No. 18-8370

IN THE

SUPREME COURT OF THE UNITED STATES

LONNIE EUGENE LILLARD

(Your Name) — PETITIONER

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

the United States Court of Appeals for the Ninth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lonnie Lillard

(Your Name)
Lonnie E. Lillard
Pro se Petitioner

(Address)
Federal Correctional Institution - Sheridan
P.O. Box 5000

(City, State, Zip Code)
Sheridan, OR 97378-5000

(Phone Number)

QUESTIONS PRESENTED

The question presented in this case is as follows:

> What procedural safeguards are afforded to federal criminal defendants when an Appellate Court panel exercises its discretion in deciding whether or not to allow an individual to proceed by way of self-representation on direct appeal from their criminal convictions?
>
> Did the Federal Court of Appeals for the Ninth Circuit violate due process if the court unjustifiably deprived a defendant's request for self-representation on direct appeal from their criminal convictions?

PARTIES TO THE PROCEEDING

The Petitioner is Lonnie Lillard. He is presently incarcerated by the United States Bureau of Prisons at FCI Sheridan, located in Sheridan, Oregon. The named respondent is the United States of America.

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CONSTITUTIONAL PROVISIONS

PETITION FOR A WRIT OF CERTIORARI

Petitioner Lonnie Lillard, respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit.

ORDERS BELOW

The order of the United States Court of Appeals for the Ninth Circuit is unpublished. Pet. App. A 1-2. The Appellate Commissioner's report and recommendation is unpublished. Pet. App. B 3-10.

JURISDICTION

The procedural history of the disposition is set forth below.

The Ninth Circuit Court of Appeals entered it's order on September 13, 2018. Pet. App. A 1-2.

Mr. Lonnie Lillard submits that this case falls within the scope of Supreme Court Rule 11, and is of such public importance as to justify the deviation from normal appellate processes sought by this petition, as well as the facts of the case make immediate determination by the Supreme Court imperative, and the jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment specifies that "[n]o person shall be...deprived of life, liberty, or property, without due process of law;...." U.S. Constitution. Amend. V.

"In all criminal prosecutions, the accused shall.. have the assistance of Counsel for his defense".

The relevant provisions of the Constitution relating to the separation of powers doctrine are as follows:

"All legislative powers herein granted shall be vested in Congress of the United States, which shall consist of a Senate and a House of Representatives". U.S. Constitution art. I, §3.

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STATEMENT OF CASE

A. PROCEDURAL HISTORY

On March 9, 2016, the government charged Mr. Lillard by superseding indictment with one count as follows:

One count of conspiracy to commit bank fraud along with co-defendants Nathaniel Wells, Melisa Sanders, and Erin Terril Wiley, and others known and unknown, for a time frame covering July 2014, and continuing until at least January 5, 2016 18 U.S.C. §1344 and 1349. See District Court Docket #53.

On September 1, 2016, Mr. Lillard pled guilty to the superseding indictment. At that time, Mr. Lillard was represented by Court Appointed Counsel, Robert Harris Gombiner. See District Court Docket #89.

Approximately eleven days later, Mr. Lillard wrote the District Court and asked to withdraw his guilty plea on the grounds that the merchant victims did not bank at any of the four financial institutions named in the superseding indictment. See District Court Docket #94

On October 7, 2016 at a status conference hearing, the District Judge informed Mr. Lillard he granted the withdraw of his guilty plea pursuant to his letter.

On January 6, 2017, Mr. Lillard and his two co-defendants all pled guilty. Mr. Lillard and Mr.

Wells pled guilty without a written plea agreement. See District Court Docket #112 and 114.

On June 2, 2017, the District Court filed Mr. Lillard's request to proceed Pro-Se. See District Court Docket #128.

On June 13, 2017, the District Court Magistrate held a hearing on Mr. Lillard's request to proceed Pro-Se. The Magistrate denied Mr. Lillard's request as untimely.

The District Court Judge, after considering Mr. Gombiner's ex-parte filing and listening to the June 13 2017 hearing before the Magistrate, granted Mr. Lillard his request to proceed pro-se, and informed him that he has to notify the Court by July 5, 2017 on how he wished to proceed (does he truly wish to proceed Pro-Se).

On July 6, 2017, the District Court Judge terminated Mr. Gombiner as Mr. Lillard's attorney. See District Court Docket #161.

On July 24 and 25, 2017, a two day Evidentiary hearing was held. Prior to the third day, Mr. Lillard met with Mr. Gombiner at the Federal Detention Center at Sea-Tac in Seattle, Washington. After Mr. Gombiner told Mr. Lillard told Mr. Lillard he was doing a botched job to his and Mr. Wells detriment, Mr. Lillard agreed Mr. Gombiner should take back over the case. The 3rd and 4th day, which was August 11, 2017 and September 14, 2017, of the Evidentiary Hearing, Mr.

Gombiner represented Mr. Lillard.

After Mr. Gombiner threatened Mr. Lillard during an attorney visit, on or about September 11, 2017, Mr. Lillard wrote the Washington State Bar Association and the Special Investigative Supervisor at FDC Sea-Tac about Mr. Gombiner's threat. Mr. Lillard also informed the District Judge about Mr. Gombiner's actions and what actions he took against Mr. Gombiner. Mr. Lillard asked the Court to appoint Emily Gause to represent him.

On September 28, 2017, Mr. Gombiner filed a sealed motion to withdraw as Mr. Lillard's lawyer. See District Court Docket #184.

To date, Mr. Gombiner has never provided Mr. Lillard with such motion he filed.

On September 29, 2017, the District Court granted Mr. Gombiner's motion to withdraw and ordered Mr. Lillard to appear Pro-Se. See District Court Docket #185.

On May 4, 2017, District Court Judge Ricardo S. Martinez sentenced Mr. Lillard to 196 months imprisonment and five years supervised release, and ordered restitution in the amount of $5,816,938.82. See District Court # 254

Also on May 4, 2017, the District Judge sentenced Mr. Lillard to 36 months for supervised release violations in cause no. CR 15-270-RSM. See District Court Docket # . Mr. Lillard proceeded Pro-Se on both sentencing matters on May 4, 2018.

B. FACTUAL BACKGROUND: Post-Supervised Release Violation

On June 8, 2018, Mr. Lillard used the Attorney phone at the FDC-Seatac to call the Federal Public Defender's office in Seattle, WA. He inquired as to whether there had been an attorney assigned to represent him on his appeal related to his supervised release violation. He had been told by staff at the Federal Public Defenders Office there had not.

On June 11, 2018, Mrs. Suzanne Lee Elliott, at approximately 5:30 p.m. met with Mr. Lillard at the FDC-Seatac for about 15 minutes and informed him that she was assigned to represent him on his appeal, case no. 18-30114 (the supervised release violation). She showed Mr. Lillard an order from the Ninth Circuit Appellate Commissioner, Peter L. Shaw, dated May 30, 2018. Mr. Lillard informed Mrs. Elliott that he was unaware Mr. Gombiner had even filed a motion to withdraw off of his case.

Mr. Gombiner was ordered by the Ninth Circuit Deputy Clerk, David G. Vignol, on May 21, 2018, that if he withdrew, he had to serve a copy of his motion on Mr. Lillard. Mr. Gombiner was further ordered to by the Court to inform Mr. Lillard that he could ask for appointment of Counsel; or Mr. Lillard could attain private Counsel to represent him, or that Mr. Liiard has chosen to to proceed Pro-Se; or

as evidenced by Mr. Lillard's affidavit, that he had been advised of his rights with regard to the appeal and has expressely stated that he wished to dismiss the appeal voluntarily. However, Mr. Lillard was never advised by Mr. Gombiner as to any of the 4 options and was never provided with his motion to withdraw.

Mr. Gombiner was granted to be relieved as Mr. Lillard's appellate counsel by the Ninth Circuit Appellate Commissioner, Peter L. Shaw on May 30 2018. In the Commissioner's order, he advised Mr. Gombiner to serve a copy of his motion to withdraw on Mr. Lillard. However, Mr. Lillard was never served with a copy of Mr. Gombiner's motion to withdraw. As already stated, Mrs. Elliott met with Mr. Lillard for the first time ever on June 11, 2018.

On June 12, 2018 Mr. Lillard sent a motion requesting the Court to provide the defendant with a motion to withdraw as ordered by the Court . The Ninth Circuit docket # is unknown as Mr. Lillard does not have a docket sheet or access to PACER. In Mr. Lillard's motion, he requested the Ninth Circuit Court provide him with the motion to withdraw filed by his former Counsel, Mr. Gombiner. He stated in the motion that the Court, twice, had informed Mr. Gombiner to serve Mr. Lillard with a copy of the filed motion to withdraw but Mr. Lillard has not recieved such.

On June 12, 2018, Mr. Lillard informed Mrs. Elliott he would inform the Court he wished to proceed Pro-Se

on appeal case no. 18-30106.

On June 14, 2018, Mr. Lillard recieved a letter from Mrs. Elliott. In that letter, she informed him she would not be representing him on #18-30106, and she would only order the sentencing transcript from January 6, 2017 and May 4, 2018. She stated she would also not file a motion to consolidate both appeals. "Not" is her emphasis added). She told Mr. Lillard to let her know if he misinterpreted her phone message. See Petitioner's Appendix C 11. Mr. Lillard made contact with her via telephone, on or about June 27, 2018 and let her know he was transferring, that he had packed up his property and that he filed a motion to proceed Pro-Se.

C. FACTUAL BACKGROUND: Post-Criminal Conviction and Sentencing

During the Attorney visit on June 11, 2018, Mrs. Elliott had shown Mr. Lillard an order from the Ninth Circuit Deputy Clerk, David J. Vignol, that informed Mr. Lillard that he had a choice to retain counsel, a choice to file a motion for appointment at government expense or inform the Court he wished to proceed Pro-Se. Mr. Lillard had not recieved to Deputy Clerk's order when Mrs. Elliott had shown him her copy. This was in case no. 18-30106.

During the attorney visit, Mrs. Elliott explained that since she was already representing Mr. Lillard on the appeal from his supervised release violation, that she could also represent him on his Direct Criminal

appeal; (referring to case no. 18-30106). Mrs. Elliott explained that if she could not identify any non-frivolous grounds as to Mr. Lillard's revocation, she would then have to file an Anders brief (referring to Anders v. California) 386 U.S. 738 (1967)). Mrs. Elliott pointed out that if that were the case, that because the time Mr. Lillard recieved on his violation was ran concurrent with his 196 month sentence, that it would not have any bearing ultimately on his criminal appeal. Mr. Lillard agreed to have her represent him on appeal.

June 12, 2018, at approximately 9:42 a.m.. Mr Lillard left a voicemail informing Mrs. Elliott he had slept on her request and gave his circumstances deep thought and he wished to proceed Pro-Se. Mr. Lillard sent the Ninth Circuit a 'Motion to Proceed Pro-Se', and and recommendation pursuant to federal rule of Criminal Procedure 38(b)(2) to be confined at the Federal Detention Center Sea-Tac for a reasonable time period until the completion of and preperation of the appeal. Ninth Circuit Docket unknown, (Mr. Lillard does not have a copy of the Ninth Circuit docket sheet).

D. The Ninth Circuit Commissioner's Report and Recommendation

The Ninth Circuit Commisioner stated in his report and recommendation that allowing Mr. Lillard to represent himself could unduly burden the Court and the government, endanger the integrity of the Judicial Process, and undermine the just and orderly resolution of the appeal.

He relied on Martinez v. Court of Appeals, 528 U.S. 152, 162 (2000) as the authority in concluding such. See Petitioner Appendix B 3-10

The Commisioner stated in his report and recommendation, the follwing reasons in support of his denial of Mr. Lillard's request to represent himself:

> In the District Court, Lillard filed a number of Pro-Se motions that did not advance his cause, and that the District Court denied or struck from the record;
>
> Lillard also filed a motion to recuse the the District Court Judge that was denied by the District Court Judge and the senior active District Judge;
>
> In addition, Lillard filed two Pro-Se interloctory appeals that were dismissed by the Court of Appeals for lack of jurisdiction;
>
> Lillard also has filed a number of unsuccessful Pro-Se appeals in the past and in some of those appeals he also filed unsuccessful motions for reconsideration and was prohibited from further filing;
>
> Lillard also has submitted Pro-Se pleadings while represented by counsel in direct criminal appeals;
>
> Lillard filed Pro-Se opening and reply briefs in his Pro-Se appeal no. 16-30194. The Court (referring to himself, the Commissioner) recently appointed the Federal Public Defender as amicus counsel, thus that appeal was insufficient file a supplemental opening brief addressing two specific issues that Lillard failed to address sufficiently in his Pro-Se briefing in that appeal was insufficient.
>
> Lillard's many Pro-Se pleadings, is handwritted, overlong, does not adequately discuss legal analysis in the context of the facts relevant

to his case, and is generally not helpful to his cause. For example Lillard wished to present an Ineffective Assistance of Counsel claim (referring to Direct Criminal no. 08-10481) which appointed counsel appropriately did not raise on direct appeal because it must be presented instead in a habeas corpus petition.

Given the complexity of the fraud in this case, the potential issues presented by Lillard's guilty plea, and the significant sentence and restitution imposed, the court would benefit from appointing counsel Elliott to represent Lillard.

Counsel Elliott is an experienced appellate attorney who has represented many criminal defendants in this court under the Criminal Justice Act.

See Pet. App. B 3-10.

The Commisioner concluded that Mr. Lillard's case was not an appropriate case in which to exercise the court's discretion to permit self-represention, and that the court's interest in the fair and efficient administration of justice outweights Mr. Lillard's interest in self-representation See Pet. App. B 9

F. The Ninth Circuit Panel's order adopting In Full the Appellate Commissioner's Report and Recommendation

The Ninth Circuit Panel adopted in full the Appellate Commissioner's Report and Recommendation See Pet. App. A 1-2 The panel denied Mr. Lillard's

request to represent himself and appointed Mrs. Elliott to represent him. The Panel also consolidated both Direct Appeals. Mr.Lillard's supervised released revocation and his direct appeal from his criminal conviction, and ordered the opening brief related to the criminal conviction due by December 17, 2018.

See Pet. App. A 1-2

E. Mr. Lillard's objections to the Appellate Commissioner's Report and Recommendation

Noting that the Commissioner denied Mr. Lillard's request to represent himself on the grounds that his self-represention could unduly burden the court and government, endanger the integrity of the Judicial Process, and undermine the just and order resolution of the appeal, Mr. Lillard in turn addressed each reason that the Commissioner relied upon to support his position. Pet. App. D 12-22

Mr. Lillard attached a declaration to his objections, wherein he stated he understood the complexity of the fraud in his case, the potential issues presented by his guilty plea and the sentence and restitution imposed by the District Court; he understood the extreme and tremendous dangers involved in self-representation on appeal; he understood that if he waived his right to counsel not, he waived his right to later claim that he

recieved Ineffective Assistance of Counsel; he was, at that time, in full possession of his faculties and not under any drugs or other impairments; and he agreed to abide by the rules of the procedure and by the Ninth Circuit Court's protocol. See Mr. Lillard's objections to the Appellate Commisioner's report and recommendation.

Mr. Lillard went on to further address the nine (9) Pro-Se motions and two (2) appeals the Commissioner mentioned. Mr. Lillard explained in his objections that District Court Docket entry #202 was a motion to withdraw his guilty plea and dismiss the indictment. Mr. Lillard argued that while the District Court denied the motion, he plans to raise such issue on appeal and that he did not see how such action did not advance his cause simply because the District Court abused it's discretion. Mr. Lillard went on to explain that attorney Gilbert H. Levy, who is an appellate panel attorney, and who represented Mr. Lillard's co-defendant Nathaniel Wells, and who has appeared before the Ninth Circuit too many times to count, also filed a motion to withdraw Mr. Wells' guilty plea and dismiss the indictment against him. See District Court Docket Entry #204. Mr. Lillard sated that the District Judge denied such motion as well. Pet. App. D 14-15.

Mr. Lillard explained that District Court docket entry #237 was a motion to accept Mr. Lillard's late filed notice of appeal, and that the District Judge

struck it because he ultimately accepted Mr. Lillard's untimely notice of appeal. Mr. Lillard further explained that the other motions he filed were miscellaneous motions, ie: they were not dispositive as to the issues. He used as an example, in his objections to the Commissioner's Report and Recommendation that his request for a written order was deemed unnecessary by Judge Martinez since the Court issued a verbal order. Mr. Lillard used as another example that he filed a motion to transmit the physical and documentary exhibits to the Court of Appeals. At the May 4, 2018 sentencing hearing, Mr. Lillard informed the Panel such motion was struck because the Court said not to worry, the exhibits are automatically sent to the Ninth Circuit. Mr. Lillard stated that his motions were in no way intentionally frivolous or otherwise interferred with the orderly procedures of the District Court. Mr. Lillard pointed out that, contrary to the Commissioner's facts, the panel had not at that time of the report and recommendation dismissed Appeal no. 18-30075. Pet. App. D 14-15

Mr. Lillard addressed his past appeals. He explained in Appeal no. 99-35996 out of the Ninth Circuit, that attorney Thomas Kummerow filed a motion requesting Mr. Lillard be allowed to file Pro-Se supplemental brief. At the time, Mr. Kummerow submitted his motion, he also had Mr. Lillard

submit the actual brief he wanted the Ninth Circuit to consider. Mr. Lillard explained in Appeal no. 03-30431, attorney Thomas Cena had Mr. Lillard file a request to dismiss the appeal. As to other appeals, Mr. Lillard informed the Ninth Circuit panel in his objections to the Commissioner's Report and recommendation, that the Commissioner is gravelly mistaken in attributing the 2002, 2005, and 2007 cases to him. Mr. Lillard said he is 85% certain that himself and no lawyer representing him would have filed anything in court during those years of 2012 and 2013. Specifically, as to Ninth Circuit Appeal no. 08-10481, Mr. Lillard stated it was his position in his supplemental brief that the record was developed to present a claim of Ineffective Assistance of Counsel as well as Brady and Due Process violations. Mr. Lillard stated in his objections that appellate counsel, Arthur Allen, presented none of the claims in his opening brief. Mr. Lillard even pointed out that as a result of Mr. Allen's refusal to do such, when he filed his Habeas Corpus (§2255 Motion as relating to Appeal No. 08-10481) the Nevada District Court Judge denied Mr. Lillard's request for a COA on the grounds that Mr. Lillard's §2255 Motion was "Meritless". Mr. Lillard pointed out that the Supreme Court very recently reiterated it's decision in Miller v. El-Cockrell, 537 U.S. 322 (2003) that at the COA stage, the examination should be limited to whether a

claim is debatable among reasonable jurists. Buck v. Davis, 137 S. Ct. 759 (2017). Mr. Lillard argued that the District Judge's order was not acceptable back then nor would it be today, as it is contrary to Supreme Court precedent. See Case No. 2:06-cr-00291-PMP-LRL, Docket Entry #268. Mr. Lillard stated such ruling by the District Judge should in no way, shape, form or fashion have a bearing on Mr. Lillard's request to proceed in the Ninth Circuit on Direct Appeal by means of self-representation.

Mr. Lillard addressed his pending criminal appeal No. 16-30194 in the Ninth Circuit. Mr. Lillard argued that the Commissioner's conclusion that Mr. Lillard's Pro-Se briefing was insufficient is totally premature. Mr. Lillard explained the Ninth Circuit has not yet addressed any of his issues he presented. Mr. Lillard explained that the panel has a duty to construe Mr. Lillard's Pro-Se pleadings liberally and he cited, Zicho v. Idaho, 247 F.3d 1015, 1020 (9th Cir. 2001). Mr. Lillard even pointed out that even seasoned government counsel, Kyle A. Forsyth, had to be ordered in case no. 16-30194, to file 7 copies of the Government's brief and asked would the court bar him from representing the Government's interest's because of such mistake and most likely other errors he committed in the past.

Finally, Mr. Lillard's objections to the report and recommendation provided that if Mrs. Elliott were

to be allowed to represent Mr. Lillard on both cause nos. 18-30114 and 18-30106 and then be allowed to file an Anders brief as to the revocation appeal, it would create a conflict as Mr. Lillard would represent himself on such but Mrs. Elliott would do the Criminal Appeal, which Mr. Lillard wanted to do himself in the first place. Mr. Lillard explained that he wanted to represent himself on the revocation and he would do so if given the opportunity, but through no fault of his own, based upon Mr. Gombiner's actions he was never afforded such chance. Mr. Lillard explained that if Mrs. Elliott was allowed to file the Anders brief in case no. 18-30114 and Mr. Lillard represent himself and be granted relief, and Mrs. Elliott continue to represent him on case no. 18-30106, potentially Mr. Lillard would, as a recourse of action, file a bar complaint on he as well as an Ineffective Assistance of Counsel claim. Mr. Lillard posed the solution to the potential problem that different counsel should represent Mr. Lillard in the two different proceedings now before the Ninth Circuit, and in the alternative that he should be allowed to proceed by means of Self-Representation in both appeals.

G. Mr. Lillard's request to Mrs. Suzanne Elliott regarding Transcripts and Court Clerk Papers Filed in the District Court

On October 29, 2018, Mr. Lillard wrote his appellate counsel, Mrs. Elliott. In Mr. Lillard's letter he requested Mrs. Elliott to provide him with the following transcripts, before she filed her opening,

so he could review them and present his claims based upon the record. The requested transcripts are:

Change of Plea hearing Dated 09/01/16
STATUS HEARING Dated 10/07/16
Change of Plea hearing Dated 01/06/17
Motion hearing (proceeding to proceed se) Dated 06/13/17
Status Hearing dated 06/16/17
Status Hearing Dated 06/30/17 9:00 a.m.
Motion Hearing Dated 06/30/17 10:00 a.m.
Evidentiary Hearings 7/24-7/25-8/11-9/14-10/05
Erin Wiley's Sentencing 4/21/17; Sanders Sentencing 03/30/18
My Sentencing Hearing on 03/30/18 (Nickie rury was the Ct. Rep.)
My Sentencing Hearing on 05/04/18

Also, Mr. Lillard included in his 54 page letter, to Mrs. Elliott a request for a number of Court Clerk's papers. The requested Court Clerk's papers filed in the District Court are:

Document 94 letter to withdraw plea agreement/Dkt 96 Mr. Gombiner's motion to withdraw plea
Dkt 98 Gov's Response/Dkt 113 Stipulation re: asset forfeiture
Dkt 129 Application of Gov./ Dkt 130 Order of Court
Dkt 131 Writ issued/ Dkt 133 Trial Brief
Dkt 134 Motion to Seal/ Dkt 139 Order
Dkt 143 Motion for forfeiture of property/ Dkt 151 Application
Dkt 152 Order for Writ/ Dkt 153 Writ issued
Dkt 155 Order/ Dkt 160 Motion to permit FBI testimony
Dkt 162 Order/ Dkt 164 Exhibit list
Dkt 170 Motion to appoint Counsel/ Dkt 171 Response
Dkt 167 Stipulation regarding restitution/ Dkt 172 Stipulated motion
Dkt 173 Order/ Dkt 174 Declaration of Publication
Dkt 175 Order/ Dkt 176 Response by Gov.
Dkt 180 Exhibit list/ Dkt 184 Motion to Withdraw
Dkt 185 Order granting withdrawl/ Dkt 254 My Judgement and Sentencing
Dkt 212 Sanders sentencing memorandum/ Dkt 216 Supplement of Sanders
Dkt 213 Order Sealing Memo/ Dkt 208 Gov's Motion to seal
Dkt 209 Gov's motion/memo/ Dkt 250 Judge Leighton's denial of motion for recusal of Judge Martinez (should be last week in April)

On December 11, 2018, Mr. Lillard recieved a letter from Mrs. Elliott. She acknowledged that she recievd Mr. Lillard's letter. Pet.'s App. E-23 However, as of date, at the time of mailing of this petition for a writ of certiorari to the Supreme Court, Mrs. Elliott has thus far not provided Mr. Lillard with any of the documents or transcripts he has requested from her.

REASONS FOR GRANTING THE WRIT

A. Immediate Review is Warranted Where a Criminal Appellant is Exposed to a procedure offensive to a Fundamental Principle of Justice Where an Appellate Court has the Appearance of Bias in its Decision Governing a Self-Self-Representation Proceeding, and the Result of which Constitutes an Unjustifiable Deprivation of Due Process.

Under 28 U.S.C. §§ 1254 (1) and 2101 (e), a petion for certiorari before judgement for a United States Supreme Court for consideration if the case was properly in the Court of Appeals, i.e., if the appeal to that Court was timely filed, all other procedural requirements were met, and the United States District Court's order from which the appeal was taken is final within the meaning of 28 U.S.C. § 1291, conferring upon the courts of appeal jurisdiction of appeals from all final decisions of the federal district courts. (Gay v. Ruff, 292 U.S. 25, 30 (1934)

This is a case of such imperative public importance that it justifies a deviation from the normal appellate practice where a movant would file a petition for a Writ of Certiorari 'after' a final judgement is rendered by a Federal Appellate Court. The injury of the violation of the appearance of bias, set forth below, in the Appellate Court Commissioner's report and recommendation is not limited soley to Mr. Lillard. There has been an injury to the law as an institution, to the public who have an interest in expecting that courts will not behave in a manner that is abhorant to justice, to the Government as they lack an enforceable and defensible interest in a process that violates due process through no fault of their own, and to the democratic ideals reflected in the process of the Courts. The criminal justice system is founded on the public's confidence in the fairness of the judiciary and the impartial execution of duties by the important actors that is essential to the successful functioning of this

democratic form of government. Young v. U.S., ex rel Vuitton et Fils S.A., 481 U.S. 787, 107 S. Ct. 2124, 2139, 2141 (1987).

The basic requirement of constitutional due process is a fair and impartial tribunal at the hands of a court. In re Murchison, 349 U.S. 133, 136 (1955). "Not only is a biased decision maker constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the probability of unfairness.'"

This court has consistently enforced this basic procedural right and held that judicial decision makers are unconstitutionally unacceptable when a situation 'which would offer a possible temptation to the average... judge to... lead him not to hold the balance nice, clear and true.' Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986); Tumey v. State of Ohio, 273 U.S. 510, 532 (1927). It is also unconstitutionally unacceptable to sit as a adjudicator where they have been the target of personal abuse or criticism from the party before them. Aetna Life Ins. Co., 475 U.S. at 825-26; Tumey, 273 U.S. at 523.

The Ninth Circuit Commisioner made an adverse ruling against Mr. Lillard and rejected his request to proceed on direct appeal by way of self representation. Pet... App..B 3-10 the Ninth Circuit panel adopted the commissioners findings in full. Pet. App. A 1-2

The commisioner's report and recommendation however, has the appearance that it is presumptively grounded in bias. Due Process requires that a judge possess neither actual nor apparent bias. See Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884 (2009). Additionally, to perform its high function in the best way "justice must satisfy the appearance of justice." In re Murchison, 349 U.S. at 136.

Mr. Lillard understands that judicial rulings alone almost never constitute a valid basis for a bias or partiality. See Liteky v. U.S., 510 U.S. 540, 555 (1994). Opinions formed by the commissioner on the basis of

facts introduced or events occurring in the course of the current proceedings do not constitute a basis or partial towards Mr. Lillard unless such facts or events display a deep seated favortism or antagonism that would make fair judgment impossible. Id. In the case at hand though the commissioner's impartiality can be reasonable questioned. The Commissioner stated in his report and recommendation:

> "Lillard also has filed a number of unsuccessful pro se appeals in the past, and in some of those appeals he also filed unsuccessful motions for reconsideration and was prohibited from further filings. See Appeal Nos. 99-35996 (affirming district court denial of habeas corpus petition), 05-56922 (denying certificate of appealability), 07-55587 (same), 10-16844 (same), 12-16326 (same), 12-16640 (same), 13-35067 (same), 17-71031 (denying application for authorization to file second or successive habeas corpus petition). Lillard also has submitted pro se pleadings while represented by counsel in direct criminal appeals. See Appeal Nos. 02-50264, 03-30431, 08-10481.

In Mr. Lillards objections to the commissioners report and recommendation he informed the panel he was "85% certain that himself and no lawyer representing him would have filed anything (sic) in this court in 2002, 2005, or 2007." Mr. Lillard can now say with 100% confidence cause nos. 05-56922, 07-55587 and 02-50264 is not him. Mr. Lillard has obtained from his case manager a copy of his period of time he was federally incarcerated for on District Court case no. 2:06-cr-291-PMP-LRL out of the State of Nevada and case no. CR 98-5168RJB out of the State of Washington. Pet. Appx. F24 & G25 Washington case no. Mr. Lillard was incarcerated from March 11, 1998 and was released on August 30, 2000. on the Nevada case no. Mr. Lillard was incarcerated from July 27, 2006 and released on June 02, 2014. Mr. lillard, in truth and in fact did not file a direct appeal as found by the Commissioner, in the

year 2002 in the Ninth Circuit. Mr. Lillard, in truth and in fact, did not file a certificate of appealability in the years of 2005 or 2007 as found by the Commissioner.

Mr. Lillard had every right to assume the Commissioner would judge his request to proceed by way of self-representation on direct appeal soley on the facts or events as they pertain to Mr. Lillard and no one else. See e.g. Taylor v. Kentucky, 436 U.S. 478, 485 (1978). (a defendant has a clearly established right to be judged "soley on the basis of the evidence introduced at trial."). Mr. Lillard had every right to assume the Commissioner would not base his decision on facts outside the record that in no shape, form, or fashion pertain to Mr. Lillard. See e.g. Gardner v. Florida, 430 U.S. 349, 357-58, 362 (1977) (judge basing his sentencing decision on facts outside the record held to violate due process). Mr. Lillard had every right to not to have the Commissioner base his denial of Mr. Lillard's request to represent himself on direct appeal, on materially false and unreliable information. See e.g. U.S. v. Tucker, 404 U.S. 443, 447 (1972). The panel's order denying Mr. Lillard's request to proceed by means of self-representation as the court adopted the Commissioner's report in full, is fundamentally flawed. Pet. App. B 3-10

The Commissioner's attributation of three unrelated cases to Mr. Lillard and making a decision based upon such hampered the quality of his adjudication and positively interferred with the administration of justice. To what degree, no one knows. Mr. Lillard does not have access to Pacer. He does not know why the Commissioner erroneously indentified Mr. Lillard as the appellant in the three cause nos. that are wholly unrelated to him. Even though the Commissioner's appearance of bias does not stem from an extrajudicial source this is one of those "rare circumstances" where such source should not be required. Liteky, 510 U.S. at 555. The probabilities are much too high that the scales tip in favor that the Commissioner's impartiality could be questioned when he denied

Mr. Lillard his right to proceed in the Appellant Court by means of self-representation. See e.g. Sao Paulo v. Am. Tobacco Co., 535 U.S. 229, 233 (2002).

It is not apparent from the record if the Commissioner has a personal bias or prejudice towards any of the parties in the three cases he attributed to Mr. Lillard. It is unknown if the Commissioner had personal knowledge of disputed evidentiary facts in the three cases he claimed Mr. Lillard was a party to. It is unknown if he served as a lawyer in any of the cases or he himself, his spouse or any relative of his was a party in any of the three cases.

This Court should grant review as Mr. Lillard was exposed to a procedure during the judicial proceedings governing his request to proceed via self-representation on direct appeal that violated his substantive due process rights, in lieu of him notifying the panel of such grave error.

There is another equally important reason why this Court should exercise it's discretion and grant review of the panel's order.

The Commissioner supported his conclusion to deny Mr. Lillard's request for self-representation, in part, on the following grounds:

> **Mr. Lillard filed a number of pro se motions that did not advance his cause (referring at least to Mr. Lillard's motion to withdraw guilty plea and dismiss indictment);**
>
> **Mr. Lillard had to be appointed amicus counsel due to his opening brief being insufficient as to briefing two issues.**

The Commissioner's reliance that Mr. Lillard's pro se brief in the pending case before the Ninth Circuit, cause no. 16-30194, was insufficient shows that he is substituting his judgment for the Court of Appeals' justices that will ultimately decide his case. If the Court of Appeals for the Ninth Circuit deems Mr. Lillard's opening brief insufficient they have the authority to have him correct such deficiency by ordering further

briefing. U.S. v. Schopp, Lexis 1404, case no. 16-30185 (9th cir. 2018). the Ninth Circuit panel who decides Mr. Lillard's case could simply hold that the issues were not properly presented and argued and concluded such issues he presented and waived. Greenwood v. FAA, 28 F.3d 971, 977 (9th cir. 1997).

Instead of letting the case go forward to the panel, after full briefing was completed, the commissioner ordered the Federal Public Defender's Office to file a friend of the court brief. The commissioner then relies on his own order to conclude that Mr. Lillard will unduly burden the court and the government, endanger the integrity of the judicial process, and undermine the just and orderly resolution of the appeal. Pet. App. B-3-10

The appearance of bias is definetly present in the commissioner's report and recommendation as he tailored his report to coincide with his earlier order. The Commissioner has also issued orders in the past cases Mr. Lillard was a party to, that he referenced in his report. It should be noted that Mr. Lillard fully complied with the procedures in filing his pro se opening brief and reply brief. He filed 7 copies of each and served them on the government counsel. He did not exceed the number of pages allowed. However, to the contrary, government counsel had to be ordered twice by the court to properly file their briefs. See court orders dated February 16, 2018, and Decmber 03,2018 (again, Mr. Lillard does not have the docket numbers as he does not have access to pacer).

As to reference to Mr. Lillard's motion to withdraw his guilty plea and dismiss his indictment, the court again jumps the gun in determining that such motion did not advance Mr. Lillard's cause. The Panel will be, as they should, the proper judges to determine such. Should Mr. Lillard prevail, the Panel will either vacate his plea or dismiss his indictment, either with or without prejudice. Mr. Lillard's other filings were miscellaneous and not dispositive of the issues that will be presented on

appeal, thus they did not have any effect on his "cause" as far as determining his sentence and conviction being invalid or valid. The Commissioner could not "substitute [his] judgement for that of the District, nor any other court Horne v. Flores, 557 U.S. 433, 493 (2009) (Breyer, J., dissenting); see also Olympic Airways v. Husain, 540 U.S. 644, 655 n.9 (2004); National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976) (per curiam); Calderon v. Thompson, 523 U.S. 538, 567-68 (1998) (Souter. J., dissenting). "NO"

In light of all the above, there was rational basis for the Commissioner to conclude that Mr. Lillard would unduly burden the court and the government, endanger the integrity of the judicial process, and undermine the just and ordely resolution of the appeal, if he were allowed to file an opening and reply briefs on direct appeal from his criminal convictions.

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B. Immediate Review of the Ninth Cicuit's Court Order is Warranted, Before Judgement is Rendered, to Ensure Mr. Lillard's Request for Self-Representation on Direct Appeal does not Become Moot in the Interim and Leave Him Powerless to Avert an Order that Plainly Contains the Appearance of Bias.

The finality requirement of 28 U.S.C. § 1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals. See e.g., Cobbledick v. U.S., 309 U.S. 323, 324-326 (1940). This requirement ordinarily promotes judicial efficiency and hastens the ultimate termination of litigation.

However, this case presents facts that make immediate determination by the Supreme Court imperative. Mr. Lillard has notified the Ninth Circuit that he has sought Supreme Court review of the Court's order dated September 13, 2018. Pet's App. H 26-36. Prior to Mr. Lillards notice of leave to the Ninth Circuit, he initially submitted his Petition for Writ of Certiorari that this Court received on December 19, 2018. See Pet's. App. H 35. Mr. Lillard has since obviously corrected and clarified the jurisdictional statement as is self evident by this Courts filing Mr. Lillard's petition. Mr. Lillard's counsel representing him currently in the Ninth Circuit has requested a continuance for filing the opening brief until after the Supreme Court can consider Mr. Lillard's Petition for Writ of Certiorari, to which the government has no objection. See Pet's. App. I 37-39. Thus, judicial efficiency would not be affected nor obstructed nor impeded as none of the parties have any objections to the Ninth Circuit continuing the case until this Court decides Mr. Lillard's Petition.

Additionally, Mr. Lillard's co-defendant, Mr. Nathaniel Wells

opening brief was submitted by his attorney, Gilbert H. Levy, on September 3, 2018. See Ninth Circuit case no. 18-30077, docket entry #9. Government counsel, Charlene Koski, filed the answering brief on January 02, 2019. See docket entry #24. Mr. Wells' reply brief is currently due on February 19, 2019. Mr. Lillard and Mr, Wells' cases, however, are not consolidated. Mr. Lillard's filing this Petition for a Writ of Certiorari does not in any shape, form, or fashion effect or otherwise impact the Ninth Circuit deciding and issuing a judgement or an opinion in Mr. Wells'case. Positive results although can come from a decision in Mr. Wells case while Mr. Lillard's Petition is pending in this Court. For example, one of the issues before the Ninth Circuit in Mr. Wells case is whether the District Court should have applied the preponderance of evidence standard or the clear and convincing standard as to certain sentencing enhancements the Court imposed. If the Ninth Circuit were to decide Mr. Wells case while Mr. Lillard's Petition in this Court is pending, there would be no need to brief that particular issue as either Mr. Lillard or the government would concede such issue since the Ninth Circuit would have settled such question of law. In other words full briefing as to that issue would not be needed and the parties could simply request a merit's determination from the court, if need be. Furthermore, as another example, the issue as to whether or not the Superseding Indictment should have been dismissed, once settled by the Ninth Circuit, (again assuming that Mr. Wells case is completed and Mr. Lillard's case is still pending in this Court) actually does not conflict with judicial efficiency, While Mr. Lillard's Petition is pending in this court. Mr. Lillard or the government counsel would not have to fully brief such issue. One party would prevail and

one party would be unsuccessful. Again a merits determination would suffice or alternatively a concession, if any, by the Government would be sufficient. Thus, it is highly likely that judicial resources would actually be saved.

There is a more overall important reason why the facts of this case make an immediate review of the Ninth Circuit Court's order imperative, by this Court.

The Supreme Court described that some prejudgement orders that are "collateral to" the merits can be reviewed immediately if they are "too important" to delay." See, Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 103 (2009) (citing Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949)).

The panel's order conclusively determined Mr. Lillard's request for self-representation on direct appeal from his criminal conviction, resolved an important issue completely separate from the merits of the action, the panel's order is effectively unreasonable on appeal from a final judgement. Will v. Hallock, 546 U.S. 345, 349 (2006)).

Thus, immediate review is warranted as Mr. Lillard has a created liberty interest to self-representation on direct appeal and such would be destroyed if it were not honored and he was not allowed to file his own opening brief. See Flanagan v. U.S., 465 U.S. 259, 265-266 (1984) (the court recognizes certain rights that have legal and practical value of which would be destroyed if they were not vindicated before trial).

If Mr. Lillard exercised his option to wait until his case in the Ninth Circuit was over, and then file a Petition for a Writ of Certiorari from the final judgement and raise in his Petition the validity of the order now in question, and this Court were to grant

his Petition, such would actually work against the finality requirement of 28 U.S.C. § 1291. If the Supreme Court were to hold, after the opinion by the Ninth Circuit is issued, that the Ninth Circuit unjustifiably deprived Mr. Lillard's request to proceed on appeal by way of self-representation, the only possible measure for a remedy is to reinstate the loss claim as a result of the violation of due process that ocurred during the appellant proceedings in deciding his request. See Christopher v. Harbury, 536 U.S. 403, 415-16, n.13 (2002). This means that this Court would vacate the Ninth Circuit's opinion in Mr. Lillard's case and remand with instructions to allow Mr. Lillard to file his opening brief himself and ultimately any other motions he may deem necessary as to his benefit. An oxymoronic paradox would develop though, because the litigation would not be quickened but would actually be well drawn out. Mr. Lillard's case falls in the limited class of cases where denial of immediate review would render impossible any adequate relief that would not further strain the parties and the Appellate Court's resources. See e.g. DiBella v. U.S., 369 U.S. 121 (1962); See also Perlman v.U.S., 247 U.S. 7, 13 (1918) (allowing immediate review of a court order where such denial of review would have left the appellant "powerless to avert the mischief of the orcer.").

It is imperative that this Court grant immediate review of the Ninth Circuit's order, in order for Mr. Lillard to not irrevocably lose his substantive right he has chosen to exercise and be allowed to represent himself on his direct appeal. Furthermore, it is recognized that the accused has the ultimate authority to make certain fundamental decisions regarding his case, such as to take an appeal. See Wainwright

v. Sykes, 433 U.S. 72, 93 n.1 (1977). (Burger, C.J., concurring); ABA Standards for criminal justice 4-5.2, 21-2.2 (2d ed. 1980).

C. This Case Presents an Ideal Vehicle, that Warrants Immediate Review by this Court to Determine How Federal Appellate Courts Should Implement and Afford Procedural Safeguards in Deciding to Allow an Individual to Proceed by way of Self-Representation on Direct Appeal from Their Criminal Conviction(s).

Immediate review is warranted to address how Federal Appellate Courts should carry out procedural safeguards when a criminal defendant elects to proceed by way of self-representation on direct appeal.

Immediate review is necessary for this Court to engage in due process analysis, so that the Federal Appellate Courts have the tools to determine when an exercise of their discretion in deciding a defendant's request for self-representation on direct appeal constitutes a violation of due process and is improper. Accordingly, there is an urgent need for the Supreme Court to conduct due process analysis to ensure a defendant's request to self-representation is not undermined under the individual due process protections of the Fifth Amendment.

1. There is an Urgent and Compelling Need to Determine the Due Process Standards to be Used When a Criminal Appellant Elects to Proceed by Way of Self-Representation.

Immediate review is waaranted to determine what due process standards should be applied in deciding a criminal appellant's choice to proceed by way of self-representation on direct appeal.

Pursuant to 28 U.S.C. § 1654, each Court of the United States has the authority to craft rules which govern self-reprsentation. The Majority of Federal Appellate Courts have crafted such rules governing such issue as shown below:

First Circuit: See Local Rule 46.6(b)

Second Circuit: See Local Rule 4.1(d)

Third Circuit: See Local Rule 27.8

Fourth Circuit: See Local Rule 46(f)

Fifth Circuit: See Local Rules Section 'Plan for Representation on Appeal under the Criminal Justice Act.'

Ninth Circuit: See Local Rule 4-1(d)

Tenth Circuit Rule: See Local Rules 46.3 and 46.4

District of Columbia: SeeCriminal Justice Act Plan, Section III (e).

The variations in the Federal Appellate local circuit rules, and how they are enforced, create a compelling need for Supreme Court review.

The Ninth Circuit Local Rule 4-1(d) that is applicable to the case at hand states:

> The court will permit defendants in direct criminal appeals to represent themselves if: (1) the defendant's request to proceed pro se and the waiver of the right to counsel are knowing, intelligent and unequivocal; (2) the defendant is apprised of the dangers and disadvantages of self-representation on appeal; and (3) self-representation would not undermine a just and orderly resolution of the appeal. If, after granting leave to proceed pro se the court finds that appointment of counsel is essential to a just and orderly resolution of the appeal, leave to proceed pro se may be modified or withdrawn.

Mr. Lillard's declaration attached to his objections to the Appellate Commissioner's report and recommendation demonstrate he knowingly and intelligently waived his right to counsel on appeal. See Faretta v. California, 422 U.S. 806, 835 (1975). Mr. Lillard's request to proceed by way of self-representation was timely. For instance, the deadline for his opening brief to be filed had been struck so there was no interfence with the Court scheduling in which to hear his case. In Mr. Lillard's declaration he informed the Ninth Circuit panel that he understood the extreme and tremendous dangers involved in self-representation on appeal. See Iowa v. Tovar, 541 U.S. 77, 88-89 (2004); see also Patterson v. Illinois, 487 U.S. 285, 299 (1988). Mr. Lillard further

informed the Court, in his declaration, that he understood he would not be allowed to claim his own ineffectiveness in later proceedings. See Faretta, 422 U.S. at 834 n.46. Additionally, Mr. Lillard informed the Court he had the mental capacity to conduct his appeal. See Indiana v. Edwards, 554 U.S. 164, 173-78 (2008). Lastly, Mr. Lillard agreed to abide by the Ninth Circuit Court's protocol. See e.g., McKaskle v. Wiggins, 465 U.S. 168, 183-84 (1984).

Mr. Lillard went above and beyond meeting the Ninth Circuit's criteria that is used to govern a criminal appellant's request for self-representation. Despite such a showing by Mr. Lillard, the Ninth Circuit Ninth Circuit still refused to allow him to proceed by way of self-representation. This interfered with Mr. Lillard's protected liberty interest in the Court of Appeal proceedings. For example, Mr. Lillard has a right to appeal his sentence he received in the District Court. See 18 U.S.C. § 3742(a). Once such avenue of appellate review are established, the avenues must not individually discriminate so as to violate the equal protection or due process clauses. See Griffin v. Illinois, 35 U.S. 12, 19 (1956); Rinaldi v. Yeager, 384 U.S. 305, 310 (1966). The equal protection analysis applies through the Fifth Amendment Due Process Clause. Schneider v. Rusk, 377 U.S. 163 (1964).

Thus, an appeal of right is therefore a componet of judicial due process. A judgment of conviction is not considered final until any appeal of right which is filed has been resolved because the possibility of reversal endures until that point. While the trial court's judgment carries a presumption of validity, the very essence of a presumption is its vulnerability to refutation. The appellate process provided the losing party with an opportunity to rebut this presumption, if he/she is able, by demonstrating the invalidity of the trial Court's judgment.

Take for instance that when a appellant dies before he/she has exhausted his/her right of appeal, the federal Courts have concluded that the preferable approach is to dismiss the appeal and remand the case to the lower Court with directions to vacate the conviction and abate the prosecution by reason of death. See U.S. v. Toney, 527 F.2d 716 (6th Cir. 1975); U.S. v. Littlefield, 594 F.2d 682 (8th Cir. 1979); U.S. v. Pauline, 625 F.2d 684 (5th Cir. 1980); U.S. v. Oberlin, 718 F.2d 894 (9th Cir. 1983); U.S. v. Dudley, 739 F.2d 175 (4th Cir. 1984); U.S. v. Davis, 953 F.2d 1482 (10th Cir. 1992); U.S. v. Pogue, 19 F.3d 663 (D.C. Circuit 1994); U.S. v. Zizzo, 120 F.3d 1338 (7th Cir. 1997); U.S. v. Logal, 106 F.3d 1547 (11th Cir. 1997); U.S. v. DeMichael, 461 F.3d 414 (3rd Cir. 2006)(regognizing rules of abatement); and U.S. v. Libous, 858 F.3d 64 (2nd Cir. 2017).

This Court's decision in Dove v. U.S.. 423 U.S. 325 (1976), overruling Durham v. U.S., 401 U.S. 481 (1971), does not preclude this result. Durham, supra, involved a defendant who dies while his petition for certiorari was pending. This Court held that "death pending direct review [whether by certiorari as in this case or on appeal] abates not only the appeal but also all proceedings had in the prosecution from its inception." 401 U.S. at 483. Dove, supra, also involved the death of a petitioner pending review of his conviction on a writ of certiorari. In a brief per curiam opinion, This Court dismissed the petition and stated, "to the extent that Durham, supra, may be inconsistent with this ruling, Durham is overruled." 423 U.S. at 325.

When Mr. Lillard requested to proceed by way of self-representation in the Ninth Circuit, he had a reasonable expectation that he would receive the full panoply of the rights of judicial process. See Goldberg v. Kelly, 397 U.S. 254, 266 (1970). Mr. Lillard had a substantive due process right that the

procedure used by the Ninth Circuit Commissioner in determining his request would be adequate, effective and meaningful and that the Commissioner would be thorough and accurate in the decision making process. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

The admirable aim of defining what substantive due process is to be afforded to criminal appellants when they request to proceed by way of self-representation on direct appeal will rein in the subjective elements that are necessarily present in due process judicial review as well as avaoid the need for a complex balancing of competing interests in every case. Washington v. Glucksberg, 521 U.S. 702, 722 (1997). Broadly defined due process rights are prone to manipulation, and would afford Federal Appellate Courts ample discretion when applying general principles to concrete fact patterns. Due Process rights defined too narrowly, however, suffer from the total opposite problem: the more specific the definition of a right, the more its vitality can become a question of judicial preference or unwarranted deference to legislative discretion because the Courts lack external standards to guide its analysis. For example, Federal Appellate Courts that disfavor a criminal appellant's proper self-representation request could relegate such conduct in a way that could amount to unprotected isolation, while Court's that favor such conduct would honor such requests. This would allow subjective enforcement of due process on arbitrary or discriminatory interpretations by the Federal Appellate Courts. City of Chicago v. Morales, 527 U.S. 41, 52 (1999).

Moreover, judicial supervision of the administration of criminal justice in the Federal Courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards... which are summarized as "due process of law..." McNabb v. U.S., 318 U.S. 332, 340 (1943); see also U.S. V.

Hasting, 461 U.S. 499, 505 (1983).

Mr. Lillard urges this Court to grant review, and implement basic procedural safeguards, to be used by all Federal Appellate Courts in deciding to allow criminal appellants to represent themselves on direct appeal from their criminal convictions.

2. There is an Urgent and Compelling Need to Determine Whether a Federal Court of Appeals Discretion is Limited in Considering a Self-Representation Request When a Criminal Appellant knowingly Waives their Right to Counsel on Direct Appeal.

When Mr. Lillard met all the applicable factors that govern self-representation on direct criminal appeal, as set out by the Federal Appellate Courts in their local circuit rules, his request was protected by substantive and procedural due process under the Fifth Amendment. See Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (Procedural due process imposes constraints on certain governmental decisions within the meaning of the Due Process Clause of the Fifth Amendment). Thus, due process does not allow Courts discretion to deny the appellant's request, when all factors that govern self-representation are met. The regulations set up by the Federal Appellate Courts clearly limits their discretion when certain factors are met. The Ninth Circuit's failure to properly perform their judicial discretion is a plain violation of the Court's judicial process due to be exercised for Mr. Lillard. The Court's actions did not accord Mr. Lillard the fairness and impartiality that due process entitles him to. The result was a judicial denial of a substantial right which the U.S. Congress has not seen fit to withhold from him, but have allowed him to exercise. See 28 U.S.C. § 1654. The Ninth Circuit directly derives their authority from such codification. Congress' intent to establish an individual subtantial right, and the fact that such request to proceed by way of self-representation in the Court of Appeals on direct appeal is specific enough to be enforced by the judicial system,

constitutes a binding obligation on the Ninth Circuit to grant such request when a criminal appellant meets all the criteria set-out and established by the Court. See Wright v. Raonoke Redevelopment and Housing Authority, 479 U.S. 418, 430-432 (1987).

Additionally, the Ninth Circuit's deviation from their own created legal standard constituted an "error." See U.S. v. Olano, 507 U.S. 725, 732-33 (1993). ("Deviation from a legal rule is 'error' unless the rule has been waived."). Such error that occurred in the proceedings at hand was clear and obvious. Olano, 507 U.S. at 732-33. Furthermore such error affected Mr. Lillard's substantial rights to judicial due process. Mr. Lillard does recognize that Federal Appellate Courts have broad discretion to determine who shall practice and/or appear before them . In the same breath, This Court recognizes that when a court improperly denies a request to proceed by way way of self-representation that such a violation is a "structural" error, which is not amenable to harmless error analysis. See McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984). Since MaKaskle, was decided, this court has repeatedly reaffirmed the principle that improper denial of a defendant's request to represent themselves is a "structural" error. See Arizona v. Fulminante, 499 U.S. 279, 310 (1991); Neder v. U.S., 527 U.S. 1, 8 (1999); U.S. v. Gonzalez-Lopez, 548 U.S. 140 (2006). The Ninth Circuit has even recognized that appointed counsel will not be improperly forced upon a criminal appellant where appellant allowed to file a supplemental brief. See Hines v. Enomoto, 658 F2d 667 (9th cir. 1981). The Seventh Circuit recognizes that "individuals" have a right to proceed pro se on appeal. Malone v. Neilson, 474 F.3d 934, 937 (7th cir. 2007).

This court held that when there is the presence of an error, and the error is clear and obvious, and the error affects the defendant's substantial right's, the Appellate Courts must exercise their discretion to review the error, if

the error seriously affects the fairness, integrity or public reputation of judicial proceeds. Rosales-Mireles v. U.S., 138 S.Ct. 1897, 1905 (2018). The injury of the violation of substantive and procedural due process is not limited soley to Mr. Lillard. There has been an injury to the law as an institution, to the public who have an interest in expecting that courts will not behave in a manner that is abhorent to justice, to the government as they lack an enforceable and defensible interest in a proceeding that violates due process through no fault of their own, and to the democratic ideal reflected in the process of the courts.

Mr. Lillard urges this Court to to grant review, and hold that when federal criminal appellants meet all the criteria for waiving their right to appellant counsel, as laid out by the Federal Appellate Courts, that the appellants be allowed to proceed by way of self-representation.

D. There is an Urgent need to Determine Whether Counsel Forced on a Criminal Appellant Creates a Conflict of Interest when that Appellant is Representing themselves in the District Court.

Once an effective notice of appeal is filed, the district court retains jurisdiction over the case only in certain circumstances. See U.S. v. Cronic, 466 U.S. 648, 667 n.42 (1984). Pursuant to 18 U.S.C. § 3145(c) and Federal Rules of Appellate Procedure 9(b), Mr. Lillard is currently drafting up an application for the release pending appeal. This of course must be filed in the district court. See 18 U.S.C. § 3143. If the district court denies Mr. Lillard's motion for release pending appeal he would then have to file a motion under Fed. App. R. Proc. 9(b).

Additionally, Mr. Lillard, on October 29, 2018 asked Mrs. Elliott to file a motion in the District Court to stay his restitution, pursuant to Federal Criminal Rules of Procedure 38(e)(1), and Federal Rules of Appellate Procedure 8. To date Mr. Lillard has not received any response back from Mrs. Elliott so he is now working on a motion,

as well, to stay his restitution payments.

Mr. Lillard is mainly asking for a stay pursuant to U.S. v. Holden, 897 F.3d 1057 (9th Cir. 2018). Mr. Lillard will, though, to first file his request to stay restitution payments in the District Court. Federal Rules of Appellate Procedure Rule 8(a). If the District Court denies such motion then Mr. Lillard can proceed in the Ninth Circuit Court of Appeals. Federal Rules of Appellate Procedure 8(b).

On Direct Appeal, Mr. Lillard has a right to effective assistance of counsel. See Evitts v. Lucey, 469 U.S. 387 (1985). Also, Mr. Lillard has a right to be free from any potential conflict of interest that would result in Mrs. Elliott being ineffective. See Strickland v. Washington, 466 U.S. 668, 692 (1984).

The Court of Appeals for the Ninth Circuit has unequivocally made it clear to Mr. Lillard they will not accept his pro se pleadings, once they forced Mrs. Elliott on him. Mrs. Elliott has thus far refused to file in the District Court Mr. Lillard's requested motion to stay his restitution payments. Should Mr. Lillard have to ask the Court of Appeals for release pending appeal and/or to stay his restitution payments, he will only be able to do so by way of Mrs. Elliott. Considering that Mrs. Elliott has not provided Mr. Lillard with the transcripts or any clerk papers he has requested it is not a stretch of the imagination by any means that she will not advance such issues in the Court of Appeals should the District Court deny both of Mr. Lillard's issues. Of Course such action on behalf of Mrs. Elliott would deny Mr. Lillard a very good chance of being released until his appeal is resolved. Mr. Lillard would also be denied a 99.9% certainty, that since

his restitution order was entered exactly as the Defendant in Holden and would now be considered in violation of the law, that his restitution order should no longer be considered enforceable and funds should no longer be taken from his inmate trust account for such purposes, as he would without a doubt as the law currently stands, be successful and prevail on appeal. This would present a clear and plain conflict, between Mr. Lillard and his lawyer as he would seek to advance one position of success and counsel would refuse, and take a contrary position, even though the law would be on Mr. Lillard's side.

Mr. Lillard even points out that during the only attorney visit he had with Mrs. Elliott, she informed him she may have have to file an Anders brief if he doesn't have any grounds for an appeal. However, this would create a clear and plain conflict because Mr. Lillard would then be allowed to file, in the Court of Appeal, his own opening brief. See Ninth Circuit Local Rule 4-1(c)(6). If he were successful as to his appeal pertaining to his supervised release violation, this would demonstrate Mrs. Elliott was, in fact, incorrect as to her analysis that there were no legitimate grounds for any appeal as to his supervised release violation. The point being that Mrs. Elliott would have, however, been able to submit an opening brief in Mr. Lillard's direct appeal from his criminal conviction. If she were able to deem there were no legitimate grounds in one instance and be proven to be in

clear error , it would be impossible for her to enforce Mr. Lillard's rights and effectively represent him as to his current criminal conviction. Part of Mr. Lillard's violations was that he committed new criminal conduct. If the Ninth Circuit were to hold that a constitutional violation(s) occurred during Mr. Lillard's supervised release proceedings and hearings and such violation is connected to his current criminal proceedings as well, ineffectiveness of counsel would have resulted on the part of Mrs. Elliott during the appellate proceedings. Unfortunately, since Mrs. Elliott has thus far not provided Mr. Lillard with a rough draft of either of the briefs in both appeals she is representing him on, this Court should not discount the high liklihood that such circumstances can become a reality.

In closing, while one could surmise that the hypotheticals Mr. Lillard has presented are far-fetched, Mr. Lillard ensures this Court they are real fears. Lets say Mr. Lillard feels he has received an "Epiphany" from Jehovah himself. He flatly, without any cut on it, tells Mrs. Elliott he refuses to accept here at all costs. Lets say the Ninth Circuit refuses to allow her to withdraw. Mr. Lillard then goes, what most people would consider, looney toons, deranged, off the deep-end, etc., and demands Mrs. Elliott dismiss both of his appeals she is filing opening briefs on. This is almost precisely what happened in United States v. Thorson, No. 17-30100 (9th Cir. 2018). See also Pet. App. J 40.

For an individual to have to even consider such an extreme nuclear option shows how far one will go to avoid what they perceive as conflicted counsel. In Mr. Lillard's situation, it is even more graver than that as he was unjustifiably deprived of his statutory right to proceed by was of self-representation. While it may seem that only the "lone fanatic" would carry out such demand, Mr. Lillard is not in no way in such a category. There is no declaration anyone could get him to sign stating there are no legitimate grounds for an appeal. It would be a travesty of justice if Mr. Lillard were to proceed on appeal with Mrs. Elliott in lieu of the great potential conflict, that is highly likley to occur. Were this Court to grant immediate review, it would erase any and all mishaps.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Lonnie Lillard

Lonnie Lillard
Pro se Petitioner