

**Memorandum from U.S. Attorney's
Office to UNABOM Team on T.
K.'s Appeal**

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Contents

A. Procedural Default	3
B. TK’s Plea is Voluntary	5
C. TK Has Waived All Pre-Plea Claims	6

To: UNABOM Team
From: Bob Cleary
Re: Response to TK's Appeal
Date: December 21, 1999

I've been mulling over our possible options in responding to TK's appeal and I think our best course will be to argue that he waived his choice of defense and self-representation claims by entering his guilty plea. We may also be able to argue procedural default, at least with respect to the voluntary plea question.

I think we should stay away from the underlying facts and the merits of his choice of defense and self-representation claims. TK has done a pretty compelling job establishing that his lawyers abandoned him, worked at cross-purposes to his expressed desires, and, in order to bar him from firing them, repeatedly lied to him and prevented him from reading published accounts about the court proceedings. TK has also made a some showing that QD & JC took affirmative steps to prevent Tony Serra from entering the fray at an earlier date. This is pretty unpalatable stuff for us and if we delve more deeply into the facts — for example, by seeking discovery of all attorney-client communications and disclosure of all ex parte conferences — the situation is likely to get worse. Among other things, going down this road will likely to lead to an evidentiary hearing, at a minimum. Can you imagine prepping QD and JC to testify?

A waiver argument (as well as a default argument) may avoid these pitfalls. The law is very good for us on this score. There is one potential downside to this position. The Court and the legal community are familiar with us making waiver arguments and then, in the alternative, addressing the merits. Our failure to advance an argument on the merits may signal that we believe there are serious problems underlying TK's allegations. Such a conclusion will no doubt be widely publicized by various TK sympathizers.

On balance, I still think we should argue waiver (or default and waiver) and inform the Court that if it wants to address the merits, we will need complete discovery and a separate briefing schedule. Hopefully, we can do this in a way that will signal to the Ninth Circuit the parade of horrors that will flow from such a result.

I've outlined below, one way that our argument might proceed.

A. Procedural Default

TK's claim of a coerced plea may only be raised on direct appeal; he cannot raise it under Section 2255. The Supreme Court has stated that "even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." *Bousley v. United States*, 118 S. Ct. 1604, 1610 (1998) (emphasis added). "Habeas review is an extraordinary remedy and 'will not be allowed to do service for an appeal.'" *Id.*, quoting *Reed v. Farley*, 512 U.S. 339, 354 (1994) (citation omitted). TK waived his right to file such a direct appeal, and in so doing, procedurally

defaulted his current challenge to his plea. *Bousley*, 118 S. Ct. at 1610 (defendant waived attack on plea based on his misunderstanding of the elements of 18 U.S.C. § 924(c) by failing to raise it on direct appeal); see *United States v. Nagra*, 147 F.3d 875, 882 (9th Cir. 1998) (appellants who did not attack the validity of their pleas by direct appeal waived the right to challenge them thereafter).

To excuse that procedural default, defendant must show “cause and actual prejudice,” or “actual innocence.” See *Bousley*, 118 S. Ct. at 1611; *United States v. Benboe*, 157 F.3d 1181, 1184 (9th Cir. 1998) (defendant who waived the right to file a direct appeal can show actual innocence and obtain relief under § 2255); see also *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir.), cert. denied, 508 U.S. 979 (1993) (although a defendant’s waiver of appellate rights might not “categorically foreclose[] him from bringing any section 2255 proceeding, such as a claim of ineffective assistance of counsel or involuntariness of waiver” of appeal, it does bar him from raising under § 2255 issues clearly contemplated by, and subject to, his waiver); cf. *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994) (entertaining § 2255 ineffectiveness claim where defendant waived right to appeal).

TK will never be able to show “actual innocence,”¹ and he obviously cannot claim that his waiver of his right to appeal is “cause.” *United States v. Pipitone*, 67 F.3d 34, 39 (2d Cir. 1995) (“this position turns the ‘cause’ requirement on its head”). He will have to challenge the voluntariness of the waiver of the right to appeal as well as of the plea itself. *United States v. Portillo-Cano*, 1999 WL 729133 *3 (9th Cir. 9/20/99) (“waivers of appeal must ‘stand or fall with the agreement of which they are a part’”); see *United States v. Martinez*, 143 F.3d 1266, 1271 (9th Cir. 1998) (waiver of appeal must be “knowingly and voluntarily made”).

All that being said, I’m not so sure this is a great argument for us. In the final analysis, it appears to simply beg the question whether TK’s plea was coerced. If it truly was coerced, then the plea would be invalid *ab initio*. TK would argue that the coerced plea compelled him to waive his appeal rights and thereby limited his procedural options to the 2255. I’m not sure how we would respond to such a contention.

On the other hand, if there is a chance that a default argument could be successful, we should make it. Obviously, we don’t want to lightly abandon any potentially successful strategy. Equally as important, however, such an argument might help in our relationships with the victims. They accepted the plea agreement with the expectation of achieving finality. A successful default argument may make them realize that they made the right choice: as a result of entering the plea and waiving his right to appeal,

¹ To show “actual innocence,” which refers to “factual innocence, not mere legal insufficiency,” a defendant must demonstrate that “in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.” *Bousley*, 118 S. Ct. at 1611. Based on our Trial Brief, 404(b) Brief, and Sentencing Memo, as well as statements the Court and defense counsel made about the strength of the government’s case, the existing record makes abundantly clear that TK could never make this showing. Indeed, he would be foolish to even try.

TK also foreclosed any reasonable opportunity to litigate his claims under Section 2255.

B. TK's Plea is Voluntary

If we don't raise, or don't prevail on, the default argument, we should be able to defeat on the merits TK's contention that his plea was coerced.

In determining whether a plea is "voluntary," "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); accord *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *Alford*); *Parke v. Raley*, 506 U.S. 20, 29 (1993) (same); *Moran v. Godinez*, 57 F.3d 690, 699 (9th Cir. 1994) (same).² [QUERY: the standard appears to be objective; is that right?].

As early as November 25, TK knew that his lawyers had been lying to him and that they were pursuing a mental defect defense. Prior to entering his plea TK was also aware that, pursuant to the court's order, QD & JC would remain as his trial counsel, that they were empowered to decide what defense and mitigation evidence to offer, and that they would raise psychiatric issues in the guilt and penalty phases. Knowing those alternative courses of action, and arguably knowing that he could preserve his objections to those rulings only by going to trial, TK chose to plead guilty. This should put the issue to rest. "[A] plea of guilty entered by one fully aware of the direct consequences ... must stand." *Mabry v. Johnson*, 467 U.S. 504, 509 (1984) (citations omitted) (reinstating plea entered after defendant had learned that the prosecution had withdrawn its plea offer).³ Because, as in *Mabry*, TK "was fully aware of the likely consequences when he pleaded guilty; it is not unfair to expect him to live with those consequences now." *Id.* at 511.

Further, a defendant who pleads guilty upon the advice of counsel "may only attack the voluntary and intelligent character of the guilty plea by showing that" counsel's advice was not "within the range of competence demanded of attorneys in criminal cases.'" *Hill v. Lockhart*, 474 U.S. 52, 56–57 (1985), quoting *Tollett v. Henderson*, 411

² See *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976) ("A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt") (citations omitted); *Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969) (the record of the plea proceeding must reflect that the defendant voluntarily waived his right to a jury trial, the right to confront his accusers, and his privilege against compulsory self-incrimination).

³ See, e.g., *Alford*, 400 U.S. at 37 ("An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime," or protests his innocence); *Brady v. United States*, 397 U.S. 742, 749–53 (1970) (defendant who "preferred to plead guilty and thus limit the penalty to life imprisonment rather than to elect a jury trial which could result in a death penalty" could not withdraw plea, even if death penalty provision was subsequently found unconstitutional).

U.S. 258, 267 (1973) and *McMann v. Richardson*, 397 U.S. 759, 771 (1970); see *Parker v. North Carolina*, 397 U.S. 790, 796–97 (1970). A defendant must also “show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. at 57–59, citing *Strickland v. Washington*, 468 U.S. 668 (1984).

This will be a difficult two-pronged burden for TK to satisfy. Whatever can be argued about defense counsel’s ethics, there can be no doubt but that they achieved the very best result possible for TK. With respect to the prejudice prong, TK was fully aware of “counsel’s errors” prior to entering his plea. Armed with this knowledge, he still chose to plead guilty and did not “insist[] on going to trial.”

To be sure, a guilty plea entered with knowledge of the alternatives can nonetheless be invalid if the plea was “induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled and unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g. bribes).” *Mabry v. Johnson*, 467 U.S. at 509; see *Sanchez v. United States*, 50 F.3d 1448, 145455 (9th Cir. 1995) (a guilty plea is void if it was “induced by promises or threats which deprive it of the character of a voluntary act”); e.g., *United States v. Sutton*, 794 F.2d 1415, 1422 (9th Cir. 1986) (discussing prosecutor’s threats to imprison female companion); *United States v. Marrow*, 772 F.2d 525, 527 (9th Cir. 1985) (same). I have yet to find a case in which, as here, unfavorable judicial decisions are alleged to be the source of the coercion. This absence of precedent is hardly surprising; the source of the cognizable coercion has to be extra-judicial for this rule of law to make any sense. Were it otherwise, any pleading defendant who suffers through an adverse ruling on motion could have a colorable argument that his plea was coerced..

Nor will the type of emotional coercion that TK alleges pass muster. The Supreme Court has made clear that even a plea compelled by a desire to avoid the death penalty is not coerced. *Brady v. United States*, 397 U.S. at 755 (“a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty”). If no cognizable coercion results from a choice of life over death, a fortiori, a plea that is prompted by TK’s desire to avoid embarrassment at being labeled as a schizophrenic in a public forum is not “coerced.”

C. TK Has Waived All Pre-Plea Claims

Whether we defeat the claim of a coerced plea on procedural grounds (Section A), or on the merits (Section B), the result should be the same: TK will have waived his choice of defense and self-representation allegations.

The Supreme Court has emphasized that “the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.” *Bousley v. United States*, 118 S. Ct. at 1610, quoting *United States*

v. Timmreck, 441 U.S. 780, 784 (1979). Accordingly, the Court has “strictly limited the circumstances under which a guilty plea may be attacked on collateral review.” Bousley, 118 S. Ct. at 1610. “It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked.” *Id.*, quoting *Mabry v. Johnson*, 467 U.S. at 508 (citing cases). Accordingly, “the inquiry is normally confined to whether the underlying plea was both counseled and voluntary.” *United States v. Broce*, 488 U.S. 563, 569 (1989); *Tollett v. Henderson*, 411 U.S. at 267.

Based on these firmly established principles, we should be able to marshal a strong argument that TK’s voluntary and intelligent guilty plea prevents him from litigating the choice of defense and self-representation claims he now seeks to raise. “An unconditional guilty plea constitutes a waiver of the right to appeal all non-jurisdictional antecedent rulings and cures all antecedent constitutional defects.” *United States v. Floyd*, 108 F.3d 202, 204 (9th Cir. 1997) (citation omitted) (defendant’s plea foreclosed Fourth Amendment claim).⁴ As the Supreme Court has stated: “When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” *Tollett v. Henderson*, 411 U.S. at 267; accord *United States v. Broce*, 488 U.S. at 569; *United States v. Marrow*, 772 F.2d at 527.⁵

Although it may not be important given where we are in this litigation, both the Supreme Court and the Ninth Circuit have emphasized that no “conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty,” because a waiver is not required at all. *United States v. Broce*, 488 U.S. at 573; *United States v. Floyd*, 108 F.3d at 204 n.2. “Relinquishment derives not from any inquiry into a defendant’s subjective understanding of the range of potential defenses, but from the admissions necessarily made upon entry of a voluntary plea of guilty.” *Broce*, 488 U.S. at 573–74. “A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence.” 488 U.S. at 569. “A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment

⁴ See, e.g., *United States v. Littlefield*, 105 F.3d 527, 528 (9th Cir. 1997) (defendant’s plea foreclosed statute of limitations claim); *United States v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992) (defendant’s plea foreclosed speedy trial claim); *United States v. Montilla*, 870 F.2d 549, 552–53 (9th 1989) (defendant’s plea foreclosed outrageous government conduct).

⁵ There are exceptions “where on the face of the record the court had no power to enter the conviction or impose the sentence,” *Broce*, 488 U.S. at 569, 574–76, citing *Blackledge v. Perry*, 417 U.S. 21, 30–31 (1974) (prosecutorial vindictiveness); *Menna v. New York*, 423 U.S. 61, 6263 & n.2 (1975) (double jeopardy). Those exceptions do not apply here. See *United States v. Cortez*, 973 F.2d 764, 766–67 (9th Cir. 1992); *United States v. Montilla*, 870 F.2d 549, 552–53 (9th 1989) (“We have not extended *Blackledge* and *Menna* beyond the specific claims alleged in those cases,” which have been further limited by *Broce*).

of factual guilt and which do not stand in the way of conviction if factual guilt is validly established.” *Menna v. New York*, 423 U.S. at 63 n.2.

Since TK has voluntarily pled guilty, he cannot now successfully attack his plea by claiming that it was induced by “a strategic miscalculation” or “that his calculus misapprehended the quality of the [government]’s case.” *United States v. Broce*, 488 U.S. at 571–72 (citations omitted). TK’s abandonment of his antecedent constitutional claims is particularly pointed in this case. At the time he entered his plea, TK knew of the constitutional claims that he now seeks to raise because he had raised them himself.

The Ted K Archive

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Memorandum from Assistant U. S. Attorney Cleary to U. S. Attorney's Office
UNABOM Team regarding Defendant T. K.'s Appeal

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