

# Pretrial Hearing Day 2

Chambers conference

DECEMBER 11TH, 1997

U.S. District Court, Eastern District, Sacramento Chambers conference  
SACRAMENTO, CALIFORNIA  
THURSDAY, DECEMBER 11TH, 1997 - 2:30 P.M.

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(In chambers telephonic conference call.)

**THE COURT:** This is Judge Burrell. I'm reporting this hearing. Please state your appearances for the record.

**MR. CLEARY:** This is Robert Cleary with Steve Lapham and Stephen Freccero for the Government.

**THE COURT:** Thank you.

**MR. CLEARY:** Thank you.

**MR. DENVIR:** This is Quin Denvir with Judy Clarke, Gary Sowards and Denise De La Rue for Mr. Kaczynski, Your Honor.

**THE COURT:** Thank you. I received a telephone call from Juror 228 about ten minutes ago. I personally answered the phone and spoke to the juror because I didn't know whether the juror had received some type of a threat that would require me to have the marshals assist him. Using hindsight, it probably would have been better for me to have called my reporter to have had the communication with the juror reported. What I did is I listened to the juror for a few moments, and then I asked the juror whether he minded if I placed him on my speaker phone and allowed my lawyers – both of my lawyers to hear the communication. He approved of that procedure; and therefore, I followed it. He told me his name, and I looked up his number, and he's Juror Number 228. He said he was calling because he takes my instructions seriously, and because of that he wanted to speak to me or write me about something he observed that he thought should be brought to my attention. He told me that he didn't want to jeopardize his ability to sit as a juror, and he gave me the impression that by communicating to me whatever information he had on his mind, he could possibly jeopardize his status as a prospective juror. He then began to tell me that yesterday afternoon, and I believe this occurred after another juror was examined by the parties and the Court, that juror returned to the jury room – I think I'm right that this occurred after the examination, but I could be wrong, that's one reason why I wish I had reported it so that you would be able to read the transcript, but it may not make a difference to you – that juror returned to the jury room, and began to discuss the death penalty and how she's an eye for an eye and a tooth for a tooth. He identified the juror by her first name. He said (redacted), the young woman with a brown leather coat with western wear. I asked him whether she was the last person examined by the Court yesterday, and he said yes. So I believe he's identified Juror 244. I then assured him that providing the information he provided would not jeopardize his status as a juror, that both the Court and the parties expect jurors to fully comply with the Court's instructions and to be as honest as possible. And that that is the only way the parties and Mr. Kaczynski can be assured of a fair trial. It is obvious that because of

the nature of the communication I felt I should advise you of it immediately and get your input.

**MR. DENVIR:** Well, Your Honor, we would stipulate to excuse that juror. We were going to – 244 is the one who made the statement? We were going to file a challenge for cause anyway given her views on the death penalty, which appeared to make her – impair her under Witt. Obviously didn't follow the Court's – I mean, I think the concern too is she obviously didn't follow the Court's admonition even after being in court and questioned by the Court so . . .

**THE COURT:** Government?

**MR. LAPHAM:** Well, Your Honor, I hate to jump to that conclusion. She's, we all know it, entitled to the presumption of innocence. I'm not sure that, even if it's true, it constitutes talking about the case. Sounds like she was discussing her death penalty views. Maybe this is something that is more properly addressed in briefing, if the defense is going to file a motion for cause anyway.

**THE COURT:** Is there anything further to cover in regard to the matter? I will leave it for briefing. I'm just bringing it to your attention in case you believe it affects other jurors at all.

**MR. DENVIR:** I guess that was the question, Your Honor. Did the – Did Juror 238, I guess, indicate whether –

**THE COURT:** Not 238.

**MR. DENVIR:** Sorry. Did 228 indicate whether the young lady made that statement in front of all the other jurors? Did she give any further detail?

**THE COURT:** I did not ask that question pointedly, but it is my clear impression that the statement was made in the jury room and the other jurors presumably were in the jury room.

**MR. DENVIR:** And I guess also the – 228 didn't say something about whether any jurors responded to the statement?

**THE COURT:** The juror did not say that anyone responded. It's also my impression that the information I have related is all the information the juror had, that is Juror 228.

**MR. LAPHAM:** Your Honor, is there any indication this was prompted by any prior question or discussion from any other jurors?

**THE COURT:** I have no information in that regard at all. The impression Juror 228 left me with is that Juror 244 – this is only an impression – that Juror 244, on her own, entered the jury room and made that statement.

**MR. LAPHAM:** Okay. Do we know how long the conversation was? Was it just a statement, or was it more than that?

**THE COURT:** All I've related to – to you is a statement. I'm not aware of any conversation.

**MR. LAPHAM:** Okay. I guess –

**THE COURT:** I see why you would say what you said, because what I told you earlier, I said that Juror 228 told me that Juror 244 began to discuss the death penalty

and how she's an eye for an eye and a tooth for a tooth in the jury room. I did not probe what the juror meant by the word "discuss", and I assume that what the juror meant was that Juror 244 simply stated that she believes in the death penalty and that she believes that it should be an eye for an eye and a tooth for a tooth. And that was the extent of the communication on the topic. But I did not do probing to say that – I mean to discern whether that is, in fact, the extent of the communication, but it is my impression that that is the essence of it.

**MR. DENVIR:** Well, certainly troubling, Your Honor, that Juror 228 obviously thought that whatever was said by Juror 244 was in violation of the Court's instructions and was serious enough he felt compelled to bring it to the Court's attention.

**THE COURT:** I can't say anything in response to that, Mr. Denvir. I think you have stated the obvious.

**MR. DENVIR:** Your Honor, as I say, we will file a – we are planning on filing a challenge for cause against Juror 244, and we will probably address this aspect of it. And – and if this person survives that challenge, then I suppose we can always explore it at the general voir dire exactly what was said further if it hasn't be cleared up by then.

**THE COURT:** Okay. Is there any problem with the way I handled this situation?

**MR. DENVIR:** No, Your Honor.

**MR. LAPHAM:** No. I think you handled it fine, Your Honor.

**MR. DENVIR:** Your Honor, I wonder if you could ask whether the court reporter will be able to give us a transcript of this conference – telephone conference so we'll know exactly what was said and be able to brief it by tomorrow, if possible?

**THE COURT:** She is indicating in the affirmative. What I'm going to do, if you don't mind, I think I will redact certain things from the transcript so that I can make it public.

**MR. DENVIR:** Absolutely. Whatever you feel. We just wanted mainly whatever the juror said so we can make sure we're accurate in our briefing.

**MR. DENVIR:** All right. Thank you.

**THE COURT:** All right. Thank you. Anything further?

**MR. DENVIR:** No, Your Honor.

**MR. CLEARY:** No, Your Honor.

**THE COURT:** Good-bye. (Whereupon, the telephonic conference was concluded.)  
—oOo— THE UNITED STATES DISTRICT COURT 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 THURSDAY, DECEMBER 11TH, 1997

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Reported by: CATHERINE E.F. BODENE, CSR No. 6926

A P P E A R A N C E S

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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: DENISE DE LA RUE, Attorney at Law

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