No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

IOURI MIKHEL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Due process requires the trial court to order a competency hearing whenever the uncontradicted evidence raises a doubt as to the defendant's competency. The question presented is where significant evidence of competency is susceptible to conflicting inferences, some pointing to competency and some pointing to incompetency, what standard of proof is required for a hearing and what party bears that burden.

2. Whether 18 U.S.C. § 1203 should be interpreted in accordance with its underlying treaty and the principles in *Bond v. United States*, 572 U.S. 844, 134 S. Ct. 2077 (2014) as applying to hostage taking related to international terrorism, and, if not, whether the statute and underlying treaty violate the Treaty Power and the Constitution's structural limits on federal authority, questions avoided in *Bond*.

3. Whether a recusal claim, under both 28 U.S.C. § 455 and the Due Process Clause, has a timeliness requirement and, if so, what is the appropriate timeliness standard and standard of review for such claims; and whether recusal is required when a judge presiding over a federal capital trial simultaneously applies to become the United States Attorney for the same office prosecuting the case.

PARTIES TO THE PROCEEDING

Petitioner is Iouri Mikhel and respondent is the United States of America. Co-defendant Jurijus Kadamovas was a party to the proceedings before the United States Court of Appeals for the Ninth Circuit and at trial in the United States District Court for the Central District of California. Kadamovas filed a petition for a writ of certiorari challenging the judgment on January 14, 2019, No. 18-7489, and Mikhel joins that petition. Sup. Ct. R. 12.

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JURISDICTION

The Ninth Circuit filed its decision on May 19, 2018 and denied rehearing on September 7, 2018. Justice Kagan granted an extension to file a petition for writ of certiorari to February 4, 2019. This petition is timely filed pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution provides, in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law."

Other pertinent statutory provisions are included in the Appendix. App., *infra*, 59a.

STATEMENT

Following a joint jury trial, Petitioner and co-defendant Jurijus Kadamovas were convicted of several federal crimes, including three counts of hostage-taking resulting in death in violation of 18 U.S.C. § 1203. Penalty phase proceedings

under the Federal Death Penalty Act, 18 U.S.C. § 3591, et. seq., resulted in death verdicts for both defendants. The court of appeals affirmed the judgment of conviction and death sentences. *United States v. Mikhel*, 889 F.3d 1003 (2018). App. *infra*, 57a.

A. The questions about Petitioner's competency.

The district court declined to hold a competency hearing despite a cascade of dire warning signs, escalating over the course of this capital trial, that Petitioner was in psychiatric distress and, as the result of his severe mental illness, engaged in a self-destruction course of conduct that sabotaged his trial and, in particular, the reliability of the jury's sentencing determination.

As detailed below, the district court heard undisputed expert evidence that Petitioner suffered a major mental illness. In the run up to his trial, he made two serious attempts at suicide, then a third right on the evening before his capital trial began. It was also undisputed that the attempts were serious and sincere efforts to end his life. His relationship with his counsel fell apart, and his lawyers repeatedly raised the issue of his competence. He appeared in court unshaven and in prison garb; against the advice of his attorneys (and the advice of the district court), he testified during the guilt/innocence proceedings, offering a grandiose narrative that must have inflamed the jurors against him, and then refused to allow the

government to cross-examine him — after which he absented himself from his trial, including the whole of the penalty phase evidence and argument. Two psychiatrists testified during the penalty phase of his trial: one, employed by the Federal Bureau of Prisons, who had treated Petitioner for over two years following his initial suicide attempt, testified that he suffered Bipolar Disorder, which impaired his judgment; the second, a defense expert, explained that the break-down in the attorney-client relationship and his self-destructive behavior during the trial were the result of his mental illness. The government called no experts to rebut this evidence.

Still, the district court declined to hold a competency hearing.

1. Petitioner made three serious, sincere suicide attempts, including one on the eve of his capital trial.

Two years before the start of trial, Petitioner attempted suicide by severing an artery in his ankle. The attempt was nearly successful: Petitioner was found unconscious and unresponsive, and as a result of having "just tried to kill himself very seriously," he was placed on suicide watch. Inderpal Dhillon, M.D., the treating psychiatrist at the jail, initially diagnosed Petitioner as having Major Depression but later determined he suffered from Bipolar Disorder. She noted Petitioner suffered psychotic episodes, noting his auditory hallucinations — which

included speaking to people who were not present — racing thoughts, and hearing electric noises. *Mikhel*, 889 F.3d at 1037, ER 2148.

A year later, notwithstanding his ongoing psychiatric treatment, including anti-psychotic and anti-depressive medication, Petitioner again attempted to kill himself with a massive overdose of the medications he had been hoarding. Staff found him unconscious in his cell and unable to breathe on his own. Again, all doctors agreed that the attempt was serious and nearly successful. After he recovered, Dr. Dhillon continued to treat him and saw hypomania, including increased activity, racing thoughts, an inability to concentrate, poor sleep, and feelings of grandiosity. In all, Dr. Dhillon treated Petitioner in excess of two years, which afforded her significant opportunity to observe him. *Id*., ER 2302.

In May 2006, a year after the second suicide attempt, authorities transferred Petitioner to the Metropolitan Detention Center - Los Angeles (MDC) where he was held during the trial. MDC staff did not obtain Dr. Dhillon's treatment notes and diagnosed Petitioner as depressive, treating him with antidepressants. Treating a bipolar patient with antidepressants risks worsening their condition. Antidepressants can destabilize a bipolar patient, triggering a hypomanic or manic cycle, making him more erratic, agitated, and self-destructive. William Vicary, M.D., a psychiatrist retained by the defense to examine Petitioner, concurred with

Dr. Dhillon's diagnosis and wrote that Petitioner's unrealistic and irritable behavior was largely due to his untreated Bipolar Disorder, and his competency would be enhanced with proper treatment. *Id*., ER 2172-73, 2175, 2303, 2305.

Petitioner attempted to kill himself a third time on September 5, 2006, the evening before trial, by hanging himself with a sheet tied to a sprinkler in his cell. He failed only because the fixture broke, and he appeared in court the next morning in jail garb with a visible ligature mark on his neck. *Id*. at 1037-38.

2. Despite dueling diagnoses and treatment plans from mental health experts following the third suicide attempt, the district court declined to hold an evidentiary hearing to resolve the conflicting opinions.

Following the third suicide attempt, at the request of the district court, Ralph Ihle, Ph.D., the MDC psychologist, submitted a forensic evaluation of Petitioner. He reviewed the medical records and interviewed Petitioner. Dr. Ihle disagreed with Dr. Vicary's and Dr. Dhillon's bipolar diagnosis and, instead, diagnosed Petitioner as suffering from Major Depressive Disorder. Dr. Ihle, however, opined that the disorder did not compromise Petitioner's ability to understand legal materials and cooperate with counsel. Over Dr. Vicary's objections and ignoring Dr. Vicary's request that Petitioner be treated with a mood stabilizer appropriate for a person suffering Bipolar Disorder, Dr. Ihle maintained Petitioner on a

treatment regime of antidepressants and sleep aids. *Id*. at 1039, SER 143, ER 2220-21, 2305-06.

Based on Dr. Ihle's written report and without any further proceedings, the district court found Petitioner competent to stand trial. The court did not convene an evidentiary hearing. It did not bring in the experts to reconcile their inconsistent diagnoses or treatment plans.

3. As the trial proceeded, Petitioner's relationship with his attorneys broke down irreparably, and he continued his decline into self-destruction.

Trial continued, and Petitioner still appeared before his jury in jail clothing. Petitioner wrote the court and asked for new counsel. Defense counsel requested another evaluation of Petitioner based on his own observations and his knowledge that Petitioner was no longer on medication that Dr. Ihle thought necessary to mitigate his psychiatric symptoms. The court denied counsel's request, stating it was getting reports from MDC, and nothing indicated Petitioner was failing. *Id*. at 1040, SER 186-87.

After reversing course twice, Petitioner — against the advice (and largely without the assistance) of counsel and the court — testified for three days. For the first two days, Petitioner said nothing relevant to any defense or the charged offenses. Instead, he manifested an unrestrained grandiosity, consistent with the

psychiatric diagnosis of Bipolar Disorder. Petitioner bragged that he alone recognized the potential of an alpha fetoprotein for cancer detection and personally provided funding for the research group when Russian government funding lapsed. He said he opened a casino in Turkey, and when that government closed it, he magnanimously opened a restaurant so the casino workers would continue to have jobs. A French princess solicited his aid to organize a music festival in Monaco where he obtained the services of famed Cuban musicians, the Buena Vista Social Club, for the festival.

Additionally, he boasted of purchasing a multi-million dollar yacht and multiple Ferraris for his use in gallivanting around Europe. He bragged of his many exotic vacations and showed the jury photographs of his trips, living the life of the rich and famous. His testimony also opened the door to admission of uncharged homicides in Cyprus and Turkey that the court had excluded pretrial. Counsel for co-defendant correctly observed that petitioner appeared to "be on some type of suicide mission here," and counsel for the government described the testimony as very helpful, "because it is so patently absurd." ER 1777, 1782. At the end of his three days of unrestrained testimony, Petitioner refused to subject himself to cross-examination and his testimony was stricken. Tr. 22-28, Jan. 9, 2007.

Petitioner never appeared before the jury again, save for the announcement of the guilty verdicts, absenting himself from the entire penalty phase over the dire warnings of the district court. The court, without holding any further proceedings on Petitioner's competency, solicited and accepted Petitioner's waiver of his presence, notwithstanding defense counsel's opinion that Petitioner was attempting to commit suicide by jury. *See, e.g.*, Tr. 45, Jan. 24, 2007.

4. During the penalty phase, the district court heard unrebutted expert psychiatric evidence tying the breakdown in the attorney-client relationship and Petitioner's course of self-destructive behavior to his severe mental illness.

The case proceeded to the penalty phase. The defense called two mental health experts, who linked Petitioner's decline and self-destructive behavior during the trial to his mental illness.

Dr. Dhillon, the psychiatrist who had treated him for over two years while he was in custody pre-trial, reiterated her pretrial diagnosis of Bipolar Disorder. She explained that decisions made during a hypomanic episode would be devastating, because there is "no insight," the person is impulsive, "judgment is shot," and there is "psychotic thinking," ER 2274. Other aspects of the Bipolar Disorder rendered him suspicious and distrustful, even of his own counsel, interfering with his participation in his defense. ER 2224.

Dr. Vicary testified to Petitioner's paranoid delusion that his attorneys, the prosecutors, and the judge were conspiring against him. Dr. Vicary noted the deterioration of Petitioner's mental health, attributable to his continuing solitary confinement. He described Petitioner as "crazy" and "irrational." Any conversation with Petitioner quickly devolved to his delusional belief that everything was "rosy" and it was "all just a conspiracy" against him. 889 F.3d at 1041.

5. Despite expert mental health testimony, expressions of doubt by Petitioner's own counsel, and the breakdown occurring right in front of it, the district court persisted in declining to hold a competency hearing.

When Petitioner filed another request for new counsel, defense counsel informed the court that Petitioner was doing everything in his power to preclude a case in mitigation. Defense counsel said, "I have a question as to Mr. Mikhel's competency," and that he would not object to an independent psychological or mental evaluation. The court rejected the suggestion of an evaluation and opined that Petitioner was competent. *Id*., ER 2361.

The Ninth Circuit affirmed. It found that the district court committed no error in failing to hold a competency hearing at any stage of the proceeding. None of the evidence yielded a genuine doubt about Petitioner's competency. 889 F.3d at 1042.

B. The hostage-taking convictions and death sentence.

Petitioner and co-defendant Jurijus Kadamovas were convicted and sentenced to death for the kidnapping of five individuals in the Los Angeles area, attempts to collect ransom, and the victims' resulting deaths. *Mikhel*, 889 F.3d at 1016. At the time of the offenses, the federal kidnapping statute, 18 U.S.C. § 1201, required interstate asportation, but the victims were never moved outside of California. The County of Los Angeles, California, brought kidnapping and homicide charges, but the federal government chose to prosecute Petitioner for hostage-taking resulting in death under 18 U.S.C. § 1203, even though international terrorism or related activity was not involved.

Petitioner challenged his convictions and death sentence, contending that § 1203 and its underlying treaty require hostage-taking related to international terrorism; he further contended that, without a limiting construction, the statute and its underlying treaty violate the Constitution's restrictions on federal power. 889 F.3d at 1021-25. The Ninth Circuit disagreed. With respect to statutory construction, the court found that it was bound by its opinion in *United States v. Lopez Flores*, 63 F.3d 1468 (9th Cir. 1995), which had relied on purported legislative history to give the statute a broad reach. 889 F.3d at 1022. The Ninth Circuit explained that this Court's subsequent opinion in *Bond v. United States*,

572 U.S. 844, 134 S. Ct. 2077 (2014) (*Bond* II), did not alter the analysis and asserted that § 1203(b), which requires the involvement of a foreign national, at least "requires some international component." *Mikhel*, 889 F.3d at 1023.

The Ninth Circuit also held that § 1203 "was a valid exercise of Congress's power under the Necessary and Proper Clause together with the Treaty Power." *Id*. at 1023. The court relied on *Missouri v. Holland*, 252 U.S. 416, 432 (1920), and stated: "Although this broad reading of the Necessary and Proper Clause has been criticized and debated, *see, e.g.*, *Bond II*, 134 S. Ct. at 2098-102 (Scalia, J., concurring), the Supreme Court has never undertaken to clarify or correct our understanding." *Mikhel*, 889 F.3d at 1023-24. The Ninth Circuit further declared that the statute "clearly bears a rational relationship to the Treaty," and "the Treaty at issue here is well within the President's Treaty Power." *Id*. at 1024. "In short, the Hostage Taking Act is consistent with Congress's 'federalism-based respect for state and local authority in this area of law enforcement.'" *Id*. at 1025. The Ninth Circuit finally concluded that the 1994 amendment adding the homicide provision and the death penalty was also constitutional under the Necessary and Proper Clause, reasoning that Congress has the authority to determine the punishment for federal crimes and the Treaty leaves the choice of punishment to the signatory nations. *Id*.

C. The recusal proceedings.

After several months of trial, the district judge held a hearing during a late December holiday break towards the end of the guilt phase and advised the parties that a search committee had asked him to submit his name for the position of United States Attorney for the Central District of California. *Mikhel*, 889 F.3d at 1025. The judge did not explicitly advise whether he had done so but did state that, if he obtained the position, he would only accept "a dollar" per year because he did not believe in "double dipping." *Id*. at 1026.

Approximately 30 days later, Petitioner filed a recusal motion; at this point, the jury had returned its verdicts at the guilt phase, and the trial had entered the penalty phase. *Id*. The motion asserted that local news outlets reported that the judge was actually the "frontrunner" for the United States Attorney position. *Id*. at 1027 n.5. The judge denied the motion, stating that defense counsel did not request recusal when he initially raised the issue; he also advised, for the first time, that he had interviewed for the position but that he withdrew his name from consideration when the recusal motion was filed. *Id*. at 1026. Petitioner immediately sought a writ of mandamus, which the Ninth Circuit denied. *Id*.

Petitioner again raised recusal on direct appeal. The Ninth Circuit found that the recusal motion was not timely and there was a "heightened risk" that the

motion was made "for strategic purposes." *Id*. at 1027. The Ninth Circuit also rejected the claim on the merits, explaining that the judge stated he would not seek remuneration for the position, he was only in the early stages of the selection process, "and he immediately withdrew his application when defendants filed their motion." *Id*. at 1028. The court concluded: "If defendants had made a timely motion and Judge Tevrizian had not immediately withdrawn his application, this issue might have presented a closer question." *Id*.

REASONS FOR GRANTING THE WRIT

I. This Court should grant the petition to clarify the standard of proof necessary to require a competency hearing where there is significant evidence of incompetency.

Because the conviction of a defendant who is legally incompetent violates the Due Process Clause of the Constitution, this Court requires the district court to order a competency hearing sua sponte if the evidence and circumstances demonstrate reasonable cause to doubt the defendant's competency. Doubt is shown where there is substantial evidence that the defendant lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960).

This Court has never articulated a standard for establishing the requisite doubt and the concomitant burden of proof. The Ninth Circuit's opinion, in effect, equated the standard for establishing doubt with the standard for proving incompetency. The opinion further allocated the burden to petitioner to prove his incompetency before obligating the district court to hold a hearing. On both issues, the Ninth Circuit's opinion conflicts with other courts and the reasoning of this Court. This Court's review is necessary to settle these important questions.

A. The Ninth Circuit's opinion held that the uncontradicted evidence raising questions about Petitioner's competency did not require a hearing on the issue, finding alternative explanations pointing toward competency to be more persuasive.

Here, from the inception of trial through its conclusion, the district court confronted substantial, undisputed evidence that raised serious questions about Petitioner's competency. None of it prompted the district court to hold a hearing on the issue. The Ninth Circuit acknowledged that this "confluence of circumstances" regarding Petitioner's mental health was "concerning." *Mikhel*, 889 F.3d at 1040.

The opinion, however, affirms the district court's inaction. For each of the "concerning" circumstances — analyzed in isolation, seriatim, without discussion of other, later evidence of incompetence and decline — the Ninth Circuit rejects the inference of incompetency in favor of the inference of competency, finding the

government's post hoc explanations allay the doubt. In effect, the Ninth Circuit requires the defendant to rule out competency — to prove that the inference of incompetency is stronger than the inference of competency, *before* the court is required to conduct a hearing on the issue.

Thus, uncontradicted evidence showed three serious suicide attempts by Petitioner, the last occurring on the eve of trial. Although not always conclusive by itself, an attempted suicide raises a doubt about the defendant's competency. *See, e.g.*, *Drope v. Missouri*, 420 U.S. 162, 180 (1974); *United States v. Mason*, 52 F.3d 1286, 1292 (1995); *Mata v. Johnson*, 210 F.3d 324, 332 (5th Cir. 2000) (evidence, including defendant's history of mental health problems and numerous suicide attempts provided reasonable cause for competency hearing); *United States v. Loyola Dominguez*, 125 F.3d 1315, 1319 (9th Cir. 1997) (attempted suicide on eve of trial raised doubt about competency); *Tiller v. Esposito*, 911 F.2d 575, 578 (11th Cir. 1990) (evidence, including defendant's suicide attempts, raised doubt about defendant's competency to stand trial). The district court and the Ninth Circuit, relying on a single psychologist's written report that attributed the suicide attempts to Petitioner's self-reported explanation that he felt hopeless, found no doubt raised.

In doing so, the Ninth Circuit and the district court ignored the competing inference garnered from the reports and testimony of Drs. Dhillon (who treated Petitioner in custody for over two years) and Vicary that the suicide attempts were the product of Petitioner's untreated (and subsequently, at Dr. Ihle's facility, mistreated) Bipolar Disorder, a major mental illness that undermines rational judgment and impairs the ability to participate in one's own defense. ER 2224, 2274. Without bringing the experts in to hear testimony and to reconcile their competing diagnoses and treatment plans, the district court simply picked, without offering any reason for its preference, the evidence supporting competency, an analytical approach followed and, thus, endorsed by the Ninth Circuit.

The Ninth Circuit and the district court similarly rejected each subsequent evidentiary sign of self-destructive decline raising serious doubts about Petitioner's competency.

Petitioner's appearance before the jury in jail clothing further signaled likely deficits in his rational understanding of the proceedings, *see, e.g.*, *Estelle v. Williams*, 425 U.S. 501, 505 (1976) (court cannot compel an accused to appear before the jury in jail clothing because it undermines the presumption of innocence), and, combined with history of mental illness and suicidal behavior should have triggered further inquiry. Petitioner's own counsel told the court that

they viewed his decision to appear in prison garb as evidence of his incompetence. SER 186-87. The district court, however, ignored the evidence, and the Ninth Circuit simply credited Petitioner's own explanation at trial that wearing civilian clothing would have been superficial. *Mikhel*, 889 F.3d at 1040. But accepting Petitioner's stated explanation, assumes, as the starting point, that his choice was rational and accurately reported — the very issue a competency hearing would have determined — and ignores the contrary opinion of his own trial counsel and the testimony of expert witnesses that his judgment and insight were impaired and that his self-destructive course of conduct was the product of his mental illness. The Ninth Circuit turns the analysis on its head, starting with the conclusion. Again, a hearing was required to test the competing inferences and explanations.

Petitioner's bizarre and incredible testimony, opening the door to unadjudicated homicides, alienating the jury, and epitomizing his grandiosity and impaired judgment, was more uncontradicted evidence raising questions about his competency. The district court, although noting it was "total nonsense," took no action. Then, ignoring the expert mental health evidence ascribing Petitioner's self-destructive behavior to his mental illness, the Ninth Circuit rejected any inference of incompetency, speculating that Petitioner's testimony amounted to a calculated "Hail Mary" attempt to exculpate himself. 889 F.3d at 1040. Petitioner

himself made no such statement, and nothing in the record supports the Ninth Circuit's post hoc inventing of a rational motive. Again, the Ninth Circuit turns the analysis on its head, assuming the conclusion in order to dispense with contrary evidence. Whatever the truth of the Ninth Circuit's guess as to the motive underlying Petitioner's testimony, its acceptance of that version, without a hearing to resolve evidence to the contrary, creates a clear conflict in the law.

Defense counsel questioned Petitioner's competency throughout. After Petitioner's third attempt at suicide, defense counsel informed the district court of his "doubt" about Petitioner's competency. He said Petitioner's mental disorder prevented Petitioner from assisting counsel. SER 130, 164. Again, at the penalty phase, defense counsel complained to the court that he had "a question as to Mr. Mikhel's competency" based on his self-destructive conduct at trial in undermining his defense and the information from the defense psychiatrists. ER 2360-61. As this Court noted, "the defendant's inability to assist counsel can, in and of itself, constitute probative evidence of incompetence, and defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." *Medina v. California*, 505 U.S. 437, 450 (1992). But at each juncture, the district court summarily rejected counsel's opinion and concerns, instead relying on its own observations to opine that Petitioner was competent. The Ninth Circuit upheld

the district court's reliance on its own opinion and dismissal of counsel's voiced doubts, again denying the requirement of a hearing to resolve the conflicting inferences of competency from the uncontradicted evidence. 839 F.3d at 1042.

Finally, the trial court and the Ninth Circuit simply dismissed the penalty phase sworn testimony of Drs. Dhillon and Vicary. Each expert opined that Petitioner suffers a serious mental illness and described Petitioner's symptoms, which undermined his ability to participate rationally in his own defense. Dr. Vicary effectively testified Petitioner was incompetent, describing him as "crazy" and lacking in judgment and insight and explaining that the breakdown in the relationship with his attorney resulted from a paranoid delusion that defense counsel, the prosecuting attorneys, and the court were all engaged in a conspiracy against him. ER 2274, 2307, 2320.

By discounting all evidence of incompetency because the Ninth Circuit was able to offer an alternative theory of the evidence showing competency, its opinion shifts the burden to the defendant to rule out competency and prove his incompetency in order to obtain a hearing on the issue. It requires the defendant to disprove any inference of competency from the evidence that calls competency into question, as the price of a hearing. That creates a clear conflict with the jurisprudence of other federal and state courts.

B. The opinion creates an inter-Circuit conflict on the issue of the standard and burden of proof required for a hearing.

Unlike the Ninth Circuit's opinion, the Fourth Circuit does not require the defendant to shoulder the burden of establishing doubt about his or her competency. In *United States v. Mason*, the district court denied a post-conviction request for a competency hearing. The request was based on defendant's attempted suicide after his conviction and defense counsel's affidavit relating the opinions of the treating physicians that the defendant had been incompetent during the trial. The district court rejected the request, instead relying on evidence that the defendant appeared competent and displayed an understanding during trial. The district court discounted the attempted suicide as perhaps a reaction to the guilty verdict. *Id*. at 1290-92. Instead of accepting these explanations, the Fourth Circuit reversed. It said that, in determining whether to hold a competency hearing, the trial court must examine the record as a whole and accept as true all evidence of possible incompetence. *Id*. at 1290. The district court could not ignore other evidence of incompetence and rely solely on the evidence suggesting competence. *Id*. at 1293, 1290.

The Third Circuit tasks the government with the burden of proving competency: "Evidence showing competency must be more persuasive than that

showing incompetency. Of necessity then, there is no room for a rule of law placing any burden of proof on the defendant." *United States v. DiGilio*, 538 F.2d 972, 988 (3d Cir. 1976).

The Iowa Supreme Court made this explicit. It referenced *Cooper v. Oklahoma*, 517 U.S. 348 (1996), where this Court held that the Constitution prohibited allocating the burden to the defendant to prove by clear and convincing evidence that he was incompetent. The comparative interests of the state and defendant caution against placing the burden on the defendant before requiring a hearing. *State v. Einfeldt*, 914 N.W.2d 773, 781-82 (Iowa 2018). *Einfeldt* warned against conflating the requirements of a merits determination of competency with the requirements for a hearing to resolve the issue. The issue was whether the "relatively low threshold had been met to require further evaluation and a subsequent hearing on the question of competency." *Id*. at 782.

C. This Court's opinions show the Ninth Circuit's allocation of the burden on the Petitioner to establish doubt about competency is erroneous.

Beginning with *Pate v. Robinson*, 383 U.S. 375 (1966), and continuing with *Drope v. Missouri*, this Court has emphasized the necessity for a hearing whenever the uncontradicted evidence raises a doubt as to the defendant's competency to stand trial. The hearing is but the first, though necessary, step to a determination of

competency. The evidence need not prove the defendant is incompetent; it need only raise a doubt.

In determining whether a hearing is required, the court must examine all the objective and uncontradicted evidence raising a doubt. Where the trial court's failure to hold a hearing is challenged, the appellate court cannot affirm based solely on evidence tending to show competency.

Thus, in *Pate*, the Illinois Supreme Court, relying on evidence that the defendant was mentally alert and that an expert had submitted a stipulation that the defendant knew the nature of the charges against him and was able to cooperate with counsel, affirmed the trial court's failure to hold a hearing. This Court reversed, finding that although that evidence may have been relevant to the ultimate question, is could not have been "relied upon to dispense with a hearing on that very issue." And the state court offered "no justification for ignoring the uncontradicted testimony of Robinson's history of pronounced irrational behavior." 383 U.S. at 385-386.

In *Drope*, as here, there was no "dispute as to the evidence possibly relevant to Petitioner's mental condition that was before the court;" the dispute involved the "inferences that were to be drawn from the undisputed evidence." 420 U.S. at 174. At trial, testimony by Drope's wife and his attempted suicide provided more

evidence to doubt his competency. Both the state trial and appellate courts relied on portions of a pretrial psychiatric report suggesting competence but ignored the contrary data in finding that a hearing was not necessary. *Id*. at 175-76. This Court reversed, finding that the state courts failed to consider and give proper weight to the record evidence and erred in not requiring a hearing. *Id*. at 180. Where the evidence is susceptible to conflicting inferences, a hearing is required to resolve the issue. Neither *Pate* nor *Drope* placed any burden on the defendant to establish doubt.

This Court has never explicitly addressed that standard of proof for establishing doubt and the accompanying burden. This Court has, however, addressed the burden of proof at a hearing to determine competency. *Medina v. California*, *supra*; *Cooper v. Oklahoma*, *supra*. The teaching of *Medina* and *Cooper* prove the Ninth Circuit's error in allocating the burden to the defendant to prove sufficient doubt to require a hearing on competency.

Medina found that it did not violate Due Process at the hearing on competency for California to place the burden on the defendant to prove his incompetency by a preponderance of the evidence. Although "reasonable minds may differ as to the wisdom of placing the burden of proof on the defendant," the Court accords States substantial deference and allocating the burden to the

defendant did not offend fundamental and deeply-rooted principles of justice as to violate Due Process. *Medina*, 505 U.S. at 446, 450. The Court found no inconsistency with *Pate*, because at a hearing the defendant was entitled to the assistance of counsel and psychiatric evidence is brought to bear on the issue. *Id*. at 450.

In *Cooper*, the Court made clear that imposing any higher burden on the defendant at the competency hearing did violate Due Process. Oklahoma's clear and convincing standard imposed a significant risk that an incompetent defendant would be forced to stand trial. 517 U.S. at 363. That risk is constitutionally unacceptable given the fundamental interests at stake. *Id*. at 354, 363.

That risk is even greater where the issue of competency is determined without a hearing. The quantum of evidence necessary to trigger a further inquiry into competency must necessarily be less than that needed to prevail following a hearing. Thus, if the highest burden constitutionally permissible to sustain a finding of incompetency is by a preponderance of the evidence, no burden of proving incompetency may be placed on the defendant once the uncontradicted

evidence raises questions as to his incompetency.[1] This Court should grant review to make this explicit.

II. This Court should grant the petition because the Ninth Circuit's interpretation of § 1203 conflicts with the view of the Second Circuit and is inconsistent with this Court's opinion in *Bond*; alternatively, this Court should grant review to resolve the important constitutional questions regarding the Treaty Power that were left open in *Bond*.

The Second Circuit has suggested that § 1203 should be limited to hostage-taking involving international terrorism. *United States v. Rodriguez*, 587 F.3d 573, 579 (2d Cir. 2009). Here, the Ninth Circuit ignored *Rodriguez* in reaching a contrary conclusion, and the Eleventh Circuit has since joined the Ninth Circuit, also ignoring *Rodriguez*. *United States v. Noel*, 893 F.3d 1294, 1299-1300 (11th Cir. 2018). This Court should grant review to resolve the confusion that persists even after this Court's 2014 opinion in *Bond*, which adopted an approach to interpreting treaty-based offenses that confirms the Second Circuit's view.

If § 1203 is not susceptible to the limiting construction suggested by the Second Circuit, then this Court should resolve the important constitutional questions avoided in *Bond*. The Ninth Circuit relied on *Holland* and the Necessary and Proper Clause to sustain the constitutionality of the statute, and the Eleventh

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[1] "Indeed, a number of States place no burden on the defendant at all, but rather require the prosecutor to prove the defendant's competence to stand trial once a question about competency has been credibly raised." *Id*. at 361-62.

Circuit did the same in *Noel*, 893 F.3d at 1302, but Justice Scalia's concurrence in *Bond* explains that *Holland* is inconsistent with the text and structure of the Constitution. Furthermore, if the Treaty is as expansive as the Ninth Circuit thinks it is, then the Treaty itself is unconstitutional, as explained in the concurrences of Justices Thomas and Alito in *Bond*; likewise, the statute otherwise violates a proper reading of *Holland*. At the very least, Congress's subsequent decision to bootstrap a homicide offense onto § 1203, a provision that appears nowhere in the Treaty, is unconstitutional. This Court should grant review to consider these important constitutional questions in this capital case.

A. This Court should grant review to resolve confusion in the lower courts regarding the reach of § 1203, particularly because the Ninth Circuit's construction is inconsistent with *Bond*.

Congress enacted § 1203 as a joint resolution in 1984 to implement the United States' obligations under a United Nations treaty called the International Convention Against the Taking of Hostages ("the Treaty"). *Mikhel*, 889 F.3d at 1021-22. The Treaty was adopted by the United Nations General Assembly in 1979, entered into force in 1983, and entered into force in the United States on January 6, 1985, also when § 1203 became effective. The Treaty's preamble states that it was created because the signatory countries believed that it was "necessary to develop international cooperation between States in devising and adopting

effective measures for the prevention, prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism . . . ."

The Second Circuit suggested that § 1203 is limited to hostage-taking "related to international terrorism[,]" explaining that the "Conference Report on the Act makes clear that it 'implements the International Convention Against the Taking of Hostages' [and] [t]he preamble to the Convention states that the Convention binds its signatories to adopt 'effective measures for the prevention, prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism.'" *Rodriguez*, 587 F.3d at 579.

The Ninth Circuit ignored *Rodriguez* and its interpretation of the preamble, as did the Eleventh Circuit in *Noel*, 893 F.3d at 1299-1300. Without citing authority, the Ninth Circuit declared that "the preamble's reference to 'international terrorism' is illustrative only; it limits neither the Treaty nor Congress's implementing legislation." *Mikhel*, 889 F.3d at 1022. But the preamble does not use "illustrative" language like "such as," *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998), or "including," *Bloate v. United States*, 559 U.S. 196, 206-07 (2010), or list any other illustrative examples. The Ninth Circuit's reading also disregards the context of the Treaty, which was signed in the wake of several international terrorism incidents in the 1970's.

Both the Ninth Circuit and the Eleventh Circuit in *Noel* relied on older cases that ignored the Treaty's preamble, offered limited analysis, and stand on unsound footing after this Court's 2014 opinion in *Bond*. Remarkably, the Eleventh Circuit's recent opinion in *Noel* did not even cite *Bond*, and the Ninth Circuit below did not meaningfully address this Court's opinion. This Court should grant review to resolve the confusion in the lower courts and because the majority view is wrong under *Bond*.

Bond considered a federal criminal statute enacted to implement a non-self-executing treaty on chemical weapons, and the defendant argued that: (1) the statute should be narrowly construed, and her conduct of using a chemical compound to burn her husband's lover did not constitute a violation of such a narrowly construed chemical weapons statute; and (2) if not narrowly construed, the statute was unconstitutional under federalism principles. *Bond*, 572 U.S. at 853-55. The majority opinion accepted the statutory construction argument, avoiding the constitutional question. *Id*. at 855-66.

In construing the statute, *Bond* relied on the Treaty's preamble in ascertaining its meaning and purpose, *id*. at 849-50, and explained that the Treaty "arose in response to war crimes and acts of terrorism[,]" and therefore there was "no reason to think the sovereign nations that ratified the Convention were

interested in anything like *Bond*'s common law assault." *Id*. at 856. Similarly, the Treaty's preamble states that it was intended to apply to "acts of taking of hostages as manifestations of international terrorism[,]" and other provisions also demonstrate an international terrorism context.

Bond further instructed the treaty-based "statute— unlike the Convention — must be read consistent with principles of federalism inherent in our constitutional structure[,]" *id*. at 856, even if its language appears "extremely broad[.]" *Id*. at 860. *Bond* relied on federalism principles to reject the government's "plain language" argument in support of its expansive view of the chemical weapons statute, reasoning that such an interpretation would intrude on the States' general police power. *Bond*, 572 U.S. at 857-60.

That reasoning controls here. Section 1203 must be limited to activities related to international terrorism. This limiting construction is based on the purpose of the Treaty, *id*. at 862-66, which is set forth in its preamble specifying hostage taking related to international terrorism. There is confusion in the lower courts on this issue, and the majority view taken below conflicts with *Bond*.

B. The Ninth Circuit's reliance on *Holland* was constitutionally flawed, as explained in Justice Scalia's concurrence in *Bond*.

Like *Bond*, this Court can avoid significant constitutional questions by interpreting § 1203 as not applying to Petitioner's conduct. If the statute is not susceptible to this construction, however, then the meaning and validity of this Court's 1920 opinion in *Holland* is squarely presented. Justice Scalia's concurrence in *Bond*, joined by Justice Thomas, establishes that *Holland* and the Ninth Circuit's constitutional analysis are flawed.

The Treaty is not self-executing, and the Ninth Circuit held that Congress had the constitutional authority to enact § 1203 based on *Holland*. *Mikhel*, 889 F.3d at 1023-24, which stated that "[i]f the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." *Holland*, 252 U.S. at 432. Justice Scalia explained that this "unreasoned and citation-less sentence" in *Holland* is an ipse dixit that is inconsistent with the "Constitution's text and structure . . . ." *Bond*, 572 U.S. at 873-74.

Justice Scalia reasoned that the Necessary and Proper Clause granted power to Congress to "help the President make treaties" but that was not a "power to *implement* treaties already made. *Id*. at 876. The Clause cannot transform

Congress's treaty power into a limitless grant of power. "To legislate compliance with the United States' treaty obligations, Congress must rely upon its independent (though quite robust) Article I, § 8 powers." *Bond*, 572 U.S. at 876 (Scalia, J., concurring). In enacting § 1203, Congress stated that it was attempting to implement the Treaty. *United States v. Lue*, 134 F.3d 79, 81 (2d Cir. 1998). Because Congress did not identify any other authority, other Article I powers cannot serve as a basis to sustain § 1203. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 642 n.7 (1999). In any event, the Ninth Circuit declined to consider any other constitutional authority for § 1203 in Article I, § 8. *Mikhel*, 889 F.3d at 1024 n.3. Thus, the constitutional question addressed by Justice Scalia in *Bond* is squarely presented, making this case an excellent vehicle to review the validity of *Holland*.

C. Even under *Holland*, § 1203 is unconstitutional, at least as applied in this case.

Holland stated that "[i]f the treaty is valid there can be no dispute about the validity of the" implementing statute. *Holland*, 252 U.S. at 432 (emphasis added). The Treaty, as interpreted by the Ninth Circuit, is constitutionally invalid. Furthermore, § 1203 is unconstitutional under a properly limited reading of *Holland*. The concurring opinions of Justices Thomas and Alito in *Bond* support

these conclusions and also demonstrate that this case presents significant constitutional questions that should be reviewed. Indeed, Justice Thomas noted that this Court has not yet had occasion to define the Treaty Power and that, "in an appropriate case . . . the Court should address the scope of the Treaty Power as it was originally understood." *Bond*, 572 U.S. at 883-84. This case fits the bill given the Ninth Circuit's broad interpretation of the Treaty. And even if a broad interpretation of the Treaty were constitutional, *Holland* does not authorize § 1203 given the States' longstanding ability to prosecute local kidnappings. This Court should grant review to determine whether Congress can usurp the States' police power by enacting legislation pursuant to an international treaty that governs local crimes of violence.

D. The 1994 amendment is unconstitutional.

Article 1 of the Treaty sets out a hostage-taking offense and mentions nothing about homicide. Article 2 states that the signatory countries "shall make the *offences set forth in article 1* punishable by appropriate penalties . . . ." Article 2 (emphasis added). In 1994, Congress amended § 1203 to include a homicide offense — found nowhere in the Treaty — by adding: "if the death of any person results, shall be punished by death or life imprisonment." 18 U.S.C. § 1203(a).

The 1994 amendment represents the type of bootstrapping that troubled Justice Scalia in *Bond*. He explained that the President and the Senate could hijack any area of the law for the federal government by entering into a nonself-executing treaty by which Congress could then "gain lasting and flexible control" because "[i]mplementing legislation is as much subject to modification and repeal by Congress as legislation upon any other subject." *Bond*, 572 U.S. at 881. Under the pretense of a non-self-executing treaty on hostage taking that had already been implemented under the purported authority of the Necessary and Proper Clause, a subsequent Congress enacted an additional homicide offense.

The Ninth Circuit reasoned that the 1994 amendment was constitutional because Congress has the authority to determine the punishment for federal crimes and the Treaty leaves the choice of punishment to the signatory nations, *Mikhel*, 889 F.3d at 1025, but ignored that the 1994 amendment created a homicide offense, not a mere penalty. *See Jones v. United States*, 526 U.S. 227 (1999). Article 2 states that the parties are to establish "appropriate penalties" for the hostage-taking offense in Article 1 and does not authorize, let alone make it "necessary," for them to establish penalties for a homicide offense. Congress's subsequent decision to expand this treaty-based offense starkly presents open constitutional questions and makes this case an excellent vehicle for review.

III. This Court should grant review to resolve the conflict in the lower courts regarding whether the federal recusal statute, 28 U.S.C. § 455, has a timeliness requirement and the standards that apply to recusal under § 455; this Court should also provide needed guidance on the precedential value of the opinions of the Committee on the Codes of Conduct of the Federal Judiciary and should otherwise hold that recusal is required when a judge applies to become the United States Attorney while presiding over a capital case prosecuted by that same office.

This Court should also grant review to resolve longstanding conflict regarding whether 28 U.S.C. § 455 requires a "timely" motion to recuse. If the statute does have such a requirement, this Court should further clarify the appropriate standards for timeliness and for appellate review, also sources of considerable confusion. Petitioner maintains that § 455(a) is self-enforcing and does not contain a timeliness requirement, but, even if it does, his recusal motion satisfied that requirement as the standard should properly be construed.

Also, this Court has not had occasion to discuss the precedential value of the opinions of the Committee on the Codes of Conduct of the Federal Judiciary. This Court should hold that lower federal courts are generally bound by the opinions. Here, a Committee opinion required the district judge to recuse himself, and the Ninth Circuit ignored the opinion despite Petitioner's heavy reliance on it. The Ninth Circuit's decision also conflicts with other authority, including an opinion by Judge Posner for the Seventh Circuit, which demonstrates that recusal was required

under § 455. Recusal was also required under this Court's due process precedent, a claim that cannot be waived or forfeited.

A. This Court should clarify whether § 455 requires timeliness, and, if so, what are the appropriate standards; this Court should also clarify the standard of review for § 455 claims.

Section 455(a) states: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Section 455(b) requires recusal if a judge "has a personal bias" and lists other situations when recusal is mandatory. Section 455(e) states that where "the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is proceeded by a full disclosure on the record of the basis for disqualification."

The lower courts are split on whether § 455 requires a "timely" motion. *Compare Roberts v. Bailar*, 625 F.2d 125, 128 n.8 (6th Cir. 1980) (no timeliness requirement in § 455); *SCA Serv., Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977) (same) with *In re Internat'l Bus. Machine Corp*., 618 F.2d 923, 932 (2d Cir. 1980) (must move for recusal at earliest possible moment). Furthermore, those courts requiring timeliness are divided on whether: (1) a recusal motion must be made at "the earliest possible moment" or instead within a "reasonable" time; (2) if a motion is untimely, does it result in waiver or forfeiture allowing for plain error

review, *United States v. Olano*, 507 U.S. 725, 733 (1993); and (3) if a timeliness requirement applies, does it apply to § 455(a), § 455(b), or both. The Circuits are also divided on the standard of review. *Compare United States v. Diekemper*, 604 F.3d 345, 351 (7th Cir. 2010) (de novo), with *United States v. McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012) (abuse of discretion); *United States v. Estey*, 595 F.3d 836, 842 (8th Cir. 2010) (same); and *United States v. DeTemple*, 162 F.3d 279, 283 (4th Cir. 1998) (same). Review is required to resolve the conflicts among the Circuits.

B. Recusal was required under Opinion No. 84 and other relevant precedent.

The Supreme Court of New Jersey has observed that "a sitting judge's exploration of future employment opportunities" is "an area fraught with peril . . . ." *DeNike v. Cupo*, 958 A.2d 446, 449 (N.J. 2008). The Committee on the Codes of Conduct of the Federal Judiciary has devoted an entire opinion (No. 84) to this subject. The Committee's opinion states: "After the initiation of any discussions with a law firm, no matter how preliminary or tentative the exploration may be, the judge must recuse, subject to remittal, on any matter in which the firm appears. Absent such recusal, a judge's impartiality might reasonably be questioned." Op. No. 84. Under Opinion No. 84, the district judge was required to

recuse even though he withdrew his application to become the United States Attorney when Petitioner moved for recusal. The Ninth Circuit ignored Opinion No. 84, and this Court should direct the lower courts to follow the Committee's opinions.

C. Recusal was required under the Due Process Clause, a claim that cannot be waived or forfeited.

The Ninth Circuit held that, "[b]ecause there was no abuse of discretion under § 455(a), there was no due process error." *Mikhel*, 889 F.3d at 1028 n.6. A § 455 claim should be subject to de novo review, not abuse of discretion, and this Court's due process recusal cases have employed independent review. *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

The Ninth Circuit relied heavily on a timeliness/waiver rationale in rejecting the due process claim. But in a capital case, the due process claim is structural error, *Williams*, 136 S. Ct. at 1909 that cannot be waived or forfeited, because independent review is required to preserve the integrity of the courts. *Id*. at 1907. Like *Williams*, where this Court held that a Chief Justice who decades earlier served as the District Attorney in a death penalty case had to recuse, due process was violated here. Review is required.

CONCLUSION

For all the foregoing reasons, Petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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