

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)
) 2:96-cr-0259-GEB
Plaintiff,)
) ORDER
v.)
)
THEODORE JOHN KACZYNSKI,)
)
Defendant.)
_____)

This Order concerns the implementation of the plan developed to sell or dispose of property seized during the criminal investigation of bombings for which Defendant Theodore John Kaczynski ("Kaczynski") pleaded guilty and has been sentenced. A status hearing was scheduled in this case concerning when the approved plan will be implemented, which was ultimately held on June 14, 2010.

I. BACKGROUND

An order approving the plan developed to sell or dispose of Kaczynski's personal property (the "Plan") issued on August 10, 2006. The Plan includes the sale at an online auction of "more than 20 thousand pages of documents written by hand by [Kaczynski], much of it with writing on both sides of the page" (hereinafter referenced as "writings"). (Docket No. 758, 1:22-23.) Kaczynski appealed the district court's order approving the Plan; however, on January 9,

1 2009, the Ninth Circuit affirmed the district court's order in United
2 States v. Kaczynski, 551 F.3d 1120 (9th Cir. 2009) ("Kaczynski").
3 Following this Ninth Circuit decision, the district court scheduled a
4 status hearing, and required Plaintiff United States of America (the
5 "government") to file a status report addressing when the Plan would
6 be implemented; any response to the government's status report was
7 required to be filed prior to the status hearing. (Docket No. 755.)

8 The government filed a status report on May 10, 2010, in
9 which it stated the following:

10 A few months ago, the [Federal Bureau of
11 Investigation (the "FBI")] provided six boxes of
12 documents with proposed redactions to the U.S.
13 Attorney's Office for review. That review
14 determined that the redactions initially proposed
by [the] FBI, of information that would ordinarily
be protected from disclosure by law, exceeded the
scope of redactions authorized by this court's
orders. Specifically:

15 (a) Some of the writings include the social
16 security number of a person who was incarcerated at
17 the time of the bombings. In addition, defendant's
18 own social security number appears throughout the
materials. FBI would normally redact social
security numbers absent a waiver or court order
specifically authorizing release.

19 (b) The writings refer to defendant's family
20 members and friends, including their addresses. In
21 addition to privacy concerns, FBI has concerns
22 about releasing into the general public information
23 about persons closely associated with defendant, in
view of public sentiment regarding defendant
himself and anticipated media attention in
connection with the public auction.

24 (c) The names of victims and intended victims
25 appear in newspaper articles among the property to
be sold.

26 (Docket No. 758, 2:17-3:2.)

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1 The government further stated in its status report:

2 In order to comply with the court's prior order
3 without incurring a risk of liability, the
4 government requests that the court specifically
5 order the FBI to release defendant's documents
6 after redacting only the three categories of
7 information referred to in the Order of August 10,
8 2006 (i.e., "the names of all the victims and their
9 families," "all recognized descriptions of the
10 victims and their injuries," and "the names of
11 intended victims").

12 (Id. 3:8-12.) The government also requested clarification of what
13 constitutes "bomb-making instructions" which are required "to be
14 excluded from the materials to be auctioned." (Id. 3:17-18.)

15 Following consideration of the government's status report,
16 the district court directed the government to file a supplemental
17 status report for the purpose of explaining "whether privacy or other
18 concerns justify redactions other than what has been addressed in
19 prior orders," "since certain of the FBI's proposed redactions have
20 not previously submitted for judicial decision" (Docket No.
21 760, 2:2-6.) Therefore, the status hearing was rescheduled and any
22 response to the government's supplemental status report was required
23 to be filed before the rescheduled status hearing. (Id. 2:16-17.)

24 The government filed a supplemental status report on May 20,
25 2010, in which it stated:

26 In the government's view, redactions other than the
27 narrow categories identified in the order of August
28 10, 2006, approving the amended plan of sale
(Docket Item 730) would be inconsistent with that
order. Although the order does not explicitly
forbid further redactions, it impliedly does so
when read in the context of Ninth Circuit decisions
in this case.

(Docket No. 762, 1:26-2:2.) However, the government also stated "the
redaction of all but the last four digits of social security numbers

1 may be appropriate" in light of the potential for identity theft and
2 the fact that social security numbers are routinely withheld from
3 disclosure. (Id. 3:14-20.)

4 Kaczynski filed a response to the government's supplemental
5 report on June 1, 2010, in which he opposed any redactions to his
6 writings other than those specifically approved in the Plan, stating
7 he agrees with the government "that the [Plan approval order filed on
8 August 10, 2006] impliedly precludes additional redactions other than
9 those specifically authorized by the [Plan approval order]." (Docket
10 No. 764, 1:25-26.) Kaczynski also requested that his writings not be
11 redacted until his counsel confirms that he possesses a complete copy
12 of his original writings. (Id. 3:6-10.)

13 At the status hearing held on June 14, 2010, Assistant
14 United States Attorney Ana Maria Martel, Esquire, appeared on behalf
15 of the government; Erin Radekin, Esquire, appeared on behalf of
16 Kaczynski; and Steven Hirsh, Esquire, appeared telephonically as pro
17 bono counsel for the Named Victims.¹

18 II. DISCUSSION

19 The following issues were discussed at the June 14, 2010
20 status hearing: 1) the propriety of the FBI's additional proposed
21 redactions; 2) the method of redaction; 3) what redactions are
22 authorized in the bomb-making instructions category; 4) Kaczynski's
23 request to obtain a complete copy of his original writings; and 5)
24 whether an in camera review of any proposed redaction is necessary.
25 These five issues are discussed in turn below.

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27 ¹ The Named Victims are those victims and/or their family
28 members who submitted claims for restitution in Kaczynski's criminal
case.

1 **A. The FBI's Additional Proposed Redactions**

2 The government and the Named Victims agreed at the status
3 hearing that all but the last four digits of all social security
4 numbers contained in Kaczynski's writings should be redacted. (Tr.
5 June 14, 2010 Status Conference ("Tr.") 7:1-3, 13:5-22, 43:20-45:3.)
6 Therefore, all but the last four digits of all social security numbers
7 included in Kaczynski's writings shall be redacted.

8 However, the Named Victims and the government argued that
9 the names and addresses of Kaczynski's friends and family should not
10 be redacted from Kaczynski's writings. The Named Victims and the
11 government explained during the June 14, 2010, status hearing that
12 Kaczynski had unsuccessfully argued this third party privacy issue in
13 his appellate briefing filed in the Ninth Circuit, which challenged
14 the approved Plan, and that this issue was thoroughly briefed. (Tr.
15 6:4-25, 9:8-15, 11:19-20, 12:21-25, 15:18-23.) The government and the
16 Named Victims contend the Ninth Circuit implicitly rejected
17 Kaczynski's third party privacy arguments, even though this issue is
18 not addressed in the Ninth Circuit's Kaczynski decision. (Tr. 11:6-
19 16, 15:23-16:1.) The Named Victims also made the following arguments
20 concerning this third party privacy issue at the status hearing:

21 We take strong exception to the idea that
22 important biographical information, that may go
23 directly to the value of these writings, such as
 references to . . . Mr. Kaczynski's immediate
 family . . . would be redacted.

24 For instance, if Mr. Kaczynski talks about his
25 relationship with his brother David, which is a
26 highly-publicized relationship, and much is known
27 about it, and of course everyone knows that he had
28 a brother named David, under the terms of what I
 believe I'm hearing the FBI proposed, that would be
 redacted, not only damaging the document but
 eliminating, perhaps, an important source of

1 interest to those who might wish to purchase them.

2 And, of course, the Ninth Circuit's basic
3 injunction to us here was to maximize commercial
4 value of the sale, consistent with the privacy and
5 feelings and sensitivities of the victims. So, you
6 know, a plan that sort of bowdlerizes the
documents, and removes the biographical interest,
is not going to help maximize the commercial value
of the auction.

7 (Tr. 7:4-22.)

8 The Ninth Circuit discussed redactions in Kaczynski as
9 follows:

10 The approved Plan permits the government to
11 redact from the originals the names of victims and
12 their families, names of other intended victims,
13 and recognizable descriptions of the victims and
their injuries. This proposal was made at the
request of the Named Victims, whose interests this
court directed the district court to consider.

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15 Moreover, any diminution in the originals'
16 value is justified because of the importance of
excising this information to protect the privacy
17 interests of the victims and intended victims. We
18 directed the district court to take [the privacy
19 interests of the victims and intended victims] into
20 account in fashioning a plan for the sale, and the
Plan is a reasonable compromise that permits the
victims to hopefully recoup some monetary value
without further compromising their privacy or
memories of their loved ones. The redactions may
affect value,

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22 Kaczynski, 551 F.3d at 1128.

23 Based upon the parties' redaction arguments and the Ninth
24 Circuit's directive to maximize the monetary return to the Named
25 Victims and the families of Named Victims, only the redactions
26 approved in the Plan and this Order are authorized.

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1 **B. The Method of Redaction**

2 The government identified two possible methods of redaction:
3 redaction by excision/cutting or redaction by ink. The Named Victims
4 suggested their preference for redaction by ink by inquiring at the
5 status hearing: "Has someone put the ink down and flipped it over and
6 seen that it made the other side unreadable?", to which the government
7 responded "No." (Tr. 24:21-23.) The Named Victims then proposed
8 "that [the government] take a page that has somebody's name on it,
9 . . . photocopy the back of it, or the reverse side of it, and that
10 they actually try it, and then show us what actually happens"
11 (Tr. 26:10-13.) The district court gave the government and the Named
12 Victims two weeks to ascertain whether redaction by dark ink was
13 sufficient, and requested that the Named Victims inform the district
14 court of their redaction preference in a filed proposed order.

15 The Named Victims subsequently filed a proposed order in
16 which they state their preference is to accomplish the authorized
17 redactions by using dark ink rather than excision. (Docket No. 770,
18 1:23-25.) Accordingly, dark ink shall be used to make the authorized
19 redactions.

20 **C. Scope of Bomb-Making Instruction Redactions**

21 The government sought clarification of what is within the
22 "bomb-making instruction" category of redactions. The government
23 indicates this clarification is required because it discovered
24 subsequent to briefing in the district court and the Ninth Circuit
25 that what could be characterized as bomb-making instructions are
26 intermingled in the 40,000 pages of Kaczynski's writings. (Tr. 20:19-
27 21:5.)

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1 The Named Victims responded at the status hearing by
2 proposing the following definition of "bomb-making instructions":
3 "'technically-enabling' bomb-making material, which includes precise
4 descriptions of quantities, design elements, and/or chemicals that are
5 not obvious." (Tr. 21:12-22:9; Docket No. 769, 2:5-7.) The Named
6 Victims also stated "we would want to minimize the redaction of such
7 material."

8 Following discussion of the issue, the district court
9 ordered the government to provide the Named Victims' counsel with an
10 example of redactions that the government opines are within this
11 definition so that it could be determined whether the government and
12 the Named Victims are in agreement on what writings are encompassed in
13 this redaction category. (Docket No. 769, 2:7-22.) If an agreement
14 was reached, the Named Victims were required to "file proposed
15 language that could be included in an order which authorizes the
16 government to make the agreed upon redactions." (Id. 2:21-23.)

17 The Named Victims filed a proposed definition for
18 "technically enabling descriptions of bomb design, construction, and
19 testing" in a proposed order filed on July 28, 2010. (Docket No. 770,
20 2:3-9.) This definition is adopted and stated below.

21 **D. Kaczynski's Request for a Complete Copy of His Writings**

22 Kaczynski requested during the status hearing that he be
23 provided a complete copy of his original writings before they are
24 redacted. (Tr. 45:7-10.) The district court previously ordered the
25 government to provide Kaczynski "with any page Kaczynski has not
26 already received in a readable form." (Docket No. 730, 14 n.12.)
27 However, after discussion of this issue at the status hearing it was
28 decided that the government shall provide Kaczynski's counsel with an

1 exact electronic copy of his original writings as they appeared before
2 redaction.

3 **E. In Camera Review**

4 The government also sought clarification on whether any
5 proposed redaction must be submitted for in camera review before the
6 redaction is made. (Docket No. 758, 3:23-25.) The Ninth Circuit
7 discussed in camera review in Kaczynski as follows:

8 To the extent Kaczynski objects that the government
9 should not be permitted to single-handedly excise
10 the documents without supervision, this can be
11 easily remedied by having the district court review
the materials in camera and approve the redactions
to ensure they correspond to and do not exceed the
descriptions in the approved Plan.

12 Kaczynski, 551 F.3d at 1127.

13 A review of the authorized redacted materials in camera is
14 unnecessary since what is to be redacted is clarified in this Order,
15 and the authorized redactions are "made at the request of the Named
16 Victims, whose interests [the Ninth Circuit] directed the district
17 court to consider." Id. at 1128.

18 **III. CONCLUSION**

19 For the stated reasons, IT IS HEREBY ORDERED that the
20 court's Plan approval order filed on August 10, 2006 is supplemented
21 as follows:

- 22 1. Within sixty days after this order is filed, the
23 government shall deliver to an auctioneer designated by
24 the United States Marshall the property to be sold for
25 restitution.
- 26 2. Sixty days after conclusion of the auction, the
27 government shall provide Kaczynski's counsel with an
28 electronic copy of his original writings (the

1 "Writings") as they appeared prior to the redactions
2 described below.

3 3. Names, addresses, and other identifying information
4 concerning actual victims or other persons whom
5 Kaczynski considered targeting, as well as descriptions
6 of the actual victims' injuries, are to be redacted
7 from the Writings using dark ink rather than excision.
8 Because the ink bleeds through to the other side of the
9 page, the other side must be copied prior to redaction;
10 and that copy will be placed next to, and sold with,
11 the original, redacted page in the auctioned materials.
12 In some instances, both sides of a page will require
13 redaction, in which case both sides will be copied
14 prior to redaction and the copies will be handled in
15 the same manner. All but the last four digits of
16 social security numbers in the Writings shall also be
17 redacted. The government shall carry out the redaction
18 of the Writings without submitting proposed redactions
19 to the court for in camera review.

20 4. Technically enabling descriptions of bomb design,
21 construction, and testing will be redacted in the
22 manner described in Paragraph 3, above. "Technically
23 enabling" means "containing specific details about bomb
24 design, materials, quantities, or chemistry that would
25 help a reader build a bomb." "Technically enabling"
26 does not refer to non-enabling statements such as (to
27 use hypothetical examples), "I tested the new bomb
28 design today and it blew up a tree stump," or "I stayed

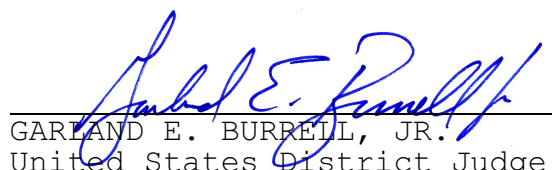
1 up until 3 a.m. working on the new bomb design, which
2 will be more powerful."

3 5. No redaction shall be done except to the Writings. For
4 example, newspaper and magazine clippings will not be
5 redacted.

6 The government shall file a status report no later than
7 90 days after this order is filed, in which it explains the status of
8 its efforts to implement the Plan. Any response to this status report
9 should be filed 100 days after this order is filed.

10 IT IS SO ORDERED.

11 Dated: August 4, 2010

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14 GARLAND E. BURRELL, JR.
United States District Judge
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