

Jury Trial Day 2

Redacted chamber proceeding

Jan. 5, 1998

U.S. District Court, Eastern District, Sacramento Redacted chamber proceeding (released Jan. 15, 1998)

SACRAMENTO, CALIFORNIA

MONDAY, JANUARY 5, 1998, 8:02 A.M.

– oOo –

(The proceedings continue.) (The following discussion was had ex parte and in camera.)

THE COURT: I'd like defense counsel to state your appearance for the record. And then the record can reflect that in addition to the individuals that will be named by defense counsel, my courtroom deputy clerk is here with us in my chambers, along with United States marshal personnel.

MR. DENVIR: Quin Denvir, Judy Clarke and Gary Sowards for Mr. Kaczynski. And Mr. Kaczynski's present.

THE COURT: Okay. Go ahead, Mr. Kaczynski.

THE DEFENDANT: Now, I'm not an attorney and I'm not sure what the formalities are here, but I do not want any of what follows to constitute a waiver of any part of my attorney-client privilege. Of course, I will be relating things that have passed between me and my attorney, and I would hope that will be the case. [Redaction for attorney-client privilege and representation matters.]

THE COURT: I want to get defense counsel's input on procedure as to if you have ideas about how to proceed and looking at Mr. Kaczynski's concerns. And if I need to elaborate on what I'm seeking, I will do that.

MR. DENVIR: We were not aware that we would be having this hearing, so we have not had an opportunity to discuss it. Could we just have a moment to see if we have any thoughts in that regard, about procedure?

MS. CLARKE: Unless the Court has some thoughts about procedure.

MR. DENVIR: That would be fine.

THE COURT: Well, let me talk to Mr. Kaczynski for a moment then before you meet on that. What is your goal, Mr. Kaczynski, your ultimate goal as far as Mr. Serra is concerned? [Redaction for attorney-client privilege and representation matters.] (Pause in the proceeding.)

THE COURT: There are basically perhaps a couple of issues. One issue is a – what you have indicated is a communication issue; and the other issue is a representation issue focused on a change of counsel, possible change of counsel, at this stage of the proceeding. The latter issue is a public issue. The former issue, in my opinion, is not a public issue. The question is at what point, if we do go public with the other issue – we may not have to. I have an idea, but I hate to give my idea without getting input from defense counsel. But I will, if you want me to do that.

MR. DENVIR: We would, Your Honor.

MS. CLARKE: Please.

THE COURT: You would. I'm not clear as to my authority in doing what I'm thinking about doing. But what I think I should do is maybe appoint another lawyer to

assist Mr. Kaczynski with what he has characterized as conflict-type issues. I'm saying that in front of you. And then that way he would have a lawyer to communicate with the Court on those type of issues. He could communicate either personally or through a lawyer. And then we would have to discuss the other issue publicly. I don't foresee that the communications that Mr. Kaczynski has just related should be communications that should cause a breakdown in the attorney-client-relationship.

MR. DENVIR: It may be, though, Your Honor, to Mr. Kaczynski it has caused that or could cause that if it's confirmed. I think that's what he may be conveying to you. I'm not sure. [Redaction for attorney-client privilege and representation matters.]

MR. DENVIR: Your Honor, one thing that I think Mr. Kaczynski has said is that he would like to know whether Mr. Serra would in fact be available to represent him, and the Court might consider having – calling Mr. Serra or having us call him to see if he could make himself available on short notice to resolve that question for Mr. Kaczynski. And I guess that also could resolve the question of what he heard from his staff – this whole question – I don't know if that's any help either, seeing if Mr. Serra is available and wants to meet with Mr. Kaczynski to deal with whatever this communication question is and the question of continued – possible representation.

THE COURT: Do you want me to communicate with Mr. Serra's office, Mr. Kaczynski, as your attorney has indicated?

THE DEFENDANT: I think that would be a very good idea.

MR. DENVIR: Would you like that? Would that be helpful?

THE DEFENDANT: Yes, it would.

THE COURT: (Telephone conversation off the record.)

MR. DENVIR: Can I tell you something, Judge? I don't think his office opens until 9:15. When we've tried to call before – you can try, but we just wanted to alert you.

THE COURT: I've just been informed by Mr. Denvir that Mr. Serra's office may not open until 9:15. So I'm going to want to see if there's a pager number that we can use if his office is, in fact, not open.

THE COURT: (Telephone conversation off the record.) (Discussion off the record between Mr. Denvir and Ms. Clarke.)

THE COURT: (Telephone conversation off the record.) (Discussion off the record between Mr. Denvir and Mr. Kaczynski.)

THE COURT: It appears that you were correct, Mr. Denvir. His office doesn't open until around

9:00 o'clock. The message center that receives messages for the office doesn't have a pager number or any other means of communicating with the people in the office. We could probably communicate with people in the office as quick as the message center. Perhaps the only exception would be that if the office calls the message center upon arrival, then there would be a quicker access to the office if we left a message with the message center.

MR. DENVIR: The only thing I could suggest, Your Honor, if it would move up, is I know the names of some of the people in our office. I suppose we could just use our phone and see if they have a way of reaching Mr. Serra. When we tried to reach Mr. Serra before, we were told he did not have a phone. It may be difficult to reach him even at 9:00, but I could see. But I could call a couple people if I could find their home numbers. I would hope I could. That's the only thing I could think of that could move things along at all.

THE COURT: What is your idea as to what would occur should we reach Mr. Serra?

MS. CLARKE: Either Tony Serra could come over and meet with Ted and decide whether he could take over the case, or the Court could – I'm thinking, and I don't know how Ted feels about it, that maybe the Court is right about it, appointing another lawyer to talk to Mr. Serra and talk to Ted and try to straighten out that communication difficulty that seems to be today's problem. And, you know, I hate to suggest it but it seems to me, given the state of our affairs right now, maybe we need to take a couple days and see if the Court can find a very skilled and experienced practitioner who can get involved on this and put it on hold. It may not be resolved by a telephone call with Mr. Serra. It may take someone to talk to Mr. Serra and to talk to Ted.

THE DEFENDANT: It's not clear to me, Your Honor, how that would be more advantageous than me talking to Mr. Serra directly.

MS. CLARKE: It would just depend on whether he's available.

THE DEFENDANT: I see. In that case, I think Ms. Clarke's idea is good and I would agree.

MR. DENVIR: I think without going into a lot of detail about it, I think that what you've termed the communication problem may be a much deeper one that goes into the representation problem. I think Mr. Kaczynski's feelings may be that there's a much more fundamental breakdown in the attorney-client relationship. I'm not sure of that and –

THE DEFENDANT: Yes.

MR. DENVIR: But it's more than just – you've broken it into two questions, and I think that they may be very much joined in his mind. [Redaction for attorney-client privilege and representation matters.]

THE COURT: You have fine lawyers. I've seen a lot of lawyers appear in front of me in criminal cases. It's almost impossible for me as a jurist not to focus on the level of attorney skill when a criminal defendant's liberty is at stake, and I am very mindful of it. Lawyers might not know that, but it is an absolute fact.

THE DEFENDANT: Your Honor, I do not question my attorneys' abilities.

THE COURT: Okay. [Redaction for attorney-client privilege and representation matters.]

THE COURT: I wonder if we shouldn't focus on the communication issue even further. We need to go public with the other issue. We'll have to be somewhat careful as

we go public with the other issue. And let me assuage any concerns you may have, Mr. Kaczynski, because one of the opening statements you made to me at the beginning of this hearing is you wanted to inform me that it was your hope that when you share an attorney-client communications that they wouldn't be made public. And to the extent I can provide you assurance under law, I will do my best to keep what I construe to be attorney-client communications private.

THE DEFENDANT: Thank you.

THE COURT: But the question as to whether or not there'll be a change of counsel, that question in the abstract is a public issue. And we would have to go public with that issue at some point in time, because the Government would have an opinion as to that particular issue.

MR. DENVIR: Could I say something on that, Your Honor? I would hope that if it did go public, the fact that he would want a change of counsel would be the public part. The reasons seem to me to be so intertwined with attorney-client issues and the Government would really have no say in that; really that's something the Court would deal with, the fact of a request for change of counsel, would that occur outside of the Court, how we'd deal with it – but the reasons to me seem to be the type of attorney-client reasons that the Government should have no access to. If it's a dividing line I'm suggesting that, at least.

THE COURT: I understand your position, and conceptually I agree with you. I'm now wondering whether I should communicate with you separately. I don't want to communicate with Mr. Kaczynski separately from counsel. I want counsel to be present when I communicate with Mr. Kaczynski.

MR. DENVIR: Although we have no problem with that, Your Honor, if you felt there was any advantage to it in resolving matters.

THE COURT: I don't see any advantage to it, because Mr. Kaczynski doesn't appear to have difficulties communicating with me with counsel present. Is that correct?

THE DEFENDANT: That's correct.

THE COURT: I'm wondering if there's an advantage to communicating with counsel separately. And if not, then I can proceed with something else.

MR. DENVIR: Would there be a particular area the Court would want to discuss with us?

THE DEFENDANT: I have no objection if you want to.

THE COURT: They may not see a need to doing it either.

MR. DENVIR: I don't think there's any particular area that we feel that we need to address without Mr. Kaczynski here, unless the Court had some thought of an area that might – that we should consider.

THE COURT: Fine. [Redaction for attorney-client privilege and representation matters.]

THE COURT: Let me interrupt you. I'm now going to talk to my deputy clerk, because it is clear we're not going to be able to proceed at least before 9:30. Does everyone agree?

MR. DENVIR: Absolutely.

THE DEFENDANT: (Nods head up and down.) Right.

THE COURT: Would you tell the Government and the people in the courtroom that we will not proceed before 9:30. Let the jury know that a matter has come up that we are discussing. Tell them that I'm sorry for the delay, that these things sometimes occur in cases, and that we will probably not proceed before 9:30. (The clerk left chambers.)

MS. CLARKE: Could I grab some notes from counsel table and be right back.

THE COURT: Sure. (Ms. Clarke left chambers.) [Redaction for attorney-client privilege and representation matters.]

THE COURT: Let me ask you a question. Do you have any problems if I call a lawyer right now?

MR. DENVIR: No.

THE COURT: I am thinking about appointing another lawyer.

MR. DENVIR: I think it would be very helpful. I think Ted would like that.

THE DEFENDANT: I think that would be good. (The judge left chambers.)

MR. DENVIR: You feel better about that? And that doesn't foreclose – it would just give you someone . . .

THE DEFENDANT: Yes. (Pause in the proceeding.)

THE COURT: I have called a lawyer so that I have the option of appointing another lawyer to assist Mr. Kaczynski in some of the areas that could be construed as areas where he has a different opinion than his present counsel. I'm not clear that I am required to do that, although there is a case that seems to suggest that a judge should at least consider that approach. The lawyer I've called is Bob Holley. Any problems with that lawyer?

MS. CLARKE: The only information that I can give the Court is that Mr. Holley has been retained by one of the news stations to make comments, and he's been a running commentator on the TV throughout the jury selection and yesterday on one of the national news programs. It simply may be awkward. I only tell the Court that. I don't know what that means. And we have talked to him on a number of occasions.

MR. DENVIR: We have, your Honor. Nothing of great moment, but at various times he's talked to us because he was doing that media type work.

THE COURT: Have you talked to Kevin Clymo?

MR. DENVIR: No. And the other two lawyers that come to mind that we've had no contact with would be Clyde Blackmon and Chris Wing. And they have had no media contact that we know of, and none of us have said a word to either one of them. And I haven't seen them quoted in the media. They're among the small group who hasn't been quoted.

THE COURT: Okay. Let me keep the reporter present. (Whereupon, the Judge left chambers.) (Judge present.)

THE COURT: Okay. Kevin Clymo is coming over. In light of what you said about Bob Holley, I'm trying to reach him through my staff so that he can do other

things. I think I'm supposed to evaluate the problem that's presented by a criminal defendant, yourself, Mr. Kaczynski, and then not only ask the defendant questions but ask his counsel questions. I haven't asked your lawyers questions yet because your lawyers have suggested that perhaps I should communicate with Mr. Serra's office. And I'm assuming that when I communicate with Mr. Serra's office, it's possible that this matter could be resolved and we could proceed on with the trial. And so that's why I'm taking this approach.

THE DEFENDANT: I don't think it's likely that the matter can be resolved that easily. My lawyers have suggested that I should make it clear to you what I want. And what I'm looking for is a change of counsel.

THE COURT: That presents a public issue. I'm going to analyze the law. I have that on my computer system concerning that issue. (Whereupon, the Judge left chambers.) (Judge present.)

THE COURT: I just spoke to a secretary in Tony Serra's office. He apparently has more than one secretary. She could not verify whether or not he's even going to come into the office. She thinks it's possible that he's on vacation right now and couldn't give me details about that. Well, a request for a change of counsel at this stage of the proceeding is a public issue, and so we would have to go public with that question. The government I'm certain will have some input on the question. The question is whether we need to consider matters in this private session before we go public. [Redaction for attorney-client privilege and representation matters.]

THE COURT: The case cited by the Government – I don't know if you had a chance to read that case, was a 1997 decision, I believe, dealt with a sentencing question. It involved a dispute between a criminal defendant and his lawyer, and the judge covered the dispute during a proceeding and asked the criminal defendant and the lawyer matters that ended up with them being in contradiction with each other on particular points. And the Ninth Circuit in that decision – although maybe it's somewhat fact bound, but it opined at the moment the judge conducted the proceeding in such a way that unearthed a conflict in the positions of the criminal defendant and his lawyer, well, then, as to the area of the conflict, the lawyer was basically not representing the criminal defendant and the criminal defendant was proceeding pro se as to those matters. I'm only relating what's on my mind. I recall reading the decision; I was somewhat surprised by it because there is often what could be characterized as contradictions between a criminal defendant and his or her client and, you don't appoint a lawyer in those situations. You sort of address them and they get resolved and the Court makes findings sometimes and then you go forward. But because of the circuit's holding that the lawyer – as I understand it, in essence didn't represent the client during the sentencing phase, I'm thinking that I need to ask questions of the lawyers concerning the things that Mr. Kaczynski is telling me, and I'm assuming that a conflict could surface. I don't know if that's true or not. But I thought that at that moment that's when Mr. Kaczynski should have another lawyer present.

MR. DENVIR: We would agree, Your Honor. You certainly have the discretion to appoint another attorney for Mr. Kaczynski to advise him on this concern he has with his present client [sic], and if there is that type of proceedings, we would urge you to do that, particularly given this is a capital case. He would like to have –

THE DEFENDANT: (Nods head up and down.)

MR. DENVIR: He would be more comfortable having an attorney who could speak to for him as needed.

THE COURT: And in doing what I'm doing, Mr. Kaczynski, I'm not indicating to you that I think you should switch lawyers. I think you have very competent lawyers representing you. But you've got some concerns that we're going to have to address, and I'm just trying to create the appropriate vehicle to address those concerns. So my thought, as far as procedure is concerned, is that we will first address those concerns in camera, ex parte. And then we will probably have to go into a public proceeding. Maybe we'll get the matters resolved ex parte in camera and when we go to the public proceeding Mr. Kaczynski will in fact opt to be represented by his present counsel. But if that's not what he tells me at the end of the proceeding, then we will have to address the matter publicly and allow the Government an opportunity to give its opinion. So with that in mind, we're going to have to wait a few minutes until Mr. Clymo appears. I don't mind leaving if you want to communicate with each other about other matters.

THE DEFENDANT: I don't think – I can't think of anything that I would want to say to my lawyers at the moment. [Redaction for attorney-client privilege and representation matters.] (Discussion off the record between the clerk and the Court.)

MR. SOWARDS: You might want to use this one (indicating), Your Honor. The bottom lines on some of these are a bit light. You can probably read them, but –

THE COURT: I should file this in the action. What's the lawyers' opinion?

MS. CLARKE: Under seal.

THE COURT: Under seal?

MR. DENVIR: Yes.

THE COURT: Can I give you this Xerox copy and I take the original?

THE DEFENDANT: Yes, sir. (Accepts document.) (Pause in the proceeding.) (Discussion off the record between Mr. Sowards and the defendant.)

THE COURT: This is just a blank sheet, I presume (indicating)?

THE DEFENDANT: That, Your Honor, was a spacer that I used to indicate the point where I was to begin reading.

THE COURT: I see. (Pause in the proceeding.) (The clerk returned to chambers.) (Discussion off the record between the clerk and the Court.) (Pause in the proceeding.)

THE COURT: Bring him in.

MS. CLARKE: Mr. Kaczynski had something (indicating) for the Court.

THE DEFENDANT: I had something that may be just a wild conjecture only, but . . .

THE COURT: (Accepts document.) Good morning, Mr. Clymo. Thank you for joining us.

MR. CLYMO: Sorry to take so long.

THE COURT: Sure.

MR. CLYMO: Mr. Kaczynski?

THE DEFENDANT: Nice to meet you.

THE COURT: Let me tell you what I understand to be happening, and I trust you will be able to assist. There's a Ninth Circuit case called U.S. V. Gonzalez, 113 F.3d 1036. It's a 1997 decision at page 1029. The Court states in pertinent part the following: "Whatever conflict may have existed between Gonzalez and his attorney going into the sentencing hearing, the district court clearly created one when he questioned Gonzalez' attorney in open court with Gonzalez present. When the Court invited Smith to contradict his client and to undermine his veracity, Gonzalez in effect was left to fend for himself without representation by counsel. Consequently, Gonzalez was denied effective assistance at the sentencing hearing." I'm not clear in my mind that this law applies to this situation, but as a matter of consideration, I raised the question with defense counsel. And the defense counsel indicated that it probably would be prudent to assume the law applies and to invite a lawyer to assist Mr. Kaczynski should Mr. Kaczynski need assistance.

MR. CLYMO: Okay.

THE COURT: My understanding is that at this juncture Mr. Kaczynski contemplates and perhaps has already made the request for the opportunity to have substituted counsel.

MR. CLYMO: Mm-hmm.

THE COURT: When a Court is faced with such a request, the Court is required to evaluate the extent of the conflict between the defendant and his counsel. That's something I think I should do in chambers. The Government may have a different opinion and they may ask when we are in the courtroom to have aspects of the conflict surfaced. We need not reach that precise issue at this moment but we do have to discuss it later. And so I'm now at the point where I'm going to try to crystallize the conflict. I will be asking his counsel questions and I wanted to have someone to represent Mr. Kaczynski should there be contradictions. Any problem with the approach?

MR. DENVIR: No, Your Honor. I was going to suggest if Mr. Clymo could see what Mr. Kaczynski had written on the subject and maybe have a moment to talk to him, it might help him.

MR. CLYMO: I was going to ask the Court if I could take a moment to consult with Mr. Kaczynski.

MR. DENVIR: He's also written something that might help you. He's given it to the Court.

MR. CLYMO: (Accepts document.)

MS. CLARKE: And, Your Honor, there was an additional note that was provided to the Court by Mr. Kaczynski.

THE COURT: Oh. (Examines document.)

MR. CLYMO: (Examines document.) (Discussion off the record between the Court and a U.S. marshal.) (Discussion off the record among the U.S. marshals.)

THE COURT: I think I'm going to interrupt you just for a moment because, Mr. Clymo, it may be advantageous to you to read this in another room.

MR. CLYMO: I'm okay reading it here, Judge. That's not a problem. I will probably want to talk to Mr. Kaczynski, though, regarding the content of the letter.

THE COURT: I've made arrangements with the marshal to allow you and Kaczynski to go to another room.

MR. CLYMO: Okay.

THE COURT: And if you want to do that now – but before you do, I want to put something on the record – but if you want to do that now, you can do that so if there are moments as you're reading when you want to ask Mr. Kaczynski questions, you can do that. And if you want a post note, I have post notes available.

MR. CLYMO: So do I.

THE COURT: Okay. Let me put this on the record. Mr. Kaczynski did give me a statement – [Redaction for attorney-client privilege and representation matters.]

THE COURT: All right. The following message was delivered from Mr. Serra's office. I'm going to spell the names, because the record should be clear as to the author of the message. Zenia, Z-e-n-i-a, G-i-l-g, an attorney from Tony Serra's office, called at 9:40 a.m. She said Mr. Serra is in Tunia, T-u-n-i-a, and they're not sure exactly when he'll be back – today, tomorrow or the day after tomorrow. She knows that he was interested in the case but had a conflict with the Federal Defender's Office and unequivocally withdrew his offer to represent Mr. Kaczynski because of the conflict. If you need to speak to Ms. Gilg, the number is 415-435-9183. That's the message.

MR. CLYMO: Okay. Now, I would like to take advantage of your offer to speak with Mr. Kaczynski and review the letter.

THE COURT: It's granted. (Discussion off the record between Mr. Denvir and Mr. Clymo.)

MR. CLYMO: Thirty minutes, judge?

THE COURT: That's fine.

MR. DENVIR: We will reconvene at 10:30?

THE COURT: Right, but I'm going to tell the other trial participants that we're not going to be meeting until 11:00. I can't imagine covering everything that we have to cover before that time. (Time noted: 10:04 a.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.) _____

– oOo –

REPORTERS' DAILY TRANSCRIPT JURY TRIAL IN CAMERA DISCUSSION
(REDACTED) pp. 1-43 MONDAY, JANUARY 5, 1998

– oOo –

Reported by: SUSAN VAUGHAN, CSR No. 9673 KELLY O'HALLORAN, CSR No. 6660 DENNIS McKINNON, CSR No. 2223 A P P E A R A N C E S For Plaintiff UNITED STATES OF AMERICA: (NO APPEARANCE) 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

– oOo –

THE COURT: Let the record reflect that all participants in the proceeding have returned to my chambers. Would you state your appearance for the record.

MR. WAKS: Dennis Waks.

THE COURT: Okay. He has also joined us. Budd Johnson, a Deputy United States Marshal, has indicated to me that perhaps I should state on the record, so that Mr. Kaczynski is provided some assurance, that all the proceedings being conducted ex parte, which simply means without the opposing party being present – and in that situation we're referencing the government – and in camera, which means that the public has been excluded, is to remain confidential. The United States Marshal is assisting the Court, and they are here for that very purpose, just to assist the Court, and they understand that all aspects of this proceeding are to be kept in confidence, except to the extent that the judge authorizes the release of any part thereof.

MR. CLYMO: Your Honor, if I might ask the Court's indulgence. Since you brought me in this morning, and with quite a challenge, I've spent quite a bit of time, over an hour, maybe an hour and half, talking with Mr. Kaczynski, and it's clear that what's going on here is that there are communication problems among the group of Mr. Kaczynski and his lawyers. I do believe we made some progress on those communication issues. There are a couple of things that – a couple of questions that Mr. Kaczynski has asked me that I'm not able to answer with some degree of assurance without taking some time to do some research. One is with regard to information that's been communicated, and another is with regard to a legal issue. I would ask the Court to allow me an opportunity to have Mr. Kaczynski taken back to the jail where I can spend some – this is going to take a while – where I can spend some time talking with him, and also Ms. Clarke and Mr. Denvir, and to spend some time in the library to answer the legal questions, some time on the phone to answer the factual question. And I would ask the Court – I know you had a jury waiting, and I'm very sensitive of that. I would ask the Court to allow me today and tomorrow to do that and then to be able to report back to the Court, because I think we've made significant progress, and I view – well, I'll leave it at that.

THE COURT: Is there still a pending request to substitute counsel?

MR. CLYMO: With Mr. Serra.

THE DEFENDANT: No, there's not. Certainly not with Mr. Serra. As to whether there might be a request to change some other counsel, that's still an open question. I would not say there is a pending question of change of counsel yet.

THE COURT: Can you elaborate on that, sir? I can let Mr. Clymo elaborate now. I brought him in so that you would have a lawyer to assist you express your personal opinions about matters to the extent that there could be a conflict with your existing counsel.

THE DEFENDANT: Probably it best if I answer this question myself, Your Honor.

THE COURT: Sure. (Redaction for attorney-client privilege and representation matters.) However, it as yet remains an open question whether I feel I'm still able to continue with my present counsel, and if I feel that I cannot, then, of course, the question might arise of whether I would either change counsel or even conceivably represent myself.

THE COURT: I think we need to go public at least with what he just stated at the very end of his communication to me, and that is that –

MR. CLYMO: If I might interrupt. And I apologize for interrupting, Your Honor.

THE COURT: That's all right.

MR. CLYMO: In my conversations with Mr. Kaczynski, I do not get the impression that he has a desire to represent himself and go pro per. That's not what I pick up from my conversations with Mr. Kaczynski. I believe the issue is a communication issue (Redaction for attorney-client privilege and representation matters.) and I think the question would be if Mr. Kaczynski goes forward with his lawyers or states that he has a conflict with those lawyers. Is that –

THE DEFENDANT: I would agree with that, yes. I would agree with that, yes.

MR. CLYMO: So I don't think that Mr. Kaczynski is in a position right now where he is really contemplating going pro per. So I disagree with the Court's feeling. I think this is something that should remain in chambers. I think this is something that, you know, creates ultimate prejudice to Mr. Kaczynski if there's publicity about it, for instance. I think these are issues that should be resolved in camera, outside the presence of the prosecution totally.

THE DEFENDANT: 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. So I don't think change of counsel is yet the issue, though it may become an issue. Is that –

MR. CLYMO: I'm very optimistic that the communication issue can be, if not accepted, then understood, and that it can – I think that can be resolved. I'm optimistic it can be resolved. I should point out for the record that in addition to my individual contact with Mr. Kaczynski, I asked Ms. Clarke to come in, and the three of us sat and

talked for a significant period of time. And I am very hopeful that the communication issue can be resolved.

THE COURT: I've got two questions. I have to probe further concerning the need to go public with some aspect of what has occurred, because the government, I am certain, wants to know something about what we're doing. The other question I have to raise – I don't mean to insult you. I said this before, Mr. Kaczynski. As a judge, I always have to raise this question, that's the question of competency to stand trial. (Redaction for attorney-client privilege and representation matters.)

MR. CLYMO: Yeah.

MR. CLYMO: I would ask the Court's indulgence to just keep it in chambers, come back Wednesday, blame it on me, that I came in out of the blue and don't know anything about what's going on and need time to talk with Mr. Kaczynski.

MR. DENVIR: I think the Court needs to explain just the – just a statement along the lines maybe of what you use when you redacted certain parts of the transcripts that were released. Is that what you were thinking? That Mr. Kaczynski has addressed attorney-client concerns to the Court, and that those proceedings are ongoing and hope to be resolved by tomorrow.

MS. CLARKE: By Wednesday morning.

MR. CLYMO: Wednesday morning.

MR. DENVIR: By Wednesday morning.

MR. CLYMO: I think that would be fair and protect Mr. Kaczynski's right to a fair trial. There would be no unfair, prejudicial information disseminated regarding mental issues or competence issues or attorney's conflict issues or any indication to the public that Mr. Kaczynski is somehow being recalcitrant to the process or a problem. I just would hate to have the label attached to this out in the public that Mr. Kaczynski has created a problem. It seems we can best avoid that by just sitting tight until Wednesday morning with a minimum statement, if any.

THE COURT: I think I'm going to have to go into the courtroom and invite government counsel, and I'll have to say something on the record and provide the government with an opportunity to state its position. Before I do that, maybe what I will do is I'll have you and Mr. Kaczynski, Mr. Clymo, go into the other room. I want to talk to the defense counsel, the other defense counsel.

MR. CLYMO: All right. (Defendant exits chambers.)

MR. CLYMO: I don't perceive at this point I have been appointed to do anything. I just perceive that I've been asked as an officer of the court to talk with Mr. Kaczynski.

THE COURT: I'm going to appoint you for the purposes of handling everything you've handled and everything that you need to handle. The Ninth Circuit case that I cited earlier, I think it was the Gonzalez case, is part of the reason why I appointed Mr. Kaczynski a lawyer. There's another reason. I wasn't certain that Mr. Kaczynski and his present counsel – not you, Mr. Clymo, but his other counsel would be in agreement on his competency, and so I also bore in mind the Ninth Circuit decision of Mason vs Vasquez, which is 5 F.3d 1220, a 1993 decision. I think that case stood for the

proposition – and I’m not really clear as to whether or not the Ninth Circuit simply approved what the district court did or whether the Ninth Circuit said something about the decision, but I followed that case when it was being decided both at the district court level and at the Ninth Circuit level. My vague recollection is that it was a case in which a defendant wanted to die, and his counsel, appointed counsel, or maybe retained counsel, I don’t recall the status of the attorney –

MR. CLYMO: Pro bono, I think.

THE COURT: Was he?

MR. CLYMO: I believe so.

THE COURT: I think that he had at least one lawyer that was against his decision.

MR. CLYMO: Yes.

THE COURT: And then the judge appointed another lawyer to represent his stated position, and that all occurred during a competency hearing. So I assumed that if Mr. Kaczynski’s present lawyers took a particular position on that question – I’m with you, Mr. Clymo. I’ve been watching Mr. Kaczynski. I have listened to him during the proceedings, and I believe he’s competent. But I don’t know about his current lawyers. I mean, they have –

MR. CLYMO: I think they’re both competent too.

THE COURT: I’m not talking about their competency.

MR. DENVIR: Well, I would be glad to have a proceeding on that.

THE COURT: I have nothing but confidence as far as his lawyers are concerned. But I need to talk to them about it, and that’s what I’m going to talk to them about. (Mr. Clymo exits chambers.)

THE COURT: Let the record reflect that Mr. Clymo left the chambers, and Mr. Kaczynski is personally out of the chambers. I wanted to chat with you about that issue, because it’s my discernment that you had previously indicated that if Mr. Kaczynski took a position that frustrated the defense you were going to assert on his behalf, that maybe that would indicate the need for a competency hearing. And I’m assuming, based on everything I heard, that Mr. Kaczynski may not agree with the defense you are asserting – at least you contemplate asserting, at least in the guilt and not guilty phase of the proceeding. So I wanted to get your views on it, because when I communicate with the government, I need to know what to communicate and I need to know if this is an issue.

MR. DENVIR: Well, I think from what I heard, that is something we wanted to discuss with Mr. Kaczynski and Mr. Clymo. Again, there’s the possibility, in my mind at least, of a need for a competency hearing, but I’m not in a position, I don’t think we are, to tell the court that it’s necessary at this time. We may know better after we explore the communication questions and these other questions with Mr. Clymo and Mr. Kaczynski to advise you in that regard. I think one thing that sounded like it would be discussed would be what defense would be pursued at the guilt phase and perhaps what would be done at the penalty phase. Those seem to be items which we intend to be discussing with Mr. Kaczynski and Mr. Clymo in the next day or so. I

think by the time we come to the end of that discussion, we may have a better idea of what kind of problem there's going to be, if there is one.

THE COURT: I know you were kind enough, Mr. Denvir, to communicate with Mr. Clymo to explain to him the need that I have to make a public statement about some aspect of the proceeding. Did you envision the public statement saying anything about competency?

MR. DENVIR: No, Your Honor.

MS. CLARKE: Not at this point.

MR. DENVIR: I envisioned the court saying something along the lines that these proceedings are ex parte and in camera dealing with attorney-client matters, and that the Court, you know, hopes that they will be resolved tomorrow, and almost nothing more than that. I think that tells everyone – in light of what the Court has previously released from the earlier proceedings and the correspondence and other things, that gives a fair statement to everybody about what is being – we kind of been through this and litigated it before. I think that's a fair statement on that factual basis. Both the government and the public will understand the general nature of what's being dealt with, and I think those questions of change of counsel, self-representation, competency, are all hypothetical at this time until we conclude this discussion with Mr. Clymo and Mr. Kaczynski.

THE COURT: How about the fact that I've appointed Mr. Clymo, should that also remain in camera?

MR. DENVIR: I would think for the moment, Your Honor, until the Court – the Court may later wish to make that matter public. But I don't see any reason why it should be made public at this point, because it's intertwined in with this attorney-client matter, which hopefully by tomorrow or Monday or Wednesday morning, whenever it is, we will know where we stand on a more concrete basis in terms of is there a problem and the exact nature of the problem and what Mr. Kaczynski wants. Mr. Clymo, I think, is trying to explore with Mr. Kaczynski and with his present counsel what is the problem, can it be resolved. If it can't be resolved, what is he asking the Court to do. That's what I understand he sees his role as.

THE COURT: The government, I'm confident, will ask questions. What you indicated I should state I don't think will be satisfactory. The government will probably tell us that they have witnesses lined up, they're ready to proceed with this trial, and I'm basically indicating to it that we don't know when the trial can actually begin for sure, we think the trial could possibly begin Wednesday, but even that is somewhat speculative.

MS. CLARKE: Well, perhaps, Your Honor – and I just throw this out for an idea. Maybe you could set a date for Mr. Clymo to report back to the Court, maybe tomorrow afternoon, at which time the Court might then be in a position to call in the government and the public and say where it is. That would give him some time, hopefully enough time, to explore this matter with Mr. Kaczynski and then report back to the Court, as I say, what is the nature of the problem, can it be resolved with

present counsel, and if not, what is Mr. Kaczynski asking the Court to do. I think that's the only way I can see sorting it out. I think the Court appointing Mr. Clymo would be very beneficial in trying to get that spelled out so the Court will know exactly what it has to deal with. That would give him until Wednesday morning to report back. I think he's got a lot to do. And he believed he was making progress in the two hours that he had. And it seems to me that if the Court advises the government we'll be back Wednesday morning for status and/or beginning of trial, that would be appropriate.

THE COURT: You're indicating, Ms. Clarke, that I need to give Mr. Clymo and Mr. Kaczynski a little bit more time, and I'm assuming what you're suggesting is that I should have the jury appear in the morning on Wednesday.

MS. CLARKE: I would think so, because the case may go forward on Wednesday and it may not go forward on Wednesday, and they could simply be discharged if it does not or sent home or whatever happens with them. I suppose if Mr. Clymo has some resolution earlier than Wednesday morning he could communicate that to the Court. I just felt like that was his request for the amount of time that he felt like he needed, and it is an unusual position for him to be in. I know we all as lawyers have been there. But if he felt like that kind of time was necessary, I think we should accommodate that.

MR. DENVIR: Should we check with Mr. Clymo and see, or maybe you want to call him in, about how much time he needs?

THE COURT: You want to bring them both back?

MR. DENVIR: We would like him to have enough time. It is a complicated matter. But he may have a better sense of what he can do or when he can at least report back to the Court where he is. (Mr. Clymo and the defendant present.)

THE COURT: Let the record reflect that Mr. Clymo and Mr. Kaczynski have joined us in chambers. I'm trying to figure out what to tell the public and the government when I take the bench. I've asked my deputy clerk to tell the government that I'm probably going to take the bench at 12:30, which gives us a few minutes. But it's obvious that they can't start the proceeding without me, so we can delay.

MS. CLARKE: Your Honor, I never felt that way myself.

THE COURT: You may be in for a surprise. I'm not certain what the government will say if I simply tell the government, which I'm inclined to do, but I'm open to your suggestions, that the proceedings that were conducted ex parte and in camera, commencing at the time when we were scheduled to commence trial, are proceedings that we hope to resolve. I need to give a date, and that's where you come in, Mr. Clymo.

MR. CLYMO: Then I would be able to report back to you by, say, close of business tomorrow to confirm that.

THE COURT: Okay. Do you contemplate the possibility of the trial actually commencing Wednesday morning at 8:00 a.m. with the jury present, et cetera? Is that a possibility?

MR. CLYMO: I hesitate to answer that question. I hesitate to answer it because if I say yes, I'm caught between a rock and a hard spot.

THE COURT: Okay.

MR. CLYMO: And I haven't had enough time to sit down in a comfortable environment – although the room was physically comfortable. I mean with a sense of confidentiality and just sit down and talk it out and see exactly what the bottom line is. I just don't want to promise the Court that. I mean, if Mr. Kaczynski went pro per, I guess theoretically he would start on Wednesday, although I can't imagine that. But if there was a conflict in representation that could not be resolved that was presented to you so you made a decision whether or not legally it was a conflict and it was your determination it was a conflict, then I don't think any lawyer could step in and address the jury Wednesday morning. Depends on how successful I think we are in addressing the communication issues. (Redaction for attorney-client privilege and representation matters.)

THE COURT: It appears that we don't know if the trial will be able to go forward on Wednesday.

MR. CLYMO: Is that fair?

THE DEFENDANT: That's fair, yes.

MR. CLYMO: I'm optimistic it would be able to or I wouldn't ask the Court for — I mean, I would just tell you right now this is it, it's blown up, forget it.

THE COURT: Then perhaps I should give the government that information and get the government's input as to what we should do with the jury. I think we can basically state that I've been provided assurance by defense counsel that they are optimistic the trial will be able to go forward on Wednesday but we're not certain.

MR. CLYMO: Is that fair?

THE DEFENDANT: Sounds fair, yes.

THE COURT: But we will know on Wednesday the status of this matter one way or the other.

MR. CLYMO: I think that's fair.

THE COURT: Okay. If you're able to mend the relationship so that we can proceed, then there would be no need for me to conduct other proceedings.

MR. CLYMO: Exactly.

THE COURT: But if you can't, I need to conduct other proceedings.

MR. CLYMO: Exactly.

THE COURT: Okay. All right. We'll go to the courtroom.

MS. CLARKE: Thank you, Your Honor.

MR. CLYMO: Your Honor, I have a question. With regard to these proceedings in open court, I think it would be appropriate to continue to have Ms. Clarke and Mr. Quin represent Mr. Kaczynski's interests with the government in public on the record. Is that all right with you?

THE DEFENDANT: That's agreeable to me.

THE COURT: That means that you won't appear in the courtroom, Mr. Clymo?

MR. CLYMO: I don't think I need to.

THE COURT: Fine.

THE DEFENDANT: May I ask a question?

MR. CLYMO: Unless the Court – I really don't think I need to. The limited role that you appointed me for I don't think requires that at this point.

THE COURT: Yes.

THE DEFENDANT: Basically, it's a question for Mr. Clymo. You were going to come and speak to me at the jail. When was this?

MR. CLYMO: This afternoon. They'll get you back as quickly as possible.

THE DEFENDANT: In other words, we're going to go back to the courtroom, and then at 1:00 o'clock or – I don't understand what's going to happen next.

MR. CLYMO: We're going to be back in the courtroom and a recess is going to continue until Wednesday morning, and I will come over and see you this afternoon, and then we'll make arrangements as appropriate for Mr. Denvir and Ms. Clarke.

MS. CLARKE: And the marshal just advised they will take him back as soon as possible. Does Ted need to be in the courtroom for this proceeding? It doesn't matter. However you want to do it.

MR. CLYMO: What's your preference?

THE DEFENDANT: I just as soon go straight back to the jail.

MR. CLYMO: I would ask to waive his presence in the courtroom so I can get over to the jail and talk to him.

THE COURT: I have a concern with the waiver. I envision some opposition from the government. I think –

THE DEFENDANT: If that's the case, Your Honor, I'm perfectly willing to go back to the courtroom.

THE COURT: Okay. All right.

MR. CLYMO: I will just duck out the side here.

THE COURT: Fine. Mr. Clymo, thank you very much for making an appearance on such a short notice. If you take care of the paperwork, I'll execute the appointment.

MR. CLYMO: Thank you.

—oOo—

The Ted K Archive

Jury Trial Day 2
Redacted chamber proceeding
Jan. 5, 1998

unabombertrial.com

www.thetedkarchive.com