

Jury Trial Day 8

Discussion regarding scheduling matters

Jan. 15, 1998

U.S. District Court, Eastern District, Sacramento Discussion regarding scheduling matters SACRAMENTO, CALIFORNIA THURSDAY, JANUARY 15, 1998, 4:32 P.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. LAPHAM: Good afternoon, Your Honor. Steve Lapham and Stephen Frecero for the United States.

THE COURT: Thank you.

MR. DENVIR: Good afternoon, Your Honor. Quin Denvir, Judy Clarke, Gary Sowards and John Balazs for Mr. Kaczynski. He is not present.

THE COURT: That means that we can only cover procedural matters, right?

MR. DENVIR: It appears that way, Your Honor.

THE COURT: That's all you want to cover?

MR. DENVIR: I can't imagine what else we'd be covering at this point.

THE COURT: I have something else on my mind.

MR. DENVIR: Oh.

THE COURT: We are here for procedural matters, and without a waiver that's all we can cover. The Government filed a brief, which I received a few minutes ago, which is premised on the notion that Mr. Kaczynski will be found competent, and the Government asked me to consider various options set forth in the brief. The Government has also requested that the matters set forth in the brief be resolved, I believe, before the 22nd, which is when we have this case scheduled for trial. What's the defense's response? It's really a scheduling question.

MR. DENVIR: Well, Your Honor, first off, we believe this issue has been resolved. The Court has made a ruling. This is termed a motion; it would at best be a request for reconsideration, and that would be if the Government had any standing in this regard. I don't believe they have any standing to bring this.

THE COURT: All right.

MR. DENVIR: In any case, while these competency matters are pending, I don't believe the Court can give an advisory opinion as to what would happen if Mr. Kaczynski's found competent. And so I don't know how you'd like to proceed on scheduling, but certainly nothing can be done until the Court's made a determination in that regard.

THE COURT: You're indicating that you don't believe we can schedule the matter, then.

MR. DENVIR: Oh, I think if you want to schedule it, I imagine we can.

THE COURT: That was my question.

MR. DENVIR: We can schedule something, dependent on whether he wants it heard at that point.

THE COURT: Well, can you give me a recommendation on scheduling? (Discussion off the record among defense counsel.)

MR. DENVIR: Well, Your Honor, it appears that the Court's determination as to competency, or hearing, is set for

8:00 o'clock on next Thursday, the 22nd. It would seem to me that this matter could not be heard until the Court has ruled on that. We could brief this before that date and then the Court could see where things stood on that morning, it appears to me.

THE COURT: Do you mind doing that?

MR. DENVIR: No. We'd be glad to brief it, Your Honor. Could we file it by say, 10:00 o'clock Wednesday morning? File a brief in response?

THE COURT: Government's position?

MR. LAPHAM: Your Honor, we would request that this be argued as soon as possible. We'd prefer to do it on Tuesday, if possible. And the reason for that is the Court doesn't have to make a ruling. Obviously it couldn't –

THE COURT: Just a moment. There's another question that I'm going to raise, but I'm not going to raise it until Tuesday of next week. And it's a matter that the Government is not aware of yet, and it concerns what occurred during the December 22nd in camera proceeding. I think what I will do is I will wait until Tuesday and issue an order that raises the question I want to raise, because I would want the Government to brief that question as well. You are seeking to accelerate argument on the motion, correct?

MR. LAPHAM: Yes, Your Honor.

THE COURT: You really aren't in a position to make that request. You need to wait until you receive the question I'm going to raise, because I think you should brief the question I'm going to raise. I'm still researching the issue, but I don't want to raise it until I've finished my research. And if I finish my research and if my research indicates that my tentative analysis which I now possess is correct, then I can raise the question in an order. That would provide the Government with an opportunity to brief that issue too, which takes a different approach from the approach taken by the Government. (Pause in the proceeding.)

THE COURT: I'm pausing, but – I was going to ask the defense something, but I won't, with Mr. Kaczynski not being present. I think anything we cover will have to be covered next week when Mr. Kaczynski is available. We're not going to have argument on anything on Tuesday. I see no reason why I shouldn't allow the defense to file the document they've indicated they wanted to file, because you're going to have to respond if I decide that I'm correct on the issue I'm telling you about and I decide to file something on Tuesday, then you're going to have to brief that issue, and you will probably want until Wednesday to file your brief. Am I right on that?

MR. LAPHAM: I think that's right, Your Honor, and obviously I don't know what you're talking about, but –

THE COURT: Of course you don't. But what you do know is that it is a matter that involves the in camera proceedings.

MR. LAPHAM: Understood.

THE COURT: Okay.

MR. LAPHAM: Your Honor, if I may –

THE COURT: And the other thing you will know is that, since it's not public yet, that means that the defense has opposed making this particular matter public. Okay.

MR. LAPHAM: Your Honor, if I may, just on the procedural matter that we've been discussing, just so you know the Government's view – and I think you probably already do, from what we've said – our point is we've got a jury potentially coming back on Thursday of next week. We've got some issues to resolve before then. Some of these issues possibly can be resolved, with the exception of the one that you've indicated and we don't know what that is yet. Some of them can at least be talked about in the abstract so that we've got – we can hit it on the run when the jury comes back in on Thursday. I think just the fact that we may not have a competency hearing until Thursday morning isn't necessarily a reason to –

THE COURT: Will you get to the bottom line, sir?

MR. LAPHAM: The bottom line is, whatever these issues are, we would prefer to discuss those earlier than Thursday.

THE COURT: Well, tell me what you want to do. I mean, give me a proposed schedule.

MR. LAPHAM: Well, I gave you the schedule we would like, which is to argue it on Tuesday. I understand that –

THE COURT: There's no sense in covering ground that we've already decided doesn't work.

MR. LAPHAM: I understand that, Your Honor. And I'm simply saying that we'd like whatever accelerated schedule is possible. If Tuesday's out of the question, we just want the Court to keep in mind that we would like to get these issues –

THE COURT: Sir, I've already said that Tuesday is out of the question for a hearing.

MR. LAPHAM: And I accept that, Your Honor.

THE COURT: Well, you don't accept it, because you're indicating that it's still being considered, because you said "if Tuesday's out of the question." It is out of the question. The defense has indicated it wants until 10:00 a.m. on Wednesday to file its brief. I'm going to grant its motion. If I decide to surface another issue on Tuesday, I will do it first thing Tuesday morning. I will have it filed when the clerk's office opens, and I will fax it to the parties. The issue will involve the attorney-client privilege and the doctrine of judicial estoppel. Will the Government be responding? Should I find those doctrines applicable and I in fact do what I just indicated, will the Government be able to respond by 10:00 a.m. on Wednesday morning?

MR. LAPHAM: Yes, Your Honor.

THE COURT: Will those be the only briefs I receive on the issues? Will you be replying to each other's briefs? (Discussion off the record between Mr. Lapham and Mr. Freccero.) (Discussion off the record among defense counsel.)

MR. LAPHAM: Your Honor, I think we'd at least want the option to reply. We don't know what the briefs will contain. We wouldn't want to waive that right without knowing it.

THE COURT: It may not be a right.

MR. LAPHAM: Well –

THE COURT: When would you reply?

MR. LAPHAM: We'd ask till close of business Wednesday.

THE COURT: That would leave me very little time. (Pause in the proceeding.)

THE COURT: Okay. 4:30.

MR. LAPHAM: Thank you, Your Honor.

THE COURT: It needs to be personally delivered to my chambers or faxed to my chambers and verify that we received the fax.

MR. LAPHAM: Yes, Your Honor.

THE COURT: That does raise another question. Is an hour enough to cover all the issues we need to cover? We have indicated that the jury was going to be summoned to appear at

10:00 o'clock – I mean at 9:00 o'clock. I'm now thinking that maybe we should summon them to appear later.

MR. LAPHAM: Your Honor, I think it would be advisable to allow ourselves more time. We have not only these issues –

THE COURT: How much more time, sir?

MR. LAPHAM: At least – I think we should have at least two hours.

THE COURT: Do you concur?

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

MR. LAPHAM: Your Honor, what I was about to say was we have not only those issues; we have some other issues that may be affected, depending on the way things go. For instance, we were going to say to the Court we have lots of stipulations, factual stipulations, but we don't know the status of those, depending on what the defendant's representation situation turns out to be.

THE COURT: The parties indicated at one point that you were going to meet and confer in regard to limiting instructions concerning 404(b) matters. Have you followed through on that?

MR. LAPHAM: Your Honor, if I'm not mistaken, that's been accomplished and we did address that in court one day. If I recall correctly, the defense is not requesting any 404(b) instruction or any limiting instructions, preliminarily.

THE COURT: Is that true?

MR. DENVIR: Yes, Your Honor.

THE COURT: "Yes" means what?

MR. DENVIR: Yes, we are not requesting a limiting instruction on 404(b) as a preliminary instruction. I think we may have dealt with that on the record last week.

THE COURT: Okay. I didn't hear that. You're indicating that if it is requested, it will be part of the closing instructions?

MR. DENVIR: Yes, Your Honor.

THE COURT: Okay. That's all I wanted to cover. Anything further?

MR. LAPHAM: No, Your Honor.

MR. DENVIR: No, Your Honor.

THE COURT: Okay. Thank you. (Time noted: 4:45 p.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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REPORTERS' DAILY TRANSCRIPT DISCUSSION RE SCHEDULING AND
OTHER MATTERS THURSDAY, JANUARY 15, 1998

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