Jury Trial Day 11

Discussion on motions and change of plea

Jan. 22, 1998

U.S. District Court, Eastern District, Sacramento
Discussion on motions and change of plea
SACRAMENTO, CALIFORNIA
THURSDAY, JANUARY 22, 1998, 8:01 A.M.
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THE CLERK: Calling criminal case S-96-259, United States vs. Theodore Kaczynski.

THE COURT: Please state your appearances for the record.

MR. CLEARY: Robert Cleary, Steven Lapham and Stephen Freccero for the Government, Your Honor.

THE COURT: Thank you.

MR. CLEARY: Thank you.

MR. DENVIR: Quin Denvir, Judy Clarke and Gary Sowards for Mr. Kaczynski, who's present in the Court.

MR. CLYMO: Your Honor, Kevin Clymo, who's also present in Court on behalf of Mr. Kaczynski.

THE COURT: Thank you. I thank the parties for the briefs you filed yesterday by 10:00 a.m. They were helpful. Both parties assumed that the judicial estoppel doctrine was intended to be applied to a matter other than what it was intended to be applied. The record of the proceeding at pages 11 and 12 reveal that I was asking you to consider application of the judicial estoppel doctrine to the December 22nd resolution. But you need not argue that point. Attorney Tony Serra sent a letter to my chambers that apparently was intended to be passed on to Mr. Kaczynski. I had my staff to forward the letter to Mr. Kaczynski through his counsel. I'm going to read the letter in the record and then file it so that it is part of the record. The letter is dated January 20, 1998. It reads as follows: "Dear Mr. Kaczynski, it appears that you are receiving conflicting reports about my availability. Therefore, let me reiterate. I am willing and able to represent you in the jury trial in September of this year. That is approximately the nine months I requested in order to prepare. Although I have some other trials before then, I will have ample time to devote to your case. I, of course, would assemble a legal team to assist. I wish you well. I can visit you at your request. Sincerely," and it's signed by Mr. Serra. I'm ready to cover the other issues. Do you have a recommended approach?

MR. DENVIR: No, Your Honor.

THE COURT: Government?

MR. CLEARY: Your Honor, I guess some of that, in the Government's view, may depend upon what was the subject of the letter that the Government mentioned yesterday. And we know in broad measure what the subject was.

THE COURT: Well, thank you. I'm glad you raised that. I forgot about the letter and I meant to cover it. The letter should not have been sent to my chambers, but defense counsel had no choice. Defense counsel's client wrote the letter and asked the letter be given – asked that it be given to the judge, but it is absolutely clear that that was an inappropriate ex parte communication with a jurist, in my opinion. I think the letter contained advocacy which should be made through counsel. Mr. Kaczynski does not represent himself, at least not yet, and he had no authority to set forth the content of that letter in it and send it to the judge. A judge is required to be impartial, and a party has no right to contact the judge ex parte on the matters set forth in that letter. The content of the letter, though, I have identified. It covered two subjects. He didn't complain about counsel. He mentioned his view on the 12.2(b) notice question and his desire to represent himself. Do you need more information?

MR. CLEARY: No, that's fine, Your Honor. Thank you.

THE COURT: Okay.

MR. CLEARY: I don't want to appear that we're – the Government is switching back and forth in its positions. The Court has indicated the other day, based on information that the Court has that the Government does not have, that the Court believes, maybe tentatively believes, that the requested Faretta waiver may be untimely. And I'd like to address that with the Court. I would also like to address with the Court some feelings the Government has as a result of – also relating to the propriety of a

Faretta waiver, based on the letter, the timing of the letter that the Court received yesterday. And if it's okay with Your Honor, I'll deal with that first. As we understand the law, enlightened in large measure by what Your Honor told us the other day, in order for a Faretta waiver to be effective, it has to not only be timely but not offered for the purposes of delay. We are getting concerned – the Government is concerned now that, given that on January 5th, the day we were about to open, the defendant spoke up, at least in open court for the first time, and that caused a three-day adjournment to January 8th. We came back on January 8th; we were ready to open then, and again the defendant spoke up and delayed the trial for what has now been two weeks. Then on the eve of getting ready to open a third time, i.e., today, the defendant writes a letter to the Court which may also create some timing questions for the Court. And not knowing the details of those letters, what the Government is concerned about is an –

THE COURT: Sir, can I interrupt you?

MR. CLEARY: Sure.

THE COURT: I thought I told you enough about the letter I received yesterday so that you would understand what the content is.

MR. CLEARY: We do, Your Honor. And I want to make my comments a little more clear, then. I'm being a little too vague, I think.

THE COURT: Well, I would like you to tell me what other information you need about the letter that I received yesterday so that you can understand that it's simply a letter by a criminal defendant arguing two points. That's all.

MR. CLEARY: Okay. Let me tell you two things that might be appropriate. And let me just say this, Your Honor. We're not asking for disclosure at this point. I just want to give you our views of points that may guide the Court in making what we all recognize is a very, very difficult decision for you. We're all in the same boat with you on this one, Your Honor, and I'm just trying to give you some guidance that obviously you can accept or reject, but I can just give you our views on this. There may be some things in that letter, the other letters or the proceedings, the ex parte proceedings that would give the Court some insight as to whether in fact the defendant is doing this for purposes of delay, for purposes of disrupting these proceedings. And it's difficult for us to say what those things would be because you're looking at objective facts and trying to interpret somebody's intent. But I would just suggest that to the Court that that might be a way of looking at the various proceedings that have taken place to make the determination if the defendant is doing this for purposes of delay and disruption and his attempt to rid himself of the lawyers would be inappropriate at this point. So that's the one part of the test as we understand the test. On the timeliness, and I could perhaps be and I hope to be a little more concrete on this one, Your Honor, on the timeliness question, if it's helpful to the Court I can go through a number of questions that I think the Court may want to resolve – you may have the information on this and maybe the basis for some findings before it could make, if the Court believes, as I think the Court does, that the request to represent himself is untimely. Can I give you those areas?

THE COURT: Sure.

MR. CLEARY: First of all, I think one of the issues that the Court would want to look at is when the defendant knew that the attorneys were, his attorneys were intending or considering putting on a mental defect defense. When was the first day that he became aware of that? Secondly, as the Court's aware, the defendant had waived his presence for a number of the proceedings as we discussed the mental defect defense and permutations of it, preclusions and those sorts of things.

THE COURT: Let's clarify what you are indicating now. Those are pretrial proceedings.

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

THE COURT: He only missed one day of trial proceedings. And jury selection constitutes a trial proceeding.

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

THE COURT: Okay.

MR. CLEARY: That's right. And you're one hundred percent correct: I'm talking about the pretrial proceedings. If the defendant was aware, and the question is, in waiving his presence at those

proceedings, was he aware of what the subject matter of the proceedings was? Because the point I would be getting to is if he knew that and he knew what would be going on, he could have come to those proceedings and could have stated whatever objections he had at that point. Thirdly, if the record is sufficient, and we believe it is, the Court could make a finding that at least as of November 25th the defendant knew that defense counsel was proposing to put on a mental defect defense.

THE COURT: Did you say "25th"?

MR. CLEARY: Twenty-five, Your Honor, correct. I can tell you what happened that day. We were in jury selection and we ended early that day. The defendant was present, and we had a discussion at that point, somewhat lengthy, as I recall, about various permutations of the mental defect defense. I think it was the preclusion issue. And the defendant was here; he was present and clearly aware of what was going on during that proceeding. So I believe there's a sufficient basis in the record for the Court to find that at least as of November 25 of 1997 the defendant was aware of that prospect and, as best we could figure out the record, did not take any action until sometime in – around December 18th. The record might be further supported by the Court identifying the dates, or the record identifying the dates written on the various letters that the defendant gave to the Court. And all I'm asking for there is the dates of those letters, the dates they were written. Two more points. The Court may wish to make detailed findings to the extent the Court – detailing the extent to which the Court explored the mental defect issue with the defendant at the December 22 ex parte proceeding. And if that's a sufficiently detailed finding, it may lead to the conclusion that the defendant was able at that point, December 22nd, to assert his Faretta rights and did not. And finally, and I guess that's what this last point goes to, whether the Court could made findings that the defendant could have raised his Faretta rights, asserted the Faretta issue at any point between December 22nd and January 8th. And that's all I have on that score, Your Honor.

THE COURT: I will cover the Faretta issue first, and then we can cover the other issues. I have a ruling. It will take me some time to cover it, because it took me until this morning to finalize it. Mr. Kaczynski moves to exercise his right of self-representation. A criminal defendant has a Sixth Amendment constitutional right to self-representation if it is timely asserted and the assertion is not a tactic to secure delay. United States vs. Smith, 780 F.2d 810, 811 (9th Cir. 1986). Even if a defendant forfeits the unqualified right to proceed pro se by not timely asserting the right or by asserting the right as a tactic to secure delay, the Court nevertheless has the discretion to authorize the defendant to represent himself. I don't believe a Ninth Circuit case has pointedly stated that, but it has been indicated in a Ninth Circuit decision; it has been pointedly stated by several other circuits. So I think it's the law. See, e.g., United States versus Lawrence, 605 F.2d 1321, 1325 (4th Cir. 1979). I now address each of the issues. Timeliness. In Fritz, 682 F.2d at 784, the United States established a bright-line rule for the timeliness of Faretta requests, holding that, begin quote, "a request is timely if made before the jury is impaneled unless it is shown to be a tactic to secure delay," close quote. Moore vs. Calderon, 108 F.3d 261, 264 (9th Cir. 1997); see also United States vs. Jones, 938 F.2d 737, 742-43 (7th Cir. 1991), where the defendant's request to represent himself made before the jury had been selected but prior to taking its oath was deemed untimely. Jones cited the Ninth Circuit decision in Smith, 780 F.2d 810, as support for its holding, stating that, begin quote, "there the Ninth Circuit found that the demand for self-representation must be made before meaningful trial proceedings, such as jury selection, have occurred." Jones, 948 F.2d at 743. In Smith, the Ninth Circuit discusses timeliness as follows. "This Court has held that a demand for self- representation is timely if made before meaningful trial proceedings have begun. . . . This Court has also found that a request is timely if made prior to jury selection . . . or if made before the jury is impaneled, unless it is made for the purpose of delay." Cases reaching a similar decision, a Fourth Circuit decision in United States vs. Lawrence, 605 F.2d 1321-1324 (1979), where the Court rejected a contention that timeliness is governed by when the jury is sworn. I'm going to read a large portion of that decision because it explains some of the policies underlying the timeliness deadline. I'm now quoting: "Counsel for the appellant does not dispute that timeliness is a viable issue, but contends that Lawrence's request was seasonable since it was voiced before the jury was sworn. In

making this contention, appellant relies heavily on the Fifth Circuit's decision in Chapman vs. United States" – that is a case that is relied on heavily by Kaczynski in this case also – "but we think this argument reads Chapman too broadly. Concededly, there is language in that opinion which indicates that the request is timely if it is made prior to the time that 'the jury is impaneled and sworn'; however, the precise holding of that case, as stated by the court, was 'that a demand for self-representation must be honored as timely if made before the jury is selected, absent an affirmative showing that it was a tactic to secure delay.' In the course of its opinion, the court observed that in delineating the procedural requirements for asserting his constitutional right, 'courts must consider the fundamental nature of the right and the legitimate concern for the integrity of the trial process.' In this vein, the court concluded, 'If there must be a point beyond which the defendant forfeits the unqualified right to defend pro se, that point should not come before meaningful trial proceedings have commenced.' We recognized the reason for the timeliness requirement in United States vs. Dunlap . . . In justifying the need to timely raise the right of self-representation, the courts recognized, among other things, the need to minimize disruptions, to avoid inconvenience and delay, to maintain continuity, and to avoid confusing the jury.'" The parties disagree – I'm finished with the quote. The parties disagree on the significance of the Ninth Circuit's pre-Faretta decision, United States vs. Price, 474 F.2d 1223 (9th Cir. 1973), in making the timeliness inquiry. In Price, the defendant moved to represent himself after the jury had been impaneled but before it was sworn. The district judge denied the motion on an improper ground, that "it believed [the defendant] did not have skills adequately to defend himself." Id. at 1227. The Price court did make reference to the request being made before the jury was sworn but specifically said, begin quote, "We need not delineate the margins of the right (referencing the timeliness right) because nothing in [the] record suggests a basis for qualifying it." Further, the Court stated, "The record contains no hint that the motion was a tactic to secure delay, and there is nothing that suggests that any delay would have attended the granting of the motion." It was not until the Ninth Circuit's decision in Fritz, 682 F.2d at 782, that the Court established a bright-line rule for the timeliness of Faretta requests, which was drawn at the impanelment of the jury. See Moore, 108 F.3d at 264, suggesting that the "jury impanelment" rule for the timeliness of a Faretta request was a "new rule" when it was announced in Fritz. The Ninth Circuit has consistently applied the jury impanelment rule announced in Fritz in deciding whether a Faretta request is per se timely. See, e.g., Moore, 108 F.3d at 264; Savage, 924 F.2d 1459, 1463 note 7 (9th Cir.); United States vs. Smith, 780 F.2d 810, 811 (9th Cir. 1986); Armant, 772 F.2d at 555-56 (9th Cir.). Thus, the "jury impanelment" rule controls the question of whether Kaczynski's request was per se timely. Price does not affect this analysis. Here, the jury was impaneled on December 22, 1997, the date both sides exercised that peremptory strikes and jurors were selected to hear the case. United States vs. Juarez-Fierro, 935 F.2d at 675 (5th Cir. 1991), where the Court states, "A jury is not 'empaneled' until all parties have exercised their strikes, and twelve jurors are selected to hear the case"; Wedalowski, 572 F.2d at 74 (2d Cir. 1978), where the Court states the word "empaneled" is a synonym for the word "selected"; Black's Law Dictionary, 677, 5th ed. 1979, defining "impanel" as "the act of the clerk of the court in making up a list of jurors who have been selected for the trial of a particular case. All the steps of ascertaining who shall be the proper jurors to sit in the trial of a particular case up to the final formation." Kaczynski's first unequivocal request for self-representation occurred on January 8, 1998, seventeen days after the jury had been impaneled. Although the subject of self-representation was discussed several times over the course of the ex parte in camera proceedings, Kaczynski never made a statement that could even remotely be construed as an unequivocal request to represent himself. A request to proceed pro se may not be granted unless it is unequivocal. Adams vs. Carroll, 875 F.2d at 1444 (9th Cir. 1989). Thus, Kaczynski's self-representation request was not per se timely. Fritz, 682 F.2d at 784. Even assuming that I'm wrong and that the request is deemed timely by the Ninth Circuit, the question becomes whether the record contains evidence that the motion was a tactic to secure delay or whether there is anything "that suggests that any delay would have attended the granting of the motion." Price, 474 F.2d at 1227. Here, there is ample evidence of both. Although Kaczynski did not accompany his request to proceed pro se with a request for a continuance, granting Kaczynski's request at this

stage of the proceedings will undoubtedly result in a substantial impediment to the orderly process of this capital case. There are a large number of technical exhibits necessitating expert testimony expected in the guilt phase; further, not including exhibits relating to the uncharged bombs, the Government expects to introduce over 1300 exhibits at trial. As the Government's attorney stated during the hearing on January 20th, 1998, begin quote – this is in the record at page 3, lines 17 to 4, line 2: "I can tell you, Your Honor, there are thousands of pages of exhibits. Hundreds of photographs. I mean, there – there's a lot of evidence. I don't know how much of it the Court wants me to detail, but we do share your view that it would be untenable, if this is the Court's view – it is untenable, I think, to request Mr. Serra to come into the case, given his schedule. There is a wealth of matter he'd have to get on top of . . . a wealth of material he would have to grasp in order to be able to represent the defendant in this case." Given that Kaczynski only made the decision to proceed pro se two weeks ago on the second continued date for the opening statements and spent last week participating in competency hearing – I'm now quoting from the decision of State vs. Stinson, 940 P.2d at 1274, note 16 (Wash. 1997): "It is almost impossible to conceive the defendant could . . . immediately assume . . . his own defense without considerable delay for him to prepare himself to conduct an adequate defense." Cf. the Ninth Circuit's decision in Smith, 780 F.2d at 811, note 1, when the Ninth Circuit stated that "Smith points out that he did not request a continuance. However, Smith apparently made his request to represent himself with the belief that he could do preparatory legal research. This would require a continuance." In determining whether the defendant's request to defend himself is a tactic to secure delay, the Court considers, in addition to the effect of delay already considered, whether the events preceding the motion are consistent with a good-faith assertion of the Faretta right and whether the defendant could reasonably be expected to have made the motion at an earlier time. Fritz, 682 F.2d at 784-85; Smith at 812. Any delay caused by Kaczynski's belated request to represent himself would significantly enhance the risk that jurors will be unable to continue to serve in this case. In assessing their availability to serve, the jurors undoubtedly considered the representations made to them regarding the estimated length of trial. Those estimates were based on Kaczynski being represented by counsel that have spent a year and a half preparing the case for trial. The effect of having to select a new jury for this case cannot be understated. Trial proceedings in this action commenced with jury selection on November 12th, 1997. Because of the considerable pretrial publicity and the fact that this is a capital case, the jury selection process was long and arduous. Six hundred jurors were summoned to fill out comprehensive juror questionnaires. Approximately 450 jurors filled out the questionnaires, questionnaires containing questions revealing that Kaczynski's mental state and background are at issue. Because of the special concern about pretrial publicity and death qualification, 182 jurors were brought into this courtroom for voir dire, and they had to be individually questioned because of the concerns about pretrial publicity. After a voir dire process that lasted 16 days, jury selection was completed with final peremptory challenges being exercised on December 22, 1997. The second consideration is whether the events preceding Kaczynski's request to represent himself are consistent with a good-faith assertion of the right of self-representation. Kaczynski has already delayed the start of the trial twice by raising issues relating to his representation just before opening statements were set to begin. This is unacceptable, since it is now clear that his reason for doing this is patently unreasonable. He thought that he could abort his lawyers' defense strategy of portraying him as mentally ill during trial by that tactic. The reason why it's patently unreasonable is because he had actual knowledge that his lawyers obviously intended to present mental status defense evidence. He should have received that knowledge during the voir dire process, and I firmly believe that he did, in fact, received that knowledge during the voir dire process. And he clearly received it on the date that the Government has stated, which is November 25, 1997. On January 5, 1998, he indicated that he wanted to replace his current counsel with attorney Tony Serra, when he knew about Tony Serra's availability way before that date; he knew that Tony Serra had offered pro bono services way before that date. So it's clear to me that if he truly disagreed with his counsel's defense strategy, he could have made the request to have Tony Serra represent him much earlier. The first time I knew that Tony Serra had made an offer, a pro bono offer to represent Mr. Kaczynski, was during the ex parte in camera

proceeding on January 5, 1998. When a criminal defendant can afford to retain counsel through his own means, if that criminal defendant requests a substitution of counsel, the judge has to stop everything, under Ninth Circuit law, and evaluate the request and how it will affect the proceedings. I deem that when a criminal defendant is able to find a lawyer that will represent him on a pro bono basis, the same law applies, and that's the law I applied. I indicated that I just finalized my thoughts this morning, so it's going to take me a moment to pause to look at my notes, and then I will continue with my ruling. (Pause in the proceeding.)

THE COURT: When I return to the ruling, I will disclose certain aspects of ex parte in camera proceedings. And I do so under the authority of Evans vs. Raines, 800 F.2d 884, 887, note 4 (9th Cir. 1996), where the Ninth Circuit reveals that the attorney-client privilege should not be used "as a 'procedural trap play that would block development of the plain truth. . . . '" Mr. Kaczynski first raised the issue of self-representation in a letter submitted under seal to the Court on December 18, 1997. In that letter he indicated three possible options that could satisfactorily resolve the conflict he was having with his counsel: number one, to proceed with current trial counsel under certain conditions; number two, to obtain a substitution of counsel; and, number three, to represent himself, "preferably with an attorney appointed to provide [him] with advice." See Letter to the Court from Theodore Kaczynski dated December 17, 1998 [sic], filed under seal. As the letter enlisted the help of the Court in resolving the conflict he was having with his attorneys, an ex parte in camera conference was arranged for December 19, 1997. At the December 19, 1997 ex parte in camera conference, Kaczynski stated that the conflict was potentially resolved by a proposal submitted to him by his lawyers that he described as, begin quote, "very generous," close quote, and that he wanted to consider it over the weekend. During the December 22, 1997 meeting, Kaczynski focused on finding an agreement acceptable to him that would allow him to continue with his current counsel. When Kaczynski was asked about the other "options" mentioned in his earlier letter, Kaczynski explicitly stated that he did not want to represent himself and later elaborated that his overall goal was to continue with current counsel under certain conditions. Eventually those conditions were embodied in an agreement which was reached on December 22, 1997 with the following terms: number one, defense counsel would withdraw the 12.2(b) notice and would not present any mental health expert testimony at the guilt phase; number two, defense counsel would retain control over the presentation of mental health evidence, both from experts and non-experts, in the penalty phase; and number three, Kaczynski would proceed to trial with his current lawyers. See December 22, 1997, draft of transcript at 39; it was unproofed draft. On January 5, 1998, the Court convened an additional ex parte in camera proceeding after Kaczynski interrupted the commencement of the trial with a request to discuss attorney-client issues. These proceedings continued again on January 7, 1998. During the ex parte in camera conferences, Kaczynski stated that a conflict with his counsel had again arisen because counsel intended to portray him as mentally ill in the guilt/innocence phase of the trial. He claimed that he interpreted the agreement reached on December 22, 1997 as including a promise that his attorneys would present no mental status evidence of any kind in the guilt phase of the trial. Therefore, he felt his attorneys had breached the agreement by planning to present evidence of Kaczynski's mental status in that phase. I initially credited Kaczynski's perspective on the agreement, noting that it might be unclear to a non-lawyer that withdrawal of the 12.2(b) notice did not entail withdrawal of the entire mental status defense. However, upon reviewing the record, it is clear that Kaczynski's main dispute with his lawyers prior to December 22, 1997 related to their use of mental health expert evidence. And that's exactly what triggered the event the Government brought to my attention during the proceeding on November 25, 1997. I no longer find credible his position and fail to see any bona fide reasons justifying the approach he has taken. After Kaczynski was given an opportunity to consult with attorney Kevin Clymo, a lawyer who was kind enough to serve as conflicts lawyer on behalf of the Court to assist the Court in trying to resolve some problems, Clymo stated that he did not believe Kaczynski wanted to represent himself. Kaczynski then stated, begin quote, "I would agree, Your Honor, that the possibility of change of representation or representing myself is still very, very nebulous. There's no definite intention there; it's just a possibility that may arise after

present discussions continue." See January 5, 1998 unproofed version of Reporter's Transcript at 3585-86. Finally, after prolonged consultation with Clymo, the following discussion occurred during the January 7, 1998 ex parte in camera proceedings. I believe this is part of the public record, filed January 7, 1998, Reporter's Transcript at pages 5 and 6: "THE DEFENDANT: Your Honor, it appears that I don't have much choice as to what I want to do. Mr. Clymo has agreed with you that other counsel would probably do the same thing as my present counsel, and, consequently, it seems that I have no other alternatives, and so far I may as well go ahead with present counsel, not because I want to but simply there are no better alternatives. "**THE COURT**: You don't want to represent yourself? That's an alternative. I don't advise it, but if you want to, I've got to give you certain rights. "THE DEFENDANT: Your Honor, if this had happened a year and a half ago, I would probably have elected to represent myself. Now, after a year and a half with this, I'm too tired, and I really don't want to take on such a difficult task. So far I don't feel I'm up to it, taking that challenge at the moment, so I'm not going to elect to represent myself." Kaczynski's conduct is not consistent with a good-faith assertion of Faretta rights. See United States vs. Flewitt, 874 F.2d 669, 675 (9th Cir. 1989), where the Court states, "A defendant . . . requesting to proceed pro se . . . is subject to the same good-faith limitations imposed on lawyers as officers of the Court." "Once the defendant has elected either to waive appointment, appointed counsel, or to waive the constitutional right to defend himself, he does not have an unlimited right to thereinafter change his mind and seek the other path of representation." United States vs. Reddeck, 22 F.3d 1504, 1510-11 (10th Cir. 1984). Rather, before a Court permits a belated change of heart, it should determine whether it is justified with bona fide reasons. Fritz, 682 F.2d 784-785. Here, Kaczynski's complaint of his lawyers is that they deceived him by planning to portray him as mentally ill and adducing mental health non-expert evidence in the guilt phase of the trial. However, Kaczynski was well aware that evidence of his mental status would be presented during the trial. Whatever ambiguity existed as to the guilt phase portion of the December 22nd, 1997 agreement, there can be no mistake that Kaczynski knew and agreed that evidence of his mental status could be presented in the penalty phase. Further, during voir dire it is abundantly clear to all observers, including Kaczynski, that his trial counsel's strategy was to select jurors they hoped would be receptive to mental health and background evidence. This is evinced by examples in the transcript covering the following voir dire proceedings: November 13, 1997, Reporter's Transcript – I will hereinafter just give the page without stating "Reporter's Transcript" – 275-277, where defense counsel queried Juror 18's opinion about mental health professionals generally, whether the juror believed mental health professionals have a good sense of people, and whether the juror would have problem considering psychological difficulties in mitigation in the sentencing phase. The juror understood that such questions whether the person was sane at the time of a criminal act; and 361-362, where defense counsel asked Juror 29 whether "psychological or mental evidence" has anything "to do with whether . . . the person is guilty. . . . "; November 17, 1997, 524-526, where defense counsel asked Juror 37 whether the juror would consider psychiatric problems of an individual despite a guilty finding of an intentional killing and about weighing mental health evidence; November 18, 1997, 776, where defense counsel asked Juror 58 concerning the juror's opinion "about psychologists, psychiatrists or other mental health professionals"; November 19, 1997, 968, where defense counsel asked Juror 74 whether anything "such as the person's background, psychiatric state . . . that would make [the juror] think differently about the sentence"; November 20, 1997, 1037-1043, where defense counsel asked Juror 82 whether the juror would be open during the sentencing to defense evidence "about the defendant, about his background, about anything that they felt would be a reason why the juror might select life instead of death"; November 20, 1997, 1097, where defense counsel assumed that Juror 85 would be open to thoughts of "a psychiatrist or a psychologist"; December 3, 1997, 2423, where defense counsel explained to Juror 165 that the defense "would put on mitigating evidence, which is . . . any evidence" about Mr. Kaczynski or about the crimes that pointed to life; December 9th, 1997, 3216, where defense counsel asked Juror 212, if you found "there was no mental problem . . . is there any evidence that could leave you to let him off with a life sentence instead of death?" Then defense counsel asked the juror, "Wouldn't information about the defendant and maybe how he grew up and what, as you say, drove

him to it," weigh into the decision between life and death if he's guilty?" As observed in United States vs. Chapman, 553 F.2d at 894 (5th Cir. 1977), it is clear that a defendant, begin quote, "may acquire disconcerting information," close quote, during voir dire about the substance or manner of his counsel's planned defense. I find that occurred here. I saw Kaczynski actively interacting with the defense team during voir dire, and he exhibited approval of pro-life jurors and those appearing to respond favorably to his counsel's questions. He knew what his counsel were doing to shape the jury so they ended up with a jury receptive to the mental status defense and hopefully, from their perspective, a jury that was pro-life. Thus, despite his knowledge that mental status evidence would be presented during trial, Kaczynski seeks to discharge his counsel because of a dispute over the precise moment at which some of that evidence will be presented. This is a timing issue that he raises which has no foundation in reason. He knows it will be presented; he just desires to control the precise moment when it will be presented. That makes no sense. It is unreasonable to assume he can interfere with trial counsel's discretion on this matter in light of the December 22, 1997 agreement showing the technical correctness of their interpretation of that agreement. When the Court asked Kaczynski why it was acceptable to him to present evidence in the penalty phase but not in the guilt phase, he responded – and since this is sealed, I want to look at the response so I only disclose what is essential to my ruling; however, the reviewing court should consider the whole response. (Pause in the proceeding.)

THE COURT: This is in the January 7, 1997 Reporter's Transcript, the unproofed version, at 3621-22. Quote: "I didn't want to break up the defense team for obvious reasons. There are plenty of reasons for not doing that. And so I was satisfied with what was, to me, a symbolic victory, even though it didn't completely settle the issue. It now appears that symbolic victory is much less a victory than I thought it was." Thus, it is clear that Kaczynski interrupted the trial twice merely to preserve a "symbolic victory" that is of no legal consequence. This asserted justification is so unreasonable in light of the December 22 resolution that it is an obvious attempt by him to purposefully delay the proceeding. It is pellucid that he knew mental health evidence would be presented during this trial, and I construe his action as a deliberate attempt to manipulate the trial process for the purpose of causing delay. Kaczynski has unreasonably placed a "symbolic victory" that really has no bearing on the presentation of mental health evidence at trial over the orderly and timely administration of justice. The integrity of the justice process would be undermined if such unreasonable personal positions could serve as a basis for undermining trial proceedings. Finally, if Kaczynski desired to represent himself, he certainly could have asserted that right earlier. Despite his awareness that his lawyers were planning to portray him as mentally ill at trial, he consistently and unequivocally assured the Court that he did not wish to proceed pro se. See Smith 780 F.2d at 812, where the Court states – it's not a quote – where the Court found that a belated request was not justified where all the reasons asserted were known to the defendant prior to trial. Instead, Kaczynski waited until the continued date for opening statements to spring his request for self-representation on the Court, thereby causing further delay. Therefore, even if Kaczynski's request was timely, his request is denied because his purpose was to delay the trial. Notwithstanding the foregoing, the question remains whether the Court, in the exercise of its discretion, should nevertheless permit Kaczynski to represent himself. The Ninth Circuit has not pointedly addressed what factors govern a district judge's discretion when deciding a self- representation issue in this context. Some circuit courts addressing this issue have held that district courts should balance "whatever prejudice is alleged by the defense against such factors as disruption of the proceedings, inconvenience and delay, and possible confusion of the jury." Fulford, 692 F.2d at 362 (5th Cir. 1982); Lawrence, cite already given, at 1321. The trial court may also consider "the reason for the request [and] the quality of counsel representing the party." Sapienza, 534 F.2d 1007, 1010 (2d Cir. 1976). "Trial courts must necessarily be wary of last-minute requests to change counsel lest they impede the prompt and efficient administration of justice." Moreno, 717 F.2d 171, 176 (5th Cir. 1983). Even though Kaczynski has no automatic right, at this point, to self-representation, because of the importance of the constitutional concerns implicated by the self-representation doctrine I still consider whether I should exercise my discretion by granting his request. This is because of the paramount principle at the heart of Faretta, which recognizes the

freedom of "the accused to personally manage and control his own defense in a criminal case." Faretta, 422 at 816. The brief filed by the defense yesterday indicates that if Kaczynski abandons the mental health defense, he will forego the only defense that is likely to prevent his conviction and execution. See defendant's brief at page 9. That ill-advised objective is counterproductive to the justice sought to be served through the adversary judicial system, which is designed to allow a jury to determine the merits of the defense he seeks to abandon. If Kaczynski's trial lawyer is correct, by allowing Kaczynski to abandon the defense would in effect allow him to use, begin quote, "the system of criminal justice . . . as an instrument of self-destruction." Faretta, 422 U.S. at 840, dissenting opinion. Further, in light of this position taken by his trial counsel and considering their extended period of representing Kaczynski, a contrary ruling risks impugning the integrity of our criminal justice system, since it would simply serve as a suicide forum for a criminal defendant. Cf. Charles, 72 F.3d at 412. For all of the stated reasons, Kaczynski's motion is denied. I'm going to reach an additional issue.

MR. DENVIR: Your Honor, I wonder if we could approach the court at sidebar.

THE COURT: Yes. (The following discussion was had at the bench.)

MR. DENVIR: Your Honor, Mr. Kaczynski would like to offer to the Government that he would plead guilty to these charges and the New Jersey charges if the Government would withdraw the death penalty notice. We have not been authorized to make that offer before; the Government has not had an opportunity to evaluate it. What we would hope, what we're asking the Court to do, is give the Government an hour to see if that can be done.

THE COURT: I'm not going to grant a continuance.

MS. CLARKE: Just an hour.

THE COURT: No.

MS. CLARKE: Judge, we can resolve this case.

THE COURT: You'd better do it before an hour. I would have to cover the continuance factors if you want a continuance. This trial is going to start at 10:00 o'clock unless continuance factors favor a continuance.

MS. CLARKE: Could the court break now?

THE COURT: I need to cover one more matter.

MR. CLEARY: Let me ask one question. Unconditional plea?

MR. DENVIR: Unconditional. We've never been able to do that before. We believe that this may be able to resolve the whole manner in a very fair and just way.

THE COURT: All right. This is what I'll do. We have a few other issues to cover. The jury is scheduled to be here at 10:00. I will just adjourn now, and at 10:00 o'clock I will start the jury selection – we'll swear in the jury and we will proceed. And so I will cover the other issues that I need to cover at the first break.

MS. CLARKE: Thank you, Your Honor.

MR. DENVIR: Thank you, Your Honor. (The proceeding resumed as follows in open court.)

THE COURT: The parties requested at sidebar that I postpone this proceeding so that they can discuss certain matters. They asked me to do that for an hour. In rather strong terms I indicated to them that I was not in favor of postponing the trial. But as far as covering the other matters I need to cover, I can wait until later to cover the other matters. I did indicate that if they were asking for a continuance, I would have to consider the continuance factors. But at this moment the jury is scheduled to be in the courtroom at 10:00 o'clock. I will return at 10:00 o'clock. And at that point in time I plan on having my deputy clerk to administer the oath to the jury and proceeding with the trial. Until 10:00 o'clock, Court's in recess. (A recess was taken.)

MR. CLEARY: Your Honor, may we approach sidebar again?

THE COURT: Does it have to be covered at sidebar, whatever you want to cover?

MR. CLEARY: Could we start at sidebar? And if the Court wants to come into open court, we'd be happy to speak in open court.

THE COURT: Okay.

MR. CLEARY: Thank you. (The following discussion was had at the bench.)

MR. CLEARY: Your Honor, the parties have discussed the plea offer that the attorneys just made. We have an agreement in principle that will dispose of both this case and the New Jersey case. We just simply need time to draft up the papers. No one wants to have any potential chance of error in the plea. We have to do Rule 20 pleas to roll the New Jersey case into this case, but I'm confident – I can assure the Court we have an agreement and we just need time to get the papers done, to get them done accurately, and this case and the New Jersey will be over.

THE COURT: How about the jury?

MR. DENVIR: How much time do you feel that we need?

MR. CLEARY: I know you're pressed for time and you don't want to delay, but if we can have two hours I can guarantee we will have all the paperwork done with finality and we won't have what we're all concerned about: rushing into this and drafting paperwork in a rush and errors in the paperwork. This is a complicated plea and complicated case. We have to make sure it's done right. In terms of the agreement between the parties, I don't think there's any doubt or mistake there's a deal here. But it's the written details that we have to get done correctly. Is that fair?

MR. DENVIR: It is, Your Honor. And, Your Honor, we would do the Rule 20 and Rule 11 today, we would propose, later today, as soon as the papers – if the jury was excused until sometime like 2:00 o'clock, but at that time they could be discharged because you will have had a plea on these charges and the New Jersey charges.

THE COURT: We can't do that. We've assured them that they would only be in session until 1:00.

MR. SOWARDS: Do you need two hours?

MR. CLEARY: Will two hours work?

MR. FRECCERO: We can do it in two hours, I think.

MR. DENVIR: Your Honor, the fairest thing for the jury may be to release them until tomorrow, because this is going to happen and it will happen today, and then they can be discharged. Isn't that your feeling?

MR. CLEARY: Yes.

THE COURT: Bring them in at 8:00 o'clock?

MR. DENVIR: Or just have them on call, because I think we're going to resolve everything.

THE COURT: Okay. Your thought is, if the case resolves today as you've indicated, there would be no need to call the jury back in by phone?

MR. DENVIR: That's correct.

THE COURT: So I need to communicate with them now.

MR. DENVIR: Right.

MR. CLEARY: Your Honor, the only reason I want to do this at sidebar is if this becomes public, there will be a media frenzy that would be disruptive to what we want to accomplish. So if we could keep this at sidebar, adjourn for two hours, and then announce it.

THE COURT: I need your assistance in formulating communication that can be given to the jury. Let me make a note. (Pause in the proceeding.)

THE COURT: Okay. This is what I have thus far (indicating). And I need some assistance in filling in the blanks. (All counsel examine document.)

THE COURT: (Indicates.)

MS. CLARKE: Tell them "because of additional proceedings we won't need your services until tomorrow"?

MR. CLEARY: That's fine. (Pause in the proceeding.)

THE COURT: I'm going to say what I just showed you. The only question is whether we need to say anything else.

MR. FRECCERO: You can say that both parties have requested – I mean, that both parties have indicated, that this is not – that both parties have requested this –

MR. DENVIR: Yeah, these additional proceedings. Is that appropriate, Bob?
MR. CLEARY: Yeah, it's fine.
MS. CLARKE: Yeah.
THE COURT: Just so it's clear it isn't –
MS. CLARKE: Us.
MR. FRECCERO: Us.
MR. DENVIR: Maybe thank them for their patience.
THE COURT: (Nods head up and down.) (Pause in the proceeding.)
THE COURT: I think that's it. (Indicates.) Did you see what I wrote?
MS. CLARKE: Yes, Your Honor.
MR. CLEARY: Yes, Your Honor.
MR. DENVIR: Yes, Your Honor.
THE COURT: Do you approve?
MS. CLARKE: Yes, Your Honor.
MR. DENVIR: Yes, Your Honor.
MR. CLEARY: Yes, Your Honor. (The jury entered the courtroom. The proceeding resumed in open court.)
THE COURT: Are we missing a juror? (Discussion off the record between the clerk and the Court.)
THE COURT: We'll let the record reflect that we're missing a juror, but since you're not in your assigned seats, we don't know what juror's missing. Ladies and gentlemen, there have been significant constitutional principles involved in this case that delayed the commencement of trial twice. When things like that happen, neither the parties nor the trial judge is at fault. Our system is designed to observe our Constitution, and there's legal precedent that must be followed when we do that. And that's exactly what I believe we've been doing, and that's why we've had delays. That may cause you to question whether your participation in this process is meaningful. Believe me, it is extremely important and it is meaningful. Without you, this process would not work. (A juror entered the courtroom.)
THE COURT: Are you a juror?
JUROR: Yes, I am.
THE COURT: Glad you could join us. I was telling the other jurors that there are constitutional, important constitutional principles that have caused this case to be delayed twice, and I was also informing the other jurors that neither the parties nor the judge can be faulted for what we do. What we do is a significant function in our constitutional democracy. Someone else's perspective of the pace of justice is irrelevant. What is relevant is that we follow Ninth Circuit and Supreme Court precedent and the statutes that govern a criminal trial in the manner in which we believe we are supposed to observe those principles. And I firmly believe that's exactly what we have done in this case. And I've indicated – and I'm not sure at what point you came in; I'm going to repeat it just in case you weren't present when I told this to the other jurors – I don't want you to think that your participation is not meaningful. It is extremely meaningful. It is essential that we have a jury ready and able to serve on this case. And you are serving at this very moment. I hope that you haven't been mindful of media coverage. You are still to observe those admonitions until you have been discharged from this case. And you aren't being discharged yet. Both parties have requested – it's a joint request – that I allow them to conduct additional proceedings today. I just found out about the request at 9:00 a.m. this morning. Obviously, if I had known it was going to be made, I would have told you. But I didn't know. I have listened to their request, and I have acquiesced that they can, in fact, have time to conduct additional proceedings. And as far as you are concerned, we're going to release you for today and ask that you be available for tomorrow. I thank you very much. I thought that I should bring you in personally, explain the situation. So until tomorrow you are released. Thank you. (The jury left the courtroom.)
THE COURT: Let the record reflect the jury has exited the courtroom. Any objections to the manner in which I communicated with the jury?
MS. CLARKE: No, Your Honor.

MR. CLEARY: None from the Government.

THE COURT: We're going to adjourn until 12:15, at which time there will be further proceedings in this case. Is that a good time, 12:15?

MR. CLEARY: Yes, Your Honor.

MR. DENVIR: Yes, Your Honor. Thank you. (A recess was taken.)

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

THE COURT: Please state your appearances for the record.

MR. CLEARY: Robert Cleary, Steven Lapham and Stephen Freccero for the Government.

THE COURT: Thank you.

MR. CLEARY: Thank you, Your Honor.

MS. CLARKE: Judy Clarke, Quin Denvir and Gary Sowards for Mr. Kaczynski.

THE COURT: Thank you.

MR. CLYMO: I'm also still here, Your Honor. Kevin Clymo.

THE COURT: Thank you. I received a written memorandum of a plea agreement which the Court understands represents the plea agreement of the parties; is that correct?

MS. CLARKE: That is correct, Your Honor.

THE COURT: And I want my deputy clerk to please administer the oath to Mr. Kaczynski. (Discussion off the record between Mr. Kaczynski and Ms. Clarke.)

THE COURT: You don't have to stand. It's okay. (The defendant was sworn.)

THE COURT: Mr. Kaczynski, do you understand that, having been sworn, your answers to my questions would be subject to the penalties of perjury or of making a false statement if you do not answer truthfully?

THE DEFENDANT: Yes, I understand that.

THE COURT: It is my understanding through a communication I just had with counsel that you wish to change previously entering pleas. Before accepting your guilty pleas, there are a number of questions I will ask you to assure that it is a valid plea. If you do not understand any of the questions or at any time wish to consult with counsel, please say so, since it is essential to a valid plea that you understand each question before you answer it. Do you understand what I just said?

THE DEFENDANT: Yes, I understand, Your Honor.

THE COURT: You need not seek my permission to speak to your lawyers. If you desire to speak to your lawyers during this process, you can simply communicate with your lawyers. I'll recognize that you're speaking to your lawyers and I won't expect to you respond to my question until you've finished that communication. You understand the liberty you have to speak to your lawyers at with will throughout this proceeding?

THE DEFENDANT: Yes, Your Honor. I understand that.

THE COURT: I'm informed that you wish to change the plea you have previously entered to a plea of guilty. Is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Is your plea being made pursuant to a plea agreement of any kind?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Your case in the United States District Court, District of New Jersey, cannot be handled in this court unless you wish to plead guilty or nolo contendere. Do you understand that if you allow that case to be handled in this court, you are agreeing to plea guilty or nolo contendere, waive proceedings in the United States District Court for the District of New Jersey in which the crimes were allegedly committed, and you're allowing those crimes to be proceeded against you in this court? Do you understand that?

THE DEFENDANT: Yes, sir. I understand that.

THE COURT: Do you understand that you have the right to be tried in the district where the crimes are alleged to have been committed?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you understand that you cannot be convicted or sentenced in this court unless you give your consent freely, as to those crimes?

THE DEFENDANT: Yes, Your Honor.

THE COURT: If you do not consent to be proceeded against in this Court, you may be proceeded against in the district in which the crimes were allegedly committed. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has a waiver form been filed or prepared?

MR. DENVIR: Yes, Your Honor. Mr. Kaczynski has executed a consent to transfer of case for plea and sentence under Rule 20, and Ms. Clarke and I have both witnessed it and signed it. The Government now has it for approval. (Pause in the proceeding.)

MR. DENVIR: It's been executed on behalf of the United States Attorney for the District of New Jersey and for the Eastern District of California. (Pause in the proceeding.)

THE COURT: The document has been fully executed. I will direct that it be filed. Mr. Kaczynski, please state your full and true name for the record.

THE DEFENDANT: Theodore John Kaczynski.

THE COURT: How old are you?

THE DEFENDANT: Fifty-five years old.

THE COURT: How far did you go in school?

THE DEFENDANT: I have a Ph.D in mathematics.

THE COURT: What is your occupation?

THE DEFENDANT: That's an open question right now. My occupation, I suppose, now is jail inmate.

THE COURT: Okay. What past occupations have you held?

THE DEFENDANT: I was once an assistant professor of mathematics. Since then I have spent much time living in the woods in Montana and have held a variety of unskilled jobs.

THE COURT: Have you ever been treated for any mental illness or addiction to drugs of any kind?

THE DEFENDANT: No, Your Honor.

THE COURT: Are you presently under the influence of any drug, medication or alcoholic beverage of any kind?

THE DEFENDANT: No, Your Honor.

THE COURT: Have you consumed any drugs, alcohol or medication in the last 24 hours?

THE DEFENDANT: No, Your Honor.

THE COURT: Have you received a copy of the indictments pending against you, that is, the written charges made against you in this case and in the case filed in the United States District Court, District of New Jersey; and have you fully discussed those charges – (Discussion off the record between the defendant and Ms. Clarke).

THE COURT: – and the case in general with Mr. Denvir and Ms. Clarke as your counsel?

THE DEFENDANT: Your Honor, I'm afraid I was occupied in discussing –

THE COURT: Okay.

THE DEFENDANT: – with my attorney –

THE COURT: No problem. I should have discontinued my communication at the time that occurred.

MS. CLARKE: Your Honor, the question is, did Mr. Kaczynski receive the indictment? We have received them. We do not have them present in front of him.

THE COURT: They don't have to be present in front of him. He has to have received them at some point in time and reviewed them.

THE DEFENDANT: Yes, Your Honor. I did receive them at a previous time.

THE COURT: Let's do that question again. Have – oh, I'm sorry. (Discussion between the defendant and Mr. Denvir.)

THE COURT: Have you at any time received copies of the indictments pending against you, that is, the written charges made against you in this case and in the case filed in the United States District Court, District of New Jersey; and have you fully discussed those charges and the cases in general with Mr. Denvir and Ms. Clarke as your counsel?

THE DEFENDANT: Yes, Your Honor, I have. (Mr. Lapham gives document to Mr. Denvir.)

THE COURT: What did the Government just provide the defense?

MR. LAPHAM: Your Honor, for the record, I just provided them with a copy of the New Jersey indictment and the Sacramento indictment.

THE COURT: Shall I pause while you review those, or is that necessary?

THE DEFENDANT: I don't think it's necessary, Your Honor.

THE COURT: Mr. Kaczynski, are you fully satisfied with the counsel, representation and advice given you in this case by Mr. Denvir and Ms. Clarke as your attorneys? (Discussion off the record between Ms. Clarke and Mr. Kaczynski).

THE COURT: I am satisfied except as reflected otherwise in the record.

THE COURT: You need to explain that, sir.

THE DEFENDANT: All right, Your Honor. You know that I have had certain dissatisfactions in my relationship with my counsel. And those dissatisfactions are reflected in the record. Apart from those dissatisfactions that are reflected in the court record, I have no other dissatisfactions with my representation by counsel. (Discussion off the record between Mr. Denvir and the defendant.)

THE DEFENDANT: I am willing to proceed for sentencing with present counsel.

THE COURT: My understanding of your dissatisfaction with present counsel is that there was a disagreement as to the assertion of the mental status defense and you had some problems with present counsel concerning communications surrounding the presentation of mental status-type evidence.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Is that what you are referencing?

THE DEFENDANT: Yes, Your Honor. That is what I am referring to.

THE COURT: Are you referring to anything other than that?

THE DEFENDANT: No, Your Honor.

THE COURT: Is it your understanding that your attorneys had discussions with the attorneys for the Government in this case concerning your change of plea?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Does your willingness to plead guilty result from those discussions?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you entering this plea of guilty voluntarily because it is what you want to do? (Discussion off the record between Ms. Clarke and the defendant.)

THE DEFENDANT: Yes, Your Honor.

THE COURT: I'm now going to have the Government to explain the terms of your plea agreement with the Government. I want you to listen to the explanation provided, because when the Government completes it I will ask you the question, "Are those the terms of your plea agreement with the Government as understand them?" And I want you to be in the position to respond to that question.

MR. LAPHAM: Your Honor, the terms of the agreement are as follows: the defendant agrees to plead guilty to all outstanding charges in Sacramento and in New Jersey. There will be a total of 13 counts. In return for a plea of guilty – that is an unconditional plea of guilty. In return, the Government agrees to withdraw the notice of intent to seek the death penalty. And the defendant understands that under those circumstances, he would be sentenced to a mandatory term of life imprisonment without possibility of release. There are also other conditions regarding payment of restitution. The defendant understands that restitution is required under the relevant statutes, as well as agreements as to the disgorgement of future earnings, if any, that are obtained by the defendant or on his behalf as a result of any writings, interviews, or access to the defendant in the future. I think that states the essential terms of the plea agreement. Your Honor, if I may, at this point, it might also be appropriate to ask

the defendant if whatever dissatisfaction he has historically had with counsel did not interfere with his decision with respect to this plea agreement and that he is satisfied with his counsel's representation with respect to their advice on this plea agreement.

THE COURT: That was a long question. I'm not sure what you want me to ask.

MR. LAPHAM: Well, I think he should be probed as to his specific – if he has any dissatisfaction with his counsel with respect to entry of this plea agreement.

THE COURT: Okay. Any problems with that, counsel for the defense, Mr. Denvir or Ms. Clarke? (Discussion off the record between Mr. Denvir and Ms. Clarke.

MR. DENVIR: I thought he had already answered that question, Your Honor, that he is prepared to proceed on sentencing with us, but if the Court has some questions about that . . .

THE COURT: I thought he had responded to the question too, but I will try to do what you have asked me to do, since it shouldn't cause any harm. Mr. Kaczynski, are you satisfied with the level of representation of your counsel in assisting you during this plea proceeding?

THE DEFENDANT: Yes, Your Honor. I am satisfied with that.

THE COURT: And I thought we had already covered the point of dissatisfaction you had with your counsel as far as other proceedings were concerned, did we not?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Government's counsel just set forth the terms of your plea agreement from the Government's perspective. Are those the terms of your plea agreement with the Government as you understand them?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has anyone made any other or different promise or assurance to you of any kind in an effort to induce you to enter a plea of guilty in this case?

THE DEFENDANT: No, Your Honor.

THE COURT: Has anyone attempted to any way to force or threaten you to plead guilty in this case?

THE DEFENDANT: No, Your Honor.

THE COURT: The offenses to which you are offering a plea of guilty are felony offenses. If your plea is accepted, you will be adjudged guilty of those offenses, and that adjudication may deprive you of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any kind of firearm. Are you aware of the valuable civil rights you may give up if you go forward with your intention and plead guilty?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you presently on probation or parole for any other offense?

THE DEFENDANT: No, Your Honor.

THE COURT: Please listen to the consequences of your plea. The maximum possible penalty provided by law for a plea of guilty to each and every count of both indictments is a mandatory sentence of life imprisonment without possibility of release and a fine of $3,250,000. You understand that, sir?

THE DEFENDANT: Yes, Your Honor.

THE COURT: If economic loss has been suffered by a victim as a result of this criminal conduct, the Court, in accordance with the Sentencing Reform Act, shall order you to make restitution unless the Court finds that, under the statute, restitution is not appropriate in this case. You will be required to disgorge any monies paid in whole or in part and regardless to whom the money is paid in return for writings, interviews or other information disclosed by you, including but not limited –

THE DEFENDANT: Your Honor, there seems to be a discrepancy here between what you're saying and the plea agreement as I have it here.

THE COURT: I've changed some of the words, but I thought it was identical. I thought the message was the same.

THE DEFENDANT: Your Honor, on mine –

MR. CLEARY: We had sent an earlier draft to chambers today. Some of that language has been changed.

THE COURT: Oh, I see. Well, my staff indicated to me that I need not worry about the changes. I thought they got that message from the parties. Has this been taken out?

MR. DENVIR: The wording's been changed on the disgorgement. It's just a little more precise.

THE COURT: What section is it?

MS. CLARKE: Page 4, Your Honor. Paragraph D.

MR. DENVIR: III-D. Roman numeral III-D.

THE COURT: (Accepts document.) Show this to the Government to make sure that I'm using the right document.

THE CLERK: (Complies.)

MR. LAPHAM: Your Honor, to avoid confusion, maybe I should just give you the original signed version of the plea agreement.

THE COURT: I have to end up with it anyway, so you might as well give it to me now.

MR. LAPHAM: Very good. (Complies.)

THE COURT: Where is it located in the original?

MR. LAPHAM: The disgorgement language is located on page 4, beginning at line 17. (Pause in the proceeding.)

THE COURT: Because I had to stop to focus on disgorgement, we need to go back to the restitution issue, because I didn't put a closure on that issue. I advised you of the consequence, but I didn't stop to determine if you understood that precise consequence. I'm going to read that again so that the record is clear. If economic loss has been suffered by a victim as a result of this criminal conduct, the Court, in accordance with the Sentencing Reform Act, shall order you to make restitution unless the Court finds that, under the statute, restitution is not appropriate in this case. You understand that is a consequence of your plea, sir?

THE DEFENDANT: Yes, Your Honor. I understand that.

THE COURT: You understand that, as a consequence of your plea, you have agreed that you shall disgorge any monies paid in whole or in part to you or on your behalf in return for writings, interviews or other information disclosed by you, including but not limited to access to you, photographs or drawings of or by you, or any other type of artifact or memorabilia to the United States Probation Office for restitution or other distribution to the victims of the Unabom events?

THE DEFENDANT: I understand that, Your Honor.

THE COURT: Okay. There will be a special assessment of $650 imposed for your guilty plea pursuant to federal law. Mr. Kaczynski, do you understand those possible consequences of your plea?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Under the Sentencing Reform Act of 1984, the United States Sentencing Commission has issued guidelines for judges to follow in determining the sentence in a criminal case. Have you and your attorneys talked about how the Sentencing Commission guidelines might apply to your case? (Discussion off the record between the defendant, Ms. Clarke and Mr. Denvir.)

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand that the Court will not be able to determine the guideline sentence for your case until after the pre-sentence report has been completed and your attorney and the Government have had an opportunity to object to any of the findings in that report?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand that after it has been determined what guideline applies to a case, the judge has the authority in some circumstances to impose a sentence that is more severe or less severe than the sentence called for by the guidelines?

THE DEFENDANT: Yes, Your Honor.

THE COURT: How about the question of appeal? Has that been waived?

MR. LAPHAM: Yes, Your Honor. It's contained at page 7, beginning at line 16.

THE COURT: Okay. Do you understand that by entering into the plea agreement you have entered with the Government, you will have waived or given up your right to appeal all or any part of your plea of guilty and anything else that occurs during this conviction hearing and anything that occurs during your sentencing hearing?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand that parole has been abolished and that if you plead guilty, you will spend the rest of your life in prison and you will never be released or paroled?

THE DEFENDANT: I understand that, Your Honor.

THE COURT: Do you understand that if the sentence is more severe than you expected, you will still be bound by your plea and will have no right to withdraw it?

THE DEFENDANT: I understand it, Your Honor.

THE COURT: Do you understand that if I do not accept the sentencing recommendation in your plea agreement, you will still be bound by your plea and will have no right to withdraw it?

THE DEFENDANT: I understand that, Your Honor.

THE COURT: Mr. Lapham, you were going to tell me about the "waiver of appeal" section of the plea agreement. Can you direct my attention to that again? I want to see if I missed something.

MR. LAPHAM: That was page 7, line 16. (Pause in the proceeding.)

THE COURT: Do you further understand that if you plead guilty, you will waive right to appeal any legal rulings made by the district court?

THE DEFENDANT: I understand that, Your Honor.

THE COURT: Do you understand that you have a right to plead not guilty to any offense charged against you and to persist in that plea, that you would then have the right to a trial by jury, during which you would also have the right to the assistance of counsel for your defense, the right to assist in the selection of that jury, the right to see and hear all the witnesses and have them cross-examined in your defense, the right on your own part to decline to testify unless you voluntarily elected to do so in your own defense, and the right to the issuance of subpoenas or compulsory process to compel the attendance of witnesses to testify in your defense, the right to require the Government to prove your guilt beyond a reasonable doubt, the right to appeal this conviction and your sentence and any rulings made by the district court? Do you understand you have all those rights?

THE DEFENDANT: I understand that, Your Honor.

THE COURT: Do you understand that by entering a plea of guilty, if that plea is accepted by the Court, there will be no trial of any kind and you will have waived or given up your right to a trial as well as those other rights which I've just described?

THE DEFENDANT: I understand that, Your Honor.

THE COURT: I'm now going to have the Government to state each of the essential elements of the offenses in the indictment so that I can be assured that the defendant understands the charges. After that is stated, Mr. Kaczynski, I will ask you the precise question, "Do you understand those charges?" The Government will now explain the elements, and the elements constitute the charges.

MR. LAPHAM: Thank you, Your Honor. Your Honor, there are three types of offenses in the two indictments. There are several counts of transportation of an explosive device with intent to kill or injure. With respect to that charge, the Government would be required to prove, number one, that transportation in interstate commerce; two, of an explosive; three, with the knowledge or intent that it would be used to kill, injure or intimidate any individual. With respect to the crime of mailing explosive device with intent to kill or injure, the Government would be required to prove, one, that the defendant knowingly deposited for mailing or knowingly caused to be delivered by mail a device or composition that could ignite or explode; and, two, that the defendant acted with the intent to kill or injure another. And with respect to the third type of offense charged in the two indictments, using a destructive device in relation to a crime of violence, the Government would be required to prove beyond a reasonable doubt that the defendant used or carried a bomb and that he did so during and in relation to a crime of violence, that crime of violence being the use of that bomb.

THE COURT: Mr. Kaczynski, do you understand those charges?

THE DEFENDANT: Yes, Your Honor. I understand them.

THE COURT: I'm now going to have the Government's attorney to make a representation concerning the facts the Government would be prepared to prove at trial. Again, Mr. Kaczynski, I want you to listen to the factual representation made by the Government's attorney, because after it's made, I will ask you the question, "Do you agree with the factual representation just made by the Government's attorney?" And I want you to be in a position to respond to the question. (Discussion off the record between the defendant and Mr. Denvir.)

MR. LAPHAM: Your Honor, what I propose to do is – the defendant has agreed to make full allocution as to all 16 of the Unabom devices; that would include charged as well as uncharged devices. The uncharged devices are relevant to showing – to the Government's proof of the charged devices. What I propose to do is first run down the charged devices, give a factual basis for each of those, and then go back to each of the uncharged devices and go through those, one by one. And what I would propose is, as I complete each, the factual basis for each device, to have the defendant queried as to his acceptance of the factual basis.

THE COURT: Okay.

MR. LAPHAM: Your Honor, with respect to Count number 1 in the Sacramento indictment, that charges a device which killed Hugh Scrutton. With respect to that, if this case were to proceed to trial, the Government would show that during 1985 the defendant constructed several bombs. During the fall of that year the defendant transported one of those bombs to Sacramento, California, where he placed that device behind a computer rental store called Rentech, which is located on Howe Avenue near Arden in Sacramento. That device was found by the owner of Rentech, Hugh Scrutton, as he was leaving through the rear entrance of that building. He, Mr. Scrutton, picked up that device or attempted to move that device, which was disguised as a scrap of wood with nails protruding from it. As he moved that device, the device exploded, causing pieces of shrapnel to enter Mr. Scrutton's heart and internal organs and killing him within approximately a few minutes. The Government would prove, if this case were to proceed to trial, that during the search of the defendant's cabin the Government found numerous entries in the defendant's journal that were written in numeric code. The Government found the key to that code among the defendant's effects and decrypted the code, and one of those entries read as follows: "Experiment 97, December 11, 1985" – which was the date that the Scrutton device was detonated – "I planted a bomb disguised to look like a scrap of lumber between Rentech Computer store in Sacramento. According to the Sacramento Bee, December 20th, the operator of the store was killed, quote unquote, blown to bits, on December 12th. Excellent. Humane way to eliminate somebody. He probably never felt a thing. $25,000 reward offered. Rather flattering. In that same cabin search, the Government located a number of experiments, totaling up to 245 experiments. One of those experiments, the one in the admission I just read, Experiment 97, contained the following passage. It reflected a bomb that was constructed during November of 1985, completed on December 8th, 1985, and the passage concludes, "The device was hidden inside a hollow piece of wood so that when the wood were to be grabbed or picked up, the bolts in the trigger would come out. The device was deployed on December 11th, 1985." December 27th is the next entry. "The device detonated with good results. It detonated on December 12th." Your Honor, that concludes the – oh, and in addition to that, the device contained an end plug, which is a component of the device, which contained the initials FC, which is a signature of the person who has been designated as the Unabomber. Forensic evidence also determined that the Rentech device was forensically similar to all other Unabom devices and was a virtual twin to a bomb which was placed in February 1987 behind a computer store in Salt Lake City. That would conclude the proffer as to the Scrutton bomb.

THE COURT: Mr. Kaczynski, do you agree with the factual representation just made by the Government's attorney?

THE DEFENDANT: Yes, Your Honor.

MR. LAPHAM: Your Honor, Counts 2 through 7 of the Sacramento indictment charge a bomb that was mailed to Drs. Charles Epstein and David Gelernter. And the factual basis for those offenses is as follows. During 1993 the defendant constructed two devices, bombs, which he then transported to Sacramento, California. On or about June 18, 1993, the defendant mailed those devices. One was mailed to Dr. Charles Epstein in Tiburon, California; the other was mailed to Dr. David Gelernter at Yale University in New Haven, Connecticut. At the same time those bombs were mailed, a letter was mailed to the New York Times essentially claiming responsibility for those two devices. The devices were opened by their recipients, causing very severe injuries to the two doctors. The defendant's cabin was searched, and the following – let me say, first, that those two devices were forensically similar to each other as well as to other Unabom devices. And the letter that I mentioned – actually, a different letter – in a letter to the New York Times dated April 20th, 1995, the Unabomber declared, quote, "After a long period of experimentation, we developed a type of bomb that does not require a pipe but is set off by a detonating cap that consists of a chlorate explosive packed into a piece of small diameter copper tubing. The detonating cap is a miniature pipe bomb. We used bombs of this type to blow up the genetics engineer Charles Epstein and the computer engineer David Gelernter." Your Honor, during a search of the defendant's cabin a carbon copy of this letter was found in the defendant's personal effects. Moreover, the defendant's experiment binders, which I've already made reference to, confirmed the statements made in the Times letter in several respects. They reflect a long period of experimentation which culminates in the development of a bomb of the type described in the New York Times letter. Experiment 225 reflects the construction of these two devices between January and June of 1993 and concludes, quote, "I sent these devices during June 1993. They detonated as they should have. The effect of both of them was adequate but no more than adequate." Your Honor, during the search of Mr. Kaczynski's cabin, the Government also obtained numerous articles pertaining to Drs. Epstein and Gelernter as well as articles referencing the bombings of those two individuals. And those articles referencing Drs. Epstein and Gelernter appeared in the papers prior to the June 1993 bombing. And that concludes the offer of proof as to those counts.

THE COURT: Mr. Kaczynski –

MS. CLARKE: Your Honor, I believe counsel misspoke regarding the newspaper articles. There were – Dr. Gelernter – there was an article about him, but not about Dr. Epstein. I believe counsel misspoke; there were no news articles regarding Dr. Epstein.

MR. LAPHAM: That's correct. Just Dr. Gelernter.

THE COURT: There is agreement on the correction made by your counsel. So with that correction in mind and everything else that the Government lawyer stated, do you agree with the factual representation just made by the Government's attorney, Mr. Kaczynski?

THE DEFENDANT: Yes, Your Honor.

MR. LAPHAM: Your Honor, with respect to Counts 8 through 10 of the Sacramento indictment, that charges a device which was mailed to the California Forestry Association and which was received on approximately April 20th, 1995 and killed Gilbert Murray. With respect to that device, the Government, if this case were to proceed to trial, would prove that during 1995 – 1994 and 1995, the defendant constructed a bomb which he transported to Sacramento – which he transported to the Bay Area and, from that location, mailed the device to the California Forestry Association in Sacramento, California. The package was addressed to William Dennison, the former president of the California Forestry Association. However, it was opened by Gilbert Murray, the current, at that time, president of the Forestry Association. In a letter to the New York Times dated June 24, 1995, the Unabomber declared after the bomb had detonated killing Mr. Murray: "We have no regret about the fact that our bomb blew up the wrong man, Gilbert Murray, instead of William Dennison, to whom it was addressed. Though Murray did not have Dennison's inflammatory style, he was pursuing the same goals, and he was probably pursuing them more effectively because of the very fact that he was not inflammatory." The letter went on to state,"it was reported that the bomb that killed Gil Murray was a pipe bomb. It was not a pipe bomb but was set off by a homemade detonating cap. The F.B.I.'s so-called experts should have been

able to determine this quickly and easily, especially because we indicated in an unpublished part of our letter – last letter to the New York Times that the majority of our bombs are no longer pipe bombs. It was also reported that the address label on this same bomb gave the name of the California Forestry Association incorrectly. This is false. The name was given correctly." Your Honor, during a search of the defendant's cabin the Government obtained a carbon copy and a handwritten draft of the foregoing letter. The Government also found letters which were mailed by the Unabomber, at the same time as that letter, to Professors Sharp and Roberts and Professor Gelernter, who I've previously mentioned. The cabin searchers also found a copy of a letter to a radical environmental group known as Earth First!, and that letter began: "This is a message from FC. The F.B.I. calls us Unabom. We are the people who recently assassinated the president of the California Forestry Association." Your Honor, the cabin searchers also located in that cabin a typewriter which was used to type the mailing labels on all the – the bomb 13 – that would be the Epstein and Gelernter bombing bombs, and also the Unabom correspondence that I have referred to. And, Your Honor, the cabin searchers also found handwritten notes reflecting bus schedules for a trip from Montana to the Bay Area in the March 1995 time period. The cabin searchers also found among one of the defendant's experiments, Experiment 245 – that was a partial experiment which chronicles the construction of the Murray device. And that would conclude the proffer as to those counts.

THE COURT: Mr. Kaczynski, do you agree with the factual representation just made by the Government's attorney?

THE DEFENDANT: Yes, Your Honor.

MR. LAPHAM: Your Honor, that concludes the proffer with respect to the counts in the Sacramento indictment. The New Jersey indictment contains three counts which relate to a bomb that was sent to Thomas Mosser in December of 1994. The Government's proffer with respect to that would be as follows.

THE COURT: All three counts, is that?

MR. LAPHAM: Yes.

THE COURT: All right.

MR. LAPHAM: Different charges, but all the same bomb.

THE COURT: Okay.

MR. LAPHAM: The Government would show that during 1994 the defendant constructed a bomb; that he transported that bomb on or around December of 1994 to the Bay Area, where he mailed the device to Thomas Mosser in New Jersey; that bomb was received at the Mosser family residence, was received by mail, was brought in by Mrs. Mosser, placed on the kitchen counter, and was later opened by Thomas Mosser, who was an executive with the national advertising firm of Burson- Marsteller. Mr. Mosser opened that device, opened that package, and it exploded, killing him almost instantly. The Government's proffer with respect to that bomb is as follows, or additional proffer. In Experiment 244 which was found in the defendant's cabin, the defendant describes constructing the Mosser bomb over a period of approximately five months, completing the device on or about October 14th, 1994. The experiment concludes, quote, "The device in Experiment 244 was used in December 1994, and it gave a totally satisfactory result." Your Honor, in a letter to the New York Times dated April 20th, 1995, the Unabomber stated in part, "We blew up Thomas Mosser last December because he was a Burston-Marsteller [sic] executive. Among other misdeeds, Burston- Marsteller [sic] helped Exxon clean up its public image after the Exxon Valdez incident. But we attacked Burston-Marsteller [sic] less for its specific misdeeds than on general principles. Burston-Marsteller [sic] is about the biggest organization in the public relations fields. This means that its business is the development of techniques for manipulating people's attitudes. It was for this more than for its actions in specific cases that we sent a bomb to an executive of this company." Your Honor, a carbon copy of that letter was found in the defendant's cabin. It is also worth pointing out, Your Honor, that that letter contained a number of misstatements, one of which was that Burson-Marsteller had anything to do with the Exxon Valdez cleanup; it did not. Also, Burson-Marsteller was misspelled. The first name, Burson, did not contain a "t." The relevance of that

is, during a search of the defendant's cabin, searchers also found a copy of the Earth First! journal dated June 21st, 1993, in which the statement was made that Burson-Marsteller did have responsibility for the Exxon Valdez incident, for the cleanup of the image over that incident. Furthermore, in that Earth First! article, the name Burson- Marsteller is misspelled in the same fashion it is misspelled in the Unabomber letter. Furthermore, during the search of the defendant's cabin, the Government found a letter written to Earth First!ers. Its title was "Suggestions for Earth First!ers from FC." That letter stated in part, "As for the Mosser bombing" – and I'm quoting now – "our attention was called to Burson-Marsteller by an article that appeared in Earth First!, Litha," which is the way of describing the edition of that journal, "June 21st, 1993, page 4." In that document, the letter to the Earth First!, the defendant states with respect to the mistake about Burson-Marsteller that "to us it makes little difference." Your Honor, the cabin searchers also found handwritten notes accurately setting forth bus schedules for a trip from Montana to the Bay Area for the December 1994 time period and a copy of the San Francisco Examiner which was dated December 2nd, 1994, which was the day immediately prior to the mailing of the Mosser bomb from the San Francisco Bay Area. Your Honor, we also found the typewriter which was used to type a mailing label for the Mosser device and for the Unabom correspondence related to the Mosser device. And that concludes the proffer with respect to the Mosser device.

THE COURT: Mr. Kaczynski, do you agree with the factual representation just made by the Government's attorney? (Discussion off the record between the defendant and Ms. Clarke.)

THE DEFENDANT: Yes, Your Honor.

MR. LAPHAM: Your Honor, I should also point out that this is a partial proffer of the evidence that the Government would produce at trial. There is also a wealth of forensic evidence that the Government would present at trial relating these bombs to all the other Unabom devices, as well as forensic evidence which would relate these bombs to evidence found in the cabin, materials analysis of various components of the bombs, as well as bomb components which were found to be forensically similar to the Unabom devices.

THE COURT: You need no affirmation from Mr. Kaczynski as to what you just told me, though, right?

MR. LAPHAM: That's correct.

THE COURT: That you don't?

MR. LAPHAM: No.

THE COURT: Okay.

MR. LAPHAM: Your Honor, with the permission of the Court, I'll move on to the uncharged devices.

THE COURT: Okay.

MR. LAPHAM: Beginning with device number 1, that was a device which was placed in a parking lot at the University of Illinois Chicago Circle campus on or about May 5th, 1978. The Government's proffer would be that that device, that package, was found by a local resident living near the Chicago Circle campus. The device was addressed to Professor E.J. Smith, School of Engineering, Rensselaer Polytechnic Institute, Troy, New York. The return address was Professor Buckley Crist, Jr., Northwestern Technical Institute, Evanston, Illinois, which is a suburb of Chicago. After first attempting to mail the device, Ms. Gutierrez, the person who found the package, found that it wouldn't fit in a mailbox, took it home, contacted the return addressee on the package, Professor Buckley Crist, and ultimately returned the package to him. Professor Crist said he knew nothing about the package but he would receive it. He caused the package to be opened the following day, and it exploded with somewhat harmless effect because it was not a very well-constructed device. During the search of the defendant's cabin the Government found a document written by the defendant in which he states in part as follows, quote, "August 21, 1978: I came back to the Chicago area in May, mainly for one reason: so that I could more safely attempt to murder a scientist, businessman or the like. Before leaving Montana I made a bomb in a kind of box, designed to explode when the box was opened . . . I picked the name of the electrical engineering professor out of the catalog of the Rensselaer Polytechnic Institute and addressed

the bomb – a package to him." The document then goes on to describe how, after being unable to fit in the mailbox, the defendant was forced to leave it in the parking lot near the Science and Technology Building at the University of Illinois Chicago Circle campus, hoping that it would be found by some good Samaritan and that it would be either mailed or opened by that person, causing injuries to whatever individual would open it. And, Your Honor, we can corroborate various statements regarding that admission. There was no newspaper accounts of that article that we could locate in any of the local Chicago area, so there would be no information available to anyone but the bomber himself. Professor E.J. Smith was a professor at Rensselaer Polytechnic and his name did appear in the catalog for the school for the relevant time period. And that would conclude our proffer with respect to bomb number 1.

THE COURT: Mr. Kaczynski, do you agree with the factual representation just made by Government counsel?

THE DEFENDANT: Yes, Your Honor.

MR. LAPHAM: Your Honor, with respect to bomb number 2, that was a bomb which was placed in a graduate student area, a shared area of many graduate student offices, on May 9th, 1979, at Northwestern University, and was in the shape of or the form of a cigar box, which was constructed so that it would detonate upon opening up the lid of the box. The box was found by a graduate student, John Harris. When Mr. Harris picked up the box and lifted the lid, it exploded, causing several cuts and burns and momentary blindness to Mr. Harris as a result of the flash of light. During the search of the defendant's cabin, the Government found a handwritten document in which the defendant states in part, quote, "May 31, 1979: Earlier this month I left a bomb in a room marked Graduate Student Research at the Technological Institute at Northwestern University. The bomb was in a cigar box and was arranged to go off when the box was opened. I did it this way instead of mailing the bomb to someone because an unexpected package in the mail might arouse suspicion. . . . According to the newspaper, a graduate researcher at Northwestern was hospitalized with cuts and burns around the eyes as a result of my bomb," paren, "(Tribune May 9)," close paren, close quote. Your Honor, the Government did locate a May 19 Chicago Tribune article – actually, it was a May 10th Chicago Tribune article. It couldn't have been May 9th, because that's the date of the explosion. And that May 10th article set forth the facts contained in that admission. That would conclude the proffer on bomb number 2.

THE COURT: Mr. Kaczynski, do you agree with the factual representation just made by the Government's attorney?

THE DEFENDANT: Yes, Your Honor.

MR. LAPHAM: Your Honor, with respect to bomb number 3, that was a device that was mailed in such a way that it would be placed on board a flight from Chicago to the Washington, D.C. area. It in fact was placed on American Airlines Flight 444, which left Chicago on November 15th, 1979 bound for Washington, D.C. Your Honor, the Government's proffer would be that when that flight approached cruising altitude of about 30,000 feet, the flight crew noticed a bump and a slight loss of – or overpressurization in the cabin. They didn't note anything in addition at that time. Later on, about 20 minutes further into the flight, smoke started appearing in the cabin and cockpit section of the airplane. Several attempts were made to locate the source of the smoke, and those attempts appeared futile. Later on, still further into the flight, smoke continued to fill the cockpit and the cabin portions of the airplane to such an extent that visibility became untenable or very difficult outside the front of the window, causing the crew great concern as to whether or not the plane would be able to land. The crew declared an emergency situation, called Washington Center and asked for priority landing at their intended destination, National Airport. As they approached Washington, D.C., they altered plans yet again to land at Dulles International Airport, which was closer to their flight path. They dropped oxygen masks in both the cockpit and the cabin area, and they were able to effect a successful landing. After the landing, a search of the plane discovered a bomb in a mail pod underneath the passenger section of the cabin. That bomb did not breach the hull of the airplane because it was surrounded by densely packed mail in that mail pod. In a coded journal entry dated December 29, 1979, the defendant states

in part as follows – and incidentally, Your Honor, that was a bomb that was triggered by a barometric device that was placed in the bomb. It also had a back-up device so if the barometric switch didn't work, it would detonate upon an individual opening the package. And the quote is as follows: "In some of my notes I mentioned a plan for revenge on society. Plan was to blow up airliner in flight. Late summer and early autumn I constructed device. Much expense because had to go to Great Falls to buy materials, including barometer and many boxes of cartridges for the powder. I put more than a quart of smokeless powder in a can, rigged barometer so device would explode at 2,000 feet or conceivably as high as 3,500 feet. Due to variation of atmospheric pressure. Late October mailed package from Chicago priority mail so it would go by air. Unfortunately plane not destroyed. Bomb too weak . . . Bomb did not accomplish much. Probably destroyed some mail. Papers said it was with mail sacks and there was smoldering fire. No damage to plane. At least it gave them a good scare. Much thick smoke came into passenger space, plane landed at airport other than its destination because of this." Your Honor, the cabin searchers also discovered handwritten notes by the defendant and calculations referring to the cruising altitude of passenger airplanes and the cabin pressure of most airplanes and a chart showing the atmospheric pressure versus altitude. Also, in a letter to the New York Times dated April 20th, 1995, the Unabomber stated, quote, "In one case we attempted unsuccessfully to blow up an airliner. The idea was to kill a lot of business people who we assumed would constitute the majority of passengers," unquote. Your Honor, a carbon copy of that letter was found in the defendant's cabin. And that concludes the proffer for bomb number 3.

THE COURT: Mr. Kaczynski, do you agree with the factual representation just made by the Government's attorney?

THE DEFENDANT: Yes, Your Honor.

MR. LAPHAM: Your Honor, with respect to bomb number 4, that was a bomb which was mailed on or about – or received on or about June 10th, 1980 by Percy Wood who was then the president of United Airlines. Mr. Wood opened that package and as he did so, the bomb detonated, causing Mr. Wood injuries to various portions of his body. Approximately a week before Mr. Wood received that package, he had received a letter from an individual named Enoch Fischer stating that he, Mr. Wood, would be receiving a book entitled Ice Brothers which the author of the letter recommended that Mr. Wood read. When Wood opened the package, the bomb that he had received in the mail on June 10th, 1980, it in fact contained a book called Ice Brothers. When he opened the cover of the book, it exploded. In a coded passage dated August 18, 1980 which was found in the defendant's cabin, the defendant writes, "In June 1980 I sent a bomb to P.A. Wood, president of United Airlines." In the remainder of that passage, the defendant notes that the device failed to perform as desired and speculates as to what the cause of the failure was. In another partially coded entry dated September 15th, 1980, the defendant expresses his anger over jet noise in the area around his cabin and states, quote, "After complicated preparation I succeeded in injuring the president of United Airlines. But he was only one of a vast army of people who directly and indirectly are responsible for the jets." Your Honor, searchers also found in the cabin a handwritten document entitled, quote, "How to Hit an Exxon Exec," which discussed sending a book-like package which concealed a bomb to the target's home, preceded by a letter. Your Honor, forensic examination of the bomb also revealed, among other things, that the bomb contained a metal tag stamped with the initials FC, and this was the first appearance of those initials with respect to the individual who ultimately became known as the Unabomber. That concludes the proffer as to bomb 4.

THE COURT: Mr. Kaczynski, do you agree with the factual representation just made by the Government attorney?

THE DEFENDANT: Yes, Your Honor.

MR. LAPHAM: Your Honor, with respect to bomb 5, that was a device – it was a firebomb which was placed outside a classroom at the business classroom building of the University of Utah on October 8th, 1981. And the Government would proffer with respect to that bomb as follows. That bomb was observed by two students exiting a typing class in that building. One of the students went over to the

device, picked it up, held it at eye level for several minutes and as he did so, he felt a stick drop out the bottom of the device. He made several attempts to push the stick back up into the device with – but each time it would fall out the bottom again. At that point, thinking that the package might contain a bomb, the student notified campus personnel, who in turn notified bomb squad authorities, who arrived on the scene and disrupted the device without incident, rendered it safe. The device, after forensic analysis, was proven to consist of a partially filled metal one-gallon gas can which contained a pipe bomb suspended inside. The bomb was designed to detonate when it was picked up. At that point, a drop stick would drop out the bottom part of the way, making contact with the electrical circuit and detonating the device. In a coded journal entry dated February 22nd, 1982 which was found in the defendant's cabin, the defendant states in part, "Last fall I attempted a bombing and spent nearly three hundred bucks just for travel expenses, motel, clothing for disguise, etc. Aside from cost of materials for bomb. And then the thing failed to explode. Damn. This was the firebomb found in the University of Utah business school outside door of room containing some computer stuff." In his April 21, 1995 letter to the New York Times, the Unabomber states in part, quote, "As for the bomb planted at the business school of the University of Utah that was a botched operation. We won't say how or why it was botched because we don't want to give the F.B.I. any clues. No one was hurt by that bomb." The carbon copy of this letter was found in the defendant's cabin. Your Honor, searchers also found a carbon copy of the letter which the defendant sent to Penthouse publisher Bob Guiccione together with a copy of the manifesto. In that letter the Unabomber references another letter which contained the initials FC, which stood for Freedom Club. Your Honor, that letter, the Freedom Club letter to the San Francisco Examiner, was also found in the cabin. Although the Examiner had no record of receiving that letter, the letter contained a handwritten notation in the handwriting of the defendant which indicated that it was mailed in December 1985. That letter states in part, "We are also responsible for some earlier bombing attempts; among others . . . the firebomb planted at the business school of the University of Utah which never went off." Your Honor, finally, one of the defendant's admissions that I've already quoted reflects the defendant's use of disguises. We found other entries in the defendant's writings in the cabin which reflected liberal use of disguises in the purchasing of bomb components as well as the placing of bombs. And that would conclude the proffer with respect to bomb 5.

THE COURT: Mr. Kaczynski, do you agree with the factual representation just made by the Government's attorney?

THE DEFENDANT: Yes, Your Honor.

MR. LAPHAM: Your Honor, with respect to bomb 6, that was a bomb that was mailed to Professor Patrick Fischer. Professor Fischer was formerly a professor at Penn State University. The package was mailed to him at that address. However, at the time it was mailed, he had moved on to Vanderbilt University. That package was then forwarded to him at Vanderbilt, and it was opened on May 5th, 1982 by his secretary Janet Smith. That device exploded upon opening, causing serious injuries to Ms. Smith. Forensic examination of the bomb revealed, among other things, a metal tag bearing the initials FC and a mailing label which had been typed on the typewriter which I've already referred to that was found in the cabin. Furthermore, an undated coded entry from the defendant's journal states, quote, "May about 1982 I sent a bomb to a computer expert named Patrick Fischer. His secretary opened it. One newspaper said she was in hospital? In good condition? With arm and chest cuts. Other newspaper said bomb drove fragments of wood into her flesh. But no indication that she was permanently disabled. Frustrating that I can't seem to make a lethal bomb. Used shotgun powder in this last, hoping that it would do better than rifle powder. Next I must try another gasoline bomb, different design. Though gasoline bomb I tried last fall did not go off. Revenge attempts have been gobbling much time, impeding other work. But I must succeed, must get revenge." Also, in a previously referenced letter to the San Francisco Examiner, a copy of which was found in the cabin, the defendant states, "We are also responsible for some earlier bombing attempts; among others . . . the mail bomb that injured the secretary of computer expert Patrick Fischer of Vanderbilt University three and a half years ago." Your Honor, the defendant – the Unabomber also claims credit for this bomb in a June

24th, 1995 letter to the New York Times. That letter was found in the defendant's cabin, a handwritten version of that letter, and one of the defendant's experiments also claims credit for this device. And that would conclude the proffer with respect to bomb 6. (Discussion off the record between the defendant and Ms. Clarke. And Mr. Denvir.)

MS. CLARKE: Your Honor, could I have just one moment.

THE COURT: Yes. (Discussion off the record between Ms. Clarke and Mr. Lapham.)

MR. LAPHAM: Your Honor, it appears there is some question whether the Patrick Fischer device was mentioned in the defendant's experiments. For the purpose of this proffer, I can withdraw that statement.

THE COURT: Okay. Mr. Kaczynski, deeming that statement withdrawn, do you agree with the factual representation just made by the Government's attorney?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay.

MR. LAPHAM: Your Honor, with respect to bomb number 7, that was a device that was placed in Room 411 of Cory Hall on the campus of the University of California at Berkeley on or about July 2nd, 1982. Professor Diogenes Angelakos located that device, which was disguised to appear to be some type of test equipment. The device was actually a gasoline firebomb which was designed to detonate when the device was lifted by a handle which sat on top of the device. That device contained a note which stated, "Wu – it works! I told you it would." Signed – "RV." The typing on that note was consistent with the typewriter which was found in defendant's cabin. We also found a journal entry, coded journal entry, among the defendant's personal effects in his cabin which claimed responsibility for that device in the following terms: "Not long after foregoing" – relating to the Fischer device – "I think in June or July I went to University California Berkeley and placed in computer science building a bomb consisting of a pipe bomb in a gallon can of gasoline. According to newspaper, vice chairman of computer science department picked it up. He was considered to be out of danger of losing any fingers but would need surgery for bone and tendon damage to hand. Apparently pipe bomb went off but did not ignite gasoline. I don't understand it. Frustrated. Traveling expenses for raids such as the foregoing are very hard on my slender financial resources." Your Honor, in the 1985 letter to the San Francisco Examiner which I've already referred to, the defendant also claimed responsibility for this device. And that would conclude the proffer for bomb number 7.

THE COURT: Mr. Kaczynski, do you agree with the factual representation just made by the Government's attorney?

THE DEFENDANT: Yes, Your Honor.

MR. LAPHAM: Your Honor, with respect to bomb number 8, that was a device which was also left in a room at Cory Hall on the campus of University of California at Berkeley. This device was left there on May 15th, 1985 and was made to appear like a black vinyl three-ring binder, on top of which was a plastic file box. The device was designed to detonate when the binder was opened. The forensic analysis of the bomb revealed, among other things, that it contained a metal end plug, which is a component of the bomb and which bore the initials FC. Your Honor, in a lengthy coded journal entry dated June 1st, 1985 which pertains to this bomb, the defendant claims responsibility for that device in the following terms. "Success at last after many failures reported in these notes. Took me year and a half of intensive effort, largely neglecting other work to develop effective type bomb . . . May 8 I planted a small bomb in the computer science department at Berkeley. This is apparatus number 2, Experiment 83, in my notebooks. At same time I mailed a larger bomb to Boeing Corporation, Auburn, Washington. Outcome of Boeing bomb unknown. Berkeley bomb did well for its size. It was sprung by Air Force pilot, 26 years old, name Hauser, working on master's degree in electrical engineering. He probably would have been killed if so positioned relative to bomb as to take the fragments in his body. As it were, mainly his right arm was hit. Witnesses said, quote, 'Whole arm was exploded.' 'Blood all over the place.' One newspaper said arm was 'mangled.' Another said it was 'shattered' and that he would never recover full use of arm and hand. Also there was damage to one eye. One paper said that

the small computer lab was 'destroyed.' This is improbable." Later on he states, "I was relieved to read what kind of guy sprang the trap. I had worried about possibility that some young kid, undergrad, not even computer science major might get it. But this guy clearly typical member of the technician class. Might even be one of the guys that has flown those fucking jets over my home. This gives great relief to my choking, frustrated anger and sense of impotence against the system. At same time, must admit I feel badly about having crippled this man's arm. It has been bothering me a good deal. This is embarrassing because while my feelings are partly from pity, I am sure they come largely from the training, propaganda, brainwashing we all get, conditioning us to be scared by the idea of doing certain things. It is shameful to be under the sway of this brainwashing. But do not get the idea that I regret what I did. Relief of frustrated anger outweighs uncomfortable conscience. I would do it all over again." Later on, the defendant states, "Further search of newspapers yielded . . . Hauser's arm was severed or nearly severed. Tips of three fingers torn off. Use of arm and hand will be permanently impaired. To what degree not known. Hauser, father of two kids. He was working toward Ph.D, contrary to other paper that said masters. He was afraid his 'dream,'" quote, unquote, "was ruined. Dream was to be an astronaut. Imagine a grown man whose dream is to be an astronaut. I am no longer bothered by this guy partly because I just 'got over it' with time, partly because his aspiration was so ignoble." And, Your Honor, that statement refers to an Experiment 83 which we found among the defendant's experiments in the cabin. That describes assembling this bomb during the March and April 1985 time period and concludes, quote, "This device did detonate, producing good results." And elsewhere in the experiments, the defendant sets forth an idea for placing a bomb in Cory Hall at the University of Berkeley which consists of a loose-leaf binder on top of a plastic box. And I didn't state it earlier, but the victim was John Hauser, who was an Air Force captain at the time training to be an astronaut. He received his acceptance into the astronaut program one week after being injured by this device. And this device also contained an end plug bearing the initials FC. That would conclude the proffer on bomb 8.

THE COURT: Mr. Kaczynski, do you agree with the factual representation just made by the Government's attorney?

THE DEFENDANT: Yes, Your Honor.

MR. LAPHAM: Your Honor with respect to bomb 9, that was a device that was constructed at the same time as the Hauser device. And that's referred to also in the lengthy passage, coded passage that I just read. That device was received by Boeing Aircraft in Auburn, Washington on or about May 16th, 1985. It was postmarked May 8th, 1985 from Oakland, California. And that bomb – it was suspected of being a bomb. Several attempts were made to open that package prior to any suspicion that it was a bomb. That attempts proved unsuccessful, and during those attempts fortunately the bomb did not detonate. The bomb was rendered safe by bomb disposal personnel. And in the lengthy quoted passage that I just described with reference to the Hauser device, that passage reflects that the bomb that was mailed to Boeing was constructed pursuant to Experiment 82. The Experiment 82 was located among the defendant's effects in the cabin, and the defendant indeed describes assembling the Boeing bomb between February and April 1985 but states, "Result unknown." In a later passage, however, the defendant records, quote, "Now," parentheses, "(1993), I know that this device was discovered and disassembled before the triggers were released." And that would conclude the proffer as to bomb 9.

THE COURT: Mr. Kaczynski, do you agree with the factual representation just made by the Government's attorney?

THE DEFENDANT: Yes, Your Honor.

MR. LAPHAM: Your Honor, with respect to bomb 10, that was a device which was received on November 15th, 1985 by Dr. James McConnell, a professor at the University of Michigan. Professor McConnell's assistant, Nick Suino, opened that device and was injured when the bomb exploded. Forensic analysis of the bomb revealed, among other things, that the initials FC were stamped on one of the metal end plugs and that the mailing label envelope were all typed on the typewriter found in the defendant's cabin. Your Honor, that device was preceded by a letter or it was accompanied by a letter purportedly from an individual named Ralph Kloppenburg. That letter explained that the package con-

tained a manuscript which Mr. Kloppenburg wished Professor McConnell to review. When the package is opened up, it appears to be a ream of paper which is hollowed out with only the edges, the borders, remaining. Inside that ream of paper was concealed a bomb. That is the bomb that exploded when it was opened by Mr. Suino. In a coded passage that was found in the defendant's cabin, the defendant states, "Experiment 100. Mid-November 1985 I sent bomb in mail to James V. McConnell, behavior modification researcher at University of Michigan. Only minor injuries to McConnell's assistant. Deflagrated, did not detonate. Must be either pipe was a little weak or loading density of explosives a shade too high at failure." Your Honor, during a search of the cabin, the Government also found Experiment 100. In that experiment, the defendant describes construction of the McDonnell device and concludes, quote, "We placed enough postage on the package for zone 8 and for 7 pounds. We sent the package on November 12, 1985." The next entry is December 17. That states, "We have learned that the package was received and opened, and that the device ignited. But, apparently, that it did not detonate, but rather deflagrated. A total failure." And, Your Honor, a carbon copy of the Kloppenburg letter was also found in the defendant's cabin. On that letter was a Spanish notation which translates as follows: "Letter mailed with the Experiment 100 package. The letter was in the envelope taped to the package. The envelope was addressed but had no postage. The package itself had enough postage for the package and the letter." There were also references to Professor McConnell found in the defendant's cabin. And that would conclude the proffer as to bomb 10.

THE COURT: Mr. Kaczynski, do you agree with the factual representation just made by the Government's attorney?

THE DEFENDANT: Yes, Your Honor.

MR. LAPHAM: Your Honor, finally, as to bomb 12, that was a device that was placed behind CAAMS computer store in Salt Lake City, Utah on February 20th, 1987. Your Honor, I previously referred to that device as being a near twin to the device that was placed behind the Rentech computer store in Sacramento, California, which was one of the charged devices in the Sacramento indictment. That device also contained an end plug bearing the initials FC. That device was placed in a parking lot in the same manner or similar manner as with the Rentech device. That device was found by one of the employees, one of the co-owners of CAAMS computer store, Gary Wright. Mr. Wright picked up that device or attempted to pick that device up, and upon movement of that device, it exploded, causing some injuries to Mr. Wright. In Experiment 121 which was found until the defendant's cabin, the defendant describes constructing a bomb in November and December of 1986 and January of 1987. According to the notes contained in that experiment, the bomb was completed on February 8th, 1987. And then another passage concludes as follows: "The device was placed February 20th and worked the same day; it exploded and probably detonated but the results – as far as we could find out – did not enough to satisfy us." Your Honor, furthermore, an article pertaining to that device was found in the defendant's cabin and among his other personal effects. And that would conclude the proffer as to bomb 12.

THE COURT: Mr. Kaczynski, do you agree with the factual representation just made by the Government's attorney?

THE DEFENDANT: Yes, Your Honor.

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

THE COURT: Yes. (Discussion off the record among Government counsel.)

MR. LAPHAM: Your Honor, that's all.

THE COURT: Is there anything further for me to cover based on the matters in the plea agreement? (Discussion off the record among Government counsel).

MR. LAPHAM: We can't think of anything, Your Honor. Mr. Kaczynski, how do you now plead to the charges in Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 of the indictment in this case, and Counts 1, 2 and 3 of the indictment in the District of New Jersey case: guilty or not guilty? (Discussion off the record between defendant and Mr. Denvir).

THE DEFENDANT: Guilty, Your Honor.

THE COURT: It is the finding of the Court in the case of United States vs. Theodore John Kaczynski that the defendant is fully competent and capable of entering an informed plea and that his plea of guilty is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offenses. His plea is therefore accepted, and he is now adjudged guilty of those offenses. Mr. Kaczynski, a written pre-sentence report will be prepared by the United States Probation Office to assist the Court in sentencing. You will be asked to give information for the report, and your attorneys may be present if you wish. I shall permit you and your counsel the opportunity to read the pre-sentence report before the sentencing hearing. You shall also be afforded the opportunity to speak on your behalf at the sentencing hearing. I'm going to obtain a judgment and sentencing date from my deputy.

THE CLERK: May 15 at 1:30.

THE COURT: How about May 15 at 1:30 for judgment and sentencing?

MS. CLARKE: That's fine, Your Honor.

MR. LAPHAM: Fine, Your Honor.

THE COURT: A question before you leave. Is there any reason why I shouldn't release the jury?

MR. CLEARY: None, Your Honor.

THE COURT: How about filing the blank copy of the jury questionnaire?

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

MR. CLEARY: Fine, Your Honor.

THE COURT: Okay. Thank you.

MR. DENVIR: Thank you, Your Honor.

(Time noted: 3:22 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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REPORTER'S DAILY TRANSCRIPT JURY TRIAL DISCUSSION ON MOTIONS AND CHANGE OF PLEA VOLUME 27, pp. 3757-3848 THURSDAY, JANUARY 22, 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: ROBERT J. CLEARY STEPHEN P. FRECCERO R. STEVEN LAPHAM Special Attorneys to the United States Attorney General For the Defendant: OFFICE OF THE FEDERAL DEFENDER 801 "K" Street, Suite 1024 Sacramento, CA 95814 By: QUIN A. DENVIR Federal Defender, Eastern District of California JUDY CLARKE Executive Director, Federal Defenders of Eastern Washington and Idaho STERNBERG, SOWARDS & LAURENCE 604 Mission St., 9th floor San Francisco, CA 94105

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

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Jury Trial Day 11
Discussion on motions and change of plea
Jan. 22, 1998

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