

Jury Trial Day 10

Defense motion for disclosure

Jan. 21, 1998

U.S. District Court, Eastern District, Sacramento
Defense motion for disclosure
SACRAMENTO, CALIFORNIA
WEDNESDAY, JANUARY 21, 1998, 2:00 P.M.

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THE CLERK: Calling criminal case S-96-259 GEB, United States vs. Theodore Kaczynski. This matter is on for defendant's motion for disclosure, Your Honor.

THE COURT: Counsel identify themselves for the record.

MR. BALAZS: John Balazs, Quin Denvir, Judy Clarke and Gary Sowards for the defendant, Mr. Kaczynski. His presence has been waived.

THE COURT: Good afternoon to all of you.

MR. FRECCERO: And it's Stephen Freccero and Steven Lapham on behalf of the United States.

THE COURT: Good afternoon to you as well. This is on the motion of the defendant to secure information from the Government about so-called secret shacks. Mr. Balazs, who argues for the defense?

MR. BALAZS: Say that again?

THE COURT: Who argues for the defense?

MR. BALAZS: Your Honor, I thought maybe we should start by asking what other information the Government has in its possession. They've already agreed to turn over photographs. The other two things we're asking for is the location of the shacks that they have located – they said they have located structures, and any inventory of the contents of the shacks, if anything. If they are willing to give us that information, we could resolve this matter.

THE COURT: I suppose you've implicitly answered my first question that you're arguing, and that's what you want to do, but let me ask you a few questions before I get to that, Mr. Balazs. And that's – it's not really a Brady issue, because the Government's correct in that if they showed you the photos of the shacks and Mr. Kaczynski can identify them or not, that information is within his purview. And so it wouldn't be a Brady violation for them not to turn over the information. Rule 16 has a broader sweep, though. And it doesn't matter if the defense has some of that information in its possession. So if you argue from Rule 16, my first question to you is from the materiality aspect. I mean, in a sense, if you've seen one shack, you've seen them all. And what else, what is this going to add to the defense, if you get more information?

MR. BALAZS: Well, I think it's significant – two points I could make. One is that, as we stated in the motion, Mr. Kaczynski said that he built the shack because he felt there was no place to escape civilization. I think it's directly relevant to his mental state. We've already told the Government, and they've brought a motion to preclude, which was denied, that we wanted to present information in the guilt phase, and maybe in the penalty phase as well, of his writings, of lay witnesses and other information that could go to his mental state at the time of the offenses. And, second,

it's not just a matter of the shack itself but what is in the shack and in the surrounding area. And so we need to know whether or not they found anything in the shack.

THE COURT: Seems like a motivation reminiscent of Henry David Thoreau, perhaps. Mr. Freccero, Mr. Lapham, who argues?

MR. FRECCERO: On behalf of the Government, I will, Your Honor.

THE COURT: Have you shown the defense the photos?

MR. FRECCERO: No. We're prepared – the point I want to make is, we don't know whether these – we have never known whether these structures, and there are a number of them, and we'll have a number of photos, and we'll show those to the defense.

THE COURT: I want you to define "no" for me. I take it from your papers you're not a hundred percent certain, but do you have any level or knowledge, or did you just go out and take pictures of any old place out there and wonder what it was about?

MR. FRECCERO: Well, I can explain the dilemma we're in. For instance, in the defense's motion, they refer to these shacks – for instance, the quote Mr. Balazs just said, as I read the references in writing, that's actually talking about a different location than their motion. That's talking about a location near what's called Rochester Gulch. And then in their motion they're talking about a Diagonal Gulch.

THE COURT: Well, bear with me for a moment.

MR. FRECCERO: Okay.

THE COURT: And that is, you went out and took pictures of shacks, correct?

MR. FRECCERO: That's correct.

THE COURT: And why did you take pictures of particular shacks.

MR. FRECCERO: Because there are numerous locations in the writings of Mr. Kaczynski. There are two reasons we've done that.

THE COURT: No. I mean, why did you take those particular shacks to take pictures of? Did you have any knowledge that this might be a shack related to defendant Kaczynski?

MR. FRECCERO: Absolutely. We're trying to figure out whether the references in the writings, and that's what we based it on, so there's a number of things – yes, we didn't just go out into the wilderness and photograph anything we saw. These are locations which, as best we can figure out, could be or might be or sound similar to locations mentioned in Mr. Kaczynski's writings.

THE COURT: And have you acquired any confirmation that one place or another is probably related to the defendant?

MR. FRECCERO: Well –

THE COURT: In other words, have you interviewed the neighbors? Did you talk to any –

MR. FRECCERO: Yes, we have.

THE COURT: All right. And so did you make any documents regarding interviews with the neighbors?

MR. FRECCERO: We have a number of interview reports of those people.

THE COURT: And did any of those interview reports indicate to you that it's more likely than not that a particular cabin or shack was utilized by defendant Kaczynski?

MR. FRECCERO: Yes.

THE COURT: All right. And that's the information that they want.

MR. FRECCERO: That's right. I take that – some of it's right. You're asking us if we've been able to confirm; we've had a number of people tell us we think there's something over here or there. We have. And I would note for the record, too, these are people who had told us they have already been interviewed by investigators working on behalf of these lawyers (indicating) in Montana.

THE COURT: All right. But remembering that Rule 16, it doesn't really matter whether the defendant has some or all of the information within the defendant's control, the Government has obligations and you turn it over regardless, unlike your Brady requirements. Why should I not just order you to turn over those documents which indicate a likelihood that that particular cabin or shack belonged to the defendant? You can argue about the admissibility or the foundation or the confirmation of it at trial, assuming it's admissible, if at all. Why shouldn't I just tell you to give them – why shouldn't you give them the documents?

MR. FRECCERO: Well, I would request that we not – the information is not a problem. We have given – we have protected the confidentiality of people who have given that information.

THE COURT: But if they've already talked to them, as you've told me, what difference does it make? I could say tongue in cheek, perhaps, inquire of the media; there are probably people crawling all over that place right now as we speak, talking with people. I don't think privacy's an issue anymore.

MR. FRECCERO: Well – very well. If I could just note, again, we have no objection to that. We want to make sure our position is we cannot independently confirm whether or not these shacks, these structures, are those referred to in the writing. Only Mr. Kaczynski can do that.

THE COURT: All right.

MR. FRECCERO: So we don't – if I could explain by way – if the Court would permit me to explain the second part of my answer as to why I – why we haven't done that. And we have, as I said in our papers, expressed concern for issues other than litigation to get to the bottom of some of these locations. So that we could alleviate ourselves of concerns other than this litigation. And that's what we've been attempting to do with the defense attorneys. But simply, you know – you just have to give us all your information, and that way we will never be able to confirm or not whether we have alleviated those collateral concerns. And that's why we're here today.

THE COURT: Which are –

MR. FRECCERO: There are public safety concerns. In these writings there are references to buried articles, ammunition, references to booby traps set out there. In the writings it says that I'm deliberately not revealing the location of that so that no

one will find it and be able to dismantle it. We've gone all over the place there. We've taken metal detectors. And so we have, and have told them for quite some time now, other than litigation – we're not going to use any of this. We simply want to assure ourselves that the public safety as regards all this area is satisfied. We're not going to use that evidence. And that's why we've ended up in this position.

THE COURT: I understand your motivation, but it doesn't follow that you shouldn't turn the documentation over to the defendants. It may mean nothing; it may mean something at this point. Certainly to the extent that it appears likely from the documents that the defendant may have utilized these cabins, I'm sure you're watching it, for the very reasons that you have just related to me. Turning that information at this time over to the defense counsel won't impact those collateral concerns, I don't think.

MR. FRECCERO: Fine, Your Honor. Again, my confusion is also because it's not clear to me – until they filed that motion, it wasn't even clear to us that there were two shacks. In other words, there's a number of references to all different locations. So I'm a little confused as to what our obligation to turn over is. And that's why I suggested we'll show the photographs of what we have. Hopefully they will tell us, "This is what we're interested in; this is not."

THE COURT: All right. I'll be able to assist you there. Besides photos and 602s, I take it –

MR. FRECCERO: I don't know if there are formal reports. There is some sort of documentation.

THE COURT: All right. We'll call it the 602 or informal report. Is there any other documentation in the possession of the Government related to any of these cabins or shacks or whatever?

MR. FRECCERO: No, nothing besides what we've already turned over to the defense. We have turned over photographs pertaining to other locations mentioned in the writings, cabins, etc. There is no physical evidence. We have seized no evidence from these locations.

THE COURT: You seized no evidence from locations outside of the cabins themselves but that relate to the cabins other than what you've told me about, photos and reports of some type?

MR. FRECCERO: That is correct.

THE COURT: All right. With respect to any photos or reports that you have in your possession, in the Government's possession, in which it appears that from the photo – from the reports and the photos that go along with it that it relates to utilization by defendant Kaczynski, turn that over to the defense.

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

THE COURT: If you have – if your report indicates that we've got, in essence, Report One and Photo One and the report links the defendant to that cabin and the photo is of that cabin, turn it over. If, on the other hand, the photo and the report gives no inkling whatsoever that it could have been utilized by the cabin [sic], as far

as you know, it's just out there, you have no idea who used it and the report – that's what I mean, you have no idea, the report does not give any indication who used it – you don't have to turn it over.

MR. FRECCERO: Okay. And could I also note for the record so it's clear – I assume the Court realizes – none of this is on any property connected to Mr. Kaczynski's property. In fact, in some cases it's difficult to figure out where it is. Most of this, we're talking about areas in national park, or may or may not be private.

THE COURT: I assumed that, because I understood the initial property was a half acre to an acre.

MR. FRECCERO: That's correct.

THE COURT: And I don't know how many places you could build on that to get away from it all. Mr. Balazs, will that satisfy you?

MR. BALAZS: Yes, Your Honor.

THE COURT: All right. Any questions at all, Mr. Freccero?

MR. FRECCERO: No, Your Honor. And the scope – I'm just trying to understand – the scope pertains to those locations they've tried to describe in their motion?

THE COURT: No. It refers to any locations that the Government has knowledge of from its report, from its interviews, from its confirmation process, that there's a shack out there that may have been utilized by defendant Kaczynski. I don't care if they've used the right gulch annotation in their motion. If you've got some information that relates to that, turn it over.

MR. FRECCERO: Okay. Okay. I guess my hesitation – I just want to make sure it's not a problem; I want to make sure we comply with the Court's order, and that is because where he may have spent time – because, for instance, there's references to all kinds of place in his writing and places where he went one day or he took other certain acts at a particular place. The Court's ruling, as I understand it, the materiality pertains to some place that shows that he stayed or spent some kind of time, a shack?

THE COURT: Correct. I'm not interested in every place that he's visited in his life, but some place that he more or less had possession of for some point in time, that he had some – either just took up residence there or did some type of building to it. That's what they're looking for, correct, Mr. Balazs?

MR. BALAZS: Yes, Your Honor.

THE COURT: All right. Is there anything else that we need to do here today?

MR. BALAZS: The only other issue would be the timing of the disclosures, and with the trial starting tomorrow, we'd ask as soon as practicable, hopefully by the end of today.

MR. FRECCERO: Mr. Freccero, how much time will it take you to get these things together?

MR. FRECCERO: Well, I can certainly start with the photographs and a couple of documents, I think, promptly, by the end of the day. I will then do a much more broad search to make sure I haven't – there are no other documents out there that might be relevant. But we can start that initially today.

THE COURT: All right. Thank you. Do the initial disclosure by the end of today; and by Wednesday of next week, everything else.

MR. FRECCERO: Thank you. And, Your Honor, I would just note that we may not have copies of the photographs, so we might have to show the photographs and make arrangements for copies, if they actually – if any of those photographs are relevant. I can't make copies by the end of today, is what I'm saying.

THE COURT: Right. Make a Xerox by the end of today. If they need something better, they'll tell you. All right. Anything else?

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

THE COURT: All right. Thank you very much. We're in recess. (Time noted: 2:17 p.m.) IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE GREGORY G. HOLLOWS, MAGISTRATE JUDGE

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UNITED STATES OF AMERICA,)) Plaintiff,)) vs.) No. Cr. S-96-259 GEB)
THEODORE JOHN KACZYNSKI,)) Defendant.) -----

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REPORTER'S TRANSCRIPT JURY TRIAL DEFENDANT'S MOTION FOR DISCLOSURE WEDNESDAY, JANUARY 21, 1998

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Reported by: SUSAN VAUGHAN, CSR No. 9673 A P P E A R A N C E S For Plaintiff UNITED STATES OF AMERICA: OFFICE OF THE U.S. ATTORNEY 650 Capitol Mall Sacramento, CA 95814

BY: 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 JOHN P. BALAZS Assistant Federal Defender, Eastern District of California STERNBERG, SOWARDS & LAURENCE 604 Mission St., 9th floor San Francisco, CA 94105

BY: GARY D. SOWARDS Also Present: TERRY TURCHIE, Assistant Special Agent, F.B.I. Unabom Task Force ROBERT ROLFSEN, JR., Special Agent, F.B.I.

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