



# A Just Cause

The defendants (David A. Banks, David A. Zirpolo, Clinton A. Stewart, Kendrick Barnes and Demetrius Harper), by and through justice advocacy organization A Just Cause, hereby petition the judicial council for review of judicial complaint nos. 10-16-90010 through 10-16-90013 against district court Judge Christine M. Arguello and circuit judges Bobby Baldock, Harris Hartz and Jerome Holmes and provide reasons for our petition below, which includes additional case law.

Chief Judge Tymkovich asserts in his response dismissing our judicial complaint that the allegations are "conclusory in nature" and "without sufficient evidence to raise an inference that misconduct has occurred." Chief Judge Tymkovich not only ignored the evidence of the judges disregarding and showing a willful indifference to prevailing law, but fails in totality to provide any detailed analysis or specificity whatsoever outside of general pronouncements of the Rules for Judicial Conduct and Judicial Disability Act (JCD). The complaint addresses the motivation and bias of the judges to support and join with the prosecutor in not only disregarding prevailing law but forfeiting their judicial independence in favor of using spurious suggestions provided by the prosecutor in support of rulings against the defendants. Judge Tymkovich's limited response shows he arbitrarily disregarded these issues and did not give proper consideration. Judge Tymkovich's response gives the impression he was indifferent and played coy with allegations of subversion of the law by the subject judges, characterizing them as merits-related and not cognizable as misconduct.

When judges show bias against defendants by disregarding prevailing law and using a prosecutor's specific phrase of conjecture in their opinions to justify their willful indifference to the law, they are subverting, perverting and undermining the law for illicit purposes. According to Rule 3 Commentary of the JCD "such an allegation attacks the propriety of arriving at a ruling with an illicit or improper motive" and is not merits-related.

It is inarguable that judges are legally and ethically bound to independently follow the law. It is also inarguable that disregarding prevailing law is considered misconduct. See *In re: Complaint of Judicial Misconduct*, 517 F.3d 558, 561 (9th Cir. 2008) (Finding that cognizable misconduct exists when there is "clear and convincing evidence of an arbitrary and intentional departure from, or willful indifference to prevailing law.")

Our complaint presented clear and convincing evidence that judges Arguello, Baldock, Hartz and Holmes intentionally departed from and showed a willful indifference to prevailing law, then attempted to hide their improprieties by using conjecture manufactured by AUSA Kirsch in an attempt to cure gross statutory and constitutional violations that occurred during trial. The violations of law in question relate to Rule 16 of the Federal Rules of Criminal Procedure and judicial coercion. We ask more specific questions and have provided additional case law to provide a narrower focus on the issues.

## **Rule 16**

1) Is it not the law, according to Rule 16 and 10th Circuit precedent from U.S. v. Nacchio, 555 F.3d 1234 (10th Cir. 2009) (en banc), that "a defendant is not required to file a Rule 16 disclosure unless the defendant has made a similar request of the government and the government has complied?"

2) Did not congressional judiciary committees, in the Notes of the Advisory Committee on the 1997 Amendments for Rule 16, state: "pretrial disclosure of information, including names and expected testimony of both defense and government...are triggered by defense requests for information. If the defense makes such request and the government complies, the government is [then] entitled to similar, reciprocal discovery."?

If this is indeed the law, did not AUSA Kirsch misrepresent Rule 16 when he said the defense was required to provide the government with expert summaries in the absence of the defendants ever triggering the request for expert information?

Trial records are void of any requests by the defendants and on Day 11 of trial, Judge Arguello confirmed this was the case, stating: "the government has tendered no expert witnesses." However, trial records and the appellate opinion are abundantly clear that Judge Christine M. Arguello issued a discovery sanction against the defendants and excluded key defense expert witnesses Andrew Albarelle and Kelli Baucom based on Kirsch's false arguments that he was entitled to the expert summaries under Rule 16. Like Judge Arguello, Judges Baldock, Hartz and Holmes disregarded prevailing law and made the exact same false pronouncements about Rule 16 and justified Judge Arguello's improper exclusion of the experts, stating she did not abuse her discretion when she ignored prevailing law.

Based on these facts, irrefutable evidence from trial transcripts and the unambiguous law, it is undisputed that Judges Arguello, Baldock, Hartz and Holmes were biased in their rulings by siding with AUSA Kirsch when they intentionally disregarded and showed a willful indifference to the Rule 16 statute, 10th Circuit precedent established in Nacchio and the constitutional rights of the defendants. Their judicial misconduct prejudiced the defendants by depriving them of their 6th Amendment right to present witnesses in their favor, denied them their 5th Amendment right to a fair trial and resulted in them being wrongly-convicted and imprisoned for past 4 years.

## **Judicial Coercion & Missing Transcript**

On Day 11 of trial the defendants alleged that Judge Arguello compelled them to testify during a sidebar which Judge Arguello denies. The defendants' allegations were made contemporaneously and are memorialized in the appellate record in accordance with Rule 10(c) of the Federal Rules of Appellate Procedure. The ONLY way the dispute of what was said at the sidebar can be resolved is by viewing the transcript but the transcript is missing.

The prevailing law of the 10th Circuit and Supreme Court makes it clear that it is impermissible for judges to attempt to resolve prejudicial misconduct by a prosecutor or judge without a verbatim transcript. However, Judge's Arguello, Baldock, Hartz and Holmes, in disregarding prevailing law, concluded that the defendants voluntarily took the stand based solely on conjecture of AUSA Kirsch. In our original complaint we cited well-settled law that governs what appellate judges should do in the

event there are allegations of prejudicial misconduct by a judge at trial and the transcript is unavailable to determine what actually occurred. We ask the judicial council to consider the following questions:

Is it not the law of the 10th Circuit in *U.S. v. Haber*, 251 F.3d 881, 889 (10th Cir. 2001) that "when the availability of the transcript makes it impossible for the appellate court to determine whether or not prejudicial error was committed with regard to the challenged action" of Judge Arguello compelling the defendants to testify against their will that the conviction must be reversed?

Is it not the law of the U.S. Supreme Court established in the case of *Estelle v. Smith*, 451 U.S. 454, 463 (1981) that "any effort by the State to compel [the defendant] to testify against his will...clearly would contravene his Fifth Amendment"?

Is it not the law of the U.S. Supreme Court established in the case of *Mayer v. Chicago*, 404 U.S. 189 (1971) that claims of prejudicial misconduct by court officials cannot be "fairly judged" without a "verbatim transcript"?

Baldock, Hartz and Holmes disregarded prevailing law and concocted a conclusion that the defendants voluntarily testified based on self-serving conjecture by Kirsch they found in the transcripts. Transcripts show that after the defendants succumbed to Judge Arguello's threats, took the stand against their will and complained about being coerced, AUSA Kirsch suggested that the defendants could have called FBI Agent John Smith to the witness stand instead of testifying. Judge's Arguello, Baldock, Hartz and Holmes joined together and used Kirsch's conjecture to support a biased conclusion in their rulings and opinions that the defendants were not compelled to testify, but voluntarily took the stand. Baldock, Hartz and Holmes' violated a cardinal rule of appellate practice.

"It is a cardinal rule of appellate practice that the facts are those found in the record and not those found in the minds of the attorneys." *United States v. Sigal*, 341 F.2d 837, 850 (3rd. Cir. 1965).

The Supreme Court spoke about appellate courts using conjecture in opinions. "As a reviewing court, we have a major obligation to guard against reading into the printed record purely conjectural concepts." *Haley v. Ohio* 332 U.S. 596, 619 (1947) (Justice Burton dissenting, Chief Justice Reed and Justice Jackson concurring), "... [a] transcript...cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing, and attitude of the petitioner...a printed record cannot reveal inflections and gestures, the tenor of a judge's conduct of trial-matters..." *Fisher v. Pace*, 336 U.S. 155 (1949)

"It is difficult enough in normal circumstances to appraise the propriety of the trial court's various actions on the basis of a cold printed record; when that record is replaced by the incomplete hearsay recollections of one of the parties, our review is turned into an exercise in creative imagination." *United States v. Workcuff*, 422 F.2d 700 (DC. Cir. 1970).

It is abundantly clear from the numerous cases mentioned herein why the Supreme Court said in *Mayer* that claims of prejudicial misconduct cannot be fairly judged without the a verbatim transcript. Judges Baldock, Hartz and Holmes, without that transcript, disregarded the law and turned review of this case into an exercise in creative imagination. They broke a cardinal rule of appellate practice by relying on what was in the mind of AUSA Kirsch and used his conjecture as their sole basis for ruling against the defendants in their opinion. The judges had no clue what was in the mind of Judge Arguello or knew what her intentions were when she compelled the defendants to testify and neither did AUSA Kirsch. Judge Arguello and this appellate panel's assertion that the defendants voluntarily testified "is purely the invention of the court's opinion, unsupported by anything except its powers, if any, to indulge in presumptions...the omniscience of this court is truly amazing." *Brown v. United States*, 520 F.2d 1106 (DC. Cir. 1975)

We suspect that Judge Tymkovich and any judge in the 10th Circuit may harbor bias against these defendants and our organization due to scathing public criticism on the Internet via blogs and press releases about these judges and the 10th Circuit as a judicial body. The judicial complaint was published online by the Denver Post and has been seen on a local talk radio website. Pursuant to Rule 26 of the JCD, we are requesting that this appeal be transferred to a judicial council in another circuit. According to the Commentary on Rule 26, "such transfers may be appropriate where the issues are highly-visible and local disposition may weaken public confidence in the process or where a complaint calls into question policies or governance of the home court of appeals."

Former federal appeals judge H. Lee Sarokin reviewed the trial transcripts after being contacted by A Just Cause. Sarokin concluded that the uncontested facts in the record related to the allegations of compulsion and missing transcript are so telling that it reveals that the defendants' Fifth Amendment rights were violated without the missing transcript. Sarokin wrote the following in the Huffington Post:

"With all of this uncontroverted evidence, the Court of Appeals certainly has enough evidence to conclude that the right against self-incrimination indeed was, violated by the trial court; the defendants reasonably believed that at least one of them was required to testify in order to have the defense remain open; and that they succumbed to that threat, and immediately voiced their objections. Lacking any competent evidence to rebut those claims of constitutional violations, the claim of the defendants must be recognized as valid --- even without the missing entry in the transcript."

If the transcript shows the defendants 5th Amendment rights were indeed violated, it substantiates that the judges, with malicious intent, disregarded prevailing law and the Constitution to rule against the defendants to protect Judge Arguello and benefit the government. This is gross judicial misconduct.

Based on the aforementioned we submit this appeal.