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PRO SE DEFENDANT

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

KENNETH MEDENBACH,
Defendant(s).

Case No. 3:16-CR-00051-16-BR

RESPONSE TO ORDER TO SHOW CAUSE

Pro se defendant, Kenneth Medenbach, offers the response to the court's *sua sponte* order for him to show cause why his pro se status should not be terminated.

A. The right to represent oneself is fundamental to the Sixth Amendment.

In *Faretta v. California*, the United States Supreme Court found that inherent in the Sixth Amendment is a defendant's right to represent himself:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense...Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.

> *Faretta v. California*, 422 U.S. 806, 819–20, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d 562 (1975).

It is for this reason that Mr. Medenbach has chosen to represent himself. In the end he must bear the consequences of his choices and not his standby counsel. If he is found to have broken the law during his act of civil disobedience he alone will be punished.

The legal issues he raised were raised in good faith. He continues to believe that the arguments he made in his motions represented an evolution of his arguments and research. Those efforts were neither frivolous nor repetitive. He intended through his successive pleadings to raise different arguments that he had developed or discovered and not simply antagonize the court.

Mr. Medenbach has chosen to represent himself because he believes that his trial strategy should be his own. That kind of choice lies at the heart of the right of self-representation.

> The counsel provision supplements this design. It speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master and the right to make a defense is stripped of the personal character upon which the Amendment insists.

> *Faretta v. California*, 422 U.S. 806, 820, 95 S. Ct. 2525, 2533–34, 45 L. Ed. 2d 562 (1975).

B. Mr. Medenbach did not willfully violate the court's orders.

On March 11, 2016, while engaging in the following colloguy with Judge Brown, she stated: "Well, Mr. Medenbach, if it's any comfort to you, I take exceedingly seriously the oath of office I took." Mr. Medenbach stated: "You take two oaths." Judge Brown stated "Sir, I took the oath, a single oath that's on record. But I would like to finish. I let you speak. I want you to listen. It's not necessary for me to make this point, but I feel I want to communicate to you as an individual. I have in fact, throughout my judicial career, tried every time I had to make a ruling to follow the oath I took, both as a judge of the circuit court of the state of Oregon and then beginning in 1999, for this court, to support and defend the Constitution of the United States." Mr. Medenbach responded: "Under 28 USC § 453 is the oath of office, to under the Constitution, which all federal judges are required to take." (Pause, referring.) "Oh, and 5 USC § 3331 is the other oath of office you're required to take."

The court responded: "All right. Thank you, sir. You've made those points previously. You've made them again now. The motion to dismiss -- I'll ask the clerk to note on the minutes for today's proceeding, Mr. Medenbach made an oral motion to dismiss for lack of subject matter jurisdiction, for the reasons he stated on the record, and that motion was denied by the Court."

The point at that time that Mr. Medenbach was trying to make was that Judge Brown took two oaths, the Constitution allows and requires only one oath, "to support and defend the Constitution."

Later, at Mr. Medenbach's *Faretta* hearing, the court noted: "Mr. Medenbach raised for the first time a motion to dismiss this matter the basis that, among other things, this judicial officer took an unconstitutional oath of office." The court stated she had taken one oath of office to support and defend the constitution.

At that point Mr. Medenbach did not know what oath the court had actually taken. Mr. Medenbach's argument was based on his reading of the law and Constitution. The law required two oaths: 5 USC § 3331 and 28 USC § 453 amended. As of April 6, 2016, Mr. Medenbach who was in custody still did not know what Judge Brown's oath said and all he was attempting to do when cut off by the court was to explain what the law said. At this point Mr. Medenbach had not made any arguments about the Constitutionality of the court's oath.

It was not until the status hearing on May 4, 2016 that Mr. Medenbach had obtained a copy of Judge Brown's oath of office, which showed two oaths. Mr. Medenbach tried to explain to the court that this was unconstitutional because, in Mr. Medenbach's view, if the constitution does not say a judge can take two oaths of office, a judge cannot take two oaths of office. This was the first point at which Mr. Medenbach understood that the court had taken two oaths. The court noted it on the record.

At the June 15, 2016 status hearing Mr. Medenbach delivered to the court a redacted oath of office based on the oath that Judge Brown said she took in 1999. In Mr. Medenbach's view this would make her a constitutional judge. The court accepted these items into the record. Judge Brown said she will put them into evidence for the court of appeals. Mr. Medenbach suggested the Judge Brown initial the revised oath. To make here a constitutional judge. Judge Brown said she wasn't going to play these games.

On July 22, 2016 Mr. Medenbach filed a motion to dismiss based on his belief that the court took an unlawful oath based on statutory interpretation. That argument had nothing to do with the constitution's requirement of an oath. Mr. Medenbach's belief was that if the court did not want to take an oath consistent with the Constitution perhaps the court would at least agree to take an oath consistent with statutory requirements.

Based on Mr. Medenbach's review of the law, federal judges can take up to 5 different oaths, one constitutional oath, two statutory oaths and two combined oaths. From the online ConstitutionalFacts.com page below, a federal judge can take a variety of oaths.

Unlike the Presidential Oath of Office, the wording of the Supreme, Circuit and District Court Justices and Judges Oath is not explicitly defined in the text of the United States Constitution. However, according to Article VI of the Constitution:

> "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious test shall ever be required as a Qualification to any Office or public Trust under the United States."

In 1789, Congress sought to remedy this omission by drafting an official oath. This first version was used until 1861. The text was short, a single sentence. It read:

"I do solemnly swear (or affirm) that I will support the Constitution of the United States."

The oath prescribed now reads:

"I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

This oath of office, much more specific and lengthy than the original, is now used by every federal office investiture except for the office of the President.

Appointees to the Supreme, Circuit and District Courts must not only take the oath listed above, but a second oath. This statement is called The Judicial Oath. The Judiciary Act of 1789 established the federal judiciary. The Act set the number

of Supreme Court Justices at six (five Associate Justices and one Chief Justice). It also mandated that for the Supreme Court, Circuit Court, and District Court Justices and Judges to begin serving, they must swear a second Oath of Office. The original text of this oath which underlies the Court's holding in *Marbury v Madison*, states:

> "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as _____, according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States."

The court in *Marbury* explicitly relied on this oath in support of its conclusion that the federal courts can in fact interpret the Constitution. It is for this reason that the court's oath is material to Mr. Medenbach's view of the court's jurisdiction.

> The court goes on to say, "why does a Judge swear to discharge his duties agreeably the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime."

The implication of *Marbury's* statement about the oath is to emphasize the extraordinary importance of the oath and the language of the oath to any court's claim of jurisdiction.

According to *Marbury v. Madison*, it becomes a crime for a congressman to prescribe this oath and a crime for a justice or judge to take this oath, if the Constitution is closed upon him and cannot be inspected by him, thus, if a justice of judge takes this oath, the Constitution is not closed upon him and must be inspected

by him or it will be a crime. This, Mr. Medenbach contends, is the basis for the power of judicial review.

This oath was used until 1990 when the Judicial Improvements Act replaced the phrase "according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God," with "under the Constitution,"

The Congressional Research Service of the Library of Congress, which works exclusively for the United States Congress, providing policy and legal analysis to committees and Members of both the House and Senate, prepares upon enactment into law, a final public law summary that provides clear evidence of Congressional intent:

> "By replacing 'according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God,' with 'under the Constitution,' the Congressional Research Service stated, "This language proved reasonably more effective in tying the decisions of the judiciary to the authority of the United States Constitution."

Based on Mr. Medenbach's review of publicly available copies of oaths, Supreme, Circuit and District Court Justices and Judges have elected to take a Combined Oath which brings the two affirmations together in one statement. The Constitutional oath and one of either the pre 1990 statutory oath or the post 1990 statutory oath.

As a pro se defendant it was unclear to Mr. Medenbach if in fact he had properly raised the various issues with the various oaths of office. Mr. Medenbach did not believe that by raising his arguments in a separate civil matter he violated the court's admonition to not raise the issue of the court's oath in this proceeding.

C. Conclusion:

Mr. Medenbach firmly believes that the power to interpret the constitution remains not with the court but with the people to be exercised collectively through a representative process just as Thomas Jefferson suggested:

> "The question whether the judges are invested with exclusive authority to decide on the constitutionality of a law has been heretofore a subject of consideration with me in the exercise of official duties. Certainly there is not a word in the Constitution which has given that power to them more than to the Executive or Legislative branches. The ultimate arbiter is the people of the Union, assembled by their deputies in convention, at the call of Congress or of two-thirds of the States."

Mr. Medenbach did not willfully violate the Court's order.

Respectfully submitted on July 27, 2016

Kenneth
Medenbach

Kenneth Medenbach
Pro Se Defendant.