A Just Cause

August 15, 2016

The Honorable John G. Roberts Jr.
Chief Justice of the United States
Supreme Court of the United States
Washington, DC 20543

Subj: 10th Circuit Judicial Complaints (nos. 10-16-90010 to 10-19-90013)

Dear Chief Justice Roberts:

We are currently appealing a judicial complaint to the 10th Circuit judicial council after the chief judge dismissed the complaint, concluding it was "without sufficient evidence to raise an inference that misconduct has occurred." That conclusion defies reality. The trial record clearly shows not just clear and convincing evidence but irrefutable evidence, that the subject judges, 1) disregarded the plain, unambiguous meaning of Rule 16 of the Federal Rules of Criminal Procedure, and 2) disregarded the prevailing law of the Supreme Court and 10th Circuit, 3) used prosecutorial conjecture in the place of actual facts from the printed record to issue biased rulings against the defendants, and 4) were willfully indifferent and disregarded violations of the defendants' 5th and 6th Amendment rights.

Given the chief judge's disingenuous conclusions, we believe there is a high probability that he and many other judges in the 10th Circuit may harbor a deep-rooted bias against the defendants and our organization based on scathing public criticism of the subject judges and the 10th Circuit as a judicial body. We therefore, in accordance with Rule 26 of the Judicial Conduct and Judicial Disability Act (JCD), request that our appeal be transferred to a judicial council in another circuit. Rule 26 provides that "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." The original judicial complaint was featured in the online Denver Post newspaper and posted on a popular local talk radio website. An article about the case was recently published in the Washington Post which we will discuss in greater detail below.

In their appellate opinion, the panel of judges confirmed that the trial judge did not abuse her discretion when she sanctioned the defense by excluding two key expert witnesses from testifying under failure to disclose expert summaries to the government. The Rule 16 statute, congressional advisory notes and 10th Circuit precedent are unambiguous, stating the requests for expert summaries are defense-triggered and that the government is not entitled to disclosure of defense expert testimony unless the defense first requests disclosure of the government's expert witnesses and then the government is entitled to reciprocal disclosure.

The trial record is indisputable and inarguable. The defense never made a request for government expert witnesses, yet the trial judge, after confirming that the government "has tendered no expert witnesses" disregarded Rule 16 and 10th Circuit precedent and excluded defense expert witnesses anyway, thereby violating the defense's 6th Amendment right to present witnesses in their favor. The appellate panel disregarded Rule 16, prevailing 10th Circuit law and the constitutional rights of the defendants in finding that the trial judge did not abuse her discretion when she completely disregarded the law.

"The role of the reviewing court is to apply the statute as it is written." Conservation Law Foundation v. Pritzker, 37 F. Supp. 3d (DC Cir. 2014) and "when the words of the statute are unambiguous, the, the first canon is also the last: 'judicial inquiry is complete." Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254 (1992).

Incredibly, the chief judge ignored that "clear and convincing evidence of an arbitrary and intentional departure from, or willful indifference to prevailing law" is cognizable misconduct under the JCD. See In re: Complaint of Judicial Misconduct, 517 558, 561, (9th Cir. 2008). The only conclusion that can be drawn from such obvious indifference to irrefutable evidence is bias.

The other issue deals with allegations by the defendants that the trial judge compelled them to testify against their will at a sidebar. The transcript of the sidebar is missing from the record. Absent the transcript, the trial court and appellate court used conjecture to fashion its own meaning of what the trial judge meant by the coercive statements and how the defendants perceived and reacted to the coercion. Here is some background:

1) Government ended its case early

2) Trial judge disallowed expert witnesses in violation of plain language of Rule 16 (see above)

3) Pro se defendants tell trial judge that they are not ready with next witness

4) Trial judge calls pro se defendants to sidebar,

5) Irascible trial judge, as alleged by defendants, compels them to testify by telling them if their next witness is not available then one of them will have to testify or the judge will rest their defense

6) Defendants caucus in a panic to discuss that they have to testify

7) Defendants break from the caucus and asks the judge if they can check to see if a witness it waiting outside courtroom

8) Defendants succumb to the threat and take the stand against their will because subpoenaed witness failed to appear

9) One of the defendants, in presence of jury, interrupts cross-examination to plead the 5th on behalf of co-defendant on the stand

10) Defendants contemporaneously complain that the judge forced them to testify at sidebar

11) Trial judge denies compelling them but could not remember what she said

12) Two government attorneys remain silent about what they heard at the sidebar

13) Defendants request the transcript

14) Trial judge refuses

15) Transcript of judge’s comments unavailable/missing for appeal

During one of many discussions with the trial judge, one of the defendants told the judge that she compelled them to testify when she stated: "put one of your witnesses on or one of you will have to testify". The trial judge and a unanimous appellate panel asserted the pro se defendants voluntarily testified, claiming the statement was not compulsion, but a "purported directive" to call a "non-defendant" witness, specifically the FBI agent sitting at the government's table. The judges didn't independently determine from the record it was a purported directive, but based it on the prosecutor who suggested that the pro se defendants could have called the FBI agent to testify instead of succumbing to the judge's threats. "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 attorneys." United States v. Sigal, 341 F.2d 837, 850 (3rd Cir. 1965).

In Stewart v. United States, 366 U.S. 1, 7 (1961) the Supreme Court said they "could think of no justification for ignoring part of a record showing error on mere conjecture that the jury might not have heard the testimony that part of the record represents" based on the prosecutor's arguments that 1) the jury may not have heard an improper question, 2) even if the jury heard, it may not have inferred that petitioner did not testify previously, and 3) no adverse inference to the petitioner would have been drawn from this fact. In absence of the record, the appellate judges conjured not only what the trial judge was thinking and purporting to say in coercive statements she denies making, but what was in the mind, perceptions and actions of the defendants, concluding they voluntarily testified. "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).

These bizarre and disturbing details about the missing transcript caught the attention of a former federal appeals judge who reviewed trial records and publically wrote about the case on the Huffington Post, which was included as part of the complaint. A recent article about the judge's advocacy was published in the Washington Post online, July 5, 2016 and in the paper, July 6, 2016. Judges are human and the chief judge's complete failure to address the allegations with any seriousness or specificity raises questions about his impartiality. We suspect that many other judges in the 10th Circuit may find it too difficult or uncomfortable to judge the actions of peers in their circuit. Furthermore, it is highly probable any 10th Circuit judicial council may harbor a deep-rooted bias against our organization and the defendants resulting from harsh public criticism.

We want to ensure that our judicial complaint is reviewed impartially and don't believe it will be possible in the 10th Circuit given the chief judge's disingenuous response, publicity of the case, and the substantial public criticism levied against the subject judges on the Internet. We have enclosed copies of the original judicial complaint, the chief judge's response, and our appeal to the 10th Circuit judicial council where we also request a transfer of the complaint."

Based on the aforementioned, we ask that our judicial complaint be transferred to another circuit and thank you for considering our request.

Sincerely

Lamont Banks

Executive Director