No. 20-6364

IN THE

SUPREME COURT OF THE UNITED STATES

In re Donovan G. Davis, Jr.

On Petition for Writ of Certiorari to
The Eleventh Circuit Court of Appeals
(Case No. 20-12986-G)

PETITION FOR WRIT OF CERTIORARI

Donovan Davis, Jr.
Reg. No. 60439-018 Unit B-3
Federal Correctional Complex
P.O. Box 1031 (Low Custody)
Coleman, Florida 33521-1031

QUESTION PRESENTED

Whether a case must proceed to final judgment with a judge who harbors actual bias against a litigant in order to obtain appellate review of the judge's non-compliance with the statutory provisions requiring the judge's recusal.

LIST OF PARTIES

The caption of the case names all the parties to the proceedings in the court below.

RELATED CASES

Davis v. United States, No. 6:20-cv-1037, U.S. District Court for the Middle District of Florida. Judgment entered June 24, 2020.

In re Donovan G. Davis, Jr., No. 20-12986-G, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered August 27, 2020.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES
Cont.

Cases **Page**

Statutes, Rules, and Other Authority

PETITION FOR WRIT OF CERTIORARI

Donovan G. Davis, Jr. asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Eleventh Circuit on August 27, 2020.

OPINIONS BELOW

The opinion of the Eleventh Circuit appears at Appendix A. The motion for reconsideration of the Eleventh Circuit's opinion appears at Appendix C. The judgment of the United States District Court appears at Appendix B.

JURISDICTION

The opinion and judgment of the Eleventh Circuit were issued on August 27, 2020. The filing of this writ is within 90 days from the motion for reconsideration of the opinion and judgment of the Eleventh Circuit. See SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code Service 28 U.S.C. § 144 provides:

> 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 and prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] 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.

Federal Rules of Appellate Procedure 21 in pertinent part provides:

> (a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing
>
> (2)(A) The petition must be titled "In re [name of petitioner]."
>
> (B) The petition must state:
>
> (i) the relief sought;
>
> (ii) the issues presented;
>
> (iii) the facts necessary to understand the issue presented by the petition; and
>
> (iv) the reason why the writ should issue
>
> (C) The petition must include a copy of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition.
>
> (3) Upon receiving the prescribed docket fee, the clerk must docket the petition and submit it to the court.
>
> (b) Denial; Order Directing Answer, Brief, Precedence
>
> (1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed time.
>
> (2) The clerk must serve the order to respond on all persons directed to respond.
>
> (3) Two or more respondents may answer jointly.
>
> (4) The court of appeals may invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so. The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals.
>
> (5) If briefing or oral argument is required, the clerk must advise the parties, and when appropriate, the trial-court judge or amicus curiae.
>
> (6) The proceeding must be given preference over ordinary civil cases.
>
> (7) The circuit clerk must send a copy of the final disposition of the trial-court judge.

STATEMENT OF THE CASE

Davis was indicted, tried, convicted of various conspiracy and fraud charges, and sentenced to 204 months. United States v. Davis, 767 Fed. Appx. 714, 718-19 (11th Cir. 2019). Davis appealed his conviction and sentence to the Eleventh Circuit. However, both were affirmed. Id.

On June 22, 2020 Davis filed a motion under 28 U.S.C. § 2255 along with a 28 U.S.C. § 144 recusal application (which consisted of the required § 144 affidavit and Good Faith Certificate of Counsel) seeking disqualification of District Court Judge Carlos E. Mendoza. Davis v. United States, No. 6:20-cv-1037-CEM-DCI, Dkts. 1-4 (M.D. Fla. June 22, 2020). Davis sought Judge Mendoza's recusal because of Judge Mendoza's personal bias against Davis. Davis's § 144 application discussed Judge Mendoza's use of extrajudicial sources to reach his decisions, as Judge Mendoza's findings in previous orders were not supported by the record. Id. at Dkts. 2-4 (App. D).

Under Section 144, the judge accused of bias is only to pass on the legal sufficiency of the § 144 affidavit. Then, upon the finding the affidavit legally sufficient, the accused judge proceeds no further and transfers the § 144 application to a different district court judge to decide. Despite Section 144's explicit requirements, Judge Mendoza usurped his judicial authority and denied Davis's § 144 application on the merits. Id. at Dkt. 8 at 2 (App. B). Instead of adhering to the statute and ruling only the legal sufficiency of the § 144 affidavit, Judge Mendoza averred that all of his decisions "were clearly made within the context of the judicial proceedings." Id.

Davis then requested that the Eleventh Circuit issue a writ of mandamus to direct Judge Mendoza to comply with 28 U.S.C. § 144's statutory requirements. In re Donovan G. Davis, Jr., No. 20-12986-G (11th Cir. 2020)(App. E). The Eleventh Circuit, also using the wrong legal standard,[1] denied Davis's request to issue

/1 The Eleventh Circuit incorrectly discusses why mandamus is not appropriate in Davis's circumstances. App. A at 1. Because the test it applied when it denied Davis's request involved 28 U.S.C. § 455, not 28 U.S.C. § 144. Id. at 1 (citing In re Moody, 755 F.2d 891 (11th Cir. 2014)(case involving 28 U.S.C. § 455 standard).

This practice of using the wrong legal standard was also used in the district court. Judge Mendoza discusses at length 28 U.S.C. § 455's legal framework and makes no mention of 28 U.S.C. § 144. App. B at 2 (citing United States v. Patti, 337 F.3d 1317 (11th Cir. 2003)(case involving 28 U.S.C. § 455). Not once during the entire proceeding——in the district court or Eleventh Circuit——is 28 U.S.C. § 144 discussed. Notably, not once does Davis mention 28 U.S.C. § 455 in his 28 U.S.C. § 144 application. App. D. Both courts blatantly ignored the party-presentation principle. Greenlaw v. United States, 554 U.S. 237 (2008).

the writ of mandamus. Id. Effectively leaving Davis to litigate before a biased judge.

REASONS FOR GRANTING THE WRIT

Section 144's strict provisions requires the accused judge to pass only on the legal sufficiency of the § 144 affidavit, not the merits. In this case, Judge Mendoza refused to comply with § 144 and declared that his decisions "were clearly made within the context of the judicial proceedings." Davis, No. 6:20-cv-1037-CEM-DCI, Dkt. 8 at 2 (App. B). And the Eleventh Circuit refused to issue the writ of mandamus to correct the error. The Eleventh Circuit held that Judge Mendoza's "thorough order" explains the reason for the denial. (App. A). But, Section 144 prohibits the accused judge from deciding on the truthfulness of the allegations in the § 144 affidavit. See United States v. Ala., 828 F.2d 1532, 1540 (11th Cir. 1987).

Significantly, this Court holds that "[t]o commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is denied. The remedy by appeal is inadequate." Berger v. United States, 255 U.S. 22, 36 (1921). "[A]nd if prejudice exists, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious." Id. The Eleventh Circuit's reasoning in its opinion is inapposite to this Court's holding in Berger by allowing Judge Mendoza to ignore Section 144 and rule on the merits. (App. A). For the reasons set forth below, this Court should grant review.

A. Circuit Split

Authorities regarding the use of mandamus to determine whether a judge should be disqualified are not uniform. A substantial body of law supports the proposition that mandamus to a United States Court of Appeals will lie when a district court judge has rejected a § 144 affidavit as legally insufficient.

Compare Pfizer v. Lord, 456 F.2d 532 (8th Cir. 1972); Pfizer v. Lord, 449 F.2d 119 (2d Cir. 1971); In re Union Leader Corp., 292 F.2d 381 (1st Cir. 1961); United States v. Ritter, 273 F.2d 30 (10th Cir. 1959) with (holding mandamus is not appropriate) Albert v. United States District Court, 283 F.2d 61 (6th Cir. 1960); Green v. Murphy, 259 F.2d 591 (3d Cir. 1958).[2] The Eleventh Circuit is silent on this proposition.

B. Mandamus

This Court has cautioned against overuse of mandamus and reemphasized that mandamus is not a substitute for appeal. Will v. United States, 389 U.S. 90 (1967). But the Will decision does not mean that mandamus is unavailable to review any preliminary rulings. Id. at 96, 98. Here, the circumstances are sufficiently extraordinary to warrant the use of mandamus, because mandamus is sought to enforce a judge to comply with a statute. Admittedly, mandamus is strong medicine, and should neither be prescribed casually nor dispensed freely. But litigating before a judge that does not adhere to the law results in significant injury.

The Eleventh Circuit and others hold that the denial of a recusal motion shall be reviewed with a final order. See, e.g., Rosen v. Sugarman, 357 F.2d 794 (2nd Cir. 1966); Green v. Murphy, 259 F.2d 591 (3rd Cir. 1958); In re Virginia Electric & Power Co., 539 F.2d 357 (4th Cir. 1976); In re Corrugated Container Antitrust Litig., 614 F.2d 958, 960-61 (5th Cir. 1980)[3]; Johnson v. Dawling, et

/2 Notably, the Seventh Circuit even goes so far as to hold that the filing of a mandamus is mandatory after the denial of a recusal motion brought under 28 U.S.C. § 455. See Lac Du Flambeau Bank of Superior Chippewa Indians v. Stop Treaty Abuse-Wis, Inc., 991 F.2d 1249, 1255 (7th Cir. 1993). But unlike a motion brought under 28 U.S.C. § 455, motions brought under 28 U.S.C. § 144 require: 1) an application; 2) an affidavit; and 3) a Good Faith Certificate of Counsel. 28 U.S.C. § 144. As previously mentioned, upon the filing of a legally sufficient § 144 affidavit, a judge must proceed no further; the allegations within the affidavit are presumed true; and the proceeding is transferred to a different judge. See Berger, 255 U.S. at 36. Therefore, mandamus is appropriate.

/3 In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

al., 727 F.2d 1109 (6th Cir. 1984); Occidental Petroleum Corporation v. Chandler, 303 F.2d 55, 56 (10th Cir. 1962); Christo v. Padgett, 223 F.3d 1324, 1333 n.10 (11th Cir. 2000). This reasoning among the circuits, in essence, provides that (in the § 144 context) one must proceed with a biased judge until a final order is rendered to seek review from a higher court, regardless whether the proceeding will continue in a satisfactory way because of the unsettled claim of actual bias——an ever present source of tension and irritation. Only a final ruling on the unsettled claim of bias by a disinterested higher court can alleviate such tension. Fundamentally, a claim of actual bias should be resolved at the first opportunity as contemplated by 28 U.S.C. § 144's timeliness component.

The Eleventh Circuit postponement of a decision to issue the mandamus to direct a judge to comply with a statute, inter alia, hurts justice's administration and efficiency. And where as here an accused judge refuses to comply with Section 144's circumscription of his or her judicial authority and issues a ruling on the truthfulness of the § 144 affidavit renders Section 144 useless.

Plainly, to be forced to proceed with a judge who harbors an actual bias in order to obtain a final order just so one can challenge the judge's inability to adhere to the law is nonsensical. Moreover, if the judge's impartiality is later confirmed, the proceedings before him or her would be a nullity——all judgments rendered void. See Tumey v. Ohio, 273 U.S. 510, 535 (1927); In re Whitney-Forbes, Inc., 770 F.2d 692, 696-97 (7th Cir. 1985)(orders may be void if issuing court acted in a manner inconsistent with due process or where the court's action involved plain usurpation of power); see also United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010). Leaving the entire proceeding for a do over. Hardly efficient.

In sum, the only logical approach is to first resolve a legally sufficient § 144 recusal application prior to proceeding any further.

C. Davis's Case is a Good Vehicle

Davis's case is an appropriate vehicle for resolving the circuit split. Davis specifically sought Judge Mendoza's recusal for actual bias at the commencement of the proceeding——prior to any rulings by Judge Mendoza. Succinctly, the judicial process can hardly tolerate the practice of: 1) a judge not complying with a statute; and 2) a litigant with knowledge of circumstances exhibiting actual bias while calling upon the court for favorable rulings, and then seek recusal when the rulings are not forthcoming. Neither can the judicial process tolerate the practice of waiting until a final order is issued to later decide the judgment is void. Consequently, the Eleventh Circuit's holding that a motion for recusal should be appealed with a final order does just that. The circuits' refusal to issue the writ of mandamus in these circumstances is illogical. Besides, a claim of actual personal bias and prejudice strikes at the integrity of the judicial process, and is intolerable to hold that the disclaimer of prejudice by the very judge who is accused of harboring it, then allow the judge to terminate the inquiry until an ultimate appeal on the merits.

The Constitution guarantees the right to be heard in front of an impartial judge in the first instance.

CONCLUSION

For these reasons, Davis respectfully requests that this Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted by Donovan Davis, Jr. on October 28, 2020.

Donovan Davis, Jr.
Reg. No. 60439-018 Unit B-3
Federal Correctional Complex
P.O. Box 1031 (Low Custody)
Coleman, Florida 33521-1031

VERIFICATION

Under penalty of perjury as authorized in 28 U.S.C. § 1746, I declare that the factual allegations and factual statements contained in this document are true and correct to the best of my knowledge.

Donovan Davis, Jr.