

No. _____

SUPREME COURT OF THE UNITED STATES

**Markette Tillman, Petitioner,
vs.
United States of America, Respondent.**

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

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Where the appeals court previously found that it was clear error to fire a defendant's attorney in an interlocutory context, does the Sixth Amendment compel the court to find clear error on the defendant's subsequent appeal?
2. Where a defendant has to wait six years to go to trial due in substantial part to the district court's erroneous firing of his attorney, is his Speedy Trial right violated under the Sixth Amendment?

CORPORATE DISCLOSURE STATEMENT

There are no corporations with an interest in either party to this litigation.

LIST OF RELATED PROCEEDINGS

Caption	Court	Docket No.	Date of Entry of Judgment	Type of Proceeding
USA v Grele et al.	9 th Circuit	13-10131	6/30/14	Interlocutory Appeal
USA v Tillman et al.	USDC Nevada	2:08-cr-00283	1/28/15	Criminal Trial
USA v Tillman	9 th Circuit	15-10037	5/18/15	Direct Appeal
USA v Tillman	USDC Nevada	2:08-cr-00283	6/24/19	2255 Petition
USA v Tillman	9 th Circuit	19-16419	8/24/21	2255 Appeal

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PUBLISHED CASE CITATIONS

Mr. Tillman's direct appeal and 2255 appeal were both decided via unpublished opinions. However, the interlocutory appeal of his lawyer's firing (USA v. Grele et al.) resulted in a published opinion at 756 F.3d 1144 (9th Cir. 2014). No district court decisions were published.

JURISDICTIONAL STATEMENT

Mr. Tillman was convicted of a federal offense in the federal court for the District of Nevada, making jurisdiction proper in this Court under 28 U.S.C. 1254. The Ninth Circuit denied his 2255 appeal on August 24, 2021. A petition for rehearing was timely filed, which was denied by the same court on October 1, 2021. This petition for a writ of certiorari timely follows.

CONTROLLING LEGAL PROVISION

U.S. Constitution, amendment vi:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Markette Tillman was originally charged in state court with the murder of Brian Wilcox, a security guard in Las Vegas. A jury found him not guilty on all charges in 2005.¹ He was then charged in federal court on RICO charges, including the VICAR murder of Mr. Wilcox. EOR 949.² Mr. Tillman was arrested by federal law enforcement in 2008, but had to wait six years for his federal trial to begin.

Much of this delay was attributable to the district court's decision to fire Markette's lawyer, John Grele, shortly before trial was scheduled to begin. The disappointment was precipitated by an email that Grele sent the court clerk, describing his concern at the non-payment of his fee requests and asking for payment to avoid setting up a conflict between Grele's interests and Mr. Tillman's. EOR 719-21. The judge's focus at this hearing was on whether Grele would affirm to the court that he was providing effective assistance of counsel to Mr. Tillman. The judge repeatedly attempted to get Grele to say that he was providing effective assistance, while Grele repeatedly stressed that he

¹ Case Number 04C199660, Eighth Judicial District Court, Clark County Nevada

² "EOR" refers to the excerpts of record filed in the most recent 9th Circuit appeal, docket number 19-16419.

was making his best effort to do so, but could not guarantee it, due to the financial problems inherent in not getting paid. EOR 736-44. As Grele put it, "If I get paid in a timely fashion, I can represent I can provide effective assistance of counsel." EOR 761.

The judge did not accept this explanation or Grele's qualified statement that he was representing Mr. Tillman to the best of his abilities and would continue to do so if he were actually paid. When Grele would not "reassure me [the judge] that he will provide effective assistance come hell or high water" the judge became visibly angry and disappointed Grele. EOR 756, 761-64.

In a written order the court found that:

1. Mr. Grele was attempting to extort the court by delay or withdraw of representation into prioritizing the signature of his vouchers and the approval of extraordinary and inappropriate budget requests and voucher requests for counsel, second counsel, paralegal, investigators and forensic experts;
2. Mr. Grele was violating his ethical obligations of representation to a client;
3. Mr. Grele was attempting to manufacture an ineffective assistance of counsel claim on behalf of the Defendant; and
4. Mr. Grele had threatened and in fact had delayed or withdrawn from representation in certain respects, all without the approval of the court as required by local rule. Finally upon the court's requests for assurance that Mr. Grele would provide effective assistance and competent

representation of the defendant going forward through trial proceedings, Mr. Grele refused to give such assurance.

EOR 705.

At a status conference after disappointing Grele, the judge ranted about the “horrific” and “outrageous” budgetary cost that had been incurred by the defense so far, and blamed himself, the court clerk’s office, and the Ninth Circuit for “inappropriately supervising” the costs. EOR 684-85. The judge’s position at this hearing was that Grele was using a strategy “in capital cases – to delay, delay, delay, third, fourth, to bill, fifth, to bill, and sixth, to bill” as part of a coordinated strategy to deter federal prosecutors from seeking the death penalty. EOR 686.

In that same hearing, the judge also mischaracterized Grele as saying “I have not done the services I need to do to prepare for trial.” The judge also said that he asked Grele if he could provide effective assistance “and he [Grele] said, no, I can’t, setting it up for a habeas petition.” The judge then stated that he asked Grele five or six more times if he could confirm that he would provide effective assistance given an adequate budget, “and in spite of that threat from the Court which he thought was idle, he said no, I cannot assure you, setting it up

again for a habeas petition on ineffective assistance.” EOR 687-88.

None of this was actually reflected in the transcript of the hearing.

While Mr. Tillman sat in jail for several more years waiting for his new counsel to get up to speed, Grele appealed his firing to the Ninth Circuit. The court found that the district court was “clearly erroneous” in taking Grele off the case. EOR 456. The court held that the district court’s finding of attempted extortion was “totally at odds” with the actual record, and reversed the sanctions that the lower court had imposed on Grele. *Id.* However, the court refused to address the violation of Mr. Tillman’s Sixth Amendment right to his choice of counsel, holding that this was more appropriately addressed on direct appeal. *Id.* Grele remained off the case.

Mr. Tillman did not go to trial until July 2014. He had previously rejected a plea deal with a term of 18 years, wrongly believing that his complete acquittal on state-level murder charges meant that he could not be convicted on federal VICAR murder charges. However, after the prosecutor’s opening statement explained that Markette could in fact be convicted, he signed a new plea deal with a 5 year trial tax. The plea

deal also included a waiver of direct appellate rights, which the Ninth Circuit relied on in dismissing his direct appeal. EOR 107, 225-26.

Mr. Tillman then filed a 2255 petition in the US District Court for Nevada, raising a number of issues. Relevant to this Petition, he argued that his replacement trial lawyers had been ineffective under the Sixth Amendment because they advised him to sign the plea deal which waived his appeal rights. This was prejudicial error because the Ninth Circuit had already explicitly stated that Grele's firing was clear error under the Sixth Amendment right to counsel, and the six years' trial delay was also clearly error under the Sixth Amendment right to a speedy trial. Mr. Tillman's argument was that effective counsel would have advised him not to waive those clearly meritorious issues. EOR 90. However, the district court denied the petition. EOR 1.

Mr. Tillman then appealed to the Ninth Circuit and made the same arguments. In its opinion, the Ninth Circuit completely ignored its prior published holding on Grele's firing, and failed to even mention it. The court also failed to address the long delay and Speedy Trial violation. Instead its holding was based on the premise that since the prosecutors were unwilling to grant an appeal waiver, there was no way

to preserve the issues and so the trial counsel was constitutionally adequate. Appendix A-8-10.

The Ninth Circuit's opinion raises two issues which are appropriate for a writ of certiorari. First, the Ninth Circuit explicitly held that it was error for the district court to fire Grele, in a published opinion. It then totally ignored its own binding law of the case when deciding almost the exact same issue in Mr. Tillman's appeal. This is a clear violation of the Court's caselaw on the Sixth Amendment right to counsel, and so far from the accepted and usual course of judicial proceedings that it requires the exercise of this Court's supervisory powers.

Second, the Ninth Circuit opinion totally failed to address the Speedy Trial violation suffered by Mr. Tillman, who had to wait six years in jail before his trial due largely to the erroneous firing of Grele. This was a contradiction of this Court's caselaw such as *Doggett v. United States* and a violation of the Sixth Amendment. The failure to abide by the Court's precedent on such an important question of federal law represents a separate ground for a writ of certiorari to issue.

REASONS FOR GRANTING THE WRIT

I. The Sixth Amendment Compels the Ninth Circuit to Uphold Its Prior Ruling in This Case.

Markette Tillman’s lawyer, John Grele, was fired shortly before his trial was supposed to start. In an interlocutory appeal, the Ninth Circuit held that this was clear error and reversed the part of the order imposing sanctions on the lawyer. However, when it became procedurally appropriate to address Mr. Tillman’s Sixth Amendment interest in effective counsel, the court ignored its own holding. This reversible error justifies a grant of certiorari by this Court.

As discussed above, the district court acted in a bizarre and unhinged manner, ranting about “extortion” and baldly mischaracterizing Grele’s repeated statements about his continued desire to represent Mr. Tillman. The Ninth Circuit correctly found that this was clear error and totally unsupported by the record with respect to the financial and disciplinary sanctions imposed on Grele. However, since the matter was before it on an interlocutory appeal, the court declined to consider Mr. Tillman’s Sixth Amendment interest in counsel of his choosing. EOR 465.

The Sixth Amendment guarantees a defendant's right to the counsel of their choosing. When counsel is appointed for an indigent defendant, there is a presumption "that the lawyer is competent to provide the guiding hand that the defendant needs" and thus the substitution of a different appointive counsel is not a *per se* violation of the right. *United States v. Cronic*, 466 U.S. 648, 658 (1984). However, if the lawyer is not competent or there is "some effect of challenged conduct on the reliability of the trial process," then this presumption disappears and the right may still be violated. *Id.* Essentially, the rule is that denial of choice of retained counsel is a presumptive violation of the Sixth Amendment; denial of choice of appointed counsel is a violation if the unwanted counsel causes some sort of prejudice.

Grele's disappointment was clearly erroneous under this Court's precedent. His removal caused the court to appoint substitute counsel who needed an extra 18 months to get up to speed³ As Mr. Tillman had already spent almost 5 years in jail at that point, the further delay caused by Grele's firing was certainly prejudicial. The replacement also

³ Grele was disappointed in February 2013 and his replacement lawyers were not ready for trial until July 2014, although they actually asked for even more time than that and were denied it. EOR 639, 703.

led to other sources of prejudice. For instance, one of Mr. Tillman’s replacement lawyers had previously represented one of the Government’s witnesses. EOR 235-255 (identification of conflict during trial, followed by testimony and cross-examination of witness); *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980) (this type of conflict establishes prejudice by itself without further particularized showing).⁴

Further, the Ninth Circuit had previously held that Grele’s firing was both “clearly erroneous” and “totally at odds with the record.” This was the binding law of the case. While the interlocutory appeal did not apply this holding to Mr. Tillman’s rights, the Ninth Circuit was still bound to apply it to him when it became procedurally appropriate.

The moment for this came in the 2255 appeal which directly precedes this Petition. The court faced the issue in the context of a claim of ineffective assistance of counsel under *Strickland v. Washington*. Mr. Tillman’s replacement counsel had advised him to sign a plea deal containing an appellate waiver, which barred him from raising the clear error of Grele’s firing on direct appeal. Under

⁴ Mr. Tillman also had statutory issues concerning the right to counsel under 18 U.S.C. 3599 and to a speedy trial under 18 U.S.C. 3161, neither of which are raised in this Petition but both of which were violated in a prejudicial manner.

Strickland, the question is whether a given action by counsel was prejudicial error or not. Since the Ninth Circuit had previously made a binding holding that it was error to fire Grele, this issue would have certainly been successful if Mr. Tillman had raised it. This Court's precedent and the Ninth Circuit's own law of the case would both have guaranteed success if the Ninth Circuit actually addressed the issue.

Instead of doing this, however, the Ninth Circuit misapplied *Strickland* in order to evade this obvious conclusion. The court's opinion noted that counsel could not have obtained an appeal waiver from the Government and held that since attempting would have been futile, there was no error in failing to do so. Appendix A-8-10. But this was a false choice. Mr. Tillman's counsel had three options, not two. Instead of attempting to get an appellate waiver or pleading without one, counsel could also have continued the trial, with the potential for a total acquittal (remember, Mr. Tillman had already been acquitted of the same murder in state court) and the certainty of a reversal under the Ninth Circuit's prior law of the case. The Ninth Circuit's most recent opinion in the 2255 appeal ignores this third option. This is a flat-out denial of both this Court's precedent and its own binding

precedent. The Court should not allow this to stand, but instead should grant certiorari in order to address this injustice.

II. The Long Trial Delay Caused by Grele's Erroneous Firing

Violated Mr. Tillman's Speedy Trial Right

When Markette Tillman's lawyer was fired without his consent, it did not just violate his right to choice of counsel; it also caused a delay of 18 months. Combined with the four+ years that he spent in jail before this, Mr. Tillman's Sixth Amendment right to a speedy trial was also violated. This Court's precedent on that ground ought to have compelled a reversal of his conviction in the Ninth Circuit. The Ninth Circuit's failure to apply binding precedent is a separate ground for granting certiorari in this case.

Mr. Tillman was initially charged in October 2008 but did not end up going to trial until July 2014. This delay was due to three principal factors. First, the Government initially charged him as death-eligible, before changing its mind and removing the death penalty as an option in 2011. EOR 941. Second, since the case involved RICO, the Government originally noticed 135 predicate acts which it might seek to introduce at trial. EOR 695. Finally, in February 2013, Markette's

lawyer, John Grele, was fired without his consent and over his specific objection that he did not want to delay his trial any longer. EOR 703, 751-55. Markette did not get to trial until July 2014, and he had to repeatedly assert his desire for a speedy trial, even over the objections of the replacement attorneys who were still struggling to get up to speed. EOR 613, 639.

The Sixth Amendment states that “In all criminal prosecutions, the accused shall enjoy the right to a speedy... trial.” “A defendant has no duty to bring himself to trial; the [Government] has that duty as well as the duty of insuring that the trial is consistent with due process.” *Barker v. Wingo*, 407 U.S. 514, 527 (1972).

“The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.” *Id.* at 522.

In determining whether the right has been violated, courts consider four factors: (1) whether the delay before trial was uncommonly long; (2) whether the Government or defendant is more to blame for that delay; (3) whether, in due course, the defendant asserted his right to a speedy trial; (4) the extent of prejudice due to delay.

Doggett v. United States, 505 U.S. 647, 651 (1992).

“To trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay.” *Doggett*, 505 U.S. at 651-52. The longer the delay, the more weight the reviewing court gives it and the more prejudicial it should reasonably be considered. *Id.* at 652.

Both prosecutors and courts have an affirmative constitutional obligation to respect the defendant’s Speedy Trial right. *Moore v. Arizona*, 414 U.S. 25, 26 (1973)). “A deliberate attempt to delay proceedings to hamper the defense counts heavily against the government. A more neutral reason such as negligence or overcrowded courts although weighed less heavily must nevertheless be considered because the ultimate responsibility for these circumstances must rest

with the government rather than the defendant. Finally, delays attributable to the defendant's own acts cannot favor the defendant's speedy trial argument." *Id.* at 827.

In terms of prejudice, there are two sources: actual and presumptive. Affirmative proof of prejudice is not essential to a speedy trial claim – a long enough delay is proof presumptive. The longer the delay, the more unreliable the trial result will be, since evidence may be lost or witnesses become unavailable. "Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay." *Doggett*, 505 U.S. at 655-56 (internal citation omitted).

In *Doggett* itself, the delay lasted 8.5 years, which the Court called "clearly sufficient" for presumptive prejudice; "indeed, we have called shorter delays 'extraordinary.'" *Id.* at 657-58. In terms of actual prejudice, courts have identified at least three possible interests of the

defendant to be prejudiced: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; (iii) to limit the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532.

“The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious.” *Barker*, 407 U.S. at 532-33.

Mr. Tillman’s Speedy Trial right was violated. This is presumptively true under the first factor in the Court’s *Doggett* test. He was in jail for almost six years, which is “extraordinary” under the Court’s other precedent. Most all of this delay was attributable to either the Government or the district court. It was the Government that initially charged him with a capital offense (requiring long delays to investigate mitigation evidence) and the Government that noticed

135 predicate acts, further increasing the time needed to investigate in the first place and for the replacement counsel to get up to speed. Most egregiously, it was the district court which erroneously fired Grele, adding an extra 18 months onto the delay for no reason besides the judge's personal pique. The second *Doggett* factor thus cuts in favor of Mr. Tillman.

The third prong was clearly met at the point when Mr. Tillman explicitly asserted that he did not want Grele to be fired because he did not want to sit in jail any longer. He then repeatedly invoked the right in the months leading up to the trial. Finally, the fourth prong was met in terms of both presumptive prejudice (due to the extraordinary delay) and actual prejudice, since an important witness, Amelia McCurdy, died during the delay. If she had been able to testify she would have testified that Mr. Tillman was innocent of some of the drug charges against him. EOR 108. Additionally, Mr. Tillman was held in custody for the entire pendency of this period, exposing him to a severe deprivation of liberty and hindering his ability to mount an effective defense. In particular, much of this period was spent in administrative segregation – Mr. Tillman spent 19 months on 24-hour lockdown, and

then another 10 months on 21-hour lockdown, further exacerbating the prejudice. EOR 546.

Under this Court's precedent, Markette Tillman's Speedy Trial right was clearly violated. Yet the Ninth Circuit refused to even consider this argument. Just as with the choice-of-counsel issue discussed above, the court misapplied *Strickland* and set up a false choice that allowed it to evade the issue entirely. Again as discussed above, this was in gross contradiction of the Court's binding precedent. This is not a case where the Ninth Circuit looked at the facts in an evenhanded manner and simply made a different value judgment than Mr. Tillman or this Court would have. Rather, it is a case where the Ninth Circuit manufactured a reason to avoid dealing with this Court's binding caselaw that would have entitled Mr. Tillman to relief. This Court should address the Ninth Circuit's misapprehension and grant certiorari on this issue.

CONCLUSION

Mr. Tillman's Sixth Amendment rights were violated. The Ninth Circuit's holding contravened both its own law of the case and binding

precedent of this Court. It is therefore appropriate for this Court to grant certiorari, and Mr. Tillman respectfully asks that it do so.

DATED: 12/30/21

Jim Hoffman, Esq