kind of effect on you, and if so, what effect?

A No. I thought she’d never be a juror anyway.

Q Prior to Cal Expo, what information had you been exposed to about the case?

I’m trying to get the specifics on the knowledge you received concerning the case prior to Cal Expo?

A Well, I heard the news programs when he was arrested. I saw the – I didn’t specifically read anything about it because I wasn’t too interest in it, but I know that his brother turned him in. And I saw interviews with his mother and his brother.

And I know that a person here in Sacramento died downtown during a bombing.

And I think maybe in Citrus Heights earlier.

Q Did you receive any information about a cabin?

A Yeah. I know there is a cabin in Montana where he was – that was supposedly his where they collected a whole bunch of evidence. Maybe they – Maybe they shouldn’t have been allowed to, but they did. And some of it will be okay, and some of it will be not okay to be admitted.

Q Did you receive information about any items of evidence collected from the cabin?

A Probably heard about some, but I don’t remember any.

Q Based upon the information you received about the case, have you formed any opinion or do you have any preconceived notion as to Mr. Kaczynski’s guilt or innocence?

A Well, when they arrested him, I figured he probably did it. And I still figure he probably did it, but maybe he didn’t. I don’t know.

Q How strongly are you committed to that opinion?

A Not very strongly.

Q Do you have the capability to set that opinion aside if you are selected as a juror in this case?

A Yes. I think I do.

Q Does Mr. Kaczynski have your assurance that you will allow him to start this trial on a clean slate, meaning that you won't bring into the courtroom, if you're a juror, any information you received outside the courtroom, and you will make a determination as to his guilt or innocence based upon information that is presented here in the courtroom?

A Yes. I think I can assure him of that.

Q Does Mr. Kaczynski begin this trial in your eyes cloaked with the presumption of innocence?

A I'm not a hundred percent, no.

Q I will give you an instruction later concerning the presumption of innocence principle. Under our legal system, you must presume that the defendant is innocent unless and until he is proved guilty beyond a reasonable doubt.

Is there anything about the information you have received concerning this case that will prevent you from being able to allow Mr. Kaczynski to be presumed innocent?

A I guess not. I don't know that I could say since I already know some things about it. He is not like a stranger and I haven't heard he's arrested, you know.

I do know stuff about it. I don't know how much – I think I can put it all aside, but who knows in their heart of hearts.

Q I appreciate your response. But I am trying to find out what is in your heart. And I know this – these may be difficult questions because I'm asking you to think about things that perhaps you have never been asked to think about before.

But when you allow a defendant, who is charged with criminal offenses, to start the trial with a clean slate, that really means that he doesn't have to be concerned about a juror –

A Uh-huh.

Q – bringing into the courtroom something that a reporter or some other news source has said about allegations against him outside the courtroom.

He's entitled to come into this courtroom and force the Government to meet its burden of proof. And if you were on the jury right at this very moment, and you had to make a decision right now, you would have to find Mr. Kaczynski innocent and not guilty because there is no evidence.

So that's what we mean by clean slate. He's presumed innocent unless and until the Government proves to you that he is guilty beyond a reasonable doubt. He has that presumption until that is shown.

Is there anything about your belief systems that will interfere with your ability to allow Mr. Kaczynski to have that presumption?

A No.

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

A Proponent.

Q If the jury should convict Mr. Kaczynski of the offense of deliberate, intentional, and premeditated murder of another human being, would you still be able to consider voting for a sentence less than death?

A Yes.

THE COURT: The parties may conduct questioning. /// ///

VOIR DIRE EXAMINATION

BY MR. FRECCERO:

Q Good afternoon, ma'am. My name is Stephen Freccero. I'm one of the prosecutors in this case.

I would like to ask you some questions to follow-up on answers you gave in the questionnaire.

A All right.

Q Let me show you. Is this your questionnaire?
(Document shown to prospective juror.)

A Yes.

Q Okay. Why don't I leave that with you.

If you could, take a look at page 27, question 107.

It gives a series of statements, and then there was – you were asked what your level of agreement was –

A Right.

Q – for each one.

If you look at the last one on that page, the question was: "A person's background does not matter when it comes to whether or not he should be sentenced to death for murder." And you checked the box that said, "Strongly agree."

Can you give us an idea of when you read that question, when you saw the word "background," what you had in mind, what you thought "background" meant?

A Educational level. Life experience.

Q And so I take it from your response from that that you didn't think that should particularly make a difference in terms of the type of punishment?

A Yes. That's right.

Q Now, when you answered these questions on page 27, you were doing that based on your personal opinion, right?

A Correct.

Q If you were chosen as a juror in this case, you would be given a number of instructions by the Court as to the law that applies.

For instance, you would be told if you had been part of the jury that found the defendant guilty in the second stage that we would be talking about, where the punishment would be discussed, you would receive instructions to go along with the evidence that is presented there.

And those instructions would tell you that you must consider a number of both the circumstances of the crime and issues concerning the person who committed the crime, his or her character, any other issue, any other evidence that is raised concerning that person, and that you must consider that prior to making a determination as to what the appropriate punishment would be.

Now, if the Court instructed you that you should take into consideration issues of the person's background when making this determination, do you think you would be able to follow that instruction and openly and honestly consider certain factors prior to making your determination?

A Yeah. I think I could.

Q If you could, turn to the next page, 28, and look at question 108.

Again, there the statement was: "Where one person intentionally kills another person." And it gives you a series of answers. You marked the one that says: "The death penalty may or may not be justified depending on the circumstances of the case."

Can you explain for us what you were thinking about when you marked that particular box there?

A Well, one of the things I was thinking about is if the person who intentionally – if the perpetrator – the alleged perpetrator knew the person, and if the person had threatened them, or if it was a parent and the parent was abusive, or any of those kinds of things, then I would think that would be a mitigating circumstance.

Q Okay. So I take it then that you don't feel that all murders, or all – every time someone intentionally kills another person, that the punishment in that case should be automatic?

A I don't automatically think it should be death, no.

Q So you would be willing to look into whatever evidence before you made a determination between the alternative types of punishment that the law allows to be inflicted?

A Yes, I would.

Q Let me just briefly touch on the discussion about the presumption of innocence. Regardless of whether you have some opinion, in other words, you mentioned, well, you thought he's probably guilty if he were arrested?

A Right.

Q The point is, that in terms of your job as a juror, if you were sworn to be a juror, you could only return a guilty verdict if the Government proved beyond a reasonable doubt each and every element of the crime.

If it did not, the law says you must return a verdict of not guilty.

Do you think, even if in the back of your mind you thought, well, he's probably guilty because he wouldn't have been arrested, would you nonetheless, if you thought the Government had failed to prove beyond a reasonable doubt, be able to return a verdict of not guilty?

A Yes.

MR. FRECCERO: No more questions.

Thank you.

VOIR DIRE EXAMINATION

BY MR. DENVIR:

Q Hello. My name is Quin Denvir. I'm one of the attorneys for Mr. Kaczynski.

A Hello.

Q And I would like to ask you a few questions too, if you don't mind.

First of all, Judge Burrell asked you about what you had learned about the case since you have been out to Cal Expo.

I think you said you had – you had – one thing you had talked to a co-worker or friend –

A Right.

Q – who lived down the street from one of the –

A Right.

Q – people who was killed?

A Right.

Q Do you know who that was – who the person was that – that lived – not – I know you know who your friend is, but who the victim was or anything about it?

A It wasn't the last guy. It was some earlier guy. I guess it must have been the guy who lived in Citrus Heights.

Q Okay. And did the friend talk about him at all with you or –

A She said she didn't know him other than just to speak – say "hello" because they were neighbors.

Q If you were selected as a juror in this case, would that – your friend's knowledge of that person have any effect on you at all?

A No.

Q Something you put out of your mind?

A Yeah.

Q You also said, I guess, that you read something about – about a mental exam issue.

Can you tell me again what you – what you read or heard about that? As you recall it?

A The prosecution says if they don't get to have their psychiatrists examine him, then they shouldn't be able to plead insanity.

Q And what did you think when you read that?

Anything come to mind?

A Well, I thought that was probably pretty fair.

Q Do you – Do you have any opinion about – about mental-health experts testifying at all, one way or another, just as a general matter?

A I think it's not a very exact science. So –

Q I'm sorry.

A So I think you can find mental-health experts to say whatever you want them to say.

Q Do you think it would be hard for you, if that type of testimony was presented, to – to – to listen to it and try to give it whatever weight you thought it deserved, keep an open mind?

A No. Because at least the mental-health experts would have actually talked to him, and I won't have.

Q So you could keep an open mind as to that type of testimony?

A Yeah. Uh-huh.

THE COURT: Could you adjust your seating so your voice is amplified more by the microphone.

Thank you.

BY MR. DENVIR:

Q I think you said that based on your exposure to the publicity and media about the case, primarily before Cal Expo, that you had come to the conclusion that – that – the opinion that he probably was guilty, meaning Mr. Kaczynski; is that right?

A Yes.

Q Can you – Can you tell me what in particular about that – about that publicity that led you to that opinion?

Is there any particular items?

A Well, maybe because I think – I almost always think that whoever gets arrested probably did it.

Maybe that's just because of who I am.

Q You mean, just because – Not because of your background, just because of who you are?

A No. Because of my background.

Q Is your background in law enforcement or something like that?

A No. My background is just an average Joe who worked for a million years in the same place, just kind of follows the rules, sort of. So, you know, I have this belief that if you don't commit crimes, you don't get falsely arrested.

And I know that's pretty stupid sometimes, and I know it does happen, but that's – that's what I generally think.

Q And is that the main basis for your opinion in this case, or is there some other – something else you learned or just –

A No. That's the main basis. I haven't really learned anything else that's particularly damning.

Q Not any particular evidence you think might be –

A Right.

Q It's just basically you feel if he was arrested for it, there must be a good reason?

A Right.

Q You understand that if you're to sit as a juror in the case, you would have to put aside any preliminary opinions you have. As you know, when you came in, the judge would instruct you. And you would have to decide the case just on the evidence presented in court.

And that's something that you have to evaluate because only you really know whether you think you would be able to do that.

And I guess I would like – I would like to get your sense of whether you think that's an instruction that you could follow, that you would have to put aside anything you had heard outside of court and rely only on things in court?

A Yeah. I could do that.

Q And then the other instructions – And again, you know, the law does not ask people to do impossible things in order to being jurors. They ask them to actually do whatever they can do. And I guess only you can know that.

As Judge Burrell told you, you would be instructed that you are to presume the defendant guilty – not guilty until or unless he was proven guilty beyond a reasonable doubt. You would have – and you would have to operate on that principle.

As you sit there, do you think you could follow that instruction?

A Yes. I think I could.

Q Okay. You would try your best on it?

A Yeah. I surely would.

Q Let me ask you: Based on what you know about the case, and what you learned about it, do you have any – any opinion or preconceived notion now as to what would be the proper penalty in this case?

A No. I don't.

Q Have you given that any thought at all based on – as you have read about the case or heard about it over the months or years?

A I've thought about it, but I can't decide. I mean, it – it's not something – Who I've always thought should be killed are people who – who wantonly do serial killings and things like that. So those I can – you know, those I just automatically think should be killed just so they won't do it again.

Q Well, let me ask you: As you're aware, there are – the charges in this case involve mailing of bombs with the intent to kill, and in two cases resulting in death. So – One of them one you referred to, and another one more recent. And I'm sure you're aware of that.

Based – You said you have given some thought, as you know, over time about what would be the proper sentence.

Based on what you know about the case, do you have a feeling now of any kind of a preconceived thought as to it, or are you still up in the air?

A My preconceived thought is it should be life without possibility of parole.

Q Now, would you – What the judge would tell you is that in a case like this, which is unlike – As I recall, you had not served on a jury before.

Am I correct on that?

A No. I have served on juries before, but never a criminal case.

Q Okay. Well, this type of – this type of case is different because there are two – two charges that are capital charges in the sense that they carry a penalty of the death penalty. So that – so that there is – first there is a trial like the civil trial you have, but with a higher standard of proof.

A Right.

Q Where the prosecution presents its evidence as to guilt, or the defense can present any evidence it wishes to on that subject.

A Uh-huh.

Q Judge Burrell instructs the jury, then the jurors go off and deliberate, and then they are supposed to determine unanimously whether they feel that the prosecution has met its burden of proof beyond a reasonable doubt as to those charges.

Two of those charges, they say, involve the transporting or mailing of a bomb with intent to kill resulting in the death of Gilbert Murray in 1995.

I believe that is right.

If the jury were to find Mr. Kaczynski guilty of those charges, then there would be a separate trial, which is unusual in a criminal case because rather than the judge determining the sentence, as in most cases, the jury would decide.

A Uh-huh.

Q And the sentences that are available under the law provided by Congress is death, execution, life in prison without possibility of release, and that's what that means because there is no parole in the federal system, and actually a lesser sentence too.

The procedure then is you have a second trial where the prosecution puts on this aggravating evidence. Anything it thinks about either the crime or about Mr. Kaczynski that would point to death as the proper penalty.

The defense then can present mitigating evidence, the legal term for anything that the defense thinks about either the crime or Mr. Kaczynski that points to life away from death.

Then the judge would instruct you and would pretty well tell you that it's your call as among the other jurors between those two penalties.

Do you – Do you – Do you think you would be able to perform that function, go in with an open mind and listen to the two different sentences, and listen to the evidence that's available, and make your own decision on that?

A Yes.

Q Let me ask you: As to the death penalty, you had – you had indicated – I don't recall. Do you have your questionnaire there?

A Yes.

Q You do? Okay.

You indicated that at one time, I guess, you were adamantly opposed to the death penalty, but at the present you do support it?

A Right.

Q And – And you have indicated that – that you would look at, where one person intentionally kills another person, you thought the death penalty may or may not be justified depending on the circumstances of the case?

A Right.

Q So am I correct that whether it is your view on the death penalty in general, or whether it is your – your knowledge about this case, you feel that you could – you could sit as a juror in this case, listen to the aggravating and mitigating evidence, then make a call between those two – those two penalties?

That's something you feel comfortable with?

A Yes.

Q Not comfortable with, but you could do?

A Yes. I could do it.

Q I know you're not comfortable with it, but you could do – I know you don't feel comfortable with it, but –

A Yes. I could do it.

MR. DENVIR: Could I have one moment, Your Honor.

THE COURT: Yes.

(Brief pause.)

MR. DENVIR: I have no other questions.

Thank you, ma'am.

THE COURT: Court will be in recess until 3:30.

(Prospective juror number 116 exits the courtroom.)

(Off the record at 3:15 p.m.)

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

Are we ready to proceed?

MS. CLARKE: Yes, your Honor.

MR. LAPHAM: Yes, your Honor.

(Prospective Juror No. 117 entered the courtroom.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Thank you for joining us. You're the 117th randomly selected juror. I'm going to be asking you some questions, and I may reference you by that number periodically.

Is there any reason why we shouldn't continue to consider you for jury service on this case?

A. I'm the sole provider for my family, and I'm the only one that's working. I work days and nights all the time.

Q. The schedule that I mentioned –

A. The school district runs from 8:00 until 3:00, and then when I get off there I change my availability at the Target so I can get more money.

MS. CLARKE: We would stipulate, your Honor.

MR. CLEARY: May I ask a few questions, your Honor?

THE COURT: Yes. / / /

VOIR DIRE EXAMINATION

BY MR. CLEARY:

Q. Good afternoon. My name is Robert Cleary. I'm one of the prosecutors in the case. I just wanted to ask you a couple of questions.

Would you get paid if you sat on jury service?

A. For the school district, but not for the Target. I have a letter with me that says that, that they sent to the Federal. They were supposed to have sent one here. I brought my copy just in case.

Q. I don't want to reveal where you are working. You work full-time for a school district?

A. Uh-huh.

Q. And you work part-time for another store; correct?

A. Six hours for the school district, and then however many hours I can get from the other job.

Q. Six hours a day for the school district, and you would get paid from the school district if you were on jury service; correct?

A. Right.

Q. And how many hours, approximately, a week, how many hours do you work for the other employment?

A. Anywhere from 30 to 40.

Q. Thirty to 40 hours a week. And is that a business that's open in the evening?

A. Yeah. But if I'm not working for the school district, I go and change my availability so I can get more money to deal with my family.

Q. Okay. Could you work for – not the school district, but for the other employment, could you work for them starting in midafternoon and working into the evening?

A. I go from one job to the next.

Q. And one job being the school district?

A. Uh-huh.

Q. What time do you normally get out of your job at the school district?

A. 3:00.

Q. 3:00 p.m.?

A. Uh-huh, sometimes 2:30.

Q. And you could be at your other job by about 3:00; correct?

A. Uh-huh.

Q. Without telling me the precise location, is that second job within an hour's drive of downtown Sacramento?

A. Yes.

Q. So if we sat, as the judge told you we are going to sit, from 8:00 until 1:00, you could be at your other job by 2:00 or 2:30, the second job by 2:00 or 2:30; correct?

A. Right.

Q. So sitting on jury service would not affect the hours you're working at your second job; is that right?

A. The second one, no, unless I change my availability.

Q. So if it doesn't affect your hours that you're working for your second job, and you are getting paid for your first job, the school district job, then it really won't work that onerous a financial hardship for you; is that correct?

A. During Christmas I will be changing my availability, so it will be any time during the day.

Q. The Court has told you that there will be a number of days over Christmas and New Year that we won't be sitting, so you would be able to work extra hours then; correct?

A. Right.

Q. With that understanding and recognizing that people from all walks of life have to make themselves available for jury service, and the parties are entitled to a broad cross-section of the community from which to pick jurors for a trial, do you feel that you would you be willing to sit as a juror on a case like this?

A. Would I be willing to?

Q. Yes, ma'am.

A. If I have to.

Q. There is nothing that would absolutely prevent you from doing that; correct?

A. Not if you put it that way, no.

Q. Let me use a little lesser – less strong standard. Am I correct in saying that it would not be overly burdensome on you, assuming we can get you out of here at 1:00 so you can go to your second job, and we'll not be sitting several days around the holidays, that it would not be that overly burdensome for you to serve on this jury; is that correct?

A. I said yes.

Q. You agreed with that statement?

A. Right, what you said. Yeah.

MR. CLEARY: Shall I continue with general questions, your Honor?

THE COURT: Just a moment.

VOIR DIRE EXAMINATION

BY THE COURT:

Q. You raised your hand during the group voir dire, and I think you indicated that you have a problem with the nature of this case.

A. No. Wasn't it the question where the days off, you would have days that you weren't going to have court?

Well, I'll be out of state from the last week of – I mean the 21st through the 27th or the 29th of December.

Q. Of December –

A. Yeah. Didn't you say December 22nd?

Q. I did indicate we would meet.

A. Yeah. Well, I'll be out of state.

Q. On December 21 until when?

A. Through the 27th.

Q. Can you tell me about that trip?

A. I'm going to Minnesota to visit with my family I haven't seen for 25 years.

Q. Is that a trip that can be rescheduled so that you can make yourself –

A. No. It's already been paid for and done.

Q. How has it been paid for?

A. My sister-in-law.

Q. I didn't mean to ask it that way. I'm trying to – well, I guess I did. But I'm trying to figure out if you have nonrefundable tickets involved.

A. Right. It's nonrefundable.

THE COURT: Does either side want to probe this issue?

MR. CLEARY: If I could, your Honor.

VOIR DIRE EXAMINATION (RESUMED)

BY MR. CLEARY:

Q. Ma'am, do you know that if in some instances with nonrefundable tickets the airlines or the travel agent can give a refund of money if there are extenuating circumstances like a summons to be a juror?

A. I didn't know that.

Q. Is that something you could check on for us?

A. I can.

Q. Check with the airlines or your travel agent to see if you could get a refund for those tickets?

A. All right.

Q. And I think there is just two days we are talking about here. In other words, you are going to leave the 21st; correct?

A. Right.

Q. And we'll be sitting the 21st and the 22nd.

And I forget, your Honor, are we sitting on the 23rd also?

THE COURT: I have to look. Counsel for defense is indicating that we are.

Q. **BY MR. CLEARY:** Okay. So it would be those three days. If you could sit for those three days and then maybe take advantage of the tickets, the flight leaving sometime the afternoon on the 23rd of December. If you could check on that and see if the airlines would not refund – or not charge you a penalty is what we are talking about, not charge you a penalty for exchanging your tickets. That would be obviously a big help.

A. Right.

Q. And you would be willing to do that?

A. I could check on it.

Q. That would be terrific. Thanks.

THE COURT: We will be in session December 22 and 23.

MR. CLEARY: Okay. And I believe the juror has indicated, your Honor, that she could check with her travel agent or the airlines to see if she could change the ticket without incurring a financial penalty so that she could leave the afternoon of the 23rd, and it might be advisable to temporarily excuse the juror so she can make that phone call and have her report back to the courtroom deputy at some point.

THE COURT: Okay.

MR. CLEARY: Thank you, your Honor.

Thank you very much.

(Prospective Juror No. 117 left the courtroom.)

(Prospective Juror No. 121 entered the courtroom.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Thank you for joining us, sir. You're the 121st 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 at the time.

Q. Okay. You had indicated in your questionnaire that this could possibly pose a hardship for you, but –

A. Since then things have changed. I was working at the time. Now I'm not. So I really can't claim that would pose a hardship. No.

Q. Okay. I'm going to ask you questions from the location of the podium. I'm going to leave you where you are.

Since you answered your juror questionnaire, which I presume you answered at Cal Expo; is that right?

A. No. Actually, I was out of town at the time, and I ended up answering mine down here at the courthouse.

Q. Did you receive any mailing directing you to go to Cal Expo?

A. Originally, yes.

Q. Since you received that mailing have you heard of or read about this case?

A. None, other than what I put in my questionnaire, other than seeing it on TV here and there, but no. I haven't really paid that much attention to it.

Q. Have you discussed the case with anyone since that time or overheard discussions concerning the case?

A. No.

Q. Prior to receiving that communication what information did you receive about this case?

A. Only what is on TV or what I've seen in the newspaper.

Q. I'm trying to find out some of the detailed information you may have received. I have a purpose for asking the question. My goal is to see precisely what information you have been exposed to, what you remember, so that we are in the position to objectively determine how that information could have affected you. And we are going to get your subjective opinion about it too, how you personally believe it may have affected you.

Can you tell me what information you received about the case?

A. I read about him living in a cabin in Montana. I've – I mean, I really haven't followed this case. I mean, I believe he either was once a State worker here in Sacramento or something, that he had affected that. That's pretty much all I know about it, but I'm not one to sit at home and watch TV or read the paper all the time.

Q. What have you heard about the cabin other than what you just related?

A. 10-by-12 or 12-by-12, that he lived in a cabin in Montana.

Q. Have you heard about any evidence allegedly found at the cabin?

A. No.

Q. Have you formed any opinion, or do you have any preconceived notion as to Mr. Kaczynski's guilt or innocence?

A. No.

Q. Do I have your assurance that if you are selected as a juror in this case Mr. Kaczynski will begin this trial on a clean slate, meaning that anything you may have heard about the case will not come into the courtroom?

You will make a determination as to his guilt or innocence based upon the evidence that's presented in this courtroom and the instructions that I give you on the law?

A. Yes.

Q. Does Mr. Kaczynski begin this trial, in your eyes, cloaked with the presumption of innocence?

Do you presume that – will you allow him – the law says that he is presumed innocent until or unless the Government proves his guilt beyond a reasonable doubt. Is there anything that would prevent you from being able to allow Mr. Kaczynski to be proved innocent?

A. No. I mean, I don't know the man. I mean, whatever is presented to me, that's as far as – you know, that's what I'm going to use my judgment on. I have no beliefs here or there, either/or.

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

A. No. I'm not an opponent.

Q. What are your views on the death penalty?

A. I believe in the death penalty.

Q. If the jury should convict Mr. Kaczynski of the offense of deliberate, intentional and premeditated murder of another human being, would you still be able to consider voting for a sentence less than death?

A. No.

Q. Do you understand that the law requires that before imposing the death penalty for the type of murder I just told you about, the jury must consider the facts and circumstances of the crime, the background and character of the defendant, and any other information that might tend to indicate that the defendant should not receive the death penalty, that a sentence less than the death penalty should be imposed?

Do you understand that?

A. Yeah.

Q. Are your views in support of the death penalty so strong that you feel you're incapable of considering such information before you decide what sentence should be imposed in this case?

A. No.

Q. They are not that strong, is that what no means? I don't know what, "no", means.

I'm leading you. I don't want to lead you.

A. If it's put in front of me that it's proven in this case, I could vote for the death penalty.

Maybe I misunderstood your question.

Q. Maybe you didn't. There are other options other than death. There are other sentencing options. One sentencing option is a sentence of life in prison without possibility release. There is no release in the Federal system. There is no parole. If you receive a life sentence under the Federal system, you are sentenced to prison for life.

A. Uh-huh.

Q. And there is lesser sentences too, and then there is also death. Is there anything about your beliefs that would prevent you from waiting until you heard all of the mitigating and aggravating evidence – this would be after you found, if you were to find, that Mr. Kaczynski was guilty of the murder offense I just told you about, is there anything that would interfere with your ability to not prejudge the sentence until you heard all the mitigating evidence and the aggravating evidence?

A. No. I haven't prejudged anything yet.

Q. Well, what I'm really trying to find out is whether, if you were on a jury that found Mr. Kaczynski guilty, if he was that unfortunate to be found guilty of the offense of premeditated, intentional, deliberate murder of another human being, if you found that in the guilt phase of the trial, would you still – I mean, do your views on the death penalty, would they interfere with your ability to still withhold your determination as to what sentence should be imposed until you hear all the evidence that will be presented in the sentencing phase?

A. No.

Q. Now, what does no mean?

A. No means I will listen to all the evidence before I came to my determination of whether he should be sentenced to death. I will listen to everything first. I mean, what you're asking me is if I have come up with an opinion already, and I haven't.

Q. I am asking you that.

A. No. I haven't. I mean, I have not come up with that opinion yet. I haven't seen anything whether he is guilty or not. I don't know.

Q. Right. But I'm asking you to assume just for purposes of this question that you were on a jury that found him guilty of first degree murder, intentional, cold-blooded killing of another human being.

A. Are you asking me if I would change my mind on the death penalty?

No. I wouldn't. If that's what his verdict was handed down, no. I wouldn't change my mind.

Q. Are you indicating that if you make that finding in the guilt and not guilty phase of the trial that you won't wait?

A. No. I will wait. See, I don't know whether – someplace we are getting twisted around here.

Q. I'm sure it's my fault.

A. Well, maybe it's mine. I've never been here before.

Q. If Mr. Kaczynski was unfortunate enough to be found guilty of murder in the guilt and not guilty phase of the trial – let’s assume that he is unfortunate enough to be found guilty of murder, and you were on the jury that made that finding. That means you would have found him guilty of cold-blooded, premeditated murder of another human being.

Are you with me?

A. I’m with you.

Q. Then if that finding was made, we would go into the sentencing phase of the trial, and I’m trying to determine whether your pro-death penalty views would interfere with your ability during the sentencing phase of the trial to hear all of the evidence that would be aggravating evidence, which would be evidence that the prosecution would argue points towards death, and mitigating evidence, that would be evidence that would point toward life.

Is there anything about your pro death penalty views that would prohibit you from waiting until you heard the aggravating and mitigating evidence before you made a decision as to whether the sentencing should be life imprisonment without possibility of release, death, or a lesser sentence?

A. No. There is isn’t.

THE COURT: The parties may question.

VOIR DIRE EXAMINATION

BY MR. LAPHAM:

Q. Not a fun experience; is it?

A. No. It’s not.

Q. Sir, let me introduce myself. My name is Steve Lapham. I’m one of the prosecutors.

Let me just go back to that last topic. Do you have your questionnaire with you?

A. No.

MR. LAPHAM: Your Honor, do you have it handy?

THE COURT: Is this your questionnaire, sir?

PROSPECTIVE JUROR NO. 121: Yes.

Q. BY MR. LAPHAM: Let me just ask you to turn to page 28, and direct your attention to question 108 which reads, "Where one person intentionally kills another person," and then you’re given three options. You checked the middle box, which is the death penalty may or may not be justified depending on the circumstances of the case.

Can you tell me why you checked that box?

A. I believe just because the prosecution, or whatever, is going for the death penalty at the beginning of the trial doesn’t prove that he should get the death penalty right then until after everything is proven.

Q. Okay. So you wouldn’t automatically vote for the death penalty just because that’s the penalty being sought?

A. No. I wouldn’t.

Q. Because the way this works is – I don't know if it was clear when it was explained to you, but the trial is going to proceed in two phases. The first phase you will be given all the evidence bearing on whether the defendant is guilty or not guilty, and if you determine that the defendant is guilty on the charges that the judge told you about, you would move on to a second phase where you would listen to additional evidence which would bear on whether or not the defendant should be sentenced to death, to life imprisonment without possibility of release, or to some lesser form of punishment.

Is that clear so far?

A. Yeah.

Q. So the question that we are all trying to get at is, even though you had already convicted the defendant at this stage, would you be open to listening to additional evidence –

A. Yes. I would.

Q. – regarding what form of punishment?

A. So that's what he was trying to say the whole time.

Q. I think we got a little turned around here.

A. Yeah.

Q. And the type of additional evidence that would be presented would be evidence bearing on the crime itself that might show that it was committed in an aggravated way, and also evidence that the defense may put on as to why the defendant should not get the death penalty. And that may go to his character and background and things that might explain the crime.

Would you be open to both of those types of evidence?

A. Yes.

Q. Turn back to page 27, one page earlier in your questionnaire, and question 107 reads, "Anyone who plans and commits a murder should get the death penalty." And you agreed somewhat with that, and is that because you believe you need to wait for the facts and circumstances?

A. Yeah.

Q. Because you were given another option there, strongly agree.

A. No. I agree somewhat because of basically what you said before, not hearing all the evidence first.

Q. Okay. And then with a double murder, that's the next question, you put the same answer, you agree somewhat. You did not check the strongly agree box for the same reason?

A. Same reason.

Q. Okay. Now, the third box – or the third question is, "Any person who commits an act of terrorism in which someone dies should get the death penalty," and you strongly agreed with that; correct?

A. Yeah.

Q. Now, despite your strong view in that area would you be able to, again, as we have talked about, listen to the evidence before you make any determination in this case, both the aggravating evidence and the mitigating evidence?

A. Yes. Some of these questions that I answered – I don't know. When I was answering them I was going back on certain cases I had remembered through the media on how I answered them. And where I agreed somewhat, that's where I started thinking about how the evidence was brought up there. That's why I answered the questions that way. I would listen to the evidence.

Q. Okay. Do you know what you were thinking about when you answered the question regarding terrorism?

A. Actually, I was bringing it back to the Oklahoma bombing, I believe, that type of situation, I guess.

Q. Okay. The fourth subpart there under 107, "A person's background does not matter when it comes to whether or not he should be sentenced to death for a murder," and you disagreed somewhat with that question.

Could you explain what you were thinking there?

A. I keep going back on one particular case that was going through my mind. I don't know whether or not this certain person's background had anything to do to justify what she did. So I don't really think a person's background has that much to do with how they acted out and carried out the crime that they did at the time.

Q. What are you thinking – when you use that word, "background", what do you think?

A. Background, I mean a person's past, I guess.

Q. How the person was raised?

A. Well, no, his past. I mean, what he has done in the past. I'm not considering how they were raised.

Q. Okay. Evidence – if there was evidence of abuse, for instance, in his background, or evidence of mental retardation, would you be able to consider things of that nature in determining the appropriate sentence?

A. Yeah. I would consider it.

Q. In fact, is it fair to say whatever is presented to you in court, would you be able to put that in the mix and consider it in coming to your conclusion?

A. Yeah. I mean, when you put it like that it's a lot different than reading it on this piece of paper, you know.

Q. I think it may be fair to say from your answers you don't know very much about this case?

A. No. I told you that in this questionnaire. I don't.

Q. You haven't followed it very much?

A. I haven't followed it. I don't have time to watch the news or read the paper that much. That's not my favorite section of the paper, I guess.

MR. LAPHAM: Okay. Your Honor, may I have a moment?

THE COURT: Yes.

MR. LAPHAM: Sir, thank you.

THE COURT: Sir, just a moment.

PROSPECTIVE JUROR NO. 121: I tried. / /

VOIR DIRE EXAMINATION

BY MS. CLARKE:

Q. With that introduction I'll come up. Hi. My name is Judy Clarke. I'm one of the lawyers for Mr. Kaczynski, and I just had some follow-up questions, if I could.

You indicated in your questionnaire that it was a financial hardship for you to serve.

A. Uh-huh.

Q. And then when you came out and told the judge you didn't have that job anymore so it wasn't as much of a problem; am I right?

A. Yeah.

Q. I was concerned. I didn't exactly understand. Are you starting your own business now, or are you looking for other work?

A. At the present time when I filled this questionnaire out I was working for another party. Since then I am not working there any longer. So to come down here and say I still had a financial hardship when I'm not working – working for him, he would only pay ten days for this trial. Being unemployed right now I can't say that.

Q. When did you come and fill out the questionnaire? Because you weren't out at Cal Expo Cal Expo.

A. I was one of the very last ones summoned both times. I was summoned at the beginning. I was out of state.

Q. And when did you actually come down to the courthouse?

A. I came down to the courthouse – I was the very last one to fill the questionnaire out.

Q. Do you remember when that was that you came down?

A. Probably two and a half weeks ago.

Q. And at that time you were still employed?

A. No. At that time I was not employed – at that time I was employed. Yes.

Q. And at that time were you starting your own business also?

A. I haven't started my own business. I'm starting my own business after the first of the year.

Q. So you'll be responsible – I mean, your time is your income then?

A. My wife has her own business. So we will survive.

Q. Is this trial – let's say it's been estimated to take somewhere between two, three, or four months. Do you think that that would have any particular impact on you starting your business?

A. No.

Q. So you're comfortable with no financial hardship? I just wanted to inquire.

A. Yeah. I'm comfortable with it. Unemployment pays me while I'm here.

Q. So you won't be looking for work. You're just going to wait until you can be free and start your own business?

A. Yeah.

Q. And that wasn't your circumstance two and a half weeks ago; it's different today?

A. No.

Q. You indicated that you really didn't have much knowledge of the case as the judge was asking you some questions. You told him you were aware of the cabin; right?

A. Uh-huh.

Q. I'm sorry. You have to answer yes or no.

A. Yeah. I'm aware of the cabin.

Q. And you were aware of the size of the cabin?

A. From what I saw in the paper, yes.

Q. I guess that would be the only basis for your knowledge is the paper or the TV; would that be right?

A. Yeah.

Q. Has anybody that you know commented to you on the case?

A. No. It really hasn't been a topic of conversation.

Q. How about since you got your summons, did anybody say anything to you about it then?

A. No.

Q. Your family, your wife didn't comment one way or the other, or family, or friends?

A. No. You just have to do what you've got to do.

Q. No, but I mean about the contents of the case or the evidence against Mr. Kaczynski.

A. No. She hasn't followed it.

Q. Have you got your questionnaire?

A. Yes.

Q. I thought when you marked at page 30 question 115 that you had a moderate amount of media coverage that you had seen, what did you mean by that?

A. Just what I heard on TV or read in the paper.

Q. I guess what we are really trying to figure out is if you could help us know what you saw on the TV or in the paper that rises to the moderate amount.

A. I guess moderate would be that the TV is on every morning before I go to work. I see five minutes of what was on the news. So walking out the door, I guess that's moderate, but all my attention is not to this case.

Q. Sure. But you're hearing something?

A. Yeah. I heard something. I heard they arrested him. I heard he had a cabin in Montana. I mean, there is not a lot that's stuck in my mind over this case. I don't know how to put it to you. I haven't followed this case. I don't go out and buy magazines and read this stuff.

Q. I certainly understand what you're saying. I guess what we are concerned about is if you were sitting on the jury and all of a sudden you go, "Oh, I remember something else." I guess that's why we push you a little bit to see what your memory is now.

A. I'm telling you that I don't have a memory of it.

Q. At page 31, question 119, when asked how would you describe your knowledge you said that you were somewhat knowledgeable. Could you help me understand what level of knowledge you have other than the cabin?

A. I guess that goes right back to moderate. I mean, somewhat knowledgeable is the cabin, a state worker dying here in Sacramento. That's all. I guess maybe I should have put no knowledge. I knew about it on the radio. Is that somewhat knowledgeable?

Q. I don't know. I'm just inquiring. I'm sorry. I don't mean to aggravate you over it. I'm trying to just get to the bottom.

A. All I know is what I've seen on TV or read in the paper. I knew he lived in a cabin in Montana.

Q. Do remember when the arrest came down and the publicity about in the cabin in Montana, do you remember them also talking about what they found in the cabin?

A. No. I do not.

Q. Anything about any writings that they found?

A. I remember he didn't have running water. I remember he didn't have a shower. It was a basic 12-by-12 storage shed.

Q. What were you thinking when you heard all that?

A. I've been in Montana before. I could hardly believe somebody could live back there in the wintertime in that little building.

Q. Pretty harsh?

A. That's kind of the way I looked at it.

Q. Did you give any thought to what they were bringing out of this, as you put it, storage shed, that maybe that was a lot of stuff they were bringing out of it? Do you remember that at all?

A. No. I don't remember what they brought out of it.

Q. You don't remember anything about any writings?

A. No.

Q. Any TV coverage about any writings?

A. No.

Q. Any TV or newspaper coverage about any physical evidence that they seized?

A. No.

Q. You can't remember whether you heard it, or you just don't think that you did?

A. I don't remember it.

Q. I wanted to ask you at page 17, question 64 regarding the effectiveness of the criminal justice system, and you thought that it wasn't working well at all.

A. Yeah.

Q. And it seems to be that some verdicts are never upheld. Can you tell us what you were thinking when you wrote that?

A. Yeah. What I was thinking is I see a lot of these cases where the sentence is handed down, then it ends up in an appeals court for 10, 15, 20 years. I don't believe that that's saying the judicial system is working.

I mean, you know, somebody is given a sentencing for something they have done. I figure they should carry that sentencing out immediately. I mean, why keep dragging it out? That's what I believe.

Q. Did you have a particular case or cases in mind when you were writing that down?

A. No, not any one case. I mean, just – I've kind of given up on watching any of that.

Q. Is that kind of out of a sense of frustration with it, or what?

A. Just something that I never really got involved in.

Q. The criminal justice system and attempting to want to be involved in it, you mean?

A. Yeah. I mean, it's just like certain cases, it seems like they – I don't know. I just – it seems like after the case is over it drags out for years and years after that. You know, it's not in the Court system anymore. It's through TV talk shows or this other stuff, where I just don't believe in it.

Q. Does it give you some sense that whatever you would do on a jury would be sort of meaningless? I mean, is that sort of your thought about it?

A. Somewhat, yeah.

Q. That it would be kind of a useless gesture?

A. I'm not saying useless, but you know, you hand a verdict down to somebody, and then your verdict is drug out for another 10 or 15 years.

Q. So you don't feel like, I'm making a decision because it's sort of taken out of my hands by something, some other –

A. No. You are making a decision, but it's still – it's not the final decision. I don't believe it's the final decision.

Q. How do you think that would make you feel if you were sitting on a case such as this where you are making a life or death decision?

Do you think that maybe you would be thinking, somebody else is going to resolve this later on?

A. No. It's not going to change my mind at that present time. I'm still going to say yea or nay on how I feel. I'm just saying it's not going to end right there.

Q. You have evidently had some experience with the system, not personally, but your family has, I understand.

A. Uh-huh.

Q. It's mentioned on page 18. Did that particular – I mean, did that particular experience make you feel like the criminal justice system just isn't functioning well at all?

A. No. That had nothing to do with it. That had nothing to do with my decision. That was something that happened back East. I wasn't really that much involved in it. It was my brother, and I wasn't back there at the present time.

Q. Was somebody arrested for that?

A. Yeah, there was.

Q. And released, or was a jury involved in that decision made at all?

A. It never made it that far. The prime suspect was never found again. So they pretty much threw it out of court.

Q. The person who was accused was released, I take it, on bail or something? Is that how it went?

A. The case was dropped.

Q. Can you tell us a little bit about how that happened? Because you felt, I think, a little bit uncomfortable about that result.

THE COURT: I don't understand the question.

MS. CLARKE: May I show the Court the –

THE COURT: Well, you said tell a little bit about how that happened. What's the subject?

Q. BY MS. CLARKE: The defendant in that case, it sounds like charges were dismissed against him.

A. What does that case have to do with this here?

Q. I don't know. I'm just trying to find out how that affects your judgment about court proceedings.

A. It doesn't affect my judgment at all in this particular case. That was something that happened with me and my family.

Q. Our experiences can affect our desire to sort of sit and listen to what's going on and be patient about it, because we can sort of feel inside ourselves that it didn't happen fairly once before. It's not going to be fair this time. I guess that's what I'm asking you.

A. No. No. There has been – no. What happened before in my past with my family has nothing to do with how I would base my judgment on this case. They asked this question in here. I just answered it.

Q. You did your best to answer it. I understand that.

If I could ask you a little bit about the death penalty, and I know you've been sort of questioned round and round about that. I'm having some difficulty understanding the depth of your feelings as a proponent of the death penalty. Could you help me with that?

A. I don't understand the question.

Q. How strong are your feelings about the death penalty?

A. If it's proven that all the evidence, or whatever, however it comes down, that's what my choice is, yeah. I would vote for the death penalty.

Q. If it's proven, if the crime is proven –

A. Yeah.

Q. – that makes a person eligible for the death penalty then you would vote for the death penalty?

A. Yes.

Q. And that would be – that would just be based on the decision of what the crime is?

A. Yeah.

Q. When the prosecutor asked you how would you consider somebody's childhood, how would that play into your decision once you've made a decision that the crime is proven, how would somebody's childhood play into that decision, or would it at all?

A. I don't think it would at all. What would the childhood have to do with a grown adult?

Q. The prosecutor also asked you about mental retardation, how that may play into it. If you make a decision that the crime has been committed, that it's been a premeditated, intentional, deliberate murder, could that really effectively play into it in your opinion?

THE COURT: Play into what? Please clarify that question.

Q. BY MS. CLARKE: The prosecutor asked about mental retardation. If that were the case in a case, how would that play into your decision as to sentence?

A. I really don't know. I mean, I would have to see all the evidence towards the whole case and just play that into consideration with the rest of it, I guess.

Q. I guess what I was thinking, you used the word – you were asked if the person were mentally retarded could you consider that factor, and I think you said, yes. I could consider it. What did you mean by consider?

I could listen to that being said to you, or would it be meaningful to you at all?

A. I can listen even to it being said to me. I guess I would weigh that into what had taken place.

Q. Would that be like childhood, that that's something that's relevant or irrelevant once you have made a decision that the crime has occurred?

THE COURT: That's a confusing question. Please rephrase it.

Q. BY MS. CLARKE: Once you made – you're sitting on a jury, and you have made a decision that a crime has occurred, premeditated, deliberate, intentional murder. That's your decision beyond a reasonable doubt.

How would childhood or mental retardation weigh for you in the sentencing decision?

THE COURT: Okay. I'm sorry. I didn't know you were going to say that.

MS. CLARKE: I'm sorry, your Honor.

THE COURT: All right.

MR. LAPHAM: Your Honor –

PROSPECTIVE JUROR NO. 121: I really – I don't know how to answer the question. I'm sorry.

MR. LAPHAM: Your Honor –

THE COURT: It's asked and answered.

Q. BY MS. CLARKE: Do you think that it would weigh into your decision, or would it be just something that you would listen to being said? Would it weigh into your decision, mental retardation and a bad childhood?

MR. LAPHAM: I object to the question.

PROSPECTIVE JUROR NO. 121: It would have to be something that would be considered, but I don't know how to answer the question.

THE COURT: It's asked and answered.

Q. BY MS. CLARKE: When you use the word, "consider", can I just ask you what you mean by that?

A. Consider – I mean, you're asking me would I be able to consider – I mean, how would it weigh in to me. I mean, I would be thinking about all the circumstances, everything that was put in front of me, I guess, considered.

Q. I guess maybe I'm looking at consider at two ends of the spectrum. One is, I'll listen to you.

A. Yeah. I'm listening.

Q. My parents are saying, "I'm going to listen to you when you say you want to go do that, but that's all I'm going to do is listen to you", versus, "It will make a meaningful impact on me".

A. I don't –

Q. Do you see what I'm trying to ask?

A. No. Actually, I don't.

Q. If I could ask one last question. You mentioned on page 27 – are you with me with the check-off questions?

A. Yeah. I'm there.

Q. You mentioned to the prosecutor, I think it was, that you were thinking of cases that you had heard about through the media when you were answering these questions, and you mentioned as to the terrorism question you were thinking about Oklahoma City. Could you tell us what other cases you were thinking about with regard to the other questions?

A. What case was I thinking of?

Q. Case or cases.

A. I was thinking of the Ellie Nesler case.

Q. Okay. With regard to the murder questions?

A. Uh-huh.

Q. And you were thinking about whether there was some justification for the killing?

A. Or where it says agree somewhat to those questions, yeah, where everything had to be put in front of me before I could make a decision. Yeah. That's what I was thinking of.

Q. And was that the same case you were thinking about at the bottom with the background where you said you were thinking of one certain case?

A. No. Actually, there wasn't any case on that one that I was thinking of.

Q. I thought you mentioned that you were thinking of a particular case, and you mentioned, "she". It sounded like a woman's case.

A. No. There was nothing in that case that I was thinking of.

MS. CLARKE: May I have just one moment, your Honor?

THE COURT: Yes.

BY MS. CLARKE: Just a couple more questions, and then I promise I'll quit.

Q. Could you tell us how often you read the newspaper?

A. I read the sporting page every day.

Q. And the rest of the paper gets chucked?

A. It goes in the trash. It depends on what the front headline says on the very top whether or not I'll fall into it. Ninety-nine percent of the time I throw it goes in the trash.

Q. And could you tell us how many hours a day you think you listen to the TV?

A. Maybe 45 minutes.

MS. CLARKE: Thank you.

THE COURT: Thank you, sir. We are going to let you return to the other room.

PROSPECTIVE JUROR NO. 121: Thank you.

THE COURT: Sir, I think I need that document that's in your hand.

Thank you.

(Prospective Juror No. 121 left the courtroom.)

(Prospective Juror No. 119 entered the courtroom.)

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Thank you for joining us. You're the 119th randomly selected juror. I will be referencing you perhaps by that number during the process.

Is there any reason why we shouldn't continue to consider you for jury service on this case?

A. Well, I'm self-employed. I'm a partner in a CPA firm. We are going into tax season, our busy season, and the time could create a problem.

Q. You weren't here when I gave opening instructions to the jury.

A. No. That's right.

Q. I'm looking for a particular instruction. It's not only an instruction, some comments on the schedule. The trial schedule I contemplate having will be from 8:00 a.m. to

1:00 p.m., and I'll look to see if you live in –

A. Carmichael.

Q. – this vicinity. You do. This would mean that the jury would assemble at 7:00 a.m. to be brought to the courthouse. Would that cause any problem for you?

A. No.

Q. Would you be able to make yourself available?

A. From 8:00 to 1:00?

Q. Yes, sir.

A. It's possible. Yes.

Q. You understand that – maybe you don't. There is a principle that allows the parties to ask the Court to make available a fair cross-section of the community from which to select prospective jurors, and the rationale behind that principle is that you don't want to have just a particular type of an individual to sit on the jury. Because the jury system, as envisioned by our forefathers, I believe thought that there would be individuals that would bring different backgrounds, different perspectives to bear

on the kind of determinations that have to be made in a case such as this one. So if we were to exclude individuals such as yourself, we would probably miss a whole stratum of society.

Is it feasible that you could make a sacrifice, make some adjustment so that you could be available for jury service?

A. Yes. I could.

Q. Okay. I'm going to move to the podium and tell you the things that I told all the other jurors. I know we had some difficulty – I don't know what the problem was, but we had some difficulty bringing you here. So I'll have to cover some things.

My name is Judge Burrell. I will preside over the trial. I want my deputy clerk to administer the oath to the prospective juror.

(Whereupon Prospective Juror No. 119 was given the oath.)

THE COURT: She is my courtroom deputy clerk. Her name is Shani Furstenau. On the same platform with her is my certified shorthand reporter. She will assist me in administering this trial. What we are about to do is engage in a function that's very important to 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 to serve as jurors. The voir dire questioning process that we are about to engage in is an essential way of ensuring that such a jury is obtained.

We trust that you will answer the questions as honestly as possible. Please don't be concerned about someone else's view of your answer. Each prospective juror is entitled to his own opinion. The parties value your opinions.

The voir dire process will involve questioning prospective jurors individually. After a number of jurors are questioned in this manner, we will invite a certain amount of jurors back for group questioning. We will let you know when it's time for that type of questioning.

Our objective is to obtain jurors who will decide this case based upon the evidence that's received here in this courtroom. We will be asking you questions as to how you've been exposed to publicity surrounding this case, but ultimately we will be asking you whether you have the capacity, the capability to assure us that you can make a determination as to the defendant's guilt or innocence, or not guilty, based upon the evidence that is received in this courtroom.

I have decided to do this individual voir dire, which means one-on-one, in a sense because the parties have requested it, and also because there has been some publicity about the case. During this process we will cover the publicity area and other matters that tell us whether you will be able to 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 in prison without the 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 causes you to prefer not being a juror on this type of a case can you tell me that now?

A. No. There is nothing.

Q. Okay. The first part of the 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 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 asked to decide whether certain aggravating factors exist, and if so, whether those aggravating factors sufficiently outweigh any mitigating factor or 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 a 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 the questioning process about your views on the death penalty.

We may ask questions in additional areas too. During this questioning we will refer to you by your randomly selected number as a juror, rather than by your name. That's because I decided to use an anonymous jury in order to protect your privacy, as I stated to you in a previous communication.

Now I will give you an instruction. I will now say a few words about your conduct as a juror.

First, do not talk to other jurors about this case 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 a juror. 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 who 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 or 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 these prohibitions.

Fifth, if you need to communicate with me, simply give a signed note to my deputy clerk, that's Ms. Furstenau, to give to me. I told you our contemplated trial schedule. I'm now going to tell you the holidays – how the holiday season will be observed. I contemplate observing the holiday season as follows:

We will not hold court December 24, 25, nor the 26th, nor on January 1 or the 2nd. I contemplate holding court December 22, 23, 29, the 30th and the 31st.

Does that cause any problem for you?

A. No. It doesn't.

Q. Please indicate to me by an audible response, or you can raise your hand also, if you have any difficulty with the following, if you do not understand the following.

Your first duty as a juror would be to determine whether Mr. Kaczynski is guilty or not guilty of the charges without any consideration of any penalty. Do you understand that?

A. Yes.

Q. If you find Mr. Kaczynski guilty of the charges that I told you about in my earlier 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 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 in prison without release or some lesser sentence.

Do you not understand that?

A. I understand that.

Q. Will you be able to reserve your judgment on the sentence you believe should be imposed in this case until after you have heard all the mitigating and aggravating evidence?

A. Yes. I do.

Q. If you are selected to sit on this case you will have 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.

Do you have any belief that will interfere with your obligation to do this?

A. No. I don't.

Q. We are going to be asking you some questions. During the questioning process, if you conclude that any question unduly pries into your private affairs, and you therefore wish to discuss it privately, let me or the parties know of that request. While I'm authorized under law to protect your legitimate privacy interests, I may ask some questions in the area you indicate a desire to discuss in private to determine whether we can discuss aspects of the matter in open court without disclosing what you desire to keep private.

If this can't occur, let me know so that I can determine whether the matter should be covered 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.

Do you understand that?

A. Yes. I do.

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

A. Yes. I did.

Q. Since you answered your juror questionnaire at Cal Expo have you heard of or read anything about the case?

A. I've heard local news in the evening about the case.

Q. What information have you received about it since that time?

A. Something to do with insanity pleading, that's about it. I mean, I can't expand on that.

Q. You can't expand on it?

A. No.

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

A. No. I haven't.

Q. Prior to Cal Expo did you receive any information about the case, or were you exposed to information about the case? If so, tell us what information.

A. Newspaper, evening news.

Q. Okay. The thrust of my question at this juncture is to have you tell us what you heard. We want to know just about everything you can remember, and I have a twofold reason for doing that.

One is an objective purpose. We need to know what information you received about the case so that we can make an objective determination as to how you possibly could

have been affected by that information, and then we are going to be asking you the other purpose, which is how you personally believe you have been affected, if at all, by the information.

So can you share some of the details about the knowledge you received about the case from pretrial publicity?

A. Every evening I do listen to the local news, and from that standpoint I have followed the case. But do I remember every event? No. I don't. It was a big case here in Sacramento, so consequently you follow it to some limited degree.

Q. What do you know about the allegations involved in the case?

A. None, other than he is to be prosecuted for killing people.

Q. Do you know about the alleged mode used to allegedly kill people?

A. Yes. I do.

Q. And what's that mode?

A. Letter bombs.

Q. Have you received any information about a cabin?

A. Yes. I have, newspaper articles.

Q. What information did you receive about the cabin?

A. He lived in a cabin in Montana, one-room cabin.

Q. Were you exposed to other information about the cabin?

A. No electricity, no water.

Q. Were you exposed to information concerning any search of the cabin?

A. When the FBI made their arrest they searched the cabin at that time.

Q. Were you exposed to information allegedly found during the search?

A. I believe they found some evidence, a typewriter, some bomb pieces and that sort of thing.

Q. Do you have any memory of other things that you believe were found during that search?

A. I believe there was a diary found.

Q. Have you formed any opinion, or do you have any preconceived notion as to Mr. Kaczynski's guilt or innocence?

A. Not at this point.

Q. The information you've received before trial, does it cause you to have any suspicions about Mr. Kaczynski's guilt or innocence?

A. Yes. It does.

Q. Well, what type of suspicions?

A. Well, it looks pretty incriminating to me.

Q. Based upon those suspicions do you have an opinion?

A. No.

Q. The things that you are relying upon that apparently give rise to the suspicions, I presume those are the news articles?

A. That's right. That's correct.

Q. Could you set those suspicions aside if you were selected as a juror in this case, and leave that information outside the courtroom, and come into the courtroom and allow Mr. Kaczynski to begin his trial on what we have been referencing as a clean slate?

A. Yes. I could.

Q. Does Mr. Kaczynski begin his trial, in your eyes, cloaked with the presumption of innocence?

A. Yes. He is.

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

A. Yes. I do.

Q. Meaning?

A. If the crime requires the death penalty then I believe the death penalty should be executed.

Q. If the jury should find Mr. Kaczynski guilty of the offense of deliberate, intentional, premeditated murder of another human being, would you still be able to consider voting for a sentence less than death?

A. Yes. I could.

THE COURT: The parties may conduct questioning.

VOIR DIRE EXAMINATION

BY MR. DENVIR:

Q. Good afternoon, sir. My name is Quin Denvir. I'm one of the lawyers for Mr. Kaczynski. I'd like to ask you a few questions if I can.

A. Sure.

Q. You had indicated when you filled out your questionnaire that you thought you might have a financial hardship, and I just wanted to explore that with you if I could since I think you maybe feel that it may be alleviated now.

You understand that the trial would take place from 8:00 to 1:00 five days a week?

A. Yes. I do.

Q. The jury would probably have to assemble elsewhere at

7:00 in the morning and would be released from maybe 1:30 or

2:00. And the trial would probably start about mid December and last anywhere from two to four months.

Are you going to be able to reconcile that with your work in that season?

A. Well, that is my busy time. It is hard to get away. If I could get out every day at 1:00 it is possible to put in eight hours at work. That's a long day.

Q. I guess what we need to know is whether that would pose an undue hardship to you, or would leave you where you would find it hard to kind of focus on exactly what's going on in the trial with that kind of a schedule and your work demands?

A. I think it could. I sure do.

Q. I'm sorry. You think –

A. I think it would create a hardship. Yeah.

Q. Well, your work, as I understand it, is extremely busy from what time period?

A. January through April the 15th.

Q. And this would overlap with it substantially. I guess – obviously, as the judge said, we always hope to get a full range of people on the jury.

A. I understand.

Q. And at various times we do, and other times we don't. Recognizing the time period that's projected and the schedule, I mean, do you feel that you should probably serve on another jury some other time rather than this particular one at this time?

A. Yes. I do.

Q. And do you feel that if you had that schedule, and the trial was maybe taking longer than people thought, that sometimes happens, that you would feel a little jammed by the feeling like, when is this going to end, or when can I get back to work, given your responsibilities?

A. Yes. I do.

MR. DENVIR: Your Honor, I wonder if the Government wanted to question in that area?

THE COURT: I'll allow the Government to go ahead.

VOIR DIRE EXAMINATION

BY MR. FRECCERO:

Q. Good afternoon, sir. My name is Steven Freccero. I'm one of the prosecutors. Let me just follow up on some of those.

And again, you are a partner in this particular firm?

A. Yes.

Q. We don't want to give out the details in particular.

A. No. I understand.

Q. But we'll just try and talk about that generally. And do you have – some of the work you do, can you be assisted at all by any other partner? In other words, could you make some kind of accommodation so that you will be getting to the office, obviously, later than you normally would. Is there any way anybody else could assist you in some way so that you could fulfill your civic duties without too much of a hardship to yourself?

A. Yeah. They could give me a hand. Sure.

Q. Okay.

A. Some of my duties could be allocated to other people.

Q. All right. And given the nature of one's jury obligation, you recognize this is an important civic duty?

A. Yes. I do.

Q. Every citizen, in order to be – you know, in order for the system to work, everyone has got to be able to do what they can to contribute their time to serve as a juror.

Would you agree with that statement?

A. Yes. I do. Sure.

Q. And we are not looking for you to ruin your business or create, you know, a large upheaval in your life, but if it's possible if you think you could make arrangements

with your partners or other people at work so that you could accommodate were you to end up being called as a juror, would you be willing to do that in order to fulfill your civic obligations?

A. Yes. I do.

MR. FRECCERO: All right. Should I – may I continue?

THE COURT: No. Let Mr. Denvir go.

MR. DENVIR: I'll continue, your Honor.

VOIR DIRE EXAMINATION (RESUMED)

BY MR. DENVIR:

Q. Sir, let me just ask you again in that area, and then we'll move on when. When you first sent back your questionnaire in September, you indicated that the – that your work situation would prevent you from serving on the jury, and then when you filled out your questionnaire out at Cal Expo, I believe you said that it was a problem that would interfere with your ability to concentrate on the case during the trial. And in the end you have to tell us what the situation is.

A. Those three and a half months are very difficult, long hours, and it would be hard to concentrate five hours a day on a jury, and then go home and put in another five hours at work.

Q. Okay. And you think it would be difficult over a long period of time to concentrate on the trial?

A. Absolutely.

Q. And at some point do you feel that it might be that you start to resent having to be there and worrying about what was going on at work?

A. That could happen.

MR. DENVIR: Do you want me to go on, your Honor?

THE COURT: I want to ask some questions if you don't mind, sir.

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

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Only you can tell us whether serving as a juror in this case is going to present unbearable hardships for you. We have to depend on your judgment. You have to be the judge of that.

A. Well, I don't think it would present unbearable hardships, but it will create hardships, absolutely. Last year one of my partners became ill, and we all picked up the workload. Well, it was taxing to say the least. Sure.

Q. You've indicated in response to Mr. Denvir's questions that because of working and also fulfilling your civic duty in this case, you may have some problems concentrating. I'm not sure what you meant by that.

Can you elaborate on that response?

A. Well, you'd have five hours of jury courtroom duty in the day, and then I'm sure I'd have appointments in the afternoon to meet with clients. It would be a long 12-hour day. Can I concentrate thoroughly?

Yes. But after 12 hours a day your concentration deteriorates somewhat. I have no trouble with jury duty. It's just a bad time of the year for me. That's my complaint.

Q. So what is your conclusion as to whether or not you should be selected for possible jury service?

A. I would think I'd like to be dismissed and recalled in the summer months.

MR. FRECCERO: That's fine, your Honor. The Government would stipulate.

MR. DENVIR: We would stipulate, your Honor.

THE COURT: I appreciate the things you've said. It's clear to me that you are willing to make a sacrifice, and that's commendable. But I won't ask you to make it. I'm going to excuse you from further participation in the case.

PROSPECTIVE JUROR NO. 119: Okay. Thank you.

THE COURT: Any reason to stay in session.

MR. DENVIR: No, your Honor.

MR. CLEARY: No, your Honor.

THE COURT: Okay. We are in recess.

Thank you.

(Whereupon the evening recess was taken.)

SACRAMENTO, CALIFORNIA

TUESDAY, NOVEMBER 25, 1997, 5:30 P.M.

– oOo –

(The following discussion was had in the courtroom. Neither the defendant nor any jurors were present.)

THE COURT: I was given a waiver of the defendant's presence which is signed by the defendant, and it reads "Defendant hereby waives the right to be present in person in open court during jury selection. Defendant hereby requests the Court to proceed with jury selection and agrees that his interests will be deemed represented at all times by the presence of his attorneys the same as if he were personally present."

The Government's response?

MR. LAPHAM: Your Honor, we're coming in cold on this. I didn't have time to do any research on this. It's not clear to me that the statute permits a waiver in this situation. It says – I believe the statute says "impanelment of the jury."

But whether or not he has a statutory right to waive, that doesn't mean the Court is required to accept the waiver. And I think there are reasons here why the Court should not accept a waiver in this situation. Given the defense that the defendant has indicated or that his attorneys have indicated they're going to pursue in this case – as you know we've raised questions about this for some time now, and we're concerned and we have reason, I think, to be concerned that the defendant should be here when jury selection is going on, when the matter – mental matters are being discussed and when the trial is going forward.

THE COURT: Okay. I understand your position.

Let me hear from defense counsel.

MR. DENVIR: Well, Your Honor, all we're seeking to waive is his presence for tomorrow, at this point, for jury selection. I think that's all the Court had scheduled.

And the reason is essentially that –

THE COURT: This doesn't say that, though.

MR. DENVIR: We were filing just a general waiver, but we can certainly file a more limited one. But we were just asking the Court to accept it for tomorrow, and we would be glad to review it, any other day, with you.

But we just wanted to waive his presence for tomorrow. He wants to waive his presence for tomorrow. And the reason is that once again we're back in the Sacramento County Jail. They've tried to make improvements in his living conditions in terms of his ability to get a reasonable amount of sleep, and it is a day-to-day matter. And he is not – he's had two – three very bad nights in a row, and he just – it's just a real pressure on him. He happens to be a person who is very much subject to sleep deprivation and its effects. And he has not been getting the sleep he needs. And then to sit through court, and then when he gets back he can't get back to sleep. It's just that type of problem.

We don't need him here. We would prefer to have him generally here, but we also feel Mr. Kaczynski – we don't want to impose upon him unduly if it's going to, you know, bother him physically or otherwise.

So all we're asking to do is waive his presence for tomorrow, at which time we're just doing jury selection, and we think that under Rule 43(b)(1) that he can waive his presence if the Court would allow him to. And we would ask the Court to allow him to for tomorrow.

THE COURT: Have you looked at (b)(1)?

MR. LAPHAM: Your Honor, I've looked at it. I didn't look at it before we came in today.

MR. DENVIR: Do you want to look at this?

MR. LAPHAM: (Examines document.)

Your Honor, I was looking at 43(a), "Presence Required."

THE COURT: But that's not the applicable section, is it?

MR. LAPHAM: Well, it says "at every stage of the trial including the impaneling of the jury." I frankly don't know what "impaneling of the jury" means, whether it's the selection process from start to finish or simply the swearing of the jury at the end.

MR. DENVIR: I think that it provides, though, that – that sentence is "except as otherwise provided by this rule."

So Section (a) is where presence required, and then Section (b) allows the exceptions to it.

I didn't mean to interrupt. I just thought that you had no chance to look at it.

(Pause in the proceeding.)

MR. LAPHAM: Are you ready for me to respond?

THE COURT: I'm ready.

MR. LAPHAM: Your Honor, frankly, I'm not sure what the rule means. I way I read it, though, is presence is required, under 43(a), for impaneling of the jury. Then (b) says, "The further progress of the trial . . . will not be prevented" if the defendant waives. But I don't know that (b), Section (b), trumps Section (a).

But, in any event, I think it's up to the Court to decide whether in any particular case they will accept a waiver.

THE COURT: Well, if it's up to the Court and it's only a request for one day, I would be inclined to accept it.

I did some quick research, and I found the Ninth Circuit decision of Campbell vs. Woods, on 18 F.3d 662, 672. But it deals with the Court's habeas powers; it doesn't deal with Rule 43. But it seems, based – if that case does provide guidance, it seems that the question is whether Mr. Kaczynski has knowingly and voluntarily and intelligently waived his right to be present at the jury selection tomorrow only.

I thought that this waiver was broader than that, but counsel has explained that it's only talking about one day.

MR. LAPHAM: And that's the way I understood it at first, and that's why I addressed my comments as I did.

THE COURT: That it was broader?

MR. LAPHAM: Yes.

THE COURT: Since it's just one day, and given the protracted nature of the jury selection process, which is probably draining on all participants – because I think we covered 12 jurors; we ended up with possibly one juror and we have another "maybe" which is subject to a telephone call.

Unless the Government has an objection, I'm going to grant the waiver of appearance for the single day that's requested.

MR. LAPHAM: I have no objection, Your Honor.

But the case you cited, if I'm not mistaken, there is language this there that talks about the Court actually voir diring the defendant. I don't know if it applies to this situation or not. I seem to recall language to that effect. That's the only thing I would add.

THE COURT: But if he comes in for that, I should deny the request for waiver. The question is whether that is essential, considering the duration of the waiver requested –

MR. LAPHAM: Right.

THE COURT: – and what we know about the defendant.

MR. LAPHAM: Right. I merely – I'm not – I'm just pointing it out to the Court that that's my recollection. I could be wrong. It may not be applicable to this situation. That's all.

THE COURT: Go ahead.

MR. SOWARDS: I don't want to add to the confusion. I think Mr. Lapham is right that it's not applicable to this situation, because Woods, as I recall, that was a suicide attempt during trial, and he was in the infirmary and not brought in, so there

was no opportunity for him to either execute an explicit waiver or be questioned by the Court, whereas here we have a waiver of the client with counsel's concession.

THE COURT: I'm going to grant it for one day.

MR. LAPHAM: Very well.

MS. CLARKE: Thank you.

MR. DENVIR: Thank you.

THE COURT: All right. Thank you.

(Time noted: 5:40 p.m.) IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

– oOo –

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 9, pp. 1453-1680
TUESDAY, NOVEMBER 25, 1997

– oOo –

Reported by: MARGARET McNAMARA, CSR No. 6729 SUSAN VAUGHAN, CSR
No. 9673 CATHERINE E.F. BODENE, CSR No. 6926

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 (not present in evening session) 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: (not present in evening session) 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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