

1 MR. BOYAJIAN: Well, we did some depositions in this
2 case.

3 MR. HERZOG: It is one thing to use depositions,
4 Your Honor.

5 THE COURT: Here's the point, Mr. Boyajian. We are
6 in the middle of this trial. These are contingencies which
7 you should have planned for earlier, and you did not. We
8 have been at this for a year-and-a-half of you representing
9 yourself, and you have -- we just cannot have a shifting set
10 of requests based on what the Cambodian government decides or
11 what the Department of State decides. We're gonna -- if you
12 have -- I really thought you had submitted all the witnesses
13 that you wanted to bring, and I don't know why we're adding
14 more at this stage.

15 MR. BOYAJIAN: At one point, we gave a list of
16 witnesses and then some other witnesses, and then they were
17 just universally cancelled.

18 Mr. Joel, why don't you -- maybe you can speak on
19 that. What happened. It's easier.

20 MR. HERZOG: Your Honor?

21 Is this the time for this, Your Honor?

22 MR. BOYAJIAN: They're blocking us. We're trying
23 to talk about my right to a defense. I mean --

24 THE COURT: I think --

25 MR. BOYAJIAN: Your Honor has cancelled our

1 witnesses, and then you said give proffers. We tried to get
2 together to give proffers on those clerks. Two of them have
3 been denied, two of our important witnesses. We're asking if
4 there could be some other arrangements given that situation
5 that they want to come. There are people in the prison we
6 need to have --

7 THE COURT: I think you'd better check the facts.
8 There is no one in a prison that I'm going to get out of
9 prison.

10 MR. BOYAJIAN: We don't want them to get out. We
11 just wanted to have some kind of deposition or video
12 testimony.

13 THE COURT: No. It's too late for depositions.
14 It's just too late. I've made it clear for I don't know how
15 long that I cannot get people out of prison. I cannot tell
16 the Cambodian government what to do.

17 MR. BOYAJIAN: Well, there's other witnesses. You
18 know, the point is that there should be some arrangement.
19 The Public Defender's Office had made an arrangement. There
20 were gonna have somebody live on the ground during the trial
21 to have live video testimony. Now, I don't understand --

22 THE COURT: I don't care what they did. The
23 problem --

24 MR. BOYAJIAN: They were planning on that.
25 Now you're saying that they were completely wrong?

1 THE COURT: I'm saying that you terminated their
2 services, and you undertook the representation yourself, and
3 now you're stuck with your own representation.

4 MR. BOYAJIAN: Oh, but they were on the eve of
5 trial when their representation was terminated. They were
6 having -- going to send Mr. Goff on the ground and have many
7 witnesses, live video.

8 THE COURT: Well, that may have been what they were
9 going to do, but that doesn't mean that we would have heard
10 that testimony that way in trial because no one ever advised
11 this Court that they were going to do that. So I'm fearful
12 that even if they had that plan, and you did not execute that
13 plan, they could not have testified.

14 MR. HERZOG: Either way, Your Honor, we are where
15 we are. The defendant terminated representation with the
16 PD's office. This is where we are which is a couple of days
17 away from the government resting.

18 Your Honor, on that point, after the government
19 rests, are we going to have some type of hearing over
20 subpoenas to the extent to which the defense is going to be
21 allowed to call people here? Because I think given the
22 breadth of the defendant's view of the subpoena power, there
23 are an awful lot of people that I think if the Court will
24 have a hearing on that, we can limit what the proper scope of
25 the defense case should be.

1 THE COURT: I think we're going to have to with
2 certain people who have been subpoenaed from the prior case
3 and things like that.

4 MR. HERZOG: Exactly, Your Honor.

5 THE COURT: Because I do not think -- if the
6 government presents the evidence as it indicated it would,
7 there's no reason for them to come.

8 MR. HERZOG: That's our position, Your Honor.

9 And we just want to be clear that with the Court in
10 terms of scheduling that if the government anticipates at
11 this point resting next witness or Thursday like we
12 anticipate, then the next thing I think that has to happen is
13 to address those outstanding issues.

14 THE COURT: I agree with that.

15 MR. HERZOG: Thank you, Your Honor. We'll see you
16 at 9:30.

17 THE COURT: Thank you.

18 MR. BOYAJIAN: Your Honor, one thing of where this
19 is going, I think that it's important. Even Mr. Buehler
20 believed that we had a list of thirteen witnesses, and we're
21 trying to find that right now.

22 THE COURT: Mr. Wyenn is gonna come back and tell
23 us where we are. I believe you are correct that I denied
24 funding for witnesses on CJA grounds, and then I learned that
25 I was incorrect, that the marshals had the funds, and I have

1 reauthorized several of the witnesses. And so if they can
2 get here, there's money to bring them here. If they can't
3 get here, I'm afraid you're cut of luck.

4 MR. BOYAJIAN: But are they -- are they
5 reauthorized? Because my understanding and on my defense
6 team, their understanding is nobody's been authorized after
7 the cancellation.

8 THE COURT: Mr. Boyajian, why don't you work with
9 your defense team and come back tomorrow and tell us.

10 MR. BOYAJIAN: Okay, okay. Will you find out about
11 that?

12 MR. HERZOG: Thank you, Your Honor. Good night.

13 THE COURT: Thank you. Good night.

14 THE CLERK: Court is adjourned.

15 MR. BOYAJIAN: Thank you, Your Honor.

16 (Proceedings were concluded at 5:28 p.m.)
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CERTIFICATE OF REPORTER

COUNTY OF LOS ANGELES)
) SS.
STATE OF CALIFORNIA)

I, LAURA ELIAS, OFFICIAL REPORTER, IN AND FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT I REPORTED, STENOGRAPHICALLY, THE FOREGOING PROCEEDINGS AT THE TIME AND PLACE HEREINBEFORE SET FORTH; THAT THE SAME WAS THEREAFTER REDUCED TO TYPEWRITTEN FORM BY MEANS OF COMPUTER-AIDED TRANSCRIPTION; AND I DO FURTHER CERTIFY THAT THIS IS A TRUE AND CORRECT TRANSCRIPTION OF MY STENOGRAPHIC NOTES.

DATE: FEBRUARY 18, 2016

/s/ LAURA MILLER ELIAS

LAURA MILLER ELIAS, CSR 10019
FEDERAL OFFICIAL COURT REPORTER

Via hand delivery

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

July 21, 2023

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

JUL 25 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

FILED _____
DOCKETED _____ DATE _____ INITIAL _____

Subject: case 16-50327: Request the Court file and act on Motion for Disqualification of Circuit Judges Ryan Nelson and Andrew Hurwitz With Request Motion Be Referred To Another Panel and for Stay of the Briefing Schedule and of the Issuance of the Mandate

Dear Ms. Dwyer,

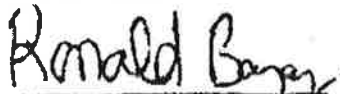
I am the Appellant in criminal appeal case no. 16-50327. Although the Court has assigned counsel for my appeal case, this counsel of record attorney Karen Landau delivered notice to me on July 10 in a letter dated July 2, indicating that counsel is not providing attorney services in my appeal case before this Court. Therefore, I am, in actual fact, unrepresented before this Court.

Given that I am, in fact, unrepresented the Court should file and act on my pro se submissions. Please file and arrange for the Court to act on the enclosed Motion:

- 1. Motion for Disqualification of Circuit Judges Ryan Nelson and Andrew Hurwitz With Request Motion Be Referred To Another Panel; Motion for Stay of the Briefing Schedule and for Stay of the Issuance of the Mandate.*

Please provide me a conformed copy of the Motion upon filing.

Cordially,



Ronald Boyajian,
Appellant

No. 16-50327

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

JUL 25 2023

		FILED _____	_____
		DOCKETED _____	_____
			DATE INITIAL
	) C.A. No. 16-50327		
	) D.C. No. CR 09-933-CAS		
UNITED STATES OF AMERICA,	) (Central Dist. Cal.)		
)		
Plaintiff-Appellee,	) APPELLANT RONALD BOYAJIAN'S		
	) MOTION FOR DISQUALIFICATION		
v.	) OF CIRCUIT JUDGES RYAN		
	) NELSON AND ANDREW HURWITZ		
RONALD GERARD BOYAJIAN,	) WITH REQUEST MOTION BE		
	) REFERRED TO ANOTHER PANEL;		
Defendant-Appellant.	) EMERGENCY MOTION FOR STAY		
	) OF PROCEEDINGS INCLUDING		
	) STAY OF BRIEFING SCHEDULE		
	) AND ISSUANCE OF THE MANDATE		
)		

EMERGENCY MOTION

STAY RELIEF NEEDED BY JULY 24

Ronald Boyajian, defendant-appellant, appearing in pro per and who is, in fact, currently unrepresented on appeal,¹ moves for disqualification of two circuit judges: the Honorable Ryan Nelson and the Honorable Andrew Hurwitz, with request this motion be referred to another panel and, relatedly, for stay of

¹ See Mr. Boyajian's concurrently submitted *Motion For Appointment Of Counsel Due to Abandonment of Assigned Counsel and for Stay of Proceedings...*

proceedings including stay of briefing and issuance of the mandate.

This motion is brought under 28 U. S. C. § 455(a) “Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”

Mr. Boyajian has filed his only appeal of right for review in this Court. The appeal has been pending over seven years. Before that filing, for seven years, there were intensively litigated criminal proceedings involving undersigned Boyajian in the district court. Because of this combination of trial and appellate court proceedings, undersigned has been ‘detained’—incarcerated under highly restrictive conditions—for fourteen years.

On May 10, undersigned’s appeal was heard before Judge Nelson and Judge Hurwitz, while the third assigned panelist, Judge Kleinfeld, was not present and not participating. On June 9, the judges Nelson and Hurwitz invoked quorum status to take jurisdiction to exercise the judicial power in order to issue their unpublished Memorandum Disposition affirming judgment below, Dkt. 222-1.

The title page of their decision shows Judges Nelson and Hurwitz invoking quorum status in reliance on Ninth Circuit General Order 3.2((h) which General Order concerns a judge who, *after* the submission of the case, becomes deceased disabled, recused, or retired. As discussed in the Offer of Proof section below, Judge Kleinfeld is provably not deceased disabled, recused, or retired.

Consequently, there is a DUE PROCESS violation-and an appearance of impropriety given the nature of the error—unlawfully invoking the quorum status in violation of the circuit general order. Furthermore, the Supreme Court has admonished this Court not to deprive parties the statutory, properly constituted three judge panel in the first instance, as a due process violation requiring vacating the disposition and hearing the appeal anew before a statutory, properly constituted panel. See *Nguyen v. United States*, (2003).

The Supreme Court is clear in *Nguyen*, and in *Yovino v Rizo*, (2019) that a missing judge before the case is submitted, i.e., *before* oral argument, is substituted with another judge whereas a quorum may apply only if a judge dies or resigns *after* case submission.

Having been refused by counsel to speak about this and also been refused by counsel any written discussion in reply to his letters of May 26 and May 27 requesting attorney action on this score and others (letters attached as exhibit in Dkt. ___), Mr. Boyajian on June 15 tendered a pro se letter addressed to the Chief Judge and same addressed to the Circuit Executive alerting each to the procedural violation with clear prejudice to his case. Through these letters, Mr. Boyajian requested the Chief Judge and Circuit Executive to conduct an investigation over the apparent, improper exclusion of Judge Kleinfeld from his merits panel, Dkt. 227.

The impropriety here involves, and stems from the circumstances under which Mr. Boyajian has been deprived a statutory, properly constituted panel in the first instance. Here, Judge Nelson and Judge Hurwitz were aware that Judge Kleinfeld is absent, and would be absent, yet they failed to accommodate a few days delay or postponement of the hearing to allow Judge Kleinfeld's presence and participation at the oral argument. There is also appointed counsel's failure, as with the government, to request postponement of undersigned's hearing until either Judge Kleinfeld or a substitute judge could be present. Compounding the difficulties for the undersigned, neither counsel nor the government immediately objected to the decision by 'quorum'.

Judge Nelson and Judge Hurwitz erroneous invocation of quorum power after denial of due process at the oral argument proceeding without a three-judge panel contrary to statute and in disregard of the Supreme Court's admonishment of this Court in Nguyen, Id. is made credibly suspect when further considered in light of Judge Kleinfeld's vital importance in this particular appeal.

First, it is public knowledge, verifiable from the Court website archived records, that Judge Kleinfeld had neither died nor resigned as these two judges averred in the quorum Memorandum Disposition Second, there was no basis under the Court's procedural rules for the *de facto* removal of the judge to have occurred while he was and is judicially active in other cases, including active in other cases adjudicated by this very same panel.

Disqualification of Judge Nelson and Judge Hurwitz warranted for the

appearance of and / or reasonable inference of cognizable misconduct.

The appearance of impropriety here arises from two judges acting in concert to circumvent principles fundamental to the operation and organization of the judiciary when they erroneously invoked a Ninth Circuit General order, the net effect of which was to improperly remove Judge Kleinfeld from the panel considering undersigned's case. Specifically, the impropriety arises from the appearance that Judge Nelson and Judge Hurwitz manipulated the electoral composition of the panel in a manner impacting the outcome. See *Yovino v Rizo*, (2019)

To accomplish this, they alleged via invocation of Ninth Circuit General Order 3.2(h) that fellow panelist Judge Andrew Kleinfeld became "deceased, disabled, recused or retired" *after* the case was submitted at the conclusion of oral argument on May 10, see Memorandum Disposition Dkt. 222-1. These are not the facts. The facts do not support a quorum. (see Offer Of Proof section below).

It cannot be explained as other than plainly intentional to exclude a judge whose participation would have posed a barrier to their at-all-costs objective: affirmance. Certainly, knowing violation of statute 46(b) , whereby exclusion of Judge Kleinfeld from the panel had the effect of excluding from the panel a Judge who had written the majority opinion in *Pepe* which is favorable to Mr. Boyajian's strongest claim and which holding binds this panel to unconditionally vacate the

conviction on the principal charge under 18 U.S.C. 2423(c). Such judicial conduct lends the appearance of unfairness, and undermines confidence in the outcome, for an unexplained and unjustified apparent exclusion of a Judge otherwise available to participate in the panel decision to be inexplicably and unjustifiably removed. The mindset that engaged in this conduct, suggests implicit if not explicit antagonism toward Mr. Boyajian with a *de facto* life sentence at stake which makes fair judgment impossible, see *Liteky v. United States*, 510 U.S. 540, 555 (1994). At the very least, it provides a basis to question their impartiality, that by excluding a panel member who had issued a favorable opinion binding the panel, then immediately thereafter issue an unpublished affirmance directly contrary to that binding authority.

Despite the Supreme Court admonishment of this Court in *Nguyen v. United States*, 539 U.S. 69 (2003) and more recently in *Yovino v. Rizo*, 139 S. Ct. 706 (2019), here an improperly constituted two-judge panel heard oral argument on May 10 and then on June 9 invoked quorum status to exercise the judicial power. By engineering an unlawfully invoked quorum, Judge Nelson and Judge Hurwitz deprived the participation of the third panel member Judge Kleinfeld. The Supreme Court forbade the Ninth Circuit from electoral manipulation impactful of outcome: “This justification is inconsistent with well established judiciary practice, federal statutory law, and judicial precedent...What the Ninth Circuit did here was

unlawful.” *Yovino*, 708. The statutory authority of courts of appeals to sit in panels 28 U.S.C. § 46(b), requires three judges in the first instance.

Offer of proof

A. FACT -- Judge Kleinfeld is not deceased, disabled, recused, or retired.

Records archived on the Ninth Circuit public website show Judge Kleinfeld signing several Memorandum Dispositions throughout May, June and July of 2023.

B. FACT -- Judge Kleinfeld became unavailable *before* case was submitted.

Records archived on the Ninth Circuit website show Judge Kleinfeld was absent from all hearings (oral arguments) on May 8, fully two days *preceding* his absence from Applicant’s May 10 oral argument.

When, as here, *prior* to the submission of a case, an assigned merits panel judge cannot fulfill their obligations, the court substitutes another judge to reconstitute the three-judge panel. The court did not provide a substitute judge. By all measures, this two-judge quorum was unlawfully constituted. *Nguyen*, Id.

Discussion

In *Liteky*, 557-8, Justice Kennedy, with whom Justice Blackmun, Justice Stevens, and Justice Souter Joined, Concurred In The Judgment Writing:

For present purposes, it should suffice to say that § 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings. I think all would agree that a high threshold is required to satisfy this standard. Thus, under § 455(a), a

judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

Mr. Boyajian asserts that the alleged conduct of two merits panel judges knowingly bringing about the predictable and apparently explicitly intended exclusion of the one panel judge vital to the appeal (i.e., whose holding in *Pepe* precludes affirmance), provides this party—defendant-appellant Mr. Boyajian-- as with the public, “to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings.”

Conclusion

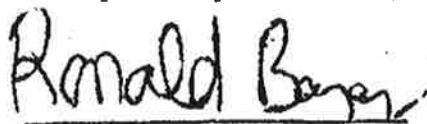
Mr. Boyajian, who is incarcerated under maximal restrictive conditions, has asked the judicial authority for investigation, Meanwhile, case dispositive or impactful motions are ongoing, several being brought in recent days. Mr. Boyajian is just informed on the undersigned date that the Court is sending these motions to the same involved quorum judges. It is crucial, that in Mr. Boyajian's *de facto* life sentence case, the specter (or actuality) of any degree of impropriety be eliminated. However, to his knowledge no action has been taken to investigate the matter as Mr. Boyajian has earlier requested of the Chief Judge and the Circuit Executive.

Mr. Boyajian, being in fact unrepresented, has no lawyer to work on this. Because he is not represented, he is moving pro se for disqualification of the involved judges, Judge Nelson and Judge Hurwitz from any further involvement in

his case. He requests an emergency stay of proceedings with stay of briefing schedule and stay of issuance of the mandate so that his appellate rights do not expire or extinguish pending resolution of this motion.

Dated: July 21, 2023

Respectfully submitted,

A handwritten signature in black ink that reads "Ronald Boyajian". The signature is written in a cursive style and is positioned above a horizontal line.

Ronald Boyajian

Defendant- Appellant, in pro per

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

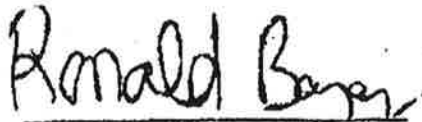
Case Name: United States v. Ronald Boyajian

I certify that I served on the person(s) listed below, either by mail or hand delivery, a copy of the **Appellant Ronald Boyajian's Motion For Disqualification Of Circuit Judges Ryan Nelson And Andrew Hurwitz With Request Motion Be Referred To Another Panel, Emergency Motion For Stay Of Proceedings Including Stay Of Briefing Schedule And Issuance Of The Mandate**, 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: July 21, 2023



Ronald G. Boyajian
Appellant