No. _____

In The

Supreme Court of the United States

ISMAEL LECHUGA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

NEAL A. DAVIS
1545 Heights Blvd., Suite 700
Houston, Texas 77008
(713) 227-4444
neal@nealdavislaw.com

JOSH BARRETT SCHAFFER
Counsel of Record
1021 Main St., Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Federal circuit courts are divided over whether to review the denial of a motion to recuse a district judge under 28 U.S.C. § 455(a) *de novo* or for an abuse of discretion. Petitioner's district judge believed that, to induce the Government to request a lower sentence under U.S.S.G. § 5K1.1, petitioner fabricated information about a plot to kill the judge. The judge denied petitioner's recusal motion alleging that the judge's role in the investigation of the plot affected his impartiality at sentencing. Before denying the motion, the judge stated that the hoax had caused only a "minor inconvenience," "like you're at a picnic and there's flies and you're trying to just swat them away" (ROA.904). After denying it, he admitted, "at one point I was very upset about this and was considering . . . giv[ing] [petitioner a] life [sentence]" (ROA.936). He denied a downward variance and sentenced petitioner to 360 months.

The Fifth Circuit affirmed using an abuse-of-discretion standard. It failed to mention that the judge was "very upset" and had left town when he learned of the alleged threat. The questions presented are:

I. Whether a federal circuit court reviews the denial of a motion to recuse a district judge under 28 U.S.C. § 455(a) *de novo* or for an abuse of discretion.

II. Whether the Fifth Circuit erred in affirming the denial of petitioner's motion to recuse under 28 U.S.C. § 455(a) and (b)(1).

RELATED CASES

- *United States v. Lechuga*, No. 7:16-CR-876-2, United States District Court, Southern District of Texas, McAllen Division. Judgment entered May 22, 2019.
- *United States v. Lechuga*, No. 19-40483, United States Court of Appeals for the Fifth Circuit. Judgment entered July 9, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ismael Lechuga, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's unpublished opinion (App. 1-7) is available at 2020 WL 3885112. The district court's judgment of conviction and sentence is unpublished.

JURISDICTION

The Fifth Circuit issued its opinion on July 9, 2020. Petitioner did not move for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1). Pursuant to this Court's order of March 19, 2020, regarding filing deadlines during the COVID-19 pandemic, this petition is due 150 days after the Fifth Circuit issued its judgment.

This Court has jurisdiction over the first question presented even though petitioner did not request *de novo* review in the Fifth Circuit and instead cited that court's controlling precedent requiring abuse-of-discretion review. This Court has jurisdiction over any federal question "pressed *or* passed upon" in the court below. *Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 530-31 (2002) (emphasis added). The Fifth Circuit passed upon the issue by explicitly applying an

abuse-of-discretion standard (App. 3, 5). In 1992, the Fifth Circuit refused to review the denial of a recusal motion *de novo* and held that an abuse-of-discretion standard applies. *See Matter of Billedeaux*, 972 F.2d 104, 106 n.4 (5th Cir. 1992). Thus, petitioner's panel had to apply an abuse-of-discretion standard regardless of what petitioner argued in the Fifth Circuit.

Petitioner acknowledged that the abuse-of-discretion standard applied in the Fifth Circuit because his former counsel was ethically bound to cite controlling authority and the Fifth Circuit panel could not review the issue *de novo*. *Cent. Pines Land Co. v. United States*, 274 F.3d 881, 893 (5th Cir. 2001) ("It is well-established in this circuit that one panel of this Court may not overrule [the prior decision of] another [panel]."); MODEL RULE OF PROFESSIONAL CONDUCT 3.3(a)(3) ("A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client. . . ."). Petitioner did not have to move for rehearing *en banc* requesting *de novo* review before filing this petition. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1296 n.4 (11th Cir. 2005) (petition for rehearing not required before filing certiorari petition in Supreme Court).

Should this Court grant certiorari on the second question presented, the standard of appellate review would be encompassed within that question. *See* SUP. CT. RULE 14.1(a) ("Only the questions set out in the petition, *or fairly included therein*, will be considered by the Court.") (emphasis added). The question of which

standard of review applies is fairly included within the substantive issue presented in the second question.

This Court has jurisdiction over both questions presented. It should not decline to exercise that jurisdiction simply because petitioner did not futilely ask the Fifth Circuit panel to review the issue *de novo*.

STATUTORY PROVISION

Section 455 of Title 28, United States Code, provides in pertinent part:

> (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 . . . .

STATEMENT OF THE CASE

A. Procedural History

Petitioner pled guilty to conspiring to deliver cocaine and launder money pursuant to a plea agreement on June 30, 2017 (ROA.661). The district court

sentenced him to 360 months in prison, five years of supervised release, and a $100 special assessment on May 15, 2019 (ROA.803). He timely filed notice of appeal (ROA.611). The Fifth Circuit affirmed the district court's judgment on July 9, 2020. *United States v. Lechuga*, 2020 WL 3885112 (5th Cir. July 9, 2020).

B. Relevant Facts

The issues in this petition do not concern the offense of conviction. Rather, they involve an alleged plot to kill United States District Judge Randy Crane, the presiding judge in the case. According to the Fifth Circuit: "Shortly after his arrest, [petitioner] began cooperating with the Government and was in line to receive credit for acceptance of responsibility under U.S.S.G. § 3E1.1(a) and a motion by the Government for a reduced sentence pursuant to U.S.S.G. § 5K1.1. Before his scheduled sentencing, however, [petitioner], his brother, and his uncle were involved in warning law enforcement of a plan stemming from Mexico to kill the district court judge, Judge Randy Crane" (App. 2). Law enforcement took the threat seriously and initially considered petitioner to be credible, as he had been a reliable, long-time confidential informant for the DEA (ROA.878-80).

Federal agents investigated and concluded that the plot was a hoax designed to cause Judge Crane to reduce petitioner's sentence for his cooperation (ROA.831-74). Agents met with Judge Crane privately during the investigation. After they determined that

the plot was a hoax, they told him that petitioner had failed a polygraph (ROA.826).

Petitioner, who was detained the entire time, did not deny that his brother and uncle knowingly participated in the hoax; but he denied personally knowing that the plot was a hoax (ROA.935). Judge Crane found that petitioner was a knowing participant in planning and carrying out the hoax to obtain a lower sentence (ROA.901).

Before sentencing, petitioner moved to recuse Judge Crane under 28 U.S.C. § 455(a) and (b)(1). The motion alleged two grounds for recusal. First, Judge Crane's impartiality at sentencing might reasonably be questioned based on the events that unfolded. Second, Judge Crane had personal knowledge of disputed evidentiary facts concerning the proceeding based on his off-the-record, *ex parte* meetings with law enforcement agents (ROA.1447-56, 1485-95).[1] In denying the motion, Judge Crane stated:

> . . . I received some very limited information, . . . I was briefed maybe three times [about the alleged plot]. Again, I left the area for a period of time during the heart of this and the first information I received as sort of a briefing on where we are was maybe two and a half, three weeks after the initial [threat was reported]. Again, I was gone for . . . eight or 10 days during that time . . . and so when I came back in town our schedules were busy, we didn't

[1] This portion of the record on appeal is filed under seal.

finally connect until maybe the end of that week or the first part of the next week. And, again, I was just generally briefed on the status of the investigation and some interviews that occurred and the belief that this was a hoax.

And I do recall, as we mentioned, being told that there was a polygraph test that showed Mr. Lechuga was evasive or deceptive . . . .

. . .

[T]he overall consensus of people in law enforcement, whose opinions I respect, is that this was a hoax. I didn't need really more than that so I wasn't provided a whole lot of specifics.

. . .

I do not believe that a Defendant can orchestrate or be behind a ruse to reduce his sentence and then when it goes awry then claim that the Judge didn't recuse himself because the Judge then may be biased against him or her. That's most of what the cases counseled against, it's not letting a Defendant manipulate who his Judge is going to be and that's what – at this point I believe that that's what the Motion to Recuse is intending to do, is to manipulate who his Judge is, and also to some extent create further delay in the case . . . .

So I'm denying [the motion to recuse] . . . (ROA.900-02).

Judge Crane added that he did not need to recuse himself because petitioner's alleged role in the hoax caused Judge Crane only "de minimis" annoyance:

> [T]he Court was able to do everything that the Court normally did. It was just like you're at a picnic and there's flies and you're trying to just swat them away, sometimes I felt like I had people around me that – more so than I was used to but, no, the Court – I mean, I would say it was a rather minor inconvenience at most to the Court that there were some – the Marshals took some precautions but, so, again, I would say de minimis. Again, the Court – there was nothing the Court did that changes the Court's normal operation, both professionally and personally, so the inconvenience was de minimis (ROA.904).

Judge Crane next considered petitioner's request for credit for acceptance of responsibility and his motion for a downward variance from the guideline range (ROA.1467-77) [sealed]. Judge Crane cited petitioner's alleged knowing role in the hoax in denying a downward adjustment for acceptance of responsibility and a downward variance for cooperating with the DEA about other drug traffickers. He sentenced petitioner to 360 months, which was within the guideline range of 30 years to life imprisonment (ROA.916, 924-25, 931, 939).

In denying a downward variance, Judge Crane asked rhetorically, "I mean, how do we keep people

from doing this in the future to other Judges, you know, like I'm doing this for my colleagues" (ROA.924-25).

After Judge Crane denied the downward variance and pronounced the sentence, he candidly stated that he did not always consider the hoax to kill him to be "de minimis":

> I mean, at one point I was very upset about this and was considering let's just do life, I mean, 360 to life, I was going to give him life. I don't want to worry about him some day (ROA.936).

C. The Fifth Circuit's Decision

Applying an abuse-of-discretion standard of review, the Fifth Circuit affirmed Judge Crane's denial of the recusal motion (App. 3, 5). It credited the district judge's statement that the hoax had only caused him a "de minimis" amount of "inconvenience" (App. 2). In assessing whether "there was deep-seated favoritism or antagonism that would make fair judgment impossible," the Fifth Circuit summarily concluded that "Judge Crane's behavior, comments, and rulings in this case do not meet that standard" (App. 5) (citation and internal quotation marks omitted). Because it reviewed the record in a light most favorable to Judge Crane's refusal to recuse himself—an appellate device that is inherent in the abuse-of-discretion standard—it failed to mention that he stated that he initially was "very upset" and considered imposing a life sentence. Nor did it mention that Judge Crane left town for

several days after the initial report of the death threat. *Cf. Cobb v. Rowan Companies, Inc.*, 919 F.2d 1089, 1091 (5th Cir. 1991) ("When reviewing the district court's action, the evidence is viewed in the light most favorable to the jury verdict. . . . The district court abuses its discretion by denying a new trial only when there is an absolute absence of evidence to support the jury's verdict.").

REASONS FOR GRANTING CERTIORARI

The Court should grant certiorari to decide two related questions. First, as a threshold matter, it should resolve the circuit court split on whether to review the denial of a motion to recuse a district judge under 28 U.S.C. § 455(a) *de novo* or for an abuse of discretion. Second, it should decide whether the Fifth Circuit erred in affirming the denial of petitioner's recusal motion under 28 U.S.C. § 455(a) and (b)(1). At a minimum, if this Court decides that a *de novo* standard of review applies, it should vacate the Fifth Circuit's judgment and remand with instructions to apply that standard.

I. Circuit Courts Are Deeply Split on the Proper Standard of Review

Circuit courts are widely divided on whether to review the denial of a motion to recuse a district judge under 28 U.S.C. § 455(a) *de novo* or for an abuse of discretion. A majority, including the Fifth Circuit, applies an abuse-of-discretion standard. Meanwhile, the

Seventh Circuit applies a *de novo* standard, and the Second Circuit has an intra-circuit split and has applied both standards. *Compare United States v. Barr*, 960 F.3d 906, 919 (7th Cir. 2020) (*de novo*),[2] *with Burke v. Regalado*, 935 F.3d 960, 1052 (10th Cir. 2019) (abuse of discretion); *United States v. Cordova*, 806 F.3d 1085, 1092 (D.C. Cir. 2015) (same); *Glick v. Edwards*, 803 F.3d 505, 508 (9th Cir. 2015) (same); *Decker v. GE Healthcare Inc.*, 770 F.3d 378, 388 (6th Cir. 2014) (same); *Kolon Industries Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 167 (4th Cir. 2014) (same); *United States v. Ciavarella*, 716 F.3d 705, 717 (3d Cir. 2013) (same); *Moran v. Clarke*, 296 F.3d 638,

[2] *Accord In re Gibson*, 950 F.3d 919, 923 (7th Cir. 2019) ("[W]e have long applied a *de novo* standard of review."); *United States v. Simon*, 937 F.3d 820, 826 (7th Cir. 2019); *United States v. Dorsey*, 829 F.3d 831, 835 (7th Cir. 2016); *United States v. Diekemper*, 604 F.3d 345, 351 (7th Cir. 2010); *In re Sherwin-Williams Co.*, 607 F.3d 474, 477 (7th Cir. 2010). The Seventh Circuit previously applied the abuse-of-discretion standard, but in 1985 it explicitly adopted a *de novo* standard to review § 455(b) motion denials. *See United States v. Balistrieri*, 779 F.2d 1191, 1203 (7th Cir. 1985) ("We think that appellate review of a judge's decision not to disqualify himself . . . should not be deferential. . . . Accordingly, we will review decisions against disqualification under § 455(b)(1) *de novo*."), *overruled on other grounds by Fowler v. Butts*, 829 F.3d 788 (7th Cir. 2016). And in 1996 it adopted a *de novo* standard to review § 455(a) motion denials. *Hook v. McDade*, 89 F.3d 350, 353-54 (7th Cir. 1996).

Justice Barrett was a member of the Seventh Circuit panels in *Barr* and *Simon* that applied a *de novo* standard.

648 (8th Cir. 2002) (*en banc*) (same);[3] *United States v. Voccola*, 99 F.3d 37, 42 (1st Cir. 1996) (same).

The majority trend of applying an abuse-of-discretion standard probably relates to the historical practice of circuit courts reviewing denials of recusal motions by mandamus instead of direct appeal. *See*, *e.g.*, *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312-13 (2d Cir. 1988) ("[I]n reviewing the instant petition, we must bear in mind not only the standards governing recusal, but we must also consider the extraordinary showing required to obtain the issuance of a writ of mandamus. In other words, petitioners must 'clearly and indisputably' demonstrate that the district court abused its discretion. Absent such a showing, mandamus will not lie."). Mandamus review, which is equitable in nature, requires a clear abuse of discretion for the writ to issue. *See*, *e.g.*, *State of Maryland v. Soper*, 270 U.S. 9, 28 (1926) (mandamus relief appropriate when there is "gross abuse of discretion of the lower court"). In modern cases, a recusal claim typically is raised on direct appeal, as it was in petitioner's case. Thus, the historical rationale for affording discretion in the mandamus context no longer applies to recusal claims raised on direct appeal.

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[3] The Eighth Circuit previously had an intra-circuit split on the issue. *See Holloway v. United States*, 960 F.2d 1348, 1351 n.8 (8th Cir. 1992) ("The standard for reviewing on direct appeal a trial court's denial of a disqualification motion is unclear in this circuit. We usually have reviewed for abuse of discretion. . . . In some cases, however, we have conducted *de novo* review.") (citing cases). The *en banc* Eighth Circuit resolved the split in *Moran.*

Judges have dissented and called for *de novo* review in some of the circuit courts that apply an abuse-of-discretion standard. *See*, *e.g.*, *In re United States*, 158 F.3d 26, 36 (1st Cir. 1998) (Torruella, J., dissenting) ("[T]he precedent relied upon by the majority, to the effect that review of Chief Judge Cerezo's refusal to recuse herself is subject to appellate review only for abuse of discretion, runs contrary to both the letter and spirit of § 455(a). This provision leaves *no* discretion to the judge if he or she comes within its purview."). Although the *en banc* Third Circuit has not considered whether to overrule precedent applying the abuse-of-discretion standard, a panel of that court has suggested reconsideration of the issue:

> It is somewhat strange to speak in terms of an abuse of discretion where the underlying statute, 28 U.S.C. § 455, states that a judge "shall" disqualify himself or herself if certain grounds are present. The abuse of discretion standard may be an anachronistic vestige of an earlier version of § 455. Prior to 1974, § 455 provided in its entirety that a judge had to "disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, *in his opinion*, for him to sit on the trial, appeal, or other proceeding therein." 28 U.S.C. § 455 (amended 1974) (emphasis added). Under that version, a judge had broad discretion to deny a recusal request even if the grounds for recusal were present.

In re Kensington Int'l Ltd., 368 F.3d 289, 301 n.12 (3d Cir. 2004).

The *en banc* Second Circuit has not resolved its intra-circuit split. *Compare In re International Business Machines Corp.*, 618 F.2d 923, 926 (2d Cir. 1980) ("The question here is not whether the trial judge has abused his discretion but whether he could exercise any discretion because of a personal, extrajudicial bias which precludes dispassionate judgment."), *with, e.g.*, *SC Holding AG v. Nobel Biocare Finance AG*, 688 F.3d 98, 107 (2d Cir. 2012) (applying abuse-of-discretion standard).[4]

The extent of disarray in the lower courts is much deeper than the unbalanced circuit split indicates. Professor Richard Neumann has noted, "some cases in *every* circuit do not allow trial judges any discretion at all [in deciding whether to recuse themselves under

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[4] A panel of the Second Circuit first adopted and applied an abuse-of-discretion standard to review recusal claims in *Apple v. Jewish Hosp. and Medical Center*, 829 F.2d 326, 333 (2d Cir. 1987) (surveying decisions from First, Third, Fifth, and Tenth Circuits in support of adopting abuse-of-discretion standard without acknowledging conflicting Second Circuit precedent from *International Business Machines Corp.*). One year after *Apple*, another panel majority applied that deferential standard over the forceful dissent of Judge Lumbard. *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312-13 (2d Cir. 1988); *id.* at 1321 (Lumbard, J., dissenting) ("[W]e have held that the standard for review of a judge's refusal to recuse himself is *not* an abuse of discretion standard. Rather, we must query whether the trial judge could exercise that discretion in the face of a 'personal, extrajudicial bias which precludes dispassionate judgment.'") (quoting *International Business Machines Corp.*, *supra*) (emphasis in original).

§ 455(a)]. Except in the Seventh Circuit, these are primarily implicit *de novo* cases: they mention no standard of review and conduct a *de novo*-type of review without any deference to the trial court." Richard K. Neumann, *Conflicts of Interest in Bush v. Gore*, 16 GEO. J. LEGAL ETHICS 375, 390 n.93 (2003) (emphasis in original). Professor Neumann lists several such cases in footnote 93.

Additionally, several circuits that have applied an abuse-of-discretion standard in the § 455(a) context have applied a *de novo* standard when reviewing a *constitutional* (due process) claim that a judge should have recused herself because of actual or apparent bias. *See*, *e.g.*, *United States v. Wessels*, 539 F.3d 913, 914 (8th Cir. 2008) (*de novo* review of due process claim that district judge should have recused himself); *Hassan v. Holder*, 604 F.3d 915, 921 (6th Cir. 2010) (*de novo* review of due process claim that immigration judge should have recused himself); *Lucio-Rayos v. Sessions*, 875 F.3d 573, 576 (10th Cir. 2017) (same).

There is no principled basis to apply an abuse-of-discretion standard to a statutory recusal claim but a *de novo* standard to a constitutional claim—particularly when both tests are "objective" in nature. *Compare Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 884 (2009) ("[T]he Due Process Clause has been implemented by objective standards that do not require proof of actual bias."), *with Liteky v. United States*, 510 U.S. 540, 548 (1994) (recusal under § 455 must "be evaluated on an objective basis, so that what

matters is not the reality of bias or prejudice but its appearance" to a reasonable person).

Legal commentators have made cogent arguments why the applicable standard of appellate review in a § 455(a) case should be *de novo* rather than abuse-of-discretion. For example, the leading treatise on federal practice and procedure advises: "Because the disqualification statutes are mandatory and reflect a societal interest in an impartial judiciary, there is a strong argument that appellate courts should apply a *de novo* standard in reviewing recusal decisions." Richard D. Freer & Edward H. Cooper, 13D WRIGHT & MILLER'S FED. PRAC. & PROC. JURIS. § 3553 (3d ed. 1986 & 2020 update).

II. The Fifth Circuit's Abuse-of-Discretion Standard Conflicts with this Court's Precedent

Professor Neumann contends that this Court's § 455 decisions implicitly support the proposition that appellate review of recusal claims should be *de novo*:

> [O]f the four Supreme Court cases that have interpreted § 455 [as of 2003], none held that a recusal decision is within the challenged judge's discretion. All four cases interpret the statute as Congress drafted it, with mandatory duties not amenable to discretion.

Richard K. Neumann, *Conflicts of Interest in Bush v. Gore*, 16 GEO. J. LEGAL ETHICS 375, 394 (2003); *see Sao Paolo State of the Federative Republic of Brazil v. Amer.*

Tobacco Co., 535 U.S. 229 (2002); *Liteky v. United States*, 510 U.S. 540 (1994); *Liljberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988); *United States v. Will*, 449 U.S. 200 (1980). This Court has not decided a § 455 case since 2002.

This Court did not explicitly address the applicable standard of review in any of those § 455 cases. However, as Professor Neumann observed, this Court discussed the *mandatory* nature of recusal upon a sufficient showing of certain facts or circumstances. *See*, *e.g.*, *Liljberg*, 486 U.S. at 862 ("§ 455 defines the circumstances that mandate disqualification of federal judges[.]"). This Court also has noted the *objective* nature of the inquiry. *Liteky*, 510 U.S. at 548 (recusal must "be evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice but its appearance" to a reasonable person) (emphasis added); *Liljberg*, 486 U.S. at 861 ("reasonable person" test). Those two features of § 455—the mandatory nature of recusal and the objective nature of the inquiry—strongly militate in favor of *de novo* review.

Two other decisions of this Court demonstrate that *de novo* review should apply to a § 455 recusal claim on appeal. *See Highmark Inc. v. Allcare Health Management System, Inc.*, 572 U.S. 559 (2014); *Ornelas v. United States*, 517 U.S. 690 (1996). The Court observed in *Highmark*: "Traditionally, decisions on 'questions of law' are 'reviewable *de novo,*' decisions on 'questions of fact' are 'reviewable for clear error,' and decisions on 'matters of discretion' are 'reviewable for "abuse of discretion."'" 572 U.S. at 563 (citation

omitted). Because § 455(a) is "mandatory" rather than "discretionary" in nature, it is not amenable to abuse-of-discretion review. In *Ornelas*, the Court held that a *de novo* standard applies to whether "reasonable suspicion" or "probable cause" exists within the meaning of the Fourth Amendment because of the "objective" nature of the reasonable suspicion and probable cause standards, which the Court described as "mixed questions of law and fact." 517 U.S. at 696-97 ("The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. . . . We think independent appellate review of these ultimate determinations of reasonable suspicion and probable cause is consistent with the position we have taken in past cases.").

Thus, an appellate court should apply *de novo* review because § 455(a) requires application of an "objective" standard and is a "mandatory" statute if its conditions are met.

III. The District Judge Should Have Recused Himself

Judge Crane should have recused himself under § 455(a)'s objective standard and under § 455(b)(1), which requires recusal when a judge has "personal

knowledge of disputed evidentiary facts concerning the proceeding."

A. Section 455(a)

Under § 455(a), "[r]ecusal is required *whenever* there exists a genuine question concerning a judge's impartiality, and not merely when the question arises from an extrajudicial source." *Liteky*, 510 U.S. at 552 (emphasis in original); *see also id.* at 558 (Kennedy, J., concurring) ("[U]nder § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.").

In petitioner's case, federal agents initially told Judge Crane that a Mexican drug cartel was planning to assassinate him. One source of the information appeared credible: petitioner, a veteran DEA informant (ROA.878-90). Any reasonable person in Judge Crane's position would have experienced significant concern after learning that information. Indeed, Judge Crane admitted at the sentencing hearing that he had "left the area for a period of time during the heart of this" (ROA.901). Additionally, any reasonable person who ultimately believed that the plot to kill him was a hoax orchestrated by the defendant to obtain a lower sentence would be furious and likely to retaliate at sentencing. Objectively, a "reasonable third-party observer would [have] perceive[d] . . . a significant risk" that the judge would be "influenced by the threat [and

subsequent discovery of the hoax] and resolve the case on a basis other than the merits." *United States v. Spangle*, 626 F.3d 488, 496 (9th Cir. 2010).

At sentencing, Judge Crane initially asserted that he was not overly concerned about the plot to kill him, comparing the threat to a fly at a picnic and referring to the episode as a "de minimis" inconvenience, which the Fifth Circuit echoed in its decision. However, Judge Crane later candidly admitted, "at one point I was very upset about this and was considering . . . giv[ing] [petitioner] life" because "I don't want to worry about him some day" (ROA.936). Although Judge Crane did not impose a life sentence, he did impose a 30-year sentence on the 38-year-old petitioner (ROA.951). And Judge Crane specifically refused to reduce that guideline sentence despite petitioner's guilty plea and substantial cooperation with the DEA about other drug traffickers. His anger may have subsided marginally by the time of sentencing, but the fact that he harbored such anger at any point required recusal because it raised a genuine question concerning his impartiality. The bell could not be un-rung.

B. Section 455(b)(1)

There was a separate reason for recusal under § 455(b)(1). In *ex parte* meetings, federal agents told Judge Crane that they believed that the assassination plot was a hoax and that petitioner was a knowing participant along with his brother and uncle. Judge Crane decided that petitioner was a knowing participant in

the hoax well before sentencing, when he also denied the recusal motion. He admitted, "the overall consensus of people in law enforcement, whose opinions I respect, is that this was a hoax. I didn't need really more than that . . . " (ROA.900-03).

The outcome was a *fait accompli* when the joint hearing on the recusal motion and sentencing commenced. Judge Crane already knew that he would deny the recusal motion, credit for acceptance of responsibility, and a variance below the 30-year guideline minimum sentence. His predisposition came from an extra-judicial source of information, namely, what the agents told him *ex parte in his capacity as a possible victim of an assassination plot*, not in court as the federal judge presiding over sentencing after hearing witness testimony in an adversarial context.[5]

Finally, Judge Crane's statement that recusal was inappropriate because it would allow future defendants to "forum-shop" by making fake threats was unfounded. There was no evidence that petitioner concocted a bogus plot to kill Judge Crane as a pretext to recuse him from the sentencing. On the contrary, even if petitioner knowingly participated in the hoax (which petitioner denied), his sole intent was to persuade Judge Crane to credit him for the information by

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[5] In *Liteky*, this Court held that an "extrajudicial source" for a judge's opinion about a case or a party is neither necessary nor sufficient to require recusal. *Liteky*, 510 U.S. at 554-56. Rather, the presence of an extrajudicial source is merely a thumb on the scale in favor of finding either an appearance of partiality under § 455(a) or bias or prejudice under § 455(b)(1). *Id.*

imposing a lower sentence. Indeed, when petitioner provided the information to law enforcement, he *wanted* Judge Crane to sentence him.

Judge Crane should have recused himself. The Fifth Circuit erred in affirming the denial of the recusal motion based on an abuse-of-discretion standard. This Court should grant certiorari to resolve the entrenched circuit split and decide, once and for all, what standard of review applies to appellate review of recusal claims. At a minimum, if it decides that a *de novo* standard applies, it should vacate the Fifth Circuit's judgment and remand to apply that standard.

CONCLUSION

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

Respectfully submitted,

NEAL A. DAVIS
1545 Heights Blvd., Suite 700
Houston, Texas 77008
(713) 227-4444
neal@nealdavislaw.com

JOSH BARRETT SCHAFFER
Counsel of Record
1021 Main St., Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com

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