

Pretrial Hearing Day 3

Discussion and rulings for on cause challenges

Dec. 16, 1997

U.S. District Court, Eastern District, Sacramento Discussion and rulings for on cause challenges

SACRAMENTO, CALIFORNIA TUESDAY, DECEMBER 16, 1997, 2:07 P.M.

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THE CLERK: Calling criminal S-96-259, United States vs. Theodore Kaczynski.

THE COURT: Please state your appearances.

MR. CLEARY: Robert Cleary and Stephen Freccero for the Government, Your Honor.

THE COURT: Thank you.

MR. CLEARY: Thank you.

MR. DENVIR: Quin Denvir, John Balazs and Denise de La Rue for Mr. Kaczynski, who has waived his presence.

THE COURT: Thank you. I appreciate the fact you've made an appearance on such short notice. My secretary informed me that one of the parties called indicating that the hearing on the 18th is unnecessary, and I wanted to put that on the record, because I was working on the hearing and I wanted to make certain that I could discontinue that work. Would you tell me your positions on the matter.

MR. CLEARY: Your Honor, from the Government's perspective, we felt that, since we did have a rather lengthy and detailed questionnaire and, thankfully, the Court allowed us to go into a great deal of information during the individual voir dire, that there would be little purpose to be served by calling in the full body of 70 or 85 remaining jurors and questioning them further. Thank you.

MR. DENVIR: That was our view also, Your Honor. I think we may have proposed the group voir dire originally, but the use of the questionnaire, then the latitude you gave us – we really covered everything. And we really discovered that when we were trying to draft questions for either the Court or for us to ask, because we suddenly realized there wasn't much to ask. And it didn't seem to justify the expense of bringing in the jury and everything.

THE COURT: Okay. I'm going to cover another matter that would affect how many jurors remain in the pool. I believe the parties previously told me that we only needed between 70 and 72 jurors. If that's still your positions, then I need not rule on the "for cause" challenges against jurors 228, 238, and 244. I have a sheet of paper that I can give each party concerning the jurors – I'm going to give it to my deputy clerk – that remain in the pool.

MR. DENVIR: (Accepts document.)

MR. CLEARY: (Accepts document.)

THE COURT: If you turn to the second page of that sheet, it seems we can draw a line under juror 225. That would be the 72nd juror. And then all jurors that follow can be deleted. Now, this sheet reflects a ruling, by the way, that I will give you at this moment since you're here, and then that will probably make it more understandable. But the ruling does not include those jurors that I just mentioned, because I don't have to rule on the motions.

MR. DENVIR: I believe that's correct, Your Honor.

THE COURT: Okay.

MR. DENVIR: I think that the reasoning was that there had to be a pool of 64, and the added jurors were in case there was something – something came up in the general voir dire that would require replacement. So they were kind of insurance people. And certainly there's no need to go beyond the 72, the number you've selected.

THE COURT: Well, maybe we can keep them as insurance, but there's no sense in me ruling.

MR. DENVIR: I think that's correct, Your Honor.

THE COURT: Okay. On December 12, 1997, Kaczynski moved to strike from the jury panel, for cause, jurors 147, 212, 222, 238 and 244. I'm going to only rule on the first three jurors, not the latter two. And the last juror, 244, is also subject of a hearing request made by Mr. Kaczynski, but we need not conduct the hearing. The reason why Mr. Kaczynski wanted a hearing is because juror 228 contacted the Court and indicated that juror 244 failed to obey the Court's instruction which directed the jurors not to communicate about the case. And so there was going to be a hearing as to whether there was in fact a breach of that instruction by juror 244 and, if so, whether the other jurors that appeared on the afternoon of December 10, 1997, were affected by that breach. But all of those jurors that would be involved in the hearing have numbers that are after the 72nd-called juror, so we need not conduct a hearing. Returning to the ruling, on the same date, the Government moved to excuse for cause jurors 203 and 228. I've already indicated that I need not reach the ruling as to 228. The decision as to the jurors requiring a ruling follows. Juror 147: Kaczynski argues that juror 147 must be excused because her employment required her to regularly inspect mail for possible bombs as a result of the Unabom bomber incidents. The Government opposes the motion by relying on the juror's assurances that she would not hold her concerns about the Unabomber incidents against Kaczynski. The juror was actually fearful or worried about herself because she thought her federal building could be a target for an explosive package. Transcript, 2875. The juror stated she was a little worried about safety concerns because she was responsible for her employees. Transcript, 2876. Although the juror believed that none of these matters would interfere with her performance of her juror duties, as observed in the *United States vs. Allsup*, 566 F.2d at 71, Ninth Circuit, the Court has an obligation to determine whether available circumstantial evidence evinces a potential for a juror to have substantial emotional involvement in a trial in a manner that could adversely affect the juror's impartiality. It is a fundamental fact of human character that people generally favor the side with which they identify themselves emotionally. Here, since the record is sufficient to presume this juror will ultimately develop an emotional connection with the Government that will adversely affect her impartiality, the motion is granted. Juror 212: Kaczynski seeks to strike juror 212 because of her views about criminal defense attorneys and her reservations about affording him the presumption of innocence. The Government counters the motion, arguing that the juror's statements express a ready

understanding of the presumption of innocence doctrine. While it is true that the jury said she understood her duty to presume innocence, she gave conflicting statements on this point at times. When questioned by defense counsel about the doctrine, she said, "The defense has to have their say as well," transcript, 3205, and that she expected the defense to refute some of the evidence that the prosecution brings, transcript, 3205. Since the juror failed to demonstrate her understanding of the bedrock principle that Mr. Kaczynski is presumed innocent, the motion is granted. Lastly, Kaczynski argues that juror 222 must be excused for cause because he has a connection with a woman who was a fiancée to one of the Unabomber victims and because of his intense experiences with bombings and terrorist activities. The Government rejoins that the motion should be denied, since the juror gave believable assurances that these matters could be put aside and that they would not affect his impartiality. In light of the credible assurances juror 222 gave as to his ability to objectively and fairly evaluate the evidence in this case, the motion presents a difficult issue for resolution, that is, whether the emotional experiences cited by Kaczynski would be likely to cause individuals affected by such experiences to be prone to favor that side of a cause with which they identify themselves emotionally. When there is a risk of such emotional identification as a fundamental fact of human character, the Court is required to evaluate the potential for a juror to have substantial emotional involvement in a trial in the way that could possibly adversely affect the juror's impartiality. Here the record established that the juror was exposed to bomb terrorists in the military and on one occasion had to do bomb damage assessment to see how the military systems were damaged in a building damaged by a terrorist bomb. When the bomb had gone off, the building juror 222 was in shock, even though he was about a mile and a half from the bomb site. Juror 222 also received information from someone at his place of employment that the person who was engaged to Hugh Scrutton, a suspected Unabomber fatal victim, was pretty shook up about the whole situation. Transcript, 3319 to 3321. Consideration of the potential impact of these extrajudicial emotional experiences on juror 222, in conjunction with the juror's eventual obligation to use common sense when evaluating evidence in this case, reveals that the juror is likely to have difficulty keeping these emotional experiences from affecting the measure of common sense he ultimately employs to decide the issues in this case. For these reasons, it is presumed that these emotional experiences create the potential for the juror to have substantial emotional involvement in the trial. Because of the risk this poses to the juror's impartiality, the motion is granted. The Government moves to excuse juror 203, arguing that the Court should credit his initial responses to the judge during voir dire in which the juror said he could never vote to impose the death penalty. Kaczynski replies that since the juror eventually assured the Court that he could follow the law and consider the death penalty as an available sentence, the Government's motion must be denied. The Government recognizes that its motion hinges on a credibility determination that the judge is required to make. Although the juror's capital punishment scruples are curious, his answers during voir dire have not left the Court with the definite impression that he would be unable to

faithfully and impartially apply the law. Although the juror appears to be ideologically opposed to the death penalty, he indicated his willingness to give fair and impartial consideration to the death penalty as an option, consistent with the Court's instructions on the juror's obligation to consider aggravating and mitigating circumstances. Therefore, the motion is denied. That covers all the rulings I need to reach. And that means that the sheet of paper, the two sheets of paper I gave you, are accurate. They reflect the jurors remaining in the pool. And I think the only thing we need to consider now is, when do you want to go through the process of exercising your peremptory challenges? (Discussion off the record between Mr. Denvir and Mr. Cleary.)

MR. DENVIR: Your Honor, I believe you had originally scheduled it for this Friday. And then we had conferred, and if it fits the Court's schedule, Monday would be fine at

9:00 o'clock, or we could do it Friday, either one.

THE COURT: Okay.

MR. DENVIR: I think we had been planning on Monday because we thought that the Court's having a big schedule on Friday. (Discussion off the record between the clerk and the Court.)

THE COURT: It's your decision. I can do it either on Friday or on Monday. I have a criminal matter scheduled in the morning on Friday which should be over by 10:00 o'clock.

MR. DENVIR: I think Monday would be preferable. That's what we had been kind of assuming. I think that's where we are now.

THE COURT: Okay. What time?

THE CLERK: 9:00 a.m. is fine.

THE COURT: 9:00 a.m. on Monday?

MR. CLEARY: That's fine.

MR. DENVIR: Fine, Your Honor.

THE COURT: I may want you to argue an issue then. If I'm in position to do so, I may give you a minute order concerning the issue I want you to focus on. It would be the sentencing issue. Can you estimate how long you believe it will take for you to exercise your peremptory challenges? (Discussion among defense attorneys.) (Discussion among the Government's attorneys.)

MR. CLEARY: Your Honor, I think between a half hour to an hour we could probably do both sides, do the whole thing.

THE COURT: Do you know what issue I'm referencing?

MR. DENVIR: The one that was briefed about the notice and –

THE COURT: Correct. The sentencing phase notice issue.

MR. DENVIR: Correct. And you think you do want us to prepare, or you will give us a minute order if you do want us to argue it?

THE COURT: I think I will give you – I'll try to help you focus your arguments, and I will strive to give you a minute order that lets you know the issues I believe are pertinent for resolution of that question.

MR. CLEARY: That would be on Monday we would argue that, Your Honor?

THE COURT: Yes, if you think you would be ready to argue that on Monday.

MR. CLEARY: Certainly.

THE COURT: I will strive to give you your minute order on Thursday, late Thursday.

MR. CLEARY: Okay.

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

THE COURT: All right. Thank you.

MR. CLEARY: Thank you, Your Honor. (Time noted: 2:27 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 VOLUME 19, pp. 3489-3498
DISCUSSION AND RULINGS ON FOR CAUSE CHALLENGES TUESDAY, DE-
CEMBER 16, 1997

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REPORTER'S CERTIFICATE

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STATE OF CALIFORNIA)) ss. COUNTY OF SACRAMENTO) I, SUSAN
VAUGHAN, certify that I was the official Court Reporter and that I reported verbatim
in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand
writing to be reduced to typewriting; and that the pages numbered 3489-3498 inclusive,
constitute a complete, true and correct record of said proceedings:

COURT: U.S. District Court Eastern District of California

JUDGE: Honorable GARLAND E. BURRELL, JR., Judge

CAUSE: U.S. vs. Theodore Kaczynski Case No. Cr. S-96-259 GEB

DATE: TUESDAY, DECEMBER 16, 1997 (Vol. 19) IN WITNESS WHEREOF,
I have subscribed this certificate at Sacramento, California, on the 18th day of De-
cember, 1997. _____ SUSAN
VAUGHAN, CSR No. 9673

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