Final Brief U.S. v. Theodore John Kaczynski, appellant; No. 99-16531 in the United States Court of Appeals for the Ninth Circuit

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Contents

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No. 99-16531

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
THEODORE JOHN KACZYNSKI,
Defendant-Appellant.

BRIEF FOR THE UNITED STATES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
NOS. CV-99-00815-GEB; CR-96-00259-GEB;
CV-99-00816 GEB; CR-98-00021 GEB

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JURISDICTION AND BAIL STATUS

This is an appeal from an order by the district court denying the defendant's motion to vacate his guilty plea and sentence under 28 U.S.C. § 2255. The district court, which had jurisdiction under Section 2255, issued its order denying the motion on May 27, 1999. CR 583; ER 453. On June 3, 1999, the defendant filed a timely notice of appeal, CR 585; ER 474-75, and on June 15, 1999, he filed a request for a certificate of appealability. CR 586. On June 17, 1999, the district court denied defendant's request for a certificate of appealability under 28 U.S.C. § 2253(c). CR 587. On October 22, 1999, this Court issued a certificate of appealability allowing the defendant to raise three issues. SER 15. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253. The defendant is serving multiple, consecutive terms of life imprisonment.

ISSUES PRESENTED

This Court granted a certificate of appealability as to the following issues:

1. Whether Kaczynski's guilty plea was voluntary.

2. Whether Kaczynski properly was denied the right to self representation.

3. Whether a criminal defendant in a capital case has a constitutional right to prevent his appointed defense counsel from presenting evidence in support of an impaired mental-state defense at trial.

STATEMENT OF THE CASE

On June 18, 1996, a grand jury in the Eastern District of California returned an indictment charging Theodore John Kaczynski with four counts of transporting an explosive in interstate commerce with intent to kill or injure, in violation of 18 U.S.C. § 844(d); three counts of mailing an explosive device with intent to kill or injure, in violation of 18 U.S.C. § 1716; and three counts of using a destructive device during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). CR 1; ER 1-9 (the "California Indictment"). On October 1, 1996, a grand jury in the District of New Jersey returned an indictment charging Kaczynski with one count of transporting an explosive device in interstate commerce with intent to kill or injure, in violation of 18 U.S.C. § 844(d); one count of mailing an explosive device with intent to kill or injure, in violation of 18 U.S.C. § 1716; and one count of using a destructive device during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). ER 10-13 (the "New Jersey Indictment").

On May 15, 1997, the United States gave notice of its intent to seek the death penalty against the defendant under both indictments. CR 97. Trial began on the California Indictment on November 12, 1997, before the Hon. Garland E. Burrell, Jr. On January 22, 1998, after jury selection was complete, Kaczynski entered a guilty plea under a plea agreement to all counts of both the California and New Jersey Indictments.[1] CR 523; ER 304-12 (plea agreement). On May 4, 1998, the district court sentenced Kaczynski to four consecutive life sentences, plus 30 years' imprisonment. The court also ordered Kaczynski to pay $15,026,000 in restitution to his victims. CR 549; SER 5. Pursuant to the terms of the plea agreement, Kaczynski did not appeal. *See* ER 310.

On April 23, 1999, Kaczynski filed a motion under 28 U. S. C. § 2255 seeking to vacate his conviction. CR 576. On May 27, 1996, the district court denied the motion. CR 583; ER 453. This appeal followed.

[1] In the plea agreement, Kaczynski agreed to the transfer of the New Jersey Indictment to the Eastern District of California under Federal Rule of Criminal Procedure 20(a). *See* ER 306, 521.

STATEMENT OF FACTS

1. Kaczynski's commission of 16 bombings resulting in the death of three people.

Between 1978 and his arrest in April 1996, Kaczynski, the so-called Unabomber, mailed or placed 16 bombs that killed three people and injured many others. The California Indictment charged Kaczynski with four bombings (Bombs 11, 13, 14, 16) that caused the death of two men, Hugh Scrutton and Gilbert Murray, and serious injury to two others, Charles Epstein and David Gelernter. The New Jersey Indictment charged Kaczynski with a bombing (Bomb 15) that resulted in the death of Thomas Mosser. As part of his guilty plea Kaczynski admitted that he committed each of the five charged and 11 uncharged bombings.[1]

a. The charged bombings

i. *The murder of Hugh Scrutton* (California Indictment Count One): In December 1985, Kaczynski traveled to Sacramento, California, where he placed a bomb disguised as wood scraps behind the Rentech computer rental store. On December 11, 1985, the store's owner, Hugh Scrutton, picked up the bomb, causing it to explode. Shrapnel from the bomb killed Mr. Scrutton almost instantly. In a coded journal found in Kaczynski's cabin, Kaczynski admitted that he planted the bomb and gloated, "Excellent. Humane way to eliminate somebody. He probably never felt a thing. 25000 dollar reward offered. Rather flattering."[2] SER 171, 325. In a log of bombing experiments found in his cabin, Kaczynski described the bomb and noted, "The device detonated with very good results." SER 172.

ii. *The attempted murders of Charles Epstein and David Gelernter* (California Indictment Counts Two-Seven): On approximately June 18, 1993, Kaczynski transported two bombs to Sacramento, California. He mailed one to Dr. Charles Epstein in Tiburon,

[1] The description of Kaczynski's offenses is largely drawn from the factual basis provided by the government at the plea colloquy, *see* SER 170-202, as supplemented by information in the government's sentencing memorandum. *See* SER 258-383.

[2] After Kaczynski's arrest, the government searched his cabin pursuant to a warrant. In addition to Kaczynski's journals, the search uncovered copies of letters that Kaczynski had sent to the *New York Times* and other publications as well as the typewriter used to type the letters and the labels on the bombs sent to Epstein, Gelernter, and Mosser and other victims. SER 171, 177.

California, and the other to Dr. David Gelernter in New Haven, Connecticut. On June 22, 1993, Dr. Epstein suffered severe injuries when he opened the package sent to him and the bomb exploded. On June 24, Dr. Gelernter opened the bomb sent to him; it exploded, and he suffered near-fatal injuries. SER 173. In a letter to the *New York Times*, a copy of which was found in Kaczynski's cabin, Kaczynski described the construction of these bombs and admitted that they were used "to blow up the genetics engineer Charles Epstein and the computer specialist David Gelernter." SER 173-74, 329. Kaczynski's journal describes the construction of these bombs and states, "I sent these devices during June, 1993. They detonated as they should have. The effect of both of them was adequate, but no more than adequate." SER 174.

iii. *The murder of Gilbert Murray* (California Indictment Counts Eight-Ten): In the spring of 1995, Kaczynski mailed a bomb from San Francisco to William Dennison at the California Forestry Association in Sacramento. On April 24, 1995, Gilbert Murray, the Association's president, opened the package, and the bomb exploded and killed him. In a letter to the *New York Times*, Kaczynski admitted mailing this bomb and stated that he had "no regret about the fact that [the bomb] blew up the 'wrong' man." SER 175-76, 333.

iv. *The murder of Thomas Mosser* (New Jersey Indictment Counts One-Three): On December 3, 1994, Kaczynski mailed a bomb from San Francisco to the home of advertising executive Thomas Mosser in North Caldwell, New Jersey. On December 10, 1994, Mr. Mosser opened the package in his kitchen seconds after his wife and 15-month-old daughter left the room. The bomb detonated and killed him. Kaczynski's log of bombing experiments states that the bomb "gave a totally satisfactory result." SER 178, 331. Letters found in Kaczynski's cabin explain that he murdered Mr. Mosser in part because he thought, incorrectly, that he worked for a public relations firm that "helped Exxon clean up its public image after the Exxon Valdez incident." SER 179.

b. Kaczynski's other bombings

i. *Bomb No. 1*: On approximately May 5, 1978, Kaczynski placed a package containing a bomb in a parking lot at the University of Illinois Chicago Circle campus. Kaczynski addressed the package to a professor at the Rensselaer Polytechnic Institute and gave a return address for Professor Buckley Crist at Northwestern Technical Institute. A passerby found the package and "returned" it to Professor Crist. When the package was opened, the bomb exploded but did not cause any harm. Kaczynski's journals state that he placed the bomb in an "attempt to murder a scientist, businessman or the like," but when he left it in the parking lot he hoped that it would injure the "good Samaritan" who found it. SER 182-83, 306.

ii. *Bomb No. 2*: In May 1979, Kaczynski placed a bomb concealed in a cigar box in a building at Northwestern University in Evanston, Illinois. A graduate student, John Harris, picked up the box and lifted the lid. The bomb exploded, causing Mr. Harris cuts, burns, and momentary blindness. Kaczynski's journals contained an admission to

this bombing that noted the injuries inflicted on Mr. Harris. SER 183-84. Kaczynski wrote that he hoped "the victim would be blinded or have his hands blown off . . . Well, at least I put him in the hospital, which is better than nothing. But not enough to satisfy me." SER 314.

iii. *Bomb No. 3*: On November 15, 1979, a bomb that Kaczynski mailed from Chicago was placed on American Airlines flight 444 to Washington, D.C. During the flight, the bomb started a fire in the plane's cargo area. The fire filled the cabin and cockpit of the plane with smoke, and the plane had to make an emergency landing. Kaczynski constructed the bomb using a barometric device intended to cause the bomb to detonate in flight. Kaczynski's journal contains an admission that he mailed this bomb with the notation, "Unfortunately plane not destroyed. Bomb too weak . . . Bomb did not accomplish much . . . At least it gave them a good scare." SER 184-86, 315. In a letter to the *New York Times*, Kaczynski explained that his "idea was to kill a lot of business people." SER 315.

iv. *Bomb No. 4*: In late May or early June 1980, Kaczynski, using a pseudonym, wrote to Percy Wood, the president of United Airlines. The letter stated that Kaczynski would be sending Mr. Wood a book that he recommended. On June 10, 1985, Mr. Wood received a package containing the book. When he opened the package, a bomb concealed in the book exploded, injuring him. Kaczynski's journals contain an admission that he sent this bomb with the comment that the bomb failed to perform as desired. SER 187-88, 317.

v. *Bomb No. 5*: In October 1981, Kaczynski constructed a bomb consisting of a can filled with gasoline with a pipe bomb suspended inside. The bomb was designed to detonate when it was picked up. He placed the bomb outside a classroom at the University of Utah. A student picked up the bomb, but it failed to detonate. The local bomb squad later rendered the bomb safe. Kaczynski's journals describe the device as a "firebomb" and lamented that the bomb had failed to explode despite the fact that he spent $300 to construct it. SER 189-90.

vi. *Bomb No. 6*: In the spring of 1982, Kaczynski mailed a bomb to Professor Patrick Fischer at Penn State University. Professor Fischer had moved to Vanderbilt University in Nashville, and the package was forwarded to him there. On May 5, 1982, Professor Fischer's secretary, Janet Smith, opened the package. The bomb exploded, injuring Ms. Smith. Kaczynski's journals noted newspaper reports that the "bomb drove fragments of wood into her chest," and complained, "Frustrating that I can't seem to make a lethal bomb." SER 191-92, 320.

vii. *Bomb No. 7*: On approximately July 2, 1982, Kaczynski placed another gasoline firebomb, this time in Cory Hall at the University of California at Berkeley. Kaczynski disguised the bomb as a piece of test equipment and designed it to detonate when it was picked up. Professor Diogenes Angelakos picked up the bomb, and it exploded, but the gasoline did not ignite. Kaczynski's journals noted newspaper accounts stating that the professor "would need surgery for bone and tendon damage to hand." The

journal entry continued, "Apparently pipe bomb went off but did not ignite gasoline. I don't understand it. Frustrated." SER 19394, 321.

viii. *Bomb No. 8*: On May 15, 1985, Kaczynski placed another bomb, concealed in a three-ring binder, in Cory Hall at Berkeley. John Hauser – an Air Force officer, aspiring astronaut, and graduate student – opened the bomb, and it exploded, severely injuring him. Kaczynski's journal gloated, "Success at last after many failures reported in these notes." The journal continued,

> Berkeley bomb did well for its size. It was sprung by Airforce pilot . . . He probably would have been killed if so positioned relative to bomb as to take the fragments in his body. As it were, mainly his right arm was hit. Witnesses said, "whole arm was exploded," "blood all over the place." One newspaper said arm was "mangled." Another said it was "shattered" and that he would never recover full use of arm and hand. Also there was damage to one eye This gives great relief to my choking, frustrated anger and sense of impotence against the system I would do it all over again . . . Further search of newspapers yielded Hauser's arm was "severed or nearly severed." Tips of 3 fingers torn off. Use of arm and hand will be permanently impaired. To what degree not known. Hauser father of 2 kids . . . He was afraid his "dream" was ruined. Dream was to be astronaut. Imagine a grown man whose dream is to be an astronaut. I am no longer bothered by this guy partly because I just "got over it" with time, partly because his aspiration was so ignoble I laughed at the idea of having any compunction about crippling an airplane pilot.

SER 195-97, 322

ix. *Bomb No. 9*: In May 1985, Kaczynski sent a bomb to Boeing

Aircraft in Auburn, Washington. Boeing employees made several attempts to open the package containing the bomb, but the bomb did not detonate. Bomb disposal personnel later rendered the bomb safe. Kaczynski's journals contain an admission that he sent this bomb. SER 198.

x. *Bomb No. 10*: In November 1985, Kaczynski, using a pseudonym, wrote to Professor James McConnell at the University of Michigan and asked him to review a manuscript. Kaczynski then mailed a bomb concealed in a hollowed- out ream of paper to the professor. Professor McConnell's assistant, Nick Suino, opened the package containing that device and was injured when the bomb exploded. Kaczynski's journals noted that Mr. Suino suffered "only minor injuries," and characterized this bomb as "[a] total failure." SER 199-200, 324.

xi. *Bomb No. 12*: On February 20, 1987, Kaczynski placed a bomb behind the CAAMS computer store in Salt Lake City. Like the bomb that killed Hugh Scrutton in 1985, this bomb was disguised as refuse. Gary Wright, the store's owner, picked up the device, causing it to explode. Mr. Wright suffered lacerations and permanent nerve

damage to his wrists and hands as a result of the blast. Kaczynski's journals states, "The device was placed Feb. 20 and worked the same day; it exploded and probably detonated but the results - as far as we could find out - were not enough to satisfy us." SER 202-02, 327.

2. Kaczynski's prosecution and trial

a. Pretrial and trial proceedings

On April 3, 1996, Kaczynski was arrested at his Lincoln, Montana, cabin. After his indictment in the Eastern District of California in June 1996, Quin Denvir, the Federal Public Defender for that district, and Judy Clarke, the Federal Public Defender for Eastern Washington and Idaho, were appointed to represent him. CR 6, 13. Denvir and Clarke enlisted attorney Gary Sowards to assist them, and during pretrial proceedings at least four other attorneys appeared on Kaczynski's behalf. On June 24, 1997, Kaczynski gave notice under Federal Rule of Criminal Procedure 12.2(b) of his intent to introduce expert testimony of his mental condition at trial. CR 128.

Trial began with jury selection on November 12, 1997. CR 325. During jury selection 600 jurors were summoned, and 450 potential jurors filled out questionnaires. Over 16 court days (lasting approximately six weeks), the district court and the parties individually questioned 182 jurors. ER 272-73. On December 22, the parties exercised their peremptory challenges and selected the jury. ER 454.

On December 18, 1997, Kaczynski gave the district court three letters stating that he had a conflict with his attorneys over the presentation of a mental status defense. ER 17-30, 454. On December 19 and 22, the district court held *in camera*, *ex parte* hearings with Kaczynski and his attorneys. At the December 22 hearing, Kaczynski informed the court that he had reached an agreement with his attorneys over the use of mental status evidence. Kaczynski's attorneys agreed that they would withdraw the Rule 12.2(b) notice and would not present any expert mental health testimony at the guilt phase of the trial. Kaczynski agreed that counsel could control the presentation of evidence at the penalty phase and that counsel could "call mental health expert witnesses and also members of Mr. Kaczynski's family. . . to put on a full case of mitigation." ER 315-16 (quoting 12/22/97 Tr. at 39 [ER 82]). Kaczynski expressly stated that he did not wish to represent himself and that he wished to continue with his current attorneys. ER 73, 81.

On January 5, 1998, the date set for opening statements, Kaczynski informed the district court that he wished to revisit the issue of his relations with his attorneys. ER 316, 454. In a letter and at another *in camera*, *ex parte* hearing, Kaczynski for the first time raised with the district court the possibility of being represented by attorney Tony Serra. ER 93-99. Kaczynski also told the district court that he had only recently learned that his attorneys intended to present nonexpert mental status evidence at the

guilt phase of the trial. ER 109-10. Kaczynski's attorneys explained that they intended to introduce evidence of Kaczynski's "physical state," "living conditions," "lifestyle," and writings to show "the deterioration of [his] mental state over the 25 years that he was in Montana." ER 161. The district court appointed a "conflicts attorney," Kevin Clymo, to represent Kaczynski in the alleged conflict with his attorneys, ER 316-17, 454-55, and continued trial until January 8, 1998. CR 463; ER 455.

On January 7, Kaczynski initially withdrew his request to be represented by Serra, ER 153, but later that day after learning that Serra would need "considerable time to prepare," Kaczynski again asked to be represented by Serra. ER 185. The district court denied this request, and ruled that Kaczynski's attorneys could present evidence of Kaczynski's mental condition over Kaczynski's objection. Kaczynski agreed to continue being represented by Denvir and Clarke and to acquiesce in a mental status defense.[3] CR 477; ER 165, 188, 190-91, 318. Kaczynski also rejected the option of representing himself. ER 165, 319. Nevertheless, the next day (January 8), immediately prior to the rescheduled opening statements, Kaczynski informed the court for the first time that he wished to represent himself.[4] ER 217-18, 320, 455. The district court then ordered that Kaczynski submit to a competency examination, and trial was continued until January 22, 1998. CR 481, 483; ER 320, 455. A court-appointed psychiatrist examined Kaczynski and concluded that he was competent. ER 321.

On January 20, 1998, the district court found Kaczynski competent to stand trial. ER 321, 455. On January 21, Kaczynski again asked to represent himself. ER 321. On January 22, the district court denied that request. In a lengthy opinion from the bench, the court found Kaczynski's request to represent himself untimely because it came after "'meaningful trial proceedings'" and the empanelment of the jury. ER 266 (quoting *United States v. Smith*, 780 F.2d 810, 811 (9th Cir. 1986)). The court found that the jury had been empaneled on December 22, 1997, when the parties had exercised their peremptory challenges and selected the jury. Thus, the court held, Kaczynski's first request to represent himself on January 8, 1998, came 17 days after the jury had been empaneled. ER 269-70.

The district court also found "ample evidence" that Kaczynski's motion to represent himself "was a tactic to secure delay" and that "'delay would have attended the granting of the motion.'" ER 270 (quoting *United States v. Price*, 474 F.2d 1223, 1227 (9th Cir. 1973)). The court noted that this was a complex capital prosecution in which the government expected to introduce more than 1,300 exhibits including "technical exhibits necessitating expert testimony." ER 270. Although Kaczynski did not request a continuance, the court found that it was "'impossible to conceive the defendant could . . . immediately assume . . . his own defense without considerable delay for him to

[3] Kaczynski told the court that he could communicate with his attorneys and that the only problem he had with them concerned the mental status defense. ER 174, 175.

[4] On January 8, the court informed the parties that it had learned from U.S. Marshals personnel that Kaczynski "might have attempted to commit suicide" the previous evening. ER 320; *see* ER 255.

prepare himself to conduct an adequate defense.'" ER 271 (quoting *State v. Stenson*, 940 P.2d 1239, 1274 n.16 (Wash. 1997), *cert. denied,* 523 U.S. 1008 (1998)).

The district court found that "[a]ny delay caused by Kaczynski's belated request to represent himself will significantly enhance the risk that jurors will be unable to continue to serve in this case." ER 272. The court noted that "[b]ecause of the considerable pretrial publicity and the fact that this is a capital case, the jury selection process was long and arduous." ER 272. In light of the number of jurors summoned and questioned and the length of voir dire, the court concluded that "[t]he effect of having to select a new jury for this case cannot be [overstated]." ER 272-73.

The court also found that "Kaczynski's conduct is not consistent with a good faith assertion of" his right to represent himself. ER 279. It held that Kaczynski had long known of his attorneys' intention to present mental health evidence, and it noted that on December 22, 1997, Kaczynski had agreed that his attorneys could present mental health testimony at the penalty phase of the trial. In light of this agreement, the district court found that Kaczynski's conflict with his attorneys turned solely on "the precise moment at which [mental health] evidence will be presented." ER 282. The court concluded that Kaczynski's "asserted justification" for seeking to represent himself was "so unreasonable in light of the December 22 resolution that it is an obvious attempt by him to purposefully delay the proceeding" and a "deliberate attempt to manipulate the trial process for the purpose of causing delay." ER 283. The court added that the "integrity of the justice process would be undermined if such unreasonable personal positions could serve as a basis for undermining trial proceedings." ER 283. The court reiterated, "if Kaczynski desired to represent himself, he certainly could have asserted that right earlier." ER 283-84.

Finally, the court declined to exercise its discretion to permit Kaczynski to represent himself notwithstanding his untimely request. The court determined that such an exercise of discretion would result in Kaczynski's foregoing "the only defense that is likely to prevent his conviction and execution." ER 285. Granting Kaczynski's request thus would "impugn[] the integrity of our criminal justice system, since it would simply serve as a suicide forum for a criminal defendant." ER 286.

b. Kaczynski's plea agreement and guilty plea

Immediately after the court rejected Kaczynski's request to represent himself, defense counsel informed the court that Kaczynski would unconditionally plead guilty to both the California and New Jersey Indictments if the government would withdraw its notices of intent to seek the death penalty.[5] ER 286. The government accepted this offer, and the parties entered into a plea agreement. CR 523; ER 304-12. In the agreement, Kaczynski agreed that he was pleading guilty "because he is in fact guilty."

[5] In plea negotiations prior to that date, Kaczynski had insisted on being able to enter a conditional plea that would have preserved his right to appeal the district court's order denying his motion to suppress evidence seized from his cabin. ER 287, 468.

ER 306. Kaczynski also acknowledged that he was waiving various Fifth and Sixth Amendment rights, that he had discussed this waiver with his attorneys, and that he "freely and voluntarily consents to said waiver." ER 309-10. The agreement contained the following provision directly above the defendant's signature:

> I have carefully reviewed every part of this plea agreement with my attorneys. I understand it, and I voluntarily agree to it and freely acknowledge that I am guilty of the crimes charged. Further, I have consulted with my attorneys and fully understand my rights with respect to the provisions of the Sentencing Guidelines which may apply to my case. No other promises or inducements have been made to me, other than those contained in this Agreement. In addition, no one has threatened or forced me in any way to enter into this Plea Agreement. Finally, except as otherwise reflected in the record, I am satisfied with the representation of my attorneys in this case.

ER 311. The agreement provided that if Kaczynski "is permitted to withdraw his plea for any reason," both indictments and the government's notices of intent to seek the death penalty would be reinstated. ER 308.

At the change-of-plea colloquy held the same day, Kaczynski stated under oath that he was "entering [the] plea of guilty voluntarily because it is what [he] want[ed] to do," ER 297, that he was satisfied with his attorneys' representation, ER 299, and that no one had in any way forced or threatened him to plead guilty. ER 299-300. The district court found that "the defendant is fully competent and capable of entering an informed plea and that his plea of guilty is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offenses." SER 203.

c. The district court's May 4, 1998, order

On May 4, 1998, the date of Kaczynski's sentencing, the district court issued an order further explaining its rulings that Kaczynski was competent to stand trial and that he had not made a timely assertion of his right to self-representation. The court found that "[t]he evidence here overwhelmingly demonstrates Kaczynski's competence to participate in the criminal proceedings" against him. ER 326. It added that "Kaczynski's request for self-representation and simultaneous abandonment of perhaps his only defense [did] not disturb [the court's] finding that he is competent," because those actions "were strategies that enabled him to delay the trial proceedings and to improve his settlement prospects with the government." ER 327.

In support of this conclusion, the court conducted a detailed review of the events leading to Kaczynski's guilty plea. The court found that Kaczynski's interruption of trial on January 5, 1998, did not result from a conflict with his attorneys over the mental status defense, because that conflict had been resolved by Kaczynski's December

22 agreement with his attorneys. Instead, the court concluded that Kaczynski sought to be represented by Tony Serra at that point in order to obtain a "substantial delay of the trial." ER 330. Likewise, the court found that Kaczynski's "alleged suicide attempt" on January 7 "was merely one attempt among many rational and ongoing attempts to delay the trial." ER 333. According to the court, Kaczynski knew that any effort to represent himself would trigger a request from his attorneys to have his competency evaluated, and thus Kaczynski "timed abandonment of [the mental status] defense and his selfrepresentation request to follow close upon the report of a suicide attempt, thereby ensuring that his trial attorneys would call for a competency evaluation" and further delay trial. ER 333.

The court also found that Kaczynski's efforts to delay trial and his assertion of his right to represent himself were part of a plan to increase his chances of obtaining a favorable settlement with the government. Kaczynski wanted to preserve his right to appeal the district court's suppression rulings, ER 333, and he knew, the court found, that the government was reluctant "to prosecute Kaczynski in a pro se status" in a capital trial. ER 335. By rejecting any mental status defense and seeking to represent himself, the court found, Kaczynski rendered himself "defenseless" and placed himself in a position to "garner public sympathy as an apparently mentally ill defendant pitted against three experienced prosecutors in a capital case." ER 335.

Finally, the court found that Kaczynski retained an ability to communicate with his attorneys, that he "knew that his counsel had, at heart, his best interests," and that "none of the alleged 'conflicts' justified having them substituted with other counsel." ER 337. Thus, the court held, "Kaczynski lacked *bona fide* reasons for questioning his lawyers' judgment, and he received competent representation throughout the proceedings." ER 338. The court concluded that "to allow Kaczynski to disavow the agreement that resolved the conflict on the eve of trial absent *bona fide* reasons for doing so would undermine the integrity of the judicial process and would be tantamount to allowing him to 'play[] fast and loose with the court[].'" ER 338 (quoting *Helfand v. Gerson,* 105 F.3d 530, 534 (9th Cir. 1997)).

In reaffirming its decision denying Kaczynski's request to represent himself, the court reiterated that "Kaczynski's self-representation request was not timely because it occurred after the jury was empaneled" and after "meaningful trial proceedings." ER 342-43. The court rejected the notion that Kaczynski had sought to represent himself because he could not "'endure' his lawyers' strategy of presenting mental status evidence in his defense." According to the court, "[n]ot only could Kaczynski tolerate this defense, he had authorized its use" in the December 22 agreement. ER 346. The court also reiterated that "the events preceding his request to represent himself were not consistent with a good faith assertion of the Faretta right to self-representation." ER 345.

3. Kaczynski's motion under 28 U.S.C. § 2255

On April 23, 1999, Kaczynski filed a Section 2255 motion seeking to vacate his conviction. CR 576. The motion argued that the district court erred in refusing to allow Kaczynski to represent himself and in ruling that Kaczynski did not have the right to preclude his attorneys from presenting lay mental health testimony at the guilt phase of trial. Kaczynski also asserted that his attorneys had rendered ineffective assistance by seeking to present a mental status defense over his objections. Finally, Kaczynski contended that the district court's rulings and his attorneys' decision to present a mental status defense coerced him into pleading guilty. According to Kaczynski, he found it "unendurable" to be portrayed as a "grotesque and repellant lunatic." Pet. at 105-06.

On May 27, 1999, the district court found Kaczynski's challenge to his plea to be "wholly without merit" and denied the motion.[6] CR 583; ER 453-71. First, the court held that "by pleading guilty, Kaczynski abandoned his right to challenge" the legal rulings that the court made before Kaczynski entered his plea. ER 457. Nor, the court held, could Kaczynski circumvent that rule by converting his challenge to the court's legal rulings into a claim that his plea was involuntary. ER 457-58.

The court also rejected Kaczynski's claim that his plea was involuntary because he could not "endure" the presentation of a mental status defense. Initially, the court found that the record "undercut" and "belied" this argument, since Kaczynski agreed on December 22, 1997, to the presentation of lay and expert mental health testimony at the penalty phase of the trial. In light of that agreement, the court ruled that Kaczynski had failed to show how his discovery that counsel intended to present lay mental health testimony at the guilt phase could have overborne his will and caused him to plead guilty. ER 460 n.7. In any event, the court held, this kind of "personal pressure does not transform a plea into an involuntary act." ER 460-61.

The court also rejected Kaczynski's contention that his plea was the result of ineffective assistance of counsel. The court noted that Kaczynski stated under oath during the change-of-plea colloquy that he was satisfied with his counsel except for the dispute over whether to present a mental status defense. ER 462. Kaczynski also affirmed "without hesitation," "signs of anxiety or distress," or "sign of reservation or remorse" that he was pleading guilty voluntarily, and he denied that anyone had forced or threatened him to do so. ER 463-64. Because Kaczynski was fully aware of this dispute and nevertheless decided to plead guilty, the court concluded that his plea was voluntary. *Ibid.*

Counsel's decision to put on a mental status defense did not constitute ineffective assistance, the court held, because it did not create an irreconcilable conflict between Kaczynski and his attorneys. Instead, the court ruled, Kaczynski's Section 2255 motion

[6] Kaczynski also moved to recuse Judge Burrell. By separate orders, the district court denied that motion and a motion to reconsider the denial. CR 579, 582; SER 9, 11.

revealed that "Kaczynski was aware of what he saw as a potential conflict early in the preparation of the defense but vacillated on his decision of whether to endorse a mental status defense and made a deliberate tactical choice to wait until December 18, 1998, to bring the perceived problem to the judge's attention." ER 465. The court noted that in June 1997, five months before trial, Kaczynski told his attorneys that he did not want to use a mental-state defense, but he then agreed to the filing of a Rule 12.2(b) notice to preserve his right to introduce mental health evidence. ER 466-67. As late as November 15, 1997, after the start of trial, Kaczynski told his attorneys that he was "'prepared to accept the kind of defense [his attorneys] want to put on.'" ER 467 (quoting Kaczynski's § 2255 motion at 26). Likewise, the court found, Kaczynski knew by November 10, 1997, that he had a potential conflict with counsel, but he refrained from bringing it to the court's attention so as not to lose a tactical advantage in plea negotiations. ER 468-69. The court thus rejected Kaczynski's allegation that defense counsel misled him into foregoing the opportunity to obtain new attorneys or bring the alleged conflict to the court's attention. ER 469.

Finally, the court held that Kaczynski's Section 2255 motion failed to show a reasonable probability that but for counsel's alleged errors, "'he would not have pleaded guilty and would have insisted on going to trial.'" ER 469 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). To show the requisite prejudice, the court held, "Kaczynski must show that the likely outcome of trial would have been objectively better without the presentation of the mental status defense." ER 470. The court ruled that Kaczynski could not meet this standard by showing that counsel sought to pursue "a viable defense," and it found that "considering the vast amount of evidence against him, . . . Kaczynski's best defense was the mental status defense." ER 469, 470. The court concluded, "[s]ince Kaczynski points to no new evidence that casts any doubt on the fact that he committed the crimes to which he plead guilty, his life would be at stake should he go to trial because he could receive a death sentence." ER 470.

SUMMARY OF ARGUMENT

1. Kaczynski pleaded guilty knowing of the consequences of his plea. He was not threatened or coerced, and his attorneys did not deceive him in any way that affected his decision to plead. That plea, moreover, was an objectively reasonable resolution of the capital charges against him. Accordingly, under settled standards, his plea was voluntary. Because Kaczynski's plea was voluntary, he may not now challenge the legal rulings that the district court made prior to his decision to plead, even if those rulings provided the motivation for his plea. Both the Supreme Court and this Court have repeatedly stressed that a voluntary guilty plea constitutes a waiver of the right to challenge antecedent constitutional violations, and Kaczynski cannot evade this rule simply by claiming that the court's legal rulings "coerced" his plea. In any event, Kaczynski has failed to show that the district court's rulings could have coerced him to plead guilty. Instead, at bottom, his argument is simply that he did not like the options available to him at the time that he entered his plea.

2. Kaczynski's guilty plea waived his right to challenge the district court's order denying his request to represent himself. If the Court reaches that issue, however, it should find that the district court correctly ruled that Kaczynski did not timely assert his right to self-representation. Kaczynski's request came after six weeks of the complicated jury selection necessary in a highly publicized, federal capital trial, 18 days after the jury had been empaneled, and only after Kaczynski had repeatedly denied that he wished to represent himself. Moreover, as the district court found, the circumstances surrounding Kaczynski's assertion of his right to represent himself show that he did not act in good faith and that he sought to delay the proceedings.

3. Kaczynski's voluntary guilty plea also waived his right to challenge the district court's ruling that his attorneys could introduce nonexpert evidence of his mental condition at the trial's guilt phase. Again, however, that ruling was not erroneous. Under the circumstances of this case, Kaczynski's attorneys' choice of defense was not one of the fundamental decisions reserved to the defendant. Instead, the use of a minimal amount of mental-status evidence to undermine the government's proof of Kaczynski's intent to commit some of the charged crimes was a matter of trial tactics that fell within the prerogative of defense counsel.

ARGUMENT

I. KACZYNSKI'S GUILTY PLEA WAS VOLUNTARY

Kaczynski claims (Br. 45-53) that his guilty plea was involuntary because it was motivated by the district court's rulings that his attorneys could present lay testimony concerning his mental health at the guilt phase of trial and that he had not timely asserted his right to represent himself. As the district court held, however, Kaczynski made a rational, intelligent, and voluntary decision to plead guilty. That plea waived his right to challenge the district court's legal rulings, and he may not circumvent that waiver by recasting his arguments as an attack on the voluntariness of his plea.[1]

A. Standard of review

The denial of a Section 2255 motion and the voluntariness of a guilty plea are reviewed de novo. *See Frazer v. United States*, 18 F.3d 778, 781 (9th Cir. 1994); *United States v. Roberts*, 5 F.3d 365, 368 (9th Cir. 1993). The district court's factual findings are reviewed for clear error. *See United States v. Signori*, 844 F.2d 635, 638 (9th Cir. 1988).

B. Kaczynski's guilty plea was voluntary and waived his right to challenge the district court's mental defense and self-representation rulings.

1. Because the need for finality has "'special force with respect to convictions based on guilty pleas,'" a guilty plea may be attacked on collateral review only in "strictly

[1] Kaczynski's Section 2255 motion should be dismissed because he failed to raise his claims on appeal. A defendant who has procedurally defaulted a claim by failing to raise it on direct review must show cause and actual prejudice, *Murray v. Carrier*, 477 U.S. 478, 485 (1986), or "actual innocence." *Smith v. Murray*, 477 U.S. 527, 537 (1986); *see United States v. Benboe*, 157 F.3d 1181, 1184 (9th Cir. 1998). "[E]ven 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*, 523 U.S. 614, 621 (1998). Kaczynski cannot show "cause" simply by asserting that he waived his right to appeal, *see United States v. Pipitone*, 67 F.3d 34, 39 (2d Cir. 1995), and in light of the "vast amount of evidence against him" (ER 470), he cannot show that he is actually innocent. Moreover, Kaczynski's failure to raise his claims on appeal is inexcusable because he knew all of the facts that support those claims when he was sentenced.

limited" circumstances. *Bousley v. United States*, 523 U.S. 614, 621 (1998) (quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979)). In particular, "a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *Mabry v. Johnson*, 467 U.S. 504, 508 (1984). Thus, when a defendant challenges the validity of a conviction pursuant to a guilty plea, "the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary." *United States v. Broce*, 488 U.S. 563, 569 (1989).

A plea is voluntary if it "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). Accordingly, "a plea of guilty entered by one fully aware of the direct consequences . . . must stand, unless 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." *Brady v. United States*, 397 U.S. 742, 755 (1970); *see Machibroda v. United States*, 368 U.S. 487, 493 (1962) (plea is invalid if "induced by promises or threats which deprive it of the character of a voluntary act"); *Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir. 1995) (same). In determining whether a plea is voluntary, this Court attaches "substantial weight to contemporaneous on-the-record statements," *United States v. Mims*, 928 F.2d 310, 313 (9th Cir. 1990), and the defendant's "[s]olemn declarations in open court carry a strong presumption of verity" and erect a "formidable barrier" to challenging the plea in a collateral attack. *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

Kaczynski's challenge to his guilty plea does not meet these standards. First, he does not contend that he was unaware of the direct consequences of his plea. Indeed, the record and Kaczynski's pleadings in the district court and this Court demonstrate that he had a keen understanding of the difference between a conditional and unconditional plea, the district court's rulings, the effect those rulings would have on his trial, and the rights he was waiving by pleading guilty. In fact, it was Kaczynski's dispassionate assessment of his alternatives that led him to plead guilty. Plainly, therefore, his plea was knowing and intelligent.

Moreover, by any objective standard, Kaczynski's guilty plea represents the most rational choice among his alternatives. The search of Kaczynski's cabin uncovered overwhelming evidence that he committed the Unabom crimes. That evidence included journals in which Kaczynski detailed his cold blooded commission of the bombings and gloated over the suffering he inflicted on his victims; the typewriter used to address the mailing labels on the packages containing the bombs sent to Thomas Mosser, Charles Epstein, David Gelernter, and three other victims; a live bomb nearly identical in design to the bomb that killed Gilbert Murray; and an extensive collection of materials that could be used to manufacture other bombs.

The government also had compelling evidence in support of its notice of intent to seek the death penalty.[2] That evidence showed that Kaczynski's 18-year reign of terror was motivated by sheer hatred and, in his own words, was borne of a desire for "personal revenge," without "any kind of philosophical or moralistic justification." SER 294. His commission of these vicious crimes was devoid of any remorse for his victims or their families, many of whom would have testified to the devastation that Kaczynski's crimes wrought on their lives. For example, Susan Mosser, the wife of Thomas Mosser, would have detailed (i) how she and their 15-month-old daughter were only a few feet away from the bomb seconds before it exploded, (ii) the "horrifying image" of seeing her husband lying on the kitchen floor, his "stomach slashed open," (iii) the difficulty of breaking the news of Thomas's murder to his four children, knowing it would "destroy their world," (iv) the unimaginable agony and feeling of emptiness her children have endured, and (v) the pain she feels watching her children "bleeding from their souls." SER 213-21.

In short, Kaczynski's plea avoided a trial at which he faced certain conviction and a substantial possibility that he would receive the death penalty.[3] By negotiating a plea bargain, Kaczynski barred the government from seeking the maximum penalty and secured the government's agreement to refrain from further prosecuting him for the Unabom crimes. Kaczynski's success in securing these concessions is further evidence of the voluntariness of the plea. As the Supreme Court has observed, plea agreements

> are consistent with the requirements of voluntariness and intelligence – because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained for exchange.
> *Mabry*, 467 U.S. at 508.

Finally, Kaczynski does not contend that his plea was induced by threats, improper promises, or misrepresentations. Although he asserts that until November 25, 1997, his attorneys deceived him concerning their intent to use a mental defect defense, Kaczynski was fully aware of his attorneys' intentions when he decided to plead guilty, and he does not claim that his attorneys, the court, or the government made any misrepresentation to him in an effort to convince him to plead guilty. To the contrary, it was Kaczynski's acute awareness of his attorneys' trial strategy that disturbed him. Thus, even if his attorneys deceived him at some point during their representation

[2] On November 7, 1997, the district court granted the government's request to offer proof of the following aggravating factors: substantial planning and premeditation; the commission of multiple murders and other significant acts of violence; lack of remorse; continuing danger to the lives and safety of others; and severe and irreparable harm to the family of a murder victim. CR 310.

[3] Kaczynski repeatedly protests that he would rather suffer the death penalty than life imprisonment. The district court, which had an extensive opportunity to observe and interact with Kaczynski, came to a contrary conclusion and found that Kaczynski's actions were motivated by the desire to avoid the death penalty. ER 328, 332-33, 339.

of him, that deception was not ongoing when he decided to plead guilty, and, as the district court found (ER 464), it did not induce his plea. Therefore, there is no reason to doubt Kaczynski's sworn statements in the plea agreement and during the plea colloquy that no one had threatened or forced him to plead guilty.

Instead of claiming that he was coerced or confused when he pleaded guilty, Kaczynski contends that his plea was involuntary because the district court's legal rulings left him no alternative that he found personally acceptable except to plead guilty. On its face, however, that is not a challenge to the voluntariness of his plea. Rather, Kaczynski's argument is simply that the alternative he voluntarily selected was unpleasant to him. The Due Process Clause does not protect a defendant against unpleasant pleas, however, only against involuntary ones. *See Brady*, 397 U.S. at 750; *United States v. Montilla*, 870 F.2d 549, 553 (9th Cir. 1989) ("A forced choice between asserting a constitutional right at trial and accepting the government's offer, while undoubtedly difficult, is not unconstitutional."); *cf. United States v. Martinez-Salazar*, 120 S. Ct. 774, 781 (2000) ("A hard choice is not the same as no choice.").

Moreover, acceptance of Kaczynski's claim would allow him to perpetrate a fraud on the court and the government by executing a plea agreement that he apparently did not intend to honor. To reiterate, Kaczynski entered into the plea fully understanding the district court's rulings. If he believed those rulings "coerced" him to plead guilty, he should have spoken up when the district court directly asked him whether he was entering his plea voluntarily. Had he done so, the district court would have inquired further to ensure that the plea was voluntary or refused to take the plea and allowed the government to present its case when it was fully prepared to do so. Instead, Kaczynski concealed his alleged concerns from the court.

In sum, Kaczynski does not allege that his guilty plea resulted from coercion that overbore his will, that he could not "rationally weigh the advantages of going to trial against the advantages of pleading guilty," *Brady*, 397 U.S. at 750, that he did not "understand the nature of the constitutional protections that he [was] waiving, *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976), or that he could not make "a voluntary and intelligent choice among the alternative courses of action open to him," *Alford*, 400 U.S. at 31. Under settled standards, his plea was voluntary.

2. Kaczynski's attack on his guilty plea must also be rejected because his "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) (emphasis omitted); *see Montilla*, 870 F.2d at 552 ("a guilty plea erases claims of constitutional violation arising before the plea"). As the Supreme Court has explained,

> a guilty plea represents a break in the chain of events which has preceded it in the criminal process. 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. 258, 267 (1973). In *Broce*, the Court held that the only exception to the rule barring a collateral attack on a voluntary and intelligent guilty plea is for challenges to the government's power "to bring any indictment at all." *Broce*, 488 U.S. at 575; *see United States v. Cortez*, 973 F.2d 764, 766-67 (9th Cir. 1992) (guilty plea waives any claim that requires proof of facts outside the indictment or the record at the guilty plea stage); *Montilla*, 870 F.2d at 552-53 (only exceptions to *Brady/Broce* waiver doctrine are for claims that "the applicable statute is unconstitutional or that the indictment fails to state an offense") (internal quotation marks and citation omitted). Applying this reasoning, both the Supreme Court and this Court have routinely held that a defendant's voluntary guilty plea forecloses him from later alleging that he suffered a violation of his Fourth, Fifth, or Sixth Amendment rights prior to the plea. *See Ricketts v. Adamson*, 483 U.S. 1, 9-10 (1987) (double jeopardy); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (right to confrontation); *Floyd*, 108 F.3d at 204 (Fourth Amendment); *Cortez*, 973 F.2d at 528 (selective prosecution); *United States v. O'Donnell*, 539 F.2d 1233, 137 (9th Cir.) (speedy trial), *cert. denied*, 429 U.S. 960 (1976); *Fruchtman v. Kenton*, 531 F.2d 946, 948 (9th Cir.) (confrontation and compulsory process), *cert. denied*, 429 U.S. 895 (1976).

Kaczynski's guilty plea likewise waives his right to challenge the district court's self-representation and choice-of-defense rulings. *See United States v. Seybold*, 979 F.2d 582, 585-86 (7th Cir. 1992) (guilty plea waives selfrepresentation claim), *cert. denied*, 508 U.S. 979 (1993); *Thompson v. Nelson*, 429 F.2d 1393, 1393 (9th Cir. 1970) (plea "foreclosed" defendant's claim that his plea was coerced by adverse publicity), *cert. denied*, 401 U.S. 943 (1971). Kaczynski cannot evade the consequences of his guilty plea by converting his challenge to the district court's pre-plea rulings "into a claim that [his] plea has been involuntarily coerced." *Mayes v. Pickett*, 537 F.2d 1080, 1081 (9th Cir.), *cert. dismissed*, 434 U.S. 801 (1976). Yet, that is precisely what he seeks to do in this Court. To consider his claim that his plea was "the product" of the district court's legal rulings, this Court must review those rulings and determine whether the district court erred. His effort to set aside the plea is thus an effort to obtain the conditional guilty plea that he bargained away. In addition, Kaczynski's claims rely on facts beyond the face of the indictment and the record established at the plea colloquy. *See Cortez*, 973 F.2d at 767.

Kaczynski's position is therefore exactly the same as any criminal defendant who loses an important evidentiary or legal ruling prior to or during trial. Rather than persevere in challenging those rulings at trial and on appeal, he elected to plead guilty and waive his right to appeal, and he then solemnly stated under oath that he had committed the charged offenses and that he was entering his plea voluntarily. Although he may now regret that decision, he cannot relitigate his legal arguments in the guise of a challenge to the voluntariness of his plea.

3. Even if Kaczynski's attacks on the district court's legal rulings may properly be raised in a collateral attack on his guilty plea, he has not shown a basis for invalidating the plea.[4] A guilty plea is not involuntary even if it is motivated by considerations far more compelling than an aversion to being portrayed as suffering from mental illness. Thus, in *Alford*, 400 U.S. at 31, the Supreme Court held that a "guilty plea which would not have been entered except for the defendant's desire to avoid a possible death penalty . . . was not for that reason compelled," even though the defendant was "unwilling or unable to admit his participation in . . . the crime." *See Rodriguez v. Ricketts*, 777 F.2d 527, 528 (9th Cir. 1985) (plea is voluntary even if the "fear of the death penalty is a principal motivation"). Similarly, in *Brady*, 397 U.S. at 749-55, the Court refused to invalidate a plea entered to avoid the death penalty under a statute later declared unconstitutional. The Court explained that there was no "requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that . . . the maximum penalty then assumed applicable had been held inapplicable in subsequent judicial decisions." *Id.* at 757. By the same reasoning, Kaczynski's plea is not involuntary even if it rested on legal rulings that he might have been able to overturn if he had properly preserved his right to challenge them.

Likewise, Kaczynski's personal distaste for mental health evidence or his "sense of injustice" over the choice he faced does not render his plea involuntary. Courts routinely find that guilty pleas are voluntary when they are motivated by embarrassment, desire to protect a family member from prosecution, or some other emotional or personal reason. *See United States v. Attar*, 38 F.3d 727, 733 n.2 (4th Cir. 1994) (plea is not involuntary because defendant entered into it to spare his family embarrassment), *cert. denied*, 514 U.S. 1107 (1995); *United States v. Pellerito*, 878 F.2d 1535, 1541 (1st Cir. 1989) (plea was not coerced because defendant felt his family had "suffered too much"); *Cortez v. United States*, 337 F.2d 699, 700-01 (9th Cir. 1964) (plea is not coerced because it was motivated by offer to allow pregnant wife to plead to a lesser charge), *cert. denied*, 381 U.S. 953 (1965). As the Fourth Circuit explained,

[4] As the district court noted, the record strongly suggests that its rulings had no effect on Kaczynski's decision to plead guilty. On December 22, 1997, Kaczynski agreed that his attorneys could present both expert and lay evidence concerning his mental health at the penalty phase of the trial, and his attorneys agreed that they would not introduce expert mental health testimony at the guilt phase. Kaczynski and his attorneys disagreed solely over whether his attorneys could present lay testimony concerning his mental health at the guilt phase. Moreover, Kaczynski's attorneys sought only to introduce a limited amount of nonexpert evidence at the guilt phase in an effort to show that he could not form the intent necessary to commit the offenses charged in the indictment. As the district court concluded, Kaczynski's complaint that he pleaded guilty to avoid being depicted as "insane" lacks support in the record. *See* ER 460 n.7. Because Kaczynski sought to represent himself only because the district court refused to preclude his attorneys from introducing mental health evidence, the record also supports the inference that the district court's order denying his request to represent himself did not motivate his decision to plead guilty.

> A defendant's desire to spare his family the embarrassment of trial is not sufficient to render his decision to plead guilty "involuntary" in the constitutional sense; if it were, virtually every guilty plea would be invalid, for a defendant can almost always claim that he entered into it in part *to spare himself* or his family the embarrassment of trial.

Attar, 38 F.3d at 733 n.2 (emphasis added). Since the government at a criminal trial will always seek to show the defendant's guilt, the defendant's antipathy toward his portrayal at trial cannot rise to the level of the coercion necessary to invalidate an otherwise voluntary plea. Accordingly, if the Court reaches Kaczynski's claim that his plea was coerced by the district court's legal rulings, it should affirm the district court's order denying Kaczynski relief under Section 2255.

II. THE DISTRICT COURT DID NOT IMPROPERLY DENY KACZYNSKI HIS RIGHT TO REPRESENT HIMSELF.

As explained above, Kaczynski's guilty plea waived his right to challenge the district court's decision denying his request to represent himself. If this Court reaches that issue, however, it should affirm the district court. The district court properly concluded that Kaczynski failed to assert his right to represent himself in a timely manner and that he asserted that right for purposes of delay.

A. Standard of review

The district court's factual findings concerning Kaczynski's motion to represent himself are reviewed for clear error. *See United States v. George*, 56 F.3d 1078, 1084 (9th Cir.), *cert. denied*, 516 U.S. 937 (1995); *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994). This Court has not decided whether a district court's decision denying a defendant's request to represent himself is reviewed de novo or for abuse of discretion. *See George*, 56 F.3d at 1083. Ordinarily, the validity of the waiver of the right to counsel is reviewed de novo, *see United States v. Springer*, 51 F.3d 861, 864 (9th Cir. 1995), but a district court should have discretion to determine whether a defendant's untimely assertion of his right to represent himself disqualifies him from exercising that right. *See United States v. Lawrence*, 605 F.2d 1321, 1324 (4th Cir. 1979), *cert. denied*, 444 U.S. 1084 (1980).

B. Kaczynski's request to represent himself was untimely

A defendant's assertion of his right to represent himself under *Faretta v. California, 422* U.S. 806 (1975), "is valid only if it is 'timely, not for the purposes of delay, un-

equivocal, and knowing and intelligent.'" *United States v. Keen*, 104 F.3d 1111, 1114 (9th Cir. 1996) (quoting *United States v. Arlt*, 41 F.3d 516, 519 (9th Cir. 1994)); *see United States v. Smith*, 780 F.2d 810, 811 (9th Cir. 1986). A *Faretta* request is timely "'if made before meaningful trial proceedings have begun,'" "'prior to jury selection,'" and "'before the jury is impaneled.'" *United States v. Schaff*, 948 F.2d 501, 503 (9th Cir. 1991) (quoting *Smith*, 780 F.2d at 811).[5] Timely assertion of a defendant's *Faretta* right is necessary to "minimiz[e] disruptions and maintain[] continuity at trial." *Chapman v. United States*, 553 F.2d 886, 893 (5th Cir. 1977).

Kaczynski's request to represent himself was untimely.[6] First, substantial "meaningful trial proceedings" had occurred before Kaczynski first gave the district court any sign that he wished to represent himself. After 18 months of pretrial proceedings, trial began on November 12, 1997. Because this was a capital prosecution that had generated enormous publicity, jury selection involved extensive in-court and out-of-court proceedings. Thus, 450 potential jurors completed the lengthy questionnaire prepared by the parties. Over the six weeks of jury selection, the parties and the court individually questioned 182 potential jurors concerning their views on the death penalty, their exposure to pretrial publicity, their receptivity to mental health evidence, and other issues. Jury selection alone consumed more than 3,000 pages of trial transcript. Moreover, the district court required all challenges for cause to be in writing, and the parties filed more than 20 briefs addressing for-cause challenges. *See* CR 333-34, 344-45, 352, 354, 362, 366, 373, 380-81, 383, 388-90, 393, 397-98, 402-03. Throughout these proceedings, Kaczynski never once mentioned to the district court that he might wish to represent himself.

On December 22, 1997, the parties exercised their peremptory challenges and selected the jury. Because of the holidays, the court delayed opening statements until

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[5] This Court has "establish[ed] a bright-line rule for the timeliness of *Faretta* requests: a request is timely if made before the jury is empaneled unless it is shown to be a tactic to secure delay." *Moore v. Calderon*, 108 F.3d 261, 264 (9th 41 Cir.), *cert. denied*, 521 U.S.1111 (1997). This case presents no occasion to decide whether a self-representation request would be timely if made after meaningful trial proceedings but before jury empanelment, since Kaczynski's request was untimely under either measure.

[6] The government's position in this Court does not contradict the position it took in the district court. After Kaczynski first raised the issue of representing himself, the government took the position that he had the right to represent himself if he was willing to go forward with trial without seeking a continuance. CR 498 (1998 WL 15074 at *2). The government noted, however, that it "remain[ed] in the dark concerning the precise nature and extent of the disagreement between the defendant and his attorneys." *Id.* On January 21, before the district court ruled on Kaczynski's request to represent himself, the government submitted a brief stating that it lacked sufficient information to take a position on whether Kaczynski's request was timely or for purposes of delay. CR 513 (1998 WL 27876 at *3). The next day, after the court gave the government further information concerning Kaczynski's communications with the court, the government argued that the record appeared to show that the defendant could have asserted his right to represent himself as early as November 25, 1997. The government stressed, however, it did not have sufficient information to take a definitive position. SER 115, 121. The district court did not reveal all the information bearing on the timeliness of the defendant's assertion of his *Faretta* rights until its May 4, 1998, order.

January 5, 1998. In the meantime, Kaczynski informed the district court for the first time that he had a dispute with his attorneys. During the ensuing *in camera*, *ex parte* proceedings, Kaczynski did not assert his right to represent himself. To the contrary, he told the district court that he did not wish to represent himself and that he wished to continue with current counsel. ER 73, 81.

On January 5, 1998, the government had gathered its witnesses and marshaled its evidence, the jury was assembled to hear the case, and the government and the defense were prepared to deliver opening statements. Even then, Kaczynski did not seek to represent himself. Indeed, at that point, Kaczynski's primary concern apparently was whether he could obtain new counsel.[7] ER 93-99, 316-17. Over the next two days, the court conducted lengthy *in camera* proceedings, during which it appointed Kaczynski a new attorney solely to advise him on his relationship with his current attorneys. On January 7, after Kaczynski had consulted at length with his "conflicts attorney," and the district court had denied Kaczynski's request to have Serra represent him, the court directly asked Kaczynski whether he wished to represent himself. Kaczynski expressly stated that he did not wish to exercise that right. ER 165. Only on January 8 did Kaczynski for the first time invoke his right to proceed without an attorney.

In sum, before Kaczynski ever asked to represent himself, the court and the parties conducted complex jury selection proceedings, engaged in nearly six weeks of voir dire, argued for-cause challenges, exercised their peremptory strikes, selected the jury, and took every step necessary to present the evidence except for swearing the jury. Plainly, in the context of this complex capital prosecution, meaningful trial proceedings had occurred before Kaczynski first asserted his right to represent himself. On that basis alone, the district court correctly found that Kaczynski had not timely asserted that right. *See United States v. Walker*, 142 F.3d 103, 108 (2d Cir.) (*Faretta* request untimely when made after "the start of trial" and 19 days of voir dire but before jury was empaneled), *cert. denied*, 119 S. Ct. 219 (1998).

Kaczynski's request was also untimely because it came after the empaneling and selection of the jury. *See Smith*, 780 F.2d at 811. For purposes of determining whether a self-representation request is timely, a jury is "empaneled" when it is selected, and not as Kaczynski argues (Br. 31), when it is sworn. *See United States v. Price*, 474 F.2d 1223, 1226 (9th Cir. 1973) (distinguishing for purposes of determining timeliness of a *Faretta* request between when the jury is "impaneled" and when it is sworn); *United States v. Lawrence*, 605 F.2d at 1324-25 (district court properly denied *Faretta* request made after the jury was empaneled but before it was sworn). That definition of "empaneled" accords with the use of the term in other contexts to refer to jury selection. *See Serfass v. United States*, 420 U.S. 377, 388 (1975) ("jeopardy attaches when a jury is empaneled and sworn"); *Lewis v. United States,* 146 U.S. 370, 374 (1892) ("'For every

[7] Kaczynski does not allege that the district court erred when it denied his request to be represented by Serra. Because a substitution of counsel would have required a substantial continuance, that ruling was plainly within the district court's "broad discretion." *See United States v. Garrett*, 179 F.3d 1143, 1145 (9th Cir. 1999) (en banc).

purpose . . . involved in the requirement that the defendant shall be personally present at the trial . . . the trial commences at least from the time of the work of impaneling the jury begins.'") (quoting *Hopt v. Utah*, 110 U.S. 574, 578 (1884)); *United States v. Wedalowski*, 572 F.2d 69, 74 (2d Cir. 1978) ("The word 'empaneled' is . . . used [in the double jeopardy context] as a synonym for 'selected,' as distinguished from 'swom.'"); *see also* Fed. R. Crim. P. 43(a) (the defendant "shall be present . . . at every stage of trial including the impaneling of the jury").[8] Here, the jury was empaneled and selected on December 22, 1997, when the parties exercised their peremptory challenges. Kaczynski's first request to represent himself came 17 days later.

C. Kaczynski asserted his right to represent himself as a delaying tactic.

A defendant's otherwise timely request to represent himself may be denied if it is "made for the purpose of delay." *Smith*, 780 F.2d at 811. In determining whether a self-representation request is made in good faith, a "court may consider events preceding a motion for self-representation," *United States v. George*, 56 F.3d at 1083, as well as the effect of the delay, *Fritz v. Spalding*, 682 F.2d 782, 784 (9th Cir. 1982). "A showing that a continuance would be required and that the resulting delay would prejudice the prosecution may be evidence of a defendant's dilatory intent." *Ibid.* The court must determine whether, in light of events preceding the request, "the defendant could reasonably be expected to have made the request at an earlier time." *Smith*, 780 F.2d at 812; *Fritz*, 682 F.2d at 784-85.

As the district court found, Kaczynski's request to represent himself was made for the purpose of delay, and he lacked legitimate reasons for waiting until January 8, 1998, to assert his *Faretta* rights. The district court found (ER 346 & n.30) that Kaczynski learned during voir dire, at the latest, that his attorneys wished to put on a mental condition defense, and Kaczynski admits (Br. 9) that he knew this fact by November 25, 1997. Yet, between that date and January 8, 1998, when he first asserted his *Faretta* rights, Kaczynski told the district court on several occasions that he did not wish to represent himself.

Kaczynski contends (Br. 17) that it was not until January 8 that he had exhausted all of his other alternatives for averting the presentation at trial of the "unendurable" evidence that he suffered from a mental defect. As the district court found, however,

[8] Likwise, the dictionary definition of "empanel" or "impanel" is "[t]o enter in or on a panel; to form or enroll, as a list of jurors." Webster's Second International Dictionary 1247 (1961). Until recently, Black's Law Dictionary defined "empanel" without reference to the swearing of the jury: "The act of the clerk of the court in making up a list of the jurors who have been selected for trial of a particular cause. All the steps of ascertaining who shall be the proper jurors to sit in the trial of a particular case up to the final formation." Black's Law Dictionary 752 (6th ed. 1990). The 1999 revision of Black's, however, defines "empanel" as "[t]o swear in (a jury) to try an issue or case." Black's Law Dictionary 542 (7th ed. 1999).

Kaczynski could not only endure such evidence, "he authorized its use" during the penalty phase. Indeed, during the December 22, 1997, *in camera* hearing Kaczynski characterized this agreement as a "very generous" offer by his attorneys. ER 346. As the district court ruled, it is "unreasonable" to conclude that the minor dispute that existed between Kaczynski and his attorneys after December 22 over the use of mental health evidence was sufficient for Kaczynski exponentially to increase his chances for conviction and the death penalty by representing himself. ER 282.

In any event, Kaczynski's effort to "pursue[] other alternatives" (Br. 17) was actually a quest for a tactical advantage. For example, Kaczynski conceded in his Section 2255 motion (at 33) that he agreed to delay informing the district court of his conflict with his attorneys so that his attorneys could use that conflict "as a lever to persuade the U.S. Justice Department to agree to a conditional plea bargain that would allow Kaczynski to appeal his Motion to Suppress Evidence." Kaczynski could have informed the district court of his conflict with his attorneys, however, and still pursued plea negotiations. More to the point, the fact that Kaczynski delayed his assertion of his *Faretta* rights so that it could be used as a bargaining chip in plea negotiations that would spare him the death penalty supports the district court's conclusion that Kaczynski saw asserting his *Faretta* right as simply another means to manipulate the proceedings against him. Kaczynski also cannot in good faith contend that he delayed asserting his *Faretta* rights to pursue representation by Serra, because he did not timely inform the district court of that request either.

In sum, the district court was not clearly erroneous in finding that "all of [Kaczynski's] reasons for making the request [to represent himself] on January 8 were present before that date and related to matters that had occurred before jury empanelment." ER 349. Rather than taking action, Kaczynski intentionally delayed until the jury had been selected and the presentation of evidence was imminent. The district court correctly found that he did not assert his right to selfrepresentation in good faith.

The district court also properly relied on the delay that Kaczynski's assertion of his right to self-representation would have caused. *See Fritz*, 682 F.2d at 784. The district court found that even though Kaczynski did not request a continuance, granting Kaczynski's self-representation request would have delayed trial. ER 34748. The court explained that in light of the 1,300 government exhibits totaling thousands of pages, the delay caused by Kaczynski's effort to represent himself in a meaningful fashion would have "compromised the empaneled jurors' ability to continue to serve in this case." ER 348. Because "Kaczynski was well aware that selecting a new jury would take substantial time to complete," ER 349, the district court reasonably concluded that the effect of the delay showed that Kaczynski did not have *bona fide* reasons for asserting his right to represent himself. For this reason as well, the district court properly denied Kaczynski's request to represent himself.

III. THE DISTRICT COURT DID NOT ERR IN RULING THAT KACZYNSKI'S ATTORNEYS COULD PRESENT LIMITED EVIDENCE OF KACZYNSKI'S MENTAL STATUS AT THE GUILT PHASE OF TRIAL.

Kaczynski's guilty plea bars him from collaterally attacking the district court's ruling that his attorneys could put on nonexpert testimony concerning his mental health at the guilt phase of trial. If the Court reaches that issue, however, it should affirm the district court. Kaczynski's attorneys sought to introduce a minimal amount of nonexpert evidence solely for the purpose of contesting the government's evidence of scienter on seven of the ten counts of the indictment. On these facts, the district court correctly held that Kaczynski's attorneys could make a strategic decision concerning the use of mental condition evidence.

A. Standard of review

The question whether Kaczynski had a constitutional right to prevent his attorneys from presenting evidence of his mental condition is reviewed de novo. *See United States v. Yacoubian*, 24 F.3d 1, 3 (9th Cir. 1994).

B. The district court did not deny Kaczynski the right to make a "fundamental decision."

In *Jones v. Barnes*, 463 U.S. 745, 751 (1983), the Supreme Court held that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *See Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring) ("Only such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make."). Those decisions are fundamental because they are "the most serious steps in the prosecution" and involve choices "made once and for all." *United States v. Boyd*, 86 F.3d 719, 723, 724 (7th Cir. 1996), *cert. denied*, 520 U.S. 1231 (1997). On the other hand, it is "clear that appointed counsel, and not his client, is in charge of the choice of trial tactics and the theory of defense." *United States v. Wadsworth*, 830 F.2d 1500, 1509 (9th Cir. 1987); *see Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988) ("the lawyer has - and must have - full authority to manage the conduct of the trial"). Thus, counsel has the "last" word on "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." *New York v. Hill*, 120 S. Ct. 659, 664 (2000) (citations omitted); *see Brookhart v. Janis*, 384 U.S. 1, 8-10 (1966)

(opinion of Harlan, J.) ("a lawyer may properly make a tactical choice of how to run a trial even in the face of the client's . . . explicit disapproval"). Kaczynski's dispute with his counsel concerned "trial tactics," not a "fundamental decision."[9]

The district court's decision was a narrow one. At the time that the court ruled, Kaczynski had agreed that his attorneys could present expert and nonexpert mental health testimony at the trial's penalty phase, and his attorneys had agreed to refrain from introducing expert mental health evidence at the guilt phase. Moreover, his attorneys did not seek to portray Kaczynski as insane; they sought to raise a reasonable doubt concerning Kaczynski's scienter by showing that he lacked the capacity to form the intent to commit some of the charged crimes. Because evidence of diminished capacity "generally is only a defense when specific intent is at issue," *United States v. Twine*, 853 F.2d 676, 679 (9th Cir. 1988), the mental condition evidence that Kaczynski's attorneys sought to introduce was admissible only on seven of the ten counts of the indictment (those alleging violations of 18 U.S.C. §§ 844(d) and 1716).[10] Finally, the district court found that evidence of a mental defect was Kaczynski's "only defense" to these charges.[11]

In short, the issue before the district court was simply whether counsel could present a small quantity of nonexpert evidence in an effort to undermine the government's proof on one element of the offenses charged in seven counts of the indictment. The decision whether to present that evidence is not analogous to the kinds of decisions that the Supreme Court characterized in *Jones v. Barnes* as "fundamental." Instead, it concerns

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[9] Kaczynski alleges (Br. 45) that the government "supported [his] right to reject the mental-status defense." That contention is misleading. The government informed the district court of its view that "the most appropriate and safest course is for the Court to direct defense counsel to follow the defendant's wishes concerning the mental defect defense." CR 498. That recommendation was not based on the government's conclusion that the defendant had the right to preclude his attorneys from asserting that defense. Instead, the government informed the district court that the law in this area was unsettled but that this Court had repeatedly held that it was not ineffective assistance of counsel for a defense attorney to follow his client's wishes, even if the defendant's chosen course of action results in the imposition of the death penalty. *See Langford v. Day*, 110 F.3d 1380, 1386-88 (9th Cir. 1996), *cert. denied*, 522 U.S. 881 (1997); *Jeffries v. Blodgett*, 5 F.3d 1180, 1197 (9th Cir. 1993), *cert. denied*, 510 U.S. 1191 (1994); *Fritchie v. McCarthy*, 664 F.2d 208, 214 (9th Cir. 1981). Thus, the government argued that the district court would not err by siding with the defendant; it did not concede that the court would err by siding with his attorneys. Moreover, at the time that the government informed the court of its position, it was not aware of the December 22, 1997, agreement between Kaczynski and his counsel. That agreement has a substantial bearing on the reasonableness of the district court's decision.

[10] The offense charged in the remaining counts under 18 U.S.C. § 924(c) requires the government to prove that the defendant knowingly used or carried a firearm during and in relation to a crime of violence. It does not require proof of specific intent.

[11] The government moved to prevent the defense from introducing lay testimony to show that the defendant suffered from a mental defect. CR 461. The government argued that this evidence would not "support a legally defensible theory of lack of mens rea," *see United States v. Pohlot*, 827 F.2d 889, 906 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988), because it would not negate Kaczynski's intent to commit the charged offenses. The district court denied this motion. CR 470; ER 191-92.

trial strategy, and the district court properly allowed counsel to decide whether to put on a limited amount of evidence of Kaczynski's mental condition.

Kaczynski concedes that "[w]hen a defendant accepts representation he delegates important decision-making authority to his counsel." He argues, however (Br. 41-43) that a mental-state defense is akin to an insanity defense, which, some courts have held, the defendant has the right to preclude. *See United States v. Marble*, 940 F.2d 1543, 1547 (D.C. Cir. 1991); *Foster v. Strickland*, 707 F.2d 1339, 1343 (11th Cir. 1983), *cert. denied*, 466 U.S. 993 (1984). In fact, the qualitative differences between the two defenses far outweigh their similarities.

First, to assert an insanity defense, a defendant must, as a practical matter, admit all the elements of the offense. A defendant's assertion of that defense therefore constitutes a waiver of his right to put the government to its proof on every essential element of the charged offense. *See Dean v. Superintendent*, 93 F.3d 58, 61 (2d Cir. 1996), *cert. denied,* 519 U.S. 1129 (1997). By contrast, mental defect evidence merely goes to the defendant's ability to form the specific intent to commit a crime. Second, in some jurisdictions a defendant must plead not guilty by reason of insanity, and thus the decision to assert the defense is one of the fundamental decisions that the Supreme Court reserved to the defendant. *See, e.g.,* Cal. Penal Code § 1016. Third, a successful assertion of an insanity defense does not result in the defendant's release from custody. Instead, in the federal system a defendant who is found not guilty by reason of insanity "shall be committed to a suitable facility until such time as he is eligible for release." 18 U.S.C. § 4243(a). An insanity defense therefore could result in the defendant's indefinite commitment to a federal mental health facility. Plainly, a decision that could cause the defendant to spend the rest of his life in commitment is sufficiently fundamental that only the defendant can make it. *Cf. Lynch v. Overholser*, 369 U.S. 705, 719 (1962) (defendant who faces mandatory commitment if found not guilty by reason of insanity has the right to choose to use that defense).

Kaczynski also argues that his attorneys should have been required to abide by his wishes because he had a "'privacy interest at stake.'" Br. 44-45 (quoting *Garlaugh v. Stewart*, 129 F.3d 1027, 1035 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 237 (1998)). That argument is without merit. At trial, the government would have shown that Kazcynski committed 16 bombings and murdered three people in an effort to draw attention to his views on technology and modern life; that he kept a journal detailing his crimes and wrote letters to the *New York Times*, *Penthouse,* the *San Francisco Examiner*, and other publications to boast of his exploits; and that he successfully demanded that the *Washington Post* publish his manifesto. Moreover, Kaczynski's Montana lifestyle was the subject of intense publicity when he was arrested. His attorneys' strategy therefore would have revealed little or nothing his private life that had not already become public.

In sum, the district court did not deprive Kaczynski of any right under the Fifth or Sixth Amendment by ruling that his attorneys could introduce a modest amount

of evidence in support of Kaczynski's only viable defense. Accordingly, if this Court reaches that issue, it should affirm the district court.[12]

[12] Kaczynski argues (Br. 54-57) that if this Court remands for further proceedings, it should recuse Judge Burrell. The Court did not grant a certificate of appealability on that issue, and Kaczynski has not made a substantial showing that the judge's failure to recuse himself denied him a constitutional right. Therefore, this Court should not consider that issue. *See Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999). In any event, Judge Burrell's treatment of Kaczynksi was a model of fairness and patience and provides no basis for his recusal. Moreover, Kaczynski's reasons for seeking the judge's recusal turn on the judge's rulings and cannot form the basis for disqualifying the judge. *See Liteky v. United States*, 510 U.S. 540, 555 (1994).

CONCLUSION

The district court's order denying the defendant's motion under 28 U.S.C. § 2255 should be affirmed.

Respectfully submitted,

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DATED: February 11, 2000

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STATEMENT OF RELATED CASES

The United States is not aware of any pending appeals related to this case.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the appellant's brief is

X Proportionately spaced, has a typeface of 14 points or more and contains 13,948 words, or is

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February 11, 2000

J. DOUGLAS WILSON

Final Brief U.S. v. Theodore John Kaczynski, appellant; No. 99-16531 in the United States Court of Appeals for the Ninth Circuit
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