Representing Ted Kaczynski

The Right to Assistance of Counsel

Michael Mello

Theodore Kaczynski is being denied his day in court: Lawyers he does not want are forcing him to stake his life on a defense he would rather die than raise. In the guise of providing him with his Constitutional right to the assistance of counsel–"assistance" is the word used in the Sixth *Amendment* -the federal government has stripped him of the only power he has left as an American citizen: the power to have *his* case raised against the indictment, to put on *his* defense in a judicial proceeding where *his* life is on the line- -not his lawyer's life, not his judge's life.

Judge Burrell ruled last week that Kaczynski cannot fire his lawyers and that those lawyers can rais. a defense based on Kaczynski's alleged mental illness-a defense that Kaczynski adamantly refuses. Kaczynski wants a "necessity defense"-a claim that his crimes were justified as part of his political war against technology on behalf of humanity Federal law would likely preclude such a defense to the murder charges, and Kaczynski and his lawyers appear to recognize that he will almost certainly be found guilty of murder at the first phase of his bifurcated capital trial The real battleground in *United States* v. *Kaczynski* is over penalty. And at the pe*nalty* phase of the trial, Kaczynski s necessity defense" evidence is admissible, in my view, under the Supreme Court's 1978 *Lockett* decision.

Judge Burrell's rulings turn the right to assistance of counsel on its head. They transform a Constitutional protection designed to shield a defendant's rights into a sword that disembowels them. The whole purpose of the right to counsel at criminal trials—a right recognized since the infamous *Scottsboro* case in 1932—is to *empower* the citizen accused.

Ted Kaczynski's lawyers, however well-intentioned and paternalistic, are: no as mentally competent to him. They are controlling him. They are strong arming a man on trial for his life, a man the judge as desions in yhis case such as stand trial—a ruling which means that Kaczynski is competent to nr life a mental illness whether he will testify, whether he would accept a guilty plea,, an w le 1 . fee strongly that he is too defense (a defense with little chance of success in this case). If Kaczy a serious way, not with a crazy to stand trial, they should have asked the judge *months* ago to exp o *c proforma* quickie psychiatric exam.

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I hope that Judy Clarke and Quin Denvir will now decide that they cannot ethically abandon Kaczynski to represent himself pro re. He clearly docs not *want* to represent himself-and for very good reasons. He wants a lawyer willing to abide by his wishes.

His lawyers themselves now face a choice: To represent Kaczynski the way he wants and has a right to be represented; or to step aside and allow Tony Serra (who is willing to represent Kaczynski, without fee) to serve as Kacyznski's lawyer If they step aside, they should do so now—to allow Serra as much trial preparation time as possible. Either way, a continuance to allow time for trial preparation is absolutely necessary.

The real issue here, as elsewhere in the Unabomber matter, is power. Who decides what his true interests are? The man whose life hangs in the balance? Or his court-appointed lawyers?

I believe the choice is his. His superb lawyers'job-their ethical duty as lawyers and their moral duty as human beings-is not to manage or control him, but to "assist" him in making *his* defense.

Judge Burrell's rulings have put Judy Clarke and Quin Denvir in an ethically awkward position. They have acted in what they honestly believe to be their client's best *legal* interests. But that is not the point.

The Supreme Court has said repeatedly that the legality of death penalty trials must be judged by the "evolving standards of decency that mark the progress of a maturing society." Consider how our standards of decency have "evolved" from 1859 to today.

John Brown, the slavery abolitionist who raided the federal arsenal at Harper's Ferry, Virginia in 1859, was critical in galvanizing public opinion so that civil war became possible—if not inevitable. John Brown's hanging by the Commonwealth of Virginia made him a celebrated martyr in the North, convincing the South that compromise on the slavery issue was impossible and so that secession (and war) were the only course—exactly as Brown himself had hoped and planned.

Perhaps the most striking aspect of John Brown—besides the subsequent vindication of his "crazy" abolitionist views—was his carnage during his trial and the way his lawyers respected him. At trial, Brown refused to allow his lawyers to raise an insanity defense (Brown's family had a history of insanity). Brown knew exactly what he was doing when he raided Harper s Ferry: attempting to incite a slave rebellion, a plan far-fetched but certainly not crazy (at least not to Virginia and the South, in the years following Nat Turner, Denmark Vesey and Gabriel Prosser rebellions and other slave uprisings). If Brown was crazy, then so were a number of prominent northern abolitionists. And, like Socrates, after Brown's trial and death sentence, he categorically scotched the plans of his followers to organize Brown s escape from Virginia. No, Brown insisted: His execution would do more for his cause than anything he could ever do alive. On this score. Brown was absolutely right, at least in the eyes of historians. Our standards of decency have come a long way in 139 years. But on one point they remain unchanged: Some things *are* worth dying for.

In a column in last week's *Boston Globe,* Ellen Goodman asked rhetorically whether "the Mad Hatter" should be running the show" in the Sacramento courtroom. My answer is, hell, yes! When he's on trial for his life it's his show to run...with assistance of counsel, according to his right under the Sixth Amendment to the United States Constitution.

REPRESENTING TED KACZYNSKI: THE RIGHT TO ASSISTANCE OF COUNSEL

By Michael Mello

Theodore Kaczynski is being denied his day in court: Lawyers he does not want are forcing him to stake his life on a defense he would rather die than raise. In the guise of providing him with his Constitutional right to the assistance of counsel--"assistance" is the word used in the Sixth Amendment --the federal government has stripped him of the only power he has left as an American citizen: the power to have *his* case raised against the indictment, to put on *his* defense in a judicial proceeding where *his* life is on the line-- --not his lawyer's life, not his judge's life.

Judge Burrell ruled last week that Kaczynski cannot fire his lawyers and that those lawyers can raise a defense based on Kaczynski's alleged mental illness--a defense that Kaczynski adamantly refuses. Kaczynski wants a "necessity defense"--a claim that his crimes were justified as part of his political war against technology on behalf of humanity. Federal law would likely preclude such a defense to the murder charges, and Kaczynski and his lawyers appear to recognize that he will almost certainly be found guilty of murder at the first phase of his bifurcated capital trial. The real battleground in *United States v. Kaczynski* is over penalty. And at the penalty phase of the trial, Kaczynski's "necessity defense" evidence is admissible, in my view, under the Supreme Court's 1978 *Lockett* decision.

Judge Burrell's rulings turn the right to assistance of counsel on its head. They transform a Constitutional protection designed to shield a defendant's rights into a sword that disembowels them. The whole purpose of the right to counsel at criminal trials--a right recognized since the infamous *Scottsboro* case in 1932--is to *empower* the citizen-accused.

Ted Kaczynski's lawyers, however well-intentioned and paternalistic, are not "assisting" him. They are controlling him. They are strong-arming a man on trial for his life, a man the judge has already found mentally competent to stand trial--a ruling which means that Kaczynski is competent to make the important decisions in his case such as whether he will testify, whether he would accept a guilty plea, and whether to stake his life on a mental illness defense (a defense with little chance of success in this case). If Kaczynski's lawyers feel so strongly that he is too crazy to stand trial, they should have asked the judge *months* ago to explore that issue in a serious way, not with a *pro forma* quickie psychiatric exam.

Now that the trial has been postponed until January 22, there is a bit of time for all sides in the case to step back, take a deep breath and re-assess their respective positions. The prosecutors should reconsider their unfortunate decision to reject a negotiated plea to life imprisonment without parole. The judge should sort out Kaczynski's counsel situation, once and for all, in a manner fair to Kaczynski and least likely to be reversed on appeal.

But the deepest soul-searching must be done by Kaczynski's court-appointed lawyers, because they are at least partially responsible for the disturbing events of last week. They must have known from the outset that their client opposed a mental illness defense. They apparently hoped that when forced--on the eve of his trial--to choose between going along with their defense or representing himself, Kaczynski would cave in. It was a gamble, and the lawyers lost.

The hard part about playing chicken is knowing when to flinch. Ted Kaczynski didn't flinch. Left with no acceptable

alternative, he chose to represent himself.

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