COMMENTARY AND ANALYSIS

The Kaczynski Dilemma

A Defense Lawyer's Ethical Duty To a Self-Destructive and Mentally Ill Client

BY RICHARD A. ZITRIN

The Kaczynski case is over, ended with a guilty plea that seemed to satisfy most participants and observers, and even many of the victims. But this resolution was achieved only after Theodore Kaczynski had been denied the ability to decide the course of his own defense.

Kaczynski's counsel, Quin Denvir and Judy Clarke, faced what might be the toughest ethical dilemma any lawyer can have: how to represent your client when the strategy you firmly believe is in your client's best interests is totally unacceptable to the client. Making this situation worse was their belief that Kaczynski was seriously mentally ill, if not legally insane. Were this not enough, they had to determine their defense strategy under the watchful eyes of media representatives in numbers rivaling the Oklahoma City trials.

First, a somewhat oversimplified summary: Kaczynski wanted nothing to do with any defense that suggested he was mentally ill. Whatever consideration Denvir and Clarke gave to actually presenting an insanity defense was effectively stymied by the client's refusal to submit to a psychiatric evaluation. The lawyers continued to insist, over Kaczynski's objections, that they would present a "mental defect" defense, though it remained unclear exactly how.

Judge Garland Burrell Jr. agreed to allow the defense team to raise the issue of Kaczynski's mental state, but the government filed an unusual document objecting to the use of Kaczynski's mental illness as a defense, and demanding a hearing on the issue. Judge Burrell then ordered a competency evaluation. After Kaczynski was found competent, Burrell denied Kaczynski's request to conduct his own defense, and the plea of guilty and sentence of life imprisonment soon followed.

On the surface, the plea arrangement seems to have gotten most people what they wanted. Kaczynski's brother, David, and his mother were grateful that Ted's life had been spared. Prosecutors avoided the growing criticism over their insistence on the death penalty for one so obviously mentally ill. And Judge Burrell got off the horns of several legal dilemmas: Had he correctly ruled that Denvir and Clarke could use Kaczynski's mental condition in court? Should he have allowed Kaczynski to hire San Francisco defense lawyer Tony Serra to come in and put on a political defense, a move that would have delayed the trial for several months and created a possible circus? Was he justified in denying Kaczynski, now found competent, the right to represent himself?

WHO DECIDES BEST INTERESTS?

It's likely that no one was more relieved by the guilty plea than Kaczynski's dedicated attorneys. Their care for their client and concern for his welfare were manifest, and helped them avoid a complete breakdown in their relationship, even when they were completely at odds with him. This undoubtedly contributed to the successful plea negotiations. But did Ted Kaczynski get what *he* wanted from this plea bargain? And ultimately, did his attorneys act in his best interests, not as they saw those interests, but as *he* saw them?

We will never know, and even the participants may never know, what would have happened had Denvir and Clarke acted as Kaczynski's "mouthpieces" by representing his views in court as strongly as they could. Perhaps they would have gone to trial and their client would have received the death penalty, though this seems unlikely. Perhaps Judge Burrell's refusal to allow Kaczynski to represent himself would have led to conviction but would have been reversed on appeal. Or perhaps Serra would have been allowed to represent Kaczynski, or advise him in his self-representation, presenting a political defense. Perhaps the very nature of that defense would have convinced a jury that Kaczynski was indeed crazy and did not deserve to die.

All this, of course, is rank speculation. But it's based on what could have happened had Kaczynski's lawyers chosen to do his bidding—acting in what *he* thought were his best interests, rather than what they thought. By never presenting their client's view of his case, they may have put Kaczynski in the position of accepting a plea he really didn't want—an offer he couldn't refuse.

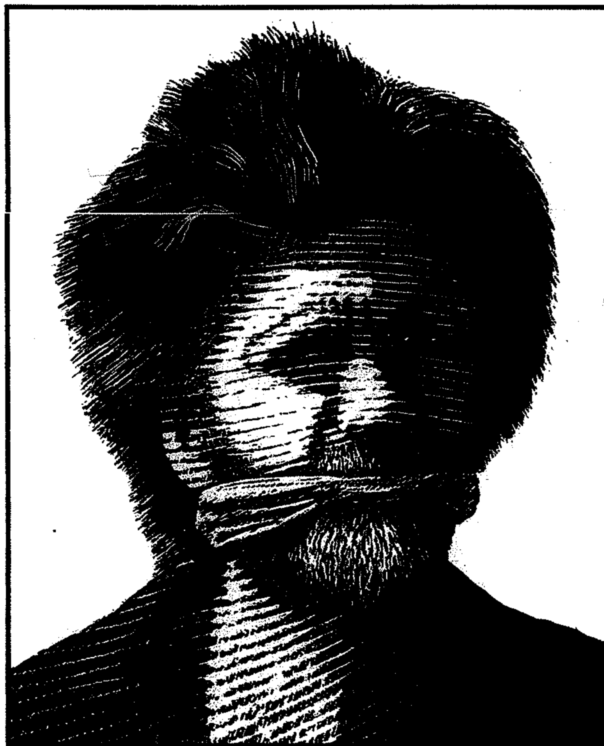
How much of a mouthpiece must a lawyer be, particularly where the client is mentally impaired? Interestingly, California case law—the law that governs the ethics of California practitioners in state or federal court—has distinguished between incompetence and insanity. In a 1979 case, a California court held that a defense attorney acted properly by presenting expert testimony that his client—who believed that aliens inhabited the bodies of the relatives he had assaulted—was incompetent. *People v. Bolden*, 99 Cal. App. 3d 375 (1979). But in 1975, the California Supreme Court had held that defense counsel couldn't force an insanity defense on an unwilling client. *People v. Gauze*, 15 Cal. 3d 709 (1975).

Denvir and Clarke never had their client's cooperation for an insanity defense, and never asked for a competency hearing until the judge himself ordered it. They were left with a tough predicament—whether they could present Kaczynski's mental state either as a partial defense in the case in chief, or to save his life in the penalty phase. With the judge's imprimatur, they chose to go forward, against their client's wishes, even though he was never found incompetent.

It's difficult to be critical of Kaczynski's lawyers in making this hard, almost impossible, decision—especially under such trying circumstances. But I must disagree with their choice. Who in the courtroom spoke for what Ted Kaczynski wanted, crazy as that may have sounded to us? The answer is no one. It's obvious that no defense lawyer would have voluntarily presented the case Kaczynski's way or advocated his "strategy." But ultimately, it was Kaczynski's life at stake, and his call to make. As members of the criminal law community often say, "We don't do the time."

CLIENT'S WISHES SHOULD PREVAIL

In 1991, the California Supreme Court decided the second death penalty appeal of a man named Deere. In Deere's first trial, his lawyer, having discussed the matter closely and carefully with the client, refused to put on mitigating testimony in the case's death penalty phase. The lawyer told the court that Deere had said that such evidence would "cheapen" his relationship with his family and remove his "last vestige of dignity." The state Supreme Court reversed the death penalty finding on ineffective counsel grounds, and ordered the lawyer to present mitigation. *People v. Deere (I)*, 41 Cal. 3d 353 (1985).



TOM TEAGUE

But at the second penalty phase, Deere again objected to presenting mitigating evidence, and his lawyer again refused to do it. "If I were to follow the Court's order and present mitigating evidence, [my client] would object to the very depth of his soul," the lawyer told the trial court. This position was the client's "true and sincere and honest beliefs about what is right for him. . . . So I cannot do it. I hope the Court doesn't feel that denial is contemptuous, but if the Court sees it that way, so be it."

Six of the seven justices signed an opinion that described this lawyer as having "at great personal risk, courageously performed the duty owed to the client." The seventh excoriated the lawyer as unethical. *People v. Deere (II)*, 53 Cal.3d 705 (1991). The majority was right: Painful though it was for his lawyer, Deere only had one person in the world to speak for him, to be a mouthpiece. His counsel was that person.

Despite disagreeing with Denvir and Clarke's ultimate decision, I can understand their motives. The same cannot be said for the prosecution team that for a time looked like it would not only turn David Kaczynski into the case's most sympathetic figure, but arouse sympathy for brother Ted as well. With one hand, government lawyers repeatedly refused the defense's proffer of a guilty plea in return for a sentence of life without parole. With the other, they filed a request to be heard on what the defense strategy should be at trial.

While they were understandably concerned that failing to allow Kaczynski his defense of choice might be error, their position was disingenuous in light of their insistence on the death penalty. And to counter the defense lawyers' feelers about withdrawing in favor of some other attorney, the government claimed counsel had no grounds to do so, despite the clearly applicable California rule permitting a lawyer to withdraw where the client makes it "unreasonably difficult for the member to carry out the employment effectively." Calif. Rule of Prof'l Conduct 3-700(C)(1)(d).

Several lessons can be drawn from the Kaczynski case. First, a defendant's competency should be evaluated as early as possible in the case, not as a virtual afterthought.

Second, before indictment, the prosecutors ought seriously to consider, if not actually resolve, how they will deal with plea negotiations where their case is based on information provided by an immediate family member, or where the defendant obviously is materially impaired. There was no need for the Kaczynski play to drag on through so many acts.

Third, the predicament of defense counsel representing a mentally impaired defendant is ultimately everyone's problem, judge and prosecution included. Everyone should focus on assuring the defendant that his voice will indeed be heard, not by tossing a pencil across a table or making a speech during jury selection, but from the very beginning of the case.

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