Supplemental Brief for U. S. v. Kaczynski, 99-16531 U. S. Court of Appeals for 9th Circuit

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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.

SUPPLEMENTAL 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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ARGUMENT

A. Introduction

Kaczynski moved to file a supplemental brief because, he contended, the district court decision in *Frierson v. Calderon*, 968 F. Supp. 497 (C.D. Cal. 1997), "seems to suggest" that both Kaczynski and the government "briefed an important issue according to an incorrect standard." He argues that *Frierson* stands for the following proposition:

> if a defendant has been denied the right to self-representation on the ground that he asserted the right for the purposes of delaying the trial, then, in order to attack the denial successfully in a collateral proceeding, the defendant must show not only that he did not in fact assert the right for the purpose of delay, but also that the trial court could not properly have found purpose to delay on the basis of the information known to the court at the time of denying the Faretta request, together with such information as the court could and should have ascertained through inquiry before denying the request. Mot. for Supp. Briefing at 2-3 (emphasis deleted).

Put another way, Kaczynski contends that the district court's conclusion that he asserted his right to represent himself as a tactic to delay trial must be evaluated in light of the facts that the district court would have found if it had conducted an adequate inquiry. Kaczynski then argues that the district court failed to conduct an adequate inquiry before it found that he asserted his right to represent himself as a tactic to delay the trial, and that if the district court had conducted a more searching inquiry, it "probably" would have discovered that the facts on which it based its conclusion that Kaczynski sought to delay the trial were false. *See* Supp. Br. 21. Finally, Kaczynski recapitulates his challenges to the district court decision denying his Section 2255 petition by breaking down the district court's reasoning into its component propositions and presenting them in the form of several tables.

Kaczynski's supplemental brief presents no new reason to reverse the district court's decision denying his Section 2255 motion.[1] Kaczynski's contention that the district court failed to conduct an adequate hearing is wholly without merit. Kaczynski concedes the key facts on which the district court found that he asserted his right to represent himself in order to delay trial. Moreover, the district court judge presided

[1] Contrary to Kaczynski's contention, the decision in *Frierson* does not suggest that the parties used "an incorrect standard" in prior briefs. Instead, in that case, as in this one, the district court determined that the record, taken as a whole, showed that the defendant has asserted his right to represent himself for purposes of delay.

over 18 months of pretrial and trial proceedings before Kaczynski raised questions concerning his relationship with his attorneys. When Kaczynski first raised the possibility that he might have a conflict with his attorneys, the district court conducted multiple and extensive *in camera* hearings. The court also appointed an attorney solely to advise Kaczynski concerning his relationship with his attorneys and his options for obtaining other counsel. The court conducted additional hearings when, minutes before opening statements were to begin, Kaczynski again informed the court that he was unhappy with his attorneys. At these hearings and in open court, the district court listened to everything Kaczynski had to say. Kaczynski has failed to point to a single occasion on which he was denied the right to make a record.

Kaczynski's effort to strengthen his arguments by breaking the district court's reasoning down into its component parts adds nothing to the arguments presented in his original and reply briefs. As set forth in the government's opening brief, the district court's decision to deny Kaczynski's request to represent himself has ample support in the record. Accordingly, the district court properly denied Kaczynski's petition under 28 U.S.C. § 2255.

B. The district court conducted a thorough inquiry into Kaczynski's complaints about his appointed counsel and his request to represent himself.

Kaczynski asserts (Supp. Br. at 21) that if the district court had "conducted an adequate inquiry [it] would have had virtually no support for a finding of purpose to delay." In fact, no additional inquiry was necessary because there was no meaningful dispute over the key facts supporting the district court's conclusion that Kaczynski asserted his right to represent himself as a tactic to delay the trial. Although the district court drew conclusions about Kaczynski's state of mind, it concluded that Kaczynski acted with the purpose to delay trial based on an objective analysis of the course of events leading up to Kaczynski's assertion of his right to counsel.

Kaczynski's request to represent himself grew out of his dispute with his attorneys over their intent to present evidence of his mental condition at trial. Kaczynski concedes that by November 25, 1997, the seventh day of jury selection, he knew that his attorneys intended to rely on evidence of his mental condition. *See* Appellant's Supplemental Brief at 25 ("It has never been in dispute that Kaczynski learned during the voir dire period (on 11/25/97) of his counsel's intentions respecting mental-state evidence."). He did not reveal this dispute until December 18, 1997, however, when he sent three letters to the district court. In response to the letters, the district court held *in camera* hearings with Kaczynski and his counsel on December 19 and 22. ER 17-30. 454. At the December 22 hearing, Kaczynski and his attorneys resolved their dispute. In that agreement, Kaczynski authorized his attorneys to present evidence of his mental condition at the penalty phase of the trial.[1] ER 82, 315-16. He also told the district court that he not wish to represent himself. ER 73, 81.

On January 7, 1998, after the district court ruled that his attorneys could present nonexpert evidence concerning Kaczynski's mental health, Kaczynski again expressly

[1] Kaczynski contends (Supp. Br. 34) that he accepted this agreement "under heavy constraint." At the time, however, Kaczynski characterized counsel's offer to forgo the introduction of expert mental-state evidence at trial as "extremely generous." ER 42.

told the district court that he did not wish to represent himself. ER 165, 319. The next day, however, Kaczynski changed his mind and told the district court for the first time that he did want to represent himself. He explained, contrary to his December 22 agreement with counsel, that he could not "endure" the idea of his attorneys' use of evidence concerning his mental condition at trial. Supplemental Excerpts of Record [SER] 20-21.

On January 22, 1998, after Kaczynski was found competent, the district court denied his request to represent himself. The court found that Kaczynski's explanation that he was asserting his *Faretta* rights because he could not endure his attorneys' decision to use evidence of his mental health at trial was "patently unreasonable." The court noted that Kaczynski waited until opening statements were about to begin to make this request, even though he had learned weeks earlier during voir dire "that his lawyers obviously intended to present mental status defense evidence." ER 129. On May 4, 1998, in an order expanding on its January 22 ruling, the court added that Kaczynski's asserted reason for wishing to represent himself was unbelievable because on December 22, Kaczynski had expressly authorized his attorneys to use mental health evidence at the penalty phase of trial. On this basis, the district court concluded that "Kaczynski deliberately chose to wait until trial was to commence on January 8 to spring his request for self-representation on the Court" and that "Kaczynski's request for selfrepresentation was for purposes of delay." ER 350.

In sum, the district court concluded that Kaczynski asserted his right to represent himself in bad faith primarily because (1) Kaczynski knew of his dispute with counsel nearly two months before trial, but failed to take action on it; (2) Kaczynski denied on December 22, 1997, and again on January 7, 1998, that he wished to represent himself; and (3) Kaczynski's December 22 agreement with his counsel directly rebutted his stated reason for wishing to represent himself. None of those facts is in dispute, and all three provide valid grounds for finding that Kaczynski asserted his right to counsel in order to delay trial. *See United States v. George*, 56 F.3d 1078, 1084 (9th Cir.), *cert. denied*, 516 U.S. 937 (1995); *United States v. Smith*, 780 F.2d 810, 812 (9th Cir. 1986); *Fritz v. Spalding*, 682 F.2d 782, 784-85 (9th Cir. 1982). Accordingly, the district court had no reason to conduct additional inquiry before ruling on Kaczynski's request to represent himself.

Kaczynski contends, however (Supp. Br. 32), that he was actually "bitterly opposed to the mental-state defense" and that if the district court had made additional inquiry it would have learned that fact.[2] But the question was not whether Kaczynski was opposed to a mental-state defense; instead, it was whether he was willing to acqui-

[2] Kaczynski also asserts (Supp. Br. 16, 28) that his explicit statement on January 7, 1998, that he did not wish to represent himself was a "result of fatigue." In fact, Kaczynski's January 7 statement was consistent with his position throughout the lengthy proceedings concerning his alleged dispute with counsel that he wished to be represented by counsel. The district court was entitled to conclude, therefore, that Kaczynski's last-minute change of mind on the brink of opening statements was evidence of bad faith.

esce in his attorneys' decision to present a limited amount of evidence concerning his mental condition at trial. The district court reasonably concluded that the most compelling evidence on that question was Kaczynski's December 22 agreement, in which he formally authorized his attorneys to rely on such evidence at the penalty phase of trial. In any event, the only additional inquiry the court could have undertaken would have been to question Kaczynski and his lawyers. The former would have been fruitless, since Kaczynski would have simply repeated that he could not "endure" a mental status defense, and the latter would have required counsel to disclose privileged communications.

Kaczynski offers few additional examples of the facts that the district court would have uncovered if it had undertaken the inquiry that Kaczynski claims it should have. In those few instances, he asserts only that the court should have inquired further of him. *See* Supp. Br. 27 (court should have conducted further inquiry into when he learned of his counsel's intention to use mental-state defense); *id.* at 29 (court should have inquired further into Kaczynski's reasons for changing his mind concerning self-representation); *id.* at 30 (court should have inquired further about Kaczynski's "interest[] in avoiding the death penalty").

These contentions ignore the district court's painstaking and extensive efforts to understand and resolve Kaczynski's concerns about his relationship with his counsel. Between December 18 and January 8, the district court held at least four *in camera* hearings with Kaczynski. During those hearings, the court took the extraordinary step of appointing an attorney to represent Kaczynski in his dealings with his attorneys and the court, and it gave Kaczynski every opportunity to state his views or express his desires. Kaczynski's "conflict" attorney, Mr. Clymo, met with Kaczynski at length and represented him fairly and zealously. With the assistance of Mr. Clymo and Kaczynski's other attorneys, the court explored every reasonable option for satisfying Kaczynski's concerns. During hearings in open court, the court also repeatedly solicited the views of Kaczynski's counsel and the government attorneys.

In short, when the district court denied Kaczynski's request to represent himself, it had conducted a sufficient inquiry to ensure that it had a thorough understanding of Kaczynski's conflict with counsel and his alleged reasons for wishing to proceed without counsel. Moreover, the court had had an extensive opportunity during the 18 months of pretrial proceedings and in its *in camera* interactions with Kaczynski to assess his credibility and sincerity. For these reasons, Kaczynski's claim that the district court should have conducted an additional hearing is without merit.

C. The district court's finding that Kaczynski's request to represent himself was untimely provided an alternative ground for denying that request

Kaczynski's supplemental brief focuses solely on the district court's finding that he asserted his right to counsel for purposes of delay. A defendant's assertion of his right to represent himself must, however, be both "timely" *and* "not for the purpose of delay." *See United States v. Keen*, 104 F.3d 1111, 1114 (9th Cir. 1996); *United States v. Arlt*, 41 F.3d 516, 519 (9th Cir. 1994). As set forth in the government's opening brief (at 41-46), Kaczynski's request to represent himself was untimely because it came after "meaningful trial proceedings" and the empanelment of the jury. Accordingly, even if Kaczynski can show that the district court was clearly erroneous in finding that he acted for purposes of delay, he could not show that the district court erred in denying his Section 2255 petition.

D. Kaczynski's supplemental brief provides no new ground on which to reverse the district court

Kaczynski devotes most of his supplemental brief to dividing the district court's reasoning into its component parts and then attacking each proposition individually. Neither Kaczynski's lengthy exegesis of the district court's reasoning nor the tables he uses to bolster his argument add anything to the arguments he presented in his opening and reply briefs. Instead, Kaczynski uses his supplemental brief to further his self-serving view of his reasons for delaying his decision to assert his right to represent himself and to second-guess the district court on matters that the district court was in a far better position to evaluate than Kaczynski. For the reasons set forth in the government's opening brief (at 46-49), Kaczynski has not shown that the district court was clearly erroneous in finding that he asserted his right to represent himself in order to secure a delay of trial.

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: September 11, 2000

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CERTIFICATE OF COMPLIANCE

By order dated August 28, 2000, the Court directed that the government's brief should not exceed 15 pages. This brief complies with that order.
September 11, 2000
J. DOUGLAS WILSON

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