

Pretrial Hearing Day 7

Redacted chamber proceeding

Dec. 24, 1997

U.S. District Court, Eastern District, Sacramento Redacted chamber proceeding (released Jan. 15, 1998)

SACRAMENTO, CALIFORNIA WEDNESDAY, DECEMBER 24, 1997, 1:59 P.M.

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(The following discussion was held ex parte and in camera, with parties appearing via speakerphone as indicated.)

THE COURT: Hi. This is Judge Burrell. This proceeding is being reported. Please state your appearances for the record.

MR. DENVIR: Good afternoon, Your Honor. Quin Denvir and Judy Clarke. Judy's in Spokane; I'm here in Sacramento.

MS. CLARKE: Hi, Judge.

THE COURT: Hi. Thank you for agreeing to participate in this ex parte in camera telephone conference. Looks like it's about 2 minutes after 2:00 p.m. on Christmas Eve. I know you have other things you would prefer to do at this moment, but I wanted to meet with you at this time because of the attorney-client matter that necessitated the ex parte in camera proceedings and the attendant provisional sealing orders. As you know, the conflict that gave rise to the in camera ex parte proceedings was just resolved on December 22nd, this past Monday. I saw the need to schedule this hearing during the public hearing we conducted yesterday because the involved matters, I believe, should be completely resolved, if possible, before the commencement of trial on January 5th. In order to do that, I believe I need to file an order following this hearing that hopefully could possibly resolve the Government's attempt to get at aspects of the closed proceedings and the media's – at least the Sacramento Bee's – attempt to get at the same type of information the Government seeks. The Bee may very well be seeking more information than what is being sought by the Government; I don't know. What I am hoping to do is to see if you agree that certain matters can be made public. And if you do agree, I can have those matters filed on the public docket as early as Monday, 9:00 a.m. on Monday in some type of redacted form. And today I plan on filing an order that reflects my understanding of the law. I know that the Sacramento Bee – I shouldn't say I know this; I should say that it is my impression that the Sacramento Bee's counsel has indicated the closure order was erroneously entered because I was required to follow the Brooklier factors, at least from that lawyer's perspective. I do not believe that the lawyer has correctly stated the law applicable to such proceedings. I believe that the law concerning bench conferences and chambers proceedings, at least in the area that is involved with the closure procedure at issue, allows a judge to do exactly what I did. But I think that the judge still, after the closure, is required to look at the transcript and other documents sealed and then conduct a balance that reflects the public's interest in having an open proceeding and the defendant's continuing interest in having a closed proceeding. And the case that reflects this in a concise way, in my opinion, is the Eleventh Circuit decision in *United States vs. Valenti*, 987 F.2d 708 at 713. It's a 1993 decision. Further, only moments before the commencement of this hearing, I received a letter from prosecutor Robert

Clearly. The letter indicates that you have received a copy of the letter. Mr. Denvir, is that correct?

MR. DENVIR: That's correct, Your Honor. I received it about 20 to 2:00, and I faxed a copy to Ms. Clarke.

THE COURT: Okay. He states in that letter that there may be significant Sixth Amendment issues in play, namely Kaczynski's right to choose for himself which defense to proffer; second, he is concerned that the ex parte discussions may impact the various psychiatric/legal issues that have been the subject of litigation between the parties for the past five months, and in particular he is concerned that the ex parte communications may have some impact on the issues of Kaczynski's competency. What I contemplate doing, to the extent it is feasible, is even making aspects of this proceeding public. I say it in that vein because I recognize that this is still an in camera proceeding, and it is my view that in camera jurisprudence contemplates that there are times when lawyers make comments in camera that they don't intend to be made public. But I thought I should tell you my intention so you can bear that in mind as you address issues.

MR. DENVIR: Thank you, Your Honor.

THE COURT: Have you had – well, do you have any initial reaction to anything I've stated? I was going to move on to the documents.

MR. DENVIR: No, Your Honor. We, as I said, we just got the Government letter. I mean, I have some initial reactions such as it's kind of hard to understand why the Government has any standing to raise any Sixth Amendment issues and a suggestion that would impact the other legal issues is unfounded. But all that could be reached sometime in briefing. So we would be glad to go over the transcripts. I should tell you that, if you like, we did try to make a review of the transcripts and to identify the parts that we felt could be released, which is substantial, I think, as to the first two, and less so as to the third. And, if anything, I think we probably erred on the side of fuller disclosure than might otherwise be required, partly because of the Court's concern that there be enough release that the Government and/or media can focus any complaints they have on their legal briefing. So however you would like to proceed, we're ready to go.

THE COURT: Well, I'll let you start. Let's look at the first transcript first. That's the transcript – I should say the draft transcript of the December 18 proceeding.

MR. DENVIR: As to – would you like as to what we thought needed to be redacted? Is that maybe the best way to do it?

THE COURT: Yes. That's the best way.

MR. DENVIR: Okay. We thought that page 1 and page 2 could be released. On page 3, we thought that – if you go down to – I think it's the last paragraph, where I say, "Your Honor, I don't think we had planned on that" – we believe that there should be redaction from that point on for the rest of the page. And all of the next page, page 4. All of page 5. And page 6, down to the part where the Court – "I think that would be helpful." And then the rest of page 6 could be released. Page 7 could be released –

THE COURT: Well, just a moment. Let me see if I am with you. You have redacted everything on page 4, page 5, and all of page 6 up to the point where I begin talking?

MR. DENVIR: Yes, Your Honor.

THE COURT: Okay.

MR. DENVIR: And then – so the rest of the page could be released, page 6. Page 7 could be released. Page 8 could be released. We think on page 9 – we would think that it should be released – should be redacted – I think it’s the full paragraph, where I’m talking – ”and we will look at the Government’s briefing.”

THE COURT: I see that.

MR. DENVIR: Just that one paragraph. And then if the Court wanted to redact where the Court starts speaking on page 9 until – the rest – on to page 10. That’s just a discussion about getting the letter over there. I don’t even know that that needs to be out or not.

THE COURT: Well, then we can leave it in.

MR. DENVIR: Okay.

THE COURT: Oh, that takes us to the letter. But before we move to the letter, I want to return to page 3.

MR. DENVIR: Okay.

THE COURT: I’ve got to look at what you’ve indicated should be redacted. (Pause in the proceeding.)

THE COURT: Why don’t you want this in there? Oh – this deals with competency

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MR. DENVIR: Well, Your Honor, in there –

THE COURT: Let me interrupt you, because I’m incorrect. All of it doesn’t deal with competency.

MR. DENVIR: No, and I think, Your Honor, our feeling on that is any discussion of competency was merely raised in the context of if Mr. Kaczynski were to proceed with what he wanted to do in representing himself. I think that’s what raised the question. Otherwise it was strictly an attorney-client question. So any questions of competency were raised only on the hypothetical that he was going to seek to have us discharged and represent himself. And later in the other hearing on Monday, the Court addressed that but found that there was no question of competency. So I don’t think that there’s any disadvantage to the Government in not having that particular – those documents. In other words, there’s nothing that they would do based on what the Court’s done, which is to find at that there is no competency question, to the degree it was raised, to be concerned about. And I think the Government, of course, says that this is only an attorney-client question. I think there’s an added question, which is that – and that’s really maybe it’s an equal protection question. If Mr. Kaczynski were able to hire his own attorneys, none of this would be addressed to the Court at all as to any concerns he had about the attorneys. He would talk to his attorneys; he would hire and fire and things of that nature. It is because it’s a – there’s – he’s unable

to afford counsel and has counsel appointed that he had to address the Court with his concerns. And so we think that's an added – so it's not just a question of what he told his attorneys regarding competence, but there is just this whole aspect of – this whole area should be treated as confidential, I believe. If he had hired us and was unhappy with us, he would have just told us to take a hike and threw somebody else in. But I think that's an added – the Government takes a very limited "it only should be what he told us or what we told him" that should be treated as confidential. We think it goes beyond that. It's the whole area of the attorney-client relationship and the reasons being aired. So we would urge the Court there's a basis to treat all that as ex parte and confidential.

THE COURT: I'm thinking about what you just stated. Let me jump ahead and ask you about the transcript where I covered the competency issue. What is your view going to be as far as a release of that portion of the transcript is concerned?

MR. DENVIR: Again, Your Honor, I think our view is that the competency question only arose in – on the basis as a conditional matter, should Mr. Kaczynski have decided that he wanted to have us relieved and to proceed on his own. Otherwise there was no matter to be in front of the Court. The Court did go on to assure itself that there was not any – something coming out of this – this protected communication that did raise competency questions. But we feel essentially it arose only in the protected attorney-client kind of context that the Court's ruling on competency should also remain confidential. And we don't believe that the Government – the Government's only issue would have been if there was something in these proceedings that raised questions about whether – unresolved questions about whether he was competent. The Court, of course, found that there were no unresolved questions in that regard.

THE COURT: But the Government is not in a position, without seeing that aspect of the transcript, to know whether I have adequately covered the matter. I could have made a mistake. I covered the matter in part because I saw a concern, not that I saw a concern stemming from Mr. Kaczynski's activity or his communications but stemming from his counsel's communication. You raised it in the Thursday hearing, and that troubled me. And then when you submitted the brief, I wasn't clear, although I didn't think you were making a motion, but I had to ask that question to assure myself that I shouldn't construe it as a motion. But the question is whether I've made a mistake. I feel that my ruling is correct. I feel that Mr. Kaczynski is competent. But the Government is not in a position to look at the record and second-guess the judge. And that's what's troubling to me.

MR. DENVIR: In light of your finding of competency, they have previously said that they – their previous communication to you was to advise you that you should be aware of your sua sponte duty in that regard. They said very clearly that they did not feel that Mr. Kaczynski was incompetent. The Court now has reviewed the matter, as I understand it, has said that, as far as a sua sponte duty, the Court does not have a doubt or reasonable doubt or otherwise about the competency. So I don't know what the Government would do. They do not feel that Mr. Kaczynski's incompetent; the

Court has found he's not incompetent, and it seems to me it's a closed matter at this point.

THE COURT: Well, let's consider approaching it a different way. Typically when I redact matters, I seek to inform the public as to the reason for the redaction so that the public is in a position to challenge my ruling. Are you in a position to assist me in that regard? Do you understand what I'm asking? Well, let me clarify it. It would require us to mention the word "competency"; we would – I'm just going to tell you off the top of my head; I have not thought through this. But we would probably say something along the lines of what I interpret Mr. Denvir to have stated earlier: that that's a question – or a hypothetical question concerning competency was raised in the context of representation, or something like that, and that was resolved and Mr. Kaczynski was found competent and that matter's been redacted.

MR. DENVIR: I think that's what we would hope, Your Honor. I was just looking at what your finding was to see whether it could be released, but it essentially it is intertwined with the whole question [redaction for attorney-client privilege and representation matters].

THE COURT: Right.

MR. DENVIR: And I thought perhaps if it wasn't intertwined, maybe it could be released, but it seems to me that it talks about [redaction for attorney-client privilege and representation matters]. It's so intertwined, to me, it couldn't be set out. But I think that's correct, the question of incompetence – the way you phrased it was really extremely accurate – that it came up as a hypothetical matter that we wanted to lay before the Court that, as things developed, the Court might have to look into. The way things developed, we didn't even think it was necessary for the Court to make its findings, but it did make its findings, and it's a – seems it's a closed matter to us at this point.

THE COURT: Well, let me see if I can remember what I just said to see if it can be placed on the record that is made public. (Pause in the proceeding.)

THE REPORTER: I can read back to you.

THE COURT: Oh, could you? That would be easier than me trying to re-state it. (The record was read back as follows: "But we would probably say something along the lines of what I interpret Mr. Denvir to have stated earlier: that that's a question – or a hypothetical question concerning competency was raised in the context of representation, or something like that.")

THE COURT: Let's stop there. (Discussion off the record between Mr. Denvir and Ms. Clarke). (Pause in the proceeding.)

MR. DENVIR: I've tried one, Judge, if you want me to – I don't –

THE COURT: Okay.

MR. DENVIR: Well, the one I had – I'll just read it to you, see what you and Judy thought of it. If it's just going to be one line, it would be: "During hearings on the issue of representation of Mr. Kaczynski, a hypothetical question was raised regarding

his competency and was resolved by the Court's finding that there was no evidence that he was incompetent to stand trial at this time."

THE COURT: Do you both agree?

MR. DENVIR: Do you agree?

MS. CLARKE: I think that's fine.

MR. DENVIR: I think that follows along what you said.

THE COURT: Can you mark that?

THE REPORTER: (Nods head up and down.)

THE COURT: Do you have any problems if I attribute that statement to counsel and then I say that therefore this matter was redacted?

MR. DENVIR: No, we don't have any problem.

MS. CLARKE: I just thought that what we were talking about was proposed language for the Court's order.

THE COURT: No. I'm looking at the transcript.

MS. CLARKE: Oh, I see – what you would place in the redaction.

MR. DENVIR: Oh, I see. This would be an insert into the redaction. Okay. I mean, into the blank space in the transcript.

THE COURT: Correct. Explaining why the matter was redacted.

MS. CLARKE: I don't know that I would attribute that to defense counsel. Couldn't it be just sort of an inserted "what happened next"?

THE COURT: Let me tell you what.

MR. DENVIR: Okay.

THE COURT: I'm not sure that I agree with you on this point, but I agree that you should have the right to litigate it, and so I'm trying to create a record that preserves your right to litigate. And that that means that I will most likely exclude from the record, through redactions, those things you opine should not be in the record, and I will set forth some explanation. But the explanation I'm setting forth at this time may not reflect my opinion.

MR. DENVIR: You mean after full briefing and –

THE COURT: Correct. That's right. That's right. I may disagree with you later on.

MS. CLARKE: Well, then, Judge, would it be just better to leave it blank, which was our original request?

THE COURT: Well, I typically don't leave things just blank. What I typically do is I try to create a record that provides all concerned an opportunity to challenge the redaction. And so I try to set forth the essence of the redaction, thereby allowing anyone who has a disagreement about the propriety of it to challenge it. And so if I don't say anything, they won't know what has been redacted. You can perhaps state that the redacted matter was redacted pursuant to defense counsel's request because, although it concerns a hypothetical competency issue, it was only raised by defense counsel in the context of the representation question and it was therefore – or, yeah – intertwined with the attorney/client issue.

MR. DENVIR: I think that probably says it better, then, Your Honor, right there.

MS. CLARKE: Yes, I agree.

MR. DENVIR: That's exactly what our position is. It was raised as a hypothetical question, and it was so intertwined with the otherwise privileged questions surrounding the representation that it ought to be sealed for that reason until the end of trial.

THE COURT: Can you mark what I just stated and his follow-up comment so I can create something that reflects it? I'm going to have to have you read it back to me later, because I'm not going to be able to remember it.

THE REPORTER: Yes, Judge.

THE COURT: I'm going to back up to make sure I'm doing this in accordance with your wishes. Still focused on the December 18th rough draft: page 1 can be released; page 2 can be released; the portion of page 3 up to where Mr. Denvir says something at the bottom of the page – everything above that point can be released.

MR. DENVIR: In fact, Your Honor, I think if you wanted to put in the first sentence there and then redact thereafter, after "planned on that."

THE COURT: Okay. All right. Then I would include that, the sentence that says, "Your Honor, I don't think we had planned on that." And then I will set forth, in place of everything that follows until a point that I will tell you about in a moment, the language that we just agreed on. And so that will mean that page 4 is redacted. Page – I think page 5 is redacted. Is all of page 5 redacted? I don't remember, Mr. Denvir.

MR. DENVIR: Yes, Your Honor. We would ask that you redact page 5.

THE COURT: Okay.

MR. DENVIR: And page 6, up to where the Court says, "I think that would be helpful."

THE COURT: Okay. And it's all redacted for the reasons we've already stated.

MR. DENVIR: Well, I think it's first redacted – the first reason is that it's attorney-client matters going to representation of the client, and then secondarily it's the part about the competency. I thought the language we were drafting – that really fits more into the hearing part. But the first part is really questions raised as to the representation of the client. Most of it is. And then the competency is just a small part of that.

THE COURT: Okay. Let me say something. It appears that the competency explanation would cover the top of page 5 before the Court speaks. Do you agree?

MS. CLARKE: Yes, and then the issue becomes the control of the defense.

THE COURT: Right. And so we need to have a different characterization for this redaction. I know this is taking time. I'm sorry, but I think –

MR. DENVIR: No, we know – well, this is strictly, Your Honor, questions raised by, I guess – let's see. How do we want to phrase it, Judy?

MS. CLARKE: Does the Court still want the same kind of insert that explains the content of what was redacted?

THE COURT: I need something, but let me attempt to draft something, because I could really, I think, see your position on this. So let me see if I could draft something.

MR. DENVIR: But I think the key of it is that these were all issues that were brought before the Court in the context of the relationship between the client and his court-appointed counsel.

THE COURT: Could we say this without any problem: "Redacted matters concerning attorney-client dispute" or "conflict" or "communications"?

MS. CLARKE: "Attorney-client communications."

THE COURT: Okay. All right. That's what I'll state. Then the next page, page 6 – where I state in the middle of the page, "I think that would be helpful," everything after that is in, right?

MR. DENVIR: Yes, Your Honor.

THE COURT: Okay. Then all of page 7's in?

MR. DENVIR: Seven.

THE COURT: Eight?

MR. DENVIR: Eight.

THE COURT: Nine?

MR. DENVIR: Nine – we would ask that you delete that one paragraph, the first full paragraph where I say, "We will look at the Government's briefing."

THE COURT: Oh, right. You did tell me that, and I have the word "redacted" there.

MR. DENVIR: And that's for the same reason given earlier as to the attorney-client issues.

THE COURT: Okay. I'll just put "same." In fact, what I'll do is, the first reason given for redaction, which I'll have to create after my reporter reads back the record, I'll call that number one, and I'll call this reason number two.

MR. DENVIR: That would be great. Judy, what do you think about that paragraph? Is that something that needs redaction?

THE COURT: The balance of it can be in?

MR. DENVIR: Yes, Your Honor.

THE COURT: And the last page, 10, can be in.

MS. CLARKE: You might want to redact your fax number.

THE COURT: Do you think – you're right. I'm going to redact my fax number.

MS. CLARKE: You'll get some really junk fax.

THE COURT: Thank you for telling me that. I would have left that in.

MR. DENVIR: Judy, you must have had a bad experience with your fax.

THE COURT: Okay. The next proceeding was on the 19th. And it appears that – I'm looking at the first page. I guess when the clerk calls the case and then you state your appearances and I say, before you say anything, has the status changed, and then Ms. Clarke says, Your Honor, we believe that it may change – I guess you can stop there.

MR. DENVIR: Actually, Your Honor, I thought that if you wanted, to give a little extra we'd be glad to have everything on page 1, and then page 2 delete where the defendant speaks.

THE COURT: Okay.

MR. DENVIR: So it would start out on page 2 where the defendant says "yes" down through to the very bottom line where Ms. Clarke starts speaking again.

THE COURT: I need you to take me through that. You want where the defendant speaks on page 2 in or out?

MR. DENVIR: Out. I'm sorry. Out.

THE COURT: Okay. Then where do we start making things public again?

MR. DENVIR: Where Ms. Clarke starts speaking again.

THE COURT: Okay.

MS. CLARKE: No. That's out.

MR. DENVIR: Oh, no. I'm sorry. I'm sorry, Your Honor. Where the defendant starts speaking, [redaction for attorney-client privilege and representation matters], that would go out. Then it would pick up again where the Court starts speaking down to the bottom of the page where Ms. Clarke says, "Your Honor, we thought that."

MS. CLARKE: We would take out the second defendant too, right?

MR. DENVIR: Seems like it's okay.

MS. CLARKE: Yeah. [Redaction for attorney-client privilege and representation matters.]

THE COURT: That's to be redacted?

MR. DENVIR: We would ask that be redacted.

MS. CLARKE: And all the way down to – all the way down to page 3.

THE COURT: Everything is redacted all the way down to page 3, where I say, "Okay"?

MS. CLARKE: That's right.

THE COURT: And that point is in?

MS. CLARKE: That's right.

THE COURT: And this is redacted because of point number 2?

MR. DENVIR: Yes, Your Honor.

THE COURT: Okay.

MR. DENVIR: And then the rest of that would be released.

THE COURT: The balance of the document would be released?

MR. DENVIR: Yes, Your Honor, page 4 and page 5.

THE COURT: Okay. All right. Now we've got the big document, the December 22nd.

MR. DENVIR: Yes, Your Honor. As to that, Your Honor, we would ask the Court to release page 1.

THE COURT: Okay.

MR. DENVIR: And page 2, up to the very last line where the defendant starts talking – "Your Honor, last Friday."

THE COURT: Okay.

MR. DENVIR: And redact page 2 and everything up till –

THE COURT: Wait a minute. You said–

MR. DENVIR: I'm sorry. Redact that last line on page 2, and page 3, 4, 5, all the way up to – let me see if I can find it.

MS. CLARKE: 49. Page 49 at the bottom of the page where it says – the Court speaks.

THE COURT: I'm going to turn back to page 2, because you're redacting a lot. You're going to redact from page 3 to what page?

MS. CLARKE: 49.

MR. DENVIR: It would be last line on page 2 all the way down to page 49.

MS. CLARKE: Bottom of page 49.

THE COURT: I'm flipping over there. To the bottom where I speak?

MS. CLARKE: Yes. Where he – the Court says, "I gave the media a deadline."

MR. DENVIR: And leave the rest of it in after that. Leave in 50, 51, and 52. Or issue. Put it out. Let the public read it.

THE COURT: Okay.

MR. DENVIR: And we think the reason for the large redaction is both 1 and 2, or 2 and 1, I guess, is what it really is.

THE COURT: All right. Let me take a moment to scan that. (Pause.) Okay. I understand your position, and I will do that. How about the documents? I mean, I'm not talking about the letters. Obviously the letters should be sealed, at least the letters that Mr. Kaczynski wrote me.

MR. DENVIR: Yeah. We think that definitely has to be sealed. What about – the other documents would be what, our letter and the Government's letter?

THE COURT: Your cover letter to me dated December 18, '97. [Redaction for attorney-client privilege and representation matters.]

MS. CLARKE: I don't recall what we said in the cover letter, Your Honor.

THE COURT: I have it. You want me to read it?

MS. CLARKE: Yes.

THE COURT: "Our client, Theodore J. Kaczynski, has asked that we deliver the enclosed letters to you this day. We are available at the Court's convenience. Due to the nature of the letters, including attorney-client privileged matters, we ask that any proceedings be conducted ex parte and in camera." Then you cite a case, and you both sign it.

MR. DENVIR: That can be released, Your Honor.

THE COURT: Okay. Your brief?

MR. DENVIR: I think it probably should not be released, because it deals with the competency question even more; it deals with the issue, the problem we were having.

THE COURT: Okay. Well, no one's requested release of the Government's letter yet. I imagine that will be covered at the hearing. I've scheduled a hearing Wednesday at

1:00 o'clock. Is that okay?

MR. DENVIR: At 1:00 o'clock?

MS. CLARKE: We had a hearing already scheduled for Wednesday at 10:00 o'clock.

MR. DENVIR: We'll do it anytime you want.

THE COURT: I'm going to change the time, then.

MR. DENVIR: Okay. We hope we will be able to advise you on Monday or Tuesday that the 404(b) either has been resolved or substantially shortened. So we probably will be telling you that, if we think – with the Government, jointly telling you that.

MS. CLARKE: The Court will be hearing both?

THE COURT: No. I'm going to set it at 10:00.

MR. DENVIR: I think that was the time you picked before.

MS. CLARKE: Would the media and the Government be briefing the redacted issue before that date?

THE COURT: This is what I think I'm going to do. And I'm going to get your input, because I don't want to do anything that's going to affect your relationships with your client. I plan on filing an order today that would deal with briefing. I would like to get the media's input and the Government's input no later than 4:30 p.m. on Monday. I've already called the media. In fact, I personally spoke to Ms. Kenyon; she returned my lawyer's call and I happened to answer the phone, and I explained to her that I was going to have a hearing – I did tell her at 1:00 o'clock, so my lawyer will have to call her and tell her it's been accelerated to

10:00 – and that I wanted their briefs in by the date and time I just told you. I indicated to them that, if feasible, I was going to be filing an order today that reflected the results of this hearing. And we've also called – my lawyer has called the Government's counsel, and the Government is prepared to file a brief at that time too. I scheduled it that way because I didn't know if you were going to ask for the opportunity to reply to their briefs. And I thought if you asked for that opportunity, then I could have you to file your reply sometime on Tuesday. It's obvious that I am going to be under some time pressures, since the hearing now is accelerated to 10:00 o'clock.

MS. CLARKE: It would be fine with us if the hearing time is pushed to 1:00.

THE COURT: Right now everything is at 1:00. Everyone thinks it's at 1:00.

MS. CLARKE: That's fine with us to remain that way. Isn't it, Quin?

MR. DENVIR: Sure. And then if we could have till the end of the business day on Tuesday to respond to the Government and the media, and that would give the Court the morning to look at our briefs. You already will have had theirs. And, as we said, we hope the 404(b) will be substantially smaller in terms of controversy.

THE COURT: Okay. [Redaction for attorney-client privilege and representation matters.]

THE COURT: Okay. I think I've covered everything I need to cover. I did get an inquiry from a juror which I should probably relate to the parties. I can do that

separately. I can tell you now and then call the Government and tell the Government. Would you like me to do it that way?

MS. CLARKE: That's fine.

MR. DENVIR: Yes, Your Honor. (Pause in the proceeding.)

THE COURT: Juror 180 is requesting to be excused as a juror. Do you want me to read it?

MR. DENVIR: That would be helpful, Your Honor, if you would.

THE COURT: Okay. It's a letter dated December 22. I just received it today. "As I explained in the courtroom interview, I started a new position in December with a national retailer. I feel that with a wife that is self-employed and three children under the age of 13, it would pose a hardship on my family to serve on the jury and to meet my commitment to my employer trying to work after courtroom hours as you have suggested. And my employer will not pay me during the trial unless I work. I have also committed and paid for participating in a trade show for my wife during the second week in March and May. I am enclosing copies of cancelled checks as verification of paid show fees and product shipped to New York. My not attending would pose a hardship on her business, since trade shows are an integral part of her income." And then he tells us how he can be reached.

MR. DENVIR: Judy, do you want to stipulate on that one? (Discussion off the record between Mr. Denvir and Ms. Clarke.)

MR. DENVIR: Your Honor, we would stipulate on 180 to stipulate to discharge him on hardship on the first basis, not the second. [Redacted statements not intended to be made public since public scrutiny of such statements could undermine the candid atmosphere of in camera proceedings.] But I think he does have a hardship, because he does have to work eight hours a day after court to earn his pay. So if the Government wants to stipulate and the Court is so inclined, we would agree to excuse him.

MS. CLARKE: Isn't that an alternate juror?

MR. DENVIR: Yes. It's way down the road.

THE COURT: Okay. If the Government agrees, I will excuse the juror. Thank you.

MR. DENVIR: Thank you, Your Honor.

MS. CLARKE: Thank you, Your Honor (Time noted: 3:05 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.) -----

- oOo -

REPORTERS' DAILY TRANSCRIPT JURY TRIAL IN CAMERA DISCUSSION
(REDACTED) pp. 1-28 WEDNESDAY, DECEMBER 24, 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: (NO APPEARANCE)

For the Defendant: OFFICE OF THE FEDERAL DEFENDER 801 "K" Street, Suite 1024 Sacramento, CA 95814 By: QUIN A. DENVIR (appearing via speakerphone) Federal Defender, Eastern District of California JUDY CLARKE (appearing via speakerphone) Executive Director, Federal Defenders of Eastern Washington and Idaho

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