

ORIGINAL

19-5097
No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

JUN 27 2019

OFFICE OF THE CLERK

DANNY FABRICANT — PETITIONER
(Your Name)

VS.

UNITED STATES COURT OF — RESPONDENT(S)
APPEALS FOR THE NINTH CIRCUIT*

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DANNY FABRICANT 84828-012
(Your Name)

3901 Klein Blvd Suite J
(Address)

Lompoc CA 93436-2706
(City, State, Zip Code)

None
(Phone Number)

*NOTE: The Court of Appeals for the Ninth Circuit was the only Defendant in the underlying lawsuit, that was appealed to the Ninth Circuit.

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:

QUESTION(S) PRESENTED

May a Court of Appeals [the Ninth Circuit] ignore an appellant's Request to Recuse itself in an appeal of a district court's Order dismissing a lawsuit (seeking only declaratory and injunctive relief) in which that Court of Appeals was the only defendant (and the only appellee) in the case?

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>Fabricant v. United States</u> , 187 L.Ed.2d 301 (2014)	4
<u>Fabricant v. United States</u> , 196 L.Ed.2d 578 (2017)	4
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<u>United States v. Fabricant</u> , 506 Fed.Appx. 636 (9th Cir. 2013)	4
<u>Fabricant v. Shartle</u> , 2017 U.S.Dist. LEXIS 85848 (D.AZ. 2017)	4
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Ninth Circuit General Order 6.11	Passim
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APPENDIX B ORDER OF DISMISSAL WITH PREJUDICE, District Court for the Northern District of California, filed 6/14/2018.

APPENDIX C ORDER DENYING REHEARING/REHEARING EN BANC, Ninth Circuit Court of Appeals, filed 5/24/2019.

APPENDIX D APPELLANT'S EX PARTE REQUEST THAT THIS COURT RECUSE ITSELF IN THIS APPEAL, filed 9/04/2018.

APPENDIX E TEXT OF NINTH CIRCUIT GENERAL ORDER 6.11

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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

[X] 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 2019 U.S.App. LEXIS 5105; 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 B 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 February 21, 2019.

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: May 24, 2019, and a copy of the order denying rehearing appears at Appendix C.

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

The Ninth Circuit's ignoring of Petitioner's Request that they recuse themselves from having anything to do with an appeal of an Order terminating a lawsuit in which they were the only Defendant, and, thus the only Appellee, certainly violated 28 U.S.C. § 455(a).

Because of the title of the case, Fabricant v. United States Court of Appeals For The Ninth Circuit, they actually should have sua sponte recused themselves, without Petitioner even filing his recusal request, which they ignored.

This certainly violated Petitioner's Due Process rights.

STATEMENT OF THE CASE
RELEVANT FACTS PRECEEDING THE FILING
OF THE UNDERLYING LAWSUIT

1. Petitioner is the lead defendant in United States v. Fabricant, et al, Central District of California District Court case No. CR 03-1257 RSWL. Two trials have been conducted. The Judgment in the first trial was reversed by the Ninth Circuit Court of Appeals (United States v. Fabricant, 240 Fed.Appx. 244 (9th Cir. 2007)).

2. Retrial was conducted in September, 2008. Petitioner was again convicted, and eventually received life sentences, again. A direct appeal was taken to the Ninth Circuit, who Affirmed the judgment and sentence United States v. Fabricant, 506 Fed.Appx. 636 (9th Cir. 2013). Certiorari was denied by this Court Fabricant v. United States, 187 L.ED. 2d 301 and 188 L.Ed.2d 137 (2014).

3. Petitioner's 28 U.S.C. 2255 motion was denied and the issuance of a Certificate of Appellability was denied, Fabricant v. United States, 2015 U.S. Dist. LEXIS 138460 (CD/CA 2015). Petitioner filed a timely Notice of Appeal and shortly thereafter filed a 30 page Application for Issuance of a Certificate of Appealability, in the Ninth Circuit, on 11/23/2015. On 5/02/2016, Petitioner filed an Addendum to the COA Application. On 6/13/2016, by a generic one-page Order, the issuance of a COA was denied by a two-Judge COA Panel (9th Cir. Case No. 15-56720).

4. Petitioner then timely filed a Request for Reconsideration/Reconsideration en banc. By another generic one-paragraph Order filed 9/12/2016, another COA Panel denied Reconsideration "and the motion for rehearing en banc is denied on behalf of the court. See 9th Cir.R. 27-10; 9th Cir. Gen. Ord. 6.11."

5. Petitioner sought a Writ of Certiorari in this Court, by a Petition filed on 11/07/2016. This Court Denied Certiorari on 1/09/2017 (Fabricant v. United States, 196 L.Ed.2d 578 (2017)).

6. Petitioner then attempted to administratively appeal the 9th Circuit's General Order 6.11. The appeal was 'received' stamped on 1/30/2017 and returned to Petitioner with a 'form letter' dated 1/31/2017, rejecting the appeal, as there is no provision/procedure for the submission of an administrative appeal to the 9th Circuit.

7. On 2/21/2017, Petitioner filed a 28 U.S.C. § 2241 Petition, in the Tucson, AZ District Court, seeking a determination of the Constitutionality of the 9th Circuit's General Order 6.11. By an Order filed 6/02/2017, the Petition was dismissed (See: Fabricant v. Shartle, 2017 U.S. Dist. LEXIS 85848 (D.AZ. 2017)).

8. Petitioner appealed the Order dismissing the § 2241 Petition, to the Ninth Circuit. Petitioner filed an Opening Brief. Without waiting for a Responding Brief, the 9th Circuit, on 12/20/2017, Affirmed the Order Dismissing the § 2241 Petition (See: Fabricant v. Shartle, 707 Fed.Appx. 902 (9th Cir. 2017)). Petitioner did not seek Certiorari as to this matter.

THE UNDERLYING LAWSUIT

1. On March 30, 2018, Petitioner filed a lawsuit in the Northern District of California seeking a judicial determination of the Constitutionality of the 9th Circuit's General Order 6.11. The lawsuit was filed in that District because the Ninth Circuit's principal place of business is in San Francisco. The lawsuit sought only declaratory and injunctive relief, and costs. (Dist.Ct.Dkt. 1)

2. On June 14, 2018, the district court dismissed the lawsuit, with prejudice and entered Judgment. (Dist.Ct.Dkt. 14/15)[Appendix B]

3. On July 09, 2018, Petitioner filed a Motion for Clarification and a Proposed Order. (Dist.Ct.Dkt. 16/17)

4. After receiving no response from the district court for more than a month (and to stay within the statutory time to file a notice of appeal) Petitioner filed a notice of appeal on August 17, 2018. (Dist.Ct.Dkt. 18)

COURT OF APPEALS AND DISTRICT COURT ACTIONS AFTER THE FILING OF THE NOTICE OF APPEAL

1. On August 22, 2018, the appeal was docketed and a briefing schedule was Ordered. (9th Cir.Dkt. 1)

2. On September 4, 2018, Petitioner filed a streamlined request for a 30 day extension of time to file his opening brief and an Ex Parte Request For This Court To Recuse Itself In This Appeal. (9th Cir.Dkt. 2/3)[Dkt. 3 is Appendix D]

3. On September 20, 2018, despite the pending Request for the Court to recuse itself in the appeal, the 9th Circuit filed a referral notice (which strongly 'suggested' that the district court revoke Petitioner's IFP status, deem the lawsuit frivolous, and Certify that the appeal is not taken in good faith.) and an Order requiring the district court to act on Petitioner's still pending motion for clarification. (9th Cir.Dkt. 4/5)

4. By Order filed September 24, 2018, the district court deemed Petitioner's motion for clarification to be a motion for reconsideration, revoked Petitioner's IFP status and certified that his appeal was not taken in good faith. (Dist.Ct.Dkt. 23)

5. Numerous other Orders and documents were thereafter filed, for the next five months. (9th Cir.Dkt. 6-19) The recusal request was not ruled on, even though Petitioner mentioned its existence in a document he filed on January 10, 2019, which pointed out that;

"25. In early September, 2018, Appellant filed an Ex Parte Request for this Court to Recuse Itself in this Appeal. That Request has not yet been ruled on." (9th Cir.Dkt. 19, pg. 7, ¶ 25)

6. By an Order filed February 21, 2019, the 9th Circuit denied Petitioner's request to proceed IFP in the appeal and dismissed the appeal as frivolous. The Order also stated "All other motions are denied as moot." (9th Cir.Dkt. 20) Appendix A]

7. On March 22, 2019, Appellant filed a petition for panel rehearing/Suggestion for rehearing en banc. The petition, on pg. 1, had a footnote designated ** which pointed out that the Court had not yet ruled in the recusal motion. (9th Cir.Dkt. 22)

8. On May 24, 2019, the same 9th Cir. panel who dismissed the appeal filed an Order stating;

"The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. See 9th Cir. R. 27; 9th Cir. Gen Ord. 6.11."

(9th Cir. Dkt. 23; Appendix C; Fabricant v. United States Court of Appeals For the Ninth Circuit, 2019 U.S.App. LEXIS ____.)

9. This will be the 200-somethingth LEXIS reported use, by the 9th Circuit, of their General Order 6.11, since mid-December, 2017. In that the Order was made in late May, the LEXIS system will not list it until the August, 2019 monthly update.

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REASONS FOR GRANTING THE PETITION

1. There is apparently no case law (that Petitioner could find) that matches what has occurred in this case.

The Ninth Circuit Court of Appeals was the only named defendant in a lawsuit filed by Petitioner, asking that a district court rule on the Constitutionality of Ninth Circuit General Order 6.11.

The district court dismissed the lawsuit. Petitioner appealed the Order of Dismissal.

The appeal was docketed on 8/22/2018. (9th Cir Dkt. 1)

On 9/04/2018, Petitioner filed an Ex Parte Request For This Court To Recuse itself In This Appeal. (9th Cir. Dkt. 3).

Instead of ruling on the Recusal Request, the 9th Cir., on 9/20/2018, filed two Orders, directed to the district court. (9th Cir. Dkt. 4 and 5)

Although the district court did not make any sort of finding that the lawsuit had been brought in bad faith or was frivolous, the Referral Notice (9th Cir. Dkt. 4) strongly 'suggested' to the district court that it should so find. The district court, by an Order filed 9/24/2018, did as the 9th Cir. 'suggested.' (District Court Dkt. 23)

The Ninth Circuit never ruled on the Recusal Request, unless the part of the Order filed 2/21/2019 "All other pending motions are denied as moot" (9th Cir. Dkt. 20) counts.

If a Judge, or a whole Court, is a party to an action, that Judge, or whole Court, should not be adjudicating the case, or in the instant case, the appeal of the dismissal of the case.

2. As to what the underlying lawsuit concerned; the 9th Circuit's General Order 6.11, the existence of that Order, and it's (apparently) increasing use has caught the attention of the folks at LEXIS/NEXIS.

Before the 12/18/2017 Opinion in Fabricant v. Shartle, 707 Fed.Appx. 902 (9th Cir. 2017) came out, the folks at LEXIS had never reported any use of that General Order to "deny rehearing en banc on behalf of the [entire] court." They do now.

Three Orders denying rehearing en banc in December, 2017 were duly reported [NOTE: Appendix F is a list of every Opinion/Order that the folks at LEXIS have reported since mid-December, 2017, through the June, 2019 update to the Bureau of Prison's LEXIS supplied electronic law library system.]

During all of 2018, there are 143 LEXIS reported usages of General Order 6.11, by two or three-Judge (either) motions or regular panels, to "deny rehearing en banc on behalf of the court" to litigants, who expected their issue(s) to be considered by the whole 9th Circuit, per F.R.A.P. 35. Their motions were not circulated to the whole court.

Through the June, 2019 LEXIS update, through May 8th, 2019, there were 54 reported usages of General Order 6.11, so far, in 2019.

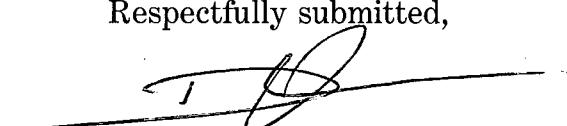
Including the three reported usages in late December, 2017, the total is exactly 200, so far. This, of course, does not include the hundreds (or thousands) of times this General Order was invoked in the past, that were not reported by LEXIS.

This issue is not ripe for review by this Court (unless this Court decides to review it). This Certiorari request deals ONLY with the recusal issue, which certainly appears to have been mandated by 28 U.S.C. § 455(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Danny Fabricant, Petitioner

Date: 24, 2019