

Lawyers Drop Mental Defense For Kaczynski

William Glaberson

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Lawyers for Theodore J. Kaczynski today abandoned their effort to defend him against charges that he was the Unabomber by arguing that he had a “mental defect.”

The action was a victory for prosecutors who have been working to bar the defense from arguing that Mr. Kaczynski is a delusional paranoid schizophrenic. The prosecutors asked the judge hearing the case to bar the argument because Mr. Kaczynski refused to be examined by Government psychiatrists.

But if Mr. Kaczynski is convicted, the defense could still assert before any sentence is imposed that he should not be executed because his mental illness provides a mitigating explanation for his actions.

In a hearing on sentencing, defense lawyers could present even a fuller picture of mental illness. But, because Mr. Kaczynski would be likely to continue to resist examination by Government psychiatrists, prosecutors would be likely to oppose such an effort as well.

Mr. Kaczynski and his lawyers had disagreed over his psychiatric defense, but they reached an accord about strategy this week that seemed to appease Mr. Kaczynski by forgoing psychiatric arguments when the jury hears evidence of whether he is guilty or not. It appears that the lawyers are preserving an argument over Mr. Kaczynski’s mental state for a later phase, when such evidence might be most persuasive in the effort to save his life.

Without a mental-defect argument, the defense team is left to face an expected barrage of prosecution evidence linking Mr. Kaczynski to a series of package bombings that killed 3 people and injured 28 others in an anti-technology terror campaign that began almost two decades ago, in 1978.

Pretrial sparring did not show any alternate defense theory of what happened and, far from asserting that their client was not the Unabomber, Mr. Kaczynski’s lawyers have often seemed on the verge of acknowledging that he was.

For example, when potential jurors were questioned by the defense, they were often asked whether they would automatically impose the death penalty if the defendant had in cold blood mailed package bombs with the intent to kill his victims.

Lawyers watching the case said that without the mental-defect argument, Mr. Kaczynski’s lawyers’ only chance seemed to be to try raise reasonable doubt in jurors’ minds on the Government’s case.

The defense needs to take such an approach, instead of acknowledging guilt and pleading for mercy, the lawyers said, because Mr. Kaczynski was facing the ultimate punishment of death. Lawyers watching the case said defense lawyers in such a case could not afford to give up potential grounds for appeal even if overwhelming evidence raised the possibility of angering jurors.

But several experienced trial lawyers said Mr. Kaczynski’s defense team would still be at a disadvantage by focusing on establishing a reasonable doubt because jurors expect to hear some explanation from the defense. “People expect you to do something,” said Otto G. Obermaier, the former United States Attorney in Manhattan, who has no role in the Kaczynski trial. “They want to know, ‘Why should we go your way?’ ”

The defense move did not come entirely without warning. Last week during legal arguments defense lawyers said they had offered during negotiations with prosecutors to give up their plan to present psychiatric evidence in the initial phase of the case in exchange for an agreement to be permitted some psychiatric testimony during a penalty phase without requiring Mr. Kaczynski to be examined by Government doctors.

The Government rejected that offer. At that hearing, the judge in the case, Garland E. Burrell Jr., ruled that the defense would have to provide notice to the prosecution within 10 days of whether it would seek to present such evidence in a later hearing on sentencing. That notice is due later this week.

If the defense says it plans psychiatric testimony during a potential penalty phase, prosecutors have indicated they would demand an examination by their own doctors just as they did for the first phase of the trial. If Mr. Kaczynski refuses, they are expected to ask Judge Burrell to bar the psychiatric testimony.

Judge Burrell has not yet ruled on whether to bar such testimony when the trial opens. But he has indicated he was likely to permit some evidence but to curtail the defense so as not to disadvantage the prosecution. Legal experts say a judge would be required to give the defense greater latitude when sentencing is the issue, with a life or death question.

Some legal analysts have said the defense effort to raise the insanity issue during the first phase of the trial appeared to be a strategic decision to try to begin arguing for mercy rather than to cede that part of the case to the prosecutors.

Because Mr. Kaczynski has long resisted suggestions that he has mental problems and because the mental-defect argument presented a series of legal hurdles, some lawyers have said they were not certain the defense lawyers were ever fully committed to advancing the claim.

Giving up that assertion, therefore, those lawyers said, might not be viewed as a serious blow to the defense. In addition, with many lawyers watching in fascination as Mr. Kaczynski apparently struggled with his lawyers over the mental-defect strategy, some analysts said the decision to abandon the effort might be the way the lawyers had made peace with their client.

Mr. Kaczynski, who is said to be opposed to any assertion that he is mentally ill, met privately with his lawyers and the judge last week to discuss what Judge Burrell characterized as concerns Mr. Kaczynski had with his lawyers.

Anthony P. Bisceglie, a Washington lawyer for Mr. Kaczynski's brother, David, also said he had read the defense lawyers' action today as a capitulation by them to their client. David Kaczynski, who turned in his brother to the authorities, has been asserting that Mr. Kaczynski's mental illness explains his actions and would make a death penalty inhumane. David Kaczynski has long said his brother's staunch denial that he has mental problems is a clear symptom of how ill he is.

Today, Mr. Bisceglie said the withdrawal of the effort to assert a mental defect argument was continuing evidence of Theodore Kaczynski's distorted view of reality.

“It proves what my client has been saying for months and months,” he said, “and that is that Ted Kaczynski is fixated in his denial that he is suffering from a mental illness.”

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