# COMPLAINT OF JUDICIAL MISCONDUCT

In accordance with 28 U.S.C. 351, we the defendants of District of Colorado case 09-cr-00266-CMA (David A. Banks, Demetrius K. Harper, Kendrick Barnes, Clinton A. Stewart and David A. Zirpolo), by and through advocacy organization, A Just Cause (AJC), file this complaint of judicial misconduct against trial Judge Christine M. Arguello, and 10th Circuit Judges Bobby Baldock, Harris Hartz and Jerome Holmes (hereafter "the judges") for conspiring with Assistant United States Attorney Matthew T. Kirsch to make particular rulings and opinions in the case of U.S. v. Banks, et. al., 761 F.3d 1163 (10th Cir. 2014). AJC's mailing address is at 3578 Hartsel Drive, #E, Colorado Springs, Colorado, 80920. AJC's phone number is 855-529-4252 ext. 710. Please forward all written correspondence regarding this complaint to AJC's mailing address.

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## Summary of Allegations

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Clear and convincing evidence exists that Judges Arguello, Baldock, Hartz and Holmes conspired with AUSA Kirsch to make affirmative misrepresentations of facts and law in opinions and rulings. In doing so, the judges violated the due process of the defendants, departed from proper legal standards and corruptly endeavored to influence, obstruct, or impede the due administration of justice in violation of 18 U.S.C. 1503. Under 1503, "administration of justice" means "performance of acts or duties required by law in discharge of that duty. See Rosner v. United States (1926, CA2, NY) 10 F.2d 675. The judges acted with intent to influence judicial proceedings that had a "natural and probable effect" of interfering with the due administration of justice. See United States v. Aguilar 515 U.S. 593 (1995).

The judges, (1), intentionally misrepresented facts and subverted Rule 16 of Federal Rules Criminal Procedure to violate the 6th Amendment rights of the defendants to present witnesses in their favor, (2), intentionally misrepresented facts and subverted the law related to missing transcripts related to prejudicial misconduct by Judge Arguello to violate the 5th Amendment rights of defendants by compelling them to testify against their will, and (3) Judge Arguello, standing alone, failed to enforce return of seized property.

Complaints of this nature are not subject to dismissal under 28 U.S.C 352(b)(1)(A)(ii) because they are not merit-based. According to Rule 3 Commentary of the Rule for Judicial-Conduct and Disability Proceedings, "an allegation - however unsupported - that a judge conspired with a prosecutor to make a particular ruling is not merits related, even though it 'relates to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness - 'the merits' - of the ruling.

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## Legal Requirements For Conspiracy

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It is well-settled law, under 18 U.S.C. 371, that to establish conspiratorial agreement, it is not necessary to establish or prove a formal agreement existed between the parties; it is sufficient if unlawful agreement can be inferred from all of circumstances.

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## Rule 16 and Sixth Amendment Violations

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On October 11, 2011, Day 11 of trial, AUSA Kirsch misrepresented that the defendants were legally obligated under Rule 16(b)(1)(C) of the Federal Rules of Criminal Procedure to provide him with disclosure of written summaries of expert testimony that the defense intended to introduce at trial. According to 10th Circuit law "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...Specifically, if a defendant requests and receives a written summary of any expert testimony the government intends to introduce, the defendant must provide similar notice of any expert he intends to use." See U.S. v. Nacchio 555 F.3d 1234 (10th Cir. 2009) (en banc). Notes of the Advisory Committee on 1997 Amendments for Rule 16 confirms 10th Circuit law, stating that "pretrial disclosure of information, including names and expected testimony of both defense and government witnesses...are triggered by defense requests for the information. If the defense makes such requests and the government complies, the government is [then] entitled to similar, reciprocal discovery."

Judge Arguello confirmed "the government has tendered no expert witnesses" and the trial record is obviously void of any requests for expert summaries by the defendants. However, Judge Arguello, using the same Rule 16 straw-man arguments, ruled that the defendants were required to provide the expert summaries and illegally sanctioned the defendants by excluding two key expert witnesses, thereby violating their Sixth Amendment right to present witnesses in their favor. The defendants would seek redress this subversion of Rule 16 with the 10th Circuit panel comprised of judges Baldock, Hartz and Holmes but they too would use the same phony arguments and misrepresentations initiated by Kirsch to affirm the conviction by audaciously claiming that Judge Arguello did not "abuse her discretion" or violate the 6th Amendment.

Experienced and sophisticated jurists such as AUSA Kirsch, Judges Arguello, Baldock, Hartz and Holmes can't make any plausible argument that they were unaware of well-settled, unambiguous Rule 16 law nor the Nacchio en banc opinion. The judges can't plausibly argue they didn't conspire together to willfully misrepresent Rule 16, subvert 10th Circuit precedent and the Constitution to deny our Sixth Amendment and due process rights.

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Missing Transcript & 5th Amendment Violation

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AUSA Kirsch would again initiate misrepresentations to subvert the law by which Judge's Arguello, Baldock, Hartz and Holmes seize upon to violate the defendant's constitutional rights and issue illegitimate rulings and opinions against the defendants. This subversion of law is related to missing transcript alleging prejudicial misconduct by Judge Arguello to compel the defendants to testify against their will in violation of their 5th Amendment right.

On Day 11 of trial, we alleged prejudicial misconduct by Judge Arguello. She told us that if we didn't have another witness available to testify then one of us would have to take the stand or she would rest our case. The defendant's sworn affidavits are memorialized in the appellate record as part of Federal Rule of Appellate Procedure 10(c). The transcript shows Judge Arguello denying compelling the defendants to testify even though she couldn't remember what she said. "I don't know what my exact phrasing was but the fact of the matter is I didn't direct you to do anything." When we requested the transcript, Judge Arguello refused to give it to us and then started making the most fantastic, speculative excuses about why her statements were not recorded. "For whatever reason, whether the parties spoke too far from the microphone or the court reporter took her headphones off, the court reporter did not hear everything that was said at the sidebar and therefore did not transcribe anything besides what is contained in the edited transcript," explained Judge Arguello. "For no purpose that I can see that would be served by having [the unedited transcript]...delivered to the defendants," said Arguello.

Defendants repeatedly told Judge Arguello she compelled them to testify:

Defendant Walker: "When we approached the bench, your words to us were put one of your witnesses on or one of the defendants will have to testify" and "our understanding of your words, if one of your witnesses is not available, one of you defendants will have to testify."

When Judge Arguello told Defendant Barnes, "You volunteered to take the stand", he replied, "I wasn't volunteering...I was compelled to take the stand from our discussion up at the bench, as we approached the bench."

Defendant Banks: "After the [bench] conference up front, we came back and we huddled and said somebody has to testify. That was based on the information provided at the sidebar. We didn't feel we had any alternative. We started discussing which one of us is going to have to testify. Somebody is going to have to testify. So that is the process we went through."

This was not a complicated legal issue. According to the U.S. Supreme Court, "any effort by the State to compel [the defendant] to testify against his will...clearly would contravene his Fifth Amendment." Estelle v. Smith 451 U.S. 454, 463 (1981). Furthermore, claims of prejudicial misconduct by court officials cannot be "fairly judged" without a "verbatim transcript." See Mayer v. Chicago 404 U.S. 189 (1971). "When the unavailability of a transcript makes it impossible for the appellate court to determine whether or not prejudicial error was committed with regard to the challenged action," the conviction must be reversed. See U.S. v. Haber 251 F.3d 881, 889 (10th Cir. 2001). However, instead of following the law, judges Arguello, Baldock, Hartz and Holmes conspired with Kirsch by using a spurious suggestion he made during trial as a fanciful conjuration to misrepresent facts in the ruling and opinion.

After the defendants succumbed to Judge Arguello's compulsion and complained they were forced to testify, trial records show that AUSA Kirsch, ignoring Judge Arguello's coercive statements he heard at the sidebar, made a disingenuous attempt to provide an escape for Judge Arguello. Kirsch suggested that the defendants "could have called Special Agent Smith instead of calling Mr. Barnes." Instead of following Supreme Court and 10th Circuit law regarding the need for verbatim transcripts related to prejudicial misconduct by court officials Judge's Arguello, Baldock, Hartz and Holmes seized on Kirsch's illegitimate could've or should've suggestion and used it as a ruse to circumvent the law.

In their appellate opinion, Baldock, Hartz and Holmes used a ruse to make the missing transcript issue moot so they could avoid following the law. Trial records show that the defendants said, as mentioned above, that Judge Arguello told them if they didn't have a witness available one of of the defendants would have to testify OR SHE WOULD REST THEIR CASE. Threatening to terminate their defense was a threat taken seriously by the defendants as evidenced by the statements from the trial record mentioned and in sworn affidavits submitted under Federal Rule of Appellate Procedure 10(c).

Baldock, Hartz and Holmes ignored the threat to rest the defendants case and focused on only a single statement from the transcript made by a defendant in their discussion with Judge Arguello, specifically "put one of your witnesses on or one of you will have to testify." The judges said IF they assumed that Judge Arguello said "put one of your witnesses on or one of you will have to testify" it was a "purported directive" for the defendants to put a "non-defendant" witness on the stand, specifically FBI Special Agent John Smith. This reasoning simply does not work for the following reasons:

1) AUSA Kirsch was the one to suggest that the defendants could have called Agent Smith and he did so AFTER the defendants had succumbed to Judge Arguello's threat and taken the stand against their will in violation of their 5th Amendment.

2) The appellate court can't just conjure up what was in the mind of Judge Arguello, saying that she was directing the defendants to call a "non-defendant" witness, especially when she denies on the record making any coercive statements.

3) If it was a "purported directive" how could the defendants know what Arguello was "purporting" for them to do.

4) Even if you fantastically believe that Kirsch's suggestion could be attributed as a "purported directive" by Judge Arguello, trial records show the defendants complied before Kirsch ever brought up Smith. Trial records show that shortly after the sidebar where this alleged "purported directive" was made by Judge Arguello, defendant Walker asked Arguello if they could check to see if "non-defendant" witness Special Agent Collin Reese from the Colorado Bureau of Investigation had arrived and was available to testify. Defendant Walker checked the witness room and outside the courtroom to see if Agent Reese had arrived but found that he failed to appear according to the subpoena. Immediately thereafter, defendant Barnes took the stand against his will, which would have been in compliance with this conjure "purported directive" conjured up by Baldock, Hartz and Holmes.

Kirsch's Monday morning quarterbacking that the defendants could've called Agent Smith was was rank conjecture. Conjecture is defined as "inference from defective or presumptive evidence" or "conclusions deduced by surmise or guess work." Judges Baldock, Hartz, and Holmes doubled-down on

that conjecture by turning the statement "put one of your witnesses on or one of you will have to testify" as a "purported directive" to call Agent Smith. The Supreme Court says that allegations of prejudicial misconduct cannot be "fairly judged" without a "verbatim transcript" and there is no legal exception for conjecture.

Imagine this scenario. If Judge Baldock claimed that Judge Hartz told him to "have your wife deliver cocaine to my house or I will burn down your house". After Judge Baldock's house was burned down, Judge Holmes, who was not party to the threatening statement said that Judge Hartz's statement was a "purported directive" for Judge Baldock to have his wife go to the pharmacy to pick up his prescription and his failure to do so was voluntary agreement for Judge Hartz to burn down his house. Judge Holmes could no more confirm what Judge Hartz meant by his statement then these judges could tell us what Judge Arguello meant by her coercive statements to the defendants during the sidebar.

Former federal appeals judge H. Lee Sarokin (U.S. 3rd Circuit Court of Appeals), after reviewing trial transcripts, said in the Huffington Post that there is "uncontroverted evidence...that the right to self-incrimination indeed was violated by the trial court. There are "uncontested facts upon which the appellate court could reach a determination that the right against self-incrimination was violated by the trial court even without the missing transcript," added Sarokin. Certainly, Sarokin's peers, the judges in the this case didn't miss the uncontested facts and neither did AUSA Kirsch. Kirsch's actions and apparent motives are discussed by Sarokin. Judge Sarokin's findings, analysis and conclusions are enclosed herein as evidence supporting our complaint.

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Failure to Enforce Return of Property

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On August 17, 2015, Judge Arguello allowed the government to retain the defendant's property long after trial (October 11, 2011), direct appeal (August 4, 2014) and denial of petition for Writ of Certiorari (October 7, 2014). Judge Arguello said the government had a right to retain the property even though "it is well-settled that he Government may seize evidence for use in investigation and trial but must return property once the criminal proceedings have concluded." U.S. v. Noyes, 557 Fed. Appx 125 (3rd Cir. 2014).

Judge Arguello accepted the government's illegitimate argument that retention of the property was still needed in the event the defendants might choose to file collateral 2255 appeals up until a year after their denial of Certiorari by SCOTUS (October 7, 2015). In the August 17, 2015 order, however, Judge Arguello did order the government and the government agreed to return all property seized after October 7, 2015 passed. The government has yet to return all of the defendant's or their company's property, the IRP Solutions Corporation.

Motions have been repeatedly filed, asking Judge Arguello to enforce the order for the government to return the defendant's property, yet Judge Arguello refuses to answer. Judge Arguello's refusal to force the government to comply with the law is a tacit endorsement of government's unlawful actions

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Conclusion

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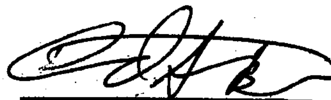
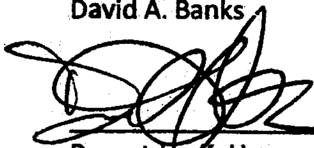
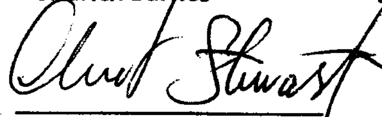
The evidence, clearly and convincingly shows that Judges Arguello, Baldock, Hartz and Holmes corruptly endeavored to influence and obstruct the due administration of justice by conspiring with AUSA Kirsch to make affirmative misrepresentations of facts and law in the rulings and opinions. The evidence clearly and convincingly shows the judges departed from proper legal standards and not only conspired to deny the defendants due process of law and a fair trial but also violated their 5th and 6th Amendment rights. Their misconduct was prejudicial to the effective and expeditious administration of the business of the courts. The judge's conduct was unethical, illegal, unjust and resulted in a wrongful-conviction and imprisonment of the six men.


David A. Banks

Kendrick Barnes

David A. Zirpolo


Demetrius K. Harper


Clinton A. Stewart

# The Case of the Missing Transcript Solved - Part III

05/16/2014 09:31 pm ET | Updated Jul 15, 2014

Judge H. Lee Sarokin Retired federal judge

In prior posts on this matter, I have assumed that absent a transcript of precisely what was allegedly said by the judge to lead these defendants to believe that they were compelled to testify, that no resolution could be made of that issue. However, after having read more of the record, the Court of Appeals has ample opportunity to accept the defendants' factual versions as true and be guided accordingly in its ruling. Here are the uncontested facts upon which the court could reach a determination that the right against self-incrimination was actually violated by the trial court even without the critical transcript:

1. The judge was frustrated at the slow pace of witnesses and said "something" to the defendants about the future of the trial.
2. Immediately following the side-bar, the defendants caucused, and one of the defendants, Mr. Barnes, then took the stand.
3. No inquiry was made by the Court regarding defendant's waiver of his right not to testify.
4. Shortly into the testimony, the U.S. Attorney (not the defendants) wanted clarification that the defendants were going to testify in any event despite the problem producing witnesses. Clearly, he, too, was concerned about the Court's comments at the side bar and that they might have been misinterpreted as being coercive.
5. Once the issue was raised by the government, upon inquiry by the court to the defendants, they were unanimous in their impression of the judge's remarks—that the judge had made it clear to them that if they didn't have a witness, one of them would have to testify in order to keep their defense alive. Each contemporaneous statement on the record confirms this.
6. Although the court denied making such statements, she did not recall her exact language. "I don't know what my exact phrasing was."
7. The failure to have a record of that conversation must be laid at the feet of the court or the government. The absence of this critical conversation, the transcript of which was called for and ordered that very day certainly creates justifiable suspicions. Strangely, in the separate civil suit against the court reporter, the U.S. Attorney stepped in claiming the reporter was an employee of and on government business. But even accepting Judge Jackson's finding in the civil case of no skullduggery by the court reporter, the defendants have good reason to cry "foul."
8. Mr. Banks asked to see a copy of the transcript of the bench conference before proceeding further, and the court advised that "the transcript would be provided at the end of the day." The court reporter has never (to my knowledge) through affidavit or testimony explained the absence of this entry.

9. On cross-examination of Mr. Barnes by the government, Mr. Walker objected, pleaded the 5th Amendment based on "being forced to testify". When government cross-examination resumed, Mr. Barnes pled the 5th in response to every remaining question — all in the presence of the jury. It is difficult to imagine anything more prejudicial.
10. Nor (to my knowledge) has the court reporter or the U.S. Attorney provided an affidavit or testimony of what they recall being said by the Court nor denying what the defendants claim was said by the court. This omission by the U.S. Attorney speaks volumes.
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; that 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.