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The Appeal

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United States Court of Appeals for the Ninth Circuit

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Alex Kozinski and Alexander Volokh[†]

† Alex Kozinski is a federal judge in California; Alexander "Sasha" Volokh is his law clerk. Kozinski and Volokh are widely respected, the latter for his brains, the former for his looks. — Ed.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES, *Plaintiff – Appellee,* v. JOSEF K., *Defendant – Appellant.*	No. 25-1883 OPINION

Appeal from the United States District Court
Hermann Bendemann, District Judge, Presiding

Argued and Submitted July 3, 1926

Filed May 1, 2005

Before: Alex K.,* Bucephalus and Godot,** Circuit Judges.

Opinion by Judge Alex K.***

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* No relation.

** Sitting by designation pursuant to 28 U.S.C. § 291. Judge Godot was not present at oral argument but will read the transcript as soon as he gets here.

*** As is the custom in the federal courts today, every word of this opinion was written by Judge K.'s law clerk, Sasha V. (The common delusion that judges actually write the stuff they author has led to some misunderstandings. *See, e.g.*, *Thompson v. Calderon*, 120 F.3d 1045, 1062 n.3 (9th Cir. 1997) (en banc) (Reinhardt, J., concurring) (referring to "a [surprising] communication from Judge K").) The judge merely read the text and fiddled with the language (but Sasha V. managed to reverse most of the changes in later drafts). It is well known that the judge never reads the footnotes.

COUNSEL

Odradek, for appellant.

Public Prosecutor Hasterer, Office of Prosecution, for appellee.

OPINION

ALEX K., Circuit Judge:

FACTS[1]

The late Josef K., a thirty-something male, claims that "[s]omeone must have slandered [him], for one morning, without having done anything truly wrong, he was arrested." T.R. 3.

The procedural history of this case is complicated and patchy, but what is clear is that, after being rude to his arresting officers, appellant came late to his initial interrogation and disrupted the proceedings.[2] He refused to attend further interrogations, submitted no evidence or brief in his defense and repeatedly accused judicial authorities of corruption and incompetence.[3]

He was apparently convicted, though the conviction does not appear in the record. On the eve of his thirty-first birthday, K. was taken to a quarry by two guards and executed. "With failing sight K. saw how the men drew near his face, leaning cheek-to-cheek to observe the verdict. 'Like a dog!' he said; it seemed as though the shame was to outlive him." T.R. 231. As it has.

K. appeals, alleging unlawful arrest, inadequate notice, due

[1]The trial record in this case has been published as Franz Kafka, *The Trial* (Breon Mitchell trans., Schocken Books) (1925). We regret the delay in disposing of the appeal, but we've been busy with more important matters. *See, e.g.*, Alex K. & Sidney T., *Don't Split the Ninth Circuit!*, Wall St. J., Nov. 10, 2004, at A16.

[2]This is not the only case where appellant has been "loud, emotional, expressed paranoid notions and lacked self control." *See Alameda County Soc. Servs. Agency v. Joseph K.* (*In re Randi K.*), 2004 Cal. App. Unpub. LEXIS 5427, *3 (June 9, 2004).

[3]We could end right here, for what else need there be said? Nevertheless, we will continue so no one can accuse us of "prejudging the case" or giving appellant "short shrift." No doubt, appellant will be much happier to lose based on a post-judged, long-shrift opinion.

process violations, systemic corruption, ineffective assistance of counsel and actual innocence. We affirm. *See, e.g.*, *State v. Samsa*, 1991 Ohio App. LEXIS 2483, at *1 (May 29, 1991) ("We affirm.").

ANALYSIS

1. The government claims the case was mooted by appellant's death. But appellant casts aspersions on the legitimacy of the legal proceedings against him, and his calumny cannot be left unrebutted. *Not contra Spencer v. Kemna*, 523 U.S. 1, 16 n.8 (1998) (damage to reputation of mere parties does not defeat mootness).

The government seems to argue, though incoherently, that we lack jurisdiction because the events in question took place abroad. K. responds that the Supreme Court's rulings in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), and *Republic of Austria v. Altmann*, 124 S. Ct. 2240 (2004), give us jurisdiction over events anywhere, anytime. We are inclined to take K.'s word for it, as we can't bring ourselves to slog through over eighty pages of the Supreme Court Reporter.[4]

2. K. challenges the authority of the officers to enter his apartment, claiming that he was unlawfully "assault[ed] . . . in his own lodgings." T.R. 6. But K. waived this argument when he got out of bed and told the arresting officer he was going to ask his landlady about the disturbance. The record clearly shows that K. "realized at once that he shouldn't have spoken aloud, and that by doing so he had, in a sense, acknowledged the stranger's right to oversee his actions." T.R. 4; *cf. Christian v. United States*, 394 A.2d 1, 38 (D.C. 1978) (per curiam) ("[T]he defendant can waive, through his silence, a constitutional right . . . .").

K. urges that we ignore his oversight because "that didn't seem important at the moment." T.R. 4. But police actions are to be judged by their objective reasonableness at the time, not in hindsight or according to defendant's shifting mental state. *See Florida v. Jimeno*, 500 U.S. 248, 249 (1991) (objective

[4] What gets *into* them sometimes? *See also McConnell v. FEC*, 124 S. Ct. 619 (2003) (168 pages of Supreme Court Reporter never read by anyone).

reasonableness under the circumstances); *cf. In re Samsa*, 86 B.R. 863, 865 (Bankr. W.D. Pa. 1988) (court must consider law at time of transaction).

Even though he was under arrest, K. was still allowed to "carry[] on [his] profession" and was not "hindered in the course of [his] ordinary life." T.R. 17.[5] Also, K. admitted that the arrest "ma[de him] laugh," T.R. 47, and that, to the extent the incident tended to "spread the news of [his] arrest [and] damage [his] public reputation, and in particular to undermine [his] position at the bank," "none of this met with the slightest success." T.R. 48. Without cognizable harm, K. lacks standing to contest his arrest. *De minimis non curat lex.*

3. While we're on the subject of trifles, we address K.'s claim that he was arrested without a warrant. At the time of the arrest, K. showed the guard his identification papers and demanded, in return, to see the guard's papers and the arrest warrant. T.R. 8. Not only was he not shown these, he was also told that the guards "weren't sent to tell" him why he was arrested. T.R. 5.

We see no problem. Before ordering an arrest, the authorities "inform themselves in great detail about the person they're arresting and the grounds for the arrest." T.R. 8. They don't "seek out guilt among the general population, but . . . [are] attracted by guilt . . . . That's the Law." T.R. 8–9; *see also* Decl. of Penal Colony Officer ("Guilt is always beyond a doubt."); *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975) (arrest warrant not necessary for arrest supported by probable cause).

4. K. argues that he did not receive adequate notice of the initial hearing: He wasn't told the hour of his hearing and he complains that the court didn't "describe[] the location of the room more precisely," alleging that this somehow amounts to "strange

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[5]He was fortunate to have guards who were friendly with him, though this "exceed[ed] [their] instructions" and was "against all regulations." T.R. 5. K.'s guards even offered to hold his personal possessions for safekeeping while his case was pending instead of forcing him to take his chances with the depository, which would have sold the possessions at below-market prices and might never have returned the proceeds to him. T.R. 5–6; *see also* T.R. 81 ("[I]t's a tradition that the undergarments belong to the guards . . . ."); *Psalms* 22:18 (King James) ("[T]hey divide my garments among them, and for my raiment they cast lots."); *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) ("We begin . . . by examining our Nation's history, legal *traditions*, and practices." (emphasis added)).

carelessness or indifference." T.R. 35, 39.

K.'s problems are of his own making. Court calendars are published, and citizens are presumed to know every word of all official publications. *See Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384–85 (1947). K. admits that he came an hour and five minutes late because he did not "have the least desire to humble himself before the commission of inquiry by being overly punctual." T.R. 38. He "decided to observe more than speak" and merely said, "I may have arrived late, but I'm here now," and thus "waived any defense of his . . . late arrival." T.R. 43.

5. Rather than give it up, K. challenges the substance of his initial interrogation. He alleges that the proceedings were "sloppy," indeed, that they were not even "proceedings at all." T.R. 45. We need not delve too deeply into this argument: The examining magistrate correctly remarked that, in view of K.'s lateness, he had no duty to even examine K., but exercised his discretion to make an exception in K.'s case. T.R. 43. We find no abuse of discretion.

But even if we were to reach the merits of K.'s argument, we would find it meritless. K. points to the examining magistrate's mistakes of fact, notably his erroneous characterization of K. as a house painter. T.R. 44. But this mistake was clearly harmless beyond a reasonable doubt, *see Chapman v. California*, 386 U.S. 18, 24 (1967), since the record does not disclose what the actual charge was and we therefore can't say that the mistake was even relevant.

Moreover, with his displays of histrionics and rudeness to the examining magistrate, K. "deprived [himself] . . . of the advantage that an interrogation offers to the arrested man in each case." T.R. 52–53; *see Arizona v. Fulminante*, 499 U.S. 279, 313 (1991) (Kennedy, J., concurring in the judgment). This uncooperativeness continued throughout the entire course of the proceedings. K. "wantonly disturb[ed]" the legal process and virtually brought the "violent measures he had thus far been spared" on himself. T.R. 251. K. can "do as he wishe[s], but he should bear in mind that the high court [can]not permit itself to be mocked." T.R. 252; *see Illinois v. Allen*, 397 U.S. 337, 343 (1970) ("[A] defendant can lose his right to be present at trial if . . . he . . . insists on conducting himself in a manner so disorderly, disruptive, and

disrespectful of the court that his trial cannot be carried on with him in the courtroom.").[6]

Finally, K. comments that his case "is typical of the proceedings being brought against many people. I speak for them, not for myself." T.R. 46–47. This case has not been certified as a class action, and to the extent that K. disclaims any challenge to harms he himself has suffered, he lacks standing. *See* Note, *Standing To Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423 (1974).[7]

6. K. has already waived any claim against his arresting officers, leaving only his claims against supervisory officials and government entities. *See* T.R. 83 ("I don't even consider [my arresting guards] guilty; it's the organization that's guilty, it's the high officials who are guilty."); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

K. produces no evidence for his claim that "an extensive organization" of corrupt officials, the purpose of which is "arresting innocent people and introducing senseless proceedings against them," was behind his arrest, beyond the conclusory assertion that "[t]here can be no doubt" about it. T.R. 50; *see Samsa v. Comm'r*, 42 T.C.M. (CCH) 1101 (1981), at *7 (testimony need not be accepted where it is "improbable, unreasonable or questionable"); Alex K. & Eugene V., *Lawsuit, Shmawsuit*, 103 Yale L.J. 463, 467 (1993) ("Chutzpah."). To the contrary, the members of our judicial system are conscientious and hard-working. Court employees are "poorly dressed, in old-fashioned clothes; it doesn't make much sense to spend anything on clothing, since [they're] almost always in the offices, and even sleep [there]." T.R. 76.[8] They belong to the Law, and thus are beyond human judgment. *See Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871) (judges have absolute immunity for judicial acts). To doubt their dignity is to doubt the Law itself. T.R. 222–23.

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[6] This is so tedious, I wonder if anyone is still reading. For this I ate 6000 stale bagels at Gannett House?

[7] *But see* Sasha V., *n Guilty Men*, 146 U. Pa. L. Rev. 173 (1997) (brilliantly proving that proceedings are not fair unless they guarantee release of those who are guilty).

[8] No kidding. Eugene V. never told me about this. *See also infra* note 9.

7. K.'s most substantial claim is ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984). K. complains that his lawyer, Dr. Huld, didn't summon him for over a month, and generally scarcely asked any questions, instead sitting across from K. in silence or giving K. empty admonitions and useless, self-congratulatory speeches. T.R. 112. After months, K. alleges, Huld still hadn't prepared an initial petition. T.R. 177. This looks bad, but it's not as if the lawyer was asleep during trial. *See, e.g., Burdine v. Johnson*, 262 F.3d 336, 348–49 (5th Cir. 2001) (en banc).

In any event, we can't rule out that Huld's supposed deficiencies were in fact K.'s fault. K. could have contacted the lawyer sooner. T.R. 123. His bad experience may be attributable to the fact that he was a bad client: He insisted on pursuing a high-stress professional career and only showed up at times convenient to him rather than, like other clients, being "quiet and industrious," T.R. 194, abandoning most of his professional commitments, T.R. 173–74, and sleeping in Huld's house in case Huld needed to talk to him, T.R. 182; *see also* T.R. 192 (client on his knees before the lawyer); T.R. 193 (client kissing the lawyer's hand).[9]

K. also took the "unheard of . . . and quite insulting" step of firing his lawyer during the trial. T.R. 125. Who knows how effective Huld would have been if he had been allowed to do his job? *See, e.g., Smith v. Ylst*, 826 F.2d 872, 875–76 (9th Cir. 1987) (even a mentally ill lawyer can be effective). At the very least, Huld is highly competent. Merchant Rudolf Block, one of Huld's longtime clients, testified regarding both Huld's competence and considerable personal contacts, T.R. 116, the latter being perhaps the most relevant element in determining Huld's ability: While the court is impervious to proof brought before it, "it's another matter when it comes to behind-the-scene efforts, in the conference rooms, [or] in the corridors." T.R. 150–51.[10]

Moreover, K. cannot show any prejudice from Huld's failure to prepare a petition. Block, for instance, found his own petitions "entirely worthless" and containing "nothing of substance,"

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[9] Sounds a lot like a law clerk. *See supra* note 8.

[10] K.'s implicit claim that such contacts are unsavory and should be discouraged collapses of its own weight. Is there a courthouse anywhere that does *not* have corridors and conference rooms? Obviously they're there for a purpose.

consisting mainly of Latin, general appeals to the court, flattery of individual officials, self-praise, and "almost canine servility." T.R. 177. What cause have we to believe that K.'s petition, if prepared, would have been any better?

We are torn about K.'s ineffective assistance claim. On the one hand, we must promote the strong public policy against defense lawyers. "[T]he defense is not actually countenanced by the Law, but only tolerated, and there is even some controversy as to whether the relevant passages of the Law can truly be construed to include even such tolerance." T.R. 114. Lambasting K.'s lawyer for incompetence would thus serve an important public purpose. On the other hand, we must also give effect to the strong public policy of ruling against criminal defendants. *See, e.g., United States v. Decoster*, 624 F.2d 196, 240 n.64 (D.C. Cir. 1976) (en banc) (MacKinnon, J., concurring) ("[M]ost defendants are guilty . . . .").

Though it is a close case, we side with the lawyer, who, after all, had to put up with appellant's officiousness. "[A]lmost every defendant, even the most simple-minded among them, starts thinking up suggestions for improvement from the moment the trial starts, and in doing so often wastes time and energy that would be better spent in other ways." T.R. 119. "One should leave the task to the lawyers, instead of interfering with them." T.R. 120; *see, e.g., Florida v. Nixon*, 125 S. Ct. 551, 557 (2004) ("'In this case, there won't be any question, none whatsoever, that my client . . . caused [the victim's] death.'").

8. K.'s only clear claim is that he is innocent. *See, e.g.*, T.R. 47, 148, 213. But how can K. credibly claim innocence when he admits to not knowing the law? T.R. 9. He might as well dispute what the meaning of "is" is. The fuss he makes about how innocent he feels "disturbs the otherwise not unfavorable impression [he] make[s]." T.R. 14. Especially ludicrous is his suggestion that no one can "in general be guilty," as "[w]e're all human after all, each and every one of us." T.R. 213. That's how guilty people always talk.

In any event—and this is the nub of the matter—we fail to see what's so special about being innocent. *See Commonwealth v. Amirault*, 677 N.E.2d 652, 665 (Mass. 1997) ("[O]nce the [criminal] process has run its course . . . the community's interest in finality comes to the fore."). We will assume, for the sake of

argument, that K. did not commit the crime for which he was convicted and executed. Can we be sure that K. did not commit some other, worse crime, that was overlooked? To ask the question is to answer it. The law works in mysterious ways and that which should be done is presumed to have been done. It follows that that which was done needed doing. K. was convicted and executed after a legal process that, as we have seen, is unimpeachable. He must have deserved what he got.

CONCLUSION

K.'s overarching complaint, that "the Law should be accessible to anyone at any time" and that he has been denied entry to it, T.R. 216, "rings hollow." Alex K., *Scholarship of the Absurd: Bob Bork Meets the Bald Soprano*, 90 Mich. L. Rev. 1578, 1583 (1992). The very existence of these proceedings has provided an entrance for K. to defend himself. K. has consistently refused to cooperate with court officials' repeated attempts "to straighten out his complex case, regardless of the time and cost." T.R. 251. No one else could gain admittance here, because this entrance was meant solely for him. If he nevertheless remained outside, he has only himself to blame.

AFFIRMED.