

Jury Trial Day 3, 1:30 P.M.

Redacted chambers proceeding

Jan. 7, 1998

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

SACRAMENTO, CALIFORNIA

WEDNESDAY, JANUARY 7, 1998, 1:30 P.M.

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THE CLERK: Calling criminal case S-96-259; United States versus Theodore Kaczynski.

THE COURT: Please state your appearances for the record.

MR. CLYMO: Your Honor, Kevin Clymo present in my limited capacity representing Mr. Kaczynski.

THE COURT: Thank you.

MS. CLARKE: Judy Clarke, Quin Denvir, and Gary Sowards on behalf of Mr. Kaczynski.

THE COURT: Thank you. What's the status of the matter?

MR. CLYMO: Your Honor, where we are, as I understand it, is the issue with regard to the letter that was filed with the Court on Monday indicating that Mr. Kaczynski wished to arrange, if possible, that Mr. Serra represent him I believe is withdrawn at this point. Is that correct?

THE DEFENDANT: Yes, your Honor. (Redaction for attorney-client privilege and representation matters.)

MR. CLYMO: With regard to the issue the Court asked me to deal with, I've spent quite a bit of time talking with Mr. Kaczynski. I've spent quite a bit of time talking with counsel, and there are polarized points of view regarding control of the presentation of the defense. And I've done the best I can to advise Mr. Kaczynski mutually of the law and what his options are. And it's my understanding that Mr. Kaczynski at this point, in recognition that he has limited options legally, wishes to go forward with the trial. And I don't believe there is a – well, wishes to go forward with the trial. However, he feels that he needs help almost, in essence, in maybe arguing his point of view or presenting his point of view or having someone to only be concerned about expressing his point of view with his lawyers, and he has asked me to ask the Court that, among all the alternatives, the one he wants is to go forward with the trial with counsel intact, and he's asked me to ask the Court if you would allow me to remain, in essence, as his perhaps personal counsel so that he feels comfortable that his position, personal position, is advocated within the context of the limits that the law places on a client and the amount of control the client can have with the presentation of the defense. So I think that's where we are. So he would like to go forward with Mr. Denvir and Ms. Clarke and Mr. Sowards and pick up where this left off on Monday, but to allow me to continue to speak for him, in essence, without having to, you know, be legally responsible for his representation in court and without – because of my limited role right now, I don't have to really, you know, be responsible for the ultimate tactics of the case and what's best for the tactics of the case, and I can be pure to Mr. Kaczynski's need for clarification of sometimes legal limits and issues and sometimes

to perhaps argue with his lawyers his personal position and how he wants things done, quite frankly. So that's where we are.

THE COURT: I'm not sure I'm inclined to do that. A criminal defendant is entitled to appointment of counsel, and a capital criminal defendant is entitled to the appointment of two counsel, which I've done. I've appointed two lawyers. I only brought in Mr. Clymo for the limited purpose of representing you, should you need representation, on what I've characterized as a potential conflict issue. There are a number of things I was required to cover and still am, if I have to, concerning the representation issue that interrupted the trial. I'm not in favor of keeping a lawyer that I only appointed to deal with specific conflicts that I thought could arise definitely in the case. I've got options. At this point I probably need to hear from your trial counsel, but I'm going to tell you my options. One option is something I have to do. If the conflict is not resolved, we've got to cover it. I have to know what it is and whether it is the type of a conflict that could reasonably be characterized as one capable of interfering with the attorney-client relationship in such a way that it causes a breakdown in communications. Some conflicts, in my opinion, will arise no matter what lawyer you bring into the case. And that's why a judge really has to evaluate the conflict, because if the conflict is one that a criminal defendant is likely to have with any lawyer appointed in the case, it makes no sense to appoint another lawyer. A criminal defendant at that point in time would have to choose between representing him or herself or going with existing counsel. We need to cover the issue – well, does the issue continue to present a problem that interrupted my trial on Monday?

THE DEFENDANT: Is that a question you want me to answer, your Honor?

THE COURT: Let me respond to you this way, Mr. Kaczynski. Since I have appointed at this moment three lawyers to assist you, I will allow you the option of allowing one of the lawyers to respond, if you prefer, or you can personally respond. It is up to you, sir.

THE DEFENDANT: Your Honor, I'd let Mr. Clymo respond for me.

MR. CLYMO: The issue that presented itself Monday to the Court and the issue – this very, very narrow, specific issue that I was asked to address and that was contained in the multi-page letter and the single page handwritten document that the Court provided me, I believe that conflict has been resolved, if it ever was a conflict. I don't know that it ever was really a legal conflict. But if it was, I believe it's resolved. (Redaction for attorney-client privilege and representation matters.)

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 the 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 taking that challenge at the moment, so I'm not going to elect to represent myself.

THE COURT: I'm going to make some findings for the record, unless counsel have other things to cover.

MR. DENVIR: No, your Honor.

THE COURT: Okay. Generally, a criminal defendant's communications during a court proceeding are expressed through counsel. This past Monday, Mr. Kaczynski directly communicated with me asking me to revisit a very important attorney relationship matter. I'm going to say something before I make a finding. (Redaction for attorney-client privilege and representation matters.)

THE COURT: I'm going to say something else. You need not respond, Mr. Kaczynski. I'm just going to make a statement to you. The government does not agree with my ruling on who controls the defense. I'm just telling you that. I do not agree with the government. I think my ruling is correct. At the time Mr. Kaczynski interrupted the commencement of the trial, I intuitively thought I knew the essence of his concern based on my memory of what occurred when we met ex parte and in camera on December 22, plus I had in mind the government's motion to exclude a mental state defense based on what it expects Kaczynski's counsel to state during opening statement. Based on all that, I recall determining whether the government had an objection to the meeting in camera, and I immediately adjourned and met with Mr. Kaczynski in camera. By doing so, the trial was adversely affected. Jurors were left waiting in the jury deliberation room until I released them about three and a half hours later. Witnesses and the public were doing the same thing in the courtroom. Because of my suspicions that we needed to devise a vehicle to reach the heart of the attorney representation problem and to do that quickly so the trial could commence this week, I received the approval of trial counsel for Mr. Kaczynski to contact what I would characterize as a conflicts attorney, and I contacted Mr. Clymo to personally assist Mr. Kaczynski as a conflicts attorney. And I did this because I saw the possible need for his assistance under the rationale of Ninth Circuit decisions in *Mason*, 5 F.3d 1220, and *Gonzalez*, 113 F.2d. Actually, I think that should be F.3d 1026. Mr. Clymo's function as a conflicts attorney was to assist Mr. Kaczynski to possibly work through any difficulties interfering with the attorney-client relationship, and, if necessary, to express Mr. Kaczynski's position on any issues Mr. Kaczynski desired him to assist with during any proceeding. I thought this advisable because, frankly, I am confident in Mr. Kaczynski's abilities, (Redaction for attorney-client privilege and representation matters.) and I felt that he needed to have a lawyer that represented his position solely. Not to say that his trial counsel are not assigned to that task, but I wasn't positive that we were going to reach a point where there would be – whether or not we would reach a point where there would be a conflict in positions. Now, I know that Mr. Kaczynski perhaps did not need the help. I

find him to be lucid, calm. He presents himself in an intelligent manner. In my opinion, he has a keen understanding of the issues. He has always seemed focused on the issues in his contact with me. His mannerisms and his eye contact have been appropriate. I know there's a conflict in the medical evidence as to whether his conduct, at least in the past, has been controlled by any or some mental ailment, but I've seen nothing during my contact with him that appears to be a manifestation of any such ailment. If anything is present, I cannot detect it. I appointed Mr. Clymo before I completed my examination of the extent of the attorney-client problem. Before Mr. Clymo's arrival, I dealt with the possible substitution question that was presented. Frankly, I was forced to deal with that question. Once I found out that Mr. Serra was willing to do work at pro bono, that basically placed him in the category of a retained counsel, and it caused the Court to have to consider other law in making a decision as to what to do. The record should reflect that I decided to conduct a further investigation of the matter involving Mr. Serra through my secretary yesterday. I had my secretary call Mr. Serra's office to see if the office was at liberty to provide content to the word "conflict" which dissuaded that lawyer from being willing to represent Mr. Kaczynski. I decided to do this to see if there was any merit to what Mr. Kaczynski told me. The law firm responded with two communications. One they don't want me to share on the record because they withdrew it and basically informed me that it was an unauthorized communication. And the other communication was a statement stating, "Tell them," the federal defenders, "that he would keep in confidence the nature of the conflict." I only share this information for purposes of the record. It is clear to me beyond doubt, although Mr. Kaczynski has expressed some communication concerns that he believes he's experienced with his lawyers, I am firmly convinced that his lawyers care about him and have his best interests at heart, and they are doing an exceptional job in his defense. Mr. Clymo, one reason I called you to serve as a conflicts lawyer was because you did a fine job before me in a complex criminal trial. I know you've had experience in handling capital cases, and I sensed that you would readily develop rapport with Mr. Kaczynski. And I care about Mr. Kaczynski, and I wanted him to speak to someone who could develop rapport with him. Also, I thought you'd be willing to assist our justice system, as you did. I'm mindful that you were even willing to do that on a pro bono basis, if necessary, and I find that gesture commendable. I really appreciate your assistance in this matter. I think Mr. Kaczynski is rather fortunate to have the counsel he has. His trial counsel, in my opinion, are nationally renowned criminal defense lawyers. One of them is the appointed Federal Defender in this district by the Ninth Circuit. I'm going to ask some questions after I finish making some statements, but I do hope that the attorney-client relationship is much better than it was on Monday, and I will probe that question with you. Under law, while ideally a relationship of trust and confidence should exist between the accused and his attorney, the Sixth Amendment, and the Supreme Court has noted, guarantees only competent representation, not a meaningful attorney-client relationship. You do have competent representation, and I do hope that the attorney-client relationship is one that will not interfere with your

defense. I'm now going to scan some questions that the government asked me to cover and see if I think it's appropriate to cover it. They have filed a document asking me to cover certain questions during this proceeding. What's the defense's perspective, trial counsel's perspective, on this question?

MR. DENVIR: I guess we'll have to look at them again, your Honor. We're just providing a copy to Mr. Clymo. Your courtroom deputy gave us a copy when we came to court. We had not seen it previously.

THE COURT: Do you want me to give you my copy?

MR. DENVIR: I imagine it will just take a second for him to look at it.

THE COURT: Okay. I'm probably inclined to ask some of those questions, because I assume you're going to ask that I keep closed aspects of this proceeding. Is that true?

MR. DENVIR: Yes, your Honor.

THE COURT: Then I should ask the questions the government wants me to ask.

MR. DENVIR: I think the questions directed to Mr. Kaczynski are – can we just look at it for one moment? We have no problems, your Honor, with the questions that are proposed to Mr. Kaczynski. I guess we'd have to look at the questions that they think should be directed to defense counsel. I'm not sure whether those are necessary or appropriate. Maybe you want to first deal with Mr. Kaczynski.

THE COURT: I had my secretary type out the questions. Can you tell me where they are in context? Page 7, right?

MR. DENVIR: Yes, your Honor. There's four questions that they suggest to Mr. Kaczynski.

THE COURT: I'm going to ask those questions. Mr. Kaczynski, are you satisfied with your current counsel?

THE DEFENDANT: I think it should be clear by now, your Honor, that I'm not satisfied with my current counsel for the reasons that I have already explained, but that I am willing to accept representation by them for want of a better alternative. (Redaction for attorney-client privilege and representation matters.)

THE COURT: Have you reached agreement with counsel concerning major strategic decisions?

THE DEFENDANT: Your Honor, as you know, I do not agree with counsel concerning major strategic decisions, but I've become aware that legally I have to accept those decisions whether I like them or not. So I guess I just have to accept them.

THE COURT: We were both using "decisions" in its plural form, but is it not true that your problem is with the assertion of the mental status defense?

THE DEFENDANT: Yes, your Honor, that's the problem.

THE COURT: You don't have problems in other areas, do you?

THE DEFENDANT: No, your Honor. That's the only one.

THE COURT: All right. Are you willing to defer –

MR. DENVIR: Your Honor, could we just have one moment?

THE COURT: Sure. (Redaction for attorney-client privilege and representation matters.)

THE COURT: Okay. Are you willing to defer to counsel's day-to-day trial decisions?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you looked at the questions the government has asked me to ask defense counsel?

MR. CLYMO: Are you asking Mr. Kaczynski that, your Honor?

THE COURT: No. I'm asking his trial counsel that.

MR. DENVIR: Your Honor, I believe that our position is that given the Court's findings and ruling on who would present the defense and given Mr. Kaczynski's answers to the questions, we don't feel that these questions are appropriate to counsel. And I don't think they add anything to what has already been developed by the Court and Mr. Kaczynski.

THE COURT: Is there anything further to cover?

THE DEFENDANT: From my point of view, no, your Honor.

MR. DENVIR: No, your Honor.

THE COURT: Thank you for your assistance, Mr. Clymo.

MR. CLYMO: You're welcome, your Honor.

THE COURT: It's adjourned.

MR. DENVIR: Your Honor, does the Court anticipate – I assume that you will want to make some public statement about the outcome of these proceedings. Would you plan on doing that at the 4:00 o'clock session that's already scheduled?

THE COURT: What would you like me to say? Are you concerned about that?

MR. DENVIR: Well, it would only be that Mr. Kaczynski is going forward with present counsel and we'll be in trial tomorrow. I think people are kind of wondering what's happening. I didn't –

THE COURT: I'll say that.

MR. DENVIR: But we would handle that at 4:00 o'clock?

THE COURT: Right.

MS. CLARKE: And, your Honor, it would be Mr. Kaczynski's request that he not be present at the 4:00 o'clock hearing, that he get back to the jail. He would like to have an opportunity to get some rest before he returns to court tomorrow.

THE COURT: Before you leave, Mr. Clymo –

MR. CLYMO: Yes, your Honor.

THE COURT: My deputy clerk just told me that my secretary sent her an e-mail in which she explains that Tony Serra sent a fax to be given to Mr. Clymo telling Mr. Clymo to tell Mr. Kaczynski that he is now willing to represent Mr. Kaczynski.

MR. DENVIR: Now, n-o-w?

THE COURT: Right. I just want to make sure that doesn't change anything.

MR. CLYMO: Can I have a moment?

THE COURT: Sure.

MR. CLYMO: Your Honor, Mr. Kaczynski has indicated that he would like to talk to Mr. Serra, whatever that means. I mean it in the sense of he would like, I think, an opportunity to have a conversation with Mr. Serra to explore what you've just indicated. Is it signed by him, your Honor?

THE COURT: I'm going to give this to you in a moment. If you don't mind, I'm going to read it first. This doesn't read as I represented. This seems to be a conditional offer. I will give this to my deputy clerk.

MR. CLYMO: Did the Court wish me to look at it and share that with Mr. Kaczynski?

THE COURT: Yes. I've got time to cover this matter.

MR. CLYMO: Your Honor, Mr. Denvir, all of us, have looked at the letter, and Mr. Kaczynski has looked at the letter. Although the letter is addressed to me, I'm sure that it involved all counsel and Mr. Kaczynski. And I believe Mr. Kaczynski has some comment he would like to make on the letter. (Redaction for attorney-client privilege and representation matters.)

MR. CLYMO: Your Honor, Mr. Denvir – the letter itself should probably be part of the record and sealed ultimately. Although the letter is addressed to me, it was faxed to the Court, and it's now become the subject of this discussion, and Mr. Kaczynski has referred to it, so I feel that it should be or a copy of it should be made a part of the court record.

THE COURT: I'm not sure about sealing it. In fact, I was going to talk to counsel about that. It seems to me this subject should be made public. The government needs to know about this. I need to hear from the government on the question because it could affect the trial commencing tomorrow at 8:00 o'clock. So, in my opinion, the letter should be public and I need to tell the government about it.

MR. DENVIR: Your Honor, I think we all agree that that would make sense. The one part I would ask the Court to keep in camera is Mr. Kaczynski's statements which didn't refer to the nature of the defense that would be presented, his feelings on those. I think those are still attorney-client. But as far as the letter itself, I think everyone agrees that is not an attorney-client matter. It's a representation or possible change of representation matter. But we would ask what Mr. Kaczynski just said, because it refers to attorney-client matters, should remain sealed.

THE COURT: I think I should advise the government as soon as possible of the fact that this issue will be covered today at 4:00 o'clock. I should provide the government with a copy of the letter and with whatever information I'm going to state publicly about Mr. Kaczynski's position. Here's the approach I'm contemplating. I'm going to state that at the conclusion – I'm going to rephrase it. I'm going to say at what I thought was the conclusion of the ex parte in camera hearing, it was decided that Mr. Kaczynski was going forward with present counsel. Trial will start at 8:00 a.m. I'm going to add some things to get your input on it. I had appointed attorney Kevin Clymo under the rationale of two Ninth Circuit decisions to serve as a conflict attorney for Mr. Kaczynski, should such services be necessary. Just when I thought

everything was resolved, I received a fax on the bench from Mr. Serra which reads, and I will read the fax into the record. And then I will state that Mr. Kaczynski desires to talk to him about representation, and then we'll cover that among the other issues we have to cover at 4:00. Is that okay?

MR. DENVIR: Fine, your Honor.

THE DEFENDANT: Fine with me, your Honor.

MR. CLYMO: I'm unclear as to my status. Am I discharged from my responsibilities as requested by the Court?

THE COURT: You are. And thank you very much.

MS. CLARKE: May we have just one moment, your Honor?

THE COURT: Yes.

MS. CLARKE: Thank you, your Honor.

THE COURT: All right. Thank you.

MR. CLYMO: Thank you, your Honor.

MR. DENVIR: And Mr. Kaczynski will be here at 4:00, I take it now? (Recess taken.) —oOo— IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE GARLAND E. BURRELL, JR., JUDGE

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

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REPORTER'S TRANSCRIPT JURY TRIAL pp. 1-18 THURSDAY, JANUARY 7, 1998

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Reported by: KELLY O'HALLORAN, CSR #6660 A P P E A R A N C E S 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

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