No.

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN ZEPEDA. PETITIONER

- against -

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Questions Presented

As matters of first impression:

> Whether an individual's challenge to the constitutionality of his sentence and case proceedings in a criminal prosecution on bases outside the limited appellate waivers agreed to by the parties survives a silent record?
>
> Whether the Sixth Amendment right to independent counsel and the Fifth Amendment right to Due Process preclude a court from manipulating the defense function and public docket in favor of the government?
>
> Whether 18 U.S.C. § 3006A(d)(2)-(3) – the subparagraphs of the Criminal Justice Act that give judges power over the defense function – should be stricken as what they are: unconstitutional?

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Statement of Jurisdiction

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Opinion Below and Judgement of Conviction

The Opinion below and Judgment of Conviction are included in the Appendix ("A.") annexed hereto.

Parties to the Proceeding and

Corporate Disclosure Statement

Pursuant to Rule 14.1, the following list identifies all the parties appearing here and in the courts below:

> The Petitioner is Jonathan Zepeda. The Respondent here and in all prior proceedings is the United States of America.

Pursuant to Rule 29.6, Petitioner states that neither party is a corporation.

Statement of the Case

The underlying questions driving this case – how to extricate the judiciary from the court-appointed defense function and achieve independence for counsel under the Sixth Amendment to the United States Constitution, so that an individual facing criminal charges may receive justice – are of such importance that the Chief Justice convened an Ad Hoc Committee to Review the Criminal Justice Act Program (the "Ad Hoc Committee")[1] for a multi-year, nationwide study. The Ad Hoc Committee issued a 341-page report (the "Ad Hoc Committee Report") vindicating arguments that Petitioner Jonathan Zepeda has made regarding these endemic problems for three years. Meanwhile, the presiding judge in the United States District Court for the Central District of California (the "Central District") wielded power deriving from such systemic bias to disregard defense issues and manipulate the record of defense filings – and unconstitutionally impose a sentence.

The defense had negotiated a plea agreement that Mr. Zepeda and I believed was crafted to preserve these issues. Imagine our surprise when the United States Court of Appeals for the Ninth Circuit granted the government's motion to dismiss his case – *by inferring an appellate waiver from a silent record.*

This petition pursuant to Rule 10(c) follows.

[1] *See* https://cjastudy.fd.org/frequently-asked-questions (last visited June 9, 2016).

To appreciate the scope of prejudice at work here, let us begin with an observation by the Honorable Kathleen Cardone and the Honorable Edward C. Prado at the outset of the Ad Hoc Committee Report:

> ***Genuine independence is crucial to providing a high-quality defense—not just in some cases but in all cases.*** It must be the standard of practice in federal courts nationwide. Under the current administrative structure too many attorneys are compromised—if not hamstrung—by the lack of financial resources, training and guidance, and latitude to mount a skilled and vigorous defense of their clients in federal court. When the defense is undermined in these ways, the innocent are more likely to face wrongful conviction ***and the guilty are more likely to face harsher punishment***, including execution. ***The failures that play out tragically in individual lives are systemic.***[2]

Judge Cardone served as the current Chair of the Ad Hoc Committee and Judge Prado is Chair Emeritus of a prior committee incarnation (which conducted a study back in 1993). As predicted – in one of my attempts at persuading the Honorable Raymond Lohier,[3] Chair of the Defender Services Committee of the Judicial Conference of the United States, to recognize the gravity of what's going on and act – the Ad Hoc Committee found the same slew of issues that Judge Prado and others identified a quarter of a century ago.

> [T]he last time an independent committee was tasked with reviewing the quality of public defense in the federal courts, that body was criticized for the lack of

[2] The Ad Hoc Committee Report at XI, available at https://www.uscourts.gov/sites/default/files/2017_report_of_the_ad_hoc_committee_to_review_the_criminal_justice_act-revised_2811.9.17.29_0.pdf (last visited March 12, 2019).

[3] Discussed a little further, *infra*.

> data supporting its findings and recommendations, despite the fact that at the time such data did not exist. It still doesn't exist. The kind of comprehensive approach to data collection needed to effectively manage and evaluate a billion-dollar-plus government program is not taking place.[4]

Two dimensions of this intractable situation manifested in the proceedings below: first, these institutional biases and systemic shortfalls unduly prejudiced the defense function; and, second, such factors negatively impacted the adjudication of, and sentencing in, Mr. Zepeda's case.

Our story begins with Mr. Zepeda's Constitutional challenge to the status quo – a state of affairs that the Ad Hoc Committee have identified as inappropriate and unstainable. We then proceed to the specific behavior of the district judge presiding below, and, in turn, a disposition in the Circuit so cursory and in contravention of this Court's precedent as to rock the conscience.

I. Background

Mr. Zepeda pleaded guilty[5] to four counts of a superseding indictment charging him with RICO conspiracy in violation of 18 U.S.C § 1962(d), conspiracy to traffic in controlled substances in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A), carrying a firearm during and in relation to a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i), and unlawful possession of firearms and ammunition as a previously convicted felon in violation of 18 U.S.C. § 922(g)(1).

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[4] *Id.* at XXII.

[5] The plea agreement is discussed in Section II, *supra*.

Notwithstanding his plea, we believed he had preserved a challenge to the institutional biases and systemic failures that infect the United States criminal court system and prejudiced the proceedings against him. As further discussed below, the defense maintained these objections in connection with sentencing and beyond.

A. The Defense Stands Up for Equal Justice

During the pre-plea litigation phase of this matter, Mr. Zepeda filed a 25-page motion to dismiss, accompanied by 31 exhibits totaling over 700 pages. This submission – the substance of which resembled motions seeking various relief in other Criminal Justice Act ("CJA")[6] cases of mine (the "Constitutional Challenges") – commenced with a challenge to the systemic bias resulting from exclusion of the defense from its own management and administration under the Act. With respect to the Central District specifically, the motion showed, intimidation tactics combine with legal services devaluation to effectuate a presumption that defense work requires "justification." It is this institutional prejudice, the defense argued, that conflicts with the presumption of competency otherwise accorded to counsel under the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984).

Please pause here for a moment and think about what it means when a court requires "justification" for defense services. Inherent in this approach is the default

[6] 18 U.S.C. § 3006A.

assumption that such services remain suspect, and, in any event, must overcome a presumption that the work required is superfluous or that the desired outcome – a conviction, likely[7] – may be achieved more cost-efficiently. The result is unfortunate for the client, the legal profession, and society at large: where an attorney should be able to derive pride and patriotism from CJA work, instead an atmosphere of embarrassment and shame prevails, and both legal representation and one of its paramount products – Constitutional law – suffer.

The deterioration of the CJA Program and judicial oversight in the Central District has become known throughout the nation's legal community. Here is an exchange between the Honorable David O. Carter, who served (or, possibly, still serves)[8] on the Central District "CJA Committee," and Judge Cardone, at an Ad Hoc Committee hearing back in March of 2016:

> Hon. Kathleen Cardone: …We as a committee are hearing that there's a problem in your District . . . [two-term Central District CJA Committee Chair Emeritus] Judge [Dale S.] Fischer is on our committee and we are a very cohesive committee and work together very well, but the problem is that if – if there is a problem in your District and people perceive Judge Fischer as the problem, then, if you are her fellow judge, and you're not willing to take a

[7] I believe it is appropriate to read this agenda into the federal judicial function, as a general matter, for two reasons. First, because the United States outpaces every other civilization history has known in incarceration rate, we may understand mass imprisonment as a governing value and objective. Second, as discussed further herein, the district judge overseeing this case – as is consistent with my experience more generally – was uninterested in anything the defense had to put forth. I might as well have been a mannequin sitting at defense counsel table.

[8] The Central District's CJA Committee is shrouded in secrecy.

> contrary stand to Judge Fischer, where does that put the CJA Panel Attorneys in your District?
>
> Hon. David O. Carter: Okay, that, by the way, thank you for the question. And, bluntness between us. Um, we needed, if you will, more uniformity. That was going to require a strong hand, whether it was Judge Fischer or me, and I was supposed to succeed her as the Chair. I absolutely have refused do that for one reason. I don't want CJA counsel, or anybody, to outweigh the standards that have been set and agreed to by our entire court, and the changes that Judge Fischer has made, by CJA counsel outwaiting her term. So, from my perception in talking to CJA counsel, who quite frankly came rushing in the door, perceiving I was the next Chair, (1) I'm not undermining her, and (2) she's there forever, and she's going to live to be 105.[9]

To worsen matters, on a national level, CJA program infrastructure pits the defense against judicial salaries and expenses as a line item *within the federal judicial budget*. The results are jaw-dropping: the standing Committee on Defender Services of the Judicial Conference of the United States – the body that oversees national CJA policy – recently recommended an overdue CJA Panel attorney rate increase (which had already been reduced to less than half of the amount required to fulfill the statutory authorization)… and then failed to get even that compromise through the United States Senate (which reduced the proposed increase to zero).

The Ad Hoc Committee have identified this war of interests as a "Fundamental conflict over funding":

> [E]ach year, the Judicial Conference approves the requests that will be presented to Congress. The judiciary's appropriations strategy, the [Ad Hoc] Committee was told, is to limit requests for increases in funding to demonstrate

[9] "Panel 5 – Views from Judges," available at https://cjastudy.fd.org/hearing-archives/san-francisco-california (last visited October 27, 2016).

to the appropriators that the judiciary is a prudent manager of resources. The belief underlying this approach is that it increases the likelihood that Congress will fully fund these limited requests.

While the Executive Branch agencies request appropriations to meet their programmatic needs, the Committee was told that there is a pervasive belief within the judicial branch that a request to fully fund the judiciary "would undermine their advocacy for the entire judiciary's appropriation before the Congress." Because the judiciary's primary mission is to support the courts as a branch of the government, the defender program, which is not a core function of the judiciary, particularly in an adversarial system, is at a disadvantage in obtaining the funding it requires.

In looking at the manner in which the [Judicial Conference of the United States] has managed the Defender Services account and requests for increases to it, the Committee considered the question of whether the needs of the judiciary as a whole take priority over those of the CJA program. *The Committee heard testimony that the needs of the CJA program were, by design of the current structure, necessarily subordinated to those of the judiciary.*

Defenders' view is that the request for resources for their program is limited in order to fully fund core judiciary functions. This was not merely the opinion of the defenders. A widely circulated memo on cost containment within the judiciary states:

> Defender Services. Third, we have all experienced the difficulties of budget shortfalls in the Defender Services program. Achieving significant, tangible cost containment in the Defender Services program has proved to be particularly challenging. Many of the ideas suggested by the Defender Services Committee require changes in legislation or changes in practice or policy by the Department of Justice. Congress has repeatedly expressed its concern about the level of growth in this account and the judiciary's cost-containment efforts in this program. In spite of the mission of the Defender Services program, the judiciary cannot expect Congress to continue to provide significant appropriations increases annually. *If such increases are provided, it will be at the expense of the Salaries and Expenses account and by extension, the courts. Thus, the judiciary must re-focus its efforts to achieve real, tangible cost savings in this program.*

This view that a dollar spent on the Defender Services appropriation is a dollar away from the courts distills the conflict inherent in judiciary control of the CJA program budget. When

> [Defender Services Committee, within the Judicial Conference of the United States] has pushed for greater CJA program funding in the past, "the Budget Committee [of the Judicial Conference of the United States] said we're not going to debate your numbers. We're not doubting what you're saying that that is the calculation of what is needed. We're just telling you you're not going to get it and you're going to have to operate with less. . . . We're not going to go forward and ask for all the money that we think that we actually need to manage the program."
>
> The former deputy assistant director of the Defender Services Office confirmed that many within the current [Judicial Conference of the United States] structure view the budget as a zero-sum game between defenders and courts, telling the Committee that as the judiciary's budget increased, "[I]t began to see a tactical need to limit the growth of the defender services appropriation as a way to limit the overall growth in the judiciary's appropriation. *This was pretty much the situation that existed when I started with the program in the late 1980s. Since then, the judiciary's focus and control over the federal defense function based upon its need to protect its own institutional interest has steadily increased.*"[10]

Meanwhile, as a practical matter, CJA counsel remain statutorily subject to unreasonable "presumptive maximums" for attorney effort and case expenditures – the inadequacy of which is only worsened by increasingly undue burdens to "justify" such work. This flaw folds into an improperly low standard for representation – mere "adequacy" as opposed to the proper bar of "effective" – to exacerbate the unconstitutionality at work in the courts below.

The Central District has exploited these shortcomings by implementing a tsunami of CJA protocols and policies to curtail defense advocacy. National representatives for the Central District CJA Panel have described such measures:

> Each time [another Central District CJA memo] is issued to the panel, the panel views the court as imposing more requirements and obstacles, designed

[10] The Ad Hoc Committee Report at 40-42 (emphasis supplied).

to make review easier for the court, but not designed to improve or facilitate their representation of the client. *Most panel members simply view new billing and record keeping requirements as an attempt to shrink the defense function, dissuade members from billing for their time, or otherwise creating obstacles to receiving payment for their services.*

These constantly-increasing impositions on panel counsel – which result in burdensome and time consuming billing and record keeping which is not compensated – have adversely affected panel morale. We recently took a survey from our panel about how they feel about their membership on the panel compared to past years. Uniformly, our panel members reported morale at an average of a level 4 on a scale of 1 to 10, and reported that their morale was much lower than in past years. The survey requested specific written reasons and repeatedly the panel members reported that: (1) the court did not respect them; (2) the court treated them with persistent suspicion in billing; (3) the court questioned their judgment in how to defend a case by reducing payments for review of discovery (by directing presumptive time for review (60 pages per hour), docking conversations with family, for litigation of motions the court felt lacked merit and questioning length and frequency of meetings with clients. *The lawyers surveyed all required anonymity in providing the information for fear of reprisals from the Court–itself a reflection of how our members feel.*

Vibrant collaboration has deteriorated among the panel. The primary conversation among members has become about billing issues, delays in payment, and the increasingly burdensome court requirements. The panel "List serve," which ideally should be a forum for sharing ideas, legal theories, information about government experts and judges' practices, is a further reflection of this dissatisfaction. The Listserve emails are now primarily about complaints of increasing billing obstacles, audits, requests for repayment, additional new forms. As the panel representatives for the Central District, we are the recipients of these daily email streams. *They are constant and persistent.*[11]

[11] CJA Ad Hoc Committee Testimony of Marilyn E. Bednarsky and Anthony M. Solis, available at https://cjastudy.fd.org/sites/default/files/hearing-archives/san-francisco-california/pdf/anthonysolismarilynbednarskisan-franwrittentestimony-attachment.pdf (last visited March 15, 2019).

These "chilling effects" extend beyond how cases are handled to the practices and lives of individual attorneys – including me. (Over $19,000 in Central District vouchers of mine remains unpaid.) Indeed, the Central District CJA Trial Attorney "Panel" membership has plummeted in the past few years – from approximately 115 to 61 lawyers.[12] When I look in the mirror and ask whether my own work has suffered, I cannot help but admit that widespread disrespect for the criminal defense profession – from Americans who should perhaps hold *more* respect than anyone, that is, the judiciary – has had a deleterious effect.

Tellingly, two decades have elapsed between the most recent comprehensive nation-wide study of the CJA, *see* Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, and the study by the Ad Hoc Committee, which was begun in 2015.[13] In that same twenty-year period, the government built a ***second*** new federal courthouse in downtown Los Angeles – this one at a cost of approximately $400 million,[14] that is, about 40% of the 2017 budget allocation sought for the defender services program across the entire country.

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[12] *See* https://court.cacd.uscourts.gov/cacd/CJA.nsf/Western+Division?OpenView (last visited March 12, 2019).

[13] *See h*ttps://cjastudy.fd.org/frequently-asked-questions (Question 5) (last visited April 18, 2017).

[14] *See* http://www.gao.gov/assets/290/280735.html (last visited October 27, 2016).

It pains me to write these words – I can only imagine how it must feel for the judiciary to read them.

B. The District Court Retaliates

While Mr. Zepeda's case was pending, the court froze my previously submitted CJA vouchers in numerous cases (including this one) and terminated me from the Central District CJA Panel. The pretexts amount to these two issues: I declined to undermine my clients' litigation positions in the Constitutional Challenges, and I also declined to make what I believed would be ethically questionable statements compromising clients' potential post-conviction claims.

The Central District voluntarily conceded that my previously appointed CJA representations would continue. Even so, however, the court cut my final voucher in this case[15] without responding to my requests for clarification; and an appeal to the Honorable John B. Owens – who oversees Central District CJA voucher processing from the Circuit level – has likewise gone disregarded.

C. The District Judge Makes a Mockery of Justice.

The district court denied Mr. Zepeda's motion to dismiss. No analysis was conducted, and no reason was given – indeed, no opinion was even written.

This charade played out twice – first when Mr. Zepeda filed an initial motion, and a second time when he filed a follow-up motion (with further exhibits and

[15] Not included in the $19,000 discussed *supra*.

argument). The court's priorities were on full display with respect to the latter, when it struck the filing because hearing information had been inadvertently omitted from the motion cover page – thereby forcing Mr. Zepeda to file a motion to restore in order to avoid a $106.77 loss to either defense counsel or the public fisc for additional (and unnecessary) "chambers copies" of a voluminous submission. Ironically, the court ended up cancelling the hearing upon issuing a one-sentence denial.

II. Plea and Sentencing

The plea agreement that the defense negotiated, and to which Mr. Zepeda pleaded, reflects a United States Sentencing Guidelines Base Offense Level of 36.[16] Applicable waivers were carefully specified to the following limitations:

WAIVER OF CONSTITUTIONAL RIGHTS

26. Defendant understands that by pleading guilty, defendant gives up the following rights:

    a. The right to persist in a plea of not guilty.
    b. The right to a speedy and public trial by jury.
    c. The right to be represented by counsel –- and if necessary have the court appoint counsel -- at trial. *Defendant understands, however, that, defendant retains the right to be represented by counsel –- and if necessary have the court appoint counsel –- at every other stage of the proceeding.*
    d. The right to be presumed innocent and to have the burden of proof placed on the government to prove defendant guilty beyond a reasonable doubt.
    e. The right to confront and cross-examine witnesses against defendant.

[16] After adjustments for timely acceptance of responsibility, and factoring in Mr. Zepeda's criminal history (Category VI), an advisory Guidelines sentence of 235-293 months resulted.

f. The right to testify and to present evidence in opposition to the charges, including the right to compel the attendance of witnesses to testify.

g. The right not to be compelled to testify, and, if defendant chose not to testify or present evidence, to have that choice not be used against defendant.

h. Any and all rights to pursue any affirmative defenses, Fourth Amendment or Fifth Amendment claims, and *other pretrial motions* that have been filed or could be filed.

WAIVER OF APPEAL OF CONVICTIONS

27. Defendant understands that, with the exception of an appeal based on a claim that defendant's guilty pleas were involuntary, by pleading guilty defendant is waiving and giving up any right to appeal defendant's convictions on the offenses to which defendant is pleading guilty.

LIMITED MUTUAL WAIVER OF APPEAL OF SENTENCE

28. Defendant agrees that, provided the Court imposes a total term of imprisonment on all counts of conviction of no more than 322 months, defendant gives up the right to appeal all of the following: (a) the procedures and calculations used to determine and impose any portion of the sentence; (b) the term of imprisonment imposed by the Court; (c) the fine imposed by the court, provided it is within the statutory maximum; (d) the term of probation or supervised release imposed by the Court, provided it is within the statutory maximum; and (e) any of the following conditions of probation or supervised release imposed by the Court: the conditions set forth in General Orders 318, 01-05, and/or 05-02 of this Court; the drug testing conditions mandated by 18 U.S.C. §§ 3563(a)(5) and 3583(d); and the alcohol and drug use conditions authorized by 18 U.S.C. § 3563(b)(7).

Plea Agreement at ¶¶ 26-28 (emphasis supplied).

At sentencing, the defense submitted a memorandum supported by seven exhibits, including a 142-page study *What Cause the Crime Decline?* issued by the Brennan Center for Justice at the New York University School of Law (the "Brennan

Center Report").[17] The defense sentencing memo commenced, in accordance with 18 U.S.C. § 3553(a), with a description of Mr. Zepeda as a human being. The short of it is that he grew up in an East Los Angeles environment that is all too common in cases such as this one – but he nonetheless emerged, somewhat astonishingly, as a sensitive and articulate man, partner and father.[18]

I argued that, in any event, a lengthy prison term was not necessary. In particular, I noted, the Brennan Center Report found that "[e]mpirical studies have shown that longer sentences have minimal or no benefit on whether offenders or potential offenders commit crimes." Brennan Center Report at 26 (citing National Academy of Sciences study concerning insufficiency of evidence to justify policy assumption that harsher punishments yield measurable deterrent effects).[19]

With respect to the United States Sentencing Guidelines, I quoted the Honorable James S. Gwin's Harvard Law Review article *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 Harv. L. &

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[17] Available at https://www.brennancenter.org/sites/default/files/publications/What_Caused_The_Crime_Decline.pdf (last visited March 12, 2019).

[18] Bloodthirsty as ever, the government exploited the Guidelines range, endeavoring to obtain a 295-month sentence of incarceration.

[19] The government responded with some nonsense, including citation to a *Sacramento Bee* article. I could go into how the sentencing submission procedures prejudiced the defense – as I noted at sentencing – but, since nothing the defense does or says really matters, and I am under time limits imposed by the Criminal Justice Act and the current administrative regime, I leave it to the Court to have a look on the off-chance that this Petition is ever read.

Pol'y Rev. 173 (2010), which concludes, after a detailed analysis involving surveys of community sentiment from over twenty juries, that Guidelines ranges are far too high. The discrepancy comes as no surprise to anyone working in the field, however, Judge Gwin's observation that the United States Sentencing Commission disregarded its mandate from Congress to tie Guidelines ranges to community sentiment is an issue that the federal courts should have redressed decades ago.

In addition, I challenged the mandatory minimum sentencing scheme implicated by 21 U.S.C. §§ 841 and 846. The legislative history, I pointed out, demonstrates that Congress adopted this Draconian punishment structure in a willy-nilly fashion – without the deliberative process that should define the creation of laws in a republic such as ours.

The court ignored these arguments and supporting legal analysis and statistical data – and by that I mean it did not even address, let alone decide, these issues that the defense raised – and imposed a 20-year sentence.

Mr. Zepeda is currently serving that time in a Bureau of Prisons facility.

III. Post-Sentencing Court Manipulation of the Docket

At sentencing, I obtained the court's permission to file e-mail correspondence with an assistant United States attorney on the case establishing that a binding plea offer in the neighborhood of 16-and-a-half to 18 years had been under discussion. This information was properly submitted – without any infringement on Rule 11 of the Federal Rules of Criminal Procedure – to contextualize an appropriate sentence,

as contrasted against the prosecution's new arguments for a significantly longer one.[20] The court struck that filing (after the judgment and commitment had been filed) upon the government's request – *and without affording the defense an opportunity to respond*. Then the court proceeded to deny Mr. Zepeda's request for the sentencing transcript (which was, of course, necessary to respond to the striking).[21]

This pattern continued: after jurisdiction had obtained in the Circuit, the district court struck the defense Objections to Imbalanced Proceedings, Institutional Biases and Systemic Failures to Ensure Equal Justice (the "Renewed Objections"):

> Curtailment of the defense function has given rise to previous litigation in this case. For example, the defense moved to dismiss due to institutional biases and systemic failures to ensure equal justice, and, subsequently, for an injunction precluding further prosecution, or, alternatively, renewal of the motion for dismissal. Both motions were briefed at length and supported by numerous exhibits. However, both were denied by the Court without any legal or factual analysis – and without the benefit of oral argument.
>
> The problem here also extends to judicial interference with the defense function and defense case management. As reflected in [an exhibit] to my Letter to the Honorable Raymond J. Lohier and Honorable Kathleen Cardone dated November 17, 2017[ ], the Court has made over $19,000 in unauthorized deductions to my court-appointed attorney work vouchers in this District – including in this matter – under the guise of the CJA.
>
> From a Constitutional perspective, it seems all the more unfortunate that aspects of the above-noted deficits comprise some of the very shortcomings that the Ad Hoc Committee to Review the CJA have identified as contributing to the nationwide crisis facing the defense function and the administration of justice in the United States courts.
>
> *

[20] See fn. 16, *supra*.

[21] I ended up paying for an expedited transcript myself.

> In light of the foregoing, the defense objects, without limitation, to the ongoing CJA violations, institutional biases and systemic failures to ensure equal justice that have resulted in an imbalance in the proceedings – as reflected in this submission and otherwise on the public docket. The defense reserves all related and relevant objections, including, but not limited to, any arguments pursuant to law of the case.

The Renewed Objections (internal footnote and citations omitted).

Meanwhile, it probably also bears noting, the court disregarded various CJA voucher processing guidelines – such as the Guide to Judiciary Policy, Vol. 7 Defender Services, Part A, Chap 2, §§ 230.13(b) and 230.36(a), not to mention the Central District's own protocols – and untimely cut many of my vouchers without proper notice. As of this Petition, the Honorable John B. Owens, who oversees Central District CJA administration from a Circuit level, has not responded to my June 2018 request for full voucher processing in this case.

IV. The Appeal

In conjunction with all the foregoing, Mr. Zepeda presented the Ninth Circuit with two questions:

1. Whether the Sixth Amendment right to *independent* counsel and Constitutional Due Process should be given effect?

2. Whether 18 U.S.C. § 3006A(d)(2)-(3) – the subparagraphs of the Criminal Justice Act that give judges power over the indigent defense function – should be stricken as what they are: unconstitutional?

Additionally, with regard to procedural Due Process, I argued that judicial control over the defense function runs afoul of guideposts set by this Court's jurisprudence on recusal – especially where, as here, the court did not decide the

lawfulness of the United States Sentencing Guidelines or Mr. Zepeda's challenge to the mandatory minimums flowing from the federal drug statutes; and, further, the court struck defense filings from the record for illusory reasons and without allowing the defense to respond.

I spent no time on the limited appellate waivers paragraph in Mr. Zepeda's opening brief beyond the tidbit of research I'd done for three prior cases because: (1) the inapplicability of the waivers seemed – and still seems – so obvious; and (2) neither the government nor the Circuit had raised any such issue in the three prior appeals (each of which involved equally strict, if not stricter, appellate waiver provisions).[22] All I believed necessary – or appropriate – were two sentences stating law that this Court, and the Circuit itself, have articulated:

> Any limited appellate waiver in the plea agreement does not preclude the issues and arguments in this appeal. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (Court does not presume waiver of important federal rights from silent record); *United States v. Odachyan*, 749 F.3d 798, 801 (9th Cir. 2014) ("The appeal waiver in the plea agreement by its terms does not preclude an argument that the sentence is unconstitutional, and we have jurisdiction to consider a claim of constitutional error in any event.").

Mr. Zepeda's Opening Appellate Brief at 24.

The government moved to dismiss Mr. Zepeda's appeal with a cursory argument: "As part of his plea agreement, defendant waived any right to appeal either his conviction or the 240-month sentence he received." There was little substance

[22] *See United States v. Anguiano*, 16-50448, and *United States v. Choi*, 17-50023; and *United States v. Doyle*, 17-50001.

otherwise – although a whole lot of relevant information, including relevant case background, was missing.

I responded with a motion to strike the government's motion for dismissal as misleading. Noting that nothing in the plea agreement touched on – let alone barred – the issues before the Circuit, I observed the government was arguing that Mr. Zepeda's Constitutional challenges did not fall within the "narrow exception" of a Constitutional challenge because they were Constitutional in nature. (Believe it or not, that is what the government argued.) Moreover, the government's motion elided any mention of: the District Court's retaliation against the defense and the presiding judge's failure to write opinions; the effects that systemic corrosion (which mirrored problems detailed by the Ad Hoc Committee) had on case proceedings and sentencing; manipulation of the public docket; and the Ad Hoc Committee Report's vindication of Mr. Zepeda's arguments.

The Ninth Circuit granted the government's motion to dismiss without any analysis, citing only to generalized principles in an unrelated waiver case, and denied the defense motion to strike without any citation or discussion at all. *See* Appendix to this Petition at 1.

Reasons for Granting the Writ: Summary of the Argument

It is beyond cavil that equal justice should be available to all parties before the courts of the United States, regardless of financial condition, and that judicial impartiality should inhere beyond question. Mr. Zepeda's case is an example of the fundamental problem infecting the CJA and indigent defense cases today, particularly in the Central District: No reasonable observer would claim that the system is fair and impartial, and the role of the court in administering and managing defense work needs to be minimized – if it is maintained at all. The defense function must be resurrected to the point where a court shall respect it and fully consider – and adjudicate – issues that an individual raises in connection with his sentencing and supports with evidence and analysis. Because this issue is so important, we begin here and then proceed to how far Mr. Zepeda's arguments fall outside the limited appellate waiver.

Argument

I. Independence of Counsel and Due Process Are Paramount.

The Fifth and Sixth Amendments of the United States Constitution provide for the assistance of counsel in criminal cases and Due Process, U.S. Const. Amend. V and VI, and the promise is a full one: indeed, this Court has long recognized that indigent defendants in federal criminal cases are entitled to the appointment of counsel, *see Johnson v. Zerbst*, 304 U.S. 458 (1938), and, furthermore, that the right to counsel for the accused is the right to *effective* counsel, *Strickland*, 466 U.S. 668.

The right to counsel, importantly, is the right to *independent* counsel: "[O]ur Constitution imposes on defense counsel an overarching duty to advance the undivided interests of [her] client, and on the State a concomitant constitutional obligation to respect *the professional independence* of [the defense]." *McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429, 445-46 (1998) (internal quotation marks and citations omitted) (emphasis supplied); *Polk County v. Dodson*, 454 U.S. 312, 321-22 (1982) ("[I]t is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages."); *see also Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) ("[T]he primary office of appointed counsel parallels the office of privately retained counsel. . . . [Appointed counsel's] principal responsibility is to serve the undivided interests of [her] client.").

These principles are echoed in the current edition of the Criminal Justice Standards for the Defense Function ("Defense Function Standards"), published by the American Bar Association (the "ABA"). As the ABA's website states: "For fifty years, the ABA Criminal Justice Standards have guided policymakers and practitioners working in the criminal justice arena."[23]

[23] See https://www.americanbar.org/groups/criminal_justice/standards/ (last visited January 17, 2019).

"[I]ntended to provide guidance for the professional conduct and performance of defense counsel,"[24] the Defense Function Standards recognize the importance of ensuring an environment for independence and zealousness in indigent defense. At heart, there is an overarching duty for counsel to provide effective and high-quality representation in advocating on behalf of the client:

> The government has an obligation to provide, and fully fund, services of qualified defense counsel for indigent criminal defendants. In addition, the organized Bar of all lawyers in a jurisdiction has a duty to make qualified criminal defense counsel available, including for the indigent, and to make lawyers' expertise available in support of a fair and effective criminal justice system.

Standard 4-2.1(a).

> Defense counsel have the difficult task of serving both as officers of the court and as loyal and zealous advocates for their clients. *The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.*

Standard 4-1.2(b) (emphasis supplied).

As to the paramountcy of these values, "[i]t is true enough that the purpose of the rights set forth in th[e Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006). Accordingly, wrongful deprivation of the Sixth Amendment right to counsel is "structural" error, that is,

[24] Standard 4-1.1(b).

error so fundamental that it results in automatic reversal. *Id.* at 148-49; *Gideon v. Wainwright*, 372 U.S. 335 (1963). At the root of this respect for the legal framework on which our criminal justice system depends is the principle that the defense shall remain independent and free from interference. *See Gonzalez-Lopez*, 548 U.S. at 146, 150 (sanctity of right to choice of counsel to protect defense ability to pursue strategy); *see also McCoy*, *Dodson* and *Ferri*, *supra*; and *United States v. Stein*, 541 F.3d 130, 152 (2d Cir. 2007).

In a similarly robust vein, "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 100 S. Ct. 1610, 1613 (1980). This adjudicatory structure remains – at least in concept – central to our system of justice:

> The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done, by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Id. (internal quotation marks and citations omitted). Thus, proceedings before a biased judge also present structural error. *See Sims v. Rowland*, 414 F.3d 1148, 1153 (9th Cir. 2005) (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

II. Is Anybody Listening?

The record brims with inappropriate court interference with the defense function – in both structural and individualized ways. It is simply not right, and surely

not Constitutional, that Mr. Zepeda's sentencing should be upheld notwithstanding such corrosion in the system. If I am asked whether, in the face of it all, I was able to exert my best efforts in representing this client, my answer is that we can never know. The requisite "courage and devotion" that I am obliged to provide necessarily suffer without their predecessor: attorney independence.

From a structural standpoint, to the extent that the deep-rooted conflicts and problems in the current indigent defense structure are not pellucidly evident from the background portion of this petition, my Medium story about what has gone down in the Central District – *Judges Run Amok: A Defense Lawyer's Story of Corruption and Manipulation in the U.S. Criminal Justice System* – lays everything out.[25]

We all need to wake up and do something before it's too late. Then again, perhaps it already is.[26]

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[25] Available at https://medium.com/@zoedolan/judges-run-amok-an-expos%C3%A9-ac2e037ee469 (last visited March 14, 2019), and annexed within the attached appendix.

[26] The CJA program is already facing an attorney recruitment crisis. *See* The Ad Hoc Committee Report at, *e.g.*, 54, 111, 118, 165 and 206. Meanwhile, imagine what results from judicial control play out as the federal courts become even more stacked than they are already. *See*, e.g., the Honorable Shira A. Scheindlin, "Trump's Crazy Choices for the Courts," the New York *Times*, Nov. 9, 2017; Charlie Savage, "Trump is Rapidly Reshaping the Judiciary. Here's How.," the New York *Times*, Nov. 11, 2017; Deanna Paul, "Trump promised to remake the courts. He's installing conservative judges at a record pace.," *The Washington Post*, July 19, 2018.

Turning to the specific prejudice here – although, to be clear, prejudice need not be shown where structural error persists – it is difficult to imagine a more skewed adjudicatory environment than one that enables a judge to act as if Constitutional and statutory challenges are not pending, and to mold the public record. Such conduct is particularly troubling where the government's response is so lacking… or even non-existent. The bar for federal practice should be higher.

For context, this Court has identified *at least three* circumstances in which judicial bias necessitates recusal, namely: where the judicial officer: (1) has a direct, personal, substantial pecuniary interest in a disposition of the matter at hand, *Tumey*, 273 at 421; (2) becomes embroiled in a bitter controversy with one of the litigants, *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); or (3) acts as a part of the accusatory process, *In re Murchinson*, 349 U.S. 133, 137 (1955). What happened here violated (3) because a judge who wields control over the defense – from financial aspects of the defense function to actual intimidation and molding the record against a defendant – operates impermissibly as part of the accusatory process, rather than as an impartial tribunal. Ask any layperson whether judges should be involved in the defense and they will say: *Of course not!*[27]

[27] Most folks I talk to about the current federal indigent defense system express shock, appall and disgust – sadly tempered though these emotions are by a resignation to the decline of affairs, and especially respect for the law, in our country generally.

Society's presumption of judicial impartiality falls where "the judge exhibited such a high degree of favoritism or antagonism to make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555-56 (1994). So too here.

III. Any Limited Appellate Waiver Is Inapplicable.

The Ninth Circuit's error calls for this Court to step in and delineate the test for determining when a constitutional challenge survives limited appellate waivers. As a fundamental principle, courts may not infer important federal constitutional rights from a silent record such as this one. *Boykin*, 395 U.S. at 243. To be sure, "[a] defendant may waive his constitutional rights through a guilty plea, but such waivers are not quickly presumed, and, in fact, are viewed with the 'utmost solicitude.'" *Dukes v. Warden, Conn. State Prison*, 406 250, 265 (1972) (quoting *Boykin*). Indeed, this Court recently recognized, no appeal waiver creates an absolute bar to all appellate claims; a plea agreement, like a contract, merely circumscribes applicable limitations. *Garza v. Idaho*, 2019 LEXIS 1596 (Feb. 27, 2019).

As the Fourth Circuit put it in *United States v. Marin*, 961 F.2d 493, 495-96 (4th Cir. 1992): "For example, a defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute or based on a constitutionally impermissible factor such as race."

Curiously, in opinions such as *United States v. Odachyan*, 749 F.3d 798 (9th Cir. 2014), the Ninth Circuit itself has observed that, notwithstanding an appellate waiver, the court could still adjudicate an unbarred claim. *See id.* at 801 ("The appeal waiver in

the plea agreement by its terms does not preclude an argument that the sentence is unconstitutional, and we have jurisdiction to consider a claim of constitutional error in any event."). Similarly, the Circuit also appears to have appreciated – at least, in the past – that presuming a waiver from a silent record contravenes the affirmative "intelligent and voluntary" requirements of a plea designed to satisfy due process. *See United States v. Diaz-Ramirez*, 646 F.3d 653, 657 (9th Cir. 2011).

Without guidance from this Court, what the Ninth Circuit did here risks recurrence. Nothing in the plea agreement limits Mr. Zepeda's challenge to the unconstitutionality of his sentencing – let alone his objections to the unfairness, partiality and imbalance in proceedings that impacted the District Court's determination of how much time he will spend in prison – let alone his arguments regarding judicial bias. The government – being well aware of issues I had presented on behalf of similarly situated clients, whose cases arose from the same district the year before and were pending in the Ninth Circuit with opposing counsel from the same United States Attorney's Office – was free to seek such protection in the negotiating process. [28]

Enabling the prosecution to go back in time and expand prior agreed upon limitations contravenes pretty much everything the rule of law stands for. Due Process demands better.

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[28] *See Choi* and *Doyle*, fn. 20, *supra.*

Conclusion

Congress has failed to find a solution to the decades-long Sixth Amendment crisis since recognizing the need for defense independence in the first round of amendments to the CJA in 1970. The judiciary have failed to rectify their methods of control since the Prado committee raised the flag twenty-five years ago. This Court should reach the unconstitutionality of 18 U.S.C. § 3006A(d)(2)-(3)[29] and then remand with instructions to resentence Mr. Zepeda once independence – and respect – for the defense function have been ensured.

March 20, 2019 s/ Zoë Dolan

[29] These subparagraphs are the sections of the CJA that give judges power over the indigent defense function, and are, therefore, a source of the problem.