Pretrial Hearing Day 8

Government's 404b motion and motions to unseal transcripts

Dec. 31, 1997

U.S. District Court, Eastern District, Sacramento Government's 404b motion and motions to unseal transcripts SACRAMENTO, CALIFORNIA WEDNESDAY, DECEMBER 31, 1997, 1:13 P.M.

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THE COURT: Please state your appearances for the record.

MR. CLEARY: Robert Cleary, Douglas Wilson, Steven Lapham, and Stephen Freccero for the Government.

MS. CLARKE: Judy Clarke, Quin Denvir, Gary Sowards and John Balazs for Mr. Kaczynski, whose presence has been waived.

THE COURT: Thank you. This case is on calendar for two matters: the Government's 404(b) motion; and the Sacramento Bee's and the Government's request to unseal portions of the closed proceedings conducted in connection with an attorney-client matter. I think the Sacramento Bee seeks to unseal all aspects of the proceeding. I know that my lawyer, one of my lawyers, spoke to Mr. Lapham this morning concerning the 404(b) matter, and I think I had my other lawyer speak to the defense concerning the closure issue. Maybe I should get your input first. I'm thinking that if my lawyer understood what Mr. Lapham stated, you have reached agreements with respect to the 404(b) matter, and that matter may be easier to handle. Is that your understanding?

MR. LAPHAM: That's correct, Your Honor. We've reached stipulations which we will provide the Court with next week which we think removes all of the 404(b) issues from consideration. That still leaves potential arguments on 403 grounds as to some of the written statements of the defendant relating to those uncharged bombings. But the 404(b) issue should be removed from your consideration now in the guilt phase of the case.

THE COURT: Will the stipulations also cover instructions? Do you contemplate having the Court issue limiting instructions of any fashion?

MR. LAPHAM: The stipulations don't cover that precise point. I would imagine we would provide the Court with appropriate limiting instructions.

MS. CLARKE: We agree with that.

THE COURT: You are going to do that?

MS. CLARKE: Yes.

THE COURT: So you will be meeting and conferring over proposed limiting instructions.

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

THE COURT: And you're also going to be giving me a stipulation concerning your agreement on the 404(b) issue.

MR. LAPHAM: Correct.

THE COURT: And the agreement apparently doesn't fully embrace the 403 question.

MR. LAPHAM: It doesn't address the 403 question at all as to the statements, the written statements.

THE COURT: It does address the 403 question as to everything else?

MR. LAPHAM: Yes, it does. It does so by concluding or stipulating that the evidence is admissible with further foundation.

THE COURT: So the only thing left for litigation would be an evaluation of the written statements under 403.

MR. LAPHAM: Correct.

THE COURT: I guess the question is whether the Government needs those written statements at the time it makes an opening statement, because if you don't we can reach that issue later.

MR. LAPHAM: And the answer to that question is yes, we will; we do intend to use some of those statements in the opening statement.

THE COURT: Do you have to?

MR. LAPHAM: Maybe I ought to let Mr. Cleary address that, since he's giving the opening statement.

MR. CLEARY: Thank you, Your Honor. It will be difficult to give an opening statement to the jury to explain the full scope of the case without referring to a number of the statements the defendant made, the 404(b) statements.

THE COURT: You're indicating that – at least this is my interpretation of what you've just stated – you are indicating that the Government believes it has to give the jury a – what you've characterized as a full picture of the case, and you desire to use the disputed statements when presenting that picture.

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

MS. CLARKE: Your Honor, there are a number of the statements that we do not have 403 objections to. There are a number of the statements that we do, and it may be that the Government's opening statement will rely on those that we don't have objection to, and I think the Government is aware of those statements at this time. We met and conferred over the disputed statements.

THE COURT: Okay. You've saved the Court considerable work, and I appreciate it. I am wondering whether use of the statements that are undisputed could obviate the need to address the other 403 question at this moment.

MR. CLEARY: Well, Your Honor, the problem is we're not sure precisely – although, as Ms. Clarke said, we did meet and confer as to some of the statements, we are not sure what the defendant's 403 objections are. They've never stated them. The Government's view, as you know from the 403 briefs, is that the 404(b) evidence is quite limited in this case. It's statements that go directly to the charged crimes – the uncharged crimes and the uncharged crimes only. That leaves a whole bevy of evidence, statements by the defendant, that relate to generally his motive and intent and the things he wished to do and how he wished to do them. It's been our view all along, and we've filed papers to the Court saying just this, that none of that latter group is 404(b) evidence. So in our view it's directly relevant to prove the intent of the charged crimes inadmissible under 402. To date, as we stand here, we don't know the defense's view on that. So that's an area that may be subject to some dispute. In

addition, there are some limited statements that, under the Government's view, go directly to the uncharged crimes and we believe would be helpful to the jury – a, here, we think they're highly relevant, which is why we want to introduce it in court, but given the nature of the proof in this case, which, as the Court knows, we view as a single motivation, a single series of motivation for the entire scheme of Unabom events, I believe it would be difficult to extract out all of those statements from the opening statement to the jury. I'm trying to talk in somewhat veiled terms. I could give the Court, without going into the precise statements, the ones we believe to be 404(b) statements. I could give the Court some sense as to what they are by identifying the bomb they relate to or generically what they deal with. Would the Court like me to do that?

THE COURT: Are the parties certain that there's disagreement on this point as to what statements are in dispute? I'm wondering whether it wouldn't accelerate the proceeding if you met and conferred briefly so that I can see whether or not there is a need to litigate the 403 issue as to statements. My preference is to see if the Government, if necessary, would consider modifying its opening statement so that we can reach these points later.

MR. CLEARY: One way of doing that, Judge, would be if we could find out what the defense's view is of our position on what's 404(b) evidence and what's not 404(b) evidence, because that, as you know, handles a large part of the case.

THE COURT: You raise two points, as I understood it. One of your points is that some of the statements you desire to use in your opening statement consist of 402 evidence and it's not subject to the 404(b) analysis. Then the other point, as I understood it, is you do have statements that would be subject to the 404(b) analysis.

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

THE COURT: So what you are asking the Court to do is just focus on the 402 statements, at least from the Government's perspective the 402 statements, and if we take time and focus on the 402 statements, how about the 404(b) statement that you have stated is subject to that analysis? Would we then return to that and we'd be involved in further discussion?

MR. CLEARY: That's what I would suggest, Your Honor; yes. I just think if the defense shares our view of what is admissible pursuant to 402 as opposed to 404(b), that will eliminate an issue as to many of the statements I proposed making in the Government's opening statement. So we would be able to put that aside and focus just on the statements that we acknowledge are 404(b) statements by the defendant.

THE COURT: Okay.

MS. CLARKE: Your Honor, perhaps the Court's suggestion of meeting and conferring is a good idea. We asked the Government two days ago to provide us with a list of the 402 statements so that we would know and we would be able to advise them of 403 objections as to those. We have in the papers in front of the Court Exhibit B, which is a listing of the proposed 404(b)-related statements. We have gone over those with the Government and advised them which portions of those statements we object

to. So we've done that part, and I'm not sure that the Court's going to be able to make the 403 balancing analysis on those 404(b)-related statements until the Court sees the strength of the evidence and the need for that.

THE COURT: Well, you can make the balance; you can make the balance based upon the briefs submitted. But often judges can change an opinion because the balance, although made based upon the briefs submitted, may not provide the judge with the full picture.

MS. CLARKE: Oh, I agree, and I think that's going to be the case here, because the Court hasn't now yet seen the 404(b) stipulation, all of the stipulations, in fact, that have gone in; the Court doesn't know the strength of the evidence yet on the charged crimes to evaluate how much of the 404(b) statements the Government needs to prove its case when it's got 402-related statements to the charged events, if that kind of numerical analysis makes any sense. But I think maybe what we ought to do is meet with the Government if they do have the list of statements, as they're calling the 402 statements – if they have that now, perhaps we can meet with them and we can avoid the Court having to deal with it.

THE COURT: Well, if I have to deal with it, when would I deal with it?

MS. CLARKE: As soon as we could meet and confer.

MR. CLEARY: Your Honor –

MS. CLARKE: And I think that we all need to remember that the only thing that's on for today was the 404(b) ruling. We're kind of getting dragged into this 402 issue, but I don't think that's a problem for us to do. It just wasn't before the Court today.

THE COURT: I always understood that I would have to make the 403 analysis upon ruling on 404(b) evidence.

MS. CLARKE: But as to statements that the Government is now raising that they're calling the 402 statements, otherwise relevant statements as to the charged crimes –

THE COURT: I see.

MS. CLARKE: That was not before the Court.

THE COURT: I understand. You're right. I understand that; okay. I didn't when you said that, but you made that clear.

MR. CLEARY: And I actually disagree with that, Judge. I think our view that those are not 404(b) statements has been before Court since we filed our original 404(b) brief. The defendant has responded to that brief on two separate occasions. They have never said they disagree with our analysis. They've had their opportunity to do that. Here we are on the eve of giving the opening statements, and they're still not stating their position on that. It's a legal question. It doesn't need to be debated between the parties. We've set forth our position: those statements are not 404(b) statements. If the defendant agrees with that, well, then, that's off Your Honor's plate also, and then the only thing you have to deal with are the 404(b) statements that both sides agree are 404(b) statements. And that's been keyed up for the Court and for the defense for

a number of months now. Moreover, Your Honor, what we're looking for is merely a tentative ruling from Your Honor. And when the defendant filed their response to the Government's reply motion to admit 404(b) evidence on October 29th of this year, they said at page 6, and I quote, "The Court can make tentative rulings on the admissibility of defendant's statements as long as doing so does not restrict Mr. Kaczynski's right to object later to individual statements in the context of evidence admitted at trial." And that's all we're asking for here, Your Honor. In the normal case the Government has evidence. It believes evidence – it has evidence that's admissible, and it gives its opening statement based on its good-faith analysis of what's going to be admissible during trial. And generally if the Government guesses wrong in that, they do so at their peril, because they made a promise to the jury and they've not been able to keep that promise. This case should be no different. We've made a good- faith analysis of what we believe is admissible. We've argued extensively in written papers before the Court over many months as to what our position is on the admissibility of that statement, those statements; the conduct at issue here revolves around many years, and the Government would like to, as best it can, detail that evidence for the jury in opening statements so they have a good sense of what the evidence is as it's presented. And it's particularly important in this case, Your Honor, because, given the nature of the case and the many years that the case spans, the evidence will not be presented to the jury in a chronological fashion. And it's, I think, very important that they have this rather detailed overview. And that's all I'm asking to do: to have an ability to open to the jury summarizing the evidence, and the Court knows and the defense knows what it is, because we've summarized it in both our various 404(b) briefs and in a detailed trial brief that we've submitted. So there really are no surprises about what is at issue here. And moreover, in July of 1996, a year and a half ago, we gave the bulk of those statements, we earmarked the bulk of those statements for the defense. We gave them separate copies of those, characterizing those as our key documents. We're now a year and a half down the road and they're trying, as I view it, trying to delay a decision on something that's critical to the Government's presentation of the case and we've been trying to get decided for a substantial period of time. So in my view I think I should be allowed to give my opening statement; I should be allowed to give it based on what I believe is admissible evidence.

THE COURT: What do you view as a tentative ruling? You mentioned that during your argument. What do you view as a tentative ruling?

MR. CLEARY: Well, I think if the Court were to agree with the Government's assessment as to where the dividing line between 402 and 404(b) is, you wouldn't be bound by that; you could say, as the Court has done in other contexts, that your view is that this is where the dividing line is, that where the Government drew the line is where it is. We would then know we would have a comfort level that we can go forward and open on the statements on one side of the line. The Court could make it a tentative, nonbinding rule, maybe generic. It may be stated generally as to what the Government believes to be the 404(b) statements. For example, Your Honor might say that, well, if

the Government is looking to introduce statements showing an acknowledgment of the act, the criminal act, that that would be – uncharged criminal act, that that would be admissible; if the Government were looking to introduce statements showing the developing or growing level of intent, that that would be admissible; if the Government were to offer evidence showing a tracking by the defendant of the events that he's alleged to have committed, that that would be admissible. And the Court wouldn't be bound by that. You would be giving your tentative view. We would then have some guidance as to how we can go forward and present this evidence to the jury. And that's what I'm suggesting.

THE COURT: I had assumed, based on the input that the Government gave my chambers through one of my lawyers, that I wouldn't be dealing with these issues at this moment. I knew that there was a 403 issue that loomed, but I didn't recognize that you also wanted me to rule on 402.

MR. CLEARY: I apologize for that, Your Honor. We probably should have been more explicit with chambers on that.

THE COURT: What does the stipulation cover?

MR. CLEARY: The stipulation – there's a separate one for each of the uncharged bombs.

THE COURT: That's all it covers, would be the uncharged bombs?

MR. CLEARY: That's correct, Your Honor. Now, the parties are working on and have executed other stipulations, but the ones we've been addressing with the Court are the uncharged bombs and the stipulations thereto. And they're set up the same way, each one, basically. It gives a summary of the facts of the bomb, what was happening immediately before the bomb was delivered, what happened once the bomb was delivered or found, the results of opening the package, injuries, if any – so those are the basic facts that would be set forth in the stipulation. In addition, the parties had agreed in the stipulation that the physical evidence gathered at the scenes are admissible without further foundation, and that certain crime scene photographs are admissible without further foundation. That's the basic gist of each one of those.

THE COURT: So the Government seeks a tentative ruling on disputed 404(b) statements and a tentative ruling on what the Government characterizes to be 402 evidence.

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

THE COURT: Well, it's called tentative, I presume, because the Government recognizes that the Court should be in a position to change its opinion should the evidence presented at trial indicate that is necessary.

MR. CLEARY: That's correct, Your Honor, and also because that's what the defendant was asking for. And I'm quoting that particular language.

THE COURT: I'll turn to the defense.

MS. CLARKE: Well, we're here on a 404(b) in limine motion by the Government. We worked very hard over the last several days to finalize stipulations on that evidence, which both parties are satisfied would dramatically reduce the length of the trial. It

takes away a lot of witnesses that will no longer have to be called. And we tried to resolve that by today because this was the day set for the 404(b) ruling. We've attempted to resolve the 403 questions regarding the statements with the Government and have been unsuccessful in doing so. We don't think that the Court can resolve those 403 questions in the absence of an understanding of the evidence with regard to charged crimes. That's just a situation that I think the Court would find very hard to make a final ruling on. The tentative ruling requested by the Government was so that they would know which witnesses to have available. That's not an issue anymore. It troubles me greatly to think that the Government would take a tentative ruling regarding statements by a defendant that are subject to 403 analysis still and use them as opening argument to a jury. This is potentially inadmissible evidence that may never come before that jury, and the Government will say they'll take the risk of telling the jury information that it may never hear, and then the Government will just simply live with proof that they never offered to the jury allowing, I suppose, the defendant is closing argument to say, "Well, they never proved up these horrifying statements that they told you in opening. You never heard evidence of that." That would be absolutely absurd to place us this in that position. Tentative rulings are to let the Government know what witnesses to have available, they're not to say to the Government, "Go on and tell a jury and suffer the peril in closing argument." We're talking mistrial at that point in time, and that's not something that the Court should want the Government to walk into a case particularly, a capital case, and say, "We're willing to take that risk." I just don't think that's fair. So as to the 403 issues on his statements, we're still willing to meet with the Government and offer up what part of the statements that we have no objection to so they can feel free to use some of those statements in opening. If they want to use all of those statements in opening we're going to be here for much more than the one hour that Mr. Cleary said that his opening statement would take. As to the 402 statements, as the Government's characterizing them, we're not here on that issue today. The Government raises it and says, "Well, the defense has known about these statements since July of '96." Well, we've known about thousands of pages of writing since July of '96. We've asked the Government now two days ago to give us a list of the statements that they would like to see admitted under 402 so that we can discuss with them what objections we may have so that they would know what they'd have available in opening and they would know what would be subject to the Court's ruling and evaluation. And the Government said, "Well, in light of the withdrawal of the 12.2(b) notice, we've got to re-evaluate our statements. So even as of two days ago the Government didn't know what statements they are they wanted to use. So now they're attributing to us some level of knowledge of those statements, which is simply lie not true. If the Government wants to meet with us and tell us about those statements, we can tell them what objections we have and we can report back to the Court. And maybe it's going to be a situation where the Court's has to rule on them shortly before opening statements. But we're not prepared to go forward on 402/403 analysis today, because we don't know what those statements are.

MR. CLEARY: May I reply, Your Honor?

THE COURT: Just a moment. (Pause in the proceeding.)

THE COURT: My inclination is to revisit the Government's motion to see what was noticed. I want to see if the 402 issue was noticed. It's clear the 404 issue was noticed, and I think anytime you notice the 404 issue, you are noticing a 403 issue. And I think I'm going to revisit the motion. So we will cover the other issue that is set for hearing. I will leave the bench and revisit that issue. In the meanwhile, while I'm away, you can see if you can meet. I will determine before I leave how much time you need for the meeting, but I think we're going to go to the other issue.

MR. CLEARY: If I can just cite the Court, to guide the Court, it's on the Government's first brief on 404(b), page 8, paragraph B as in "boy."

THE COURT: What date was the first brief filed?

MR. CLEARY: November 7th, 97. It was filed under seal November 7th, 1997.

THE COURT: Page 8, what lines?

MR. CLEARY: Page 8, line 25, continuing over to the next segment.

THE COURT: Okay. I want to take care of some housekeeping matters before I forget them. I'm going to give my deputy clerk the preliminary jury instructions so that you can have them in your possession.

THE CLERK: (Complies.)

THE COURT: The other matter I wanted to bring to your attention: I indicated that I was on an educational committee and was supposed to attend a midwinter workshop. I left word this morning that I'm not going to attend the workshop. It was scheduled, or still is scheduled, the last week of January. So we will have that time available for evidence. I'm going to turn now to the other issue. I think I should give you a tentative ruling on the other issue, which I will confirm on the bench unless your argument persuades me otherwise. Now, before I rule, I want to address a question to defense counsel. I had one of my lawyers call defense counsel this morning, because I had a question about the competency issue. And I think the defense counsel should address that question. Essentially what I asked my lawyer to ask defense counsel was whether defense counsel had any objections, and, if so, to state the objection to the release of a redacted version of a letter brief submitted and provisionally sealed December 19, 1997. And I also asked about defense counsel's position concerning two transcripts: the December 22nd transcript and the December 18 transcript. I want to get defense counsel's perspective on those matters first. I need your input before I could issue a tentative ruling.

MR. DENVIR: Well, Your Honor, as I think we've told your staff attorney, as to the letter itself, the particular part that the Court had proposed releasing, we have no objection to that part. The letter from counsel regarding the law on competency –

THE COURT: Can I, then, at this moment give a copy of my deputy clerk? You can scan it and if you agree, I will give it to counsel present immediately and will file a copy today. How many copies did I give you, Ms. Furstenau?

THE CLERK: Two.

THE COURT: I just gave you two?

THE CLERK: Yeah.

THE COURT: I meant to give you three. Well, maybe you don't need a copy. Do you need a copy, Mr. Denvir?

MR. DENVIR: No, Your Honor. We don't need a copy.

MS. KENYON: (Accepts document.)

MR. CLEARY: (Accepts document.)

THE COURT: That covers the letter. The record shall reflect that I have provided – Ms. Kenyon, you didn't state your appearance for the record.

MS. KENYON: No, Your Honor. Charity Kenyon; Diepenbrock, Wulff, Plant & Hannegan, on behalf of the Sacramento Bee.

THE COURT: Okay. And you received a copy of the redacted form of the letter that was dated or is dated December 19, 1997?

MS. KENYON: Yes, I have, Your Honor.

THE COURT: All right. Go ahead, sir.

MR. DENVIR: Your Honor, as to both of the transcripts, the Court has already released certain portions as to which the defense had no objection. As to the remainder of it, I think the key point to recall is that those proceedings were triggered by a letter to the Court or series of letters to the Court from Mr. Kaczynski regarding attorney-client matters. And the parts that had been redacted are the parts that have to do with those attorney-client matters, both our discussion of those with the Court and Mr. Kaczynski's discussion of those with the Court. What I want to point out and I think is critical to this is that Mr. Kaczynski has court-appointed attorneys. If Mr. Kaczynski were able to retain his own attorneys and he had some concerns about those attorneys that he wanted addressed, he would address those directly to those attorneys and they would be resolved between those two parties. The fact that he is unable to hire his own attorneys means that the Court has appointed counsel, and so when there are concerns he cannot deal with them directly but must address them to the Court. And that is exactly what he was doing. So I think that that context is extremely important. That is why these matters are before the Court at all. And I think that Mr. Kaczynski's communications with the Court because of the court-appointed counsel have to be treated just the same as they would have been if the Court weren't involved and it were merely counsel and the client discussing these matters. Now, in the course of those communications, there was a hypothetical question that was intertwined regarding competency, and that was what was briefed there. It was strictly a hypothetical question. It was not presented to the Court for resolution. The Court did not have to resolve that matter. But it was intertwined in these attorney-client matters. And we believe that because of that nature of that, that privileged confidential matter, it should just not be released certainly to the Government, the adversary, the people who want to convict Mr. Kaczynski and execute him. And certainly the public has no right to it. These are attorney-client matters. The public does not have any traditional right of access to these types of matters, no matter what Ms. Kenyon may say in this

regard. These are the kind of matters that are always done ex parte and in camera. And there also is no role that the public can play in these matters. They're very sensitive. It's unfortunate that the Court has to deal with them, but the Court has to deal with them, but there's no role for either of these parties to do and they have no right to deal with these. They have to do with questions of attorney- client communications; they have to do with trial strategy, and they're simply matters that should remain sealed while this trial is pending. And we think that includes everything in there. And I'd also say that, if the Court will look to page – as to the matters that are on – have to do with December 22nd, if the Court will look at the page 2 of that, beginning at the first full paragraph, the first two paragraphs, what the Court indicated was that its involvement was strictly to assist with communication difficulties between attorney and client. And we think that that in itself, that was the premise upon which we were proceeding, we believe Mr. Kaczynski was proceeding, and we think that that in itself is a reason it should not be released.

THE COURT: The part of the transcript you just referenced is already part of the public record, isn't it?

MR. DENVIR: I didn't understand that. Oh, is it? Well, then there's no problem. The Court said you granted these ex parte request; these things happen sometimes; there are times when lawyers and clients have communication problems. (Discussion off the record between Mr. Denvir and Ms. Clarke.)

MR. DENVIR: It is part of the record, Your Honor. And what the Court said, that, "That's why there's precedent that allows me to do what I'm doing so that the judge can be involved just to the extent necessary to assist with communication difficulties. I gave that you preamble because I want you to know that the extent of my involvement really depends on you. I shouldn't be involved more than necessary but I should be involved to the extent it's necessary." And I think that it goes on after that, but I think implicit in all that was that the Court's involvement was to deal with communication problems between the attorney and client that were presented in the letter. That's what occurred at that hearing, and that the understanding was that it would be limited to those matters and should not be disclosed to either our adversary or to the public.

THE COURT: Let's discuss this for a moment before I allow the parties to discuss it. When I was presented with the letters from your client, I felt at that very moment I was presented with a conundrum, because I knew that, based upon the content of the letters and based upon your request, I had to conduct an ex parte in camera proceeding. I felt then, and I feel now, that that was clearly appropriate under law. There's just no doubt in my mind about that. I think that more is involved than just attorney-client communications when those type of matters are presented to the Court. I think what is involved is the Sixth Amendment right to effective counsel. And when you presented the matters to me, it was on what I considered to be the eve of trial, and I had to act swiftly. I tried to satisfy what I felt was my obligation to the public by telling the public that I had been approached by you and I had conducted an ex parte

and in camera proceeding and I had another one scheduled and that I provisionally sealed a document. I think that was appropriate. I didn't place in my order the words "ex parte," because those words should have been added because the Government was excluded, but I think it was appropriate to exclude the Government initially. The conundrum is that, although a proceeding begins ex parte and in camera, the question is at what point, if ever, does it transform into a public proceeding? I was always mindful of that. Two issues were weighty on my mind as I reflected on that concern. One issue is the Faretta problem. If the situation ever presented itself where I would have to advise your client or any criminal defendant of the Faretta admonitions, I think that those admonitions are given in public, not in a closed proceeding. And the other problem was the competency question. Although I personally have never had difficulty with the defendant's competency, I still felt obliged to assure myself that no one else had difficulty with his competency. That occurred. I think under the circumstances it was appropriate for that to have occurred as it did, ex parte and in camera. The Government presents a very interesting argument. It basically opines that it has a duty – and I agree with the Government's position on this – it has a duty to ensure that the record, to the extent possible, is error-free. And so the Government has expressed an interest in being apprised of aspects of the record that could reflect error. And it is possible that during this proceeding the Government's concerns in that regard will be assuaged. So although I'm communicating with you, Mr. Denvir, I'm really being transparent with my thoughts, and perhaps I'm communicating with everyone.

MR. DENVIR: Well, let me tell you what I think the solution is, Your Honor. You're correct. You had a communication from the client raising a potential problem. You had a hearing and you heard from the client and the problems were resolved. Now, the problems when you first heard them had hypothetical questions of either competency or Faretta, but they were resolved without either of them actualizing. So there's simply no reason – it would have been true if either of those had actualized into a problem, then we would agree there would have to be public proceedings and they wouldn't be ex parte. But they came up as a concern that were addressed to the Court and resolved themselves without either of those hypotheticals actuating. So we believe those matters should stay just where it was. Now, it would be different if the hearing you held had turned out differently, if either one of those potential problems had surfaced and had to be resolved. But they did not. And we believe that that's the answer to it right there, that this was an attorney-client matter that stayed an attorney-client matter. It might have turned into other things, but it didn't. And that should simply be the end of it.

THE COURT: Okay. I don't want to turn to a tentative ruling before I get the other party's input on this issue. If you have input, I'll listen to you.

MR. WILSON: May I use the podium, Your Honor?

THE COURT: Sure.

MR. WILSON: Thank you. Your Honor, you've expressed most of our concerns this afternoon. I'd just like to reiterate a couple of points. Although defense counsel has

characterized you as sort of a referee in this situation this afternoon, at the time Mr. Denvir characterized this as a, quote, major problem, with a, quote, long history. It involved communications between defense counsel and the defendant; it implicated at least hypothetically the defendant's competency and raised directly the very sensitive and complicated concern of a defendant's Sixth Amendment right. That's an issue that obviously the Government has a substantial interest in protecting the record on. And it's also an issue that –

THE COURT: Now, just a moment. You just raised numerous issues, and then you told me that that's an issue the Government had an interest in protecting the record on. What single issue are you referencing?

MR. WILSON: Well, I'm specifically referencing the defendant's communication problem with his attorneys, the, quote, major problem that Mr. Denvir alluded to. We don't really know what that problem is. The Government's –

THE COURT: I don't see why that's any of the Government's business.

MR. WILSON: Well, it's our business – it's not necessarily, strictly speaking, our business to the extent that it involves attorney-client communications –

THE COURT: Let me rephrase that. It could be the Government's business if the – what we're characterizing as a major problem, what you've characterized as a major problem, if it involves something other than perhaps strategy or other things that are clearly attorney-client confidential communications. If it involves a matter that the disclosure of would provide the Government with information it could use in the prosecution of the defendant, I don't think the Government's entitled to that information.

MR. WILSON: Your Honor, I'm not suggesting that the prosecution team should have access to any attorney-client or legal strategy information. The prosecution team's interest is in protecting the record on appeal or even in later stages of this case. If, as the press has speculated, this issue involved the defendant's mental defect defense, it could come up again during the penalty phase. New attorneys could be brought into this case on appeal who may seek to raise whatever the problem was as an issue on appeal. Our interest is in protecting against – protecting the validity of a conviction that might be entered in this case.

THE COURT: Well, how would you go about doing that?

MR. WILSON: Well, we've suggested two possibilities to the Court. The first would be to have a Government attorney with no involvement in the case –

THE COURT: Let's back up for a moment, because you're only focused on what you consider to be, as you characterize it, a major problem. That's the issue.

MR. WILSON: Mr. Denvir characterized it that way.

THE COURT: Okay. So you used Mr. Denvir's characterization, because you're indicating that that was set forth in the publicly filed document?

MR. WILSON: Yes, Your Honor.

THE COURT: Okay. And so you are telling me that the Government has an interest in knowing about what is characterized as a major problem?

MR. WILSON: Your Honor, we have an interest – I don't want to suggest that we necessarily have the right to know what the problem is, that is, that the prosecution team has that is right. But – but this is a complicated and sensitive matter that we're just not in a position to give the Court any input or advice on.

THE COURT: But you must.

MR. WILSON: Well –

THE COURT: You've raised it.

MR. WILSON: Well, we can't know whether this is going to come back to bite us again at the penalty phase, on appeal, in a habeas –

THE COURT: But I'm trying to figure out what you're trying to understand.

MR. WILSON: We're trying to understand if there's a conflict between the defendant and his counsel that will either be an issue on appeal or reassert itself in the penalty phase.

THE COURT: Is that the Government's interest?

MR. WILSON: A conflict or breakdown in communication, some sort of irreconcilable problem. I mean, the transcript reveals nothing about whether that – Mr. Denvir today said the conflict was resolved. Nothing that the Court has issued or that is in the transcript specifically states that. It's inferable from the fact that defense counsel continues to represent the defendant.

THE COURT: Okay. I understand your position.

MR. WILSON: And we have suggested a couple of alternatives to deal with that. One would be to have the firewalled-off AUSA, to have a Government attorney who's been firewalled off from the prosecution team, review the unredacted transcripts and give the Court input. But in particular we would urge the Court to make findings that would address the concerns that have been raised by these contacts.

THE COURT: I'm going to issue a tentative ruling, and I'm going to give you an opportunity to tell me whether you believe additional findings are necessary after you hear my tentative ruling.

MR. WILSON: All right. Thank you, Your Honor.

THE COURT: Okay. Do you want to respond?

MS. KENYON: Your Honor, we appreciate having received these additional briefs and additional information about the content, as well as the redacted transcripts. And I believe that, to the extent the Court does make findings that evidence or strategy to which the prosecution would not be entitled, we agree the public would also not be entitled to that information. To the extent, as one of the cases suggests, that – where the right of the defendant not to testify against himself is somehow implicated, a finding like that, clearly we would also not believe that we were entitled to that kind of information. But I think we're satisfied that the Court has properly divided the issues. There are issues like competency and like the instructions under Faretta, to which the public has been apprised in the past; and then there are issues which the prosecution also would not be entitled to, thus the public would not be entitled to.

We are satisfied that the Court has properly divided the issue, and we look forward to hearing your tentative ruling.

THE COURT: Okay. I want to give you some background information, because I'm going to just confirm my ruling, and I want the record to understand how we got to this point. The closure proceedings at issue here were instituted at the request of Kaczynski's trial counsel in a letter dated December 18, 1997, which was a cover letter for letters that Kaczynski asked his lawyers to give me. The cover letter stated that "due to the nature of the letters including attorney-client privileged matters, we ask that any proceedings be conducted ex parte and in camera." Because of the content and sensitive nature of Kaczynski's missives, I conducted an ex parte and in camera hearing on December 18 with defense counsel, on the record, to determine when a hearing should be scheduled with Kaczynski. It was agreed that an ex parte and in camera hearing would be conducted the following day. After meeting with defense counsel on December 18, I moved with celerity to file an order later that day informing the public about the closed proceedings, the sealed document, which I have given to the public today in a redacted form, and a hearing scheduled for December 19. Actually, I'm not sure that that order actually told you that, because it may have been the December 19th order that referenced the document that I've made public today. The December 18th order should have included the words "ex parte" because the Government was excluded from the hearing, under the rationale of United States versus Golden, 102 F.3d 936, 940 (7th Cir. 1996). That order stated my opinion that the public did not possess a contemporaneous right of access to the closed proceeding. It was obvious that under the rationale of Valenti, 987 F.2d 708 (11th Cir. 1983), and Golden, I needed to act with dispatch to explore whatever dispute existed between Kaczynski and his attorneys to discern whether it threatened to deprive Kaczynski of his Sixth Amendment right to counsel on what I considered to be virtually the eve of when the trial would commence. Following two ex parte and in camera hearings with Kaczynski, I conducted an ex parte and in camera telephonic conference with defense counsel on December 24 to obtain their view on what portions of the closed proceedings should be made public. I filed an order after that meeting and another order on December 26 in which I made public those portions of the closed record that defense counsel agreed could be made public without prejudice to Kaczynski's rights, plus I made public the Government's letter brief to me. I do have information concerning the Sacramento Bee's position, but as I understand the Sacramento Bee's position as expressed during this proceeding, I don't think I need to address the Sacramento Bee's position because the Sacramento Bee gives me the clear impression that it understands the reason for the closure and is, at this point at least, satisfied with the procedures followed by the Court. If I'm wrong, then I can address other things. Am I correct?

MS. KENYON: Your Honor, I think that's essentially correct. As we stated the last time we were here, we thought we should be responding to the showing that was being made by defense counsel. We got that recently, yesterday, and I think that's added considerably to the information that the public has about the nature of the

proceedings. But we do understand the Court's position and reason for going forward as it did.

THE COURT: All right. I will say some things, because I think it's just absolutely clear that what I did was correct. The Bee's brief did indicate that I had closed the proceeding because of concerns about pretrial publicity. That's not the reason I closed the proceedings, had nothing to do with why I closed the proceedings. My orders filed December 19 and December 26 clearly reveal that what was at issue were attorney-client communications and the attorney-client relationship. The Bee's argument that the December 19 hearing was required to be open is not supported with pertinent authority. In Valenti, the Court expressly rejected the argument the Bee advanced in its papers, explaining that the Times Publishing Company wrongly interpreted the United States Supreme Court decision in Press-Enterprise I, 464 U.S. 501 (1984). The Eleventh Circuit stated in Valenti, "We do not interpret Press-Enterprise I to require a trial court to articulate findings that a closed bench conference is necessary and narrowly tailored to preserve higher values before a closed bench conference occurs. Instead, Press-Enterprise notes that a court may conduct an in camera conference on the record where the 'constitutional value sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time.' In this process, the trial court balances the right of access against the interests in maintaining a sealed transcript. In placing a duty on the trial court to balance competing interests and make findings after the occurrence of a closed bench conference, the Court in Press-Enterprise I articulated a workable procedure to accommodate the public's right of access and the long-recognized authority of a court to conduct bench conferences outside of public hearing." It's at 713. The Bee's argument was also rejected, at least implicitly, by the Court in Golden, where the Seventh Circuit approved of the district court "clear[ing] the courtroom immediately after learning of Golden's concerns about [his lawyer] and holding an in camera hearing to identify the source of Golden's problems." Golden at 940. As the United States Supreme Court observed at Press-Enterprise II, 478 U.S. 1, 8-9 (1986), "Although many [court] processes operate best under public scrutiny, it takes little observation to that there are some . . . [court] operations that would be totally frustrated if conducted openly." These decisions reveal that the district courts are not required to articulate findings before conducting the closed hearing at issue. Even though I was authorized to close the proceeding, the issue remains whether any aspect of the sealed record should be made open. Release of sealed transcripts and documents is generally required as to those portions to which the public possesses a qualified right of access. To determine whether such a right exists, two factors are considered: whether the place and process have historically been open to the press and general public; and whether public access plays a significant positive role in the functioning of the particular process in question. Press-Enterprise II at 8. The matters discussed at the closed hearings can be divided roughly into two categories: privileged attorney-client communications; and discussions pointedly addressing Kaczynski's competence to stand trial, although

I never questioned his competence to stand trial; I only addressed them to assure myself that no one else questioned his competence to stand trial. Kaczynski argues that all ex parte and in camera communications were part of the attorney-client privilege and relationship and therefore should remain under seal. An examination of the scope of the attorney-client privilege is required to discern its contours in a situation where the Court is asked to assist a criminal defendant and his attorney with a dispute that threatens the core of the attorney-client relationship. As stated in United States vs. Noriega, 725 F. Supp. 1032, 1033, (S.D. Fla. 1990), affirmed at 917 F.2d 1543 (11th Cir. 1990): "The attorney-client privilege is not per se a constitutional right; however, the privilege takes on a constitutional aspect when, as here, it serves to protect a criminal defendant's Sixth Amendment right to effective assistance of counsel by ensuring unimpeded communications and disclosure by a defendant to his attorney. . . . A secondary purpose behind the attorney-client privilege, and the prohibition of its violation, is to prevent the disclosure of information damaging to the defendant's case – information which, though damaging, is privileged. In this sense, the issue is really one of the right to a fair trial rather than the attorney-client privilege per se." In a different context, the Ninth Circuit noted in United States vs. Bauer, 1997 WESTLAW 783090 "that the attorney-client privilege is perhaps the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of our legal system." What is at issue here is the construct of the attorney-client privilege that "takes on a constitutional aspect." This is because when the judge is requested by defense counsel or a criminal defendant to look at a disrupted attorney-client relationship to assist in unearthing the source of a dispute and to aid in reconciling the relationship or taking other measures if the relationship is irreconcilable, the judge becomes imbued in an aspect of the attorney-client relationship and sometimes the judge becomes a conduit through which the attorney-client communications are effectuated. As the Government recognizes, when the judge is confronted with a criminal defendant disgruntled about the attorney-client issue, the Court is required to give the defendant "an opportunity fully to explore his concerns about his appointed counsel's performance." United States vs. Gonzalez, 113 F.3d 1026 (9th Cir. 1997). I covered this area with Kaczynski during the ex parte and in camera proceeding, and whether this aspect of the transcript should be released presents a conundrum which I've alluded to earlier on the record. Since in this situation the judge is usually cast in the midst of a disagreement between an attorney and the criminal defendant about some aspect of the communications, whether the communications should be publicly vented depends on the nature of the dispute and whether it involves litigation strategies. While the Bee appears to argue, or at least in the past did, in favor of automatic public disclosure of such disputes, that approach is likely to have a chilling effect on the willingness of the criminal defendant and his counsel to air their differences, which is imperative to understanding whether the dispute compromises the defendant's right to effective counsel. As the Eleventh Circuit stated in United States vs. Noriega, cite already given, at 1548, "the general public has no right of access to private communications between a defendant and his counsel." As

the First Circuit states in United States vs. Foster, 469 F.2d 1 at page 5 (1972), the Court should avoid "the possibility of prejudicial disclosures to the prosecution." This is especially true when such communications involve strategy. Thus, the public has no right of access to those portions of the transcript that reveal privileged attorney-client communications and strategies. Moreover, even assuming such a right existed, sealing would nevertheless be appropriate under the test articulated in Brooklier. Disclosure would create a substantial probability of irreparable harm to Kaczynski's right to a fair trial, since Kaczynski and his counsel disclosed at the hearing strategy to which the prosecutor might not otherwise be privy to. Further, I do not see any lesser alternatives and need them identified if such alternatives exist. Finally, continued sealing would effectively prevent the information from reaching the prosecutor. I'm going to make a finding during the record that was concerning this Brooklier issue. I'll make it now. During the probing concerning the source of the attorney-client problem, Kaczynski made statements during the hearing that the Government could use against him during the trial. As a matter of fundamental fairness, such statements should not be made public at this time, because they were only made to apprise the Court of the attorney representation problem. A defendant should not be penalized for bringing such problems to the attention of the judge. How else could a defendant address such problems if the defendant cannot approach the judge with them? He has to approach the judge with them. The judge, in essence, at that point in time, becomes a facilitator or could become a facilitator in the communications. No one wants a defendant to be unrepresented or to think that he or she is unrepresented. That's why the proceedings had to be closed and the defendant given an opportunity to air his concerns. I was troubled by the part of the transcript that concerns the competency issue. And that's why I wanted argument on that point before I proceed with my tentative ruling. But I agree with Kaczynski's counsel. I think they're right. I construe defense counsel's objection as a request for the Court to use its discretion in disallowing public disclosure of the portions of the December 18 transcript that could affect the existing attorney-client relationship. See United States vs. Gurney, 558 F.2d 1202, 1210 (5th Cir. 1977), a case that indicates the Court has that discretion. The Seventh Circuit observed in McDonald, 49 F.3d 294, 301, that public scrutiny of in-chambers conferences could undermine their very purpose. Since the purpose of the closed proceedings was to restore an optimal attorney-client relationship, if feasible, I give the defense counsel's perspective on this matter considerable weight. Therefore, I find that the communications in the December 18 and December 22 transcript concerning the competency issue were inextricably intertwined with the attorney-client relationship and therefore they are properly protected from public scrutiny at this juncture. The Court was also mindful, when it met with Kaczynski, of the admonitions that must be given to defendants who wish to represent themselves. See Faretta vs. California, 422 U.S. 806. However, since Kaczynski did not unequivocally assert his right of self-representation and agreed to the continued representation of his counsel after the problem was resolved to his satisfaction, no Faretta admonitions were required. See Faretta, 422 U.S. at 835; Johnson

vs. Ylst, 921 F.2d 882, 889 (9th Cir. 1990), holding that when a defendant equivocates, he is presumed to have – not requested assistance of counsel – I'm sorry; when he equivocates, he is presumed to have requested assistance of counsel. Since the record concerning the Faretta issue is intertwined with the attorney-client communications attendant to Kaczynski's right to effective assistance of counsel, those portions of the record will remain sealed. Also, the Government has the right to be apprised of the attempts made by the Court to ensure that Kaczynski was not deprived of his Sixth Amendment right to counsel. The Ninth Circuit's decision in United States vs. Gonzalez, 113 F.3d 1026 (1997), reveals that the district court in that case "clearly created" a conflict when it invited a defense counsel in court with the criminal defendant present "to contradict his client and to undermine his veracity." At the moment, the Gonzalez decision reveals, Gonzalez in effect "was left to fend for himself without representation by counsel. . . . Consequently, Gonzalez was denied effective assistance at the sentencing hearing." See Gonzalez, 113 F.3d at 1029. Here, during aspects of the December 22nd proceeding, the record reveals that contradictions existed between Kaczynski and his counsel, but there was no need to reach the merits of the matter because Kaczynski and his counsel ultimately reached an agreement that transcended the problem that gave rise to the closed proceedings. The agreement reflected a renewed and amicable attorney-client relationship. That concludes my tentative ruling. Is there a need for the record to reflect additional findings, or is there any objection to the tentative ruling?

MR. WILSON: May we have just a minute to confer, Your Honor?

THE COURT: Yes. (Discussion off the record among Government's counsel.) (Discussion off the record among defense counsel.)

MR. WILSON: Your Honor, we have no objections or request for further findings.

MS. KENYON: Your Honor, we are also satisfied with the findings the Court has made.

MR. DENVIR: We would ask the Court accept and adopt the ruling.

THE COURT: I adopt it. We return to the other matter. You were going to meet and confer. I assume you want to do that right away. How much time do you need?

MS. CLARKE: Do you want to give us about 15 minutes; then we can report back to the Court's clerk?

THE COURT: I think I'll have to return to the bench. I plan on returning to the bench. I assume I'll have to issue a ruling.

MS. CLARKE: We usually find we can agree or disagree in 15 minutes.

THE COURT: Okay. I'll wait. (A recess was taken at 2:28 p.m.) (The proceeding resumed at 3:20 p.m.)

MR. CLEARY: May I report, Your Honor?

THE COURT: Yes.

MR. CLEARY: Your Honor, the parties have just met and have not reached an agreement on the statements that the Government proposes to reference in its opening statement, the Kaczynski statements the Government proposes to reference in its opening statement. And I think we've gone as far as we possibly can on this, to

try to work this dispute out. We've even gone to the unusual length, the unprecedented length, of just informing the defense attorneys of an overview of what the Government's opening statement is going to be, including telling them the documents that we'd be referring to or plan on referring to in opening statement, the Kaczynski statements we plan on referring to in opening statement, and indeed just some of the general themes of the Government's opening statement. Having done that and having briefed this issue over many months and not reaching an agreement, we would be asking the Court for a ruling at this point.

THE COURT: The ruling is just on the uncharged conduct, right?

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

THE COURT: I looked at your brief concerning the 402 issue, and it doesn't appear to be noticed for a hearing. Not the page you've cited me to. You do reference it at that page, but you've noticed a 404(b) motion; you don't notice a 402-type motion. You don't ask the Court to make a determination as to relevancy, which is really what a 402 motion is. And the notice appears to be pointedly stated at page 2 of the brief, lines 10 to 16. And in the caption, you say nothing about 402; you say 404(b). And then the section that you directed my attention to, it doesn't pointedly notice anything. It says, "Thus, much of the Government's evidence is admissible directly under 402 without recourse to 404(b)." That doesn't tell me what 402 determination you want me to make. So I think the defense is right. I don't think you've noticed that as a matter.

MR. CLEARY: Well – I'm sorry.

THE COURT: So I think that all we're talking about is whether I should rule on the 404(b) issue that involves writings, correct? I mean, you may think we're talking about something else.

MR. CLEARY: Right.

THE COURT: If I'm correct in what I just said, that's all we're talking about.

MR. CLEARY: That's correct with one exception – two exceptions – three exceptions. There are three statements, Kaczynski statements concerning charged events, that are admissions to the charged events. The Government wants to open on those three statements, and the defense is objecting to that. So that's a charged event, not a 404(b) event.

THE COURT: Isn't that just another way of telling me that in the Government's – in your opinion, that's a 402 matter?

MR. CLEARY: It is – if I could just tell the Court how I understand how 404(b) and 402 work together, so I can make sure I'm answering your question properly –

THE COURT: Well, let me tell you what I think. I think a 402-type matter would be something that is inextricably intertwined with and part of the same transaction as the crime for which the defendant is charged.

MR. CLEARY: Right. Right, and I agree with that, Your Honor. And I guess the way I was coming at this, and it sounds like I may have been wrong, but I was looking at the pool of evidence, the body of evidence, to be admissible either under

402 or 404(b). Both those rules, as I understand them, are rules of relevance. Even 404(b) is a rule of relevance, in my view; the evidence would not be admissible unless it's relevant. You have to prove it goes to show intent, motive, etc., something other than propensity to commit the crime. If it's not 404(b) evidence, it would be – but is admissible, it would have to be admissible because it's relevant under 402. So the pool of admissible evidence, as I've always looked at this, and I acknowledge I may be wrong, but my view has always been you've got a pool of admissible evidence; it's either relevant pursuant to the guidance 404(b) gives us or it's relevant and hence admissible under 402. So by saying we've got all this evidence and this stuff is what the 404(b) evidence is, it means, in my view, that all the rest is admissible pursuant to 402 – has to be admissible, if it's admissible at all, pursuant to 402. And therefore, in my view, when we said in a 404(b) brief that the only 404(b) evidence is this category, and then went on to say we don't view this other category to be 404(b), it's 402, just like an admission to one of the charged events would be admissible under 402, there was no need, in our view, to distinguish or notice any more than those facts, because that puts the defendant on notice that this other evidence – and what we were talking about there is the general motive and intent evidence not connected specifically to an uncharged event – is admissible not pursuant to 404(b), and if it is admissible, it necessarily has to come in under Rule 402. And that's why I think the party was on notice, the defendant was on notice.

THE COURT: I disagree.

MR. CLEARY: Okay. Well, I'll move on to the 404(b), Your Honor. On 404(b) we've got, in addition to that, we've got the admissions to three – four charged bombs, three statements encompassing four of the charged bombs. I would like to open on that. I don't see how that could be rendered inadmissible. It is the most probative evidence of the defendant's – what we're alleging is his culpability for those crimes. So that's the charged events. In addition, the Government would like to offer statements in which the defendant admits to and describes in some instances the injuries to – that result from uncharged crimes and his reaction to that. I don't know how far the Court wants me to go on that; I could explain the theory of why that's relevant and why that would be admissible, in the Government's view.

THE COURT: Maybe I should hear from the defense before you go further, unless there's something else that you have to say that you haven't already coined.

MR. CLEARY: I don't believe there's anything else I need to say. Just one thing for the guidance of Court, however, is in the Exhibit B to our 404(b) memo, the statements, the 404(b) statements I just referred to, are set forth, and we can point those out to Your Honor, if that would be helpful.

THE COURT: All right. You can point them out. You can just tell me what section, what page and section.

MR. CLEARY: I'm going to go through them in the order I have them listed, which is not necessarily the order they're in Attachment B; is that all right?

THE COURT: Yes.

MR. CLEARY: I believe it's page 19, Your Honor. When I say "I believe," some of the pagination got changed when we reprinted a copy of this document a second time. Does that refer to bomb number 15 in your copy?

THE COURT: Yes.

MS. CLARKE: I have the same copy as the Court. Perhaps I can just bring it over.

THE COURT: All right.

MR. CLEARY: Okay. (Examines document.) One, two, three, four – the fifth line down, which

starts with "a month," and continues through the sixth line and ends with the ellipsis. (Pause in the proceeding.)

MR. CLEARY: Go to the word "December."

THE COURT: I see the word "December," but it's not at the beginning of a sentence.

MR. CLEARY: No, I'm sorry. Beginning of a line, Your Honor. The word furthest to the left on the – one, two, three, four – fifth line down.

THE COURT: What's the word that begins the line?

MR. CLEARY: The sentence that begins with the quote "the device."

THE COURT: I see that. It's referencing two forty-four?

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

THE COURT: Okay.

MR. CLEARY: The next one, Your Honor, is on page 4. Reference to bomb 2.

THE COURT: Yes.

MR. CLEARY: Counting up from the bottom – one, two, three, four – the fifth line up from the bottom, "but not."

THE COURT: Yes.

MR. CLEARY: That sentence. Next one is on page 8. The second entry on that page, the bottom entry on that page. (Pause in the proceeding.)

MR. CLEARY: I believe it's seven lines down. The sentence begins "other newspaper." (Discussion off the record between Ms. Clarke and Mr. Cleary.)

MR. CLEARY: Your Honor, on your copy it may be the top entry on that page. (Discussion off the record between Ms. Clarke and Mr. Cleary.)

THE COURT: I don't see that.

MR. CLEARY: Does that entry on Your Honor's copy start "May about 1982"?

THE COURT: You're referencing the top – the bottom entry starts "May about 1982."

MR. CLEARY: Okay. Your Honor, then it is the bottom version.

THE COURT: And I also see "other newspaper" now.

MR. CLEARY: Okay. That sentence, Your Honor. The next page, page 9. The bottom entry. The second-to-last sentence, which is a single word.

THE COURT: Starts with F?

MR. CLEARY: That's correct, Your Honor. (Pause in the proceeding.)

MR. CLEARY: Your Honor, the next entry is on page 11. And it's about half the way down that passage, a sentence that begins "this gives."

THE COURT: "This gives"?

MR. CLEARY: "This gives."

THE COURT: I see that.

MR. CLEARY: That sentence. And towards the bottom of that same entry – that same page on the same entry, it's the, I believe, second-to-last sentence that begins "so many."

THE COURT: Okay.

MR. CLEARY: And finally, Your Honor, for the disputed area between the parties, page 18, the bottom entry. The last clause of that, the final sentence beginning with the words "but the results."

THE COURT: Okay.

MR. CLEARY: I'm sorry. There's one more entry, I believe, Your Honor. (Discussion off the record among Government counsel.)

MR. CLEARY: Your Honor, there's one other statement that's not reflected in Exhibit B because it's the Government's view that it's not 404(b) evidence. Defense believes it is and objects to our using the evidence at trial and hence the opening on it. If I could state it generically, it relates to an intent that we believe is relevant to the intent for the charged crimes, an intent that the defendant formed in 1971, and we know that from the admission in the documents. And I would like to open on that also.

THE COURT: The defense?

MS. CLARKE: Your Honor, I guess I'm speaking as to the six – seven statements that the Government just identified generically to the Court?

THE COURT: Right.

MS. CLARKE: Because the issue of the charged offenses in those statements is not before the Court right now. Am I focused?

THE COURT: Are you referencing the intent formed in 1971 matter as the charged statement?

MS. CLARKE: No. That's not a charged statement nor was it noticed as a 404(b) statement. That particular – the seventh one that was just listed to the Court – I'm just a little confused. We've got the Government with three charged crimes, statements that it thinks is 402 but it's not before Court right now. So I'm not dealing with those. And then there are the six that they just listed that were noticed in Exhibit B and the one additional one that they say is 404(b) but wasn't – that they say is not 404(b) but wasn't noticed in the 404(b). Well, when we spoke with the Government and went over their intended use of the statements, Your Honor, there are, oh – eight, 10, 12 statements that we just simply said, "If you want to open on those, we think that's fair game." And what we objected to the Government opening on, based on their representations, were the seven statements that they just listed to the Court. And as to six of them, I think the Court has to keep in mind that they're all as to uncharged

crimes. So the quality and quantity of the Government's evidence as to uncharged crime is really an open question for the Court that the Court is just going to have to weigh and balance, given the strength of the other evidence in the case. It's impossible for us to argue to the Court now in an open courtroom as to the rationale for excluding those particular statements. We would need to seek a closure of the courtroom and proceed to argue then, because we would be having to argue to the Court the basis for excluding them; one. Two, I'm not sure that the Court really had before it even information, if we were able to argue to the Court the basis for exclusion, to make that 403 balancing in the absence of understanding the strength of the direct evidence of the crime and the other strength of the 404(b) evidence. I mean, 404(b) is coming in, Your Honor, to show some element of the charged offenses. It's not coming in simply because the Government has some show-and-tell they want to put on. It's got to have some relevance to come in. And when the Government needs statements to come in, I think the Court is in an awkward spot in evaluating the prejudicial value of those statements versus the need for those statements. And I think you're in a very difficult spot in trying to rule on those. One, we can't make the argument in an open courtroom because it gives away the content of the statements and the rationale for the exclusion; and, two, you don't know the other evidence yet.

THE COURT: Well, why can't you make the argument in an open courtroom?

MS. CLARKE: Because it goes to the content of those statements. The rationale for the exclusion reveals the content of the statements. And all we're talking about right now –

THE COURT: But you haven't noticed a closure issue. I would have to follow Brooklier to allow argument in a closed courtroom. I'd have to satisfy the Brooklier requirements.

MS. CLARKE: We would like to make this argument at the time that the Government seeks to admit the evidence. And we'd like to do it in the normal course, at sidebar, when evidence is not generally discussed with the public and may be released at a later time to the public when there is no danger of taint or prejudice. That's how we think it should be handled. And we're here right now making these arguments because the Government wants to use six or seven statements out of a huge quantity of statements that they have in their opening statement. We believe they can do an incredibly effective job in their opening statement without forcing the Court to rule on these evidentiary issues. (Discussion off the record between Mr. Denvir and Ms. Clarke.)

THE COURT: Aren't all of the statements identified by the Government, except for one, uncharged conduct statements, uncharged act statements?

MS. CLARKE: Yes. Of the first six listed, referring to Exhibit B, and I think we all need to remember that Exhibit B is in a sealed – is under seal at this point.

THE COURT: Right. I didn't count them, but when the Government was referencing Exhibit B, those are all uncharged act-type statements.

MS. CLARKE: That's right. There's six of them.

THE COURT: Now, when you stood up, you were trying to tell me what you were going to address, and you mentioned something about charged act statements.

MS. CLARKE: There are three charged act statements that the Government was going to seek a ruling, arguing that they've given adequate notice.

THE COURT: But he hasn't mentioned that during this portion of the hearing, has he?

MS. CLARKE: Right. And I just wanted to make sure that that's where we were.

THE COURT: Okay. He only mentioned one charged act, which was – at least from the Government's perspective it's a charged act – and that was the matter that he characterized as intent formed in 1971.

MS. CLARKE: Right. And that's not a charged act.

THE COURT: Well, the Government differs. I mean – well, they don't say it's a charged act; they say it's the 402 evidence.

MS. CLARKE: Right.

THE COURT: Right. Okay.

MS. CLARKE: That's correct.

THE COURT: What's your response to that item of proffered evidence?

MS. CLARKE: That 402 issue wasn't noticed; we're not here to argue that, and the Court should schedule a later hearing. If that statement alone is that important to the Government's opening statement, the Government should then seek a ruling. We have to go back and find it, find its context; nobody brought it with them today. We don't have the ability to sort of place it in context and sort of give the Court the focus of the argument on that. And that's the whole point of notice is to have us be prepared.

THE COURT: Okay. Anything further?

MS. CLARKE: I think that's it.

MR. CLEARY: May I respond, Your Honor?

THE COURT: Yes.

MR. CLEARY: Thank you. Ms. Clarke spoke about the quality and quantity of the evidence and how the Court would need to assess that to make a ruling on the statements related to the 404(b) acts. And in our view, the Court has everything the Court needs right now to make that ruling. The fact that there may be other evidence linking the defendant to uncharged crimes does not change this one essential fact, and that is: the most probative evidence linking him to uncharged crimes are the statements we directed Your Honor to. And the fact that there may be other evidence that can accomplish that same goal is no reason to exclude the most probative evidence. As the Supreme Court said in the Old Chief case, "The mere fact that two pieces of evidence might go to the same point would not, of course, necessarily mean that only one of them should come in." But we can have two pieces of evidence going to the same point. Moreover, the point that we're trying to establish through this most probative evidence is a fact that both sides have admitted is relevant. It's 404(b) evidence that the parties have agreed is relevant, and we've stipulated that issue away from Your

Honor's decision. So you have a relevant act that occurs. The Government is using – seeking to use the most persuasive evidence, that is, the defendant's own words, linking him to that act, because the stipulation, keep in mind, does not link the defendant to the act; it's just that the act occurred and these are the photographs and this is the physical evidence. So what we're seeking to do is identify the most persuasive, most probative evidence. We've done that; we've pointed Your Honor to it, and we're asking to be allowed to open on that statement and prove that statement up at trial. Moreover, in terms of the length of the Government's list, the number of documents that it's going to be referring to in its opening, we pared that down considerably. This is a case that depends upon documents. We told Your Honor that throughout the lengthy litigation. It's the very centerpiece of the Government's case is the defendant's words. And that's what we're asking to put into evidence in this case. What we told the defendants, the defense attorneys when we were just meeting with them, is we're going to outline of the Government's opening. We pointed them to roughly 26 statements but also included in that were themes, themes we were going to argue. The actual number of statements was less than 26. They've objected to almost half of them, 10 of them. And we're trying to be reasonable; we're trying to pare this down and do this in a way that would burden the Court the least amount possible. But we're at this point now where we do ask the Court to rule on these issues. As to the 404(b), for the reasons I stated, I think the Court has everything you need to rule on it. As to the charged events –

THE COURT: I don't understand what you just said about the 404(b). I thought that was taken away from me through your stipulation.

MR. CLEARY: You're right, and I misspoke. I meant the statements of the defendant linking him to the uncharged crimes. That's what I meant to say. I apologize.

THE COURT: I see. You're referencing disputed admissions as 404(b).

MR. CLEARY: That's correct, and it's incorrect for me to do that. Moreover, as to a number of those statements that we just pointed Your Honor to, particularly the ones relating to bomb 15 – start with bomb 15, which is on one of the last pages – it's hard to imagine any less inflammatory language than what we're pointing to there. And if the Court were to look through . . . page 19, Your Honor. (Pause in the proceeding.)

MR. CLEARY: And if the Court were to look through a number of the other verbs that –

THE COURT: Is that statement being offered on a limited proposition, on a limited 404(b) proposition?

MR. CLEARY: In the sense that all 404(b) evidence is limited, correct?

THE COURT: Correct.

MR. CLEARY: Absolutely. Absolutely. It would be appropriate for the Court to give a 104 instruction to the jury.

THE COURT: When?

MR. CLEARY: Whenever the Court deems it appropriate. It may be appropriate to give it several times, like each time some of that evidence comes in. The Government would have no objection to that.

THE COURT: You haven't proposed an instruction for me. I mentioned that today.

MR. CLEARY: That's correct.

THE COURT: Because you did indicate that you had reached certain stipulations, and I obviously appreciate that. And I asked you about limiting instructions, and really what you are proposing is to use disputed 404(b) – it's not really disputed 404(b); I don't think. I think it's really disputed as to whether it's needed under – given 403. And you're asking that I rule now and say that it's needed and though – the considerations I am to look for in 403 don't apply. That's difficult, frankly. I understand your position, and I can see that you firmly believe in it. But I don't know how I'm ultimately going to rule on 403. It seems clear to me at this juncture that tentatively it is admissible under 403. But whether that would continue to be my ruling is an open question. I am not immersed with the evidence involved in this case. I wish I had more time to perhaps analyze everything that's been submitted, but we've had a number of things that have kept me busy up to this point. And so I don't know how I will ultimately rule. And that's the defense's problem.

MR. CLEARY: May I respond, Your Honor?

THE COURT: Yes.

MR. CLEARY: I don't know that that distinguishes this case from any other case in which, during the course of the pretrial litigation, different sides are staking out different territory and positions for themselves.

THE COURT: Let me tell you how I typically rule in cases. You're right. Litigators often debate 404(b) evidence, and it typically occurs before trial. And when I am firmly convinced that I can rule on a 404(b) issue, I rule. If it's a ruling that causes me some pause, I will tell the litigator about the pause so that the litigator will know that there's a possibility I could change the ruling. Typically when I do issue rulings, I don't say that I'm pausing as I rule. I rule. There are sometimes items of evidence that present difficulties for the Court, because you can tell that the evidence is prejudicial, but obviously all evidence, just about, is prejudicial; that's why a party is trying to offer it. The real question is whether the probative value of the evidence substantially outweighs the prejudicial effect. It has to be unfairly prejudicial. And that's the problem I have at this moment. I cannot tell. It seems that it's obviously probative evidence. But I am looking at it in a vacuum, and that is troubling to me. The other problem I have is it's coming in for a limited purpose. You want to give it to the jury in your opening statement. They're not going to know what the limited purpose is. The preliminary jury instructions we've worked together on say nothing about this type of evidence. And so the parties, at least at the time we finalized the preliminary jury instructions, did not include any instruction talking about the limited purpose for evidence being admitted. And so that means that, from my perspective as I look at this situation,

the jury may form an opinion that the evidence has some other purpose, some general purpose, and that's why it's part of your opening statement.

MR. CLEARY: Well, I think, Your Honor – two ways to solve that problem. One is, my understanding is there's a pattern Ninth Circuit instruction on the use, the 104 use of 404(b) evidence, the limitation on the use of 404(b) evidence. And I'm sure without too much difficulty we could propose either that precise instruction to Your Honor or something very similar to it. It would not be inappropriate for the Court, if I were going to open on those statements, to tell the jury that at that time or, as I've seen done in the past, I could inform them during the course of my opening of what the relevance of that statement is. We listed in Attachment B, Exhibit B, what we believe the relevance of each of those various statements are. Now, just looking now, Your Honor, at the preliminary instructions as Your Honor handed to us earlier, and it does say, "Some evidence is admitted for a limited purpose only. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and no other."

THE COURT: That doesn't pointedly address the issue. That is a general instruction, and we're talking about a specific item of evidence that the jury could possibly assume has relevancy far broader than what it really has.

MR. CLEARY: Right. But if we could tailor an instruction for the Court to give to the jury – or I could, as I say, I can give it, not as a legal instruction but just tell the jury the purpose, the relevance of the uncharged bombings. That should solve the problem. Moreover, Your Honor, in responding to some other problem Your Honor does have, and that is you don't have a full enough record, you believe; you don't have – you're dealing with this in a vacuum. As I think you said, the reason for that is –

THE COURT: Let me rephrase that. At this very moment, I don't know if this evidence is cumulative or not. I'm not ruling in a vacuum. I looked at your trial brief. I have an idea of what this case is about. But I don't know if it's cumulative.

MR. CLEARY: Right. And I take Your Honor to mean you don't have enough of the – you know what our argument is as to why it's admissible. You don't have the counterpart argument, the countervailing argument as to why in the context of the case it's prejudicial or unduly prejudicial. And the reason for that is the defense has never stated their 403 objections. Never. Now, we noted a while ago when we talked earlier today that the Government's 404(b) brief was filed in November, I believe it was, of this year. But that's when it was publicly filed. We had given a copy of that brief in March of this year to the defense and again, I believe, in June, sometime early summer, when we updated the brief and gave it to them. So from March to now, or June to now, however you're going to count, this issue has been pending. We've been trying to get it litigated, Your Honor. And I know you're very busy and you've got a lot of things on your plate. But the problem you're dealing with now is because you've never gotten a response from the defense. Their failure to act, their failure to respond, is now interfering with the Government's ability to put its case on in the most persuasive way, fashion, and to explain to the jury in opening statement what

evidence we truly believe is going to be held admissible in this case. It's not a problem of the Government's making, Your Honor. That's the only point I'm trying to make.

THE COURT: I understand your position on the 403 issue where you indicate that the defense has not responded, at least in the way that the Government thought they would respond. Previously, when the Government asked me for an early ruling on the 404(b) issue, you wanted the ruling because of witnesses. You wanted to be assured that you can line up your witnesses and you wouldn't have any difficulty in that regard. But that doesn't appear to be your argument now.

MR. CLEARY: It is not, Your Honor; that's correct.

THE COURT: So the thrust of your argument is that the Government opines it has made a 403 argument that should be accepted by the Court and the defense has not pointedly responded to that argument and therefore I should rule against the defense at this moment.

MR. CLEARY: That's correct, Your Honor. And I say that knowing that you have read the trial – I mean, you, as you said, have a sense of where the Government – I'm not saying, "Well, they didn't respond, so rule in our favor." You've read the trial brief; I know you've spent a lot of time with our 404(b) motion, so you have a sense of where this fits in context of the case, and I know you understand that because they're statements of the defendant they are the most probative form of the evidence. So with all of that together, I guess that's why we're asking you to rule now.

THE COURT: What I don't have an understanding of is the strength of the Government's case on the charged events without use of uncharged evidence. I'm not mindful of that as we talk. And that's troubling to me, because that would be something the judge would need to know when making the 403 balance, when conducting the 403 analysis. Let me have the defense respond to you. I know you have other things to say; that's my impression, but I want to hear from the defense on your argument.

MR. CLEARY: Thank you, Your Honor.

MS. CLARKE: Your Honor, as to the specificity of our 403 objection?

THE COURT: Right.

MS. CLARKE: The fact that it hasn't been made?

THE COURT: Right.

MS. CLARKE: Well, it can't be made until the evidence as to the charged crime is heard. It can't be made in the vacuum that we're in, really, and it can't be made in a public setting. I think we're here because we're trying to accommodate the Government on their witness problems; we've tried to accommodate the Government on knowing the, you know, how long their case will take – I mean, we've tried to make some accommodations by stipulations, an unusual step, I must say, in a capital case. We've tried to do that to accommodate everyone. But it's virtually impossible, as we stand here today, to give the Court a full understanding of our position as to the 403 until the Court has the sense of the strength of the Government's case on its charged crimes. The Government repeatedly says, "We need the most probative evidence on the uncharged crimes." I don't think that's really what they get. I think they get a balancing by the

Court under 403 as to what's necessary without unfairly prejudicing the defendant. And as you can see from Exhibit B, there are a whole host of statements from which the Government, on which the Government can rely, without relying on the ones that we've objected to, and particularly without relying on them right now in opening statement. I mean, maybe the Court will have a sense and an ability to rule, and I'm certain Court will have the ability to rule before that evidence is admitted. But I doubt that the Court will want the Government to put the 404(b) evidence on before putting on the charged crimes, because the Court's still going to be caught in the Catch-22 of, you know, do you need it? And I think we've got a long way to go before these statements that we've identified and objected to – and there's a whole host of segments we've told the Government, "Fine, go ahead and open with" them, because we think, fairly, they're going to be admissible and the Court's not going to have a problem with that and we aren't going to have an objection to it. We're talking right now about six statements out of a host, which I think the Government mentioned 26 statements that they wanted in in opening. We're talking about six. And those six relate to uncharged crimes. I think they're skating on thin ice with trying to get the Court to say, "Go ahead and use that in opening" without giving the Court the full view of the strength of their case.

THE COURT: Okay. I'll rule later.

MR. CLEARY: I'm sorry, Your Honor?

THE COURT: I'm going to rule later on the 403 issue. I want to see the evidence and make a ruling that I am sure is within the context of the evidentiary issues involved in this case. And I don't want to engage in guesswork. I think this case is too important for that. So I will rule on these statements later. That doesn't cover the issue about the statement you characterized as a 402 issue. But the defense says that's not noticed, that I don't have that statement and that I shouldn't rule on that statement.

MR. CLEARY: I could tell you the statement, Your Honor. There are notices to the fact that we don't believe that's 404(b) evidence; we believe it's admissible under 402. And I can tell you what the statement is.

THE COURT: Is that statement in your trial brief?

MR. CLEARY: I believe it is, Your Honor.

THE COURT: It's in the filed public trial brief? (Discussion off the record among the Government's counsel.)

THE COURT: I mean, there's no unfiled trial brief. I returned that to you.

MR. CLEARY: Right. They're checking –

THE COURT: I didn't mean to say it that way. I meant to say there's no sealed trial brief.

MS. CLARKE: Your Honor, we don't have it, but our instant recollection is it was not in the trial brief that was provided to us. It's not in the 404(b) motion.

MR. CLEARY: That's what I'm being told. But if I can just move on from there and we can come back to it. The other outstanding issues are our right or ability to

open on the admissions to the charged bombs. And that, to me, seems something we have to be entitled to do. Four charged bombs.

THE COURT: Well, that takes us back to the question of whether this hearing was noticed for that purpose, doesn't it? I mean, we're in somewhat of a predicament, because if we don't consider it now, we're going to be considering it on Monday. But that is the question, I think, is whether this hearing noticed that issue for decision.

MR. CLEARY: It's not, Your Honor, because we did not know till today that the defendant had objections to specific admissions to charged bombs.

MS. CLARKE: That's not – that's really – I'm sorry to say that's not quite accurate. We tried to get the Government to talk to us two days ago about the statements it wanted to use so that we could meet and confer and then actually properly be prepared to visit it. And then, as I mentioned to the Court earlier, the Government said, "Well, the withdrawal of the 12.2(b) notice has changed the landscape; we're going to have to reconsider," never coming back to us and telling us the statements until they walk in today and we took our 40 minutes in the jury room and thought about the statements. So we really never had that kind of notice. We told them two days ago that we needed to know, because we had 403 objections to a variety of statements that they may seek to use. And then we find out about them when we walk in today. It's just not a good, professional thing to do, to have us in the position of arguing about the admissibility of statements we really didn't know we came to court to argue about. And maybe what the Court is going to have to do is take – start up is a 15 minutes early or half an hour early or delay the jury 15 or 20 minutes and rule on this before the opening statement begins on Monday. If the Government is bound and determined to put in – I guess it's three statements, four statements that we've objected to that they characterize as 402. We don't have the statements with us today; we don't have the context of the statements; we don't have the documents reflecting the statements with us in court, and they do – as Mr. Cleary noticed, they have 26 statements; we've objected to 10 of them. That leaves 16 others. Your Honor that covers the landscape. So, Your Honor, maybe we could either argue it Monday morning or the Government to could reconsider its adamant position on using those four statements in opening.

THE COURT: Government?

MR. CLEARY: Your Honor, in our trial brief, which we filed some time ago, the three statements we're talking about, the three admissions to four charged bombs, is set forth.

THE COURT: Where, if you have it?

MR. CLEARY: Pages?

THE COURT: Yes, sir.

MR. CLEARY: Pages 7 through 9, Your Honor. I'm sorry. Seven through 11. And the defense has known about those statements for a substantially longer period of time than that. And in the normal case, Judge – and I know we can always say this is not the normal case – we wouldn't even be going through this. The Government would have the admission to a crime; it would get up; it would not tell the defense what its

opening statement is and would open up, and that would be it. And if they had an objection, they'd have an objection. But here we've done everything we possibly can to apprise them, including – I keep going back to this – July of 1996, giving them a stack of documents about a foot high, a foot and a half high tops, of what we deemed to be the key documents in the case. Many of those documents contained – or those documents contained many of the statements we've been talking about today. So to say it's surprise, we didn't know – it's just not true. They've known for a year and a half. And as to the charge, the admission to the charged statements, as I informed the Court, on the pages of the trial brief they're set forth as clear as day.

THE COURT: I can read the trial brief. I have read the trial brief in the past, and I was planning on reading it this weekend anyway. I will look at it again, specifically pages 7 to 11, so that hopefully this will not interfere with the trial.

MR. CLEARY: Thank you, Your Honor.

THE COURT: How about that other statement, though? That's not one of the statements you just directed my attention to in the trial brief, right?

MR. CLEARY: That's correct; it is not. And the Government's view again on that, again, Your Honor, is we have been stating throughout our position that evidence, if it's admissible, is either going to be coming in through Rule 404(b) and if it's not it's going to be coming in through Rule 402. Our position on that statement is that it's 402 evidence; it's relevant evidence going to the issue of intent, intent to the charged crimes.

THE COURT: Will I become fully apprised of that statement at the time you give your opening statement? Is that what you're indicating?

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

THE COURT: Anything further to cover?

MS. CLARKE: No, Your Honor.

MR. CLEARY: Your Honor, if – for purposes of helping the Court, assisting the Court in doing the balancing, the 403 balancing that, as you know, you're required to do, if you focus on the trial brief on the statements, the descriptions of each of the bombs, it's going to give you, I think, what you need to make that 403 balancing. It'll set forth what the evidence is as to the strength of the Government's case and the relevance of some of the evidence we're proffering to the Court. Thank you.

THE COURT: Are we done?

MR. CLEARY: I am, Your Honor.

THE COURT: Thank you.

MR. DENVIR: Thank you, Your Honor.

THE COURT: Oh, someone placed a computer device on my bench. I assume it was the Government in connection with the exhibits.

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

THE COURT: Is someone going to show me how to work it?

MR. CLEARY: We'll do that whenever you want. We were telling the defense that we'd show them also. So whenever it's convenient for the Court and the defense attorneys. We can do that anytime this week if you like.

THE COURT: Want to do it Friday morning?

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

THE COURT: What time?

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

THE COURT: 8:00?

MR. CLEARY: That'd be terrific.

THE COURT: All right. Thank you.

MS. CLARKE: Thank you.

MR. CLEARY: Your Honor, as long as we're talking about housekeeping matters, does the Court want a binder of the 3500 material for the trial? The Jencks Act statements?

THE COURT: I may need that. I don't know if I'm going to need it. If it's going to be disputed, I'm going to need it.

MR. CLEARY: Why don't we just get it for you and you'll have it.

THE COURT: All right. Thank you. (Time noted: 4:12 p.m.) IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE GARLAND E. BURRELL, JR., JUDGE

– oOo –

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

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REPORTER'S TRANSCRIPT GOVERNMENT'S 404(B) MOTION AND MOTIONS TO UNSEAL TRANSCRIPTS WEDNESDAY, DECEMBER 31, 1997

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