

No. _____

IN THE
Supreme Court of the United States

MARK WHITEHEAD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a trial judge that has had a significant hand in the accusatory process of a criminal contempt jury trial should be recused from presiding over that same trial as a constitutional matter?

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is an unpublished memorandum disposition, available at *United States v. Whitehead*, 756 Fed. Appx 755 (9th Cir. 2018), and is reproduced in the Petitioner's Appendix (Pet. App.) at A1. The relevant decisions of the lower court is reproduced in the Pet. App. at A5-A19.

JURISDICTION

The Court of Appeals entered judgment on March 11, 2019 (Pet. App. A1), and denied Petitioner's timely petition for rehearing on June 13, 2019 (Pet. App. A4). This petition is filed within 90 days after that date pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INTRODUCTION

When a district court has a significant role in the accusatory process of a criminal contempt trial, this Court has found that an unconstitutional risk of bias exists that requires recusal whether or not a defendant can demonstrate actual bias. *See In Re Murchison*, 349 U.S. 133 (1955). In referring Mr. Whitehead for criminal contempt, the district court here had a very significant role in the accusatory process: it clarified the evidentiary basis underlying the contempt charges, (ER 6-9); discussed why Mr. Whitehead's defenses were legally untenable, (*id.*); and outlined several prior bad acts that were later admitted against the defendant. (ER 9-10). Yet, the Ninth Circuit panel, citing *Ungar v. Sarafite*, 376 U.S. 575, 583-88 (1964), rejected Mr. Whitehead's claim that a different judge should have presided over his trial. But the *Ungar* decision encompasses a different grounds for constitutional recusal from the *Murchison* decision that requires analyzing different facts. The *Ungar* court also distinguished itself from *Murchison* because it concerned a type of contempt proceeding (a summary contempt proceeding) that this Court has held requires far fewer constitutional protections than a full criminal contempt jury trial. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798-99 (1987)

This Court should grant certiorari to protect its precedent from such misinterpretation. Contempt defendants who proceed to a full jury trial should get the benefit of the most basic due process protections. Those protections include the right to an impartial judge that has not previously acted as the investigator and

prosecutor of his/her contempt, especially where that contempt results in a two-year prison sentence.

STATEMENT OF THE CASE

On July 28, 2017, the district court referred Mr. Whitehead for criminal contempt charges based on four alleged violations of a Receivership Order and Final Judgment in his civil case.¹ (ER² 1-11, 28-43). Criminal contempt referrals are governed by Federal Rule of Criminal Procedure 42(a) (“Rule 42(a)”), which requires a court to “(a) state the time and place of the trial; (b) allow the defendant a reasonable time to prepare a defense; and (c) state the essential facts constituting criminal contempt and describe it as such.” Fed. R. Crim. P. 42(a). This language in Rule 42(a) was intended as a simple notice provision for the benefit of defendants. *United States v. Powers*, 629 F.2d 619, 625 (9th Cir. 1980) (stating that under then-Rule 42(b), now Rule 42(a), simple notice is all that is required and the purpose of such notice “is to inform the contemnor of the nature of the charge and

¹ Mr. Whitehead and Mr. Donald Okada, the plaintiff in the civil lawsuit, were in a dispute over ownership of a piece of property. Mr. Okada expressed that he wanted to appoint a Receiver to sell the property and divide the assets according to the Judgment to prevent any future litigation over the sale price of the property. (ER 602). Mr. Whitehead had agreed to the appointment of a Receiver as part of the settlement. (ER 565).

² “ER” refers to the Appellants Excerpt of Record, filed under Ninth Circuit Case No. 18-50111, Dkt. No. 10-1.

enable the contemnor to prepare a defense.”). The language in Rule 42(a) asking the court to “describe it as such” only requires the court to describe it – the criminal contempt – as criminal in order to distinguish between criminal versus civil contempt charges. *See United States v. United Mine Workers of America*, 330 U.S. 258, 296 (1947) (finding the phrase “describe the criminal contempt charged as such” requires the contempt to be described as criminal instead of civil.)

Furthermore, the use of the words “state the essential facts” in Rule 42(a) was intended to indicate a brief summary, and is distinguishable from Rule 42(b), the subsection designed for summary contempt proceedings, which does invite the court to recite the facts in more detail. *See United States v. Robinson*, 449 F.2d 925, 930 n. 8 (9th Cir. 1971) (Summary contempt certificate must be detailed as compared to non-summary proceedings because “[t]he certificate itself constitutes the record.”); *see also United States v. Marshall*, 451 F.2d 372, 374-75 (9th Cir. 1971) (indicating that summary proceedings occurs without process and therefore the referring certificate must be more detailed.).

In Mr. Whitehead’s case, the referral, hereinafter referred to as the Criminal Contempt Order, went well beyond the “essential facts” required by Rule 42(a). The district court found that Mr. Whitehead had acted contumaciously by violating the Receivership Order and Final Judgement in four different ways: “(1) attempting to sell [the property], (2) denying the Receiver access to the property, (3) refusing to disclose any bank records associated with [the property], and (4) refusing to hand over all online rental listings for the property.” (ER 6). However, the district court

did not stop at declaring the charges, as it should have. Instead, it clarified the evidentiary basis underlying these charges, (ER 6-9), went on to reject Mr. Whitehead's defenses as untenable, (*id.*), and outlined several prior bad acts which the government later sought to admit. (ER 9-10).

A few months later, at a bail hearing, the court and the government agreed that the detailed Criminal Contempt Order would form the charging document in Mr. Whitehead's criminal case. (ER 213-14). During that same proceeding, the court rejected the government's request to cap Mr. Whitehead's sentencing exposure to six months (and have a bench trial) because the court intended to impose a longer sentence. (ER 187-88). Specifically, the court analogized Whitehead's conduct to fraud, and stated that the fraud sentencing guidelines would provide the court with the ability to impose more time based on the value of the property at issue.³ (*Id.*).

Based on the court's actions and statements, Mr. Whitehead moved to recuse the district court under 28 U.S.C. § 455(a) and the Due Process clause. (ER 159-235). Mr. Whitehead argued that a reasonable observer might question the court's impartiality under the statutory basis for recusal and that the risk of bias was unconstitutionally high. (ER 170-78). The government opposed this motion arguing

³ Contempt does not have a specified sentencing range; instead, the contempt guidelines instruct courts to look to the sentencing range that applies to the most analogous offense. *See* U.S.S.G. § 2J1.1 ("Apply § 2X5.1 (Other Offenses)"); *see also* U.S.S.G. § 2X5.1 ("If the offense is a felony for which no guideline expressly has been promulgated, apply the most analogous offense guideline.").

that Mr. Whitehead had not identified an extra-judicial source for the court's bias. (ER 237-46). Under *Liteky v. United States*, 510 U.S. 540, 548, 554-55 (1994), an extra-judicial source is a factor in assessing a statutory claim for recusal. The government conflated the statutory basis for recusal with the constitutional basis for recusal.

The motion was referred to the Honorable District Court Judge Cormac J. Carney. (ER 236). At a hearing on the issue, Mr. Whitehead reminded the court that the constitutional question does not require an extra-judicial source under Supreme Court law. (ER 265). Relying on the government's arguments, Judge Carney filed a written order stating that the defense had not proven that there was an extra-judicial source for the trial judge's bias. (Pet. App. A9-A14).

After trial was over, the case proceeded to sentencing on April 6, 2018. (ER 919). Defense counsel believed that the most analogous offense for the contumacious acts themselves was obstruction of justice, under 18 U.S.C. § 1509, which would limit his sentencing exposure to one year. (ER 901-07). The government argued, as the court had directed them to do before trial, that wire fraud, under 18 U.S.C. § 1343, was the most analogous offense. (ER 874-77). The court then applied the fraud guidelines, as it had predetermined it would do before trial even commenced, and sentenced Mr. Whitehead to two years in prison. (ER 90-98, 934-41, 969).

Mr. Whitehead appealed this decision challenging, amongst other things, Judge Carney's failure to reach the constitutional basis for recusal. The panel

denied this argument with a citation to an inapplicable Supreme Court case: “The presiding judge’s role in issuing the criminal contempt referral, which served as the original charging document, did not deprive Whitehead of an impartial tribunal. *See Ungar v. Sarafite*, 376 U.S. 575, 583-88 (1964).” (Pet. App. A1).

REASONS FOR GRANTING THE WRIT

The panel’s reliance on *Ungar v. Sarafite* was wrong and, as a result, the decision conflicts with the rule in *Murchison*. The *Ungar* decision distinguished *Murchison* because it concerned a different type of contempt process which requires fewer constitutional protections. *Ungar* also concerned a different grounds for recusal which requires analyzing different facts, and the holding was specifically defined by those facts. The writ should be granted in order to remedy this conflict and clarify the different rules that are articulated by the *Ungar* and *Murchison* decisions.

Firstly, the *Ungar* case involved a type of summary contempt proceeding based on a defendant’s in-court behavior where the right to a neutral arbitrator does not apply. The *Ungar* court specifically distinguished the *Murchison* grounds for recusal because the type of contempt proceeding that was at issue in *Murchison* was different than what happened in *Ungar*. *Ungar*, 376 U.S. at 585. As the *Murchison* court itself recognized, summary contempt proceedings require fewer constitutional protections, including the right to a neutral arbitrator, because they are based on in-court behavior, where a trial judge needs to retain the ability to preside over such contempts as part of the judge’s inherent power to control their

courtroom. *Murchison*, 349 U.S. at 626 (“It is true that contempt committed in a trial courtroom can under some circumstances be punished summarily by the trial judge. But adjudication by a trial judge of a contempt committed in his immediate presence in open court cannot be likened to the proceedings here.”)(internal citations omitted).

By contrast, where the contempt conviction requires a full jury trial and the presentation of evidence concerning events external to the courtroom, this Court has repeatedly recognized that same due process rights that defendants have in regular criminal proceedings should apply. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798-99 (1987); *see also United States v. Dixon*, 509 U.S. 688, 696 (1993) (“We have held that constitutional protections for criminal defendants...apply in non[-]summary criminal contempt prosecutions just as they do in other criminal prosecutions.”). These rights include the right to “a neutral and detached judge in the first instance.” *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61-62 (1972). There is no other circumstance in which a judge would be permitted to preside over a criminal trial in which that same judge wrote the charging document, preselected a sentence before trial, rejected the defendant’s defenses before trial, and predetermined that certain prior bad acts were admissible before any argument was made concerning them.

Secondly, the *Ungar* decision was based on a different type of constitutional basis for recusal that involved different facts than Mr. Whitehead presented to the panel. The constitutional basis for recusal covers a distinct set of circumstances

which all give rise to a risk of bias so offensive to the appearance of justice that recusal is warranted even where the defendant cannot prove actual bias on the part of the judge. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876-882 (2009). The different circumstances that this Court has identified as meriting recusal regardless of actual bias can be summarized follows: when a judge has a pecuniary interest in the outcome, *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (hereinafter referred to as the “*Tumey* grounds for recusal”); when the contumacious conduct involves personal attacks against a judge, *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971) (hereinafter referred to as the “*Mayberry* grounds for recusal”); and where the judge has had a significant hand in the investigative or accusatory process, *In re Murchison*, 349 U.S. 133, 137 (1955) (hereinafter referred to as the “*Murchison* grounds” for recusal). See *Crater v. Galaza*, 491 F.3d 1119, 1131 (9th Cir. 2007) (summarizing the these three areas where the Supreme Court has identified that there is a constitutionally high risk of bias requiring recusal).

Mr. Whitehead’s appeal focused on the *Murchison* grounds for recusal, whereas the *Ungar* court was deciding whether the *Mayberry* grounds merited recusal (although the *Mayberry* decision had not occurred yet...*Ungar* was a precursor cited by the *Mayberry* Court). *Ungar*, 376 U.S. at 581. In other words, the *Ungar* court was not analyzing whether the trial court’s role in the accusatory process was so significant that it prevented the trial court from fairly presiding over the defendant’s contempt proceeding. Instead, the Supreme Court framed the issue as whether “the defendant’s constitutional rights to a fair hearing were violated

because his contemptuous remarks were a personal attack on the judge which necessarily, and without more, biased the judge and disqualified him from presiding at the post-trial contempt hearing.” *Id.* at 584.

Consequently, the Ninth Circuit erred in dismissing Mr. Whitehead’s case based on the *Ungar* decision. The analysis when presented with a *Murchison* grounds for recusal is very fact-specific and requires looking at all of the relationships and circumstances presented. *Murchison*, 349 U.S. at 136 (holding that when a court’s role rises to an unconstitutional level “cannot be defined with precision. Circumstances and relationships *must* be considered.) (Emphasis added). This Court has recently upheld that the constitutional question in a case concerning the *Murchison* grounds for recusal involves an analysis of whether the district court had such a significant role in the accusatory process in that case that it was constitutionally intolerable. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1907 (2016) (determining that the constitutional question is whether the jurist had a “significant, personal involvement in a critical trial decision.”). Yet the Ninth Circuit did not engage in this analysis, and found that Mr. Whitehead’s claim failed based on a case that was not focused on whether the judge had a significant role in a critical trial decision.

Although based on an entirely different grounds for recusal, to the extent that there is any analogy between these grounds for recusal, the *Ungar* Court restricted its holding to the specific facts presented there which were very different from the court’s role in the accusatory process in Mr. Whitehead’s case. *Ungar*, 376

U.S. at 588. (“In these circumstances, we cannot say there was bias, or such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.”) (emphasis added). The *Ungar* court also noted the accusatory pleading which characterized the petitioner’s conduct as “contemptuous, disorderly and malingering was at most a declaration of a charge against the petitioner, based on the judge’s observations, which, without more, was not a constitutionally disqualifying prejudgment of guilt. . . .” *Id.* at 586-87 (emphasis added).

Yet here, we had a great deal more than a mere description of Mr. Whitehead’s conduct as contemptuous based on the judge’s in-court observations. The accusatory pleading outlined all of the external evidence presented by the plaintiffs and rejected any defenses Mr. Whitehead might raise to this external evidence. (ER 1-11). The court also made credibility findings and applied them to assessing the charges, before trial even took place. (ER 2, 6-9). The selected several prior bad acts that the government sought to admit against Mr. Whitehead. (ER 9-10). The detailed nature of the Criminal Contempt Order encompassed matters best left to the prosecutor and jury, not the presiding judge, and was not required by the Rule 42(a) contempt referral process.

Perhaps the most egregious part of the court’s role in the accusatory process was when the court denied the government’s request to cap Mr. Whitehead’s sentence at six months and then *alerted the government to the fact that it should be seeking a higher sentence based on the fraud guidelines*. (ER 48, 50-52). The

government then sought the same higher sentence that the court told them to seek. (ER 874-876). In effect, the judge defined the entire accusatory posture of the prosecution.

The trial court in Mr. Whitehead's case went well beyond a mere "declaration of a charge" against Mr. Whitehead before presiding over the ensuing trial. Instead, the court outlined the government's entire case and preselected his sentence. The panel's reliance on *Ungar* to reject this argument was a misinterpretation of the holding of that case, and contrary to this Court's holding in *Murchison*.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

September 11, 2019

Respectfully submitted,

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