Pretrial Hearing Day 6

Discussion on motions for mental examination and sanctions

Dec. 23, 1997

U.S. District Court, Eastern District, Sacramento Discussion on motions for mental examination and sanctions (released Jan. 16, 1998) SACRAMENTO, CALIFORNIA TUESDAY, DECEMBER 23, 1997, 11:02 A.M.

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

THE COURT: Please state your appearances for the record.

MR. CLEARY: Robert Cleary, Douglas Wilson, Stephen Freccero and Steve Lapham for the Government. And Mr. Wilson will be arguing for the Government today, Your Honor.

THE COURT: Okay. Thank you.

MR. DENVIR: Good morning, Your Honor. Judy Clarke, Quin Denvir, Gary Sowards and John Balazs for Mr. Kaczynski today. We have waived his appearance.

THE COURT: Okay. We are here for argument on two issues: a guilt phase mental status issue and a sentencing phase mental status issue. Let me hear from the defense first on the guilt phase mental status issue.

MR. SOWARDS: Good morning, Your Honor.

THE COURT: Good morning.

MR. SOWARDS: Your Honor, by way of the status of where we are with respect to the guilt phase mental status evaluation, pursuant to the Court's order – and I apologize for explaining this belatedly to the Court – we have been meeting and conferring through this morning with the Government. And we have made the following proposal which we had hoped would actually moot out some of the issues and actually take care of all of the pending issues. The proposal which we have been authorized to relate to the government, and have related, is to withdraw the 12.2(b) notice with respect to the guilt phase; to make Mr. Kaczynski available for neuropsychological testing and specifically to undergo – I believe it's 10 tests which were specified by the Government in their status report; to agree also with the ability of the neuropsychologist to conduct a structured clinical interview or diagnostic interview; and to permit the Government's designated forensic psychiatrist to observe that examination at a facility at the jail which is eminently conducive to that procedure. It has a one-way glass which would allow them – and monitoring devices which would allow them to be in on that evaluation. In return, what we would then propose, and this is by way of explaining the negotiations with the Government, not to pre-empt the notice issue at the – as to the penalty phase, but if that were agreeable to the Government, we had then proposed that only at the penalty phase we would be calling the neuropsychologist who had evaluated Mr. Kaczynski and produced the data which we've already given to the Government. And then we would be calling one psychiatrist who had actually observed him in a less structured clinical situation than the Government's experts would have an opportunity to observe him. And so she's had less than an hour of just exposure to Mr. Kaczynski. And we would also be proposing to call a social historian to give a psychosocial evaluation of the family dynamics of the Kaczynski

family, including evidence which we have already provided in the Rule 16 discovery, of multiple generational indications of affective mood disorder and other mental illness which is consistent with the schizophrenia diagnosis. Unfortunately, the Government has turned us down on that.

THE COURT: Are you indicating that the defense's offer effectively withdraws the mental status issue from the guilt phase of the trial?

MR. SOWARDS: That's correct.

THE COURT: And your offer, in essence, concerns the sentencing phase of the trial?

MR. SOWARDS: Correct. It's what – as we characterized it to the Government – a global disposition of all the issues. And I'm also prepared to address the Court with respect to the penalty phase. We also think not only would it give the Government's expert access to everything and more that our experts have had access to, at least the ones that we would be relying on, but I would believe also that it would give them more than they even may be entitled to under the statute for purposes of penalty phase preparation and rebuttal.

THE COURT: Okay. I think I want to hear from the Government.

MR. SOWARDS: Thank you.

MR. CLEARY: Thank you, Your Honor. There were a couple of parts of the defense proposal that were quite problematic for the Government. And if I can go through a number of those now: first of all, when Mr. Sowards says they would allow a structured clinical interview of Mr. Kaczynski, in fact what the proposal was is that our experts would submit written questions to the defense attorneys; they would then pre-approve and pre-screen those questions, and then those questions would be read presumably by our experts in haec verba to the defendant. And the problem with that, as we see it, is the defense saw it, as they explained it to us, as not merely structured but kind of pre-ordained questions –

THE COURT: Maybe I should interrupt you. I'm interrupting you because at this juncture I'm discerning that the parties have not agreed upon an approach and you are really explaining the nature of the disagreement. A United States district judge is not supposed to be involved in settlement, so that thought's on my mind. I'm not supposed to be involved in that aspect of a criminal case. Perhaps what I should do is just address the issues. I've asked you to meet and confer on the guilt phase issue. I think that's appropriate. I'm not certain that it would be appropriate for me to get involved extensively in the meeting and conferring. The sentencing phase issues, in my opinion, present different problems. The Government simply moved for an order that would require Mr. Kaczynski to undergo an examination, a sentencing phase examination, despite the fact that Mr. Kaczynski did not give notice that he intended to offer mental health testimony in the sentencing phase aspect of the proceeding, should there be a sentencing phase. That troubled me, and so I asked the parties to submit supplemental briefing on the notice question in connection with the sentencing phase issue. I'm not clear about the Government's position on the sentencing phase notice

question. The defense appears to agree with the Court's tentative analysis concerning that issue. But since I don't think I should be involved in any kind of breakdown in your negotiations, I'm not going to be involved, especially if it's obvious that you have a disagreement; the thing for me to do is just rule and receive your arguments on the issues and I'll issue a ruling. And since the guilt phase aspect of the trial has to be determined first, that's where arguments begin. And as far as that phase of the trial is concerned, the issue before me is a sanctioning question. I think I want to hear from the Government on that issue.

MR. CLEARY: Thank you, Your Honor. Our position, as we've set forth before to the Court, is for – and I don't want to go over all the ground – but our initial position was complete preclusion of any mental defect defense based on expert testimony. And the Court indicated that, you know, what's our fallback position, that you were not inclined to do that. And so I'd like to address that now. Our position on what our fallback position would be, as we set forth in our papers, is that the defendant should be precluded from calling any experts that have had any access to the defendant in any way, shape or form – that would be testing and evaluating or examining the defendant, because the Government's experts have been likewise precluded or prevented from doing that. Likewise, the defense should not be allowed to call any experts who've been tainted, in a colloquial sense, tainted by the results of contact with the defendant.

THE COURT: What does that mean?

MR. CLEARY: Well, so, for example, the defense has administered some recent neuropsychological testing to the defendant. We believe that experts that have evaluated that testing should be precluded from testifying in the case. So basically what we're looking at in our proposal is both sides have experts who have reviewed the defendant's writings and interviewed third party witnesses, to the extent they chose to, and then both sides could present that evidence. We've also suggested to the Court that, under that proposal, the Government be able to offer proof at trial or the Court instruct the jury at trial that the Government experts did seek to examine and test the defendant and that the defendant rejected those efforts. And under our proposal, the Government would be able to argue their inferences that flow from those facts. So that would be basically our suggestion to the Court.

THE COURT: The factor I'm supposed to analyze – one of the factors – is prejudice. What prejudice would the Government experience – let me rephrase that. I have in mind what I anticipate to be the defense's argument. What the defense, I believe, will argue, is that they should at least be allowed to submit the neuropsychological testing results. And I understand the Government's position is that I shouldn't allow that.

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

THE COURT: One of the factors that I am to consider is the prejudice factor. You are telling me what you want me to do, but you haven't made an argument under that factor.

MR. CLEARY: I understand, Your Honor. Let me address that specifically, then. And I guess there's really two parts to the prejudice, because we have a psychiatric examination that we wanted to take and we had proposed six different alternatives to the defense for our psychiatric examination, and that's been rejected by the defense. As to those – I'll deal with that separately from the neuropsych testing. As to the psychiatric defense, the psychiatric examination that we were precluded from taking, the prejudice there is that seems to go to the very heart of the matter, the very issue in the guilt phase, and that is, is the defendant – it's really a two-part analysis, as I see it. Does the defendant suffer from the mental disease that the defense alleges he does, paranoid schizophrenia, number one; and, number two, assuming he does, how does that impact his ability to form intent, his ability to intend to injure or kill people through the acts, the alleged acts that he committed? And that is a psychiatric issue that can be best determined, most validly and most reliably determined by an examination, a psychiatric examination. The prejudice to the Government – and that seems to be what the focal point of the guilt phase will be. The prejudice to the Government is, on that crucial issue that the Government bears the burden of proof, we are prevented from putting forth the most valid and most reliable evidence that should be at our disposal, and that is the examination of the defendant. So that's the prejudice on that part. On the testing part of it – and if the Court has no questions, I'll move on to the testing part. On the testing part of it, the prejudice there is several-fold. First of all, the defense experts chose not to administer what we believe are the most valid tests, the most probative tests. And those are personality inventories, the MMPI, the MCMI and the Benden [phonetic] – I'm sorry – the Beck Depression Inventory. Those are, in our view, the most probative tests to determine whether the defendant in fact suffers from paranoid schizophrenia. As to the first of those, the MMPI, that is widely administered, widely accepted as a test that is probative on that issue as well as other issues. And to us there's no reason that that test should not be given. We should not be precluded from administering that test simply because the defense chose not to give it. We should be allowed to give that test, which goes, in our view, to one of the crucial issues in this case. So that's the first prejudice on the testing part is they didn't give the test that we believe would be appropriate, would be most relevant in this case. Other less significant areas of prejudice – well, let me give you one other very significant area of prejudice, and that is the effect this may have on the jury, what this may suggest to the jury. If the jury is to learn, as they might, that the defense experts were allowed to test the defendant but the Government experts did not, that may lead the jury to draw an unfair inference adverse to the Government. Second – thirdly, the tests themselves, the actual administration of the tests, although in large measure they are objective tests, or many of them are objective tests, test scores and a patient's ability to score high on a test is determined by a whole host of factors. Whether he's depressed, whether he is frustrated, whether he is angry can affect the test scores; whether he is encouraged well by the examiner to do as well as he could on the test, the surrounding circumstances. Is there noise in the next room? Are there

distractions in the next room? Had the patient been up all night the night before? All of those factors could affect the scores that someone gives on a test. And we set forth some of that in our papers for the Court with a citation to one of the treatises in the area that sets this forth in great detail. We don't know the answer to any of those questions, because we weren't administering the test. We don't know the surrounding circumstances. So the inferences that we can draw from the tests and conclusions from them are skewed somewhat until we know that information. We would only know the information if we administered the tests ourselves. And finally, Your Honor, there would be certain advantages in determining what affliction, if any, the defendant has from observing him at the time he is administering the test and having some interaction with the defendant in terms of the administration of the examinations or the tests. And we are, again, precluded from doing that, and that is something the defense has been allowed to do. So those are the prejudices that flow from the testing part of this.

THE COURT: Have you made all the argument you want to make on the factors?

MR. CLEARY: I have, Your Honor. I would, if I can just go back – I know Your Honor doesn't want to get into the dispute between the parties or the negotiations between the parties on the testing, but I just wanted to let you know, without going into detail, there were a number of other proposals the defendant made, in terms of this compromise meet-and-confer we had last night and today that we felt are unacceptable because it would leave the jury with a distorted view of what the facts are. And that's the reason we rejected their proposal last night and today. And in terms of prejudice, I think that I've answered the best I can.

THE COURT: I only asked you about the prejudice factor, but, as I understand the law, I am required to analyze each factor and make a ruling. And it's up to you whether you address other factors.

MR. CLEARY: Can I have one moment, Your Honor?

THE COURT: Yes. (Discussion off the record among the Government attorneys.)

MR. CLEARY: Your Honor, just briefly, two of the other factors I'd like to comment on, just very briefly. One is the willfulness thing, and we believe, the Government's position all along has been that this is contumacious, willful conduct and the Court should take that into account in fashioning an appropriate remedy. And I think the best indication of that is, really, kind of the history of where we've been with this litigation, that we went for months litigating various parts of this issue, our right to examine and how we're going to do it, the terms and conditions of the examination, and it wasn't until the eleventh hour that we were apprised, first, that the defendant is afraid of – first that he wasn't going to submit to any testing with no excuse whatsoever, any testing or examination, no excuse whatsoever; then after that that he was afraid of psychiatrists; and then after that that he was afraid of Government psychiatrists. And I think the Court should take that history of events into account in determining the degree or the aggravated nature of the willfulness in this case. Secondly, in terms of lesser sanctions, which I believe is one of the other factors, in our view, the Court should impose what we've been calling our fallback position

as a way to hopefully compel the defendant, to coerce the defendant into submitting to an examination by Government psychiatrists, so that the search for the truth – and that's what this should be, this ability to get truthful non-misleading facts before the jury – we still hold up some hope that if the Court upholds the measures we're suggesting that we may be able to get an examination of the defendant. And let the chips fall where they may; whatever the results of the examination are, that's what they are. And that's what we're hoping for. Thank you, Your Honor.

MR. SOWARDS: Just very briefly, Your Honor. The question which the Court has asked all along, with respect to the sanctions question, is, given that the Government may not have access to what it considers an optimal set of circumstances in terms of examining the defendant, the question the Court has asked repeatedly is: what is prejudicial about something less than the optimal examination procedures? And I believe Mr. Cleary's responses to the Court today again rehash or repeat their request for optimal conditions and never convincingly point out a way in which they will be significantly prejudiced if they do not have that, all of which, what Mr. Cleary recited for the Court today is exactly the stuff of either cross-examination of defense experts or argument and instruction to the jury with respect to the inferences they should draw in – from the Government not having full access to that which they describe as an optimal way of testing the evidence. Additionally, the Government does not explain the significant prejudice, if any, when both the defense and the Government experts will be essentially proceeding from the same base of information, that being the neuropsych data as well as all of the life history documents and the massive amount of social and medical history that is available to both sides. With respect to the one psychiatrist that we have asked or sought to have testify is a person who observed but did not conduct a clinical interview of Mr. Kaczynski for I believe it was just under or perhaps just over an hour that she observed this. If – and I believe it was Dr. Resnick in his declaration – if he feels that there is a clinical basis for justifiably arguing that a trained clinician cannot put out of their conscious mind the information that they observed or received in that setting and testify to the jury with respect to their reliance solely on all of the other information that's available to the Government, then certainly that would be a persuasive argument to make to the jury; in other words, that Dr. Resnick would be saying that this person should not be relied on because he or she has been contaminated by this brief exposure. But with that one narrow exception, everything that we would be relying on, the Government is relying on. And in the bargain we will forgo reliance on two psychiatrists who did have more extensive exposure to Mr. Kaczynski.

THE COURT: The Government argues – at least the way I understand the Government's argument is that I should exclude the neuropsychological tests that you want to rely on. How is that evidence material to your case?

MR. SOWARDS: I think, Your Honor, that that evidence is material to the case because it provides, as we've been saying, an objective basis for finding that Mr. Kaczynski – and this matches up, by the way, I should say, with the sociological

data, the family genealogy and family history, but it shows a longitudinal analysis of his situation that begins with the family and shows a genetic risk or predisposition for schizophrenia; it is consistent with contemporaneous witness observations of his motoric impairments as a youngster, and then it shows, on the basis of the testing, a constellation of relative deficits. And the Government also makes this point: that they're relative deficits in relation to his superior intelligence, and there are also some absolute deficits, meaning they would be deficits for any, quote, normal individual. And that combination of deficits – they're primarily right temporal lobe impairments in Mr. Kaczynski – are strongly correlated in the research data, the research and literature funded by the National Institute for Mental Health, that shows schizophrenia to be, or the source of it to actually be an organic brain disorder. It's not just a free- floating mental illness but actually arises from the individual's predisposition and neurological impairment, which makes them then vulnerable to environmental stressors that will cause the actual onset of the illness. And so this is a significant and material component in that it is hard scientific data that says he has that deficit at exactly the place that the research shows a high correlation with – in schizophrenia patients.

THE COURT: Aren't the test results that were yielded in the 1959 neuropsychological test the same or similar to the ones you're now referencing?

MR. SOWARDS: They're not, Your Honor, and to the extent there is confusion there, it's probably my fault in discussing them together. The 1959 tests that we've been referencing are during Mr. Kaczynski's sophomore year, I believe it was, at Harvard, was administered the MMPI that the Government is talking about. The MMPI is what they call personality testing. And the difference between personality testing and neurological testing is that personality tests get a score based on the examinee's endorsement of certain answers, which are then normed to categories of diagnoses, of potential diagnoses. And so the results you get will say an individual having this kind of score tends to be someone who may have the following symptoms that are associated with a particular kind of either personality disorder or illness or whatever. So it's sort of an actuarial comparison. The difference is that neurological data and testing is the sort of X-ray that the Government was talking about last time. That is a patient/examinee-specific test which measures individual impairments in functioning. So it's not that an individual who got these scores looks sort of like this category of individuals. What it says is, a patient getting these scores has these impairments in these areas of the brain. The significance of the Harvard MMPI was that Mr. Kaczynski at that time in his life, when he was approximately 19 years old, 19, 20 years old, endorsed a very high scale for social isolation, among other things, and there was a constellation, again, of sort of personality traits which, again, in the literature and over time as funded by NIMH studies, has again consistently shown a high correlation of consistency between adolescents with that sort of an MMPI profile and later onset of schizophrenia. The MMPI – and I beg to differ with Mr. Cleary; I don't know exactly where he's getting his information, but the MMPI is not a probative diagnostic instrument for diagnosing schizophrenia. There's some confusion about it because of

the several scales that it measures. One of them is designated a schizophrenia scale. But' it doesn't mean that the person who scores high score on that has schizophrenia or is at risk to it. It simply shows that they endorse certain answers that have a kind of internal inconsistency. It's used in some clinical contexts, where a person – like an E.R. room or a clinic situation where someone is coming in and they have to make a snap decision about whether there might be some overriding major neurological impairment or organic problem explaining psychotic-like behavior, like a brain tumor. If they can, they may administer that kind of a personality screening. But where you have this kind of history – and this is what all of the experts tell us we have – this kind of a history, neurological data and, you know, his writings and his behaviors and everything else, the MMPI would be wholly superfluous, would not be indicated.

THE COURT: So your position, then, is that the neuropsychological test is material to Mr. Kaczynski's case?

MR. SOWARDS: That would be my position; yes, Your Honor.

THE COURT: Then if it's material would you explain why the Government would not be prejudiced if I allowed that evidence to be admitted before the jury?

MR. SOWARDS: Sure. Because of the standardized testing procedures that are followed. Unless their concern is that the individual administering the examination intentionally fudged the results – I mean, was result-oriented – and I should say that the information that they have available to them includes multiple testers with congruent data. And one of the individuals which they've spoken to at great length is the leading researcher and diagnostician in schizophrenia and neurological impairments in the country. So unless they're concerned that the results of the examination are essentially fraud, the standardized results are standardized results. There's just no two ways about them. If their concern is they want to cross-examine the person, say, "Wasn't it true he was frustrated, angry, sleepy, he was on medication?", all of that is part of the protocol, to make those observations. One of the things the person assesses is that, you know, the person isn't on medication or hasn't been drugged. And so that information can be gleaned from the examiner. But again – and I think that Your Honor also touches on an important point, which is: we have repeatedly asked them to speak with their neuropsych expert and tell us, in addition to the additional exams that they may want to administer, tell us whether they have any concerns at all for the reliability of the data in the way it was administered or the clinicians who administered it. And to date we have heard absolutely not a peep out of their expert regarding any reason at all for doubting the objective reliability of the test data we provided.

THE COURT: Okay.

MR. SOWARDS: So I don't think there is a significant risk of – that's why I say it really is like the X-ray that both sides have access to and they can draw the inferences or arguments they want to from that. And certainly their psychiatric experts would have access to them.

THE COURT: I want you to tell me – and I'm asking you to tell me this because this is a sanctioning hearing on the guilt phase issue.

MR. SOWARDS: I understand.

THE COURT: And if I already told me, I don't remember it. I want to know what experts the defense plans on calling for the guilt phase portion of the trial.

MR. SOWARDS: And that would be, Your Honor, the two neuropsychologists who administered and interpreted the data that we provided to the Government.

THE COURT: And can you specify what you mean by "data"? Is that –

MR. SOWARDS: Right. All the test results; I'm sorry.

THE COURT: – the neuropsychological tests?

MR. SOWARDS: Correct.

THE COURT: Okay.

MR. SOWARDS: And it would be a psychiatrist with a specialty in schizophrenia. May I have just one moment, Your Honor, to make sure I'm not leaving anyone out. Thank you. (Discussion off the record among the defense attorneys.)

MR. SOWARDS: Yes, Your Honor. I just wanted to confirm that the one psychiatrist with the expertise in schizophrenia is the person who had observed Mr. Kaczynski for approximately an hour. It would be that individual.

THE COURT: What do you mean, observed him for about an hour?

MR. SOWARDS: Observed him while he was being interviewed regarding his insomnia by another – a sleep disorder specialist. And then finally – I'm sorry, Your Honor – was a forensic psychiatrist who had not met Mr. Kaczynski at all and had only access to the written information.

THE COURT: My understanding of the sanction the Government requests – first, the Government requests the ultimate sanction.

MR. SOWARDS: Correct.

THE COURT: As a fallback position, the Government has requested that I would exclude all experts except for the last one you mentioned.

MR. SOWARDS: Right.

THE COURT: You haven't discussed, I don't believe, the materiality of the psychiatrist with the specialty in schizophrenia.

MR. SOWARDS: Yes, Your Honor. And I'd be prepared to do that now, if the Court wishes.

THE COURT: Okay.

MR. SOWARDS: We believe, Your Honor, that that individual is – and her testimony would be material to the defense because of the unique clinical picture presented by Mr. Kaczynski. And that is, in particular, that he is what is regarded as a high-functioning schizophrenic. The clinical literature shows, and this witness would be able to explain to the jury, a number of important factors: first, that schizophrenia accounts or applies to approximately one percent of the population of the United States; that among schizophrenics, violent behavior or criminality, violent criminality occurs at the same rate as in the general population but goes up dramatically when the individual has paranoid delusions because of the persecutory nature of those, they tend to give rise to violent criminality at much, much higher rates than among the general population

or among patients suffering from schizophrenia in general. Mr. Kaczynski is further distinguished in that small percentage of a small percentage of the population by the fact of his superior verbal I.Q., vastly superior verbal I.Q. when measured against the general population, which, in the case of schizophrenia, causes his delusional world to in fact take in the entire world. It's a very elaborate, a very well- organized system of delusion which marks him from – I wouldn't say more typical but more, perhaps, recognized instances of paranoid schizophrenia that gives rise to violent behavior. And I don't mean at all to trivialize it but, in fact, the classic example is the individual who works in a warehouse or a postal storage facility or something like that where they don't have contact with the public; they have a routinized, routine job that they can just do by themselves sort of unseen by anyone else. But all the time their paranoia and their delusions are at work until one day they show up with a gun and injure or kill co-workers. Those sorts of folks, when they are diagnosed to have to have paranoid schizophrenia, typically have I.Q.'s in the ninety to hundred range. Mr. Kaczynski is far above that, and it is confirmed; it's documented in the literature by researchers with this expertise that that in part explains the elaborate nature of his delusions as expressed in his writings. That is part of it and that is expressed in his. The other important thing, I think, that a jury of lay individuals, certainly lay lawyers in this area missed the fact that an individual of Mr. Kaczynski's verbal intelligence nevertheless suffers these right-hemisphere neurological impairments which give rise to the schizophrenia, so that it explains the – or argues against the commonly held notion that you can't have a debilitating mental illness, you can't be psychotic and have a delusional view of reality if, in fact, you're so smart. And so what happens a lot with these individuals, and this is addressed in Dr. Froming's declaration that was filed with our supplemental response, is that they mask the mental illness, because the people that they encounter on a casual basis know them only by their verbal abilities which, as long as they don't relate to anything that's part of their delusional structure, come off as, you know, very mentally sound individuals. So she is material, this particular witness is material to explaining not only the general phenomenon of the high-functioning schizophrenic and its relationship to this case but she will then also be prepared to take the jury through Mr. Kaczynski's life and his writings and his decline in functioning, to show how all of that information is wholly consistent with the diagnosis.

THE COURT: But part of her analysis is based upon clinical observations of Mr. Kaczynski. That's what you said.

MR. SOWARDS: Well – and if I said that, Your Honor, I misspoke, because what – I said she had had that exposure; she is prepared to – essentially what happened, if I can relate some of the history –

THE COURT: You said "clinical picture."

MR. SOWARDS: A picture; yes, I'm sorry. And by that I mean the best clinical picture basis for diagnosing schizophrenia, and this is addressed in Dr. Amador's evaluation, is what they call a longitudinal evaluation of the individual, as much infor-

mation you can get on that individual from birth or even prebirth through the time they're seen. And what Dr. Amador also explains, either paradoxically or ironically enough, is that the clinical – meaning in a clinic setting – exposure to the patient is probably the least important when you have all that information, particularly with paranoid schizophrenics, because their tendency is to deny any symptomatology; they want to hide the illness. They lack insight and they also deny symptomatology. So, for instance, Dr. Amador's studies with the NIMH provide a protocol for rendering diagnoses of schizophrenia without ever seeing the patient, and this is funded by the federal government when they're looking at the neurological and historical incidence of schizophrenia as caused by different neurological conditions. They diagnose schizophrenia multigenerational without ever meeting the individuals, based on, you know, much less information than we have in this case. But the psychiatrist that we had in mind was essentially being introduced to Mr. Kaczynski in the hopes that he would find the presence or the company or her demeanor, whatever, sufficiently comfortable to allow further interviews. And as events turned out, she was not able to conduct those or talk to him. So what she was prepared to inform the Court under oath is that any observation or any opinion that she provided to the jury would be made with a conscious exclusion of any observations, any physical in-person observations she made of Mr. Kaczynski.

MR. DENVIR: (Indicates document.)

MR. SOWARDS: Thank you very much. Message from the front, Your Honor. I'm sorry. (Pause in the proceeding.)

MR. SOWARDS: And I think the other important part of this, Your Honor, in terms of assessing the materiality of this particular witness we're now describing, is that she would be called instead of other psychiatrists with expertise in the area of schizophrenia who had multiple hours of exposure to Mr. Kaczynski, so that we do put ourselves on an equal footing with the Government.

THE COURT: I'm trying to gauge what footing you are referencing. You indicated that the psychiatrist had made personal observations of Mr. Kaczynski while he was examined by someone else –

MR. SOWARDS: Correct.

THE COURT: – for insomnia.

MR. SOWARDS: Correct.

THE COURT: And I assume you told me that because it was important to your position. And then you also mentioned a clinical picture. And typically you think of clinical pictures as referencing hands-on type of interactions between a physician and a patient, where observations are made and are used in formulating opinions. And then at the very end of your argument, you seemed to indicate that we should forget all that because the witness is not going to rely upon any of that information. If that's so, I'm wondering why you told me what you've told me in the first place.

MR. SOWARDS: All right. And I apologize, Your Honor, for the lack of clarity. When I used the term "clinical picture," what I meant was all of the information

that is revealed primarily on the basis of the historical data – what I'm saying is everything that's available to the Government: the writings; the family history records; social-medical history records; and the neuropsychological test results from the two neuropsychologists. What I was also explaining to the Court and frankly acknowledging is the problem we had is that there was this period of observation when someone else was talking to Mr. Kaczynski about his sleep disorder and we thought it was a good opportunity for this doctor to just make his acquaintance. So she was not involved in the assessment or evaluation; she was – but I could not, obviously, suggest that she wasn't, in a sense, laying eyes on him and observing him, but that her diagnosis and her opinion that she would be presenting to the jury would not rely on her visual observation of Mr. Kaczynski. She would limit herself to rendering an opinion based on her review of the written data that we had to provide to her.

THE COURT: I need to have you repeat what you've just said.

MR. SOWARDS: Sure.

THE COURT: Did you tell me that the doctor will not rely on the physical observations? Is that what you said?

MR. SOWARDS: Correct.

THE COURT: Okay.

MR. SOWARDS: And I'm sorry for blending all that together initially when I used the term "clinical picture." And then what I was also saying was so that would be in – she would be in distinction to the doctors who had been able to – the psychiatrists who had been able to conduct more extensive interviews, or extensive interviews, with Mr. Kaczynski, those individuals who were referenced in our opposition and whose declaration, one of them, Dr. Foster, that we appended to our opposition to the sanction motion. Because of his interview with Mr. Kaczynski, we were willing to forgo his participation.

THE COURT: I'm going to look at all of the written material again when I sit down to write my order. When I look at that written material, will I see any opinions by physicians or psychologists that support the arguments you are now making?

MR. SOWARDS: Yes. In particular, Your Honor, I would invite the Court's attention to the declaration of Dr. Xavier Amador. If I may reference that for you. (Pause in the proceeding.)

MR. SOWARDS: That, Your Honor, was filed as Exhibit A to the defendant's supplemental brief in opposition to the Government's motion filed with the Court on, I believe, November 18th. I'm correct; November 18th.

THE COURT: I have that exhibit. What aspect of this exhibit – do you know what paragraph supports what you're telling me orally here?

MR. SOWARDS: (Examines document.) If I may just take a moment, Your Honor. I apologize for this. There was a reference to the clinical interview. (Examines document.)

THE COURT: Do you understand that I'm seeking to determine –

MR. SOWARDS: Yes.

THE COURT: – if this declaration supports your position on materiality?

MR. SOWARDS: Correct.

THE COURT: All right.

MR. SOWARDS: Beginning, Your Honor, with paragraph 11.

THE COURT: (Examines document.)

MR. SOWARDS: And paragraph 12.

THE COURT: I don't see anything in paragraph 11 that supports that proposition. Looking at paragraph 12, there's information that seems counter to the proposition.

MR. SOWARDS: I was referencing, Your Honor, with respect to paragraph 12, the last two sentences, explaining that a patient with the same symptoms as Mr. Kaczynski would not be given the diagnosis of schizophrenia, continuous paranoid subtype, if he had not evidenced signs of illness for at least six months, and then the differential diagnosis that would have to be given just based on if he'd been evaluated in a clinic, and that the better information is the longitudinal information, which is referenced in paragraph 11.

THE COURT: I'm looking at the second sentence.

MR. SOWARDS: Where is that, sir? I'm sorry. In paragraph 12?

THE COURT: Paragraph 12.

THE COURT: Because schizophrenia –

MR. SOWARDS: Right.

THE COURT: – longitudinal based diagnosis, other sources of information, such as a patient's writing and work history can carry more weight than information gleaned from direct clinical interview.

MR. SOWARDS: Right. That's actually probably a better phrase – a better portion of the paragraph. That, and then in an earlier, Your Honor, in paragraph 8.

THE COURT: You understand that I'm trying to determine why the defense opines that the clinical interview involved with the administration of the neuropsychological test is material evidence. And I understand that counsel for the parties have been arguing their client's respective positions in regard to the matter, but I'm trying to see if the argument is supported by medical evidence.

MR. SOWARDS: Okay. And let me, then, also, Your Honor, correct if I again have blended these two together – our neuropsychological evaluation, or the testing, the objective neuropsychological testing, was not accompanied by anyone conducting at that time a clinical interview. No one who has attempted a clinical interview of Mr. Kaczynski would be someone who we were calling. We offered the opportunity –

THE COURT: Why do you need two neuropsychologists, then?

MR. SOWARDS: Oh, it's only because one did the – when we talked earlier, one did a more general screening battery and testing, and then based on the test results when Mr. Kaczynski was transferred down to California, someone locally did some more fine tuning of the information. But all they did was administer the tests in the standardized format. We were hoping for the benefit of their experts, if they wanted to hear Mr. Kaczynski answer –

THE COURT: But why do you need them?

MR. SOWARDS: We don't. We thought that was responsive to their concern that they had no one, no psychiatrist who had actually been able to gauge or observe Mr. Kaczynski just answer questions or view his manner of speaking or responsiveness to questions. We thought if that was important to them, we would give them that opportunity.

THE COURT: You have opined that the test results are material?

MR. SOWARDS: Correct.

THE COURT: Can we view the test results in a vacuum, apart from the clinicians who administered the tests? Are the clinicians or neuropsychologists material?

MR. SOWARDS: The neuropsychologists are material in the sense of explaining to the jury what the tests are and what they measure and what the results mean. Perhaps if the Government – I don't know if they would be willing to reach a stipulation on that; it sounds like they want to do the opposite, and I can understand that, from their perspective. But I think what they would have to – absent a stipulation that the test results are accurate and mean what our experts say – I think they would have to present as live witnesses subject to cross-examination, which is why we wanted to call them.

THE COURT: Okay. I think I understand your position.

MR. SOWARDS: Okay. Unless Your Honor has other questions on that –

THE COURT: I do.

MR. SOWARDS: You do. Okay. Good.

THE COURT: On a different issue. We can revisit this issue if the Government wants to respond, but since you're at the podium, I'm going to ask you another question.

MR. SOWARDS: Fair enough.

THE COURT: The sentencing phase issue – I read your brief, and I realize that you opine that notice is needed before I order an examination.

MR. SOWARDS: Correct.

THE COURT: I agree with you. But notice is probably not needed if it's clear that a criminal defendant has, in fact, placed his mental status in issue. And the argument you made earlier – but that was in connection with what I assumed was a breakdown of the parties' negotiations to try to resolve an issue.

MR. SOWARDS: Correct.

THE COURT: And so maybe that argument doesn't apply to the sentencing phase issue I'm now addressing.

MR. SOWARDS: Right. And what I meant to indicate, Your Honor, was that –

THE COURT: Well, let me tell you what I'm thinking. I'm trying to determine whether your client has already decided to place in issue a mental status type of a defense as a mitigating factor in connection with the sentencing phase of the proceeding, should it reach that phase. And I had discerned that you indicated that in your earlier comments, but I'm not sure that you intended me to use those comments in the

manner in which I'm indicating I'm contemplating using them, and I'm trying to get some clarification from you on it.

MR. SOWARDS: And not only had I not intended, Your Honor, but I'd hoped I had actually reserved the right to disclose to you the status of the negotiations just so you knew where things were, but without prejudice to or waiver of our ability to litigate whether notice and an examination could be ordered. So no, I did not mean to – that clarification or bringing the Court up to date to amount to either a judicial admission or otherwise concede the issue of the notice requirement.

THE COURT: Okay. That's one of the points that's raised by the Government. The Government does raise the question of judicial admission.

MR. SOWARDS: Correct.

THE COURT: They raise it in connection with a proceeding before Magistrate Judge Hollows.

MR. SOWARDS: Correct.

THE COURT: And you disagree with the Government on that point?

MR. SOWARDS: I do, Your Honor, for the reasons that we addressed in our brief responding to the Court's questions, and in particular – this is at pages 5 through 10 – that under the Ninth Circuit definition of what constitutes a judicial admission, the discussion with Judge Hollows, both in the moving papers and the hearing before him last summer, did not constitute a forthright acknowledgment or admission of a factual matter. And I would almost – or also suggest, as illuminated by the Ninth Circuit authority, the concept of judicial admission, sort of the hallmark of that is the sort of intentional, forthright statement of a factual situation. And the briefing and argument before Judge Hollows was more in the nature of, given the conceivable scope of mitigating evidence and aggravating evidence that could be introduced at the penalty phase, what are the affirmative obligations of disclosure by the Government? So it was all Government disclosure, not defense showing at that phase.

THE COURT: As far as the penalty phase issue is concerned, I have a tentative ruling.

MR. SOWARDS: Okay.

THE COURT: But before I give that, I'm going to ask you another question. The tentative ruling will have aspects of it that favor the defense as far as the notice issue is concerned. And it will favor the Government as far as – well, I'm not sure that it will favor the Government. I think I have the authority to require notice. I also believe I have the authority to allow an examination in the appropriate circumstances. And defining what's meant by "appropriate circumstances" may end up not favoring the Government, and I haven't defined that yet. But if I decide that notice is appropriate, from the defense's perspective when should I require notice? I'm talking about a sentencing phase issue.

MR. SOWARDS: Well, because I had been proceeding on the assumption I'd be arguing to the Court that notice was not appropriate to order –

THE COURT: You can reflect on that. I'm going to give my tentative on that issue.

MR. SOWARDS: Okay. Thanks.

THE COURT: My discernment as far as the guilt phase issue is concerned, I'm going to hear further argument on it, and then I'm just going to write an opinion that resolves that issue. I cannot rule from the bench. I want to analyze all arguments, plus the arguments made today. But on the sentencing phase, I'm going to see if we can resolve that issue today. Okay. You don't have to stand.

MR. SOWARDS: I can go sit down. All right. (Complies.)

THE COURT: On November 5, 1997, the Government moved for an order compelling Kaczynski to submit to a mental examination to assist the Government in preparation for the penalty phase of the trial. At the hearing on the motion on November 21, I requested both parties to address whether obtaining notice from Kaczynski of his intent to introduce evidence of his mental status in the penalty phase was a prerequisite to ordering the examination and whether I had the authority to require such notice. The Government argued that it did not – and I'm now quoting from the transcript at 1215, lines 3 to 5: it did not "believe it's necessary for the Court to require [Kaczynski] to provide notice before he is required to undergo a mental examination." And, alternatively, the Government asserted that if it was required, Kaczynski had given sufficient notice through representations made during proceedings before Magistrate Judge Hollows. That's in the transcript, 1214, lines 19 to 22. Kaczynski countered that notice was required and had not yet been given, although I think I raised that issue sua sponte, on my own motion, at that hearing, and Kaczynski agreed with my analysis. Because a criminal defendant may invoke the Fifth Amendment privilege against self-incrimination during the penalty phase of a capital trial, the Supreme Court has held that – I'm now quoting: "A criminal defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing hearing," close quote, Estelle vs. Smith, 451 U.S. at 468. However, the Supreme Court recognized that "a different situation arises where a defendant intends to introduce psychiatric evidence in the penalty phase." At 472. This is because "by indicating that he intends to introduce psychiatric testimony," a criminal defendant essentially "waives his right to remain silent." Savino vs. Murray, 82 F.3d at 604 (4th Cir. 1996). Absent such a waiver, however, a defendant retains his Fifth Amendment right to refuse to participate in a psychiatric interview. The three district court opinions cited by the Government in support of its motion for a penalty phase examination all declined to order a mental examination until the defendant provided notice of his intent to rely on mental health expert testimony in the penalty phase. See United States vs. Haworth, 942 F. Supp. at 1408, where the Court states, "The Government will not be entitled to a court-ordered independent examination unless and until the defendants give notice that they intend to introduce psychiatric evidence at the penalty phase"; United States vs. Beckford, 962 F. Supp. at 761, where the

Court states the "balance between securing a defendant's Fifth Amendment rights and affording the Government a meaningful right of rebuttal on mental health issues. . . is best struck by . . . requiring reasonably early notice by the defendants that they intend to rely on mental health or mental conditions in mitigation of death in the penalty phase. . . . "; United States vs. Vest, 905 F. Supp. at 653, where the Court states, "The Court will not order an examination unless a defendant first indicates that he plans to introduce mental health testimony. . . . " Therefore, each of the cases the Government cited in support of an examination all required notice, and I agree with those decisions. And I believe that the Fifth Amendment, as interpreted by Smith and its progeny, prohibits ordering a defendant to submit to a mental examination unless he first provides notice of his intent to rely on mental health expert testimony in the penalty phase. The Government argues alternatively that the Court need not require notice to satisfy the Fifth Amendment requirements in this case because Kaczynski has already indicated his intent to introduce psychiatric testimony in the penalty phase. I don't find that argument persuasive. That argument, in essence, relies on the judicial estoppel doctrine. That's a doctrine that involves the discretion of the Court, and the Court makes a determination as to whether a fact has been proved or based upon statements made by a party in the lawsuit and whether, as a matter of fairness, a party should be bound by that fact. See American Title Insurance Company vs. Lacelaw, 861 F.2d 224, 227 (9th Cir. 1986). I'm not going to invoke that doctrine in a capital case like this one. I distilled these as the issues to be argued here today, and on December 16, 1997, I in essence reflected this conclusion by asking you to be prepared to argue whether the Court has the inherent authority to require Mr. Kaczynski to provide notice of his intent to rely on mental health expert testimony in the penalty phase. At the time I issued that order, I had not completed my analysis. Since issuing the order, I now have a view on the issue which I will give you, because you should have this view in mind when you argue, because unless your arguments change the view, I will adopt what I'm now stating as my ruling in this case. No rule or statute explicitly provides the Court with authority to order Kaczynski to give notice of his intent to rely on mental health experts in the penalty phase or to submit to a mental examination for that phase. However, the Supreme Court has recognized district courts "may, within limits, formulate procedural rules not specifically required by the Constitution or Congress." Carlisle vs. United States, 116 S.Ct. 1466 (1996); see Federal Rule of Criminal Procedure 57(b), providing that where no law or rule is directly applicable, "[a district] judge may regulate practice in any manner consistent with federal law, [the federal] rules and local rules of the district." "Confronted with situations in which the Federal Rules of Criminal Procedure were not applicable, courts historically have invoked inherent judicial powers" to address problems and to craft appropriate solutions for them. Beckford, 962 F. Supp. at 754. However, a court may not exercise its inherent authority in a manner inconsistent with rule or statute. Heileman, 871 F.2d 648, 652 (7th Cir. 1989); it's an en banc decision by the Seventh Circuit. Therefore, the Court's inherent authority should be invoked, if at all, in a manner that is in harmony with

the procedures prescribed by Congress for cases involving the death penalty statute. Kaczynski argues that ordering him to provide notice of his intent to rely on mental health expert testimony during the penalty phase would be inconsistent with the statutory scheme reflected in Title 18 United States Code Section 3593. That section, at least Part (a) of that section, is titled "Notice by the Government," and it specifically provides that if the Government believes that the death sentence is appropriate, it shall file and serve on the defendant a notice stating its belief that the death penalty would be justified if the defendant is convicted. The notice is required to set "forth the aggravating factor or factors that the government . . . proposes to prove as justifying a sentence of death." Since the statute is silent on whether a defendant is required to provide the Government with notice of the mitigating factors on which he will rely in the penalty phase, Kaczynski argues that "absence of any defense notice obligations in [the statute] necessarily gives rise to the 'negative implication' that Congress did not intend to impose such obligations." However, as stated in Heileman, the mere absence of language in a federal statute specifically authorizing or describing a particular procedure does not necessarily give rise to "a negative implication or prohibition." At 871 F.2d 652. Kaczynski supports his position by pointing to failed post-enactment attempts to amend the statute to include a notice provision for mitigating factors. And then he cites such failed attempts. I cited in the order which I gave the parties so that they would be prepared to brief issues a Ninth Circuit opinion that indicates if there's a failed attempt to amend existing legislation, that's not significant evidence of the intent of Congress. Kaczynski argues that the plain terms of Section 3593 and the post-enactment legislative history preclude the Court from exercising its inherent authority to order notice, citing the Ninth Circuit decision in Hicks as support for his position. In Hicks, the Ninth Circuit held that the district court had acted beyond its authority when it required the parties to exchange witness lists in advance of trial. The Ninth Circuit reasoned that there was no authority for the order because neither the rule itself nor its legislative history authorized the exchange of witness list. In fact, the Ninth Circuit cited the legislative history of Rule 16 that demonstrated that Congress had considered enacting a version containing a provision for the exchange of witness lists but had explicitly rejected it in favor of a version without the provision. Thus, Hicks reveals the Ninth Circuit's agreement, although it didn't state this, that "inherent power is not a license for federal courts to do whatever seems necessary to move a case along." That was stated by Heileman, 871 F.2d at 666. But the legislative posture in Hicks is different than that in this case. Here, the exercise of inherent authority to require notice is not inconsistent with congressional intent. There is no inconsistency here, since Congress explicitly provided the Government with a statutory right to rebut any mitigating information provided by a defendant, 18 U.S.C. Section 3593(c). As recognized in the cases cited by the Government, at least in Beckford and Wabash, that type of language in the statute does provide the Government with the opportunity – should provide the Government with the opportunity to, at least in the mental health area, receive notice of what a defendant contemplates presenting. I think

there's other things I could say, but I think I've said enough. It is clear to me that I have the inherent authority to require notice. And my inclination is to require notice. The Government, however, didn't move the Court for an order requiring notice; it moved the Court for an order requiring an examination. I think that we need to decide the notice question first. And I need to look at the notice to determine whether an examination will be required and the scope thereof. That's my tentative ruling. Who wants to argue first?

MR. CLEARY: Your Honor, do you want us to go back and reply to the guilt phase argument first, or do you want to deal with the sentencing?

THE COURT: I want to deal with the sentencing phase and get it out of the way; then we can move back to the guilt phase, unless you want to break and return after lunch.

MR. CLEARY: Whatever's convenient with the Court.

THE COURT: Let's – can you do that? Do you want to break and return after lunch?

MR. DENVIR: Whatever the Court wants. We can continue. Whatever the Court's pleasure is.

THE COURT: I can continue, but let me talk to my staff. (Discussion off the record.)

THE COURT: My staff is willing to proceed.

MR. WILSON: Your Honor, I think we agree with much of the Court's analysis this morning, and if the issue is whether the Government has moved for notice or needs to move for notice, if it's a necessary prerequisite that the Government move for notice, then we would move for notice now and, if necessary, file a document saying so today, if that's the only bar to the Court's requiring notice. And then we would be willing to proceed with the Court's analysis to – after receiving the notice – determine, litigate or however determine that the scope of the examination that would follow.

THE COURT: Why don't you respond to the question I asked the defense: when do you think notice should be given?

MR. WILSON: We think notice should be given immediately after ordered by the Court. In the three district court cases that have been discussed throughout this proceeding, it was ordered prior to trial. There's no particular reason why it can't be ordered prior to trial in this case. And it would serve the purposes of the notice, obviously, for the Government to know sooner rather than later and for the Court to know sooner rather than later whether the defendant intends to put on mental health testimony at the penalty phase.

THE COURT: Okay. All right.

MR. WILSON: Thank you.

MR. SOWARDS: Thank you, Your Honor for the opportunity. I just wanted to address a few observations with respect to the case law cited by the Court for the Court's consideration to the extent you do wish to reconsider the issue about notice. And that is just, very, very quickly – the Court had drawn our attention to Tahoe

Regional Planning vs. McKay, which is the Ninth Circuit case that said under certain circumstances the failure to amend a previously adopted enactment wasn't really dispositive about what was and wasn't required by the enactment. The thing I would point out that I think is interesting about this case is in Tahoe Planning what they were talking about was a 1960 statute, a public meeting statute, and the question was whether there should be an attorney-client exception for meetings between the Nevada Attorney General and the Tahoe Commission, I guess. And the rejected amendments arose in 1977, seventeen years after the attempted enactment, so that ruling wasn't that dispositive of what was intended by the legislature.

THE COURT: What proposition are you advancing?

MR. SOWARDS: I'm advancing the proposition, Your Honor, that the Court was correct in being disturbed by the legislative history of the federal death penalty act which was adopted in 1994 and immediately thereafter the Justice Department tried in two successive legislative sessions to get the Court them to adopt the notice provision that the Court is now considering. And what I'm suggesting there with respect to Tahoe Planning is that there was an immediate adoption by the statute, and in fact what we're talking about with all these cases, with Beckford, Haworth and Vest, is the predecessor to the 1994 statute. So that also did not include a notice provision when it was included in the current form of 1993. There still isn't a defense notice proposition. As Mr. Wilson explained to the Court, that was still of some concern to the Department of Justice.

THE COURT: I still don't see the proposition. Are you indicating that because of the closeness, of proximity to the enactment and the amendment, this situation should be viewed differently?

MR. SOWARDS: Correct, Your Honor. I'm distinguishing that from Tahoe Planning because it was immediately after – because not only is it immediately after the enactment that they tried to amend it, but also what we have is an adoption of a second statute and Congress' continued failure, whether conscious or not, to – failure to include the defense notice requirement.

THE COURT: But "whether conscious or not" is important, isn't it? Because if it's conscious, that could give rise to the negative implication doctrine. But when you say "or not," if it's not conscious, then that probably does not give rise to the negative implication doctrine. And that's my discernment: that it doesn't give rise to it.

MR. SOWARDS: Right. And my suggestion was, Your Honor, that it wasn't because of the reason given in Tahoe Regional Planning that the Court should go one way or another on that, especially in finding that it wasn't a conscious decision. I would agree that that fact alone is not dispositive of what Congress intended. I think when you then look at it as part of the overall legislative scheme, you do see that the balance tips in favor of finding a congressional intent to exclude it. And those two things that I would ask the Court to reflect upon are the analysis undertaken by the United States Supreme Court in Lindh vs. Murphy, which was discussed in our pleadings, again with the federal death penalty habeas corpus statute, where, again,

they used the analysis that Your Honor mentioned earlier, that where the legislature has specifically included a provision as to one set of circumstances and hasn't to the other, that is more reflective of a conscious choice and decision than it is just mere oversight. So that is an additional factor which would weigh in favor of a conscious decision not to require the defense notice.

THE COURT: Three district courts disagree with you.

MR. SOWARDS: Sure. And let me, then, if I may, just very briefly address those. The three district courts – the way we started out on this was, again, with Your Honor illuminating the parties that the three district courts in question were not within the Ninth Circuit and that, in particular, Your Honor pointed out the distinction between the Ninth Circuit's analysis and the Fourth Circuit's analysis.

THE COURT: Right.

MR. SOWARDS: When we look at Hicks, I think, correctly read, there are two parts to Hicks. One is the part Your Honor referred to a moment ago: that the intervening legislative history over 20 years was very consistent with a conscious rejection of exchange of witness list under Rule 16. What I would invite the Court's attention to is the fact that Hicks also pointed out that the Ninth Circuit had addressed the issue 20 years before in the Seymour case, which we discussed in our brief. Therefore, it's 20 years before; they didn't have the 20-year legislative history. And the point, the sort of straightforward point was Rule 16 doesn't contain it; the district court isn't authorized to order it; end of inquiry. Then what they said in Hicks was perhaps folks thought because in Seymour where there was sort of "no harm, no foul," because the defendant, I guess, didn't comply the order; we were just sort of speaking in dictum and it really wasn't essential to our holding. So in Hicks they said, We're now making explicit what folks may have thought we were making implicit in Seymour: that rule 16 doesn't authorize it. Clearly they were buttressed by the intervening history. But it in no way undercut the Ninth Circuit, the controlling authority in Seymour's observation that we look at the rule, if it doesn't have it in there, then the district court isn't authorized to order it. And I think in this case, again echoing Your Honor's observation, in a death case, where the issue is what should the Court do in proceeding cautiously in a death case or capital case to exercise its discretion, whether inherent authority is appropriate – when we look at the scheme in 3593, we see great congressional sensitivity to the disparate position of the parties. In a capital case, particularly with respect to the presentation of mitigating evidence, what the long line of U.S. Supreme Court cases has shown is there should be no burdening the defendant's right to present an unrestricted scope of mitigating evidence –

THE COURT: This doesn't burden the defendant's right. This only requires the defendant to give notice of a mitigating factor, not all mitigating factors, just a single mitigating factor.

MR. SOWARDS: Right. And then the – but then what occurs, as observed by the Fourth Amendment, is once the notice is given, that constitutes a waiver of Fifth and Sixth Amendment rights. So in pursuit of the Eighth Amendment right to present

mitigating evidence as it relates to mental health evidence, there is a corresponding burden on the Fifth and Sixth Amendment rights; those have to be weighed because the notice is given. And the only thing I'm suggesting to Your Honor is that it may well be that may explain why Congress was troubled or stayed its hand consciously in not ordering that up, with respect to 3593, but that, particularly given the absence of an explicit provision for defense notice, it would be appropriate for the Court to stay its hand with respect to inherent power.

THE COURT: I saw nothing in the legislative history indicating that Congress made a conscious decision, and the parties haven't cited anything to me that indicates that.

MR. SOWARDS: Okay.

THE COURT: So I see no support for the argument that it was a conscious decision by Congress. In fact, the statute that gives the Government right to present rebuttal evidence against the mitigating factors asserted by the defense would indicate that Congress contemplated that the Government would in fact have a meaningful right to rebut certain mitigating factors. In light of other congressional enactments such as Rule 12.2(a) and (b), where Congress saw fit to give notice in that particular – as to this particular matter, mental status defense type matters, and the fact that the Government has a right to rebut the defense's case on mitigating factors, it seems that there may not be anything expressly approving it, but there's nothing that indicates Congress sought to take away a district judge's inherent authority as to this procedural type of a matter. It seems that Congress was focused, when it enacted the death penalty act, on constitutional concerns, not discovery matters, and that's why I think it required the Government to give notice of the aggravating factors, because it wanted to make certain that a defendant received that type of notice as a matter of due process. But I don't see anything in the statute or anything in the legislative history that evinces a congressional intent to take away the district judge's authority to enact a procedure to effectuate discovery. And that's really all this is. And so I don't see it. Unless you can point it to me, I think I'm going to affirm my tentative.

MR. SOWARDS: Well, I appreciate the opportunity, Your Honor, to be heard. Thank you very much.

THE COURT: Okay. Well, don't leave, though.

MR. SOWARDS: I'm not leaving.

THE COURT: Because I am going to affirm the tentative. Let's focus on timing. The Government wants notice immediately. What's your position?

MR. SOWARDS: As to the nature and timing, I would assume the nature of the notice would be similar to that that we discussed with respect to 12.2(b). Am I presuming too much?

THE COURT: I think you may be.

MR. SOWARDS: Perhaps if we could discuss the nature –

THE COURT: I have a note. I've thought through this, and I'm going to look at my note.

MR. SOWARDS: Thank you. (Pause in the proceeding.)

THE COURT: Because of the problem experienced in the guilt phase as to the notice issue, I'm inclined to order that Kaczynski state in the notice whether any of the experts offered during the penalty phase will base their opinions on having examined, tested or otherwise interfaced with Kaczynski. The notice would be in the nature of discovery and thus would be served on the Government and not filed. If Kaczynski serves the notice of his intent to rely on mental status mitigating factors in the sentencing phase, the Government could move for an examination at that time if it deems one is necessary for rebuttal.

MR. SOWARDS: Then, Your Honor, if we may have – within 10 days of the Court's order we could provide the Government with that notice.

THE COURT: Okay. Let me get the Government's response.

MR. SOWARDS: You want me to leave or remain here?

THE COURT: I think we're done, unless you have something else you want to cover.

MR. SOWARDS: No, that's fine. I don't think so. Thank you very much.

THE COURT: All right.

MR. WILSON: Your Honor, 10 days after the Court's order would be fine with us.

THE COURT: You just received my order.

MR. WILSON: Okay.

MR. SOWARDS: Thank you.

THE COURT: So it would be 10 days from today's date.

MR. DENVIR: Your Honor, I want to make sure I understand. You want a statement of the defense intent to present mental status evidence by way of experts or –

THE COURT: This is experts.

MR. DENVIR: So it's to call experts regarding mental state as a mitigating factor and to state whether those experts will base their opinions on testing, interviewing or otherwise interfacing with Mr. Kaczynski, and you want it specified as to which experts, if that's true, that will be true?

THE COURT: Right. And in light of what you just said, I will issue an order so that it's clear.

MR. DENVIR: Thank you, Your Honor.

THE COURT: Okay. We're now ready to return to the guilt phase issue. Does the Government want to respond?

MR. CLEARY: Thank you, Your Honor. If I could start first with the question of materiality. You put that question to Mr. Sowards, and his response dealt almost exclusively with the diagnosis of schizophrenia. And the real issue, as we see it, Your Honor, is not what the diagnosis is. That's the starting point. But the question of relevance to that defense is, does the mental disease or defect interfere with the defendant's capacity to form intent? If it doesn't, it's not a viable defense and should

be inadmissible. So in Mr. – Dr. Amador's declaration, he likewise never makes the link between the alleged mental disease and the capacity to form intent. And without that link, that evidence is non-material and, we'll argue, inadmissible. And I think in assessing what the materiality is, that's what the Court needs to look at. And from what we know and from what we've heard and from what we've read, the defense has never made that most material connection. Moving backwards to the beginning part of Mr. Sowards' presentation, he said that both sides would have access to the same material and therefore there is no prejudice to the Government. But there is in fact a prejudice to the Government even if we both have the same material, and that's because the Government has the burden of proof on this issue, and it's a thorny issue. It's not – it's psychiatric testimony. It's not a science; it's an art. And how that relates to the capacity to form intent is a difficult question that experts are going to have to deal with and explain to a jury. We bear the burden on that. It would be very much in the defense's interest to use the least reliable, least valid forms of proof, because we have to prove intent. We have to prove the defendant had the capacity and, in fact, did form the requisite intent to kill or to injure in this case. So that's where the prejudice is. The prejudice is borne of the notion that the Government has to prove this issue in the case, and therefore we need the most reliable, most valid form of evidence. Mr. Sowards also suggested that there be relative deficits –

THE COURT: Before you move on, Mr. Sowards argued – this is not the first time he's made the argument, but he's arguing that the neuropsychological tests are material to Mr. Kaczynski's case and that it's an objective type of a test. And he's indicating that I should revisit Exhibit A and I will find medical support for the argument he made. What is your response to that argument? I understand that you have argued, as a lawyer, that there are a number of things that could have affected the test. But I don't know that. And so what is your response?

MR. CLEARY: My response, Your Honor, is that the tests, although they may be objective, don't cover, in our view, the grounds that you need to make a conclusive, objective diagnosis, and I'll give you an example. Mr. Sowards talks about the consistency, that there's a constellation of consistency, the test scores are consistent; I assume that meant consistent with schizophrenia. Our research reveals, and just the use of the word "consistent" suggests, that it is not dispositive of schizophrenia. It could be consistent and indeed our research reveals is consistent with other mental illnesses or personality disorders, which is kind of a lower form of a defect. And the tests we want to do are designed to probe that very issue, is the relative deficits that Mr. Sowards claims or the disparity in test scores, the fact that the defendant scored average on some scores and very high on others. They would argue, if I understand their argument, that that is consistent with schizophrenia. What we want to be able to show is that it is a – if this is true, we want to probe that and see if that disparity in test scores is attributable not to schizophrenia but to depression, anxiety and some of the other factors I mentioned to Your Honor. And that's what the essence of our request is. That's why this is important. And what the defense has done is actually

suggest that what we're asking to do is a reasonable request. They told you that they themselves had had two neuropsychologists administer a battery of tests to fine-tune the results they got the first time.

THE COURT: Let me ask a question about the record. I want you to pick up on your argument, but I want to know what constitutes the record for purposes of my decision. I asked Mr. Sowards that, in a roundabout way, because I wanted to know whether statements made by Mr. Sowards during the portion of this proceeding where he was explaining a breakdown of the parties' communications where you were trying to negotiate something and I decided that I didn't want to hear a lot about that because it was my impression – and perhaps I shouldn't have the impression – it was my impression that were almost inviting me to participate as a settlement type of a judge, and you know that Rule 11 deals with that in another context, and I just assumed that the rationale of that prohibition would extend to this context too. So that's why I backed out of that. But statements that were made when you were communicating on that topic, and Mr. Sowards has indicated that from the defense's perspective I shouldn't use any of those statements for substantive purposes or, I guess, for purposes of my record when I render a decision ultimately in this case on either the guilt phase or the penalty phase issue. What's the Government's position on it?

MR. CLEARY: Your Honor should not be so constrained. If representations are made in court by either side, you should be allowed – you are allowed to rely on those representations and issue your rulings, make your rulings based on those representations.

THE COURT: So your position is that everything stated during this proceeding constitutes the record, part of the record on which I can base a decision?

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

THE COURT: Okay.

MR. CLEARY: If I can just move on to one final – I believe it's just one final point in Mr. Sowards' guilt phase argument. He says that one of the tests we want to take is the MMPI; he says that that is wholly superfluous. I don't know that that's a decision for him to make. That's what our experts tell us they want. They say it is probative; they would like to take the MMPI. And the claim that it's wholly superfluous flies in the face of the defense reliance of a 30-year-old MMPI. We should not be required to rely on a 30-year-old MMPI when some of the crimes in this case are as recent as a year and a half old. We should be able it to take an MMPI currently. The fact that counsel views the MMPI as superfluous – well, that's something they could cross-examine our experts on in trial, but their view should not be a factor for the Court. Our experts want to do it. They tell us it's consistent with professional standards applicable to their profession, and we've looked ourselves at some of the research in the area which suggests that the MMPI is quite frequently given in connection with a battery of neuropsychological tests, and indeed the psychological battery that was given, neuropsychological battery in this case, I understand, is a Halstead-Reitan battery. Dr. Reitan himself has said, acknowledged that the MMPI is generally or

frequently given with his battery of neuropsychological tests. And that's what we're asking to do here. And we think we are entitled to that rather than having to rely on a – their interpretation of a 30-year-old MMPI that we've never seen. And that's all I have on that, Your Honor. Thank you.

MR. SOWARDS: Your Honor, unless the Court had any particular questions raised by Mr. Cleary's comments, I was prepared to submit the matter.

THE COURT: Okay. I'm going to deem it submitted, but before you leave I wanted to talk with my reporter for a second. (Discussion off the record between the Court and the court reporter.)

THE COURT: I was communicating with my staff about another matter. It involves the ex parte in camera proceedings. We previously decided that the defense would look at a rough draft of those transcripts concerning the ex parte proceedings and then I would meet with the defense ex parte to get the defense's perspective on whether aspects of the in camera proceedings should be disclosed to the Government and perhaps to the public. And I wanted to know when my court reporter was going to have the rough draft of yesterday's proceeding prepared so that she could give it to defense counsel. And she's indicated that she will be able to give that to defense counsel – I believe she told me tonight. She's shaking her head in the affirmative, so she did say tonight.

THE REPORTER: Yes, Judge.

THE COURT: It's a matter I would like to get the Government's and the public's input on before trial starts. And so it is my desire to meet with defense counsel tomorrow, because that would – (Discussion off the record between the clerk and the Court.)

THE COURT: – because that would allow me to get defense counsel's input and should place me in a position to issue an order so that I can get the input of the Government and the public or the media. Is it feasible to meet with you tomorrow on the topic? And I'm assuming that I need to meet with you because you have an opinion that everything covered was attorney-client communications.

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

THE COURT: Ms. Clarke is shaking her head in the affirmative. Can we meet sometime tomorrow? Is that feasible?

MS. CLARKE: Your Honor – I sound like a prospective juror with a hardship – I don't have a nonrefundable ticket, but I have probably a nonrefundable seat on an airplane to go home tonight. And I'm coming back on Sunday. I wonder if the Court would be – it would be as reasonable to meet on Monday?

THE COURT: Are you going to be in a position where you will not be able to use a telephone so we could have a conference call on it? Maybe we could set up a conference call, and I could meet with you telephonically.

MS. CLARKE: We could do that, if Mr. Denvir and I would have a chance to speak after we get the transcript so we could have a little bit of time to talk about it ourselves.

THE COURT: My chambers can arrange a conference call. We will report it.

MS. CLARKE: We do have telephones where I'm going.

THE COURT: Okay. Can you give me an approximate time so we can schedule the meeting now?

MS. CLARKE: Whatever's good for the Court. Sometime in the afternoon would be fine.

THE COURT: Two o'clock?

MS. CLARKE: That would be fine.

THE COURT: Okay. We'll schedule it for 2:00 o'clock. Please let me deputy clerk know where we can reach you. All right. And thank you.

MR. CLEARY: Thank you, Your Honor. (Time noted: 12:56 p.m.) 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 1-64 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 23, 1997 IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on the 15th day of January, 1998. _____ SUSAN VAUGHAN, CSR No. 9673 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

– oOo –

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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REPORTER'S TRANSCRIPT DISCUSSION ON MOTIONS FOR MENTAL EXAMINATION AND SANCTIONS TUESDAY, DECEMBER 23, 1997

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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

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BY: GARY D. SOWARDS Also Present: TERRY TURCHIE, Assistant Special Agent, F.B.I. Unabom Task Force ROBERT ROLFSEN, JR., Special Agent, F.B.I.

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Pretrial Hearing Day 6
Discussion on motions for mental examination and sanctions
Dec. 23, 1997

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