

Jury Trial Day 7

In chambers conference

Jan. 13, 1998

U.S. District Court, Eastern District, Sacramento In chambers conference
SACRAMENTO, CALIFORNIA
TUESDAY, JANUARY 13, 1998, 9:00 A.M.

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(The following discussion was conducted in chambers, with parties appearing telephonically as indicated.)

THE COURT: Hi. This is Judge Burrell. Please state your appearances for the record. It's being reported by a certified shorthand reporter.

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

MR. DENVIR: Quin Denvir and Gary Sowards for Mr. Kaczynski.

THE COURT: Thank you. Thank you for agreeing to meet on such short notice. I started reflecting this morning on the material being considered by Dr. Sally Johnson in connection with the competency issue, and I began to wonder whether the letters which Kaczynski submitted to me under seal have been given to Dr. Johnson.

MR. DENVIR: I don't believe they have, Your Honor. I don't believe she's asked for them.

THE COURT: Well, she may not ask for them because they may not know about them.

MR. DENVIR: She knows about them, Your Honor, because she's talking to Mr. Kaczynski and talking to us.

THE COURT: You don't believe it's important for her to have those communications, Mr. Denvir?

MR. DENVIR: We would be happy to provide them to her, Your Honor, if she wants them, if they're not made available either to the public or the prosecution. On that basis we would be glad to make them available to Dr. Johnson and can do so, if the Court would like.

THE COURT: Do you see a problem with giving her the letters? Let me ask that question another way. I'm curious as to whether she knows the content or the subject matter of the letters and is in a position to know whether the letters will be helpful to the determination she has to make. Can you help me on that, Mr. Denvir?

MR. DENVIR: Yes, Your Honor. She's fully aware of the history of what brought these proceedings about. We have given her detailed information about that. I'm not sure whether she has yet covered all those items with Mr. Kaczynski, because we're not present at those talks. But she is certainly aware of that, and we can certainly make her aware that those letters exist, and if she wants them, make them available to her, if they're used just for purposes of her consideration for her report and don't go any further.

THE COURT: Let me turn to the Government and get the Government's input on the issue.

MR. LAPHAM: Your Honor, this is Steve Lapham. Your Honor, it seems to me that the whole conflict here arose because the defense, as I understand their argument

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THE COURT: Mr. Lapham, I can hear you, but it's difficult.

MR. LAPHAM: We had the telephone turned the other way. (Pause in the proceeding.)

MR. LAPHAM: Is that better?

THE COURT: A little better.

MR. LAPHAM: I'll try to speak up, Your Honor. It seems to me the defense argument goes something like this: that in part the defendant is not competent, or they question his competence, because he refuses to go along with the defense that they have chosen. They have kind of equated his refusal with competence. I think, in assessing whether he is competent, Dr. Johnson should have the letters in which he expresses his reasons for not wishing to go forward with those defenses. I can't state it any more clearly than that, because obviously we haven't seen the letters and don't know what the contents are.

THE COURT: But you have clearly stated the Government's position that the doctor should have the letters. How about Mr. Denvir's concern? Do you want to respond to that? Mr. Denvir has indicated, I believe, that if I state the doctor should receive the letters, he will give the doctor the letters, but he is concerned that the letters are in fact under seal; he doesn't want the Government to see the letters. (Pause in the proceeding.)

THE COURT: I'm talking to you, Mr. Lapham. Maybe I didn't ask a question. Do you understand the question I'm seeking to ask you?

MR. LAPHAM: Yes, I do. I was just seeking a little input from my colleagues.

THE COURT: I see. Well, that's the disadvantage in meeting as we're meeting, telephonically. Let me know when you finish caucusing.

MR. LAPHAM: Thank you. (Pause in the proceeding.)

MR. LAPHAM: Your Honor, we're not seeking to find the contents of the letter. What we were discussing is just that if the contents of the letter have become central or relevant to Dr. Johnson's conclusion, she may necessarily have to divulge in some fashion the contents of those letters. But we're not trying to seek the letters themselves or to know what the contents are.

THE COURT: Let me ask this question. Let's assume that the doctor finds some aspect of the letters significant to her decision and then she desires to divulge, as the Government has indicated, some part of the letter in her competency report. It seems to me that in that situation the defense should have input on whether that aspect of the report is readily given to the Government, and so perhaps we should devise a procedure so that we can allow the defense to litigate what aspect of that type of material is given to the Government. Do you understand what I'm suggesting?

MR. LAPHAM: Yes, Your Honor. We have no problem with that.

THE COURT: How about you, Mr. Denvir?

MR. DENVIR: Fine, Your Honor.

THE COURT: That means that you would have to do the communication, Mr. Denvir, with Dr. Johnson and make sure that your concerns are understood by her.

MR. DENVIR: What I would propose, Your Honor, is we will advise her that these are sealed letters, that if she is going to divulge the contents or feel the need to, she ought to advise us and we could, perhaps, advise the Court and the Government and perhaps have a hearing on that. It may be she will not need to do that and she may be receiving the information she needs from Mr. Kaczynski.

THE COURT: I think you're correct. Let's proceed, then, along the lines that I've just indicated. You can make the letters – you should make the letters available to her, and then you can make the communication that you've just indicated, and I think that your client's rights will be protected. You agree, don't you?

MR. DENVIR: Yes, Your Honor.

THE COURT: I've got another question. I'm asking this question because I want to know the status, at least the defense's status or understanding of the status of Mr. Clymo's involvement in the case at this point in time.

MR. DENVIR: Mr. Clymo, Your Honor, I believe, has consulted with Mr. Kaczynski on at least one occasion. I don't know what else – what other involvement he has at this particular point in time.

THE COURT: Do you think he should have any involvement at this particular point in time?

MR. DENVIR: Your Honor, my sense is that Mr. Clymo stands ready to assist Mr. Kaczynski as Mr. Kaczynski requires it, and that he understood his appointment to extend to that point, and if he had any doubts about it he would get back to the Court on that matter. I think as of now he is just answering questions and giving some general advice to Mr. Kaczynski. Or he was, at least, over the weekend.

THE COURT: Mr. Denvir, I want you to control Mr. Clymo's involvement. Do you have any problems with that?

MR. DENVIR: No, I don't, Your Honor.

THE COURT: Are you doing that now?

MR. DENVIR: We've been working very cooperatively with him on that, and I don't see any problems on that at all. And if we have any problems, we can bring them to the Court's attention. As of now, I think he's serving a personal function, just giving some advice to Mr. Kaczynski.

THE COURT: You personally want him involved now?

MR. DENVIR: I think it's helpful, eases Mr. Kaczynski's concerns about the examination and makes it likely it'll go forward without any hitches. And we are talking with Mr. Clymo, and I think it's working out very well, and I don't think the Court needs to intervene at this point.

THE COURT: Okay. For your information, when doing research on another matter this morning, I found another Ninth Circuit decision that more pointedly addresses the need to appoint a conflict lawyer in a situation where the Court is conducting

an inquiry into the defendant's concern with trial counsel. If you're interested, you can look at United States vs. Wadsworth, 830 F.2d 1550 at 1510 and 1511. It's a 1987 decision. I've just covered everything I want to cover. How about you? Anything further you wanted to cover?

MR. DENVIR: Nothing for the defense, Your Honor.

MR. CLEARY: Nothing for the Government, Your Honor.

THE COURT: Thank you for making yourselves available on such short notice. Good-bye. (Time noted: 9:11 a.m.) 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 TELEPHONIC CONFERENCE TUESDAY, JANUARY 13, 1998

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