Memorandum from Bob to Doug regarding Kaczynski's Petition for Re-Hearing

April 25, 2001

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MEMORANDUM

To: Doug
From: Bob
Re: Kaczynski's Petition for Re-Hearing
Date: April 25, 2001

Kaczynski makes five separate claims in his petition for re-hearing. However, the bulk of his arguments emanate from a single complaint: Kaczynski's disagreement with the judge's finding that the *Faretta* request was made for the purpose of delay. It is difficult to see how the portions of the petition which challenge the district court's fact finding raise "a question of exceptional importance" or present issues which must be resolved in order "to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a). Certainly Kaczynski pays no more than lip service to this standard for *en banc* review. And to the extent that the petition raises legal issues (*e.g.,* Point I), the resolutions of those issues are based on settled, uniform principles of law. Kaczynski makes no claim for which the underlying legal doctrine applied by the district court is at odds with Supreme Court caselaw, other Ninth Circuit decisions, or opinions rendered by other federal courts of appeals. As you have pointed out, leaving aside the notoriety of the defendant and the aggravated nature of his crimes, this case turns on the straightforward application of the facts to a well-established body of law involving a defendant's right of selfrepresentation. Accordingly, there is no justification for the court of appeals to rehear this matter.

That being said, here are some thoughts and questions that I have on the five separate points that Kaczynski makes in his petition for re-hearing.

I. The Claim: Self-Representation Request Cannot Be Denied on the Grounds of Purpose to Delay Without Showing There Would be an Actual Delay (pp. 6-9)

A. Kaczynski is wrong in asserting that the prospect of an actual delay is relevant *per se*; I have found no cases so holding. The appropriate inquiry focuses on the defendant's

intent and whether his Faretta request is made in good faith. The prospects of an actual delay are irrelevant.

It is well settled that to be effective, a *Faretta* request must be made in good faith. It appears that the "purpose of delay" inquiry is a corollary of the good faith requirement. As the Ninth Circuit has stated,

> In deciding whether a timely [self-representation] request was made for the purpose of delay, the court must examine the events preceding the request to determine whether they are consistent with a good faith assertion of the *Faretta* right.

United States v. Smith, 780 F.2d 810, 812 (9th Cir. 1985). *Accord United States v. Flewitt*, 874 F.2d 669, 674 (9th Cir. 1989) (the issue is whether "the request is made in good faith or merely for delay"); *United States v. George*, 56 F.3d 1078, 1084 (9th Cir. 1995) (same), *cert. denied*, 516 U.S. 937 (1995). *See also United States v. Hernandez*, 203 F.3d 614, 621 (9th Cir. 2000) (no evidence that defendant's request to defend himself "was calculated" to cause delay); *Armant v. Marquez*, 772 F.2d 552, 556 (9th Cir. 1985) (no indication of "purpose of delay").

The cases cited above establish that when a defendant makes his self-representation request for the purpose of delay, by definition that request is not made in good faith and it should properly be denied. Thus, the defendant's intent is the controlling factor. The Ninth Circuit has emphasized the distinction between intent and actual delay, and that the former can be an appropriate basis for the denial of a *Faretta* request while the latter is not:

> Delay per se is not a sufficient ground for denying a defendant's constitutional right of self-representation..... [A defendant] may not be deprived of that right absent an affirmative showing of purpose to secure delay.

Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir. 1989). *See United States v. Flewitt*, 874 F.2d at 674 (request may be denied "if it is **intended** merely as a tactic for delay") (emphasis added); *United States v. Smith*, 780 F.2d at 812 (affirming the district court's denial of a self-representation request for several reasons "including the ultimate finding of intent"); *but see United States v. Price,* 474 F.2d 1223, 1227 (9th Cir. 1973) (no evidence that "motion was a tactic to secure delay, and there is nothing that suggests that any delay would have attended the granting of the motion"). However, the court may consider the deleterious effect that an actual delay would have on the prosecution's case in assessing whether a *Faretta* request was made for the purpose of obtaining a delay. *Ibid.*

In any event, beyond Kaczynski's willingness to **start** the opening statements and presentation of evidence on January 22, 1998, the record contains no evidence to support his contention that self-representation would not have delayed the **progress** of

the trial. Indeed, Kaczynski's antics had already postponed the presentation of the evidence, from January 5 until January 22. There was no reason to expect that a similar pattern would not repeat itself if Kaczynski were to proceed *pro se.*

And Kaczynski's claim that self-representation would "actually abbreviate the trial" (Br. 8), is unconvincing. *Pro se* defendants invariably cause protracted proceedings. This stems from their unfamiliarity with rules of evidence and procedure, their ignorance of courtroom protocol, their awkwardness in conducting cross-examinations and direct examinations, and their inexperience in making legal arguments. *See McCaskle v. Wiggins,* 465 U.S. 168, 184 (1984) (suggesting that *pro se* defendants need help complying with "courtroom protocol" and "in overcoming routine obstacles"). They have to be guided through the process every step of the way, making for an inordinately slow trial. *See United States v. Campbell*, 874 F.2d 838, 849 (1st Cir. 1989) (noting "the delays often associated with *pro se* representation").

There likewise is no merit to Kaczynski's argument (Br. 8-9) that his quest for a conditional plea suggests that he would not have put on any defense at all (thereby expediting the trial). His request for a conditional plea - which would have preserved his right to appeal the most important issue in the entire case - proves that Kaczynski desperately wanted to be set free. Indeed, during the course of his competency evaluation, Kaczynski admitted that his goal was to "receive the least penalty possible and to be acquitted if possible." 1/16/98 Report of Sally C. Johnson, M.D., Chief Psychiatrist, Federal Correctional Institution, Butner, North Carolina ("*Competency Report*") at 35, 38. That desire would serve as a powerful inducement to put on some defense. It is quite common for defendants to engage in unsuccessful plea negotiations with the government and then, at trial, mount vigorous attacks on the government's affirmative proof and put on very forceful defenses. Simply put, there is no connection between a defendant's stance in plea negotiations and the positions he takes at trial.

More pointedly, Kaczynski disclosed during the competency examination precisely how he would portray himself in his own defense:

> He wanted to present himself as rational; a person having a valid point to make; a decent person who felt cornered; as socially vulnerable; in some ways a victim personally and via the system; an individual who had his back against the wall; a person who lived a beautiful way of life in the woods and a person whose psychiatric disorder could serve as a mitigating factor.

Competency Report at 37. Because what Kaczynski would have offered in *pro se* status centered on his state of mind and "psychiatric disorder," it is difficult to see how it varied from his lawyers' defense strategy and how it would have shortened the trial. In fact, Kaczynski himself "was unable to articulate a difference" between this evidence and the proof that his lawyers were contemplating offering. *Ibid.*

In sum, the district court did precisely what the Ninth Circuit has counseled it to do when presented with a *Faretta* request. The court evaluated whether Kaczynski's

request to defend himself "was made for the purpose of delay" by examining "the events preceding the request" in an effort "to determine if they are consistent with a good faith assertion of the *Faretta* right and whether the defendant could . . . have made the request at an earlier time." *United States v. Smith,* 780 F.2d at 812. Based upon this analysis, the court found that Kaczynski made his request for the purpose of delay and that he could have made an unequivocal request at an earlier date.[1] Kaczynski's disagreement with these factual findings cannot provide a basis for *en banc* review.

1. *Hernandez* prevented us from making the waiver argument before the panel. But now before the *en banc* court can we argue that *Hernandez* was wrongly decided and that Kaczynski's voluntary plea waived this claim? (I realize that the government's petition for re-hearing *en banc* was denied by the Ninth Circuit.)

2. Should we argue that Kaczynski's request was untimely, as we did in our main brief? The panel never reached the issue, and simply assumed *arguendo* that the request was timely. Slip op. at 1877.

II. The Claim: the District Court Must Conduct an Adequate Inquiry in Order to Find Purpose to Delay (pp. 9-10)

I think you answer this claim in the Supplemental Brief. As you argue there, no additional inquiry was required between January 8, 1998 and January 22, 1998 because the trial court's finding of bad faith was based on undisputed facts. Supplemental Brief at 6-7. Kaczynski still does not dispute those facts.

While I have not yet found any cases addressing the issue, a judge has to be able *sua sponte* to re-evaluate the evidence before him and, if warranted, to alter or modify his factual findings.[2] But we need not get tied up on this point because on January 16, 1998, Judge Burrell was presented with substantial additional evidence bearing on the *Faretta* issue. On that day, Dr. Johnson issued the *Competency Report.* That report is replete with facts suggesting that Kaczynski acted in bad faith, as the court found.

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[1] The court's finding of dilatory purpose was based on the following undisputed facts:

1. Kaczynski knew of his conflict with counsel at least by November 25, 1997, yet failed to take any action on it;

2. Kaczynski denied on December 22, 1997 and again on January 7, 1998 that he wished to represent himself; and

3. the December 22 agreement between Kaczynski and counsel directly rebutted Kaczynski's stated reason for asserting his *Faretta* rights. (ER 330-45).

[2] I found several cases under the "law of the case" doctrine holding that the court is free to reconsider and change its earlier legal rulings provided that doing so does not prejudice the parties. If a court is free to alter its legal holdings, surely it must be able to do so for factual findings. If you think its worthwhile, I can do some more extensive research on this issue.

Specifically, the report sets forth numerous facts which directly rebut Kaczynski's primary contention that he could not "endure" a mental status defense. First, Kaczynski "agreed to some psychiatric and psychological evaluation by defense experts." *Id.* at 32. Second, Kaczynski did not dispute that he suffered from a psychiatric disorder, and "would not object to the issue of the psychiatric disorder being raised" at trial, provided it was done so accurately. *Id.* at 35. Third, Kaczynski would have been willing to use a mental defect defense if he thought "he had an 80% chance of succeeding and being released." *Ibid.* Indeed, Kaczynski even would have been willing to assert an insanity defense[3] if he believed that in approximately five years "he could be released." *Ibid.* Finally, Kaczynski's plan for representing himself called for him to adduce evidence as to his state of mind and of his "psychiatric disorder." *Id.* at 37. *See* Section IA, at 4, *supra.* Not even Kaczynski himself could explain how his attorneys' proposed defense differed at all from the one he himself planned to use. *Ibid.*

These additional facts - which were presented to the court after January 8, 1998 - provided powerful support for the court's conclusion that "[n]ot only could Kaczynski tolerate this [mental defect] defense, he had authorized its use." (ER 346). And this post-January 8 information was presented to the court on top of the extensive factual record that the court developed prior to that date. The district court conducted extensive *in camera* hearings between the dates of December 19, 1997 and January 8[?], 1998. The court also held hearings in open court. Neither Kaczynski nor his lawyers were ever denied their right to address the court. No additional factual inquiry was necessary.

[did Kaczynski file anything btn 1/8/ and 1/22?]

III. The Claim: Kaczynski Could Have Assumed His Defense Immediately; the Fact That it Would Have Been an Inadequate Defense Is Irrelevant Because Kaczynski Was Not Required to Present Any Defense at All (pp. 10-13)

The basis for this argument is Kaczynski's claim that "the panel majority[] relied heavily on the contention that 'Kaczynski could not have immediately assumed his own defense without considerable delay.'" (Br. 10). This allegation is incorrect. The majority merely stated that this district court finding was "well grounded in the record" and that it "support[ed]" the district court's conclusion. Slip op. at 1879. But the majority's decision was based on two other primary facts: first, that in the December 22 accord, Kaczynski authorized his attorneys to assert a mental defect defense; and second, that Kaczynski did not invoke his right to defend himself at that time. Slip op. at 1880.

[3] Such a defense would have required Kaczynski to prove, *inter alia,* that he was afflicted by a "severe mental disease or defect." 18 U.S.C. § 17.

The majority recounted the following facts in holding that the district court's finding of dilatory motive was not clearly erroneous:

1. Kaczynski knew about counsel's contemplated mental defect defense since at least November 25, 1998;

2. on December 22, Kaczynski agreed to allow counsel to present lay and expert mental condition evidence in the penalty phase, provided they did not offer expert mental condition evidence in the guilt phase;

3. knowing that mental condition evidence would thereby be offered at his trial, Kaczynski "expressly" stated on December 22, that he did **not** want to represent himself;

4. on January 7, 1999, Kaczynski announced for the first time that he wanted Tony Serra to represent him, "knowing that it would take Serra months to get ready;"

5. on January 7, after the court denied this application and ruled that defense counsel could determine the timing of the presentation of mental health evidence, Kaczynski again stated that he did not want to represent himself;

6. the very next day - January 8 - Kaczynski declared that he wanted to represent himself.

Slip op. at 1879-80.
After marshaling these facts, the majority concluded:

> As the events preceding Kaczynski's *Faretta* request show, he knew about and approved use of mental state evidence without invoking his right to represent himself. Accordingly, the court could well determine that Kaczynski's avowed purpose of invoking the right in order to avoid a defense he could not endure was not "consistent with a good faith assertion of the *Faretta* right," and that he "could reasonably be expected to have made the motion at an earlier time."

Slip op. at 1880. Thus, the basis for the panel's decision was an absence of good faith, not an inability to start the presentation of the evidence right away. In fact, whether or not Kaczynski

could have **immediately** undertaken to defend himself is largely irrelevant. Once the district court found that the defendant made his request in bad faith for purposes of delay, the court properly denied the request on that ground, and the panel majority correctly so held. Slip op. at 1880.

IV. The Claim: Postponing Self-representation Request until All Other Reasonable Avenues Have Been Exhausted Is Not a Tactic for Delay (pp. 14-17)

This is just a straightforward factual dispute, as Kaczynski is merely quarreling with the district court's fact finding. He claims that he did not make his *Faretta* request for purposes of delay. But the district court made a contrary finding based upon the undisputed facts outlined in footnote 1, *supra.* A re-hearing *en banc* is not the appropriate vehicle to challenge the court's fact finding. *See* Fed. R. App. P. 35(a).

In support of this argument, Kaczynski claims that he had a legitimate reason to delay asserting his *Faretta* rights: an attempt to resolve his conflicts with counsel concerning the mental defect defense. (Br. 14). But in the district court, Kaczynski admitted to a different motivation which belies his newly-minted argument. In his *habeas* petition (at 33) , Kaczynski conceded that he postponed informing the district court of his conflict with counsel so that his attorneys could use that conflict "as a lever to persuade the U.S. Department of Justice to agree to a conditional plea bargain" that would preserve Kaczynski's Fourth Amendment challenge.

Moreover, as the district court found (ER 330, 346), Kaczynski had resolved his conflict with counsel on December 22 and had expressly stated at that time that he did **not** wish to represent himself. Again on January 7, Kaczynski reiterated that he did not want to defend himself. It wasn't until January 8 - after a jury had been selected, counsel for both sides were ready to deliver opening statements, and the presentation of evidence was imminent - that Kaczynski reversed field and announced for the first time that he wanted to represent himself.[4] No material facts had changed in the interim. Kaczynski reversed his position based on facts that were known to him since at least December 22 and maybe as early as November 25. As the district court found, Kaczynski reasonably could have made his request on December 22; he delayed making the request then in an attempt to secure a tactical advantage and to delay the proceedings. (ER 327).

Judicial acceptance of Kaczynski's argument will set a dangerous precedent and establish an unworkable standard. Defendants who belatedly assert their *Faretta* rights will invariably be able to point to some pre-trial event - the receipt of discovery, the filing of or ruling upon motions, the completion of the defense investigation, the interview of some crucial witness, etc. - which "caused" them to delay the assertion of their right to represent themselves.

[4] Kaczynski claims that his "acceptance of the December 22, 1997, agreement . . . postponed until January 5, 1998, any need for a self-representation request." (Br. 16). In fact, that agreement **eliminated** the need for a good faith self-representation request.

V. The Claim: the Panel Should Not Be Limited to "The Record and Files" to Show That the Purpose of Delay Finding Was Clearly Erroneous; the Panel Should Be Allowed to Rely Upon the 2255 Petition (pp. 17-19)

Like Point IV, this too is no more than a challenge to the district court's fact finding. While the 2255 petition probably is part of the record and should be considered by the panel, that is besides the point. The primary allegation that Kaczynski makes in the petition - that his *Faretta* request was made in good faith and could not reasonably have been made earlier - is directly refuted by the record. The majority therefore properly rejected the allegations set forth in the petition, as did the district court.

Kaczynski contends (Br. 18) that his notes to his attorneys, which he quoted extensively in the petition, establish that "his aversion to the mental-state defense was genuine" and prompted his *Faretta* request. But the proper inquiry is not whether Kaczynski was opposed generally to a mental defect defense. The relevant issue was whether Kaczynski could accept his lawyers offering such proof at a trial. The record irrefutably establishes that he could. In the December 22 agreement, Kaczynski specifically authorized his attorneys to offer expert and lay evidence concerning his mental health in the penalty phase. Kaczynski then told the district court that he did not want to represent himself. On January 7, after the court ruled that counsel could present guilt phase, lay mental state evidence, Kaczynski reiterated that he did not wish to represent himself. On the next day however, Kaczynski claimed he could not "endure" the presentation of mental condition evidence, a claim that is directly refuted by the December 22 agreement and Kaczynski's own statements to the court on that day and again on January 7. [**We did not argue the following in our appellate brief and therefore I don't think we can argue it here:** And Kaczynski admitted to Dr. Johnson that he "would not object to the issue of the psychiatric disorder being raised" at trial, provided it was done so accurately, *Competency Report* at 35, that he would be willing to use a mental defect defense if he thought "he had an 80% chance of succeeding and being released," *Ibid.,* and that he would use an insanity defense if he believed that in approximately five years "he could be released." *Ibid.* Moreover, as Kaczynski admitted to Dr. Johnson, his self-representation plan called for him to adduce evidence as to his state of mind and of his "psychiatric disorder." *Id.* at 37.] Based on these undisputed facts, the panel majority properly rejected Kaczynski's self-serving contentions set forth in his 2255 petition.

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