

No. 23-6137

IN RE RONALD BOYAJIAN,
Petitioner.

Appendix

- A. Public Docket Sheet U.S. Supreme Court case 23A112
- B. Public Docket Sheet U.S. Supreme Court case 23-6137
- C. Oct. 20, 2023, Court's Mandate terminating jurisdiction of the Ninth Circuit Court of Appeals. Dkt. 261
- D. Oct. 31, 2023, Rule 27-3 Emergency Motion To Recall The Mandate And To Direct The Clerk To File Counsel's Previously Submitted Papers; Declaration Of Barry A. Fisher; Exhibits. Dkt. 264
- E. Nov. 2, 2023, Two-judge Merits Panel Order denying motion to recall mandate & denying directing clerk to file previously submitted pleadings. Dkt. 266
- F. Nov. 16, 2023, Appellant's Motion To Reconsider, Clarify, Modify, And Vacate November 2 Order (Dkt. 266) Denying Motion To Recall The Mandate And To Direct The Clerk To File Counsel's Previously Submitted Pleadings (Dkt. 264) Request For En Banc Review. Dkt. 267
- G. Nov. 21, 2023, Two-judge Merits Panel Order denying reconsideration & denying review en banc. Dkt. 268
- H. Notice of case docketing and Respondents brief due date served on Respondents



Search documents in this case:

No. 23A112

Title:	Ronald Boyajian, Applicant v. United States
Docketed:	August 8, 2023
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(16-50327)

DATE	PROCEEDINGS AND ORDERS
Aug 03 2023	Application (23A112) for a stay, submitted to Justice Kagan. Main Document Lower Court Orders/Opinions
Aug 09 2023	Application (23A112) denied by Justice Kagan.
Aug 09 2023	Application (23A112) refiled and submitted to Justice Jackson. Written Request
Sep 06 2023	DISTRIBUTED for Conference of 9/26/2023.
Sep 06 2023	Application (23A112) referred to the Court.
Oct 02 2023	Application (23A112) denied by the Court.

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
Ronald G. Boyajian Counsel of Record	33900-112 USP Terre Haute PO Box 33 Terre Haute, IN 47808	
Party name: Ronald Boyajian		
Attorneys for Respondent		
Elizabeth B. Prelogar Counsel of Record	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001	202-514-2217
SUPREMECTBRIEFS@USDOJ.GOV		
Party name: United States		



Search documents in this case:

No. 23-6137

Title: **In Re Ronald Boyajian, Petitioner**

Docketed: November 30, 2023

Lower Ct:

DATE	PROCEEDINGS AND ORDERS
Oct 18 2023	Petition for a writ of mandamus and motion for leave to proceed in forma pauperis filed. (Response due January 2, 2024)
	Petition Proof of Service Appendix Motion for Leave to Proceed in Forma Pauperis
Dec 07 2023	Waiver of right of respondent United States to respond filed.
	Main Document
Jan 04 2024	DISTRIBUTED for Conference of 1/19/2024.
Jan 22 2024	Petition DENIED.

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
Ronald G. Boyajian Counsel of Record	33900-112 USP Terre Haute PO Box 33 Terre Haute, IN 47808	
Party name: In Re Ronald Boyajian		
Attorneys for Respondent		
Elizabeth B. Prelogar Counsel of Record	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001	202-514-2217
SUPREMECTBRIEFS@USDOJ.GOV		
Party name: United States		

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 20 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RONALD GERARD BOYAJIAN,
AKA Ronald G. Boyajian, AKA Ronald
Geral Boyajian, AKA Ronald Gerald
Boyajian, AKA John,

Defendant - Appellant.

No. 16-50327

D.C. No. 2:09-cr-00933-CAS-1
U.S. District Court for Central
California, Los Angeles

MANDATE

The judgment of this Court, entered June 09, 2023, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

Barry A. Fisher, CSB 49074
FLEISHMAN & FISHER
119-17th Street
Santa Monica, California 90402
(310) 557-1077 / bfshr557@gmail.com

Attorney for Ronald Boyajian

No. 16-50327

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,) C.A. No. 16-50327
) D.C. No. CR 09-933-CAS
Plaintiff-Appellee,) (Central Dist. Cal.)
)
v.) **RULE 27-3 EMERGENCY MOTION**
RONALD GERARD BOYAJIAN,) **TO RECALL THE MANDATE AND**
) **TO DIRECT THE CLERK TO FILE**
Defendant-Appellant.) **COUNSEL'S PREVIOUSLY**
) **SUBMITTED PAPERS;**
) **DECLARATION OF**
) **BARRY A. FISHER; EXHIBITS**
)

Rule 27-3 Emergency Motion

Relief requested by: Monday, Nov. 6

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 16. Circuit Rule 27-3 Certificate for Emergency Motion

9th Cir. Case Number(s) 16-50327

Case Name United States v. Ronald Boyajian

I certify the following:

The relief I request in the emergency motion that accompanies this certificate is: Recall of mandate, and filing of pleadings previously and timely submitted to the Clerk previous Thursday, October 19 but neither docketed nor filed.

Relief is needed no later than *(date)*: Monday, Nov. 6, 2023

The following will happen if relief is not granted within the requested time:

Loss of rights to petition for rehearing/en banc, deprivations of right of access to the courts, right to due process and right to counsel

I could not have filed this motion earlier because: Learned of issue mid-day Friday, October 20, e-filed notice of appearance or substitution October 27. Have been researching and working on this amid other work as expeditiously as possible. Given limited contact with Appellant, including periodic prison lockdowns, counsel was able to complete and electronically file the motion on the undersigned date.

I requested this relief in the district court or other lower court: Yes No

If not, why not: N/A

I notified 9th Circuit court staff via voicemail or email about the filing of this motion: Yes No

I have notified all counsel and any unrepresented party of the filing of this motion:

On *(date)*: October 31, 2023

By *(method)*: Email

Position of other parties: Opposing government counsel

David Ransom Friedman, Assistant U.S. Attorney

Direct: 213-894-7418

Email: david.friedman@usdoj.gov

DOJ - Office of the U.S. Attorney

312 N Spring Street

Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true.

Signature s/ Barry A. Fisher Date October 31, 2023

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Exhibits

- A. Counsel's Pleadings delivered to Clerk 9th Cir. San Francisco at 3:17 p.m.
October 19
- B. Mandate Issued by Clerk of the Court on October 20, Dkt. 261
- C. Order, Denial of Pro Se to access appellate record and Extension of Time,
Dkt. 260 October 4.

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**RULE 27-3 EMERGENCY MOTION TO RECALL THE MANDATE
AND TO DIRECT THE CLERK TO FILE COUNSEL'S
PREVIOUSLY SUBMITTED PAPERS**

Appellant Ronald Boyajian, by undersigned counsel, moves to recall the Mandate (Exhibit B Mandate Dkt. 261) and file counsel's timely submitted pleadings deeming them filed the date submitted, October 19, 2023. This Motion is based on this memorandum, attached exhibits, and counsel's declaration.

I. Introduction

This motion is necessitated to reverse the manifest injustice to Appellant by the improvident termination of his direct criminal appeal and the Court's jurisdiction when, on October 19, the Court's deadline to file Appellant's petition for rehearing/rehearing en banc, within less than 3 office hours, the Clerk denied counsel's application for e-file exemption, refused filing counsel's hand delivered pleadings, and issued the mandate terminating Appellant's direct appeal and the Court's jurisdiction.

Appellant had previously moved to file pro se a petition for panel rehearing/rehearing en banc after appointed counsel refused, requested a 90 day extension of time to file and *Faretta* (*Faretta v. California*, 422 U.S. 806 (1975)) assistance to access his files still in counsel's possession. (In fact, Appellant, joined by then appointed counsel, moved for substitution of appointed counsel which the Court denied) The Court's October 4, 2023 order denied the *Faretta* assistance,

and granted the extension of time limited to solely 2 weeks to Thursday, October 19. Dkt. 260. Order attached Exhibit C. As set out in the accompanying declaration of counsel Barry A. Fisher, he was first contacted by Appellant to possibly represent him Monday, October 16, following what he was informed was receipt of the October 4 Order by regular mail at USP Terre Haute many days later on Friday, October 13. Counsel then conducted due diligence about the status of the case and some of the appellate issues finding several highly meritorious for panel rehearing, rehearing en banc and for certiorari review, so that by October 18 counsel had agreed to file an emergency appearance to represent Appellant on the rehearing petition stage of the appeal given the (next day's) October 19 deadline.

As set out in his attached Declaration, on October 19, never having filed electronically and unacquainted with PACER and after efforts, counsel realized it was impossible for him to connect to and access PACER system in time. Counsel completed the pleadings, filled out an e-filing exemption form and arranged for a messenger who timely delivered pleadings to the 9th Circuit Clerk in San Francisco at 3:17 PM that day. The submitted pleadings are attached as Exhibit A including counsel's cover letter to the Clerk of the Court requesting filing, notice of entry on behalf of Appellant, motion for extension of time in which counsel may petition for panel rehearing/rehearing en banc, 9th Circuit Form 30 Appellate Attorney Exemption from electronic filing application.

Upon receipt of counsel's papers, the Clerk's Office in less than three business hours -- without contacting counsel -- refused to file or even docket counsel's papers, denied the accompanying exemption from e-filing form application, and issued the mandate.

The mandate should be recalled so that the Court may exercise its jurisdiction to order the Clerk to file counsel's papers deeming them filed as of the date received, October 19. The Court should then grant counsel's motion for extension of time to petition for panel rehearing/rehearing en banc

Relief is necessitated by this exceptional circumstance that cut off Appellant's last chance of having his direct appeal presented by counsel in the final stage of his only appeal of right involving a 70-year prison sentence.

This emergency motion is being filed as expeditiously as possible. Counsel filed electronic appearance on October 27. Given limited contact with Appellant, including periodic prison lockdowns, counsel was able to complete and electronically file the motion on the undersigned date.

II. The Mandate Should be Recalled, the October 19 Submitted Pleadings Filed As Timely, and the Motion Presented Granted

Upon timely delivery of counsel's entry of appearance and motion to extend time to petition for rehearing, within less than 3 business hours, 3:17 PM Thursday October 19, and the next morning by 9:16 AM, the Clerk refused filing Appellant's pleading, denied the accompanying e-filing exemption application, and issued the

mandate terminating Appellant's direct appeal.

Fed. R. App. P. 25(a)(4) provides: "Clerk's Refusal of Documents. The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice." See Fed. Rule Civ. Proc. 5(e) the district court parallel rule ("The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices"). See also *Cintron v. Union Pacific R. Co.*, 813 F.2d 917, 920-21 (9th Cir. 1987)(holding that appellant constructively filed his complaint when he delivered it to the clerk of court although he was not in compliance with local rules); *Loya v. Desert Sands Unified Sch. Dist.*, 721 F.2d 279, 280 (9th Cir. 1983) (where the clerk rejected the plaintiff's timely presented complaint because it was typed on 8 1/2 by 13 paper instead of 8 1/2 by 11 paper, the appellate court commented: "This was error. A copy of the complaint arrived in the hands of the Clerk within the statutory period. To uphold the Clerk's rejection of it would be to elevate to the status of a jurisdictional requirement a local rule designed merely for the convenience of the court's own record keeping; the district court should regard as 'filed' a complaint []]) See also *In re McBryde*, 120 F.3d 519 (5th Cir. 1997); *McClellon v. Lone Star Gas Co.*, 66 F.3d 98 (5th Cir. 1995).

Here the papers were not deficient except presented on paper and not in

electronic form. That involved here is not the size of the paper or any such deficiency but not in electronic format is a difference without a meaningful distinction.

The pleading should have been filed and docketed.

With respect to the difficulties in electronic filing on October 19 and why Form 30 e-filing exemption¹ was submitted, the accompanying declaration of undersigned counsel explains the last minute problem and why a courier was used to deliver the pleadings to the Clerk. The pleadings submitted October 19, at accompanying Ex. A, should be deemed filed or now be permitted to be submitted again electronically marked as received October 19, 2023.

III. Power of the Court to Recall the Mandate under these Circumstances

Appellant moves for recall of the mandate as improvidently entered. “[T]he courts of appeals are recognized to have an inherent power to recall their

¹ In the realm of Good Cause in deferred electronic filing, Appellant notes there exists some authority for a "one time exemption" for those attorneys who are not yet e-filers. For instance, in the supplemental rules of the local district court Rules of New Hampshire, Part II Electronic Filing, Section 2.1(c) Exemptions, "**attorney who is not a filing user may conventionally file the first document without leave of court.**" (emphasis added) The same exemption applies for local court rules of District of Columbia, Puerto Rico, Rhode Island and Alaska in their bankruptcy courts. This list is not exhaustive.

'Non filing user' attorneys in these other federal courts are granted automatic exemption, i.e. without leave of the court, for first-time filing in a case. These rules specify a reasonable period of time 21 days, or longer, from the date of entry into the case by conventional paper filing in which the attorney will *thereafter* transition their practice in that case to electronic filing.

mandates" which power may be exercised "to protect the integrity of its appellate processes." *Calderon v. Thompson*, 523 U.S. 538, 549,566 (1998). The Clerk's Office refused to file and docket, denied the e-filing exemption application and quickly issued the mandate. As a result, both Appellant's rights on appeal and the Courts ability to effectuate its pending appellate processes were abruptly terminated. In *Lamb v. Farmers Ins. Co., Inc.*, 586 F.2d 96 (8th Cir. 1978), recalled was a mandate dismissing an appeal for failure to respond to the court's order to show cause why the appeal should not be dismissed because the response had mistakenly been filed with an individual circuit judge, who promptly forwarded it to the clerk of the court who erroneously treated it as a copy of previous papers. See 16 Wright, Miller & Cooper, *supra*, § 3938, n. 27. One of the bases on which the Court may here exercise its power to recall mandate is to correct clerical error. *Northern California Power Agency v. Nuclear Regulatory Commission*, 393 F.3d 223,224-5 (D.C. Cir. 2004)(“As to the ground for recalling the mandate, it is often said that this may be done only in exceptional circumstances. (citations omitted); One of those circumstances is clerical error, see 16 Charles Alan Wright, Arthur R. Miller Edward H. Cooper, *Federal Practice And Procedure* § 3938, Recall of Mandate n. 27 (3d ed. April 2023 update).

The vast majority of the instances in which a mandate is recalled is due to clerical issues not an attack on the judgment itself. 16 Wright, Miller & Cooper,

supra § 3938, n 27. Here, the reason for recall is denied e-file exemption, timely filing/docketing pleadings and premature termination of the proceedings by an improvidently entered mandate.

IV. Conclusion

Recall of mandate is necessary to enable the Court to ensure the integrity of its process and to prevent injustice under this exceptional circumstance. The Court is respectfully asked to restore Appellant his rights of access to the Court(s) and to counsel of choice in this *de facto* life sentence appeal under whose representation Appellant will proceed to complete the final stage of his direct appeal. With mandate recalled, the Court should direct the clerk to file counsel's papers, which should be deemed filed as of the date they were tendered to the clerk (October 19) and then rule on counsel's motion for extension of time in which to petition for panel rehearing/rehearing en banc. The Court should then grant counsel the extension of time.

Relief requested:

1. The Court should recall its mandate;
2. The Court should direct the Clerk to file Counsel's pleadings submitted October 19, at accompanying Ex. A, be deemed filed or now be permitted to be submitted again electronically marked as received October 19, 2023.

Dated: October 30, 2023

Respectfully submitted,
/s/ Barry A. Fisher
Barry A. Fisher, Esq.
Counsel for Appellant Ronald Boyajian

Declaration of Barry A. Fisher, Esq.

Barry A. Fisher declares under penalty of perjury as follows:

1. I am an attorney admitted to, and have practiced in the states of California, Alaska, and Rhode Island(special admission), the United States Supreme Court, the 9th Circuit and most federal circuits, and many federal district courts in the country. I have been counsel on many appeals over a long career and am for decades a member of the California Academy of Appellate Lawyers. Graduating law school in 1968, and clerking on the Alaska Supreme Court, my first reported appeal was *Strasser v. Doorley*, 432 F.2d 567 (1st Cir. 1970) and most recent as amicus counsel in *Gingery v. City of Glendale*, 831 F. 3d 1222 (9th Cir. 2016).
2. Until a few years ago, I maintained a law office with tech savvy support staff which carried out all electronic filing when the requirement began and did so in the referred to *Gingery* case. I now am a sole practitioner without staff and I have never filed electronically until October 27, 2023, notice of appearance in this case.
3. I was first contacted to represent Appellant on Monday October 16, 2023 and informed that the previous Friday, October 13, he had received by mail this Court's October 4 ruling on his motion requesting time and *Faretta* assistance in order to prepare and file a petition for panel rehearing/rehearing en banc.

Though denying him assistance regarding access to the record still in previous counsel's possession, and provided an extension of time only to October 19. That deadline was 6 days from when he apparently received the order on Friday, October 13, and only days from Monday October 16 weekend when I was first contacted.

4. Reviewing pleadings and seeing meritorious grounds for rehearing/rehearing en banc application, as time permitted in the short time before the deadline, I prepared an emergency motion entering the case for an extension of time. Finished by deadline Thursday, October 19 morning I tried to connect to PACER and determine how to e-file. Never having done this, not sure that I still had an account after long disuse, I could not connect. I then completed an attorney exemption from electronic filing form to include and arranged for a messenger to deliver the pleadings to the 9th Circuit clerk in San Francisco. The messenger reported that the delivery was completed at 3:17 p.m.

5. Neither showing as having been filed and docketed by mid-morning the next day October 20, I called the Clerk's office and by mid-day spoke to Chief Deputy Clerk Gelmis. I was informed the Clerk's Office had denied the e-file exemption application, refused filing and docketing and had already issued the mandate terminating the direct appeal and ending 9th Circuit jurisdiction (the docket shows the mandate issued less than 3 business hours of the pleadings

having been lodged at the Clerk's Office by the messenger).

6. The clerk invited me to give a more convincing explanation for why I did not e-file but I then did not know the details of the problem and I was told I had not been convincing. After that call, on Friday, October 20, I made efforts to determine the PACER problem. This included 2 calls with PACER staff that Friday afternoon. While they provided my account number, I was told I needed to reset my password and arrange for security questions. With their assistance by the second call that day I was able to reset my password but was told I needed to send them an email in order to receive assistance regarding the security questions. By the end of that Friday, October 20, I had sent the email but did not hear back from PACER until the following Monday. After work online with PACER and one more call with PACER staff I was then equipped with the necessary electronic credential to enter the Ninth Circuit CM/ECF system in order to e-file.

7. Thereafter, I began research and writing work on this motion to recall the mandate. Given limited contact with Appellant, including periodic prison lockdowns, I was able to complete and electronically file the motion on the undersigned date.

I declare under penalty of perjury that the above is true and correct except where on information and belief.

Executed on October 31, 2023

s/ Barry A. Fisher, Esq.

Exhibit A

**Counsel's papers submitted
October 19**

Barry A. Fisher, Esq. CSB #49074
Attorney at Law
FLEISHMAN & FISHER
119-17th Street
Santa Monica, California 90402
(310) 557-1077 (telephone)
Email: bfshrm557@gmail.com

Attorney for Ronald Boyajian

October 19, 2023

Molly Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

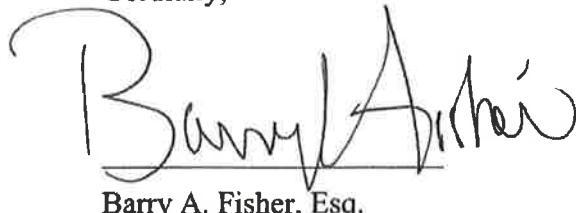
Subject: filing in case 16-50327 United States v Ronald Boyajian

Dear Ms. Dwyer,

I am the new counsel on appeal for Ronald Boyajian, defendant-appellant in the above referenced Ninth Circuit case.

Please accept my enclosed exemption from electronic filing form, and kindly file my enclosed motion for counsel, and motion for extension of time in case 16-50327. I request the two motions be filed as separate docket entries.

Cordially,



Barry A. Fisher, Esq.

Counsel for Ronald Boyajian
Defendant-Appellant

Enc.

1. Lawyer's Exemption from electronic filing form
2. Motion for Substitution of Counsel
3. Motion for Extension of Time

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 30. Appellate Electronic Filing Exemption Form

ATTENTION SELF-REPRESENTED PARTIES:
DO NOT USE FORM 30

If you do not have a lawyer, you are automatically exempt from electronic filing.

9th Cir. Case Number(s) 16-50327

Case Name United States v. Ronald Boyajian

I am a court reporter
 I am counsel of record for Ronald Gerard Boyajian
(party/parties that you represent)

I hereby request an exemption from the court's requirement that all attorneys and court reporters use Appellate Electronic Filing. I am unable to register for electronic filing because:

software issue

My name is Barry A. Fisher, Esq.

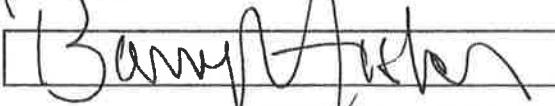
Mailing address Fleishman & Fisher

119-17th St.

City Santa Monica State CA Zip Code 90402

Country (if not USA) Phone (310) 557-1077

If approved, I understand that this exemption will apply to all pending and future cases in this court for one calendar year. If I wish to participate in Appellate Electronic Filing in the future, my Appellate Electronic Filing registration will apply to all pending and future cases.

Signature  Date October 18, 2023

Mail this form to the court at:

Clerk, U.S. Court of Appeals for the Ninth Circuit, P.O. Box 193939, San Francisco, CA 94119-3939

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Barry A. Fisher, Esq. CSB #49074
Attorney at Law
FLEISHMAN & FISHER
119-17th Street
Santa Monica, California 90402
(310) 557-1077 (telephone)
Email: bfshf557@gmail.com

Attorney for Ronald Boyajian

No. 16-50327

IN THE UNITED STATES COURT OF APPEALS

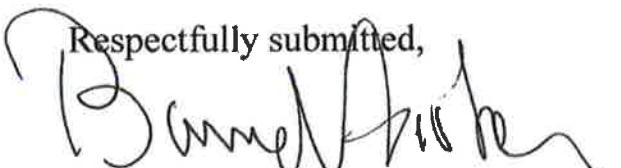
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) C.A. No. 16-50327
	) D.C. No. CR 09-933-CAS
Plaintiff-Appellee,	) (Central Dist. Cal.)
)
v.	) MOTION FOR SUBSTITUTION
	) OF COUNSEL; DECLARATION OF
RONALD GERARD BOYAJIAN,	) RONALD BOYAJIAN
)
Defendant-Appellant.)
)

Barry A. Fisher, Esq. moves for substitution of counsel in the above captioned case to represent Ronald Boyajian. This Motion is supported by the attached declaration of Ronald Boyajian.

Dated: October 18, 2023

Respectfully submitted,


Barry A. Fisher, Esq.
Counsel for Ronald Boyajian
Defendant- Appellant

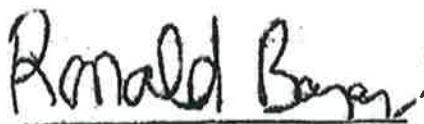
Declaration of Ronald Boyajian

I, Ronald Boyajian, the defendant-appellant in *United States v Ronald Boyajian* in appeal case 16-50437 before the Ninth Circuit Court of Appeals, provide this declaration in support of the attached Motion For Substitution Of Counsel:

1. I am the pro se litigant in the above captioned case.
2. I consent to the substitution of counsel, in that I withdraw my election to proceed pro se in case 16-50327 before the Ninth Circuit Court of Appeals in favor of being assisted by counsel and hereafter represented by Barry A. Fisher, Esq. on any Petition(s) for Rehearing/Rehearing en banc.

The foregoing is true and correct under penalty of perjury.

Executed October 18, 2023 at Terre Haute, Indiana



Ronald Boyajian

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Adapted from Form 25. Certificate of Service for Paper Filing

9th Cir. Case Number(s): 16-50327

Case Name: United States v. Ronald Boyajian

I certify that I served on the person(s) listed below, either by mail or hand delivery, a copy of the **Motion for Substitution of Counsel**, and any attachments:

Molly Dwyer, Clerk of the Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

I understand that should there be any parties requiring service, any such parties are registered with this court's electronic filing service such that any service requirements that might pertain are met thereby.

Date: October 19, 2023


Barry A. Fischer, Esq.

Counsel for
Ronald Boyajian
Defendant-Appellant

Barry A. Fisher, Esq. CSB #49074
Attorney at Law
FLEISHMAN & FISHER
119-17th Street
Santa Monica, California 90402
(310) 557-1077 (telephone)
Email: bfshr557@gmail.com

Attorney for Ronald Boyajian

No. 16-50327

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) C.A. No. 16-50327
	) D.C. No. CR 09-933-CAS
	) (Central Dist. Cal.)
Plaintiff-Appellee,)
)
v.	) MOTION FOR EXTENSION
	) OF TIME; DECLARATION OF
RONALD GERARD BOYAJIAN,	) BARRY FISHER
)
Defendant-Appellant.)
)

Ronald Boyajian, defendant-appellant in the above captioned case, appearing through counsel, moves for 90-day extension of time in which to file any petition for panel rehearing and or for any petition for rehearing en banc which currently due by October 19.

The grounds for the requested extension of time is entry of new counsel into

the case and the information in the attached Declaration of new counsel.

Dated: October 18, 2023 Respectfully submitted,

A handwritten signature in black ink, appearing to read "Barry A. Fisher". The signature is fluid and cursive, with "Barry" on the top line and "A. Fisher" on the bottom line.

Barry A. Fisher, Esq.

Counsel for Ronald Boyajian
Defendant- Appellant

Declaration of Barry A. Fisher, Esq.

I, Barry A. Fisher, counsel for Ronald Boyajian, defendant-appellant in *United States v Ronald Boyajian* in appeal case 16-50437 before the Ninth Circuit Court of Appeals, provide this declaration in support of the attached Motion For Extension of Time in which to file any petition(s) for panel rehearing and or rehearing en banc.

Barry A. Fisher Declares Under Penalty of Perjury As Follows:

1. I am an attorney admitted to practice in California, other states, and, as set out in my attached, accurate C.V., I have been admitted to and have practiced before the United States Supreme Court and most of the country's Circuit Courts of Appeal including the 9th Circuit. My practice includes civil and criminal appeals as well as international law, issues of which are included in this case. I have long been a member of the California Academy of Appellate Lawyers.
2. On information and belief, appellant Ronald Boyajian, case 16-50327 here and 2:09-cr-00933-CAS below, was renditioned from Cambodia to Los Angeles in 2009, charged under the PROTECT Act for one instance of oral sex with an underage girl in Cambodia, held without bail 7 years then tried, convicted and sentenced to 70 years, now, 8 years since is in his 15th year doing hard time at the USP Terre Haute.
3. Further, on information and belief, following affirmance, his appointed counsel wrote no rehearing/en banc application would be filed and the Court permitted his pro se representation to do so. His request for *Faretta* counsel assistance in

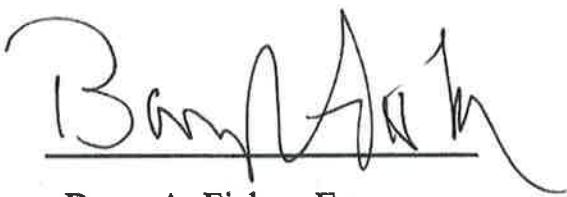
obtaining and accessing his case files from appointed counsel was denied.

Hands tied, his family contacted me for assistance.

4. I have known the appellant and members of his family for over a decade and have on occasion been in contact with the appellant, both in person and by email. A motion for rehearing/en banc is his last chance at direct appeal relief. I am familiar with many issues in his case and I believe a motion for rehearing/en banc is highly meritorious and I have agreed to serve as his counsel at this stage of his case regarding the motion. My estimate of time is that it will take 45 days to obtain and begin review of the files currently in the possession of former counsel and another 45 days to draft and finalize the pleading. I want to meet with the appellant at USP Terre Haute which hopefully can happen within the first 45 days.

I declare under penalty of perjury that the above is true except those matters stated on information and belief

Executed October 18, 2023 at Santa Monica, California

A handwritten signature in black ink, appearing to read "Barry A. Fisher, Esq." The signature is fluid and cursive, with a horizontal line underneath it.

Barry A. Fisher, Esq.

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BARRY A. FISHER

Partner, Fleishman & Fisher. The firm's practice includes trial and appellate civil, criminal and international law. Mr. Fisher has assisted the drafting of constitutions and legislation for countries including Romania, Moldova, Albania, Bosnia, Sierra Leone, and Belarus, and has consulted on legal matters in many countries, including Russia, Mexico, Spain, Cambodia, Slovakia, Argentina, Canada, Germany, and England. He has served as a state and federal court receiver in securities fraud cases and is a FINRA arbitrator (Financial Institutions Regulatory Authority). He has testified as an expert witness in federal court immigration asylum proceedings..

Mr. Fisher, UCLA J.D., U.Penn. Law School R.H. Smith Fellow, served on the United States team of the multinational negotiation of the German and Austrian Holocaust claims resulting in treaty settlements to which Mr. Fisher was a signatory. He serves as counsel on behalf of Chinese, Korean and other Asian victims of the sexual slavery and slave labor systems of wartime Japan.

Admitted to practice before the courts of California, Alaska, and Rhode Island (special); United States Supreme Court; the United States Courts of Appeals for the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh and District of Columbia Circuits, the United States District Courts for the districts of Alaska, Massachusetts, Rhode Island, Texas (Western), District of Columbia, California (all districts); United States Tax Court.

Recipient, International Lawyer of Year Award (California Lawyer Assoc. 2021); Recipient, NogunRi Peace Prize (Seoul ROK Nov. 2008); Recipient Amicus Poloniae Award (Gov. of Poland 1997); Member, California Academy of Appellate Lawyers; Mr. Fisher's work has included Consultant, Central and East European Law Institution (CEELI), American Bar Association; Vice President, Human Rights Advocates International; Vice Chairman, First Amendment Committee, American Bar Association; Chairman, Religious Freedom Subcommittee, American Bar Association; Fellow, International Academy for Freedom of Religion and Belief; Working Subcommittee member, United States Court of Appeals, Ninth Circuit, Conference on Race, Ethnicity and Religion; Recipient, Office of Chief Prosecutor, Certificate of Appreciation, U.N. International Criminal Tribunal for former Yugoslavia; Listed Marquis Who's Who in America.

Author, Roma in 3 Human Rights Encyclopedia 876 (James R. Lewis & Carl Skutsch eds., Sharpe Publ'g 2001); Author, The Victims of Nazi Persecution: Will The Holocaust

Era Litigation Answer the Questions of History?, in Anatomy of Genocide: State-Sponsored Mass Killings in the Twentieth Century 111 (Alexandre Kimeny & Otis L. Scott eds., Edwin Mellen Press 2001); Author and Symposium speaker, "No Roads Lead to Rom: The Fate of the Romani People Under the Nazi and Post War Restitution," Symposium on Nazi Gold, Assets of the Holocaust [15th Annual International Law Symposium] 20 Whittier L. Rev. 513 (1999); Author, Religion: The Root of Conflict and the Gypsy Minority in Bosnia, Symposium on War Crimes and Other Human Rights Abuses in The Former Yugoslavia, 16 Whittier Law Review 359 (1995); Author, Notes From The WWII Redress Trenches: The Disparate Treatment of Victims East and West(32 Loy.L.A. Int.&Comp.L.Rev.93(2010); Author, Comfort Women and the Courts: Coordinating Legal Strategies, in Erzwungene Prostitution in Kriegs- und Friedenszeiten: Sexuelle Gewalt gegen Frauen und Mädchen(Barbara Drinck & Chung-Noh Gross eds., Kleine Verlag, Bielefeld (Germany), 2007)(Wissenschaftlicher Reihe, Band 160).

Presentation, Exiled and Forgotten-Kosovo War Roma, World Romani Congress (Berlin 5/23); Presentation, European Union Parliament, Roma Kosovo War Death, Destruction, Exile representing KRRC(Kosovo Romani Rts Coalition(Brussels 5/22); Speaker, Russian Romani Federation Conference(Moscow 10/19); Speaker, Dale Farm UK Travellers Exhibit Opening(Tate Modern,London 6/19); Advisor, Meeting Europe Rom Leaders(Bucharest 12/18); Delegation leader, IOM Conference on Romani German, Swiss Holocaust-Era Claims (International Organization for Migration, Geneva January 2002,May 2001); Legal Adviser & Election Officer, Fifth World Romani Congress (Prague 2000); Consultant, Romani Leaders Conference (OSCE/Norwegian Government - Oslo 2000); Participant, OSCE Human Dimension Conference/Romani Issues (Vienna 1999 Organization Cooperation Security Europe); Member, International Romani Union Delegation, Washington Conference on Holocaust Era Assets (U.S. State Department - 44 Nation Conference November, 1998

Speaker, Roadmap to Statehood, Kurdish National Congress(Washington D.C. Sept. 2014); Speaker, Turkey/Kurds (European Parliament, Brussels 2012); Speaker, Kurds-Discrimination (Berlin State Parliament, Germany Nov. 2010); Speaker, Kurdistan Strategies(Kurdish National Congress No. Amer., Calgary Canada April 2011/Kurdish National Kongress, Brussels, May 2011); Speaker, Korean American History Conference(Los Angeles Oct. 2010); Speaker, Symposium Litigating Genocide(Loyola Univ. Law School, Los Angeles Feb. 2009); Speaker, International Solidarity Council Symposium1907 Hague Convention(Stichting Japanse Ereschulden, The Hague, Netherlands Oct. 2008

Appellate Practice--Counsel in numerous cases before the United States Supreme Court and other courts throughout the United States including, e.g., Spiritual Psychic Science Church of Truth v. City of Azusa, 39 Cal. 3d 501 (Cal. Supreme Ct.1985) (Romani spiritual counseling) International Society for Krishna Consciousness v. Lee, 112 S. Ct. 2711 (1992); Larson v. Valente, 456 U.S. 228 (1982); Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. 569 (1987); Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981); U.S. v. X-Citement Video, Inc., 115 S. Ct. 464 (1994); Audubon Society v. Morton, 421 U.S. 902, 95 S. Ct. 1549 (1975, stay pending cert. granted,

Douglas, J.); Riley v. National Federation of the Blind, 487 U.S. 781 (1988); Secretary of State v. Munson, 467 U.S. 947 (1984); Dayton Area Visually Impaired Persons v. Fisher, 70 F.3d 1474 (6th Cir. 1995); Properties, Inc., 189 Cal. Rptr. 12 (1983); Eckl v. Davis, 124 Cal. Rptr. 685 (1975); Carreras v. City of Anaheim, 768 F.2d 1039 (9th Cir. 1985); Friends of Westwood v. City of Los Angeles, 191 Cal. App. 259, 235 Cal. Rptr. 788 (1987) (application of California environmental statutes to permits for major building projects); People v. Fogelson, 21 Cal. 3d 158, 577 P.2d 677, 145 Cal. Rptr. 542 (1978) (first amendment forum); Tiernan v. Bd. of Trustees, Cal. State Univ., 188 Cal. Rptr. 115 (1983 - rights of teachers); United States v. Rev. Sun Myung Moon, 718 F.2d 1210 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984) (discriminatory use of criminal tax laws); International Society for Krishna Consciousness v. Bowen, 600 F.2d 667 (7th Cir.), cert. denied, 444 U.S. 963 (1979).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Adapted from Form 25. Certificate of Service for Paper Filing

9th Cir. Case Number(s): 16-50327

Case Name: United States v. Ronald Boyajian

I certify that I served on the person(s) listed below, either by mail or hand delivery, a copy of the **Motion for Extension of Time**, and any attachments:

Molly Dwyer, Clerk of the Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

I understand that should there be any parties requiring service, any such parties are registered with this court's electronic filing service such that any service requirements that might pertain are met thereby.

Date: October 19, 2023



Barry A. Fisher, Esq.

Counsel for
Ronald Boyajian
Defendant-Appellant

Exhibit B

Mandate Dkt. 261

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 20 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RONALD GERARD BOYAJIAN,
AKA Ronald G. Boyajian, AKA Ronald
Geral Boyajian, AKA Ronald Gerald
Boyajian, AKA John,

Defendant - Appellant.

No. 16-50327

D.C. No. 2:09-cr-00933-CAS-1
U.S. District Court for Central
California, Los Angeles

MANDATE

The judgment of this Court, entered June 09, 2023, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

Exhibit C

**Dkt. 260--Order setting Oct. 19
due date**

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD GERARD BOYAJIAN, AKA
Ronald G. Boyajian, AKA Ronald Geral
Boyajian, AKA Ronald Gerald Boyajian,
AKA John,

Defendant-Appellant.

No. 16-50327

D.C. No.

2:09-cr-00933-CAS-1

Central District of California,
Los Angeles

ORDER

Before: HURWITZ, and R. NELSON, Circuit Judges.*

Boyajian's "Motions For Reconsideration En Banc Re Disqualification Of Circuit Judges Ryan Nelson And Andrew Hurwitz And For Stay; Exhibit; Notice Of, And Contingent Request For, Further Extension Of Time In Which To File Any Petition For Panel Rehearing And/Or Petition For Rehearing En Banc," **Dkt. 258**, are denied. Boyajian's "Motion For Extension Of Time; Exhibits," **Dkt. 259**, is granted in part and denied in part. It is granted in part only insofar as any petition for rehearing or rehearing en banc will now be due no later than October 19, 2023; the motion is otherwise denied. No further extensions of the time to file a petition

* These motions were decided by quorum of the panel. *See* 28 U.S.C. § 46(d); Ninth Circuit General Order 3.2(h).

for rehearing or rehearing en banc will be granted. If no such petition is timely filed, the mandate will issue forthwith.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 2 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD GERARD BOYAJIAN, AKA
Ronald G. Boyajian, AKA Ronald Geral
Boyajian, AKA Ronald Gerald Boyajian,
AKA John,

Defendant-Appellant.

No. 16-50327

D.C. No.
2:09-cr-00933-CAS-1
Central District of California,
Los Angeles

ORDER

Before: HURWITZ and R. NELSON, Circuit Judges.*

Boyajian's "Rule 27-3 Emergency Motion To Recall The Mandate And To Direct The Clerk To File Counsel's Previously Submitted Papers," **Dkt. 264**, is **DENIED**.

* This motion was decided by quorum of the panel. *See* 28 U.S.C. § 46(d); Ninth Circuit General Order 3.2(h).

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Attorney for Ronald Boyajian

No. 16-50327

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,) C.A. No. 16-50327
Plaintiff-Appellee,) D.C. No. CR 09-933-CAS
v.) (Central Dist. Cal.)
)
RONALD GERARD BOYAJIAN,) **APPELLANT'S MOTION TO**
Defendant-Appellant.) **RECONSIDER, CLARIFY,**
) **MODIFY, AND VACATE**
) **NOVEMBER 2 ORDER (DKT 266)**
) **DENYING MOTION TO RECALL**
) **THE MANDATE AND TO DIRECT**
) **THE CLERK TO FILE COUNSEL'S**
) **PREVIOUSLY SUBMITTED**
) **PLEADINGS (DKT 264)**
)
) **REQUEST FOR EN BANC REVIEW**
)
)

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<i>Nguyen v. United States</i> , 539 U.S. 69 (2003)	4,8,9,10,11
<i>Pace v. DeGuglielmo</i> , 544 US 408 (2005)	4,7
<i>Yovino v. Rizo</i> , 139 S. Ct. 706 (2019)	10,11
<i>Cintron v. Union Pacific R. Co.</i> , 813 F.2d 917 (9th Cir. 1987)	4,7
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16 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice And Procedure § 3938, Recall of Mandate (3d ed. update April 2023)	6

**APPELLANT'S MOTION TO RECONSIDER, CLARIFY, MODIFY, AND
OR VACATE NOVEMBER 2 ORDER (Dkt. 266) DENYING MOTION TO
RECALL THE MANDATE AND TO DIRECT THE CLERK TO FILE
COUNSEL'S PREVIOUSLY SUBMITTED PLEADINGS (DKT 264);
REQUEST FOR EN BANC REVIEW**

Appellant Ronald Boyajian, by undersigned counsel, hereby moves pursuant Fed. R. App. P. Rule 27 and General Order 6.11 to reconsider, clarify, modify and or vacate its November 2, 2023 Order (Dkt. 266, hereinafter “Order”) denying Appellant’s Motion to Recall the Mandate and to Direct the Clerk to File Counsel’s Pleadings. Dkt. 264.

Appellant further requests that this motion be heard en banc pursuant to General Order 6.11, and to that end requests that the motion be circulated to all active judges on the Court. En banc review of this motion is appropriate because (1) as discussed in Section IV below, the November 2 decision on the motion that is under review, as well as the Memorandum Disposition and every subsequent order, was made by an improperly constituted two-judge panel, a continuing structural error, and (2) as discussed in Section III below, the premise of the underlying motion is that the clerk of the Court exceeded her power in rejecting counsel’s filing based on its format. En banc review is appropriate under Fed. R. App. P. 35 (to the extent Rule 35 applies given this is a motion for reconsideration en banc, not a petition for rehearing en banc) because, as discussed below, on both issues the decision of the two-judge panel was in conflict with decisions of the

United States Supreme Court (and of this Court), and both issues are ones of exceptional importance because they involve fundamental questions regarding the proper functioning and jurisdiction of the Court, its judges, and its administrative staff. In order for these issues to receive fair and impartial review, the full court – not merely the same two-judge panel that improperly ruled – should be made aware of these irregularities and given the opportunity to rule upon them.

This motion is based on the following briefing, and the files and records of the Court of Appeals in this case.

I. Introduction

On October 19, 2023, this Court’s San Francisco Clerk’s office received Appellant’s counsel courier-delivered appearance and motion for reasonable extension of time within which to file a motion for rehearing/rehearing en banc along with an exemption from electronic filing form. In less than 3 business hours, the clerk denied the e-file exemption, denied filing and docketing and immediately dispatched the mandate severing 9th Circuit jurisdiction and possibility of rehearing or en banc, Appellant’s last direct appeal remedy. Notwithstanding that no document was filed or docketed, the clerk seemed to approve counsel’s appearance, who to date has not received back the rejected pleadings.

Appellant’s October 31 motion to recall the mandate followed, an immediate government opposition was filed notably not disputing any of the law or facts

relied on and the Court immediately one-word denied the motion on November 2, just as a reply was about to be filed raising significant authority. Like the merits argument at May 10 hearing and decision issued June 9, the denial of mandate recall was by two-judge quorum, itself raising profoundly serious issues as discussed below.

Appellant has been diligent and consistent in seeking to file a petition for panel rehearing/rehearing en banc. Told by appointed counsel she would not file the petition, he filed pro se an emergency motion (Dkt. 231,234) joined by counsel (Dkt. 236) for substitution of appointed counsel or to proceed pro se in order to preserve his rights to petition for panel rehearing and or rehearing en banc. Thereafter, when it became clear recently departed counsel would not provide him access to the court record and case file, he made requests for specific *Faretta*-styled (*Faretta v California*, 422 U.S. 806 (1975) logistical assistance in order to access his files and records, which includes sealed record he explained relevant to preparing his petition for panel rehearing/rehearing en banc. The quorum issued an Order on October 4 (Dkt. 260), received in regular mail Friday October 13, instructing October 19 as the drop dead date to file Appellant's petition for rehearing and conclusively denying any possibility of access to his case file and court record, still in his relieved counsel's possession.

Accused that he's engaged in dilatory tactics by the government in its

mandate recall response, the opposite is true. He was renditioned from Cambodia to Los Angeles in 2009, charged under the PROTECT Act for one instance of oral sex with an underage girl in Cambodia, held without bail 7 years then tried, convicted and sentenced to 70 years, now, 8 years since is in his 15th year doing hard time at the USP Terre Haute. He is 63 years old and time stands against him.

Reconsidering and vacating the order is warranted. The clerk refused to file counsel's manually submitted motions to substitute and for extension of time, in contravention of Fed. R. App. P. 25, the Supreme Court precedent in *Pace v. DeGuglielmo*, 544 US 408 (2005) and this Court in *Cintron v. Union Pacific R. Co.*, 813 F.2d 917, 920-21 (9th Cir. 1987); *Loya v. Desert Sands Unified Sch. Dist.*, 721 F.2d 279, 280 (9th Cir. 1983). Moreover, and most fundamentally, the November 2 decision, like the preceding orders, was made by a two-judge “quorum.” But, as Supreme Court precedent in *Nguyen v. United States*, 539 U.S. 69 (2003), *New Process Steel, L.P. v. National Labor Relations Board*, 130 S.Ct. 2635 (2010) (underscoring holding in *Nguyen* in reversing over 500 NLRB ‘quorum’ decisions) and this Court following in *Summerlin v. Stewart*, 341 F. 3d 1082 (9th Cir. 2003) make clear, a two-judge merits panel is structural error that necessitates vacating the instant order and all preceding orders, as well as the Memorandum Disposition itself. Recalling the mandate under these circumstances does not offend the principle of repose and instead is the only way to afford justice

and fundamental fairness in the appellate process.

II. This motion is the proper procedure for the party adversely affected by the Court's action

Fed. R. App. P. Rule 27 Motions at subdivision (b) provides: (b) Disposition of a Motion for a Procedural Order. "The court may act on a motion for a procedural order [] at any time without awaiting a response, []. A party adversely affected by the court's, or the clerk's, action may file a motion to reconsider, vacate, or modify that action. []" Appellant is a party adversely affected by the Court's action.

Here, established legal principles and undisputed facts militate reconsideration. Moreover, clerical error improvidently terminating an appeal case not finally judicially resolved on the merits is of exceptional importance affecting the ability of the Court to "protect the integrity of its appellate processes."

Calderon v. Thompson, 523 U.S. 538 (1998)

Finally, the two-judge merits panel improperly exercised appellate jurisdiction through invocation of the "quorum" power. As a result, learned at the time of the decision on November 2, the order presents a structural, even jurisdictional, fundamental issue, as the Supreme Court and this Court have stated as set forth in Section V. below.

//

//

III. Recalling mandate is supported by Court rules, case law, and fundamental fairness

The gravamen of this pleading is that, overall, the Court overlooks “it is perilous to develop any sense of repose around a disposition based on a procedural shortcoming rather than the merits.” 16 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice and Procedure* § 3938, Recall of Mandate (3d ed. Update April 2023). Wright and Miller further states, “Jurisdictional or similar errors by the court of appeals afford one relatively persuasive justification for recalling a mandate. Recall is easily justified if an appeal was mistakenly dismissed [].” Wright & Miller, *id.*

As Wright and Miller points out, “A miscellaneous variety of other missteps by court or parties have been corrected in circumstances that do not threaten the central values of repose.” Wright & Miller, *id.*; *see, e.g., Lamb v. Farmers Ins. Co., Inc.*, 586 F.2d 96 (8th Cir. 1978) (recalling mandate dismissing an appeal for failure to respond to the court's order to show cause why the appeal should not be dismissed because the response had mistakenly been filed with an individual circuit judge, who promptly forwarded it to the clerk of the court who erroneously treated it as a copy of previous papers); *Application of Snyder*, 557 F.2d 820 (C.C.P.A. 1977) (mandate affirming decision of PTO was recalled to permit filing petition for rehearing, since timely motion for extension of time to petition had been prepared and served but never filed with court); *Billings v. Chicago, R. I. & P.*

R. Co., 570 F.2d 235 (8th Cir. 1978) (panel recalled mandate dismissing appeal for failure to timely file brief and appendix “we reinstate this appeal so as not to penalize the appellant personally”); *BHTT Entertainment, Incorporated v. Brickhouse Café & Lounge, L.L.C.*, 858 F.3d 310, 312-314 (5th Cir. 2017) (appeal reinstated following dismissal based on untimely filing of appellant’s brief)

Here, most fundamentally, the clerk refused to file the pleadings timely placed into its custody. notwithstanding Fed. R. App. P. Rule 25(a)(4) Clerk’s Refusal of Documents. “The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.” In *Pace v. DeGuglielmo*, 544 U.S. 408 (2005), the Supreme Court underscored the clerk serves a recordkeeping function, obligated to mechanically file pleadings. *Id.* at 415 n.5. See also *Northern California Power Agency v. Nuclear Regulatory Commission*, 393 F.3d 223, 224-5 (D.C. Cir. 2004) (“As to the ground for recalling the mandate, it is often said that this may be done only in exceptional circumstances. One of those circumstances is clerical error.”) (citations omitted).

In particular, the Court overlooks the government does not dispute authority cited from this Court and sister circuits about the filing obligation of the clerk and holdings that, in defying its obligation to file, the clerk impermissibly usurps judicial powers: *Cintron v. Union Pacific R. Co.*, 813 F.2d 917, 920-21 (9th Cir.

1987) (holding that appellant constructively filed his complaint when he delivered it to the clerk of court although he was not in compliance with local rules); *Loya v. Desert Sands Unified Sch. Dist.*, 721 F.2d 279, 280 (9th Cir. 1983) (where the clerk rejected the plaintiff's timely presented complaint because it was typed on 8 1/2 by 13 paper instead of 8 1/2 by 11 paper, the appellate court commented: "This was error. A copy of the complaint arrived in the hands of the Clerk within the statutory period. To uphold the Clerk's rejection of it would be to elevate to the status of a jurisdictional requirement a local rule designed merely for the convenience of the court's own record keeping; the district court should regard as 'filed' a complaint []); *In re McBryde*, 120 F.3d 519, 521 (5th Cir. 1997) ("It has long been the practice of this court to interpret rule 25(a)(4) according to its plain language, permitting rejection of pleadings only on the order of a judge, not at the discretion of the Clerk."); *McClellon v. Lone Star Gas Co.*, 66 F.3d 98, 102 (5th Cir. 1995) ("in the absence of specific instructions from a 'judicial officer,' the clerk of court lacks authority to refuse or to strike a pleading presented for filing."))

Given the severity of consequences of the clerk not filing the papers on the due date in the clerk rejecting counsel's e-filing exemption request and immediately issuing the mandate, there is also the fact that before issuing the mandate there was no outreach to the counsel.

Meanwhile, when counsel the next day made inquiry into the status of his

submitted pleadings, at that moment he did not know all the reasons for the electronic filing difficulties, first learned of them after the issuance of the mandate. On the filing date, he first learned he could not connect with and access to PACER and thus he could not electronically file, but his e-filing exemption request – delivered accompanying his manually submitted pleadings -- was improperly denied. The reasons for his inability to e-file he learned after the fact as described in his declaration submitted with the mandate recall motion (Dkt. 264).

IV. Core structural issues invalidate the November 2 Order

A. Court's failure to provide properly constituted statutory three-judge merits panel is error of constitutional dimension

Appellant respectfully notes the Court has serially invoked the two-judge quorum authority for every order including and proceeding from the Memorandum Disposition, Dkt. 222-1. Appellant has found no authority for permanent exclusion of an assigned available member of the merits panel from *every* merits panel order.

The quorum presents a structural error. This Court has made clear that the error recognized in *Nguyen* is a “structural error.” *Summerlin v. Stewart*, 341 F. 3d 1082, 1118 (9th Cir. 2003). As the Court explained,

The Supreme Court's recent opinion in *Nguyen v. United States*, ____ U.S. ____, 123 S.Ct. 2130, 156 L.Ed.2d 64 (2003), “reaffirms that any decision of an improperly constituted judicial body must be vacated.

Whether before an improperly constituted federal appellate panel, a flawed jury panel, a biased judge, or a judge without fact-finding authority in particular contexts, even an otherwise error-free trial is subject to reversal because the error affects the very framework within which the trial proceeds. *Id.* Such structural error indisputably arises here ...

Id. at 1117-18.

In *Nguyen*, the Supreme Court admonishes “no one other than a properly constituted panel of Article III judges [i]s empowered to exercise appellate jurisdiction.” *Id.* at n.17. *See also New Process Steel, L.P. v. National Labor Relations Board*, 130 S.Ct. 2635, 2643 (2010) (“We have interpreted that statute [28 U.S.C. § 46] to ‘requir[e] the inclusion of at least three judges in the first instance,’ but to allow a two-judge ‘quorum to proceed to judgment when one member of the panel dies or is disqualified.’” (citing *Nguyen*, and overturning over 500 NLRB decisions).¹

More fundamentally, the two-judge quorum here violates the holding in *Nguyen v. United States*, 539 U.S. 69 (2003) (reaffirmed in *Yovino*), wherein the Supreme Court reversed this Court’s misplaced reliance on two-judge ‘quorum’ power. The Court emphasized relief was required to protect the judiciary

¹ In this instance, the permanent exclusion of Judge Kleinfeld arguably prejudiced Appellant. Excluded is a judge whose precedent is favorable based on the same facts and application of law as in Appellant’s case, as Judge Kleinfeld’s precedential holding in *United States v Pepe (I)*, 895 F. 3d 679 (9th Cir. 2018) requires unconditionally vacating the principal charge of 18 U.S.C. § 2423(c) in Appellant’s appeal.

irrespective of the merits of the underlying case. *See id.* at 82-83 with remedy, “it return these cases to the Ninth Circuit for fresh consideration of petitioners’ appeals by a properly constituted panel organized ‘conformably to the requirements of the statute.’” Here, too, the November 2 two-judge quorum Order is invalid on its face.

The Court must submit Appellant’s motion to recall the mandate, Dkt. 264, for fresh consideration before a properly constituted statutory three-judge panel. Appellant, clearly due a new appeal before a properly constituted statutory three-judge panel, would certainly raise this claim on any petition for rehearing en banc were this Court to recall the mandate and permit him to proceed on appeal.

B. Circumstances do not permit lawful invocation of quorum power

Crucially, no judge died or resigned *after* the case was submitted justifying quorum powers as required by the Supreme Court. See *Nguyen*, Id., at 82, “settled law permits a quorum to proceed to judgment when one member of the panel dies or is disqualified” citing *United States v. Allied Stevedoring Corp.*, 241 F. 2d 925, 927 (2nd Cir. 1957) (L. Hand, J.) (“when a judge has resigned *after argument*, or has died *after expressing his dissent*, a remaining majority has jurisdiction to dispose of the appeal”)(emphasis added)

Similarly, the Supreme Court in *Yovino v Rizo*, 139 S. Ct. 706, 709 (2019) requires, “Invoking this rule, innumerable court of appeals decisions hold that when one of the judges on a three-judge panel dies, retires, or resigns *after an*

appeal is argued or is submitted for decision without argument, the other two judges on the panel may issue a decision if they agree.” (emphasis added)

Consequently, here, the two-judge panel invalidly clothes itself with judicial authority as ‘quorum’ where the facts show the absent judge (Judge Kleinfeld) did not participate at argument, and the case was never submitted to Judge Kleinfeld. Thus, contrary to the requirement the absent judge did not become unavailable judge *after* the case is submitted.

Here, moreover, there is no record or notice that the absent Judge Kleinfeld ever disqualified himself from this case nor was he ever disabled. To the contrary the Court website archived decisions show Judge Kleinfeld judicially active signing three-judge panel dispositions with this same panel (and with another panel) during the time frame of relevant to proceedings and disposition of Appellant’s case. Accordingly, the invocation of quorum power under 28 U.S.C. § 46(d) or Ninth Circuit General Order 3.2(h)² both cited in the two-judge issued memorandum of decision is misplaced.

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² G.O. 3.2(h) in relevant part, “If, *after a matter is under submission to a three-judge panel*, a judge becomes unavailable by reason of death, disability, recusal, or retirement from the Court, the remaining two judges may – if in agreement – decide the matter as a quorum pursuant to 28 U.S.C. § 46(d), or shall request the Clerk to draw a replacement judge.” (emphasis added)

C. Repetitive quorum error involving six cases requires en banc attention

The en banc court review is required in this matter of exceptional importance to this circuit, where circuit wide Impact has occurred due to the quorum error replicated across six cases identified below. In all these quorum invocations, Judge Kleinfeld was absent hearing, evidenced in archived videos of the arguments in these cases. Notably, the quorum power is being invoked for every case submitted after oral argument but never in any case submitted without argument. The listing below indicates Judge Kleinfeld signed every disposition in the cases submitted without argument, but none of the dispositions of the five cases (six actually as one case had codefendants) for which he did not join the hearing:

<u>Date</u>	<u>Case no.</u>	<u>Case Name</u>	<u>Oral Argument</u>	<u>quorum</u>
May 8	18-71255	Guardado v. Garland	no	no
May 8	20-70469	Hernandez-Tovar v. Garland	no	no
May 8	19-70527	Yan Jin v. Garland	YES	YES
May 8	20-50182	USA v. Olivas	YES	YES
May 8	22-55614	Parker v. County of Riverside	YES	YES
May 10	20-72055	Cortez-Arreola v. Garland	no	no
May 10	21-50094	USA v. Cota	no	no
May 10	16-50327	USA v. Boyajian	YES	YES
May 10	20-50144,21-50175	USA v. Shih	YES	YES

Improper invocation of quorum power where a judge is unavailable before the case is heard (and not replaced with a substitute) is radical departure from

established rule of law, tradition, norms and practices of this Circuit.

VI. Summary and Conclusion

The Order is inconsistent with the fact it is undisputed that this direct criminal appeal, Appellant's only appeal of right, was improvidently terminated by clerical error. The Order is further inconsistent with undisputed authority that an improvidently procedurally terminated appeal is not accorded the finality or repose of a judicially determined resolution on the merits. Accordingly, Appellant has presented an undisputed factual and legal basis to recall the mandate and therefore to this reconsideration.

The Court overlooked that the undisputed facts and law compel the Court to recall the mandate to cure clerical usurpation of judicial power and in order to "to protect the integrity of its appellate processes." *Calderon v. Thompson*, 523 U.S. 538, 549,566 (1998).

The November 2 order, which validity is questioned as an unauthorized exercise of appellate jurisdiction by a two-judge quorum grants the government's request to deprive Appellant of his fundamental rights, cutting him off from the final stage of the direct appeal process. Contrary to the government in its opposition to the mandate recall motion, the decision to what extent to extend time for counsel to file the rehearing petition is *not* before the Court. With jurisdiction restored by recalling the mandate, the motion for the lawyer to have some time can

reasonably be considered and any questions answered, including, to the extent appropriate, some recitation of issues to be presented. However, the Court's future ruling on that motion should not be conflated with a decision on whether the facts and law call for the mandate to be recalled.

Relief requested:

1. The Court should recall its mandate; direct the Clerk to file Counsel's pleadings submitted October 19 (attached to Motion to Recall Mandate Dkt. 264 Ex. A), be deemed filed or now be permitted to be submitted again electronically marked as received October 19, 2023.
2. Once instated, counsel's extension of time motion should then be submitted to a properly constituted statutory three judge panel for decision.
3. If the Court denies any relief, then it is respectfully requested to clarify or modify its Order refusing to recall the mandate, specifying grounds on which it is ruling, and provide its reasoning with citation to authority.

Dated: November 16, 2023

Respectfully submitted,

/s/ Barry A. Fisher

Barry A. Fisher, Esq.

Counsel for Ronald Boyajian
Defendant-Appellant

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOV 21 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD GERARD BOYAJIAN, AKA
Ronald G. Boyajian, AKA Ronald Geral
Boyajian, AKA Ronald Gerald Boyajian,
AKA John,

Defendant-Appellant.

No. 16-50327

D.C. No.
2:09-cr-00933-CAS-1
Central District of California,
Los Angeles

ORDER

Before: HURWITZ and R. NELSON, Circuit Judges.*

Boyajian's "Motion To Reconsider, Clarify, Modify, And Vacate November 2 Order (Dkt. 266) Denying Motion To Recall The Mandate And To Direct The Clerk To File Counsel's Previously Submitted Pleadings (Dkt. 264); Request For En Banc Review," **Dkt. 267**, is **DENIED**.

* This motion was decided by quorum of the panel. *See* 28 U.S.C. § 46(d); Ninth Circuit General Order 3.2(h).

January 9, 2024

Scott S. Harris, Esq., Clerk of the Court
Office Of The Clerk
1 First Street N.E.
Supreme Court Of The United States
Washington, D. C. 20543

ATTN: Susan Frimpong

Re petition for writ of mandamus case No. 23-6137

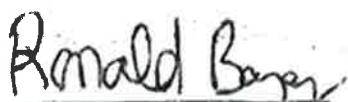
Dear Ms. Frimpong,

I write because I am informed the Court's public docket does not identify or reference the six individually named Respondents.

In particular, the docket reflects no responsive communication with the Court directly or through counsel from the six individually named Respondents (four circuit judges including a chief judge and two senior administrative staff all officers of the Ninth Circuit Court Of Appeals).

Please be assured and communicate to your colleagues before Conference that all six individually named Respondents were noticed. Upon your instruction in your letter announcing docketing of the case, I served all six Respondents with the enclosed Notice of case docketing (filed Dec. 12, 2023 at Dkt. 269). As you can see, the Notice additionally attached the Court's docket showing the January 2, 2024 due date for Respondents to respond.

Sincerely yours,



Ronald Boyajian,
USP Terre Haute
Petitioner, Pro Se

Enc. 4-page extract from Notice filed 12.12.23, Dkt. 269

Ronald G. Boyajian
Register # 33900-112
United States Penitentiary
USP Terre Haute
P.O. Box 33
Terre Haute, IN 47808

16-50327

December 6, 2023

RECEIVED
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DEC 12 2023

FILED
DOCKETED

DATE

INITIAL

Molly Dwyer, Clerk of the Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

re: Notice to Respondents of Docketing case in Petition for Writ of Mandamus in Supreme Court case no. 23-6137:

Respondent **Mary Helen Murguia**, Chief Circuit Judge,
Respondent **Susan Soong**, Circuit Executive,
Respondent **Molly C. Dwyer**, Clerk of the Court,
Respondent **Ryan Douglas Nelson**, Circuit Judge,
Respondent **Andrew David Hurwitz**, Circuit Judge,
Respondent **Andrew Jay Kleinfeld**, Circuit Judge.

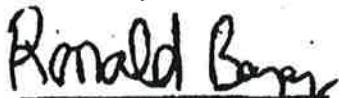
Dear Ms. Dwyer,

I am the Appellant in criminal appeal case no. 16-50327. Please file attached Notice of the filing and docketing of the mandamus petition in Supreme Court case no. 23-6137.

On October 12, I requested filing of the copy served on Respondents of my Petition For Writ Of Mandamus In The Supreme Court Case No. 23-__ (now case no 23-6137). Please do file it. For your convenience, please find enclosed a duplicate of the October 12 mandamus petition and October 12 correspondence to you / Respondents.

Please mail me conformed copies upon filing these items.

Cordially,



Ronald Boyajian
Appellant, Pro Se

Enc.

12/6/23 Notice of Docketing Mandamus Petition in Supreme Court case no. 23-6137
10/12/23 Correspondence / Service on Respondents
10/12/23 Petition for Writ of Mandamus / Service copy

No. 23 - 6137

IN THE SUPREME COURT OF THE UNITED STATES

In re: Ronald Boyajian

Petitioner

Ronald Boyajian,

Petitioner,

v.

Mary Helen Murguia, Chief Circuit Judge, Susan Soong, Circuit Executive,
Molly C. Dwyer, Clerk of the Court, Ryan Douglas Nelson, Circuit Judge,
Andrew David Hurwitz, Circuit Judge, Andrew Jay Kleinfeld, Circuit Judge,
Respondents.

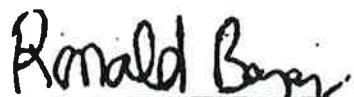
Of the United States Court of Appeals for the Ninth Circuit
Ninth Circuit Case No. 16-50327

NOTICE OF DOCKETING CASE

To _____ Counsel for Respondents:

Notice is hereby given that a petition for writ of mandamus in the above titled case was filed in the Supreme Court of the United States on October 18, 2023 and placed on the docket November 30, 2023. Docket Sheet attached.

Dated: December 6, 2023



Ronald Gerard Boyajian
Register no. 33900-112
USP Terre Haute
P.O. Box 33
Terre Haute, Indiana 47808
Petitioner, Pro Se

Search documents in this case:

No. 23-6137

Title:	In Re Ronald Boyajian, Petitioner
Docketed:	November 30, 2023
Lower Ct:	

DATE	PROCEEDINGS AND ORDERS
Oct 18 2023	Petition for a writ of mandamus and motion for leave to proceed in forma pauperis filed. (Response due January 2, 2024) Petition Proof of Service Appendix Motion for Leave to Proceed in Forma Pauperis

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
Ronald G. Boyajian Counsel of Record	33900-112 USP Terre Haute PO Box 33 Terre Haute, IN 47808	
Party name: In Re Ronald Boyajian		

Ronald G. Boyajian
Register # 33900-112
United States Penitentiary
USP Terre Haute
P.O. Box 33
Terre Haute, IN 47808

RECEIVED
MOLLY C DWYER, CLERK
U.S. COURT OF APPEALS
DEC 12 2023
FILED
DOCKETED
DATE
INITIAL

October 12, 2023

Molly Dwyer, Clerk of the Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

re: service on Respondents in Petition for Writ of Mandamus in Supreme Court case no. 23-__:

Respondent **Mary Helen Murguia**, Chief Circuit Judge,
Respondent **Susan Soong**, Circuit Executive,
Respondent **Molly C. Dwyer**, Clerk of the Court,
Respondent **Ryan Douglas Nelson**, Circuit Judge,
Respondent **Andrew David Hurwitz**, Circuit Judge,
Respondent **Andrew Jay Kleinfeld**, Circuit Judge.

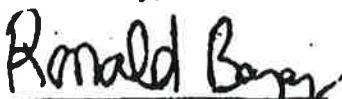
Dear Ms. Dwyer,

I am the Appellant in criminal appeal case no. 16-50327. I am ordered to proceed without counsel. Please find enclosed service copy of Petition For Writ Of Mandamus In The Supreme Court Case No. 23-__. Service is hereby provided in care of your Office to above-named Respondents each in their official capacities.

Please file this letter and enclosed Petition for Writ of Mandamus in case 16-50327.

I would appreciate your providing me a conformed copy upon filing.

Cordially,



Ronald Boyajian
Appellant, Pro Se

Enc. Petition for Writ of Mandamus in Supreme Court case no. 23-__