

Declaration of Michael Mello

May 11, 1999

1. My name is Michael Mello. I am a professor of law at Vermont Law School, where I have taught the required course in legal ethics. I am a member of the Bar of Florida. I have been involved in capital postconviction litigation, in state and federal court, on a full-time or part-time basis, since 1983. To the best of my recollection, I have never before filed a document in court advocating the recusal of a judge. I wrote this declaration at the request of Theodore Kaczynski.
2. I recently published a book about the Theodore Kaczynski case. In the course of researching the book, I acquired “knowledge of all the facts,” *Yagman v. Republic Ins. Co.*, 987 F.2d 622,626 (9th Cir. 1993). in the proceedings that culminated in Theodore Kaczynski’s guilty plea including the un red acted transcripts of the *in camera*, *ex parte* meetings between Kaczynski, Judge Burrell, and Kaczynski’s defense lawyers.
3. In addition to the court records, I have read news accounts of the in-court proceedings, and I have spoken with journalists and observers who were present during the open-court proceedings. These observers commented on the judge’s apparent “anger” (their word) at Kaczynski
4. My reading of the court records, as well as the reactions of observers present in court, have led me to conclude that Judge Burrell’s impartiality is tn reasonable question by Kaczynski. I believe that “a reasonable person, with knowledge of all the facts, would conclude that the judge’s impartiality might reasonably be questioned.” *Yagman, supra* at 626.
5. It is, of course, hornbook Jaw that ‘a judge’s prior adverse ruling is not sufficient cause for recusal.’ *United States v. Studley*, 783 F.2d 934,939 (9th Cir. 1986).
 - a. Kaczynski’s request for recusal is not based on “prior adverse rulings.” Rather; it is based on Judge Burrell’s personal involvement in the totality of circumstances that culminated in Kaczynski’s coerced guilty plea. Judge Burrell did not simply “rule” adversely. He was an active participant in the *in camera*, *ex parte* meetings. Following those meetings, the judge’s anger at Kaczynski was so palpable that journalists covering the proceedings in open court commented on it.
 - b. Certain of the judge’s rulings in this case were so clearly contrary to the record that they support an inference of bias against Kaczynski For example, the judge denied Kaczynski’s constitutional right to self-representation ostensibly because Kaczynski had made his request “too late” and for purposes of “delay.” However, the record—particularly the portions of the record the judge ordered sealed, ostensibly to protect Kaczynski—prove that Kaczynski was seeking no delay and that his request was timely.

- c. Similarly, the judge ordered a delay in the proceedings to assess Kaczynski's mental competency to stand trial and to represent himself. No party had seriously questioned Kaczynski's competency to stand trial. The judge threatened Kaczynski with a 30 days in a mental institution unless he cooperated with the competency evaluation ordered by the judge. Kaczynski did cooperate. Yet, after he was found competent, the court still denied his right to self-representation.
 - d. Further, when the judge was informed, on January 22, by Kaczynski's counsel, that a negotiated solution to the case was possible, the court initially refused to allow a brief delay to pursue this possibility of preterminating the Unabomber trial. Grudgingly, the court gave the parties one hour to confer. Within that hour, a negotiated plea was worked out.
6. Judge Burrell's summary rejection of Kaczynski's motion for recusal also evinces a lack of impartiality.
 - a. Judge Burrell's assertion that Kaczynski's recusal motion should be denied because it does not allege "extrajudicial" proof of impartiality is typical of the judge's practice of relying on arid procedural technicalities to defeat the ends of justice the procedural rules are designed to promote. Under the judge's logic, a judge who said, during a guilty plea colloquy, that "I'm letting you plead guilty because you're a damned kike." would not be subject to recusal because the anti-Semitic slur was not "extrajudicial."
 - b. Judge Burrell also denied Kaczynski's recusal motion because it did not articulate specific facts demonstrating bias. But Kaczynski's I 2255 motion described the impossible circumstances under which it was written. An unbiased judge, who actually was interested in knowing why Kaczynski believes him to be biased, would have asked—he would not have summarily denied the recusal motion.
7. Judges are human. Humans don't like to admit they made mistakes. It is human to resist admitting error—particularly the sorts of egregious error alleged in Kaczynski's § 2255 motion. A reasonable person, in possession of all the facts, would think it unlikely that Judge Burrell will admit that he botched the most high-profile case of his career to date.
8. Canon 2 of the ABA's Model Code of Judicial Conduct (1990) commands that a judge shall avoid.. the appearance of impropriety in all of the judge's activities." The commentary to this Canon stresses that "a judge must avoid.. appearance of impropriety...The test for appearance of impropriety is whether conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with...impartiality..."

- a. How did Judge Burrell “appear”? To at least some observers, he appeared to be “angry” at Kaczynski Canon 3(B)(5) provides that “a judge shall not, in the performance of judicial duties, by words *or conduct* manifest bias or prejudice ...” The comment explains that “facial expressions and body language, in addition to oral communications, can give to parties and lawyers in the proceedings, jurors, the media and an *ap* others *pearance* of judicial bias.” (emphasis added).
 - b. Further, at least one journalist, who was present in the courtroom, wrote that Judge Burrell appeared to be influenced by fear of public criticism. *See* Finnegan, *Defending the Unabomber*, NEW YORKER, March 1998. Canon 3(B)(2) of the Model Rules provides that “a judge shall not be swayed by... fear of criticism.”
 - c. The point was not that Judge Burrell wits in fact “angry” or influenced by fear of public criticism. The point is that he so *appeared* by presumably reasonable observers.
9. Like the Model Code, the purpose of the recusal rules is to maintain the perception and the appearance, as well as the reality, of impartiality and fairness by judges. The bottom tine is that, given Judge Burrell’s extensive personal role in the events that culminated in his coerced guilty plea—a guilty plea that was coerced by Judge Burrell as well as by the court-appointed lawyers for Kaczynski—“a reasonable person with knowledge of a) I the facts would conclude that the judge’s impartiality *might* reasonably be questioned.” *Yagman, supra*. In my own mind, after studying the record in this case, I believe that Judge Burrell’s impartiality might reasonably be questioned.
 10. A reasonable person, in possession of all the facts, might well conclude that Theodore Kaczynski’s § 2255 motion would not receive a fair and impartial hearing in Judge Burrell’s court. Judge Burrell’s expected final determination — that he did nothing wrong in his personal involvement in the events that led to Kaczynski’s illegal plea-cannot have credibility, to Kaczynski or to many others, including this writer.

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