App. 1

USCA11 CASE: 21-11921 DATE FILED: 08/12/2021 PAGE 1 of 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-11921-C

GREGORY C. KAPORDELIS, Petitioner-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

ORDER:

Gregory Kapordelis's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. Section 2253(c).

/s/ Britt Grant

UNITED STATES CIRCUIT JUDGE

USCA11 CASE:21-11921 DATE FILED: 09/24/2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-11921-C

GREGORY C. KAPORDELIS, Petitioner-Appellant,
v.
UNITED STATES OF AMERICA, Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

BEFORE: GRANT and LAGOA, Circuit Judges.

BY THE COURT:

Gregory Kapordelis has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's August 12, 2021, order denying a certificate of appealability. Upon review, Kapordelis's motion for reconsideration is denied because he has offered no new evidence or arguments of merit to warrant relief.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scot C. Harris
Clerk of the Court
(202)479-3011

December 10, 2021

Mr. Gregory C. Kapordelis
Prisoner ID 63122-053
FCI Oakdale I
P.O. Box 5000

RE: Gregory C. Kapordelis v. United States
Application No. 21A214

Dear Mr. Kapordelis:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-titled case has been presented to Justice Thomas, who on December 10, 2021, extended the time to and including January 24, 2022.

This letter has been sent to those designated on the attached notification list.

Scot C. Harris, Clerk
By /S/ Jacob Levitan

Jacob A. Levitan
Case Analyst

App. 4

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

GREGORY C. KAPORDELIS,

Movant,

v. Civil Case No. 11-cv-280-CAP
Crim. Case No. 04-cr-249-CAP

UNITED STATES OF AMERICA,

Respondent.

NOTICE OF APPEAL
NOTICE OF INTENT TO FILE FORMAL APPLICATION FOR COA

Comes now Movant, Gregory C. Kapordelis, Pro Se, and provides Notice of Appeal to the Eleventh Circuit Court of Appeals from the district court's orders denying his Rule 60(b)(4), Fed.R.Civ.P., motion to reopen 28 U.S.C. Section 2255 proceedings due to defects in the integrity of those proceedings. (Doc. #653, Order dated May 13, 2020; Doc. #658, Order dated April 1, 2021). To secure an appeal from these orders, Kapordelis provides herewith his Notice of Intent to File a Formal Application for Certificate of Appealability

("COA"), as required under 28 U.S.C. Section 2253(c) and Rule 22, Fed.R.App.P.

THIS NOTICE OF APPEAL ALSO TARGETS the district court's orders denying recusal from the instant Rule 60(b) proceedings pursuant to 28 U.S.C. Sections 455(a) and (b)(1). (Doc. #643, Order dated January 18, 2019; Doc. #653 at Sections III(A) and III(B), Order dated May 13, 2020; Doc. #658, Order dated April 1, 2021). Jurisdiction for appellate review from recusal orders is authorized, as a matter of right, under 28 U.S.C. Section 1291; as such, a COA is not required. Kapordelis provides a brief legal argument in support of this position.

Appellate Review of Recusal Orders Does Not Require a COA.

As explained in Kapordelis's Rule 60(b)(4) pleading (Doc. #650 at 23-26), 28 U.S.C. Section 2253(c)(1)(A) and (B) provide that unless a circuit justice issues a COA an appeal may not be taken from the final order "in a habeas corpus proceeding" whether the detention complained of arises out of a State court or 28 U.S.C. Section 2255 proceeding. 28 U.S.C. Section 2253(c)(1)(A) and (B). These provisions "govern final orders that dispose of the merits of a habeas corpus proceeding---a proceeding challenging the lawfulness of the prisoner's detention." *See, generally, Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000); *Wilkinson v. Dotson*, 544 U.S. 74, 78-83 (2005). An order that merely denies a motion to recuse a judge from Section 2255

proceedings is not such an order and is therefore not subject to the COA requirement. See *Harbison v. Bell*, 536 U.S. 180, 183 (2009)(holding that orders relating to appointment of counsel fell outside statutory requirement for COA). Although the predicate for the holding in *Bell* is not relevant under Kapordelis's circumstances (Kapordelis's issue is recusal orders, not appointment of counsel orders), the *Bell* holding was based on a strict reading of the language in 28 U.S.C. Section 2253(c)(1)(A) that limits the COA requirement to "final orders that dispose of the merits of a habeas corpus proceeding." *Id.* A

Applying *Bell* to Kapordelis's circumstances, orders that dispose of recusal motions are clearly not final appealable orders, and they---like orders addressing appointment of counsel---do not dispose of the merits of a habeas corpus proceeding except on a procedural basis.

Fortunately, one need not rely on the aforementioned argument to conclude that a COA is not required to appeal from recusal orders: Nearly every circuit court of appeals, including the Eleventh Circuit, have reached the same conclusion. See *Iacullo v. United States*, 463 Fed. App'x 896, 896-97 (11th Cir. 2012)(setting forth a briefing schedule followed by an on the merits review of district court's recusal order in Section 2255 proceeding, even though no COA was issued with respect to alleged 2255 grounds of error); *Ohle v. United States*, 2018 U.S. App. LEXIS 28074 (2d Cir. 2018); *United States v. Schwartz*, 2016 U.S. App. LEXIS 24190 (3rd Cir.

2016)(No COA required in a Rule 60(b) proceeding to appeal from the denial of a motion to recuse district judge, *citing to Harbison v. Bell*); *Rice v. McKenzie*, 581 F.2d 1114, 1118 (4th Cir. 1978)(vacating district court's denial of a habeas petition because the district court abused its discretion in denying recusal motion); *Trevino v. Johnson*, 168 F.3d 173, 176-78 (5th Cir. 1999)(accepting jurisdiction to hear appeal regarding recusal under 28 U.S.C. Section 455(a), where the issue did not constitute an appeal of the merits of the order to deny habeas relief); *Kemp v. United States*, 52 Fed. App'x 731, 732 (6th Cir. 2002)(appeal from recusal order not mooted based on decision to not issue a COA to review the Section 2255 grounds of error); *Russell v. Lane*, 890 F.2d 947, 947 (7th Cir. 1989)(finding jurisdiction to consider whether a district court abused its discretion in denying recusal motion, because "federal procedural law governing recusal entitles [the petitioner] to have his habeas corpus petition heard by a[n] unbiased judge"); *Nelson v. United States*, 297 Fed. App'x 563 (8th Cir. 2008)(A petitioner "need not obtain a certificate of appealability to appeal [his motion to recuse] because it is separate from the merits of a Section 2255 motion"); *United States v. McIntosh*, 2018 U.S. App. LEXIS 3095 (10th Cir. 2018)(No COA required to appeal from recusal order, *citing to Harbison v. Bell*). Simply put, the overwhelming case law is unambiguous on this subject.

To understand precisely why Kapordelis must be provided an on the merits review of the district

court's recusal orders, the rationale in *Iacullo* (*supra*) is instructive. In Iacullo, the government took the position that any review of the recusal orders was "moot" because Mr. Iacullo was denied a COA with respect to the Section 2255 grounds of error and, therefore, could not prevail on the merits. Speaking for the panel in a per curiam decision, Circuit Judge Tjoflat explained the fallacy in this argument, as follows:

> [I]acullo's recusal argument is not moot. As in *Mixon [v. United States*, 620 F.2d 486 (5th Cir. 1980)], if we determine that [Judge] White should have recused himself, we can grant relief by reversing the district court judgment and ordering that the case not be assigned to White on remand. Even if the government is correct that *Iacullo* cannot prevail on the merits, Section 455 is intended to protect against unfair judicial proceedings.

Iacullo, 463 Fed. App'x at 896-97 (some citations omitted). Mr. Iacullo was provided advance notice of a briefing schedule, and the government was given an opportunity to respond. Kapordelis deserves the same notice and consideration.

Some recent Eleventh Circuit cases provide additional heft to Kapordelis's argument. For example, in *Rufus v. Georgia*, 2021 U.S. App. LEXIS 806 (11th Cir. 2021), a Rule 60(b)(4) motion which included a motion to recuse the district judge, a COA was denied with regard to the Rule 60(b)(4) claim, but the recusal issue was addressed on the merits. As another example, in *Johnson v. United States*, 2019 U.S. App. LEXIS 6679 (11th Cir. 2019), the

case was dismissed by the district court as an impermissibly second or successive Section 2255. On appeal, Circuit Judge Marcus held that the requests for a COA, on that issue and on the issue of the district judge's recusal, were DENIED AS UNNECESSARY.

As a final example, in *United States v. Martinez*, 760 Fed. App'x 911 (11th Cir. 2019), which involved an appeal from a Rule 60(b) judgment and recusal orders, the *per curiam* panel affirmed the dismissal of the Rule 60(b) motion as second or successive. With respect to the disqualification issue, however, the panel explained that it would have reviewed the matter on the merits (Circuit Judge Jordan actually did so, in a concurring opinion), but could not because "Martinez did not include the district court's ruling on this disqualification motion in his notice of appeal, so we lack jurisdiction to consider it on the merits." *Id.* In short, jurisdiction was not lacking due to the denial of a COA; it was lacking because, unlike here, the notice of appeal did not directly target the recusal orders.

CONCLUSION

Wherefore, Kapordelis provides his Notice of Appeal and also submits his Notice of Intent to file with the Eleventh Circuit an Application for Certificate of Appealability to secure an on-the-merits review of the district court's orders denying of Rule 60(b)(4) relief.

In addition, Kapordelis provides notice of appeal concerning the two issues that do not require

a COA: (i) appellate review of the orders denying Judge Pannell's disqualification from the Rule 60(b)(4) proceedings, and (ii) appellate review of the district court's decision to deny Rule 60(b)(4) relief because the motion is an "impermissibly second or successive" Section 2255 motion.

Gregory C. Kapordelis, Pro Se