

**FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

v.

THEODORE JOHN KACZYNSKI,  
Defendant-Appellant.

No. 99-16531

D.C. Nos.  
CV-99-00815-GEB  
CR-96-00259-GEB

ORDER AND  
DISSENT

Filed August 17, 2001

Before: Stephen Reinhardt, Melvin Brunetti, and  
Pamela Ann Rymer, Circuit Judges.

ORDER; Dissent by Judge Kozinski

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**ORDER**

A majority of the panel has voted to deny the petition for rehearing. Judge Reinhardt voted to grant the petition for rehearing. Judges Reinhardt and Rymer voted to deny the petition for rehearing en banc and Judge Brunetti so recommends.

The full court has been advised of the petition for rehearing en banc. An active judge called for an en banc vote, and a majority of the active judges of the court has voted to deny the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

KOZINSKI, Circuit Judge, dissenting from the order denying the petition for rehearing en banc:

I need not address the flaws in the majority opinion; Judge Reinhardt does so eloquently in his dissent. I write to point out that this is not just a case about the sufficiency of the district court's findings; it is about the integrity of the judicial process. The opinion affirms the finding that Kaczynski made his Faretta motion for purposes of delay, even though he said he was asking for no delay. Is this 1984, or what? If a defendant tells the court he is willing to go to trial right then and there, how can the district court possibly find the opposite? After all, the district judge need not delay; he can take defendant at his word and go forward with the trial. Defendant's secret intentions and reservations--whatever they be--are of no consequence. If the district judge doubts the defendant's sanity for making that choice, he can order a competency hearing, as he did here. But having found Kaczynski competent, how can the district judge penalize him for delay that he does not seek?

It is true that Kaczynski tried to improve his situation by attempting to hire Tony Serra as substitute counsel; who in Kaczynski's position wouldn't? This just shows that Kaczynski knows his self-interest. Doubtless, he would have preferred to go to trial represented by a lawyer who would follow his instructions. But when that proved impossible--precisely because Serra needed time to prepare--Kaczynski chose to go it alone rather than with lawyers who would paint him as a kook. The opinion does not explain why Kaczynski's statement--made by a competent defendant on the record--is not merely proof of his intentions, but binding on him.

I well understand the district judge's motives for doing what he did. See Reinhardt Dissent at 1897-1900. But there is an important principle at stake here: **whether we who administer the law will treat ordinary mortals with the candor and respect they deserve as human beings.** There is, I suggest,