

A Better Defense For The Unabomber?

In an exclusive interview with TIME, attorney J. Tony Serra outlines an alternative strategy for defending Kaczynski

David S. Jackson / Sacramento

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Ted Kaczynski's first attempt to keep his mental condition out of his defense was to hire a new attorney, and the one he wanted was J. Tony Serra, a well-known San Francisco attorney with a reputation for defending notorious clients. The trial judge eventually ruled that it was too late to bring in Serra, but in an exclusive interview with *Time*, Serra revealed that if he had been allowed to represent Kaczynski he would have based his defense on Kaczynski's ideology—a strategy that Kaczynski endorsed.

In an interview with *TIME* the day before Kaczynski pleaded guilty, Serra said that he had informed the Unabomber suspect of three things: "I would not predicate a defense on mental disease or defect or insanity; I didn't view the case as a whodunit, like he's not responsible. And third, that I would predicate his defense on his ideology or philosophy."

Kaczynski's response to that, says Serra, was "immediate." Said he: "Mr. Serra, it must be my ideology."

"And," adds Serra, "I readily acceded."

"It's my belief, as it is everyone else's, that he doesn't want any part of being described by his lawyers as insane, psychotic, mad, diseased; he doesn't buy into that," says Serra. "And therefore, he would be amenable to being defended on a theory that related to his manifesto. And therefore that would be his first choice. And it appears that his alienation from his present attorneys is because they are steadfast on defending him based on a mental defect or disorder and that obviously raises legal, ethical and philosophic questions. But recall that this guy is a genius. He sees things we can't see and understands things we can't understand. Maybe we should give him the benefit of the doubt."

Kaczynski's opposition to his attorneys' defense strategy threatened to derail the trial, a problem that Serra says should never have come up. "We are agents of a defendant," he says. "We are not in a position to dominate them with our own view, our own philosophy, our own ideology. That's why I would never defend him on the basis that he is mentally defective against his own wishes. If he's competent to stand trial, he's competent to participate in his own strategy and, ultimately, he must be the one who decides the strategy on which he lives or dies. The lawyers are his agent, and hopefully his articulate presence in the judicial system, and that's what I told him, and he was very pleased."

Serra believes Kaczynski was clearly competent to decide what strategy he should use, and he thinks Kaczynski could have been a good witness on his own behalf. "I found him very cogent, very polite, very respectful," he said. "I've represented every type of [defendant with a] mental illness, and nothing I saw in those brief smatterings of communications I've had with him, showed anything but respect and politeness and obviously a very articulate and intelligent mind."

"He's subdued, he's a gentleman, and I think a jury would perceive the ultimate humanitarian attribute that he possesses," Serra went on. "This is a man who, if he did it, and I think all sides are conceding that, he did it not through some kind of loathsome hatred. He did it ultimately to save humanity from self-destruction, and

that is a different kind of criminally accused than one who is to be portrayed as a mad schizophrenic.”

Serra concedes that a defense based on the concept of committing a crime in order to avoid a greater harm would probably have a better chance in the second, penalty phase of a trial when the jury would be considering whether to impose the death sentence, “but I would certainly seek to get it into the first [guilt] phase.” He said he had successfully used this defense before when he defended the distribution of clean hypodermic needles in Redwood City (Ca.), to halt the spread of AIDS. Kaczynski’s defense could be based on “imperfect necessity”, which “is where you have a bonafide belief that you have to commit a crime in order to avoid a greater harm, but the belief ultimately from the main societal perspective is unreasonable. That’s why it’s imperfect,” says Serra. “It usually results in a lowered culpability but not a complete exoneration. I would seek that.”

He admits it would be a long shot. “Maybe I would [succeed] and maybe I wouldn’t,” he says, “but certainly it would become a relevant consideration—and they wouldn’t bar it—in the second, penalty phase.”

Serra’s first communication with Kaczynski was by letter shortly after his arrest in Montana. “I have friends, alliances, acquaintances who share his anti-technocracy views,” he says. “They first asked that I offer myself. So we initially made contact through letter-writing while he was in Montana subsequent to his arrest. There are people out there—although none share the view that you kill to postulate a theory—that share his theory. A lot of people do. The native American view, you know, is anti-technocracy; the indigenous people’s view is anti-technocracy; the ‘enlightened ecology movement’ is predicated in part on anti-technocracy views. It’s a response to what in many eyes is a threat to humankind. This is not a mad, isolated view.”

Judge Burrell ultimately turned down Kaczynski’s request to have Serra represent him because Serra’s request to postpone trial until September was too long a delay. In making his ruling, Burrell noted that Serra was “saturated” with clients, a comment that caused Serra to chuckle. “If I’m ‘saturated’, I’ve been saturated for many years, but my head is always above water, and the truth is I have about 3 trials that have to go, but I’ve been doing routine jury trials back-to-back all my life,” he said. “But I reiterated by fax yesterday to the clerk of the court—and hopefully she, as she has in the past, will transfer it to Kaczynski—that I would be able to try the case in September. I wanted half the time the public defenders had to prepare [18 months], and that’s been a constant position. I understand it when the judge says I have a jury and I have to consider that, but that’s been my position from the beginning. In deference to the public defender’s motions, I waited, and then everything became untimely, unfortunately.”

Serra said he was worried about Burrell’s rulings regarding Kaczynski’s rights. “He is a careful judge,” he said. “I’ve tried three jury trials in front of him, probably more than any other lawyer, and I respect him. He consults with all the legal authorities before doing anything. But I think he’s courting disaster with what he’s doing. First

he says ‘Oh you want to represent yourself? Well, you have to be competent.’ And then it’s, ‘Oh, you’re competent? Well, then the request was untimely.’ It’s like he’s holding out hope for Kaczynski which ultimately becomes a stone wall.”

Serra says he still believes that Kaczynski’s ideas could have ultimately spared him from a death sentence if jurors had been allowed to hear them. “Someone who is an ideologue and who ultimately believes that humanity is good, is certainly, from my perspective, one that is more likely to be spared the death penalty than a mad killer,” he says.

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