19-5952

No. 18-60869

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM 2019

KEITH A. GORDON,

Petitioner

v.

CENEDRA D. LEE, COX MEDICAL FACILITY, DEREK S. DYESS, ERIC L. RUSHING, JACKSON HMA, LLC, MESERET TEFERRA, FAMILY HEALTH CARE CLINIC, and XYZ INSURANCE COMPAN(IES), ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

"PETITION FOR A WRIT OF CERTIORARI"

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ORIGINAL

original

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cont.

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QUESTION PRESENTED

Whether the Court of Appeals err in finding that Petitioner has not shown a "clear and indisputable right" to issuance of a writ of mandamus to compel recusal?

PARTIES TO THE PROCEEDINGS BELOW

Keith A. Gordon is a pro se plaintiff in the United States District Court for the Southern District of Mississippi, and appellant-petitioner in the United States Court of Appeals for the Fifth Circuit.

Cenedra D. Lee, Cox Medical Facility, Derek S. Dyess, Eric L. Rushing, Jackson HMA, LLC, Meseret Teferra, Family Health Care Clinic/United States of America; and XYZ Insurance Companies are defendants in the United States District Court and appellees in the United States Court of Appeals, but none of them participated in the appeal/writ of certiorari pertinent to this Petition before the Supreme Court.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit may be unreported. However, it is cited as case: 18-60869, Document 00514911157 and a copy is affixed as Appendix A-1 to this petition. The order of the Court

of Appeals denying rehearing and rehearing en banc may be unreported, but is cited as case: 18-60869, Document 00514953743 and a copy is affixed as Appendix A-2 to this petition. The order of the United States District Court for the Southern District of Mississippi may not be reported. However, a copy is affixed as Appendix A-3 to this petition.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On December 14, 2018 petitioner sought a writ of mandamus. The United States Court of Appeals for the Fifth Circuit issued its opinion on April 10, 2019. On May 6, 2019 petitioner sought a panel rehearing with suggestion rehearing en banc. About five days thereafter, on May 13, 2019 the Court of Appeals denied the petitioner's application for rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Title 28 U.S.C. § 455; and § 144 in which provides:

> § 455.
>
> Disqualification of justice, judge or magistrate judge.
> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; ...
>
> § 144.
>
> Bias or prejudice of judge.
> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor

> of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

STATEMENT OF THE CASE

The three judges of the Court of Appeals who denied rehearing in this case observed the petitioner has not shown a "clear and indisputable right" to issuance of a writ of mandamus to compel recusal. The judges also concluded the district court's record reflects nothing to suggest a separate motion were filed simultaneously on October 17, 2018, seeking recusal of Magistrate Judge Ball, and thus, there is no record or ruling for the appeals court to review.

On October 17, 2018 petitioner filed two separate motions simultaneously seeking recusal against both, Judge Jordan and Magistrate Judge Ball asserting the judges are bias, making fair judgment impossible. Appendix A-4, A-5, A-6; A-7. On October 30, 2018 the court denied only the motion against himself. Appendix A-3. The court failed to entertain the remaining motion pending against Judge Ball. Following the court's denial, petitioner sought a writ of mandamus on December 14, 2018. Appendix A-8.

During the pendency of writ of mandamus, on January 11, 2019 the district court rendered another and different judgment [Appendix A-9] whereat the court confessed Judge Ball and himself being bias (unfairly) towards petitioner. Ap-

pendix A-9, p.2,para.3, **viewed/compared** with Appendix A-10, p.2,para.2; pp. 3,4;5.

On April 10, 2019 the Court of Appeals denied writ of mandamus without realizing the court's judgment amounts as a confession, and the Court of Appeals were not provided the record (motion) against Judge Ball.

On May 6, 2019 petitioner sought a panel rehearing with suggestion rehearing en banc but were advised rehearing en banc was not possible due to insufficient copies. Appendix A-11. Thus, petitioner filed its petition deleting: With Suggestion Rehearing En Banc. On May 9, 2019 petitioner timely sought a panel rehearing en banc providing (17) additional copies. Appendix A-12. About two days thereafter (round-about the same date Court of Appeals obtained said copies) the Court denied rehearing on May 13, 2019. Appendix A-13.

The Court of Appeals' reason for denial is illustrated at paragraph one herein-above.

BASIS FOR FEDERAL JURISDICTION

This case raises a question of interpretation of the Due Process Clause of the First and Fourteenth Amendments to the United States Constitution. The district court had jurisdiction under the general federal question jurisdiction conferred by 28 U.S.C. §1331.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. Conflicts with United States Constitution & Decisions of Courts.

The holding of the Court of Appeals that petitioner has not shown a "clear and indisputable right" to issuance of a writ of mandamus to compel recusal

is directly contrary to the holding of the Fifth Circuit in United States v. Scroggins, 485 F.3d 824 (5th Cir. 2007); Phillips v. Joint Legislative Committee on Performance & Expenditure Review, 637 F.2d 1014, 1020 (5th Cir. 1981); Liteky v. United States, 510 U.S. 540, 555 (1994). In addition, contrarily to petitioner's case before the Court, Supreme Court has held, ... none of the grounds Liteky asserted required disqualification, "because," they all consist of judicial ruling, routine trial administration efforts, and "ordinary" admonishments ... all occurring in the course of judicial proceedings, and neither relied upon knowledge acquired outside such proceeding nor displayed deep-seated and unequivocal antagonism that would render fair judgment impossible. Id. @ Liteky, 556.

B. Importance of the Question Presented.

This case presents a fundamental question of the interpretation of the statute 28 U.S.C. §§ 455 and 144. The question presented is of great public importance because it affects the operations of judiciary proceedings in all states, generally hundreds of courts. In addition, the question is of great importance to pro se litigants because it affects their ability to receive fair decisions in judiciary proceedings that may result in months or years of denial of due process or illegal and unethical practices.

The issue's importance is enhanced by the fact that the lower court and court of appeals in this case have misinterpreted Berger v. United States, 255 U.S. 22, 41 S.Ct. 230 (1921). The Court held in Berger that to warrant disqualification the affidavit "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." The court of appeals reiterated this point in United States v. Townsend, 478 F.2d 1072

(3rd Cir. 1973), and added that it is the duty of the judge against whom a §144 affidavit is filed to pass upon the legal sufficiency of the facts alleged; and neither the truth of the allegations nor the good faith of the pleader may be questioned. Simmons v. United States, 302 F.2d 71.

The Thompson Court stated, in an affidavit of bias, the affiant has the burden of making a threefold showing: (1) the facts must be material and stated with particularity; (2) the facts must be such that if true they would convince a reasonable man that a bias exists;[1/] (3) the facts must show the bias is personal, as opposed to judicial, in nature. United States v. Thompson, 483 F.2d 527.

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1. Under the statute, the judge must accept for purposes of the motion that all facts stated in the affidavit are true. Berger v. United States, 255 U.S. 22, 41 S.Ct. 230. But ironically, reviewing Appendix A-9 with Appendix A-14 in which has not been entertained (pending), then A-9 amounts as a confession where the court admit the Government did not address many of Gordon's substantive arguments (referenced to 28 U.S.C. §2680(a) & (h)) ... Plus, there are jurisdictional and procedural (referenced to §2680(a) &(h)) issues the parties did not address. ... this leaves the Court with three options: ... (3) allow the Government to file supplemental briefing. While the third option has some appeal, it would be unfair to Gordon to give the Government a second bite at the apple (substantive argument/jurisdictional & procedural [§2680(h)]). Clearly the Court is referring to jurisdictional pertinent to **§2680(h).**
However, the Court allowed the Government to bite the apple at least four times because the same substantive argument and jurisdictional issues were ignored prior to Appendix A-9 and is pending before the district court. This means, by announcing it would be "unfair" to Gordon to allow the Government not address §2680(h), then it was unfair to petitioner allowing the Government, as well as the Court, not address §2680 within the past (Appendix A-14), a documentation that went un-noticed through the magistrate judge and district court judge. In addition to personal bias, had the Court entertained petitioner's opposition (Appendix A-14) designed to combate a Motion to Set Aside Entry of Default, the judgment rendered under Docket Text #72 would have resulted differently.

Both petitioner's declarations alleges material facts with the requisite particularity. The declarations alleges the judges purposely provided erroneous and threatening information hindering the ability to litigate, they denied due process failing to entertain a combative "pending" opposition listed under Docket Text #57[2] "they,"[3] warned a term of imprisonment should litigation continue, inter alia.

The facts show the allegations of bias was personal in the sense that it was directed against petitioner as a particular class, pro se litigant. The distinction is important for an allegation of "personal" bias is a proper basis for disqualification; and an allegation of "judicial" bias is not. Thompson, supra.

The Court held in any circumstances in which a judge's impartiality might reasonably be questioned, whether or not touched on in §455(b), requires recusal under §455(a). Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988). The Liljeberg Court has relied on a violation of §455(a) --which requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned-- is established when a reasonable person, knowing the relevant facts, would expect that a judge knew of circumstances creating an appearance of partiality, notwithstanding a finding that the judge was not actually conscious of the circumstances. To constitute scienter as an

2. An Opposition presently pending which now reveal proof the court erroneously set aside entry of default.
3. Magistrate Judge Ball's verbal threat is manifested via phone recordings.

element of a §455(a) violation would oppose that section's language and its purpose of promoting public confidence in the integrity of the judicial system. The reading of §455(a) does not require judges to perform the impossible by disqualifying themselves based on facts they do not know, since, ..., the provision can be applied retroactively to rectify an oversight once the judge concludes that "his impartiality might reasonably be questioned." Concluding that an objective observer would have questioned a judge's impartiality, his failure to disqualify himself was a plain violation of §455(a).

The Court notes what remarks ordinarily do not support a bias or partiality challenge. Not establishing bias or partiality ... are expressions of impatience, dissatisfaction, annoyance, and even anger that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration -even a stern and short-tempered judge's ordinary efforts at courtroom administration- remain immune. Liteky, 510 U.S. 540, 555-56, 114 S.Ct. 1147, 1157 (1994); Hollywood Fantasy Corp. v. Gabor, 151 F.3d 203, 216 n.6 (5th Cir. 1998).

The Court's remark was direct and its choice of words suggested foreseeable danger to petitioner. The utterance "warn"[4/] was viewed threatening. The remark simply illustrate going to prison. Appendix A-15.

Liljeberg sets forth standards governing recusal. Denying the single motion to recuse -especially when §455(b) illustrates any circumstances in which a

4. The court purports the utterance was used to advise petitioner and sibling. Appendix A-3. But other non-threatening words (advise, counsel, recommend, etc.) would have eliminated foreseeable danger; instilling fear.

judge's impartiality might reasonably be questioned, whether or not touched on, requires recusal- is not only prejudicial, it's at odds with a binding precedent, Liljeberg, supra. The common sense understanding of recusal of judge is the removal of judge from a judiciary proceeding, and nothing in Liljeberg suggests otherwise.

Thus, mandamus relief is justified only by exceptional circumstances and bias warranting disqualification must be personal demonstrating such a high degree of antagonism making fair judgment impossible. §§455; 144. The statute §455(a), inter alia, provides that any justice, judge, or magistrate judge of the United States "shall"[5/] disqualify himself. Evidence of actual bias is not needed. The Court stated that precedent dictates recusal at times where actual bias is absent. Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable. Rippo v. Baker, 137 S.Ct. 905, 907 (2017). The three judge panel were unable to review the additional motion filed simultaneously vis-a-vis the magistrate judge. Also the panel were unaware Judge Jordan endorsed a different judgment which constitutes proof of unfairness committed against petitioner.

A rehearing were sought because the panel were not able to review both, the undisclosed recusal motion against Judge Ball and Judge Jordan's confession with a high degree of antagonism making fair judgment impossible. The court's confession alone support a high degree of antagonism as to making

5. "Shall" is ordinarily the language of command. Anderson v. Yungkau, 329 U.S. 482, 485, 67 S.Ct. 428 (1947)(quoting Escoe v. Zerbst, 295 U.S. 490, 493, 55 S.Ct. 818 (1935); Lopez v. Davis, 531 U.S. 230, 241, 121 S.Ct. 714 (2001).

fair judgment impossible.

Nothing changed in the First Amendment framework which would justify deprivation of adequate, effective and meaningful access to the courts. From the outset, to hinder litigation alone constitute personal bias. The Court of Appeals should have distinguished between personal and judicial bias. Moreover, the Court misinterpreted Liljeberg; 28 U.S.C. §§455(a)(b); 144. For the reasons stated, the Court should grant the Writ of Certiorari.

CONCLUSION

Keith A. Gordon, the Petitioner, pray the Court grant the Petition for A Writ of Certiorari in this matter.

THIS, the 7th day of August, 2019.

Respectfully submitted,

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