

Pretrial Hearing Day 5

Scheduling discussion and peremptory challenges

Dec. 22, 1997

U.S. District Court, Eastern District, Sacramento Scheduling discussion and peremptory challenges

SACRAMENTO, CALIFORNIA MONDAY, DECEMBER 22, 1997, 10:03 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, Stephen Freccero and Douglas Wilson for the Government.

MS. CLARKE: Quin Denvir, Judy Clarke, Denise de La Rue, Gary Sowards and John Balazs for Mr. Kaczynski. His presence has been waived.

THE COURT: This is the time for the parties to exercise peremptory challenges. Are you ready to proceed?

MS. CLARKE: Yes.

THE COURT: The Government?

MR. CLEARY: Your Honor, there are a couple of matters after the peremptory challenges we'd like to raise with the Court.

THE COURT: You said there's a couple matters you want to raise after you do the peremptory challenges?

MR. CLEARY: Right. Or we can do them beforehand, whatever's convenient for the Court.

THE COURT: What are the matters?

MR. CLEARY: They relate to scheduling issues, Your Honor, predominantly scheduling issues, on a number of legal issues that I think are still pending before the Court. And I think – do you want me to go through them one by one?

THE COURT: Sure.

MR. CLEARY: There's the pending 404(b) motion, and I believe a couple weeks ago we informed the Court that there's been some discussions about stipulations among the parties that may remove the 404(b) issue from the Court's plate. We don't know if that's going to take place or not; we don't know if we're going to be able to take the 404(b) issue entirely away from the Court. I just want to let you know that we may need to schedule some hearings with Your Honor.

THE COURT: Do you have scheduling dates in mind also?

MR. CLEARY: I hadn't discussed it with the defense, but I was wondering if we could do it by the end of this week, resolve the stipulations and –

THE COURT: Tell you what. Why don't you talk to the defense; we'll have this discussion again, come up with proposed scheduling dates. I know we're going to have a matter scheduled tomorrow, right, at 9:00 o'clock?

MR. CLEARY: We were going to ask about that today too. Is that all right with the Court?

THE COURT: That's fine with me. That's a sentencing issue matter.

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

THE COURT: Okay.

MR. CLEARY: For one thing, I will discuss the issues with the defense in terms of the remaining legal issues for the Court and the possible bases to argue those, but it relates to the next issue I wanted to bring up to the Court, and that is one of starting the trial. I know we're scheduled to start on the 29th, a week from today. Given the issues that are still pending, we think they do need to be resolved prior to opening. And we also are having some difficulty in scheduling witnesses for next week because of some personal issues with the witnesses and flight problems for the witnesses. Because of that, I'm wondering if it would be okay with the Court if we put the open statements off one more week to January 5th.

THE COURT: I don't like that.

MR. CLEARY: Okay.

THE COURT: I may be forced to do that, if you can show good cause for doing that. I will be in a position to resolve all legal issues, I believe, this week.

MR. CLEARY: We can go ahead on the 29th, then, as scheduled.

THE COURT: Okay. I will say this. I am contemplating a gag order in this case. That would apply to the lawyers and the parties. And I'd like your input on it.

MR. DENVIR: Your Honor, could we address the scheduling issue? I know the Court is not inclined to or was not inclined to grant the Government's motion. I think that there may be value in that. And the reason is that we are trying to work out with the Government the question of these stipulations. And they really need to be done before opening statements. Unfortunately, opening statements, if they're on next Monday, you have the holidays in here, and it really might be a good use of time to put it back one week and it also would allow the Court more time to deal with these legal matters. The stipulations might change what would be brought before the Court for a decision as legal matters too. And then we have the ongoing meet-and-confer with the Government about the sanctions question. So with the holidays now, it really might be – and we would support the Government's request to put it back one week. We think that could be time that would be used very well.

THE COURT: And you both believe we should select the jury today and then tell them that the trial will begin in two weeks rather than one week?

MR. CLEARY: If that's okay with the Court.

MR. DENVIR: Yes, Your Honor. I have a feeling that the jury will not be disappointed, given the holiday, being that it's a holiday week, that they probably – we think that would be fine to pick the jury today, put it over for two weeks, and allow the parties to really put some time in what may shorten the trial and reduce the number of legal issues before the Court.

THE COURT: There's a problem with that proposal, I think. If you select a jury today, those individuals will be the jury. You will start with 18 jurors, and you can lose jurors between now and the two-week starting date. And if you lose them, then you will just have fewer jurors to try the case. I mean, I don't know what kind of risks would be involved in that.

MR. DENVIR: Well, Your Honor – Go ahead.

MR. CLEARY: All I was going to say, Your Honor, if we don't swear the jurors – which obviously we're not; they're not here – we have, fortunately, additional jurors in the pool; if we were to lose people that we had selected – in other words, the 18, some drop out, we have additional jurors in the pool we could, I guess, pick. I don't know how we would do it mechanically with exercise of challenges, but there are other people in the pool that could be used for the panel of 12 and then six alternates.

THE COURT: Is that the defense's position as well?

MR. DENVIR: Yes, Your Honor.

THE COURT: I have a stipulation in that regard?

MR. CLEARY: If I can just consult with counsel. (Discussion off the record among Mr. Cleary, Mr. Denvir, Ms. Clarke, Mr. Lapham and Mr. Freccero.)

MR. CLEARY: Your Honor, the parties do agree on that, and I think our consensus is we would not be using any peremptories. We will have used all our peremptories, so there will be no peremptories left over if there are any backfills we have to do, but that's acceptable to both sides.

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

MS. CLARKE: All of those jurors, Your Honor, should stay under the same admonishment. You wouldn't be able to tell the people that were over the 64 or over the 18 today that they are free; they would simply stay with the same admonishment until the 5th. There will be a few that are not even in the pool. I think the Court went to sent 72, and we only need 64. So we would leave under the same admonishment that they may serve as jurors until the 5th, all of the rest of those folks.

THE COURT: I understand what you just said. Your thought is that if you lose a regular juror, then you would have the first alternate to replace that regular juror. And then the next juror in order would become the sixth alternate.

MS. CLARKE: That's correct.

MR. CLEARY: That's correct.

THE COURT: And that's your stipulation.

MS. CLARKE: Yes, Your Honor.

MR. CLEARY: Yes, Your Honor.

THE COURT: Okay. Then I will grant what you've requested. (Discussion off the record between the clerk and the Court.)

THE COURT: Okay. That means that trial will begin January 5, '98 at 8:00 a.m.

MR. CLEARY: Thank you, Your Honor. I do have one housekeeping matter. If you'd like, I can raise that now too.

THE COURT: Fine.

MR. CLEARY: I've discussed this with defense counsel, and I believe there's no objection from their side. What we've done with the cabin documents, which are voluminous, is we put them in a series of binders and labeled the binders, indicating which exhibit is in each binder. If it's okay with the Court, what we'd like to do, for the convenience of both sides, is to put a bookshelf in the courtroom right behind where

our computer set-up is, leave those binders in the courtroom. The binders will contain the photographs and photocopies of the cabin documents, with any translations or decodings that are necessary to read the document. Those will all be contained in the binders. And what the jury will be able to see – the writing on the outside of the binder is so small that from where they're sitting they're not going to be able to see what they say. And at some point when we introduce them, we'll introduce them in that form, in binders.

THE COURT: The defense?

MS. CLARKE: No objection.

THE COURT: Granted.

MR. CLEARY: Thank you, Your Honor. We'll just work with your courtroom deputy to set the binders up, then?

THE COURT: Yes.

MR. CLEARY: Thank you.

THE COURT: I had indicated to you previously that there was a Ninth Circuit workshop; I believe it was the last week in January, and I was on the educational committee and planning on attending that. I think I'm going to change my plans and I'm going to call the chairperson of the committee so that I can try to fix it so I don't have to attend that. Is that going to cause you any problems?

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

MR. DENVIR: No, Your Honor.

THE COURT: Anything further to cover, from the parties' perspective?

MR. CLEARY: No, Your Honor.

MR. DENVIR: No, Your Honor.

THE COURT: Okay. We discussed last Friday juror 10 and juror 165. You may recall that juror 165 wrote a letter stating that he forgot to tell us about prepaid vacation plans and that he had nonrefundable airline tickets in the amount of \$1,486.84. I called the travel agent involved and received another number and called that number to try to verify that the tickets were nonrefundable and was advised that if the juror seeks a refund seven days before the trip, the juror would have to pay a \$75 cancellation fee but would receive the balance of the money as a refund; if the juror seeks a refund less than seven days, it would be a \$200 cancellation fee; if the juror seeks a refund on the day of the trip itself, the juror would lose all of his money. I directed my jury administrator to tell the juror that he is still in the jury pool. And I also left a message informing the juror of the information that I received, because it's possible the juror never received the information. If the juror only called the travel agent that was listed on the ticket confirmation form, then the juror may have been told the information that he related in his letter. I went beyond that source, and I received additional information. So it's unclear whether the juror went beyond that source. I don't know whether that juror would be on this waiting list that you've referenced earlier for possible selection as a juror when you exercise your peremptory challenges. I'm rather certain the juror would like to know one way or the other, if possible today.

MR. DENVIR: I believe that juror is in the alternate pool, would not on the waiting list, is in the first 64.

MS. CLARKE: He's in the top 64.

THE COURT: Okay. So he'll find out today. And how about juror 10? I've asked about juror 10. I believe the Government indicated a willingness to stipulate.

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

THE COURT: And the defense wanted to think about it, and you were going to give me your position today.

MS. CLARKE: Your Honor, we were not inclined to stipulate. The information provided did not seem to rise to the level of hardship that other jurors were willing to, and did, overcome. We looked back at the questionnaire. There were 25 people, I believe, in the department that the juror was in. And the second reason does not necessarily mean that that can't be accommodated by leaving court at 1:00 o'clock each day. So we were not inclined to stipulate.

THE COURT: In view of your response, I'm going to keep the juror in the pool. Are you ready to exercise your peremptory challenges?

MS. CLARKE: We are, Your Honor.

MR. CLEARY: Yes.

THE COURT: Okay. I'd like my deputy clerk to please give the strike sheet –

MS. CLARKE: Your Honor, it was our request that our table be allowed to move to the jury room so that we would have the freedom of discussion, and then we could just walk the list back and forth. I don't think the Government had any problem with that.

MR. CLEARY: No objection.

THE COURT: All right. That's fine. Your request is granted. I'm just trying to figure out where I should be physically located while you do this.

MS. CLARKE: Perhaps in chambers? When we have it ready we can –

THE COURT: I think that's where I should go, so I can do other work. And if I'm needed to resolve something, I'll take the bench.

MS. CLARKE: Thank you.

THE COURT: All right. Thank you. (A recess was taken at 10:21 a.m.) (The proceeding resumed 12:04 p.m.)

THE COURT: Let the record reflect that the participants who previously identified themselves on the record are before me again. I've received the strike sheet, and my deputy clerk advises me that she has shown it to you and verified that you have in fact selected 12 regular jurors and you know the numbers, and you've selected six alternate jurors. And she's shown those to you. Are there any objections to the manner in which your opponent has exercised peremptory challenges?

MR. CLEARY: None for the Government, Your Honor.

MR. DENVIR: None for the defense, Your Honor.

THE COURT: Okay. Can I anticipate objections being filed later? Do we have our jury at this moment, once we list the individuals that are named by number?

MR. DENVIR: We don't anticipate filing any objections later, Your Honor.

MR. CLEARY: Nor do we, Your Honor.

THE COURT: All right. Do you have the list? (Discussion off the record between the clerk and the Court.)

THE COURT: I'm going to have my deputy clerk list by number those individuals you have selected to serve as members of the jury, and it is my understanding that all jurors that are after the 64th juror on the list will be in reserve status should they be needed to replace an alternate or regular juror.

MR. CLEARY: That's correct.

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

THE COURT: All right. Please read the list.

THE CLERK: Juror number 12; number 20; number 33; number 52; 82; 83; 101; 116; 123; 134; 137; and 162. The alternate jurors are 165; 179; 180; 184; 188; and 190.

THE COURT: Do you concur?

MS. CLARKE: Yes.

MR. CLEARY: We do, Your Honor.

THE COURT: When those individuals join us, juror number 12 will become juror number 1. I'm going to change the number system at that time so we will give them a number in accordance with the seat in which they will occupy. The first juror called will take a seat in the top row of the jury box and will go to the extreme right-hand side of the jury box as you face it the way a lawyer would face it in communicating with the jury. You count sequentially until you reach seat number 7 in that box, which is where I will place the seventh juror, and that will be that juror's number at that time. We will do the same thing in the bottom row. The 8th juror called will take a seat on extreme right-hand side, and the 14th juror called will take a seat on the extreme left-hand side. And the next four jurors will be placed in front of the jury box, with the 15th juror called on the extreme right-hand side and the 18th juror called on the extreme left-hand side. There are some scheduling matters. I don't know if you had an opportunity to discuss those with each other. Do you want to do that later today or do you want to do that now?

MR. CLEARY: If we could, Your Honor, we have not had a chance to discuss those. If we could meet later and report back to the Court.

THE COURT: Are you going to report back to me today or tomorrow?

MR. CLEARY: We could report back today.

THE COURT: How are you going to do that?

MR. CLEARY: Would you like us to just call your chambers?

THE COURT: Is it convenient to come in?

MR. CLEARY: Certainly.

THE COURT: I think the public wants to attend all aspects of this proceeding, if they can.

MR. CLEARY: Is 4:00 o'clock okay with the Court?

THE COURT: 4:00 o'clock's fine. We'll cover one more matter. The Government responded to defendant's proposed preliminary jury instructions, arguing that proposed instruction 214 and 15 should be deleted for the reasons stated in the Government's brief and that the Court should give a mental status instruction unless the defendant is precluded from offering a mental status defense. I do not reach the mental status issue at this time. But I tentatively reached the other issues as follows. I say I "tentatively" do it because I will listen to you if you have input on the issue. Tentatively, I am inclined to grant the Government's request by deleting jury instruction 2, 14 and 15. And I am tentatively inclined to give jury instructions in the following order. I will give number 1; then number 13 will become number 2 – it will be given next; number 3; 4; 5; 6; 7; 8; 9; 10; and then I will give 12; and 11, I believe, should be the last instruction given, because it basically tells the jury that the parties are about to make opening statements. Input, if any?

MR. DENVIR: Your Honor, I don't believe that we have received the Government's filing. Maybe we could get a copy of it and then deal with it at 4:00 o'clock?

THE COURT: That's fine.

MR. DENVIR: I don't think we've seen that. So if we could have a copy of it faxed over, we'll cover it at 4:00.

THE COURT: I had assumed you had seen it. Okay. We'll cover it at 4:00. Anything further?

MR. CLEARY: Your Honor, one question for the Court. On Friday the Court indicated that you were going to be issuing an order on the ex parte matters that you discussed with counsel. And the question I had is whether that's going to cover today's ex parte proceedings and if the Court is inclined to share those transcripts of those proceedings with the Government.

THE COURT: I did issue an order on Friday.

MR. CLEARY: Okay.

THE COURT: But the order doesn't tell you the content of the ex parte proceedings. The order simply states that the proceedings involved attorney-client matters involving the defense. As far as your second inquiry is concerned, I'll let the defense respond.

MR. DENVIR: Well, Your Honor, as the Court's aware, the matters that were discussed in camera are attorney-client privileged matters. The Government has simply no standing in those in any way, and we would oppose – that's why they were done in ex parte; that's why they should remain confidential and they shouldn't have a copy of the transcript.

MR. CLEARY: If I may, Your Honor, that may well be so for a large part of what was discussed, the actual words and language that were used. Obviously we're not in a position to judge that, because we don't know what was said. The only concern we have and the only reason that I bring this to the Court's attention is, if the Court has issued any rulings or any decisions or made orders as a result of what happened, then we have, obviously, an obligation to protect the record in this case and that

would – and to advise the Court if we believe the Court should take some prophylactic measures if there is a problem. And that would be the only reason we believe we may be – we don't know, but may be entitled to look at the transcript. And that could be in redacted form. If there are certain matters that can be disclosed without infringing on the attorney-client privilege, maybe the Court could redact the transcript, do that, we'll have a copy to look at it, and then advise the Court of it then.

THE COURT: A media entity is seeking, presumably, access to the transcripts and also the documents that I sealed in connection with the in camera – I should say ex parte in camera proceedings. The order I issued on Friday – which I didn't fax to the parties; I simply directed the clerk's office to serve the parties and the media representative with a copy of the order – that order provides the media entity and the parties an opportunity to brief the issue, and the brief is due this coming Friday. I assume that the Government can take advantage of that briefing schedule.

MR. CLEARY: That would be fine, Your Honor. Thank you.

THE COURT: All right. Thank you. Oh, did you have something else?

MS. CLARKE: The Court had mentioned earlier the possibility of entering a gag order, and I didn't know whether the Court wanted to take that up at 4:00 o'clock this afternoon or –

THE COURT: I was thinking about that. I haven't done research on it, but I am considering the notion, and I would like input from the parties before I give it considerable thought. Are you in a position to give me input on that now, or would you be in a position to give me that at 4:00 o'clock?

MS. CLARKE: Perhaps we could do that at 4:00 o'clock and meet and confer with the Government.

MR. CLEARY: That would be fine, Your Honor.

THE COURT: All right. That will be fine. Okay. (A recess was taken at 12:17 p.m.) (The proceeding resumed at 4:03 p.m.)

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, Stephen Freccero and Douglas Wilson for the Government, Your Honor.

MS. CLARKE: Judy Clarke, Quin Denvir, Gary Sowards, John Balazs and Denise de La Rue for Mr. Kaczynski. His presence has been waived.

THE COURT: Thank you. We scheduled this hearing so we could cover scheduling matters. One matter that was supposed to be covered is the gag issue. I did some research on that issue, some preliminary research. I raised the possibility with the parties of imposing some type of a gag order that would prohibit the lawyers and parties from discussing certain matters involved in this case with the public, and I asked the parties for their input, and you wanted to give that to me today at this time. But my preliminary research indicates that it is premature to issue a gag order, because no information has been brought to my attention that indicates that anything has been

said or is likely to be said that threatens to interfere with a party's right to a fair trial. So I'm just making that preliminary observation so you can have that in mind when you discuss that issue. Other than that, we are here for scheduling matters. Oh, there is another matter I want to raise. It's the matter that the Government raised. And I believe that the media's representative is present too. If you'd like to come forward at this time, you may, Ms. Kenyon.

MS. KENYON: Or I could sit here as well, Your Honor. (Comes forward.) Thank you, Your Honor.

THE COURT: Okay. The matter concerns the Government's request that the Court consider filing in redacted form some aspect of the proceedings I've conducted ex parte and in camera with the defendant and his counsel. I think we need to develop procedures to deal with that question, and I thought I should give you my tentative thought on that. It seems to me that the Government's inquiry requires determination as to what constitutes attorney-client communications. We'd also have to consider the Golden case. I'm not sure that I have the cite to that case. I will have to tell you what the case states – and unfortunately I didn't bring the citation to the bench with me – it approves of the procedure of a district court excluding the Government and the public from the courtroom when it's obvious that attorney-client communications need to be addressed concerning a criminal defendant and his counsel. Based on the authority of that decision, I followed the in camera, ex parte approach. And if there's a need to provide you with that decision in an order, then I will do that, and I will also indicate the procedures that I contemplate in an order if that would be helpful also. But I do want to discuss the procedures with you. I think that we need to perhaps determine what constitutes attorney-client communications. I've already asked my court reporter to make available to me a draft copy of the transcript so that I will have it over the weekend. I'm going to analyze the transcript. My thought is that I should meet again in camera with the defense after I've looked at the transcript, thinking that perhaps I could agree with the Government, although I don't know that at this moment, but it's possible that I could ultimately believe that certain matters could be redacted and other things made public. And if I believe that is the situation, the defense should have an opportunity to address those matters with the Court in camera. Then there should be a public hearing. Anyway, those are my tentative thoughts. And I'm thinking that we need to approach it in two steps, at least. Other than that – well, maybe we should cover that issue first. What is your position on that question, as far as my tentative thoughts are concerned?

MS. CLARKE: Your Honor, it seems like we should probably brief that on the 29th, and what the Court is proposing sounds reasonable but we really haven't thought that through, obviously, and perhaps we should look at a draft of the transcript as well before we brief the issue or before we meet with the Court. And we may concur that that's exactly the right way to go; we just simply haven't had time to think about it.

THE COURT: Okay. There would be two transcripts involved.

MS. CLARKE: Right.

THE COURT: Or maybe – well, three, because there will be –

MS. CLARKE: Friday.

THE COURT: No. There would be Thursday first. There was a telephonic conference where I scheduled the Friday hearing; then there'd be the Friday hearing and today's hearing. Okay. I'm not sure about what you are indicating as far as the briefing issue. You are indicating that the interested parties should know enough at this point to be able to brief the issues?

MS. CLARKE: I would think so. The briefing's been ordered with regard to the in camera proceedings of, I guess, Thursday and Friday.

THE COURT: But, see, they (indicating) don't know what happened in camera.

MS. CLARKE: And you're thinking these procedures would precede the briefing by the other parties as to whether or not to release the redacted transcripts?

THE COURT: I just start thinking about the problem and the Government's request, and I start wondering whether anyone challenging the procedure would know enough about it to challenge it. And so I'm not sure that I have a solution. I have a partial solution for consideration, and that's why I mentioned at least having a hearing with the defense in camera again.

MS. CLARKE: Well, Your Honor, maybe if the Court would provide us with a draft transcript, we could communicate with the Court as to whether or not this looks like the appropriate procedure and then delay the briefing so that the interested parties would have an opportunity to know what we've done with the draft transcript.

THE COURT: Okay. This is what I discern you to indicate: that I should provide the defense with draft copies of the transcript, allow the defense to analyze the issue, and then the defense would meet with me and then you would get my input on whether consideration should be given to filing aspects of the transcript in the redacted form. It seems that if we ultimately conclude that that would be a good idea, that that's the appropriate approach, then I would then issue an order that reflects that approach, and that may obviate the need for litigation. And if it doesn't, then we would provide interested individuals the opportunity to object.

MS. CLARKE: That sounds good to us.

THE COURT: How about the Government?

MR. CLEARY: That would be fine, Your Honor. The only thing we would ask is that the Court just consider, as you're going through this, the possibility that there may be certain portions that would be appropriate to disclose to the Government but not to be publicly disclosed. What that might be we can't opine on that, but we would just leave it to the defense and the Court, as you read the materials, to keep that in mind. Thank you.

THE COURT: I had assumed that if the Government has a right of access to portions of the proceedings, the public would have the same right.

MR. CLEARY: Your Honor, I think that's probably true as a general matter, but as this case does illustrate, there is some information that the Court could decide is appropriate for the parties to know but not for the general public to know. Where the

dividing line is here is going to be very difficult for us, standing in a vacuum, to opine on.

THE COURT: Okay.

MR. CLEARY: Thank you.

THE COURT: If I make that determination that the Government indicates is possible, then that should be in my order, and that would allow all interested individuals or entities the opportunity to challenge the Court's decision. Any problem with the approach?

MS. KENYON: No, Your Honor. And, in fact, our preliminary opposition on behalf of the Bee sought that kind of information so there would be something we could respond to the interest, which is coming out through the Court's more recent orders, the interests that the Court is seeking to protect on the basis or – including the public. And I think it would make sense, then, for us to respond to the showing which was made in the Court's order.

THE COURT: I had to move with dispatch, and so I gave you the order that I could under the circumstances. How about the other issues that we're here for?

MS. KENYON: Your Honor, I would understand that you would not expect a brief, further brief from the news media on the 29th, that we would be responding to the – whatever the Court issues.

THE COURT: That's correct. (Discussion off the record between Ms. Kenyon and Mr. Denvir.)

MS. KENYON: If it wasn't served, I apologize; it will be. It was just – it was a Press-Enterprise – we did file with the Court Friday a request that we have the information to respond to the – it was a preliminary opposition based on Press-Enterprise, being informed of the interests to be on the basis of the interests of the public.

MS. CLARKE: We were simply notifying the attorney for the media that we had not been served with that document.

THE COURT: Okay. But the question is whether any interested party needs to respond to my order that required responses by the 29th, and the answer is no. I'm going to follow the approach I've indicated following earlier. Okay. How about other issues?

MR. CLEARY: Your Honor, on scheduling matters that the parties have been talking about, we have had some additional discussions today on stipulations. We've not concluded those yet, but if I could make a suggestion to the Court, if we can conclude our discussions on the stipulations and reach agreement on – frankly, it's a large number of stipulations we're trying to work out – I believe the Court will not have to reach the 404(b) issue or the 104 issue, the question of whether we have 104 hearings. If we could have until – Wednesday morning?

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

MR. CLEARY: – Wednesday morning to resolve that issue –

MS. CLARKE: Week from Wednesday.

MR. CLEARY: Oh, I'm sorry; a week from Wednesday to resolve that issue. It may make sense at this point if the Court wants to, if you have the time, block out some time Wednesday morning, the 31st, for argument on those issues, in the event the stipulations don't get concluded. And if the stipulations do get concluded, we can contact chambers and let you know that we don't need argument on Wednesday the 31st. And there is one other issue, Judge, that I think we will definitely have argument on, need argument on.

THE COURT: You didn't tell me the time of argument on the 31st yet.

MR. CLEARY: Anytime in the morning, but actually whatever's convenient for the Court.

THE COURT: Okay. (Discussion off the record between the clerk and the Court.)

THE COURT: I'll set it at 10:00 a.m.

MR. CLEARY: Your Honor, there's one other issue that I don't think we will reach agreement on, and that is the photographs, predominantly crime scene photographs, of the charged events which we've produced to the defense, and my understanding is they have objections to certain of the photographs but not all of them. And I don't think we will be reaching agreement on that, so perhaps that would be a good time to have that argument also. And for the Court's guidance, in our trial brief we have a section on what we believe to be the controlling law on the admissibility of crime scene photographs in cases like this. And there are some autopsy photographs that I think are objectionable to the defense, crime scene and autopsy photographs.

THE COURT: I don't recall seeing any photographs in any of the papers filed. Have I missed the photographs?

MR. CLEARY: Because we have not submitted the photographs, Your Honor. Quite some time ago, as we were producing photographs to the defense, we told the Court, informed the Court in writing, that we had a set of photographs for the Court. We've never filed those with the pleadings, but we still have those photographs for the Court, if the Court wants them.

THE COURT: I would have to have them. I couldn't rule otherwise.

MR. CLEARY: Certainly. Right.

THE COURT: Anything else?

MS. CLARKE: Your Honor, we are still in the process, the never-ending process of resolving issues regarding the notice and the sanctions. We had a hearing set for tomorrow morning at 9:00. It would be the joint request of the parties to delay that till 11:00, if that's convenient with the Court.

THE COURT: That's fine with me.

MS. CLARKE: There was another issue the Court asked us this morning about: the instructions. We have no objection with the Court's proposed manner of handling the preliminary instructions.

THE COURT: Okay. Then I will finalize the instructions and then give the parties a set of instructions.

MS. CLARKE: That would be fine. With regard to the gag order, Your Honor, we concur with the Court's analysis.

THE COURT: Okay. The analysis I stated during this proceeding?

MS. CLARKE: Yes.

THE COURT: Okay.

MR. CLEARY: If I may visit the photos again, Your Honor, we have a whole set of photographs from various different bombing incidents. Does the Court want all of those or just the ones that the defense are objecting to?

THE COURT: I would think I would only need – well, I don't know about that.

MS. CLARKE: Seems to me, Your Honor, as to the charged bombings the Court should see all of the photographs, because it will be a weighing for the Court in determining which photographs will be admitted. As to the uncharged crimes we're still – we're about to work those out.

THE COURT: Without having the photographs and without knowing why certain photographs are not objected to, I'm not certain that I fully understand the issue. The photographs may be objected to because a party opines that they are cumulative.

MR. CLEARY: Right.

THE COURT: And so I'm not sure that I will be issuing a ruling that is concrete. It sounds like it could be a ruling in a vacuum unless I know what's objected to and what's not and why.

MR. CLEARY: I think that's right, Your Honor. So we will submit to the Court the – because, as Ms. Clarke just said, we're still talking about the uncharged events; between the parties we may be able to take that issue away from Your Honor – we'll submit the charged events, photographs and autopsy photographs that relate to those.

THE COURT: Are you indicating that all of the charged event photographs are subject to dispute or there are objections filed as to all of them?

MR. CLEARY: We're not sure from the defense which ones they're objecting to or not; we don't know. So they perhaps will tell you whether there are particular volumes to which they have no objections or not. All I was saying was as to the uncharged ones; those are the ones we're negotiating over right now.

THE COURT: Yes, but you're indicating that it's feasible that no dispute exists with respect to certain charged events that I'll be given photographs on, and so I could be resolving a dispute that doesn't exist. (Discussion off the record among the Government attorneys.)

MR. LAPHAM: Your Honor, it's our understanding that the defense is going to notify us of which photographs they object to with respect to the charged events. We can then provide the Court with all the photographs for those charged events, and you can – and then we'll brief the matter, and you can make your decision based on actually seeing the photographs and the briefing.

THE COURT: When you say "brief the matter," are you indicating that you would tell me what photographs are unobjected to and which ones are objected to?

MR. LAPHAM: Correct.

THE COURT: And then your opinion as to why I should rule in your favor on the objected-to photographs?

MR. LAPHAM: Correct. We contemplate filing a brief that says, "This is our understanding of what the defense objects to in the photographs." We would then provide you with the Government's explanation and law supporting why that particular photograph should be admitted into evidence –

THE COURT: Okay.

MR. LAPHAM: – over a 403 objection.

THE COURT: And when would you file that brief?

MR. LAPHAM: We haven't talked about timing yet, but the defense is going to give us their objections. I don't know when they intend to do that. That would obviously affect the timing of when we brief the matter.

THE COURT: Didn't we just assign it a hearing date?

MR. LAPHAM: We did: for the 31st. This is essentially a motion in limine brought by the defense, which we would then respond to. So I think the ball's really in their court as to when they intend to –

MS. CLARKE: Your Honor, the Government wanted to resolve this in advance of the start of the trial. This is the kind of thing that, prior to the admission of the photograph, we would have been able to object on 403 grounds. And the Government wanted to resolve it before opening statements. We said we'd be happy to notify them of which photographs we object to. I don't know that it requires a lot of briefing. It really is a matter that the Court is very familiar with handling and it will be a question of the discretion of the Court in admitting certain photographs.

THE COURT: There is law that pertains to photographs. The Government cited some of that law in its trial brief. This is the type of an issue that we should consider resolving before trial, if possible, because I think it would expedite the trial. The question is whether it will be briefed – I'm not obligating you to brief it. If you (indicating) don't want to brief it, you don't have to – I'm pointing to the defense when I say that.

MS. CLARKE: Well, Your Honor, I –

THE COURT: You can just – you can argue it. I understand 403.

MS. CLARKE: That was really a position we thought was appropriate. We could just argue the pictures for the Court.

THE COURT: That's fine.

MR. DENVIR: And, Your Honor, to be candid with the Court, one of the problems will be – and the Government wants this resolved ahead of time; otherwise as they came up with each photograph we would make our objection, you could make your ruling – is what is the particular probative evidence of each of these particular photos, and of course that is dependent somewhat on what other evidence is produced. So it may be difficult for the Court to make its determinations on those, but we were willing to try it.

THE COURT: And by "other evidence," are you indicating oral testimony that would describe the scene or describe what is depicted in the photograph?

MR. DENVIR: We think in many cases that will be true. I don't believe that the Government is limiting itself to say that these photos will show something that is not otherwise at all reflected in any other testimony. And I think that that may be one of the questions on these. Say that there's a big string of these, some of them we have no problems with, some of them we do, but in all of them, as the Court is aware, has ruled on this a number of times, it's always going to be what is the marginal probative value versus the prejudicial effect? And we're more than willing to try to argue it and lay it out. But I don't think it takes a lot of legal analysis. It's really the Court's discretion under 403. But there is that inherent problem of trying to do it in limine on photos is when you haven't heard the other evidence in that particular area. And this is just as to the charged. As to the uncharged, we hope we will have resolved all these questions.

THE COURT: I understand. I don't know if I'm going to be in a position to resolve the charged dispute, the charged photograph dispute. And if I resolve it, I'm not certain that my opinion will be final. If I hear testimony during the trial that causes me to believe that I should have ruled otherwise and if I had known about that testimony I would have ruled otherwise, then I could undo a ruling under 403.

MR. CLEARY: That's fine, Your Honor. We're just trying to identify as many issues as we can and get them handled right prior to trial, because we don't want to have sidebars and lengthy conferences when the jury is sitting in court.

THE COURT: Well, it appears that the defense is not interested in briefing the issue, and the Government has that interest. The defense is interested in arguing the issue. With that in mind, when would you submit your brief?

MR. CLEARY: Your Honor, we could either recast what we have in the trial brief – we have a section specifically addressing autopsy and crime scene photographs, or we can just leave it where it is, whatever is most convenient for the Court –

THE COURT: When you say "recast" it, what do you mean?

MR. CLEARY: We have a section –

THE COURT: I know that. I read that.

MR. CLEARY: Right. So we could pull that out, extract that out and make that in the form of a separate motion offering the evidence.

THE COURT: I don't think I necessarily need that, because I read that. But I thought you were going to present argument providing the Court with the status of the proposed exhibit and why you felt the proposed exhibit should be admitted over the objection of your opponent, which I presume would explain the probative value of the proposed exhibits and why it shouldn't be excluded under 403; that's the type of argument you were going to make. And in making that type of an argument, it would seem that to the extent you would find it necessary to cite a case that you've already cited because it stands for a unique proposition, that would be appropriate.

MR. LAPHAM: Your Honor, I think that's what we plan to do. And so we can just key it up for you, and if you don't think there's enough information to decide the

issue, that you need to wait till we get into the trial, that's fine, so you'll at least have the photographs and the brief in front of you.

THE COURT: I'll give you that opportunity.

MR. LAPHAM: Thank you.

MR. CLEARY: Your Honor, there's one other issue with that, and that is –

THE COURT: We never covered when the brief was going to be filed.

MR. CLEARY: Right. I guess we have to wait to find out when the defense is going to brief the photographs they have an objection to, and a few days after that we can get the brief to the Court.

THE COURT: Is there a date certain, I mean, that I can expect it?

MS. CLARKE: We just advised the Government we can give them our objected photographs by the end of the day tomorrow.

MR. CLEARY: If we can get our brief to the Court by close of business Monday, a week from today?

THE COURT: That's fine.

MR. CLEARY: That would be great, Your Honor.

THE COURT: Okay.

MR. CLEARY: One other issue on that: do we need to publicly file the photographs, or do we just submit those to the Court? And let me tell you what I'm thinking. If we were handling this in trial – we're doing it in advance of trial just to speed things along – if we were handling those at trial, we would not be publicly filing the photographs; we would show the Court and we would then have the argument over the photographs. There would be no public record of it if the Court ruled against the admissibility of that particular photograph. And I'm wondering if we should adopt the same, in substance, the same procedure here.

THE COURT: What do you think, Ms. Kenyon?

MS. KENYON: Well, I'm thinking that we're really close to having a jury seated, I believe, and admonished, and that this is a point where the public interest, of course, in excluded evidence is heightened and the ability of the Court to maintain protection against disclosure to the jury of excluded evidence is at its best, so that there should be a showing greater than this that would preclude that being filed publicly.

THE COURT: I don't think I want to be involved in this litigation. This involves Brooklier factors, and I think we're going to wait until trial.

MR. CLEARY: Fair enough.

THE COURT: Because if that's the position of the media, I think we'll just wait until trial and handle it at trial. Anything further?

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

THE COURT: How about the defense?

MS. CLARKE: I think that's about it, Your Honor.

THE COURT: Thank you.

MR. CLEARY: Did you want to hear from us on the gag order, Your Honor, or do you want to just put that in abeyance?

THE COURT: What's your input?

MR. CLEARY: Well, I agree with the Court I don't know that there's a need for one. But if the Court were inclined to order a gag order, our only concern is the precise terms of it. There's a whole host of information that we need to be able to discuss and communicate with law enforcement authorities, victims; there may be scheduling matters with the media we would like to communicate. So maybe it's premature to get into it, unless the Court is inclined to grant a gag order at this point.

THE COURT: No, I said it was premature too. However, I raised the issue because I received information that a media source attempted to contact one of the parties. And that was troubling. And I haven't heard of that occurring in any other case that I've been involved with, and I decided to raise the issue with the parties. But based upon my research, I don't think the issue's ripe for decision now.

MR. CLEARY: Thank you.

THE COURT: All right. Thank you.

MR. DENVIR: Thank you, Your Honor. (Time noted: 4:35 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

– oOo –

UNITED STATES OF AMERICA,)) Plaintiff,)) vs.) No. Cr. S-96-259 GEB)
THEODORE JOHN KACZYNSKI,)) Defendant.) -----

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1997

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