23-6542

No. ____________ ORIGINAL

FILED
DEC 04 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

ARCHIE CABELLO — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Archie Cabello
(Your Name)

Federal Prison Camp La Tuna P.O. BOX 8000
(Address)

Anthony, TX 88021
(City, State, Zip Code)

N/A
(Phone Number)

RECEIVED
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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

a) Whether the trial court violated its duty under the Fifth Amendment, due process clause and Sixth Amendment counsel clause to inquire about an alleged "conflict of interest" asserted by the government in connection with the petitioners retention of defense counsel immediatly after he was indicted.

b) Whether the government threatened Criminal prosecution against lead defense counsel, his co-counsel daughters and his law firm, if the law firm, continued to represent the petitioner.

c) Whether the goverment's threat of prosecution had a chilling effect on retained counsel who withdrew from representing Cabello.

d) Whether the trial courts promise to hold a mandatory evidentiary hearing on whether there was a conflict of interest, but never did so rendered the entire proceedings void due to loss of jurisdiction in the course of the proceedings.

* * * * * * * * * * * *

All parties listed on the cover page

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

* * * * * *

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

TABLE OF CONTENTS

TABLE OF AUTHORTIES

Cases

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix ______ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the ______________________ court appears at Appendix ______ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was OCTOBER 25, 2023

[✓] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: ______________, and a copy of the order denying rehearing appears at Appendix ______.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ______________ (date) on ______________ (date) in Application No. __A______.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was ______________. A copy of that decision appears at Appendix ______.

[ ] A timely petition for rehearing was thereafter denied on the following date: ______________, and a copy of the order denying rehearing appears at Appendix ______.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ______________ (date) on ______________ (date) in Application No. __A______.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) Fifth Amendment Due Process Clause.
2) Sixth Amendment Right to Counsel of Choice.

STATEMENT OF THE CASE

This is a 60(b)(4) motion attacking an adverse judgement that the court having lost jurisdiction in the course of the proceedings did not have the power to adjudicate.

Subsequently the Ninth Circuit Court of Appeals also ruled adversly, when it only had jurisdiction to correct the district Courts error.

Cabello is currently detained at the Federal Prison Camp, La Tuna in Anthony, TX.

REASONS FOR GRANTING THE PETITION

1) Plain and Clear violation of the Fifth Amendmend. 2) Plain and clear Violation of the Sixth Amendment. 3) the Ninth Circuit Court of Appeals has entered a decision in Conflict with all United States Courts of Appeal, in conflict with its own binding court precedent, and finally Supreme Court Case Law and precedent. In so doing, has so far departed from the accepted and usual course and Sanctioned such a departure by a lower court, as to call for this Courts supervisory power. This is an opportunity for the Supreme Court to communicate to the Oregon District Court and the Ninth Circuit Court of Appeals the Supreme Court Case law and Supreme Court precedent must be followed. The Court "will not pass on a constitutional issue." The Ninth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this court. See Supreme Court Rule 10(a)(c). 4) Under Buck v. Davis, Supra, the Supreme Court clarified the standard for a COA. At the first stage, the only question is whether the applicant has shown that, jurists of reason could disagree with the Courts resolution of his constitution claims, or if a jurist of reason could conclude the issues are adequate to deserve encouragement to proceed further. See Miller-EL v. Cockrell, 527, US 322, 327, 123 S. Ct. 1029. The issues presented by Cabello are eminently debatable and reasons abound for a jurist of reason to conclued that the issues are adequate to deserve encouragement to proceed further.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: January 8, 2024

No.

IN THE SUPREME COURT OF THE UNITED STATES

ARCHIE CABELLO Pro Se Petitioner v. UNITED STATES of AMERICA Respondent	DC No. 3:10-cr-482-MO AC No. 23-35081

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit under 60(b)(4).

PETITION FOR WRIT OF CERTIORARI

NOW COMES, Archie Cabello respectfully seeking leave of this Honorable Court to entertain the above referenced case in which he invokes Rule 60(b)(4) for the proposition, this rule is not only consistent with case law, but also comports with the fair and equitable administration of justice. It is settled that equitable relief is relief that is available pursuant to an independent action in cases of loss of jurisdiction rendering the judgement void. A 60(b)(4) motion may be raised at any time. Jurisdiction also can be raised at any time and cannot be waived.

JURISDICTION

This Court has jurisdiction pursuant to 28 USCS § 1254(1)

QUESTIONS PRESENTED

a) Whether the trial Court violated its duty under the Fifth Amendment due process clause and Sixth Amendment counsel clause to inquire about an alleged

"conflict of interest" asserted by the government in connection with the petitioners retention of defense immediatly after he was indicted.
b) Whether the government threatened Criminal prosecution against lead defense counsel, his co-counsel daughter, and his law firm, if the law firm, continued to represent the petitioner.
c) Whether the government's threat of prosecution had a chilling effect on retained counsel who withdrew from representing Cabello.
d) Whether the trial courts promise to hold a mandatory evidentiary hearing on whether there was a conflict of interest, but never did so rendered the entire proceedings void due to loss of jurisdiction in the course of the proceedings.

HISTORY OF PROCEEDINGS

This is a 60(b)(4) motion attacking an adverse judgement that the court having lost jurisdiction in the course of the proceedings did not have the power to adjudicate. Subsequently the Ninth Circuit Court of Appeals also ruled adversly, when it only had jurisdiction to correct the district courts error.
Cabello is currently detained at the Federal Prison Camp, La Tuna in Anthony, TX.

STANDARD OF REVIEW

For purposes of appellate review in Criminal Cases, the federal constitutional errors, sometimes called structural defects, that defy analysis by harmless-error standards include; (1) the denial of counsel, (2) the denial of the right of self-representation, (3) the denial of the right to a public trial, and (4) the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction. (Scalia, J, joined by Stevens, Souter, Ginsburg, and Breyer, JJ) Gonzalez-Lopez 548 US 140

LEGAL ANALYSIS

Federal Courts "indulge every reasonable presumption" against a waiver of fundamental rights. Johnson v. Zerbst 304 US 458, 464, S.Ct. 1019, 82 L.Ed 1461 (1938). Such a waiver should not be implied and should not be lightly found. Ostlund v. Bobb, 825 F.2d 1371, 1373-4 (9th cir. 1987). The presumption against a waiver of constitutional rights applies equally in criminal and civil contexts, Gete v. I.N.S. 121 F.3d 1285 1293 (9th cir. 1997). Moreover, jurisdiction cannot be waived. McGirt v. OK 140 S.ct. 2452, 207 L.Ed. 895 (2020). Motions to set aside a judgement as void under 60 (b)(4) may be brought at any time. Meadows v. Dominican Republic 817 F.2d 517, 521 (9th cir. 1987)

Structural defects defy analysis by harmless-error Standards. See Gonzalez-Lopez 548 US 140 S.ct. 2557 (2006). A lack of subject matter jurisdiction may be raised anytime, even on appeal Fed. R. Civ. P. 12(h)(3).

Throughout the proceedings of his prosecution, Cabello continually asked to be represented by his attorney for over fifteen years, Gerald Boyle of Milwaukee, WI. The court consistently denied all of these requests. The details are illuminating. In May, 2010, Mr. Boyle told the government that he was representing Cabello with regards to any prosecution that might arise out of the events of this case. Cabello had paid over a period of time a retainer of $14,800 Cash. Mr. Boyle had duly reported those cash payments on IRS Form 8300.

On September 3, 2012, through his then appointed attorney Mr. Michael Smith, Cabello asserted in writing an attorney-client privilege against any attempt by the government to elicit any extensive testimony from Mr. Boyle about other matters beyond the amounts, dates, forms, and manner in which the fees were paid. The district court construed the assertion as a motion and after a hearing on September 6, 2012 ordered that Mr. Boyle was was not to be asked anything beyond disclosures of the amounts, dates, forms, and the manner in Which the fees were paid. See Appendix B pg. 1-2

The court also suggested to Counsel that such simple facts could be best established by way of stipulation. The government agreed. This point is important because the government would later misrepresent that Mr. Boyle would be a full-blown government witness against Cabello and completely disregard the fact that he agreed to a stipulation restricting the questioning to the manner in which fees were paid. Full-Stop. (!). The government filed no motion to disqualify Mr. Boyle. The court issued no order to disqualify Mr. Boyle. The government never had to prove Mr. Boyle was conflicted. The court gave the government a Hall-Pass.

At a December 5, 2012 hearing, Cabello again stated his desire to be represented by Mr. Boyle. A Mr. Levine had been appointed by the court after Mr. Smith left the state and became "unavailable". Mr. Levine addressed the court. Mr Levine: Mr. Cabello wants me to press with the Court that he objects to my appointment. He wants Counsel of his Choice. He believes he has been denied counsel of his choice and he objects to my appointment. "Thats the first thing." The court answers in part; I will continue to deny him hiring his own lawyer, in fact from the midwest." See App. B pg. 3. Here is an extraordinary circumstance of a Federal Judge declaring in open court, that he will continue to deny Cabello his counsel of choice, without making any inquiry, any investigation, or performing any of several core duties it must perform when it learns of even the possibility of a conflict of interest. See U.S. v. Lussier, 71 F.3d 456, 461-62 (2nd cir 1995) Chief among them is to hold a hearing to determine what the facts are. The Court's action was in conflict with Supreme Court case law, all circuits case law, including Ninth Circuit case law.

The court appeared to base this exclusively on Mr. Boyle having been paid in cash and the government's assertion that they would have been able to prove a negative, namely, that Cabello did not have a legitimate source for these funds. In repeated filings with the Court, Cabello asserted that these funds were acquired innocently. Cabello never waived his right to counsel, he demanded counsel of his choice and not counsel of the goverment's choice.

As for Mr. Boyle, in a letter to public defender Mr. Patrick Ehlers, Mr. Boyle expresses that he is willing to represent me and that it is absurd to think there is a conflict, and that any Federal Judge will see it as it is clearly an administrative matter and not anything relative to the case charged. See App. B pg. 4. Cabello represented to the Court that were he called to testify, Mr. Boyle would confirm, that he had been threatened with prosecution by the government, and that, as a result he had been coerced off the case. App B pg. 5

the government put the threat in writing. See App. B pg 6-7. This was a threat that any lawyer would take seriously. The Court neither addressed nor resolved whether Mr. Boyle's representation of Cabello would present a conflict, waivable or otherwise. The court must exercise its discretion within the limitations of the sixth amendment

At Cabello's behest Mr. Levine raised the issue again. Mr. Levine pointed out to the court that if, "there is some evidence that the government in someway interfered with Cabello's right to retain his own counsel... that raises a very serious constitutional issue, which also affects the entry of the guilty plea... but even beyond that, it could affect the status of the indictment." Of course, the Court was aware of the alleged conflict all along but was now put on full notice that the court needed to seriously investigate this matter. The court responded, "Well, in respect to this matter, it can be resolved by having a hearing. Mr Boyle can testify under oath. He can do this with our electronics so he doesn't have to travel. We will find out what the facts are. See App. B pg. 8-9. The Court will note that the government again asserted that Mr. Boyle would be a witness against Cabello at this December 5, 2012 hearing. Apparently, forgetting that all parties had agreed to address the form of payment to Mr. Boyle by way of Stipulation. See App. B pg. 5 Also App B pg. 10

The government and the court knew that this was patently untrue and bears the marks of gamesmanship.

The court will note that the government impaired and interfered with Cabello's counsel of choice from the very outset. See App. B pg. 6. The date of the threatening letter is December 17, 2010, days after Cabello's indictment and arrest. In other words the governments interference with the defendants right to counsel from the very outset would have Post-Indictment effects of Sixth Amendment significance. The difference between Mr. Boyle and Mr. Smith was stark. On point, Mr. Boyle signaled that he would demand speedy trial. The first action that court appointed panel attorney Mr. Smith took was to stipulate to a fourteen month extension. Accordingly, everything after December 17, 2010 is void, i.e. DOA.

The court had promised a hearing as mandated by; Johnson v. Zerbst, supra, Cuyler v. Sullivan, 466 U.S. 335 (1980), Wood v. Gorgia, 450 US 26 (1981). Despite having earlier in the hearing betrayed his inclination to personally deny Cabello his counsel of choice. (see App. B pg 3) the court stated that it would hold a hearing on this crucial and substantive matter. It is unconstitutional and unlawful to forfeit attorney's fees without giving the attorney an opportunity to be heard in a hearing. The government knew it and made no moves regarding Mr. Boyle vis-a-vis forfeiture. It is manifestly improper to require defense counsel to admit clients criminal guilt in matters related to representation of the client. It is called Attorney-Client-Privilege. This is Hornbook Law. The government was content with coercing Mr. Boyle off the case. See App. B pg. 6. Of course the court knew about the conflict all along, but now with a formal objection the court was on Full Notice, about the possibility of conflict, entry of guilty plea, and status of indictment. See App. B pg. 9.

For reasons that are not disclosed in the record or anywhere else, the trial court never held the mandated hearing. This failure was structural error, as recognized in Gonzalez-Lopez, supra. As such, Cabello's conviction must be reversed even without a showing of prejudice. Additionally, Cabello never waived his right to a hearing on his exercise of this fundamental Sixth Amendment right. As such, the government never carried its burden of proof on this issue. With the trial courts acquiesence, the prosecution evaded further inquiry on this matter and as appellate attorney, Mr. Robert Weppner ignored Cabello's pleas to raise this issue on direct appeal. They evaded any inquiry on subsequent appeals. At all events, the government chilled Cabello's right to counsel of choice.

For purposes of deciding a criminal defendants claim, under the Federal Constitution's Sixth Amendment, the denial of counsel of choice during

Critical stages of a judicial proceeding - which includes appeal mandates a presumption of prejudice, because the adversarial process itself has been rendered presumptively unreliable. Moreover, the trial Courts apathy vis-a-vis the mandated hearing which Cabello wanted and to which Cabello had a right, demands a presumption of unreliability because no presumption of reliability can be accorded to a judicial hearing that never took place. See Criminal Law § 46.6 denial of counsel or proceeding - prejudice

Cabello tried repeatedly to bring up his Sixth Amendment rights. The district court went from apathy to combative. At a March 12, 2013 hearing, Cabello brought up his counsel of choice and the fact that Mr. Boyle had been prepared to go to trial two years ago. This drew a stern rebuke from the court. The court: "We're not going to hear anymore about Boyles today, sir"... the court went on to close the door on Cabello's Sixth Amendment rights and that no further time will be alloted to that issue. The Court had an obligation to hold a disqualification hearing and failed to keep its word and hold the mandated hearing. We will never know why the Court failed in its duty, but it appears to have been caprice. See App. B pg. 11. Also see App. B p12 Doc line 227.

LOSS OF JURISDICTION

Johnson v. Zerbst, supra, governs the disposition of Cabello's 60(b)(4) motion. Cabello has demonstrated by clear and convincing evidence that the trial court lost jurisdiction" in the course of the proceedings," by "failing to complete the court-as the sixth Amendment requires." Johnson, supra, 304 US at 468. In this case, the government, the trial court, and Cabello's court-appointed Counsels all failed to protect Cabello's Sixth Amendment right to counsel of choice. This tri-fecta of failure is a rare occurence in the Federal Criminal Justice System.

In addition to Johnson v. Zerbst, supra, the U.S. Supreme Court's decision in Wood v. Georgia, supra, also imposed an affirmative duty on the trial court to find out the true facts regarding what AUSA Ms. Faye alleged was a conflict of interest," and whether the funds used by Cabello were "tainted." In Wood v Georgia, supra, the Court stated: [Cuyler v. Sullivan, 466 US 335 (1980)]. mandates a reversal when the court has failed to make an inquiry even though it knows or reasonably should know that a particular conflict exists [with respect to the counsel for the defense]. As was the case in Wood, the "facts", [in Cabello's Case], demonstrate convincingly the duty of the trial court to hold a hearing to determine the facts and not proceed on mere government supposition and conjecture. Judicial proceedings should not proceed by guess-work and caprice. The loss of jurisdiction rendered the judgement of the District Court of Oregon, "Void." A void judgement is a legal nullity. Although the term "void" describes a result, rather than the conditions that render a judgement unenforceable, it suffices to say that a void judgement is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgement becomes final. The whole purpose of 60(b) is an exception to finality. See Buck v. Davis 580 US 137 S.Ct. (2017).

The government with the district courts acquiesence, summarily Cabello's counsel of choice, Mr. Boyle. Ninth Circuit Law does not permit summary disqualification of counsel: procedural due process requires notice and an opportunity to be heard. With all due respect, this was not done. The court had made a commitment to hold a hearing, in the courts own words: "We will find out what the facts are that are disputed." See App. B pg. 9 Again, this was not done. The court should have held a hearing evidenced by a written finding, opinion, or other reliable indicia. Ninth Circuit Law does not permit summary disqualification of counsel. See U.S. v. Tillman 756 F.3d 1114 (9th cir. 2014).

No reliability can be placed on a hearing that was never held. See Halloway v. Arkansas 435 US 475. Issues concerning actual or constructive denial implicate the overall fairness of the trial because they bear directly on the "framework" within which the trial proceeds. Gonzalez-Lopez, 150, 126, S.ct. 165 (quoting Fulminante 499 US 279, 310, 111 S. ct 1246). (1991).

Furthermore, because Federal Courts possess only the power that is authorized by the U.S. Constitution art. III and statutes enacted by Congress pursuant thereto, every Federal Court and especially Federal Appellate Courts has a special obligation to satisfy its own jurisdiction, but also that of a lower Court in a cause under review, even if not contested by the parties. If the district court lacked jurisdiction, then the circuit court of appeals has jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower Court. Accordingly, the Ninth Circuit Court of Appeals opinion and order on direct appeal and all subsequent appeals is by extentsion also VOID. AUSA Mr. Edmonds and Court appointed appellate attorney Mr. Weppner were derelict in their duties by not bringing this fatal error to the appellate courts attention during oral argument. This was not by inadvertance or by accident, but by willful indifference. See U Tube case # 13-30080 3/2/15 Location: Portland, Oregon.

The Appellate Court reviews lack of subject matter de novo. The Appeals court reviews for abuse of discretion. The trial courts discretion must be exercised within the limitations of the sixth amendment. See Powell v. Alabama 287 US L.ed 158 (1932)

In Cuyler v. Sullivan, supra, reaffirmed that the judge is obliged to take reasonable prospective action, if he knows or reasonably should have known that a particular conflict exists. The Supreme Court made this clear beyond cavil, ten months later when Justice Powell, the same justice who wrote the Cuyler opinion, explained in Wood v. Georgia, supra that Cuyler mandates a reversal when the trial court has failed to make an inquiry even though it knows or reasonably should know that a conflict exists. 450 US at 272, n 18, 67 L Ed 220, 101 S.ct. 1097 (emphasis in original). To disqualify counsel and not hold a hearing, over the objection of the accused, per se violates the Constitution, Plainly and Clearly. Counsel's objection in Halloway v. Arkansas 435, US 475, 55, L Ed, 426, 98 S.ct. 1173 was important as a fact to put the judge on notice that he should inquire. It will take just such an objection to alert a trial judge to a prospective conflict, and the Cuyler court reaffirmed that the judge is obliged to take reasonable prospective action whenever a timely objection is made. 466 US at 346, 64 L.Ed 333, 100 S.ct. 1708. It bears repeating that, in this coherent scheme established by Halloway, Cuyler, and Wood, supra, that a hearing must be held. See also Johnson v. Zerbst, supra. This superintending architecture, systematically formulated by Justice Powell governs and settles the matter. Since the district court in the instant case was on notice of a prospective conflict from Cabello's timely objection, (See pg. 4 of motion. Also see App. B pg. 3) this case calls for nothing more than the application of the prospective notice rule annanced and exemplified by Halloway and confirmed in Cuyler and Wood, supra. The remedy for the judge's dereliction of duty [535 US 196] should be an order vacating the conviction and dismissing the underlying indictment. The court was full aware of his obligation.

The government impaired and interfered with Cabello's right to counsel of choice within days after his arrest. Accordingly, everything after December 17, 2010 is void and has no legal force or validity. See App. pg. 6-7. Lawyers have a duty before the courts in which they practice, they have to layout all relevant facts before the court. For both AUSA Mr. Edmonds and court appointed appellate attorney Mr. Weppner to not make the Ninth Circuit Court of Appeals aware of this glaring error is a dereliction of duty and made the circuit courts opinion and order void and a legal nullity. The circuit court has limited jurisdiction, not on the merits, but merely to correct the lower courts' error. In the instant case, the question, the issue is not whether the defendant is guilty, but whether the court has jurisdiction even if he is guilty. In sum, questions to the jurisdiction of the court are distinct from questions of guilt. A guilty plea does not waive jurisdictional claims or due process claims. They cannot be waived. Menna v. New York, 423 US 61.

In U.S. v. Stein, et al 541 F.3d 2008 (2nd. Cir). the U.S. District Court for the southern district of New York (Kaplan-J) the government had the company KPMG over a barrel, the company was seeking a non-prosecution agreement. The government conditioned that on KPMG capping and ultimately ending the the Company's payment of their employees legal fees, which was a condition of their employment, based on the co-operation of their employees who were the defendants. The Company under over-whelming pressure joined the government in violating the Sixth Amendment rights of their employees. The company caved because the government imposed its will by force of law. The appellate court affirmed the district Courts ruling that that the government deprived thirteen former partners and employees of the accounting firm KPMG, LLP of their right to counsel under the Sixth Amendment by causing KPMG to place conditions on the advancements of legal fees to defendants. Because the goverment failed to cure the Sixth Amendment violation, Judge Kaplan dismissed the indictment because

No other remedy will return the defendant to STATUS QUO ANTE, the second Court of Appeals affirmed the dismissal of the indictment. Judge Kaplan also ruled that the prosecutors misconduct independently shock[s] the conscience.

Along the same lines, the government put coercive pressure on Mr. Boyle concerning fees, to withdraw or face criminal charges and forfeiture. The only thing Mr. Boyle was guilty of was following the law and duly filing a form 8300. It is important to note that at the time of the intimidating threats, the charges were mere allegations. Again, in Cabello's case, the government imposed its will by force of law. Like in Stein, supra, the government used fees to eviscerate Cabello's Sixth Amendment rights as well as his fifth Amendment rights to due process. The government felt free enough from any sanction that they arrogantly put the threat in writing. See App. B pg. 6-7. The government misconduct also shock[s] the conscience. Mr. Boyle with health issues and his daughter and law partner also having health issues, took the threat seriously and withdrew under the circumstances. See App. B pg. 10

But for the governments threats and coercion, Mr. Boyle would have defended Cabello. At the very least, the prosecutor has an affirmative obligation not to act in a way that circumvents and thereby dilutes the protection afforded by the right to counsel.

This is intuitive: the right to counsel would mean little if defense counsel could be controlled by the government without good reason. See Maine v Moulton 474 US 159, 170-71 106 S.Ct 477 (1985). If the framers of the constitution had intended for the right to counsel of choice to be contingent on the prosecutors approval, the would have said so. Constitutional Concerns are greatest when the state attempts to enforce or to impose its will by force of law and uses its great powers to ride roughshod over the rights of the accused. Unfortunately, through a series of misrepresentations the court had been so thoroughly schooled by the government of the necessity to summarily disqualify attorney Mr. Boyle in contravention of Ninth Circuit Case law, all other circuits case law, and Supreme Court Case Law, that Honorable Judge Robert E. Jones took the governments position as his own. The goverment's interference with Cabello's right to counsel from the out-set, infected the entire proceedings. After eviserating Cabello's Sixth Amendment rights, a series of superflous hearings were held, none of which addressed Cabello's Fifth and Sixth Amendment rights. The superflous hearings were solely designed to free the judge from any impediment to passing sentence. On its face the evidence in this 60(b)(4) motion is not only credible, but is of such weight and directness as to make out the facts beyond a doubt.

AEDPA

The United States Supreme Court has held in Slack v. McDaniel 529 US 473, 146 L.Ed 542, 120 S.ct 1595 (1) when a federal habeas petitioner sought to initiate an appeal of the dismissal of a petition after April 24, 1996 - the Antiterroism and Effective Death Penalty Act of 1996 (AEDPA)(PL 104-132) - thereby effectively barring the petitioner from appealing the dismissal. <* pg. 543>

On certiorari, The United States Supreme Court reversed and remanded, In an opinion by Kennedy, J., joined in part (as to holding 1 below) by Rehnquist, Ch. J., and O'Connor, Scalia, Thomas, and Ginsburg, JJ., and joined in part (as to holdings 2 and 3 below) by Rehnquist, Ch. J., and Stevens, O'Connor, Souter, Ginsburg, and Breyer, it was held that (1) when a federal habeas corpus petitioner sought to initiate an appeal of the dismissal of a petition after April 24, 1996 - the AEDPA's effective date - the petitioner's right to appeal was governed by the certificate of appealability (COA) provisions of the AEDPA (28 USCS § 2253 (c)); (2) When District Court denied a state prisoner's habeas corpus petition on procedural grounds without reaching the prisoner's underlying federal constitutional claims, a COA ought to issue - and an appeal of the District Court's order might properly be taken - if the prisoner showed, at least, that jurists of reason would find it debatable whether (a) the petition stated a valid

Claim of the denial of a constitutional right, and (b) the District Court was correct in its procedural ruling; and (3) in the case at hand, the District Court was not correct in its procedural ruling, because a federal habeas corpus petition (60(b)(4)) petition filed by Cabello previously was denied without adjudication on the merits, as was the present petition- was denied without condition and without prejudice, therefore was not a reconsideration, second or successive petition, or abuse of the writ, within the meaning or rule 9(b).

A COA should issue pursuant to the appeal provisions of the AEDPA of 1996 (28 USCS § 2253(c))-and an appeal of the District Court's order may be taken, if the prisoner shows, at least, that jurists of reason would find it debatable both whether (1) the petition states a valid claim of the denial of a constitutional right, and (2) the district court was correct in its procedural ruling. It is clear that Cabello has a valid denial of a constitutional right; equally clear that the District Court erred-in it's procedural ruling. Courts are encouraged to resolve the procedural issues first under the principle that courts will not pass on a constitutional question. In setting forth the preconditions for issuance of a COA under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar substantial constitutional rights on appeal.

The recognition that the "court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of," Ashwander v. TVA, 297 US 288, 347, 80 L Ed 688, 56 S.Ct 466 (1936) (Brandeis, J., Concurring), allows and encourages the Court to first resolve procedural issues, the Ashwander rule should inform the court's discretion in this regard. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition. Stewart v. Martinez-Villareal, at 644, 140 L.Ed 2nd 849, 118 S.Ct 1618. Cabello has demonstrated that jurists of reason could conclude that (a) the District Court was incorrect in its procedural ruling and (b) the petition states a valid claim to a denial of a constitutional right. See Also - U.S. v. Winkles, 795 F.3d 1134; 2015 U.S. App. Lexis 13364

In all circuits it is universally recognized that the District must undertake several core duties when it "learns of even the possibility of a conflict of interest." See U.S. v. Lussier, 71 F.3d 456, 461-62 (2nd cir 1995). The District Court "must inquire into the details of the attorney's interests to determine whether it's actual, potential, or nonexistant.

Typically, a District Court enjoys broad discretion in managing its docket and determing the Order in which a case may proceed. That discretion is limited, however; in circumstances where a party brings an attorney disqualification motion. Because a conflict of interest could affect the fairness and impartiality of the proceeding, or the perception of fairness, a plausable claim of conflict must be resolved before allegedly conflicted counsel or the court takes further action in the case.

The apellate court reviews orders disqualifying counsel for abuse of discretion. A district court abuses its discretion when it applies the incorrect legal standard or if its application of the correct legal standard was illogical, implausable, or without support from the facts on the record. Reversal is warranted when the district Court misperceives the law or does not consider relevant factors and thereby misapplies the law.

It is worth repeating that there was no motion for disqualification of counsel and there was no finding of disqualification, the government summarily disqualified Mr. Boyle and the court inexplicably delegated its duties regarding disqualification of Counsel of choice to the prosecutor, thereby permitting the government to arrogate to itself the authority to expel Mr. Boyle by government fiat. The government gave no notice or opportunity to be heard. The only notice Mr. Boyle received was in the character of an ultimatum; remove or face prosecution and forfeiture. See App. B pg. 6-7. The Court did not mispeceive the law, he applied no law.

The court did not consider relevant factors, the Court simply acquiesced to the government's wishes. The Court knew full well that a hearing must be held and the matter seriously investigated, and in fact promised to hold one, but had no intention of doing so. See App. B pg. 8-9.

All circuits agree that a hearing must be held. In United States v. Tatum, 943 F.2d 370, 379 (4th cir. 1991). The fourth circuit held that when a potential conflict of interest "is brought to the attention of the trial court... the court has a responsibility to investigate further. But here, the district court seriously considered and took the necessary steps to resolve the ethics and fairness concerns" involved. When the court became aware that Nicholson had a potential conflict of interest, it investigated the matter.

In Freeman v. Chicago Musical Instrument Co. 689, F.2d 715, 719 (7th cir. 1982). Disqualifying a lawyer, the court held, "has immediate, severe, and often irreparable consequences" for the party and disqualified attorney. Disqualifying a lawyer deprives the losing party from the "representation of his choice" and disrupts the litigation. Disqualification is a drastic measure which courts should hesitate to impose except when absolutely necessary... [because it] destroy[s] a relationship by depriving a party of representation of their own choosing. Id at 721.

The 5th Circuit has held that courts must be wary that a motion to disqualify is not being used as a "procedural weapon" to advance purely tactical purposes. In RE: American Airlines Inc. 972 F.2d 605, 611, (5th cir. 1992). Thus it is "required" that a court engage in a "painstaking" analysis of the facts and precise application of precedents" when determining whether disqualification is the appropriate remedy. Acad. of Allergy & Asthma, 384, F Supp 3d at 653 (Ed. La 2018) (quoting Brennans Inc v. Brennans Restaurants, inc. 590 F.2d 168, 174 (5th cir. 1979).

In Grimes v. D.C., 794, F.3d 83; 417 US D.C. 2015, the D.C. Court the court held that because a claim of counsel's conflict of interest calls into question the integrity in which the allegedly conflicted counsel Participates, a court should resolve a motion to disqualify before it turns to the merits of any dispositive motion. Again there was no motion, Only a government allegation and the summary disqualification.

Of course, Supreme Court case law has ruled on the application of the prospective notice rule announced and exemplified by Halloway and Confirmed in Cuyler and Wood, Supra. The Ninth Circuit Order is in conflict with all circuits and Supreme Court case law. Perplexedly the Ninth Circuit court of Appeals is in conflict with itself, and makes it difficult to attain comprehension as to why this is so.

Binding court precedent must be applied precisely. Only an en banc court or the Supreme Court can overule binding court precedent. District Courts do not have the authority to ignore binding Court precedent. The circuit Court's order violates clearly established law: "Ninth Circuit [2014 U.S. App. LEXIS 20] law does not permit a summary disqualification of counsel; for the court to disqualify an attorney, procedural due process requires notice and an opportunity to be heard." Cole, 366 F.3d at 821 (Citing. Pac. Harbor Capital, Inc. v Carnival Air Lines, Inc., 210 F.3d 1112, 1118 (9th cir 2000)). Cf. Masters v. Thomann, 273, F.3d 159, 175 (2d cir. 2001). The district court clearly erred by summarily disqualifying Mr. Boyle without giving notice and an opportunity to be heard. The Ninth Circuit Court of Appeals erred in ignoring binding circuit court precedent. See Also Tillman, supra See App. A pg. 1. In U.S. v. Williams, Et AL. 68, F. 4; 2023 The Ninth Circuit held that the improper disqualification of a defense Counsel is redressable on appeal. There is no reason why his right to counsel of choice cannot be vindicated on appeal. Everything about this matter is contrary to Ninth Circuit precedent, sister courts' precedent, and Supreme Court precedent. If a defendant is denied counsel of choice without cause, the resulting trial is always a fundamentally unfair one. Gideon v. Wainwright, 372 US 335, 9 L. Ed 2d, 799 (1963) a sweeping

Watershed rule.

60(b)(4)

Honarble Judge Michael Mossman avoided the constitutional question by summarily denying Cabello's petition on procedural grounds, on the very day that the petition arrived in the clerk's office and may have gone unread. The court did not reach the underlying federal constitutional claims. Accordingly, Cabello is entitled to a COA under the appeal provisions of the (AEDPA)(28 USCS § 2253(c) as he has demonstrated throughout the petition that jurists of reason would find it debatable both whether the petition states a valid claim of denial of a constitutional right and whether the District Court was correct in its procedural ruling. Just on its face the court was wrong on its procedural ruling. See App. A pg. 2. Jurists of reason would find that the petition is richly supplied with constitutional claims that are eminently debatable.

The petition arrived at the District Court of Oregon on January 18, 2023 and was denied on procedural grounds. Working at a snails pace, the District Court granted leave to appeal in Forma Pauperis on 3/9/23 almost two months later. See App. A pg. 3. On March 16, 2023, the Appellate Commissioner, Ms. Lisa B. Fitzgerald filed an Order, remanding the case to the district court for the limited purpose of granting or denying a COA at the court's earliest convenience. See 28 USC § 2253(c); Fed. R. App. P. 22(b); U.S. v Asrar, 116 F.3d 1268, 1270 (9th cir. 1997). The district Court ignored the order and did not comply with the Appellate Commissioner's order. After languishing for 10 months, the Ninth Circuit denied the petition on October 25, 2023. As stated earlier the denial was incorrect. See App. A pg. 4-5 Also see App. A pg. 1.

STATEMENT OF CLAIM

As spelled-out throughout this motion, the too apparent threat in Ms. Faye's December 13, 2010 letter from the outset chilled Cabello's Sixth Amendment rights. The matter was then compounded by not making an inquiry into the substance of the issue as mandated by Ninth Circuit Law and Supreme Court case law, thereby chilling Cabello's fifth amendment right to due process. See App. B pg. 6-7. Why the court failed to execute its duty to hold a hearing is not known. The Court promised to hold a hearing and then did not; perhaps out of concern that Mr. Boyle would confirm what Cabello represented to the court many times, that he had been threatened and coerced off the case. We will never know as no reliability can be accorded to a hearing that was never held. No argument can be made that Cabello received anything resembling due process or even basic fairness. This Honarable Court has the power to correct this failure in the administration of justice. The fifth and Sixth amendment violations are in plain sight. This Court will spot them at a glance.

SUMMARY

1) Jurisdiction and due process are two seperate bases for applying Fed. R. Civ. P. 60(b)(4). Rule 60(b)(4) applies only in the rare instance where a judgement is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard. The instant case satisfies the two bases copiously.

2) What we have here is a "complete" denial of Counsel, that is when Counsel [is] totally absent, or is prevented from assisting the accused during critical stages of the proceedings. id at 659 and n 25, 104, S.ct. L.Ed 2d 657 U.S v Cronic. Also see Gideon v. Wainwright, supra.

REASONS FOR GRANTING

1) Plain and clear violation of the Fifth Amendment.
2) Plain and clear Violation of the Sixth Amendment.
3) The Ninth Circuit Court of Appeals has entered a decision in conflict with all United States Courts of Appeal, in conflict with its own binding court precedent, and finally Supreme Court case law and precedent. In so doing, has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by a lower court, as to call for this Court's supervisory power. This is an opportunity for the Supreme Court to communicate to the Oregon District Court and the Ninth Circuit Court of Appeals that Supreme Court case law and Supreme Court precedent must be followed. The court "will not pass on a constitutional issue". The Ninth Circuit has decided an importa federal question in a way that conflicts with relevant decisions of this Court. See Supreme Court Rule 10(a)(c).
4) Under Buck v. Davis, supra, The Supreme Court Clarified the standard for a COA. At the first stage, the only question is whether the applicant has shown that, jurists of reason could disagree with the court's resolution of his constitutional Claims, or if a jurist of reason could conclude the issues are adequate to deserve encouragement to proceed further. See Miller-El v. Cockrell, 527, US 322, 327, 123 S. Ct. 1029.

The issues presented by Cabello are eminently debatable and reasons abound for a jurist of reason to concluded that the issues are adequate to deserve encouragement to proceed further

RELIEF SOUGHT

Structural error is clear especially as the trial court was on full notice of a prospective potential conflict, this case calls for nothing more than the application of the prospective notice rule announced and exemplified by Halloway and confirmed in Cuyler and Wood, supra. The remedy for the courts dereliction of duty should be an order vacating the conviction and dismissing the underlying indictment returning Cabello to Status Quo Ante, i.e., the position he would have occupied absent the goverment's questionable conduct, or in the alternative remand to the Ninth Circuit Court of Appeals with instrutions to grant a COA and give the instant case a full review, there is much here that merits review.

CONCLUSION

In light of the fact that there is a sufficiency of Supreme Court case law and Ninth Circuit case law on violations of defendants rights under the fifth and sixth amendments, and in light of the district courts vast departure from the accepted and usual course of judicial proceedings, This Honorable Court should grant this motion.

Under Haines v. Kerner, 404, US 519, 520, 92 S.Ct. (1972) Cabello's pro se petition is to be "liberally construed" and "must be held to less stringent standards than formal pleadings drafted by lawyers."

Finally, I pray that this court will [look] beyond the forms and inquire into the very substance of the matter and the very violations of Cabello's Substantial rights as required by Johnson, supra.

Respectfully submitted,

Dated: ~~December 4, 2023~~
January 8, 2024

[signature]
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