No. __A_____

****

IN THE
SUPREME COURT OF THE UNITED STATES

****

Henry Lee Bryant,
petitioner,

versus

David Smith, Clerk of Court,
United States Court of Appeals for the Eleventh Circuit,
The Honorable Ed Carnes, Chief Judge of the Eleventh Circuit,
The Honorable Gerald Bard Tjoflat,
The Honorable Stanley Marcus,
The Honorable Charles R. Wilson
The Honorable William H. Pryor Jr.,
The Honorable Beverly E. Martin,
The Honorable Adalberto Jordan,
The Honorable Robin S. Rosenbaum,
The Honorable Jill A. Pryor,
The Honorable Kevin C. Newsom,
The Honorable Elizabeth L. Branch,
The Honorable Britt C. Grant.
respondent(s).

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PETITION FOR A WRIT OF MANDAMUS TO UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PETITION FOR WRIT OF MANDAMUS

****

Henry Lee Bryant #99570-004
Federal Correctional Complex
P.O. Box 1031 (Low custody)
Coleman, Florida 33521-1031
Unit A-4

QUESTION PRESENTED

At the end of Henry Bryant's direct appeal the government informed his appointed attorney (Sheryl Lowenthal) that the lead investigator had been disciplined. Ms. Lowenthal filed a Rule 33 motion. The district court appointed David Howard as Mr. Bryant's new attorney. The district court denied the Rule 33 and Mr. Howard filed an appeal. Mr. Howard never told Mr. Bryant about either event. Since then Mr. Howard ignored Mr. Bryant's efforts to contact him.

Mr. Bryant asked the Eleventh Circuit to discharge Mr. Howard in order that Mr. Bryant could represent himself. The Eleventh Circuit denied the request.

> Did the Court of Appeals violate **28 U.S.C. § 1654** by refusing to allow Mr. Bryant to represent himself in the appeal of the collateral proceeding?

LIST OF PARTIES

All parties appear in the case caption on the cover page.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix "1".

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1651(a) and S.Ct. Rule 20.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1654:

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

PETITION FOR A WRIT OF MANDAMUS

Henry Lee Bryant seeks a writ of mandamus to the Eleventh Circuit Court of Appeals directing the Court of Appeals to comply with **28 U.S.C. § 1654** and allow Mr. Bryant to represent himself in his direct appeal from a collateral proceeding[1], that is, a denial of a Rule 33 motion for new trial.

From the early stages of his direct appeal, Mr. Bryant attempted to exercise his statutory right to self-representation. (App. 1). The appeals court refused to grant Mr. Bryant that right, and its clerk refused to docket his pro se filings warning of the continuing and growing conflict. (App. 2). Mr. Bryant's attorney, David Howard, has not spoken or communicated with Mr. Bryant since before the appeal commenced. (App. 3). Mr. Howard refuses to withdraw, and has made misrepresentations to the Court of Appeals as well as to the district court; but both of those courts refuse to provide Mr. Bryant an opportunity to be heard on the issue. (App. 5).

Mr. Bryant requests that this court exercise its mandamus jurisdiction and direct the Eleventh Circuit Court of Appeals[2] to comply with the unambiguous law contained in **28 U.S.C. § 1654.**

An Appeals Court Violation of the Law Meets the Standards for Issuing a Writ of Mandamus

Mandamus is a procedure reserved for exceptional circumstances. See **Kerr v. United States District Court,** 426 U.S. 394, 402 (1976); **Ex Parte Fahey,** 332 U.S. 258 (1947)(Mandamus is a "drastic and extraordinary remedy"). One extraordinary

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1/ See generally **United States v. Berger,** 375 F.3d 1223 (11th Cir. 2004)(discussing right to counsel for a Rule 33 motion finding a post-appeal Rule 33 is a collateral proceeding and their is no right to counsel); compare **Kitchen v. United States,** 227 F.3d 1014 (7th Cir. 2000)(finding a right to counsel in a Rule 33 filed during the pendency of a direct appeal). Significantly, despite the circuit split on the nature of a Rule 33 motion filed during the pendency of a direct appeal. Section 1654 applies to both circumstances, thus the circuit split does not impact Mr. Bryant's right to represent himself.

2/ Mr. Bryant refers to the respondents collectively as the Court of Appeals. He does not believe any particular judge is responsible for denying him his right to represent himself. Thus, believes it more appropriate (and efficient) to use the collective term, court.

circumstance involves a federal court ignoring the clear directive of a statute or otherwise exceeding its subject-matter jurisdiction. See generally **Cheney v. United States District Court,** 542 U.S. 367 (2004).

In addition to extraordinary circumstances, a petitioner must also demonstrate that no other equitable or legal remedy is available to avoid the damage that will result from the respondent's error. **Cheney,** 542 U.S. at 381. Then, the petitioner must show that his or her "right to issuance of the writ is clear and indisputable." **Id.** (quoting **Kerr,** 426 U.S. at 403). Thereafter, the "issuing court ... must be satisfied that the writ is appropriate under the circumstances". **Id.**

Historically, this Court has issued the writ to prevent the federal judiciary from embarrassing the Executive Branch, and to prevent the federal judiciary from intruding on the balance between federal andstate authority. **Id.** (collecting cases). Similarly, a Court of Appeals defying a constitutionally valid law in order to deprive a citizen of a statutory right requires intervention to preserve the balance between, and the separation of, governmental powers.

Mr. Bryant shows that the Eleventh Circuit's refusing to allow Mr. Bryant to represent himself is a sufficiently outrageous act to warrant this Court's exercise of its mandamus power.

STATEMENT OF THE CASE

On appeal from the denial of a post-appeal (collateral proceeding) Rule 33, Henry Bryant attempted to discharge his appointed attorney David Howard. (Appx. 6). Also, Mr. Bryant asked that he be allowed to represent himself. **28 U.S.C. § 1654.** Mr. Bryant did this because Mr. Howard had not spoken to Mr. Bryant for approximately two years; Mr. Howard still has not spoken with Mr.

Bryant. Furthermore, without telling Mr. Bryant, Mr. Howard has filed pleadings, some of which directly conflict with Mr. Bryant's expressed wishes. The Eleventh Circuit refused to discharge Mr. Howard and refused to allow Mr. Bryant to proceed pro se. (Appx. 2). The Eleventh Circuit violated the express command of Congress.

Sixth Amendment Right to Counsel is Not Implicated

Importantly, the underlying action is an appeal from a collateral proceeding (a post-appeal Rule 33 motion), which does not implicate the Sixth Amendment. Therefore, it lies outside this Court's holding in **Martinez v. California**, 528 U.S. 152, 160 (2000)(right to counsel on appeal does not come from the Sixth Amendment).

Statutory Right to Self-Representation Governs

This controversy resides within the ambit of 28 U.S.C. § 1654, which codifies a fundamental statutory right to represent oneself in court, a right that is afforded the highest degree of protection. "It is a right which is deeply rooted in our constitutional heritage, and although statutory in origin, its constitutional aura is underscored by the proposal the very next day of the Sixth Amendment." **Reshard v. Britt**, 819 F.2d 1573, 1579 (11th Cir. 1987)(citing **United States v. Dougherty**, 473 F.2d 1113, 1123 (D.C. 1972)); see generally **Faretta v. California**, 422 U.S. 806 (1975). The Second Circuit emphasized that self-representation "is a right of high standing, not simply a practice to be honored or discharged by a court, depending on its assessment of the desiderata of a particular case." **O'Reilly v. New York Times Co.**, 692 F.2d 863, 867 (2d Cir. 1982). A right all circuits extend to habeas corpus and other collateral proceedings. See **Anderson v. United States**, 948 F.2d 704, 705 n.3 (11th Cir. 1991); **Scott v. Wainwright**, 617 F.2d 99, 102 n.3 (5th Cir. 1980).

Despite the universal precedent and a statutory right that predates the Constitution's fabled Ten Amendments (Bill of Rights), the Eleventh Circuit denied Mr. Bryant this right (Appx. 1) and forced him to proceed with an unwanted and conflicted attorney. (Appx. 2). The Eleventh Circuit had no authority to refuse Mr. Bryant the opportunity to plead his own case.

Nearly as disturbing, the Eleventh Circuit Clerk of Court refuses to docket pro se pleadings expressly designed to inform the appeals court of the continuing and expanding conflict between Mr. Bryant and Mr. Howard. (Appx. 2). Minimally, these filings would develop a record for subsequent review. The circuit clerk's actions amount to a repudiation of due process (notice and opportunity to be heard) as well as a rejection of this Court's jurisprudence on conflicted counsel in the post-conviction context. See **Christeson v. Roper,** 135 S. Ct. 891, 894-96 (2015); **Maples v. Thomas,** 132 S.Ct. 912 (2012); **Martel v. Clair,** 132 S.Ct. 1276, 1284-86 (2012) (a district court would be compelled "to appoint new counsel if the first lawyer developed a conflict").

REASONS FOR GRANTING THE WRIT

Standards for Mandamus

This Court's precedent provides that it will issue a writ of mandamus to a federal court "only where a question of public importance is involved, or where the question is of such a nature that it is particularly appropriate that such action by this court should be taken." **Ex parte United States,** 287 U.S. 241, 248-49 (1932). When a petitioner seeks a writ of mandamus to address a substantial question of public importance, the petitioner must establish: (1) that "no other adequate means [exist] to attain the relief he desires"; (2) that the petitioner's "right to issuance of the writ is 'clear and indisputable'"; and (3) that "the writ is appropriate under the circumstances." **Cheney v. United States Dist. Crt. for D.C.,** 542 U.S. 367, 380-81 (2004).

1. A federal circuit court willfully defying a properly enacted statute constitutes an extraordinary event.

The Eleventh Circuit Court of Appeals prevented Mr. Bryant (and similarly situated litigants) from exercising his statutory right to self-representation. A course of conduct which fits within this court's definition of substantial public importance. See **Hollingsworth v. Perry,** 558 U.S. 183, 190-91 (2010) (identifying a district court "order based on a local Rule adopted in violation of federal law" as an issue of public importance). Here, the Court of Appeals defies Congress's explicit command that a person may plead their own causes before any court. "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as by the rules of such courts, respectively, are permitted to manage and conduct causes therein." **28 U.S.C. § 1654** (2018). Civil litigants do not have a Sixth Amendment right to self-representation. See generally **Austin v. United States,** 509 U.S. 602, 608 (1993). "They do, however, have a statutory entitlement to proceed pro se in federal courts. **28 U.S.C. § 1654.** While the doctrine of "harmless error" does not apply to a claim of deprivation of this right. ... a litigant seeking to proceed pro se must among other things clearly and unequivocally "asserts his intention ...." **Abdulhaseeb v. Hargett,** 171 Fed. Appx. 224, 227 (10th Cir. 2006)(citing **Devine v. Indian River County Sch.,** 121 F.3d 576, 580 (11th Cir. 1997);**United States v. Akers,** 215 F.3d 1089, 1096-97 (10th Cir. 2000). Even if the Eleventh Circuit only appeared to disregard a congressional statute this is generates an issue of paramount importance, which requires this Court's attention.

2. The Mandamus Test is Met: No Other Remedy and A Right to Self-Representation

The first requirement is that no other adequate means exist to attain the relief desired. Mr. Bryant seeks to represent himself in his appeal from denial of the Rule 33 motion. The Eleventh Circuit Court of Appeals refuses to allow him that opportunity and refuses to uphold the law; only this Court remains. There is no other statutory procedure; no other avenue for relief exists. **United States v. Moody,** 555 Fed. Appx. 867, 868 (11th Cir. 2014)(citing **Cargill v. Turpin,** 120 F.3d 1366, 1386 (11th Cir. 1997)).

The second requirement is that there is an unequivocal entitlement to the relief sought. The Constitution guarantees a person access to the courts, the right to petition for redress of grievences, and equal protection of the laws. A bulwark protecting those rights is one of the nation's earliest laws which guarantees a person the right to represent himself or herself in any court. **28 U.S.C. § 1654; Martinez v. Court of Appeals of Cal.,** 528 U.S. 152 (2000); **Faretta v. California,** 422 U.S. 806, 844 (1975)(The right to self-representation was codified in 1789; the next day Congress proposed the text of the Sixth Amendment guaranteeing counsel to persons accused of crimes.).

American tradition and congressional statute both guarantee Mr. Bryant the right to represent himself. **28 U.S.C. § 1654.** Mr. Bryant is competent and his request to represent himself was not meant for delay and did not prejudice the government. Nevertheless, the Eleventh Circuit refused to allow Mr. Bryant to represent himself.

The third requirement is that this Court must determine that the writ is appropriate in this circumstance. This Court recognized that the right to defend or prosecute one's own cause is deeply ingrained in our common law and our national heritage. **Faretta,** 422 U.S. at 844.

The Eleventh Circuit denied Mr. Bryant his right to represent himself, an affront to Congress. Moreover, the Eleventh Circuit effectively denied Mr. Bryant the opportunity to challenge the Rule 33 process itself, and his actual innocence claim. That is, because Attorney Howard failed to raise Mr. Bryant's arguments in the district court, and then ignored Mr. Bryant's communications for more than two years, Mr. Bryant must overcome a double default. During those two years, he begged and pleaded with the district and the appellate court to terminate Mr. Howard. Notably, Mr. Bryant did not ask the taxpayers to pay for another attonery, he simply wanted to plead his own case, in light of Mr. Howard's betrayal and abandonment. But the Eleventh Circuit would not listen.

Final Indignity the Clerk Slams the Door

The Eleventh Circuit pours salt on Mr. Bryant's (dignity) festering wounds and slams the door in Mr. Bryant's face. The Court of Appeals asked Mr. Howard to provide status on his representation. Mr. Howard provided a misleading, if not false, report and made promises that (we now know) were not kept. Mr. Bryant sought to inform the appeals court of counsel's deception, but the clerk refused to file the pro se documents. (Appx. 2). Stating in a boilerplate response only counsel may file. Ignoring that for nearly two years counsel (Mr. Howard) has refused to communicate by email, telephone, or letter. And only copied Mr. Bryant on the (implied) threat of the Court of Appeals. The clerk's letter is not only an insult but it is ludicrous.

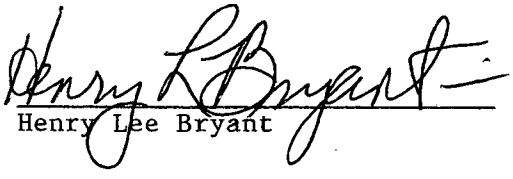
We emphasize that Mr. Bryant has not received any PLRA strikes, he has never been <u>accused</u> of filing an invalid pleading let alone a frivolous one. His pro se pleadings have been brief and to the point. His use of authority was sparse and relevant to the proposition for which the authority was cited.

The Eleventh Circuit, without cause, simply refuses to allow Mr. Bryant to exercise his historic and statutory right.

CONCLUSION

Congress authorized Henry Bryant to represent himself before all United States courts. The Court of Appeals refused to allow Henry Bryant to represent himself. This Court has a duty to protect Mr. Bryant from its subordinate court's transgression of **28 U.S.C. § 1654.** Thus, this Court should issue a writ of mandumus to the members of the Eleventh Circuit directing them to comply with **28 U.S.C. § 1654** and allow Mr. Bryant to represent himself; and such other relief as this Court deems appropriate or fair.

Respectfully submitted on this 30th day of August, 2018.



Henry Lee Bryant