

Jury Trial Day 5

Kaczynski requests to serve as his own defense

Jan. 8, 1998

U.S. District Court, Eastern District, Sacramento
Kaczynski requests to serve as his own defense
SACRAMENTO, CALIFORNIA
THURSDAY, JANUARY 8, 1998, 8:04 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.

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

THE COURT: Thank you. I have a communication that I'm thinking about giving to the jury. I'd like you to approach the bench so I can see if you have any objection to it. We're going to do it right here (indicating) next to my court reporter. (The following discussion was had at the bench outside the hearing of the jury.)

THE COURT: Let me put it there. You can read it. (Counsel examine document.)

MS. CLARKE: It's good.

THE COURT: Oh, the first page is okay?

MS. CLARKE: There's more?

THE COURT: There's more. (Counsel examine document.)

THE COURT: Is that acceptable?

MS. CLARKE: Yes, it is.

MR. DENVIR: Yes, Your Honor.

THE COURT: All right, then. Thank you.

MR. DENVIR: You do know there is something we want to address with you?

THE COURT: You want to do it now? We can do it in open court?

MR. DENVIR: Sure. (The proceeding resumed as follows in the hearing of the jury.)

THE COURT: Before we can proceed with the matter you said that you wanted to address, Mr. Denvir, I need to tell the parties that we are missing a juror. I've been advised that juror number 203 has reported that he is sick in bed and will go to a doctor's office later today. So at some point we will have to decide to handle that situation. I'm now ready to hear what Mr. Denvir wants to talk about.

MS. CLARKE: Your Honor, if I may address the Court, Mr. Kaczynski had a request that we alert the Court to, on his behalf – it is his request that he be permitted to proceed in this case as his own counsel. This is a very difficult position for him. He believes that he has no choice but to go forward as his own lawyer. It is a very heartfelt reaction, I believe, to the presentation of a mental illness defense, a situation in which he simply cannot endure. So it is his request that the Court permit him to proceed on his own behalf.

THE COURT: I understand the request. I am pleased to see that it was made through you, through counsel, because it is appropriate for such requests to be made through counsel when counsel is appointed to represent a criminal defendant. As a matter of courtroom decorum, that is how a criminal defendant should communicate with the Court when a criminal defendant is represented by counsel. I assume that you just wanted to make the request to provide the Court with it so that I can then evaluate what we should do.

MS. CLARKE: That is correct, Your Honor. Mr. Kaczynski can speak with the Court. He has asked that we make the request on his behalf.

THE COURT: All right. Thank you. Not yet. I first want to see what the Government's position is.

MR. CLEARY: Your Honor, I think at this point, given the history of what we've gone through with the complaints, the defendant's complaints about his representation and his current request today, the Government would seek a brief adjournment for us to caucus and decide, as best we can, how to advise the Court and what the Government's position should be in this. We look at this – and I think the Court knows this from our conversation yesterday – we look at this as a very, very serious matter, and I would hate to rush in and take a position at this point and then regret that decision at a later date. So respectfully, and I understand that we've got jurors pulled in again today; we have a lot of people who are here waiting for this trial to begin, but with all due respect I think under the circumstances the Government is constrained to ask for a brief adjournment to consider the situation.

THE COURT: What do you consider a brief adjournment?

MR. DENVIR: Till tomorrow. Tomorrow morning.

THE COURT: Well, that's too long. I'm not going to grant that.

MR. DENVIR: Okay. Could you give us two hours, till 10:00 o'clock today?

THE COURT: I'm not granting that.

MR. DENVIR: Could you give us one hour?

THE COURT: That's too long also.

MR. DENVIR: How much time would the Court grant us?

THE COURT: Until 8:30.

MR. DENVIR: Thank you. Fair enough.

THE COURT: But I'm not finished. I want to get the defense's response to it. And then plus I want to talk to the parties about the jurors, because this time I want to communicate with the jurors in some fashion.

MS. CLARKE: Your Honor, Mr. Kaczynski has advised us he is prepared to proceed in pro se today. His request to proceed on his own behalf would not delay the proceedings.

THE COURT: I have a concern about the timeliness of the request. In my opinion, trial proceedings in this case commenced November 12th, 1997, with a very lengthy jury selection process. That process concluded on December 22nd, 1997 when the parties

exercised their peremptory challenges. Other trial proceedings continued, even after the parties exercised their peremptory challenges. Pursuant to the parties' stipulation, the Court was authorized to replace those jurors selected with certain jurors that remained in the pool, and we had to, in fact, do that because we lost jurors. The very fact that we lost jurors indicates to me that unless this trial commences, we may be in a position where we have to start the jury selection process all over again. And that makes no sense under our justice system. And so the timing of it is quite disturbing. There are some cases that I can bring to the parties' attention which should expedite your consideration of the issue: *United States vs. Smith*, 780 F.2d 810 (9th Cir. 1986); a key case, *Fritz*, *United States vs. Fritz*, 682 F.2d, 782 (1982); *Moore vs. Calderon*, 108 F.3d 261 (1997). How about the jurors? My inclination would be to call the jurors into the courtroom and advise them along the lines of what I shared earlier so that they understand that we are mindful of those things they have on their minds about being meaningful participants in the process, and they may feel at this moment that they are not meaningful participants in the process. And then I will probably add to what I shared with you something to the effect that, because of constitutional concerns, we will experience another delay, but this will be hopefully a briefer delay than the one they experienced previously. Is that acceptable?

MR. CLEARY: It is to the Government, Your Honor.

MS. CLARKE: It is, Your Honor. I only ask for the Court's consideration in thinking about the timing issue, that it is not Mr. Kaczynski's request that anything be delayed or this jury be interfered with. He is prepared in the sense that he feels he has no choice to go forward today. He is not asking for any delay. I know that the timing is a question when a delay is involved. But that is not his position. His position is he will go forward on his own behalf as soon as the jury is sworn. He is prepared. He is not asking, as the Government is, for any delay.

THE COURT: Well, that raises another question. And we need to cover all questions before we adjourn for any consideration of the issue. That raises a competency question. Was the Government going to consider that in the caucus it referenced?

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

THE COURT: Then you do need more time.

MR. CLEARY: I think it's a difficult problem, Your Honor. I understand you want to get up and running. We'll take whatever time the Court would allow us.

THE COURT: When I was putting rather tight time constraints on you, I only bore in mind the *Faretta* issue. But the other issue may involve more analysis.

MR. CLEARY: I'm sorry. I should have mentioned that to the Court at the time.

THE COURT: Well, is there anything else that I should know that you don't? I mean, you asked for two days. Why did you ask for that much time? What other type of issues were you thinking about? Maybe I don't know all the issues.

MR. CLEARY: Your Honor, first of all, I was only asking for a single day's adjournment. I'm not arguing that –

THE COURT: I don't want to talk about time; I want to talk about issues. What issues are you considering?

MR. CLEARY: I understand. It was the Faretta issue, the competency issue, and the question of whether new counsel should be brought in – it's all related, whether new counsel should be brought in, whether current counsel should remain as standby counsel, whether there are other people at the public defender's office who might be familiar with the case who might replace current lead counsel, and the question of what, if anything, we could do to get meaningful access to some of – some more of the ex parte proceedings to help us in this analysis over the issues.

THE COURT: It's my decision whether I appoint a standby counsel. I have the discretion to do that, and I can decide that issue. And I really don't need your input on that, so you can forget research on that question. I want you to elaborate on your concern about new – well, let me back up. You mentioned other counsel coming in from the public defender's office, the federal defender's office. That's unnecessary. I mean, Mr. Kaczynski at the present time has what I consider to be nationally renowned criminal defense lawyers who understand this area of the law fully, and I can't imagine another lawyer from that office providing him with a more comprehensive defense than he's going to be provided by present counsel. The crux of the question doesn't deal with what counsel is brought in. The issue centers on the assertion of a particular defense. In my opinion, any lawyer you bring in – almost any lawyer – that you bring in will assert the same defense that present counsel is asserting. And so appointing another lawyer is not the solution. I do not see that as a feasible solution. And I thought we discussed the question of new counsel yesterday, and so I'm not clear what the Government's referencing by "new counsel."

MR. CLEARY: What I understand, Your Honor, is there appears to be – there is, Your Honor, a major dispute between these lawyers and the client as to who's going to be choosing the defense. There may be other lawyers that take a different view, that take the view that it's the client's position to direct the defense. There may be a substantial number of lawyers that take that view, and the lawyer we discussed yesterday apparently takes that view. That's the only reason I raise the issue, that other lawyers may be willing to come in and put forth whatever defense the defendant wants and avoid putting forward whatever defenses defendant wants.

THE COURT: We've already dealt with that issue. And so that should save you some time on analysis. (Discussion off the record among Government counsel.)

THE COURT: I'm pausing because you're caucusing. Let me know when you're done.

MR. CLEARY: Thank you, Your Honor. (Discussion off the record among Government counsel.)

THE COURT: Let me interrupt you. There is an issue that you haven't identified that also involves a matter I have discretion on. Hybrid representation. I think it's hybrid representation. You can go ahead and caucus.

MR. CLEARY: Oh, okay. Thank you. I'm sorry.

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

MR. CLEARY: Your Honor, I think I've identified the issues that – and I know the Court said there are certain issues we don't need to worry about, but the remaining issues that we've identified are things I believe we have to deal with: the Faretta issue and the competency issue. Competency, as I see it, is possibly two different questions: the defendant's competency to be tried; and his competency to represent himself. And I'm not sure, as I stand here, whether that's a single question or if there are two different questions. And there is a question relating to all of this as to the timeliness. We don't know – we're not in a position to know when the defendant tried to raise – when, if at all, he tried to raise this issue prior to this time.

THE COURT: "This issue" referencing self-representation?

MR. CLEARY: Self-representation, Your Honor; that's right.

THE COURT: The defendant told me yesterday that he was not interested in self-representation, that he wanted to be represented by counsel, because I asked him that question so that answers your question.

MR. CLEARY: So I think we've covered the waterfront of the issues, at least that the Government standing here can identify.

THE COURT: Raising the issue of self-representation is a broad question. But I don't think we have to deal with the broader question in light of what he said yesterday. I mean, he could have told me sometime in the past. He could have made a conditional request to me that included the option of self-representation. But if a defendant makes a conditional request for self-representation, you have to evaluate the request to see whether or not it is in fact an unequivocal request for self-representation and whether it triggers advisement of Faretta rights. But yesterday the defendant categorically told me he did not want to represent himself; he wanted to proceed through counsel.

MR. CLEARY: That being said, Your Honor, we'll take whatever time the Court would allot us.

THE COURT: I think we should come back to the courtroom at 9:00.

MR. CLEARY: Fine, Your Honor.

THE COURT: I want to call the jurors in. You don't have problems with that, right?

MR. DENVIR: No, Your Honor.

THE COURT: How about the missing juror? Do you have input on that?

MR. CLEARY: Whatever Your Honor wants to do. We – I guess our choices are either to adjourn for the day, which I realize you don't want to do, or to discharge the juror.

THE COURT: Go ahead.

MR. DENVIR: Your Honor, I don't think the Court should take any step in regard to discharging jurors while this is pending. The juror has not been sworn, and you've always had the option before of adding jurors as necessary, of replacing. I would suggest to the Court that you maybe read that instruction you have and advise them there's another problem and just leave it at that, until we resolve the issue of

Mr. Kaczynski representing himself. The jury has not been sworn; jeopardy does not attach. It doesn't seem there's any need to do anything about the jury. (Discussion off the record between Mr. Denvir and Ms. Clarke).

MR. DENVIR: And we don't feel there's any reason to decide whether that particular juror who was sick today needs to be discharged and replaced or anything of that nature at this particular point. Maybe if it's 9:00 o'clock, a preliminary ruling, because I think Mr. Kaczynski's prepared to proceed without that juror present for the purpose of bringing them in just to instruct them.

THE COURT: Are you also indicating that I should consider calling in the next juror to replace that juror?

MR. DENVIR: Your Honor, I think maybe we could deal with that at 9:00 o'clock, I think, rather than –

THE COURT: There's a Ninth Circuit decision involving a juror that didn't appear at trial. And what the trial judge did was had all of the trial proceedings transcribed and read – allowed the juror to read the trial proceedings. I was telling you about that decision, and I probably have a cite to that case in my chambers, so you can probably call my chambers and get the cite to it, if you'd like to read that decision.

MR. CLEARY: Your Honor, we'd make a request that the Court not swear the jury until we've resolved whatever issues we can resolve today.

THE COURT: I'm not going to swear them in. I'm just going to bring them in and talk to them. All right. Let's bring them in. (Discussion off the record between the Court and the clerk, following which the clerk left the courtroom.)

THE COURT: I'm going to add to the communication I shared with counsel. I want you to look to the addition and see if you have any problems with it. (Counsel examine document.)

THE COURT: (Indicates.) Taking action, I believe, is required by law and –

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

MR. CLEARY: Okay, Your Honor.

MS. CLARKE: That's fine. (The jury entered the courtroom.)

THE COURT: You can take your seat. Thank you for joining us. Some of you may be disappointed by your appearance on Monday. You reported here to fulfill your civic responsibilities only to find out after at least three hours of wait that you weren't going to be able to do that in the manner that you had contemplated. I take full responsibility for the delay. But I allowed the delay to occur because I felt it was appropriate under the circumstances. It was not the fault of the parties. When a judge takes action that the judge believes is appropriate under law, you can't fault a party for that action. It reflects one of the hallmarks of our constitutional democracy. Sometimes justice does not move in accordance with the notions we have in our mind; it moves at its own pace. And if it has to slow down, so be it. That's the law. But it's my interpretation of the law, and that's why I take the blame. Sometimes judges interpret the law in a way that's wrong, and they get reversed. Obviously, sometimes judges are appealed. But,

still, I accept full responsibility for all delays involved in this proceeding. You're going to experience another one but hopefully this will be shorter. But I wanted to bring you into the courtroom this time to explain it, because I think you should have the right to hear from me so you understand why you're not going to begin fulfilling your civic duty here in this courtroom. You're still fulfilling your civic duty, even though you're not in this courtroom. We are dealing with matters of constitutional significance. As participants in our criminal justice system, we do our best to deal with those matters before opening statement, so that you can hear the opening statement and then hear the evidence. But sometimes other things occur. That's just the nature of our criminal process. If the delay turns out to be longer than expected, I will invite you back into this courtroom and explain that to you, so you will have a general idea what is going on. At this moment, the parties are going to be excused until 9:00 o'clock, at which time they will come back into the courtroom and we will see if we can resolve certain matters. And if so, we will proceed with the trial. If not, we may have to have another delay that I will invite you in and tell you about it. Okay. You can take them back to the jury room. Thank you. (The jury left the courtroom.)

THE COURT: Recess until 9:00 o'clock.

MR. CLEARY: Thank you, Your Honor.

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

THE COURT: Let the record reflect that the same participants are present except for – I don't see Ms. Clarke.

MR. DENVIR: Ms. Clarke is out in the hall, Your Honor. We will proceed without her.

THE COURT: Okay. What is the status?

MR. CLEARY: Your Honor, let me state the Government's position as completely as I can. We are very concerned about the prospect that this defendant, who has articulated strong desires to represent himself, may not be allowed to do that. We think he has a Sixth Amendment right to represent himself. I realize that the perception in some quarters may be that that – the Government would say that to secure –

THE COURT: Just a moment. (Ms. Clarke entered the courtroom.)

THE COURT: There's another issue before you even reach that issue.

MR. CLEARY: Certainly.

THE COURT: That's a Faretta issue. The first issue is competency. And there's even another issue, which I think is perhaps the key issue. That issue involves who controls the mental status defense. It is my opinion that that's what this is all about. The question is whether I should have argument on that issue. I don't know if the defense – you can't argue, of course, because you will probably not be able to argue, to have a conflict with your client's position. But the Government would probably have – should be allowed to address that issue. That's the question. But the competency issue may even override that question.

MR. CLEARY: May I respond, Your Honor?

THE COURT: Yes.

MR. CLEARY: As to the question of who controls the mental defense or defenses generally, I hesitate to disagree with the Court, but I think my view was that was the issue yesterday. I think the issue today, when the defendant says he wants to represent himself, is the question of Faretta and –

THE COURT: He's only saying that, in my opinion, because he wants to control the mental status defense.

MR. CLEARY: That may well be so, Your Honor, but I don't think we can avoid the fundamental question, which is it's his Sixth Amendment right to represent himself.

THE COURT: I know that. You may be taking my preliminary comments as indicating a ruling. It indicates no ruling. Focus on competency.

MR. CLEARY: Okay. Let me deal with the competency issue. As best we can figure out in the last 20 minutes, the question of competency – it's a single question as to competency to be prosecuted and competency to represent yourself. Our understanding is it's the same standard. We, throughout this proceeding, have said we see no evidence that the defendant is incompetent. We were talking then about incompetent to be prosecuted, but we believe that, as I say, that's the same standard for representing himself. And we still see no evidence of that.

THE COURT: Let me share something with you. I have to be – I should be transparent with my thinking so that the Government understands what I consider to be the legal thicket afoot here. In my opinion, the defendant would not be asking to represent himself if he was in control of the mental status defense. That's my opinion. And so the competency issue has to be evaluated in light of whether he is competent to make a determination as to that defense and also as to whether he is competent to represent himself. There's two issues. Okay. Go ahead, sir.

MR. CLEARY: Thank you, Your Honor. And as I started to articulate, I think our preliminary research on this – we had to do it fairly quickly – is that that is the same standard; it's the same standard for both, I mean, to be prosecuted and to represent himself. It's the Government's position that we have seen no evidence that he is not competent; the defense attorneys have articulated on several occasions directly that the defendant is competent and assisting in his defense, and on several occasions somewhat indirectly they have indicated that in various pleadings in this case. And the Court, who has spent, we gather, a substantial period of time with the defendant in the ex parte conferences over the last couple weeks, has also stated unequivocally that there is no evidence that the defendant is incompetent.

THE COURT: I just had a flash on – the point that I tried to make earlier, I'm not sure I made it clearly. It involves a possible error. Mr. Kaczynski could argue that he is being forced to represent himself, he really doesn't want to represent himself, that he's being forced to represent himself because of my ruling on the mental status issue, and that if I had made what he considers to be a correct ruling on the mental status issue, meaning that he is in control of that issue, not his counsel, he wouldn't be asking to represent himself, and so this is a forced decision. And so when I indicated

to you earlier that that decision has some interplay with what's going on, that's what I meant. And I didn't – I'm not sure that I fully reflected that. That was my thinking.

MR. CLEARY: I think you articulated that, Your Honor.

THE COURT: Oh, I did?

MR. CLEARY: I understood that's the Court's view.

THE COURT: Okay.

MR. CLEARY: And I'll get back to that in a second, if I could. But to finish the competency issue, it's the Government's position the defendant is entirely competent to represent himself and to stand trial. The question that the Court is asking, or the point the Court is making, about the defendant possibly being forced to represent himself is – the way I look at it gets back to the discussion we had yesterday and what the Court pointed out today: who's got the choice of defense? That's been a serious issue for us, Your Honor. We've discussed that issue last night with the Solicitor General's office and the Appellate Section of the Criminal Division of the Department of Justice. And it appears, based on our own conversations and our own independent research, that the answer, unfortunately, is far from clear. There are those line of cases we cited Your Honor to, in which it is clear that the choice of an insanity defense is the choice of the defendant. On the other hand, it's clear that – at the other extreme, it is clear that major decisions like do I plead, do I testify – that's the defendant's decision.

THE COURT: Right.

MR. CLEARY: And the third area is day-to-day management of the trial; objections and that sort of stuff is for counsel to decide. We have yet to find – and those are the pole stars we used to try and judge where we are now – we have yet to find a case precisely on point dealing with regarding choice of defense that is not an insanity defense. Although we give this is analogous, I realize you can distinguish this. What concerns us is that I think by telling the defendant that by taking an area that we view as uncertain in the law and telling the defendant that that is not his choice, that he has to live with choice of counsel – creates a potential for grave appellate error in this case. And that's been our major source of concern tonight and today, and that's why we've been asking for a little more time to resolve this. We think it is a tremendously complicated issue for which there is no ready answer. And, I assure the Court, through late last night and early today we have been consulting with as many people as we can in very high positions at the Department of Justice, and we have yet to come up concrete advice for the Court. But if the Court is determined to go forward, and I understand –

THE COURT: But just a moment. You knew this issue was an issue at least two weeks ago, because you've submitted a brief on it. I think you've given me two briefs on it.

MR. CLEARY: We have, Your Honor.

THE COURT: And so it's not a surprise issue.

MR. CLEARY: No, and I'm not suggesting it is. But the new issue, the surprise issue, the difficult issue for us is the Faretta issue with – as Your Honor's pointing

out, the overlay of the defendant's possibly, arguably, being impelled in some way to represent himself.

THE COURT: That's the question.

MR. CLEARY: Right. And that's the one we're having a lot of difficulty with at this point, Your Honor. I think that the safer course would be – and most effective course and certainly the most efficient course would be to tell counsel, direct counsel to follow the defense wishes of the defendant. He's got, obviously, exceedingly competent counsel, who have been vigorous in protecting his interests, who have vigorously litigated this case, and they know this case inside and out. You're not going to get better lawyers for Mr. Kaczynski. If the Court were to direct counsel to put forth whatever defense the defendant wants, I think that protects the record, and it obviously – we can start this trial today, because we can get this off and running.

THE COURT: I understand.

MR. CLEARY: Just to address the Faretta issue very briefly –

THE COURT: Well, would you have to? Because if my tentative opinion is that if he's ready to go now, I'm inclined to let him do that, if we've reached this point, reached that point, assuming he's competent. I don't know what you want to address.

MR. CLEARY: Was Your Honor suggesting to represent himself?

THE COURT: Right.

MR. CLEARY: And then there would just be the question of the Faretta warnings at that point, but I'm sure Your Honor has a better handle on that than I do.

THE COURT: Right. I'd have to give him the amount of . . .

MR. CLEARY: May I have one second, Your Honor? (Discussion off the record among Government counsel.)

MR. CLEARY: Nothing further, Your Honor. Thank you.

THE COURT: Okay. I think the issue is competency. What the government, in essence, argues is that the law is unclear as to who controls the mental status defense. I think I'm probably correct in the way I coined the issue. I think the crux of the question centers on who controls that defense. And I believe that Mr. Kaczynski has expressed the interest of representing himself because I told him he doesn't control that defense. The Government's research to date reflects what I found to date, and that's that the law is not clear on this precise question. I think the law is somewhat clear as to who controls the insanity defense. But that defense involves a plea and it's pretty clear that a criminal defendant decides what to plead. The Government argues that I should revisit that issue, make a determination that the defense is controlled by the client and that the client's counsels have to yield to his desires. That's the question. And also involved in that question is the competency issue. What's the defense's response? (Discussion off the record among defense counsel.)

MS. CLARKE: Your Honor, I think that the Court is focused on the issue precisely and accurately. And I think the issue of who controls the defense was resolved yesterday, and we believe that the Court is correct, that it is the lawyer's professional obligation to make strategic decisions and present the case in the way that the lawyer professionally

believes is accurate and appropriate. And I think to say otherwise to counsel would pit a lawyer against his or her oath, professional oath. And I understand that there's litigation over that, but I think the Court, for purposes of this case, has resolved that question. Where it becomes a difficult issue on the question that the Court raises of competency is the question of – Mr. Kaczynski and I believe the Court is correct, and he has said it to the Court and I said it this morning: that he feels he has no choice. His present counsel intend to present him in a light of mental illness and intend to present to the jury his case in a way that he has had for his entire life a deep and abiding fear that he would be presented. The Court has evidence in the record already over the past several months of that problem. The Court knows the intensity of Mr. Kaczynski's feelings that that is not the way in which he wants to be presented. We have said to the Court repeatedly that we believe that Mr. Kaczynski understands and knows the nature of the proceedings and that to those particular days we had been able to accommodate the situation. It appears that we no longer are able to accommodate it, because Mr. Kaczynski cannot endure the presentation of a mental health defense and he feels because of that heartfelt reaction on his part, he must represent himself. So I think that the Court has –

THE COURT: Just a moment. I want to reflect on something you've just said, and it's on my screen. I want to read it. Just a moment. (Pause in the proceeding.)

THE COURT: All right. What I wanted to make sure I heard correctly – is trial counsel's assessment, and this is part of my discernment, that unless Mr. Kaczynski acquiesces in the assertion of the mental status defense he's not competent? Is that what you were indicating?

MS. CLARKE: I . . . I think that would be a legal and factual determination, and what I wanted to do was guide the Court to the portions in the record where I believe that is the case. We have taken a position all along that we believe that the unendurability of this defense is based in the mental illness. So "yes" is the bottom line.

THE COURT: "Yes" to my question?

MS. CLARKE: Yes.

THE COURT: Here are the choices. Or let me hear from the parties. Maybe you want to suggest choices. It appears to me that, in light of what defense counsel just said, one option I have is to call in the conflicts lawyer to personally represent Mr. Kaczynski's position. What's the parties' position on that?

MR. CLEARY: That would be for trial purposes, Your Honor?

THE COURT: No, just on the conflict issue that I believe is evident.

MR. CLEARY: That would be acceptable to the Court [sic] if the Court felt that it would further the discussions that the Court had ex parte.

THE COURT: You said, "That would be acceptable to the Court." You meant "acceptable to the Government"?

MR. CLEARY: I'm sorry. The Government, Your Honor.

THE COURT: Trial counsel for the defense.

MR. DENVIR: Your Honor, we would have no objection to that, and Mr. Kaczynski would like to have assistance so he would have someone to help him in representing his views against those of his present counsel in that regard.

THE COURT: Have I correctly identified the issues? My thought is Mr. Kaczynski disagrees with the position articulated by trial counsel and that he would desire to have the conflicts lawyer to express his opinions on the subject. That's my guess. Am I correct?

MR. DENVIR: I believe that's right, Your Honor. Obviously, there's a disagreement on how to go forward with this defense. I think Mr. Kaczynski would appreciate the services of someone other than his present trial counsel who could articulate for him, advise him and articulate to the Court for him as to what he wishes to do in this regard.

THE COURT: Well, that's a different question. It may relate to the question we're focused on. The question we're focused on is a competency issue. And trial counsel have expressed a view on it, and I assume that Mr. Kaczynski has a different view, and that that view he may want to have expressed through the conflicts lawyer.

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

THE COURT: Yes. (Discussion off the record among Mr. Denvir, Ms. Clarke and the defendant.)

MS. CLARKE: Your Honor, I think it would be appropriate to have Mr. Clymo brought back in to discuss the position that Mr. Kaczynski should take with regard to competency. I don't think there's a disagreement about how we get to the issue, that it is the unendurability of the defense.

THE COURT: I'm – go ahead.

MS. CLARKE: But it's the question of whether or not we are representing Mr. Kaczynski's interests when we say that competency is the question. And I think Mr. Clymo could represent Mr. Kaczynski's position on that. So it would be helpful.

THE COURT: I'm going to ask you to crystallize what you just told me.

MS. CLARKE: I think it would be helpful to bring in Mr. Clymo on the question of whether there should be a competency evaluation.

THE COURT: And by "evaluation," what do you mean?

MS. CLARKE: Examination.

THE COURT: By a physician? By a physician? Examination by a physician?

MS. CLARKE: Yes.

THE COURT: Government?

MR. CLEARY: That would be fine, Your Honor, if the Court wanted to have Mr. Clymo come in. I just wanted to ask, when you said "physician," you mean a psychiatric physician, correct?

THE COURT: Yes.

MR. CLEARY: That would be fine. If the Court wants to proceed, there would have no objection to that. But – let me make that clear. No objection to Mr. Clymo

coming in and consulting with the defendant for whatever assistance that may offer the Court.

THE COURT: The Government's present position – well, tell me your present position. You've heard what the defense has stated. What's the Government's position?

MR. CLEARY: As to the issue of competency?

THE COURT: Let me elaborate on where I think we are. The defense has indicated approval of bringing in Mr. Clymo, the lawyer I have appointed to represent Mr. Kaczynski for purposes of conflicts, so Mr. Clymo can articulate Mr. Kaczynski's personal position on the issue. The defense opines – I should say trial counsel for the defendant opines that this matter should be determined by psychiatrists. And so Mr. Clymo would be – we don't know this, but perhaps articulating a different personal viewpoint by Mr. Kaczynski. And I assume that the Government does not believe this matter needs to be handled by psychiatrists. (Discussion off the record among the Government counsel.)

MR. CLEARY: We don't have an objection to proceeding down that road. We're not asking for that and we don't believe there is a need, from the Government's perspective, for a competency inquiry, which is the view we've taken all along up to yesterday, up to and including yesterday, and we don't see any change on that issue for today. But just procedurally, as I see this, obviously, the Court can order a competency hearing sua sponte pursuant to 4241, and the defense, as well as the Government, could file a motion seeking a competency motion. We're not seeking a competency hearing, but the defense can make that motion, should they care to, and where the Court finds reasonable cause required by the statute, you could order the competency hearing. To further that process, whatever is convenient for the defendant and the defense counsel is fine by us. If, in order for them to determine whether they want to make that motion for a competency hearing, they believe it would be helpful and the Court believes it would be helpful to have Mr. Clymo in here, we have no objection to that whatsoever. Am I responding to the Court's question?

THE COURT: Not in a crystallized fashion.

MR. CLEARY: What else do you want to answer your question?

THE COURT: Don't worry about what I want. Tell me what you want. That's what I asked you. I don't want you to think about the things I may want you to do. I want you to tell me what the Government wants to do. And if you cut that out of it, maybe it would be more crystallized.

MR. CLEARY: On the competency issue alone?

THE COURT: That's what I was asking you about.

MR. CLEARY: We're not asking the Court to do anything on the competency issue.

THE COURT: Okay.

MR. CLEARY: We're not making a request.

THE COURT: All right. But it is clear to me that we cannot go forward until that issue is resolved, and in light of what trial counsel has just stated, the issue is

not resolved. Anticipating that I could possibly need Mr. Clymo, I directed my staff to call him and ask him to come to the courthouse. The response we received said he's an hour and a half away from the courthouse. I think I'm going to state publicly, so that everyone understands why we are proceeding in this vein – I don't have the decision I am going to reference on the bench with me, but there is a Ninth Circuit decision in the case of Mason involving a criminal defendant that chose a course of action which his trial counsel thought was unwise, and his trial counsel did not support that course of action because his trial counsel did not believe it was in the interests of that criminal defendant and that the criminal defendant could possibly be killed if he pursued that decision. The defendant was personally bent on that course of action, and the district judge in that case brought in a lawyer just to represent the criminal defendant for the limited purpose of allowing the criminal defendant to express his view on the issue. And so that's why I'm bringing in Mr. Clymo. (Discussion off the record between the Court and the clerk.)

THE COURT: Mr. Clymo probably won't be here until

11:00 o'clock. We cannot go forward without fully analyzing the competency issue. We're not going to start covering that issue until 11:00 o'clock. It seems doubtful that the trial could begin. But it's possible. But that would only be an hour for the trial. I would assume it would take us between a half hour to an hour to cover the issue. It really depends on what Mr. Clymo says. What are your thoughts on the question? And I'm now concerned about the jury; I'm concerned about the public; I'm concerned about witnesses. But just because we are at this point should not indicate that it's anyone's fault. A judge must continuously determine whether a criminal defendant is competent to stand trial. If I didn't think Mr. Kaczynski was competent to stand trial, we wouldn't be here at this moment, but I have to listen to all viewpoints on it. And when the issue was raised by trial counsel, the Court must stop and evaluate what counsel stated and make a ruling. And I think I'm absolutely required to do this under the Constitution. But I only said that so the public would know why we must pause at this moment. And we have to return to the question of the jury. The parties' input on it? (Discussion off the record among Government counsel.) (Discussion off the record among defense counsel.)

MR. CLEARY: Your Honor, from the Government's perspective, perhaps it would be best to discharge the jury for today and have them on telephone standby so we could call them back in when we need them.

THE COURT: What does that mean? You don't want them to come back tomorrow?

MR. CLEARY: What my concern is – I would love for them to come back tomorrow if we were assured we were going forward. My concern is having them come in what would be a third time and send them home, and really – just as an accommodation to the jurors, to let them know we will call them when we need them as soon as we need them.

THE COURT: What's the defense's view on what the Government just said?

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

THE COURT: I'm pondering over what the Government suggested earlier. And that if I ultimately decide Mr. Kaczynski is competent, which, frankly, that's my view at this very moment – and I mean competent to stand trial – if I decide that, knowing that he only wants to represent himself because of his dispute with trial counsel over the assertion of the mental status defense – knowing that, I would probably have to allow him to do that, if he's competent. Knowing that he would prefer to be represented by present trial counsel without assertion of that defense, it seems that the Government's position is persuasive. I'm just saying that because you should think about that as trial counsel, because it seems to me that if I find he is competent – and I've already stated that at this very moment I believe he's competent to stand trial – given the scenario I just related, it would seem to me that his present trial counsel should represent him, if that is his desire, without assertion of the defense.

MR. DENVIR: Your Honor, you're talking about the Government's suggestion is that the Court would order us – the suggestion being made is that the Court would order us that we could not present the defense that we feel is called for in a capital case and would have to accede to the defendant's wish not to present that defense? Is that the suggestion?

THE COURT: Yes.

MR. DENVIR: Then we would have to deal with that.

THE COURT: Okay. I'm going to call the jury back into the courtroom. (Pause in the proceeding.) (The jury entered the courtroom.)

THE COURT: Thank you for joining us. You can take a seat. As you know, we have been covering a matter, and we're not finished covering that matter. We're not certain when we are going to be finished covering the matter, but there are just constitutional principles that are afoot that require us to pause and to decide the issue. It has nothing to do with the parties; it has to do with the process. The process, as I've indicated earlier, they may not work in accordance with our own personal notions, but it works. May not work fast from the Court's own personal notions, but it's at a pace, and I do believe that in the end, it turns. The wheels of justice will in fact operate in accordance with our notions, which is that you will have witnesses and you will hear testimony, yet. But not at the moment. We are going to – not release you; you are jurors. Don't listen to any news reports, etc. Continue to follow my instructions. That's extremely important. You could even be curious about what's going on. At the end of the trial, I'll be happy to talk to you – I don't know if I'll be happy to talk to you, but I will make myself available to communicate with you. The parties typically make themselves available, too, to communicate with jurors at the end of the trial. And if you wanted insight into some of the things that I'm telling you about now, I can tell you then. But in the meantime, please strictly adhere to the admonitions and instructions. We will place you on standby status until we need you again. At this moment I'm going to allow the marshals to take you back to the location from which

you were picked up. All right. Thank you. I assume my communication with the jurors was okay?

MS. CLARKE: Yes, Your Honor.

MR. CLEARY: Yes, Your Honor. Thank you. (The jury left the courtroom.)

THE COURT: Adjourn until 11:00.

MR. CLEARY: Yes, Your Honor.

MR. DENVIR: We're meeting in the courtroom again at 11:00 o'clock, Your Honor?

THE COURT: Yes. (A recess was taken.)

THE COURT: Please reflect your appearances for the record.

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

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

THE COURT: All right. Thank you. I asked Mr. Clymo to join us, and I thank you for responding to the summons, Mr. Clymo, as I thought there could be a need to provide Mr. Kaczynski with personal assistance, although I'm not sure that is necessary. I offered that as an option earlier, and it's my understanding that his trial counsel and Mr. Kaczynski embraced that option. Correct?

MS. CLARKE: That's correct.

THE DEFENDANT: (Indicates in the affirmative.)

THE COURT: Okay. Did you see Mr. Kaczynski responded Mr. Reporter?

THE DEFENDANT: Yes.

THE COURT: All right. I have appointed Mr. Clymo under the rationale of two Ninth Circuit decisions, the Ninth Circuit decision in Mason, 5 F.3d, 1220, 1993, and the Ninth Circuit decision in Gonzalez, 113 Fed.2d. – I think that's F.3d, 1026, 1997. The statute that is involved in our considerations is Title 18 United States Code Section 4241(a), which provides at any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the government may file a motion for a hearing to determine the mental competency of the defendant. That hasn't occurred, I'm only providing background information. The Court shall grant the motion, or shall order such a hearing on its motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. There's another principle that's afoot. Although the Court is to consider a defendant's trial counsel's views on the question of competence, the Supreme Court in *Drope* at 420 United States 177 note 13 states that the court need not accept without question a lawyer's representation concerning the competence of his client, an expressed doubt in that regard by one with the closest contact with the defendant is unquestionably a factor that should be considered. That doubt, and I want to be corrected if there's a different view on it, was expressed today, and I'm

going to pause just for a moment because I think the doubt should be crystallized, and I'm going to ask for input on it so this proceeding can be focused. You may go ahead.

MR. DENVIR: Go ahead, Your Honor. I'll wait.

THE COURT: All right. I'm going to tell you what I think. And I don't know if I should think what I think. What I assume is that the doubt stems solely from Mr. Kaczynski's refusal to allow his trial counsel to assert the mental status defense. And because of his refusal to cooperate in allowing his counsel to assert that defense, then you are questioning his competency.

MR. DENVIR: I think that's correct, Your Honor. And I would say more strongly, I don't think it's a refusal to allow us to do that. I do not think that Mr. Kaczynski can bear for us to present that defense. And I think that therefore he cannot cooperate or allow us to do that, and I think that is why we do have that doubt.

THE COURT: I have to take a note on what you just stated. It's going to take me a moment. I alluded to constitutional concerns earlier without mentioning any support for what I was saying because, frankly, I didn't know we are going to cover the issue when we did. But that one case that supports what I was indicating is a Ninth Circuit decision in *United States vs Loyola-Dominguez* at 125 F.3d 1315, 1317, where the circuit states it is well established a conviction obtained against an incompetent defendant is a clear violation of the constitutional guarantee of due process. Competency requires that the defendant have the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense. As stated in the Ninth Circuit decision of *Mason*, 5 F.3d at 1223, and the Court was actually referencing Mr. Mason at the time, the Court must ascertain whether Mr. Mason has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity and the premises. There's a related issue to what we're doing, whether I should have recognized Mr. Kaczynski's right to serve as his own counsel before covering this issue, because he has asserted that right through counsel. The decision in *United States vs Purnett*, 910 Fed.2d. 51 at 55 states refusing to accept a waiver of counsel until the competency of the defendant to make a knowing and intelligent waiver has been established will not create the catch-22 that the government evokes. I'm not indicating the government evoked it, but I'm just letting you know that I think this is the correct approach. Hence, appointing counsel for the limited purpose needed to determine whether a defendant is competent to stand trial is not viewed as a denial of the defendant's right to self-representation. I think I covered the things I wanted to cover. Mr. Clymo, I assume you've had a chance to talk to Mr. Kaczynski or am I wrong about that?

MR. CLYMO: I have had a chance to talk to him today for a very limited period of time. And as the Court, I believe, is aware, I talked to him for a period of time on Monday, and a period of time yesterday, Tuesday. With regard to this specific situation,

I have had probably, what, 15 minutes at the most, probably 15 minutes at most to talk to Mr. Kaczynski.

THE COURT: What do you reference by this specific situation?

MR. CLYMO: My recall to court today.

THE COURT: Okay.

MR. CLYMO: And the issues that you've now just delineated is what I'm referring to.

THE COURT: All I did was provide background to place this proceeding in context. The issue is whether he is competent to make the decision I believe I have indicated he made. And a related issue is who controls that defense. Are you in a position as his conflicts lawyer to express his views on the issue?

MR. CLYMO: Mr. Kaczynski –

THE COURT: Let me say something. Let the record reflect that when I said what I said, I'm not indicating that you're not a lawyer, you're not operating as a lawyer. You are a lawyer for him on this issue.

MR. CLYMO: Well, let me clarify one thing, Your Honor. If the question is to me do I believe he is competent to make these decisions, I don't believe that I have sufficient foundation upon which to offer an opinion in the extremely limited period of time and under the circumstances that exist during which I had contact with Mr. Kaczynski. If you're asking me to be Mr. Kaczynski's voice right now, I do know what his position is. Now, I don't know if that answers the Court's question.

THE COURT: It does. I don't – I'm not certain I want you to tell me his personal position.

MR. CLYMO: Thank you.

THE COURT: I really wanted your position, because there's a question as to his competence. He could incriminate himself by expressing a personal view, and the Government could use every one of his statements against him during every phase of this trial, and I'm not inviting that.

MR. CLYMO: Thank you.

THE COURT: What's the Government's position on the matter?

MR. CLEARY: Your Honor, the government has, as we said before, has seen no evidence, no facts which would suggest that the defendant is incompetent. However, based on the representation by counsel today that Mr. Kaczynski cannot bear for the defense counsel to present the defense, coupled with the declarations that have been filed previously by defense experts in this case, I think what the state of the record is as follows: That the defense counsel and their expert's position is that as a result of a mental defect, the defendant is unable to rationally choose between his defenses, his choices, his strategic choices at trial. That inability is affecting his capacity to keep his present lawyers, which we all recognize would be the best thing for him to do, keep his current lawyers. Given that that's the state of the record, it's the government's view that the safest course is for the court to order the competency hearing based on the

representations made by defense counsel today and the declarations that have been previously filed.

THE COURT: Would you expect to – what do you expect to occur at the competency hearing?

MR. CLEARY: What I would imagine would happen is the defendant would be sent to a federal institution that has a psychiatric clinic associated with it; that the defendant, pursuant to the statute 4247, would remain in that institution for approximately 30 days. This would give an opportunity for experts, multiple experts, to observe and evaluate and examine the defendant. I think it's crucial that that happens because the defendant has refused in the past to meet with psychiatric experts, and if he is in that setting and he still persists in that refusal, at least he will be in a position where he can be meaningfully observed.

THE COURT: Why do you call that a competency hearing? You're asking that I order that the defendant be confined at a mental institution for psychiatric examination.

MR. CLEARY: That's right. Preparative to the hearing.

THE COURT: The defense.

MR. DENVIR: Well, Your Honor, I don't have with me the letter that we previously filed with the Court, and I believe the Court realized we would oppose sending Mr. Kaczynski away to some federal institution. We believe the Court has the authority to have any medical or psychiatric examination conducted locally while he's at the Sacramento County Jail. The Court has authority to appoint one or more psychiatrists or psychologists to conduct that examination and file a report with the Court, and we feel that's the way it should be done. I don't have that in front of me, I did not anticipate we would be where we are, but I believe that previously in the letter, part of which the Court released, we dealt with that authority in cases along that line. We don't see any reason why this matter should require moving him to a federal facility somewhere away from here when he can be evaluated here by someone who can report back to the Court and then there could be a hearing.

MR. CLYMO: Your Honor, I have to also say on Mr. Kaczynski's behalf he objects to any such procedure. His position is he's competent. He's competent to go to trial, he's competent to exercise his Faretta rights, and he's competent to control what defenses are presented. That's his position. I told you I don't have a foundation to say he's wrong. You asked me do you have a foundation to say his lawyers are right. I don't have a foundation for that either. And his position is he objects and he wants to go forward.

MR. CLEARY: To respond to what Mr. Denvir said, the statute does allow – my reading of the statute 4247(b) would allow the Court to appoint local psychologists and psychiatrists to examine Mr. Kaczynski. I think the problem we're going to have if the Court goes that route is the same problem we had all along. Presumably he is going to refuse to meet with those psychiatrists and psychologists, and they're not going to have an adequate basis to meaningfully observe and evaluate the defendant,

where if he is in the federal psychiatric institution for the period of time allowed for by statute, that issue gets more firmly and concretely resolved. And I think if the Court is going to order the hearing, that that would be the best way to do it. Provide the Court with the most complete evaluation of the defendant, and I think that's what we need at this point. The government suggests all this just so the record is clear as a prophylactic measure to protect the record at this point, Your Honor.

THE COURT: Okay.

MR. CLEARY: Thank you.

THE COURT: Any response from the defense from caucusing on your response?

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

THE COURT: Yes. (Short discussion off the record.)

MR. DENVIR: Your Honor, for the record, the letter that I was referring to was a December 19, 1997, letter which was originally filed in camera, and subsequently the Court ordered this particular part released that has the authority. (Short discussion off the record.)

MR. CLYMO: Your Honor, I apologize, but I do require a moment.

THE COURT: I'm not indicating that you're being rushed just simply because I looked up. I was just looking to see if you were ready. You can take your time, sir.

MR. CLYMO: Thank you. (Short discussion off the record.)

MR. CLYMO: Your Honor. (Short discussion off the record.)

MR. CLYMO: Your Honor, my position on this is that if the Court is going to proceed with the procedure to establish legal competency, that it be done locally and the Court appoint doctors locally to do any kind of competency examination. And I believe Mr. Kaczynski would cooperate with that. So I don't think there's a concern that he would not cooperate would play out.

MR. CLEARY: Your Honor, I am very concerned about that. There's been a great deal of litigation in this case. The defense attorneys have said, they argued that the defendant has a deep-seated, long-standing fear of psychiatrists that prevents him from meeting with psychiatrists, and that that's a manifestation of what they allege to be his mental disease. They now say the complete reverse of that.

THE COURT: Why shouldn't you believe what he told me? I understand what you just said. And that's not a fair question to you. Let me back up and start again, because I placed you in an awkward position. I had numerous communications with Mr. Kaczynski, and based upon what he just told me through his counsel, I believe he will cooperate.

MR. CLEARY: If the Court is comfortable, you're in a much better position to assess that than we are, obviously. If the Court is comfortable that that would be the result, and that cooperation means he would submit to examinations and testing as proscribed under the terms and conditions for the length of time required by the appointed experts, then we share your comfort, if that's the way you feel about it. But I just want to caution the Court that if you're wrong about that, if your assessment turns out to be incorrect about that, that we may wind up having a delay in this case without

really advancing the ball at all, because we would be right back in the same position where we are where competent, professional people do not have the information at their disposal that they need to render what they believe to be a reliable opinion. That's the risk of going down that road.

THE COURT: How do you know he will cooperate with the individuals you're referencing?

MR. CLEARY: What I am suggesting is if we go the way the government is suggesting pursuant to the statute, even if he chose not to cooperate, he would be in a custodial setting, no different from where he is now; in fact, probably better accommodations than where he is now. He would be in a custodial setting, he would be available to be observed for a substantial period of time, up to 30 days by statute, and that would give the Court – the experts, and hence the Court, additional feedback. So that's where I think the difference is. If he chooses not to cooperate, we will have at least some basis for assessing this question.

THE COURT: It's absolutely clear to me that there is foundation in the record that justifies the government articulating the position you just stated. The defense has heard it. I want to get input from the defense before I decide.

MR. CLEARY: Thank you. (Short discussion off the record.)

MR. CLYMO: Your Honor, I think all the factors line up on doing it locally. Mr. Kaczynski will cooperate for the purpose of developing legal competence. You have a jury waiting. It can all be done much quicker doing it that way. And as the Court has indicated, with the Court's contact with him, the Court has a foundation for believing that he will follow through with what he has said. If you need him to say personally he will cooperate with the local competency examination process, he will tell you that.

THE COURT: He need not speak personally since you're present. He has said that through you. I'm going to trust him. I'm going to trust him. Mr. Cleary, I understand your position. I don't think I'm wrong. I hope not. I'm going to trust him.

MR. CLEARY: Fair enough.

THE COURT: How about the mechanism for bringing about the result?

MR. DENVIR: Your Honor, based on the declarations that were filed by the defense in the past, you know that our experts have diagnosed Mr. Kaczynski as a paranoid schizophrenic, high-functioning. We believe to get an adequate competency evaluation, the Court should appoint somebody who has expertise in that particular diagnosis, and we would be glad to submit some names of people in the Northern California area, and the government may want to also do that. I think this is a matter where you need the help of an expert; I mean, an expert in that particular area.

THE COURT: My thought was that the parties should meet and confer on this.

MR. DENVIR: Fine.

THE COURT: I should get your joint input, and I would think a proposed order would be appropriate. And you should do that as soon as you possibly can. And then if you can agree, your agreement should be reflected in the order. If you can't agree, I think we need to have another hearing.

MR. DENVIR: Could I speak to Mr. Cleary and see how long he thinks we need for this?

THE COURT: Yes. (Short discussion off the record.)

MR. CLEARY: Your Honor, I believe by tomorrow afternoon, the parties could report back to the Court as to whether we have an agreement on a list of names or a name, or let the Court know if we can't reach agreement on that.

THE COURT: Okay. All right.

MR. DENVIR: Fine, Your Honor.

THE COURT: Is there anything further to cover?

MR. CLEARY: I guess the only question is what to tell the jury at this point, if anything.

THE COURT: What do you think we should tell them?

MR. CLYMO: Your Honor, are you suggesting coming back to court tomorrow afternoon or sometime tomorrow?

THE COURT: Well, the real question is how the parties will let me know. It seems to me that if you agree, you should provide me with a lodged order so that I can simply sign the order, and the order will affect the examination probably. And if you can't agree, then you need to appear. This is not something we should handling telephonically. I think we would have to appear in the courtroom.

MS. CLARKE: Just one moment, Your Honor. (Short discussion off the record.)

MS. CLARKE: Your Honor, would it be agreeable if the Court set a status hearing at 4:00 tomorrow afternoon, and if we had a proposed lodged order before then, we could certainly submit it to the Court before that time. If the Court would prefer earlier, I think that would be fine too.

THE COURT: I can order what you just indicated. The only thing I'm wondering is what will I be provided if you're not in agreement. I would want your respective positions, because I'm assuming that we would have a status hearing so that you could explain to me the reasons for not being able to agree.

MS. CLARKE: Yes, I think that would be –

THE COURT: But my preference is I would want to have those reasons before the hearing so I can evaluate the problem. I don't want to have to try to figure it out on the bench. I want to figure it out before I take the bench.

MS. CLARKE: How about by noon, if we notify the Court by noon whether we're in agreement or what the nature of the dispute is?

THE COURT: How?

MS. CLARKE: By telephone call to chambers. Would the Court like something filed? We're cutting it a little bit tight.

MR. CLEARY: Why don't we just appear.

THE COURT: What do you envision as possible obstacles in reaching an agreement?

MS. CLARKE: Having never been here before, I don't know.

THE COURT: Does the government have any idea?

MR. CLEARY: The only potential obstacle I can see, Your Honor, is I would imagine the way the process is going to work, we're going find out the – government will find local psychologists and psychiatrists that we think would be appropriate for the circumstances, the defense will probably do the same thing, and we'll talk to one another about what our respective research revealed. The only potential problem is going to be if there's no overlap on those lists. If there's overlap, I think it's a done deal.

THE COURT: I think we need to talk further here. How many independent experts do you envision proposing?

MR. CLEARY: From the government's perspective, it would probably be one or two. We would probably defer to the experts themselves on that. With what little I know about this area, I think it's probably going to be one or two.

THE COURT: Defense.

MR. DENVIR: That would sound correct, Your Honor.

THE COURT: So the area of possible disagreement will probably be centered on which physician?

MR. CLEARY: That's correct, Your Honor. And that dispute in and of itself may relate to which area of expertise. I think the question paranoid schizophrenic is important area for expertise in selecting an expert. There may also be a need to get someone with some knowledge about forensic issues, so we may talk to defense counsel about that, and that will help us focus our list, and hopefully there will be an overlap if we can do it.

THE COURT: Okay. I think just letting me know then by phone should be sufficient, and we'll schedule the hearing at

4:00 o'clock for status. If you reach agreement and you're in a position to lodge an order, you should lodge the order before that time, perhaps sufficiently before that time just in case I'm independently looking at the issue myself, it will allow me to focus on other things.

MR. CLEARLY: In that event there would be no need for the status conference, correct?

THE COURT: That's right. Mr. Kaczynski, I don't express any – you don't have to respond to me, sir. I don't express any opinions in issuing the order that I'm issuing. Basically, we're trying to determine whether there could be something involved that lay people cannot detect, and that's why we're following this approach. Any problem that we need to cover?

MR. CLEARY: There was the question about communication with the jury.

THE COURT: You're right.

MR. CLEARY: Perhaps we could take that up tomorrow when we get a better sense of where we stand.

THE COURT: Right. But I should have my staff tell them that they will not be called to court tomorrow.

MR. CLEARY: Right.

THE COURT: And then we can think about a more elaborate communication to give them tomorrow. That means that we would have to meet, and so what you would need to do then, you need to give me two things if you are going to avoid a 4:00 o'clock hearing. You would all have to jointly agree upon a communication I could give to the jury.

MR. CLEARY: That would be fine, Your Honor.

THE COURT: Are we done?

MR. CLEARY: Yes.

MR. CLYMO: Your Honor, I need to clarify what my status is at this point and if the Court wishes me to continue in a status with Mr. Kaczynski through this.

THE COURT: Let me get talk to trial counsel first. I will give trial counsel my thoughts and see what trial counsel thinks. We don't know how this is going to develop. I don't know if trial counsel will be in agreement or disagreement with Mr. Kaczynski on this issue. My thought is that he should have his personal lawyer just to represent him on this narrow issue.

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

THE COURT: Do you agree?

MR. DENVIR: Yes, Your Honor.

THE COURT: That means that you're appointed under the Ninth Circuit authority I've stated earlier on this narrow issue to assist Mr. Kaczynski.

MR. CLYMO: Your Honor, I may need some help. If you're anticipating coming back to court tomorrow afternoon sometime, I may need some help in scheduling. I'm scheduled to be out of the county tomorrow afternoon.

THE COURT: I don't think he needs to have you tomorrow. The issues we're going to cover are really just scheduling issues. My thought is that if we actually have to go to a competency hearing, then he would need to have a lawyer represent him if his views differ from his current counsel. It just seemed to me that allowing you to develop a relationship with him would place him in a position to use you in a very effective manner, and so that's why I'm allowing the appointment, because I believe that you should be able to establish a relationship with him and be in a position to argue the position you believe you should argue as his personal counsel on the issue should it, in fact, be a conflict issue. So you're a conflicts lawyer.

MR. CLYMO: Thank you, Your Honor.

THE COURT: Anything further?

MR. CLEARY: Nothing from the government.

THE COURT: I assume the government has no position on what I just stated.

MR. CLEARY: That's correct, Your Honor, we do not.

THE COURT: All right. Thank you.

MR. DENVIR: Thank you, Your Honor. (Court adjourned.) —oOo— 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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The Ted K Archive

Jury Trial Day 5
Kaczynski requests to serve as his own defense
Jan. 8, 1998

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