Jury Trial Day 9

Hearing regarding competency report and other matters

Jan. 20, 1998

U.S. District Court, Eastern District, Sacramento Hearing regarding competency report and other matters SACRAMENTO, CALIFORNIA TUESDAY, JANUARY 20, 1998, 11:02 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.

THE COURT: Thank you.

MR. CLEARY: Thank you, Your Honor.

MR. DENVIR: Quin Denvir, Judy Clarke and Gary Sowards for Mr. Kaczynski, who is present in the court, and also Mr. Clymo, who has previously been appointed to advise Mr. Kaczynski.

THE COURT: Thank you. The hearing has been scheduled to cover the competency report, the forensic evaluation performed by Dr. Sally Johnson. Are we ready to cover that?

MR. DENVIR: Yes, Your Honor.

THE COURT: How do you recommend covering it?

MR. DENVIR: Well, Your Honor, we were provided a copy of the 47-page report and the cover letter on Sunday. Counsel have reviewed it; we have provided a copy to Mr. Kaczynski, and I believe that we are prepared to stipulate at this time that he is competent to stand trial, based upon that report. As far as the report itself, we would ask the Court to release the cover letter but to keep the remainder of the report sealed under the authority of the court previously cited. So I believe that, then, would take care of the competency matter.

MR. CLEARY: We join in the defense's request to file the cover letter and seal the report itself, Your Honor.

THE COURT: Okay. I filed the report; it was sealed today – actually, I filed two copies of the report. I filed a redacted copy and an unredacted copy. And I will make public the cover letter later today. What's the next thing you would prefer to cover? I sent an order; I faxed it to each of you. Did you receive the order?

MR. CLEARY: We did, Your Honor.

MR. DENVIR: Yes, Your Honor.

MR. CLEARY: We could discuss, if Your Honor wanted to, the issues of representation.

THE COURT: As laid out in your motion?

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

THE COURT: Let's go back to the competency question first. I'm going to tell Dr. Johnson she's not needed for Thursday. And by virtue of your stipulation, I assume you don't contemplate the Court making any findings?

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

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

THE COURT: Okay. Let's now cover the motion. I should cover an aspect of the motion before you cover it. One of the options set forth in the motion involved Tony Serra. I spoke to the personal secretary for Tony Serra – I believe it was on Friday, last Friday. And I asked about his availability for trial. I was informed that he would not be available for trial until September of '98. The impression I received is that he is saturated with trials up until that date, and if my impression is correct, I question whether he could in fact be available for trial in September of '98, because I'm assuming it would take some time to prepare for this trial. Will the Government tell me how many exhibits are involved?

MR. CLEARY: I can tell you Your Honor there are thousands of pages of exhibits. Hundreds of photographs – I mean, there's a lot of evidence – I don't know how much of it the Court wants me to detail, but we do share your view that it would untenable, if this is the Court's view – it is untenable, I think, to request Mr. Serra to come into the case, given his schedule. There is a wealth of matter he'd have to get on top of?

THE COURT: There's what?

MR. CLEARY: A wealth of material he would have to grasp in order to be able to represent the defendant in this case. So I think it is untenable to consider him as a likely alternative here.

THE COURT: The Government's motion also suggests that I order Mr. Denvir and other counsel of Mr. Kaczynski to represent Mr. Kaczynski without the mental status defense. Is the defense in a position to respond to the Government's position on that matter now? I'm not indicating the Court's position on it. I'm just interested in your position.

MR. DENVIR: Your Honor, we were briefing that for the opposition that we were filing at 10:00 o'clock tomorrow. We believe that there is no legal authority to do that, along the lines of the Court's earlier ruling, and that we have further authority that we will be presenting tomorrow on that issue, that, as counsel – when counsel – when defendant appears with a counsel, the question of – these questions of what evidence to present, what witnesses to call and, in particular, what type of defense to present is in the control of counsel. We believe that's the correct – that the law supports that, and we will provide further analysis tomorrow morning along those lines.

THE COURT: Okay. What other option did the Government want to cover?

MR. CLEARY: Several options, Your Honor. I guess the next one would be bringing in a new lawyer, obviously not Mr. Serra.

THE COURT: You mean appointing a new lawyer?

MR. CLEARY: That's correct, Your Honor, who would follow the defendant's wishes in terms of the defense to present in this case, defense and mitigation arguments to present in this case.

THE COURT: Do you think that's a viable option?

MR. CLEARY: I think it's an unfortunate option, Your Honor. It may be the safest – one of the safest courses to take. The Government is concerned, as we've

expressed before, not seeing the results of the defense's research on this, but we are concerned, as we've expressed before, about going forward with this case on what we believe is an uncertain area of the law, that is, who does control the choice of defense, and we're looking for the best method, the best way to protect the record for appeal.

THE COURT: Question.

MR. CLEARY: Yes, sir.

THE COURT: If the defendant gave counsel control of the defense at issue, do you believe that the defendant, under Faretta or any other law you're relying on, would have the authority to take back that control during closing argument?

MR. CLEARY: Possibly. I don't know, and the reason I say that, Your Honor, is I don't know that a defendant making choices about his case, the presentation of his case, makes at any time irrevocable choices. And I'm concerned that that might be, in fact, the controlling law in the situation Your Honor posited.

THE COURT: Well, then, why isn't this circular? What if I appoint a new lawyer, and the new lawyer indicates that he or she will follow the advice of the defendant, and then the defendant changes that advice and decides that he wants to do something else, and the new lawyer doesn't want to do it? Wouldn't we be in the same predicament?

MR. CLEARY: We might, Your Honor. I think the resolution of that, what the Court has pointed to the resolution, is still the same open legal question, and that is, who controls the choice of defense? There are certain things that are clear, and that is the defense attorney can determine what evidence to put on, what objections to make, the day-to-day ministerial actions in court. If the defendant is now, as I understand it, this defendant or any defendant, before opening statements, saying, "I don't want that defense," and our research reveals that legal question is an open one, the safer course would be to bring in – either direct these lawyers to follow his choices, the defendant's choice of defense, or bring in another lawyer who will say, who will represent to the Court that he will follow the defendant's choice of defense. And what that would mean, in my view, is that if the defendant chose, as I think he has a right to do, to switch his defense later on, or he may have a right to do under the law, to switch his defense in midstream, the lawyer would be obligated to follow that.

THE COURT: Are you finished?

MR. CLEARY: With that scenario, Your Honor. And then the other scenario that is likely is that the defendant, depending on the Court's ruling, the defendant will ask to represent himself. And it's the Government's view that if he does that, that the Court would have to grant his request.

THE COURT: Do you make that statement based upon the authority you submitted in your motion?

MR. CLEARY: We do, Your Honor.

THE COURT: The Arlt case at 41 F.3d 516 doesn't seem to support what you're telling me. It doesn't deal with the question of timeliness. The other case you cited in connection with the Faretta issue deals with the unequivocality requirement. I don't think that's necessarily at issue. It seems to me that the timeliness question is at

issue. But you haven't cited a case in your motion that deals with timeliness. I cited the Fritz case from the bench the last hearing. You didn't brief it. And Fritz deals with timeliness. Fritz also deals with another concept that I believe is afoot which you have not briefed, and that's whether the request for self-representation is done for the purpose of delay. I'm going to deal with those issues. The Government has not submitted a single case that pointedly deals with those issues, and yet you're indicating to me that I should rule on the Faretta issue as you state. Yet your position is not supported by any authority you've cited.

MR. CLEARY: May I just explain my position a little more thoroughly, if I can?

THE COURT: Sure.

MR. CLEARY: Just as on –

THE COURT: On what point? Let's make sure we're talking about the same thing. On what point?

MR. CLEARY: Sure. The Court raised the question of timing in the Fritz issue. As I understand it, the Government understands the timing issue, the timeliness factor is whether the timing of the raising of the request of self-representation will delay the trial. And we don't see –

THE COURT: I don't see that as the issue at all, sir. I think you need to revisit Fritz.

MR. CLEARY: Okay. And my understanding of Fritz, Your Honor, is that the timeliness of the issue, the raising of the issue by the defendant, is analyzed in light of whether the defendant is raising the issue for purposes of delay. That's my understanding of the case.

THE COURT: Well, there are two separate concepts. One concept is what you've just indicated: purpose of delay. And that is a concept that is analyzed by a particular body of law, and we receive a lot of guidance on that by looking at Fritz. And the other concept deals with timeliness. And Fritz, I believe, discusses empanelment, that if the request is made prior to empanelment, it is timely. A number of other circuits, other than the Ninth Circuit, have indicated that a criminal defendant has an absolute right to self-representation if it is made timely and is not made for purpose of delay. If it is not made timely or if it is made for purpose of delay, the other circuits seem to indicate that the judge has discretion as to whether to grant the request. None of those things are covered in the Government's motion. The single case you cited on the issue involved a finding that the motion was timely made during a pretrial hearing. We're not in a pretrial hearing. We're in trial. These are trial proceedings. The trial in this case commenced November 10, 1997. Or was it the 12th? It was the 12th?

THE DEFENDANT: (Nods head up and down.)

THE COURT: Okay. What I'm telling you, sir, is the Government's position is not supported – at least you haven't given me support, and I'm not sure that you understand the law on the issue, because you were mixing the concepts as you were arguing. And I'm going to fully consider those concepts before I rule. I'm in the process of analyzing those concepts right now. And I've done considerable research both in the

Ninth Circuit and in other circuits considering the timeliness issue. And I've also looked at the concept dealing with purposeful delay. I'm in the process of analyzing it. But I looked at your cases in the motion, and they're not helpful on any of those concepts. And so your argument is a conclusory argument that is not supported by any authority that you've cited. And I can't imagine why you would think I would grant your position when you haven't given me any authority in support of it. What else do you want to cover?

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

THE COURT: I think you should look at another issue, because I'm going to research another issue and I'm just starting to look at it. I will find my notes. (Pause in the proceeding.) I'm concerned that I spent considerable time communicating with the defense ex parte in camera to resolve a matter that I felt was resolved. That troubles me, because if a judge spends his or her time with litigants believing that a matter was in fact resolved, and then you leave the meeting, and then about a month later the same issue appears and it appears that you have wasted the judge's time, you've interfered with the orderly administration of the judicial process, and you may have even engaged in action that delays justice. And I question whether our justice system is designed to allow such things to occur. So I think you need to look at the judicial estoppel doctrine. I don't know if it applies, but I'm looking at it. It was applied in two Ninth Circuit situations, at least discussed in two Ninth Circuit cases. I can give you the cites: United States vs. Garcia, 37 F.3d 1359, 1366-67 (9th Cir. 1994); United States vs. Ruiz, 73 F.3d 949, 953 (9th Cir. 1996). Those cases indicate that the doctrine fosters policies that prevent inconsistent positions from being taken in the same or a different case, and the policy underlying the doctrine or policies involve considerations of the orderly administration of justice and regard for the dignity of judicial proceedings. The doctrine was applied against a criminal defendant in a Third Circuit decision at 922 F.2d 178; it's a 1990 case. In a civil decision, the doctrine was applied to statements involving a settlement. Rissetto vs. Plumbers and Steamfitters Local 343, 94 F.3d 597, 605 (9th Cir. 1996). I'm sharing those cites with you because I'm engaged in preliminary research at the moment to see if the doctrine applies, and I'm looking at the December 22 resolution that was reached by the defense in this case. I assume if you are going to brief that issue, I will receive input from you tomorrow?

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

THE COURT: And by what time tomorrow?

MR. CLEARY: What time would be convenient for the Court?

THE COURT: As early as possible.

MR. CLEARY: We'll get it to you first thing in the morning.

THE COURT: You can?

MR. CLEARY: Yes, we can.

THE COURT: Okay. Are you going to brief the Faretta issue as well?

MR. CLEARY: We can, Your Honor, and we'll have that to you in the morning also.

THE COURT: Do you want me to assist you on the Faretta question?

MR. CLEARY: Certainly.

THE COURT: You should look at the Ninth Circuit decision in Smith. I only have a target page, 780 F.2d at 811. The Ninth Circuit in that decision discusses timeliness as follows: "This court has held that a demand for self-representation is timely if made before meaningful trial proceedings have begun." It cites Fritz for that proposition. "This court has also found that a request is timely if made prior to jury selection" – it cites another Ninth Circuit decision for that position – "or if made before the jury is empaneled, unless it is made for the purpose of delay." Do you know when a jury is empaneled? (Discussion off the record among the Government attorneys.)

MR. CLEARY: We're not sure what "empanelment" means, whether that means bringing them into court or swearing them, Your Honor.

THE COURT: That's important to your motion. Tentatively, I'm not inclined to bring in new lawyers. I think the question centers on whether Mr. Kaczynski will be allowed to represent himself. I think the difficulty that Mr. Kaczynski has experienced with his present lawyers will resurface if I bring in additional lawyers and we will be right back in the situation we're in right at this moment. We have the jury scheduled to come in at 10:00 o'clock on Thursday. I assume that we should keep that schedule, correct?

MR. CLEARY: Your Honor, I think it would be prudent to resolve the representation issue before bringing the jury back to the courthouse.

THE COURT: Okay. Well, then we're going to keep the schedule. We are scheduled to come in here at 8:00 o'clock. We will resolve the representation question between 8:00 and

10:00. I'm bringing the jury in at 10:00. I will resolve the representation question between 8:00 and 10:00. I want to revisit a matter that you told me I didn't have to be concerned about and you indicated that it was covered during one of the earlier hearings, and that's the question of stipulations. When the stipulation comes to me, will it indicate the proposition on which 404(b) evidence is admitted or it's probative?

MR. LAPHAM: Your Honor, I'm not quite sure what you mean by your question.

THE COURT: Well, I don't have any problems clarifying my question. There are limited propositions on which 404(b) evidence is generally admissible, such as the question of intent or identity, and there are other propositions. And I'm trying to ascertain whether your stipulation that you've indicated I'm going to receive, I presume, on Thursday morning, is going to tell me the proposition on which 404(b) evidence embodied in the stipulation is admitted.

MR. LAPHAM: The stipulation itself does not identify any of those specific issues. It merely says that the parties stipulate that that evidence is admissible.

THE COURT: Well, that's interesting, because you told me that you didn't want me to give a limiting instruction and that we would give an instruction on the matter at the close of the trial.

MR. LAPHAM: Your Honor, to be precise, the defense said they are not requesting a limiting instruction preliminarily.

THE COURT: Well, to be precise, I asked the question and the Government didn't indicate that it was going to offer a limiting instruction, and I thought the Government indicated to me that this matter had been covered previously, and I tell you I'm troubled by it, sir.

MR. LAPHAM: Your Honor, we did submit a limiting instruction to be given preliminarily. The defense said they didn't want it given preliminarily.

THE COURT: Wasn't the limiting instruction you submitted a general limiting instruction that didn't cover precise propositions on which 404(b) evidence would be admissible?

MR. LAPHAM: If I'm not mistaken, it was the standard Ninth Circuit 404(b) instruction.

THE COURT: How do you expect the Court to make the 403 balance that the parties will be asking the Court to make as to the admissibility of disputed evidence if I don't know what propositions the 404(b) evidence in your stipulation are admissible?

MR. LAPHAM: Your Honor, the 404(b) motion itself, the 60-page motion that we filed last spring, identifies the basis for each one of the statements that we intend to use. And it identifies generally the 404(b) –

THE COURT: Is that part of your stipulation with the defense?

MR. LAPHAM: No.

THE COURT: Well, then, what does that have to do with what you're telling me?

MR. LAPHAM: What it has to do is, the defense has stipulated that this evidence is admissible under 404(b) and –

THE COURT: Okay. Just a moment. I'm troubled by this, and I want to know, why do I have to wait until Thursday to see the 404(b) stipulation?

MR. LAPHAM: Well, Your Honor, this is – as we stand here today, the Government has some doubt as to the circumstances of those stipulations. We had expected on the first day of trial that the defendant would be voir dired by the Court as to his agreement with those stipulations. That was kind of – well, we never got to that because of the self-representation request. When we resolve that issue, we'll have to go back and make sure that those stipulations are still in place. For instance, if the defense, if the current defense counsel are still here on Thursday, we would ask that voir dire to go forward and have the defendant affirm that he agrees with all of those stipulations. If the defendant winds up representing himself, he would have to basically sign off on the stipulations that have been previously entered into by his counsel. We had a footnote in our trial brief regarding that procedure.

THE COURT: I know that. I'm still trying to figure out how the parties expect the Court to make the 403 balance if I don't know what discrete propositions the 404(b) evidence will be admitted on.

MR. LAPHAM: Well, you –

THE COURT: If you have – well . . .

MR. LAPHAM: Your Honor, I can answer that question.

THE COURT: Go ahead, sir.

MR. LAPHAM: First of all, it's the defense – it's the burden of the defense to make the 403 objection and to state the basis for the 403 objection. They've already acknowledged that the evidence is admissible under 404(b), and we have given them the bases –

THE COURT: Just a moment. Admissible under what proposition under 404(b)?

MR. LAPHAM: Well –

THE COURT: That's what I've been asking. That's what I've been asking ever since I started asking questions on this. I started reflecting on what the parties told me, because I didn't recall covering this during a hearing, because if you had indicated what you just indicated, I would have had the same reaction that I've got, because it's very difficult for a judge to balance under 403 if you don't know what evidence is already in the record on that particular proposition.

MR. LAPHAM: Your Honor, that's rather a broad question. Let me see if I can explain why. The – with any given uncharged device, uncharged bomb, there will be numerous statements that we're going to ask Court to admit into evidence. And those statements, some of those statements may go to intent; some may go to motive; some may go to plan, preparation; some of those statements may go to all of those things. If you look at Exhibit B which is attached to our 404(b) brief, with respect to each one of those statements we analyze the bases for admitting those statements into evidence, why they are relevant under both 404(b) and 403.

THE COURT: For the second time, sir, I know that. And what I don't know is whether your 404(b) brief is part of the stipulation. And if it's not part of the stipulation, isn't it irrelevant?

MR. LAPHAM: Your Honor, the defense has stipulated that the uncharged conduct is admissible under 404(b).

THE COURT: Just a moment. How about the jury? How will the jury know what the evidence is used for? How will you keep the jury from using the evidence as character evidence, something that is absolutely prohibited by the rule?

MR. LAPHAM: Your Honor, it is the burden of the defense to request a limiting instruction at the appropriate point in the trial, whether that's at the time the evidence is admitted –

THE COURT: I see.

MR. LAPHAM: – or if they want to delay that –

THE COURT: I understand. It's not the Government's problem; it's the defense's problem.

MR. LAPHAM: Your Honor, we keyed up this issue since spring. It is definitely the defense's burden of proof to show what the 404(b) or 403 objection is.

THE COURT: Okay. We're now going in circles. I understand your position, I believe, clearly, and I guess I will just have to wait until I have to make a 403 balancing call to decide the value of the 404(b) evidence and the stipulation.

MR. LAPHAM: Your Honor, we're beyond the 404 issue. The defense has stipulated that evidence as to the uncharged bombings are admissible –

THE COURT: Aren't you – why can't I see the stipulation?

MR. LAPHAM: We have no objection.

THE COURT: Well, let me see it.

MR. LAPHAM: We don't have them in court right now.

THE COURT: I see. I thought the stipulation covered both 404(b) and 403.

MR. LAPHAM: No. The stipulation covers – let me see if I can describe the stipulations in generic terms again. Each stipulation describes the facts relating to each bombing incident.

THE COURT: Just a moment. If the stipulation doesn't cover 403, then you will have to make a specific motion if there's an objection – not a motion, but you would have to argue the 403 issue later. I had always thought you told me that the stipulation covered 404(b) and 403. (Discussion off the record between Mr. Cleary and Mr. Lapham.)

MR. LAPHAM: Your Honor, I understand now what the confusion might be. The stipulation does cover both 404(b) and 403 as to the bombing incidents themselves. There are certain statements by the defendant going to those uncharged events by which the defense has reserved a right to bring 403 objections, as to specific statements. But as to the evidence about uncharged bombing activities, the defense has agreed that those events come in under both 404(b) and 403. And we've stipulated that certain photographs come in relating to those bombs, that components come in –

THE COURT: You're going beyond the call of my question. I'm only trying to determine whether the stipulation covered the 404(b) proposition that is admissible under the Evidence Code. And you've indicated that it does not and that that's not the Government's problem, that's the defense's problem; if the defense wants a limiting instruction, the defense should ask for it.

MR. LAPHAM: That's correct.

THE COURT: Okay. I understand the situation. Anything further?

MR. LAPHAM: In the hearing or on that issue?

THE COURT: On any issue. No, I don't want to hear anything else on this 404(b) issue.

MR. LAPHAM: I have a question about the December 22nd hearing, a couple of questions.

THE COURT: Okay.

MR. LAPHAM: It appears the Court is not going to release any more transcripts; is that correct?

THE COURT: Well, there's been an objection. And I don't know if I brought the transcripts to the bench with me. I didn't think I should release the transcripts in

the face of an objection. I thought that we should discuss it here in open court. So I haven't made a decision on it; I just thought that since the defense has objected, we need to discuss it in open court. But I'm not sure that I brought the document with me. I can have my deputy clerk go to my chambers and get it, if you want.

MR. LAPHAM: Your Honor, I don't think that'll necessary. I think, if I can just state the Government's views on that – the Government obviously doesn't know the precise contents of the matters under discussion. So it would be impossible for the Government to state whether that matter is protected by some privilege. What we do know, though, is that it's the burden of the defense to prove the privilege. And between the defense and the Court, you know what's covered, and it's just a matter of making a ruling on whether or not the defense has shown that such a privilege exists for the material that's being considered. The mere fact that they state the opinion or argue that it's covered by attorney-client privilege doesn't end the matter. And there's nothing more that I think the Government is going to be able to assist the Court with on that issue.

THE COURT: Let me hear from the defense on it. What I understand the Government to state is that it is very awkward for the Government to argue against the objection, because to argue against the objection the Government would have to see the document that the defense does not want to show the Government. And I understand the Government's position in that regard, and I'm sure you do too. I want to hear your response.

MR. DENVIR: Well, Your Honor, in the order that you filed this morning on page 4, you've summarized the substance of what occurred on the 22nd and you stated that the issue of control of the defense should be viewed in light what occurred at that hearing. I don't believe the Government needs anything further than that. You've set out the essence of what occurred at that hearing, and that should serve their purposes of briefing, it seems to me. I assume that was the purpose of the Court's giving a summary.

THE COURT: Let me scan it right now on the bench to see if it sets forth enough information. (Pause in the proceeding.)

THE COURT: One thing was definitely decided at the December 22 hearing. And that is that trial counsel for Mr. Kaczynski would be in control of the presentation of mental status evidence during the sentencing phase, should there be a sentencing phase or penalty stage of the proceeding. There's no doubt in my mind at all that that was decided. There's some disagreement concerning what was decided as to the presentation of evidence during the guilt phase. I want to talk to defense counsel at sidebar and tell them what I'm going to say and see if they have any objection to it.

MS. CLARKE: Shall we bring up Mr. Kaczynski?

THE COURT: Yes. Marshal, let Mr. Kaczynski come up to the bench. (The following discussion was had at the bench.)

THE COURT: What I – can you hear, Mr. Kaczynski?

THE DEFENDANT: Yes. Yes.

THE COURT: What I would like to say is that there was an agreement that the 12.2(b) defense – or notice, I should say –

MS. CLARKE: Notice.

THE COURT: – would be withdrawn and that Mr. Kaczynski construed that as a withdrawal of all mental status evidence. And then – are we okay thus far?

MR. SOWARDS: Okay.

THE DEFENDANT: Okay.

MR. DENVIR: Okay.

MR. CLYMO: It's okay with Mr. Kaczynski.

THE COURT: Okay. And then I will say that I stated that I understood his position because I thought that myself at one point, and then I will state that when I went back to review the record, it now appears to me that what counsel discussed was not only the statutory provision of 12.2(b) but also the withdrawal of expert evidence on that issue –

MR. CLYMO: (Nods head up and down.)

MR. DENVIR: (Nods head up and down.)

THE COURT: – and that I'm now analyzing the issue in the context of all trial proceedings.

MR. CLYMO: Judge, are you stating that as the source of the potential conflict between Mr. Kaczynski and his lawyers on this issue?

THE COURT: Right. I will probably say that his lawyers have made statements but I did not examine them extensively on this point. That's when I brought in Mr. Clymo.

MR. CLYMO: I think that's okay with Mr. Kaczynski to indicate that, subject to Mr. Denvir and Ms. Clarke –

MR. DENVIR: (Nods head up and down.)

MS. CLARKE: (Nods head up and down.)

THE DEFENDANT: I think it's okay to indicate that.

THE COURT: All right. (The proceeding resumed as follows in open court.)

THE COURT: I've indicated at sidebar what I was going to state. Defense counsel should interrupt me if I deviate from what I said I was going to say. I didn't take notes; I'm going to be saying this off the top of my head, from my memory. There was an agreement reached during the December 22 hearing concerning presentation of mental status evidence during the guilt phase. I am still analyzing the record in regard to the matter. At one point during my interactions with the defense ex parte in camera, it was obvious that Mr. Kaczynski assumed that the agreement to withdraw the 12.2(b) notice would mean that there would be no mental status evidence presented during the guilt phase of the trial. I agreed with Mr. Kaczynski's impression once, possibly twice, during my interactions with the defense, and at that time I was just focusing on the 12.2(b) notice. When I returned to the record to see what was actually stated, if you'll look at my order on page 4 at line 11, that's really almost verbatim as to what was stated. But there were a lot of other things covered, but everything really centered

on expert witnesses concerning the mental status issue. I am now in the process of deciding the issue. I have reviewed all of the ex parte in camera transcripts; I have reviewed some of the public transcripts; I've even reviewed transcripts of jury selection. And I'm still in that process of reviewing the record so that I can make a decision. Does that tell the Government enough information?

MR. LAPHAM: Your Honor, I think – well, it sounds like you're still reviewing so there's a chance we may still get additional information; I may be wrong about that. But I think it would be important for the Government to know the nuances about that agreement, whether there is – whether the Court believes there is some ambiguity about what was actually agreed to during the course of those proceedings. And I think you've identified exactly where the Government's concern is.

THE COURT: Well, I think what I've indicated to you is that initially I thought there was some ambiguity. But I reached that conclusion without real memory of the record. And when I returned to the record, I realized that there does not appear to be ambiguity.

MR. LAPHAM: Your Honor, the question in our mind would be whether or not if an agreement was reached as to the withdrawal of the 12.2(b) notice, it would certainly not seem obvious that a layperson such as the defendant would immediately understand that withdrawal of the 12.2(b) notice only related to mental health expert testimony and might still permit defense counsel, under their view, to put on lay testimony, which I assume he – from statements after that hearing, he would object to. And I think it would be necessary, for the Government's purpose, to actually see what was said with respect to that to decide whether or not that was actually what was agreed upon. I'd also, in response to Mr. Denvir's argument – he indicated that the Court's order gives the Government enough information to go on to know what is at dispute. The Government's view is that that's not the standard in analyzing attorney-client privilege matters. It's the burden of the defense to show why or why not those matters are protected by the attorney-client privilege. And it's not a sufficient argument.

THE COURT: Well, here's the problem I think the defense has. Statements made by Mr. Kaczynski during the proceeding could be used by the Government in its attempt to kill him. That's a deadly serious matter. And so you can understand why the defense is reluctant to allow anything that Mr. Kaczynski actually said to be made public, because they would, arguably, be helping the Government in its quest to obtain its objective.

MR. LAPHAM: Well, I understand that, Your Honor, but I'm not sure that that changes the analysis under the attorney-client privilege.

THE COURT: It's more than just the attorney-client privilege. I tried to tell you that in an order I filed. You are correct: the attorney-client privilege is part of the doctrine that protects the communication. But the Sixth Amendment right to effective counsel is also implicated. A criminal defendant that receives an appointed lawyer has no absolute right just to fire his or her lawyer. If Mr. Kaczynski had the means to hire his own lawyer, then he would have just – maybe – fired the defense team, wouldn't have

had to involve the Court. But when you have an appointed lawyer, the Court under law gets involved. And you cited a case in your recent motion – you cited it for another proposition, but the case you cited actually supports the action I took, and that's why I took the action. If a criminal defendant has the means or if someone is going to offer services pro bono as a lawyer, the criminal defendant then is entitled, under Ninth Circuit law, to allow that lawyer to take over the reins, unless I analyze certain factors and I decide that that can't occur. And when it's an appointed situation, I have to look at the communications to decide whether or not irreconcilable differences are afoot that require the appointment of another lawyer. And that's why I went in camera, to make those determinations. If I did that publicly, then everything Mr. Kaczynski said could be used against him in this case. And the same principle applies now. I really think the Government at this moment has the essence of everything that is at issue with respect to the guilt phase issue. There really isn't an issue, in my opinion – well, there is an issue if Mr. Kaczynski – and apparently the Government opines this – if Mr. Kaczynski can withdraw the control at any moment of the proceeding, then there is an issue. And it's hard to believe that's the law, because that would disrupt many trials.

MR. LAPHAM: Your Honor, I don't dispute, and I don't think anybody does dispute, that you handled it in the correct fashion. The question is – and I want to emphasize the Government is not seeking any admissions to any of the charged offenses, or any criminal conduct, for that matter, that may have been made in those proceedings. What the Government is looking for is statements that are relevant to the issue now before the Court, the voluntariness of the defendant's – well, the agreement – voluntariness of his agreement to whatever happened in that December 22nd hearing.

THE COURT: I can shed some light on that. The defense can interrupt me if they think I'm sharing things that shouldn't be shared. The parties used the Court as an assistant or a facilitator, and I think that Mr. Kaczynski, just as other criminal defendants who have appointed counsel who are concerned about something the appointed counsel allegedly did, chose to get the Court involved. I listened to Mr. Kaczynski; I listened to a defense lawyer, and that continued for a considerable period of time during the hearing. I'm not mindful of how much time passed, but it seemed like hours to me. I don't mean that in a pejorative way. It just seemed like a long time, because I didn't think I was going to get anything resolved. And I started to wonder whether I needed to call in a conflicts attorney, and just when I started having those thoughts, a proposal was made by a member of the defense team, which I wish I could take credit for, but I can't, and the proposal was eventually something that resolved their dispute. I didn't force an agreement on them. I really was just a facilitator. They agreed themselves. It was a volitional act. The only question is what constitutes the agreement. But I don't think there's any doubt about the fact that they decided that the course of action that makes up the resolution was something they all wanted at that moment.

MR. LAPHAM: Your Honor, "voluntariness" probably wasn't the correct word. A knowing, understanding waiver is probably more what we're getting at here, whether or not the defendant actually knew what he was agreeing to.

THE COURT: Well, you've already covered that issue, because you're indicating that he may not have understood that lay witnesses couldn't be called. But I don't think sharing additional information about what occurred on the 22nd is going to provide you additional light. You mentioned getting a brief to me in the morning. Did we give you a time?

MR. CLEARY: We said we'd get it to you early in the morning. You did not give us a time, Your Honor. Ten o'clock?

THE COURT: How about the defense? Are you going to file something?

MR. DENVIR: We had planned to file a brief by

10:00 o'clock, Your Honor.

THE COURT: You do?

MR. DENVIR: In response to the Government's motion; yes.

THE COURT: Will that be the last brief? Are you going to be filing replies to each other's brief?

MR. DENVIR: My understanding was that you had authorized us to file by the end of the day in reply.

THE COURT: I did that reluctantly. I didn't want to do that, because that – what I allowed you to do was to file it at 4:30, but that doesn't give me much time.

MR. DENVIR: We'd be glad to make our last brief at

10:00 o'clock tomorrow, Your Honor.

THE COURT: If you're going to file a reply and you're going to file it late, give me the cases so I can leave the building at a particular time; I can take cases with me. And let's change the time. Can we change the time, maybe move it back from 4:30, just in case I want to do independent research on some of the points? At least 3:30. That would give me a little bit more time.

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

THE COURT: Is that okay?

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

THE COURT: Have we covered everything?

MR. CLEARY: We have.

MR. DENVIR: Yes, Your Honor.

THE COURT: Thank you.

MR. CLEARY: Thank you. (Time noted: 12:06 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 JURY TRIAL

HEARING RE: COMPETENCY REPORT AND OTHER MATTERS TUESDAY, JANUARY 20, 1998

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Reported by: SUSAN VAUGHAN, CSR No. 9673 A P P E A R A N C E S For Plaintiff UNITED STATES OF AMERICA: OFFICE OF THE U.S. ATTORNEY 650 Capitol Mall Sacramento, CA 95814

BY: ROBERT J. CLEARY STEPHEN P. FRECCERO R. STEVEN LAPHAM Special Attorneys to the United States Attorney General 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 Also Present: KEVIN CLYMO, Attorney at Law TERRY TURCHIE, Assistant Special Agent, F.B.I. Unabom Task Force ROBERT ROLFSEN, JR., Special Agent, F.B.I.

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Jury Trial Day 9
Hearing regarding competency report and other matters
Jan. 20, 1998

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