

21-5162

ORIGINAL

No. _____

Supreme Court, U.S.
FILED

JUL 02 2021

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Andrew Cox — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Third Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Andrew Cox (69123 061)

(Your Name)

PO Box 10

(Address)

Lisbon, OH 44432

(City, State, Zip Code)

n/a

(Phone Number)

QUESTION(S) PRESENTED

1. Does 28 USC 455(a) require disqualification of a district judge for initiating multiple secret, ex parte communications with the United States regarding its 16-month abandonment of Petitioner's prosecution?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

n/a

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4-5
REASONS FOR GRANTING THE WRIT	6-7
CONCLUSION.....	8

INDEX TO APPENDICES

APPENDIX A Opinion of the Third Circuit in *In re: Cox*, No. 20-2665
(3d Cir. 2021)

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix 1/1 to the petition and is 1/1

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 07 June 2021.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 USC 455(a) states that any judge "of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

FROM: 69123061
TO:
SUBJECT: Statement of the Case
DATE: 06/30/2021 08:54:59 AM

STATEMENT OF THE CASE

On 05 December 2014, (then) District of New Jersey Chief Judge Jerome B. Simandle sua sponte removed Cox's sentencing judge -- USDJ Jose L. Linares -- for criminal judicial misconduct and reassigned his case to USDJ Claire C. Cecchi. See DNJ 11-cr-99 at docket entries 236-237.

Cox's conviction was finalized on direct appeal on 23 February 2015. Cox v. United States, No. 14-7941 (US, 2015).

On 20 January 2016, Cox filed a timely motion to vacate under 28 USC 2255, alleging, *inter alia*, malicious prosecution *per se* via the fraudulent manipulation of his district court docket to post-date his arrest 35 days; actual innocence based on a staggering amount of unlawfully withheld Brady exculpatory evidence; and both Court and Government violations of his judicially binding Rule 11(c)(1)(C) plea agreement. See DNJ 16-cv-0345 at Dkt 01.

Judge Cecchi inexplicably waited 22 months after Cox's 2255 motion was filed before even issuing a briefing schedule on 17 November 2017. *Id* at Dkt 22.

On 02 March 2018, the United States filed a stupidly frivolous and borderline incoherent Answer to Cox's 2255 motion, which failed to address or deny any of Cox's claims -- including that Cox was maliciously prosecuted *per se* and is actually innocent. *Id* at Dkt 29.

Thus -- under Rule 5(b) of the Rules Governing Section 2255 Proceedings ("The answer must address the allegations in the motion."), and Federal Rule of Civil Procedure 8(b)(6) ("An allegation ... is admitted if a responsive pleading is required and the allegation is not denied.") -- the United States legally admitted that Cox is actually innocent.

On 13 March 2018, briefing was completed with Cox's motion for summary judgment of his now Government-admitted 2255 motion. *Id* at Dkt 30.

But Judge Cecchi inexplicably refused to exercise jurisdiction over Cox's 2255 motion.

Unbeknownst to Cox at the time, in January of 2019, the AUSA assigned to Cox's case -- Shana W. Chen -- left the United States Attorneys Office, the Government chose not to assign another AUSA to Cox's active case, and thus the United States effectively abandoned Cox's prosecution. *Id* at Dkt 51.

The Government choosing to abandon Cox's prosecution at this point was appropriate -- and indeed was expected -- because the United States had already admitted ten months earlier (in March of 2018) that Cox was maliciously prosecuted *per se* and is actually innocent.

On 22 January 2020, Cox filed a motion to expedite (*Id* at Dkt 35), and on 27 January 2020 Judge Cecchi inexplicably ordered the United States to supplement its "deficient" Answer by 03 February 2020. *Id* at Dkt 36.

Since the United States abandoned Cox's prosecution in January of 2019 -- one full year earlier -- it refused to comply with Judge Cecchi's order and defaulted, thus officially abandoning Cox's prosecution because he is actually innocent.

Over the next three months, Cox filed a notice of Government default (*Id* at Dkt 37), motion for entry of nolle prosequi (*Id* at Dkt 38), and a second motion to expedite because a district court has no legal discretion to deny an abandoned prosecution (*Id* at Dkt 39).

Importantly, at no point did Judge Cecchi ever issue a show-cause order to the United States, but still inexplicably refused to exercise jurisdiction over Cox's Government-admitted and Government-abandoned 2255 motion.

On 12 May 2020, Cox filed an emergency petition for a writ of mandamus asking the Third Circuit to grant his 2255 motion and order his immediate release from federal custody. *In re: Cox, No. 20-1993 (3d Cir. 2020)*.

In direct retaliation for Cox filing that mandamus petition, the very next day, 13 May 2020, Judge Cecchi actually initiated

multiple secret, ex parte communications with the United States. Id at Dkt 42.

When Judge Cecchi initially "reached out to the Government" ex parte: (1) she was told that AUSA Chen left the DNJ-USAO in January of 2019 and the United States had abandoned Cox's prosecution, and (2) she apparently requested that the USAO assign a new AUSA to Cox's case. Id.

The DNJ-USAO assigned sacrificial rookie AUSA George L. Brandley to Cox's case, who then had at least one subsequent, secret ex parte teleconference with Judge Cecchi on 13 May 2020 regarding how to suppress the Government's 16-month abandonment of Cox's prosecution. Id.

There is no record of any of Judge Cecchi's secret, ex parte communications with the United States. There is no minute entry on the docket, no transcript, no letter memorializing the teleconference -- nothing. And Cox was neither informed nor included. See Id at Dkt 44.

The "appearance of justice" at this point indicates a criminal conspiracy between Judge Cecchi and the DNJ-USAO to deny Cox's constitutional due process right to entry of nolle prosequi following the Government's incredibly lengthy abandonment of his prosecution.

On 05 June 2020, the United States explicitly admitted to at least two of its secret, ex parte communications with Judge Cecchi. Id at Dkt 42, pg 03.

Cox immediately moved to recuse Judge Cecchi on 16 June 2020 (Id at Dkt 45), and to disqualify AUSA George L. Brandley on 19 June 2020 (Id at Dkt 46).

The United States did not oppose Cox's motions to recuse Judge Cecchi or disqualify AUSA Brandley.

On 13 August 2020, Cox filed a petition for a writ of mandamus with the Third Circuit to compel Judge Cecchi to recuse herself. In re: Cox, No. 20-2665 (3d Cir. 2021).

On 07 June 2021, the Third Circuit issued a non-precedential opinion denying Cox's mandamus petition, and stating in relevant part:

"Although ex parte communications are strongly disfavored, the District Judge's May 13, 2020 videoconference with the Government does not warrant recusal here because there is no indication that substantive advice was either solicited or offered.

Moreover, to the extent that Cox complains about the pace of his 2255 proceedings, the docket report reflects that the case is moving forward and mere dissatisfaction with prior rulings does not warrant recusal.

Lastly, we discern no evidence of bias in the record."

In re: Cox, No. 20-2665 (3d Cir. 2021), 06/07/21 Opin at pg 03 (internal citations omitted).

The standard for recusal under 28 USC 455(a) is not "indication that substantive advice was either solicited or offered;" even if it was, there is no possible way for Cox to know if substantive advice was either solicited or offered because he was not a party to the secret, ex parte communications between Judge Cecchi and the United States; the docket report absolutely does not reflect that Cox's case is moving forward (after five and a half years); and the Third Circuit inexplicably failed to address any of the newly discovered evidence regarding the Government's 16-month abandonment of Cox's prosecution.

That is not justice; that is a witch-hunt and a railroad job.

This petition followed.

FROM: 69123061
TO:
SUBJECT: Reason the Writ should be Granted
DATE: 06/30/2021 10:40:03 AM

REASON THE WRIT SHOULD BE GRANTED

I. 28 USC 455(a) requires disqualification of USDJ Claire C. Cecchi for initiating multiple secret, *ex parte* communications with the United States regarding its 16-month abandonment of Cox's prosecution.

28 USC 455(a) states that any judge "of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 USC 455(a).

The statute is intended to avoid even an appearance of impartiality. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 US 847, 865 (1988).

The inquiry is "whether the record, viewed objectively, reasonably supports the appearance of prejudice or bias." *In re Kensington Int'l Ltd.*, 368 F3d 289, 300-301 & n.12 (3d Cir. 2004).

"A party moving for disqualification under 28 USC 455(a) need now show actual bias because 455(a) concerns not only fairness to individual litigants, but, equally important, it concerns the public's confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted."

Id at 302 (internal citations omitted).

"*Ex parte* communications occur when one party speaks to the judge without notice to the other party." *Hood v. Dir. of the Cal. Dep't of Corr. & Rehab.*, 2016 US Dist Lexis 195370 (SDCA 2016).

As one judge succinctly responded in writing to a plaintiff's repeated attempts to meet with him: "Please tell her sorry that is not how the process works. I can not engage in *ex parte* communications with any litigants." *Dillard-Crowe v. Aurora Loan Servs.*, 2008 US Dist Lexis 111988 (DCO 2008).

First, in one case directly on point, it was held "legally sufficient" grounds for disqualification under 455(a) where the judge actually initiated two *ex parte* communications with defense counsel to try and avoid trial. *United States v. Furst*, 886 F2d 558, 583 (3d Cir. 1989).

Here, Judge Cecchi initiated at least two secret, *ex parte* communications with the United States to avoid releasing Cox on entry of *nolle prosequi* once she learned that the Government had abandoned Cox's prosecution for over 16-months (from January 2019 to May 2020), and that is why the United States intentionally defaulted on her 27 January 2020 order to supplement.

Thus, the exact circumstances of this case are "legally sufficient" to disqualify Judge Cecchi under 455(a).

In another case directly on point, when it became public that USDJ Colin S. Bruce had engaged in *ex parte* communications with members of the USAO for the Central District of Illinois, all criminal cases assigned to Judge Bruce were reassigned to other judges. *United States v. Williams*, 949 F3d 1056, 1058 (7th Cir. 2020).

The Seventh Circuit held that Judge Bruce's conduct -- *ex parte* communications about cases pending before him, including with the AUSA assigned to the instant case -- "created an appearance of impropriety violating the federal recusal statute." *Id* at 1059.

Here, Judge Cecchi's misconduct was substantially worse than Judge Bruce's conduct in *Williams*, *supra*.

After the United States abandoned Cox's prosecution, the only appropriate action for Judge Cecchi was to grant Cox immediate summary judgment on entry of *nolle prosequi*, and then order the Government to show cause why it should not be sanctioned for defaulting on her order to supplement.

Thus, Judge Cecchi initiating secret, ex parte communications with the United States -- and then having a subsequent, secret ex parte teleconference with AUSA George L. Brandley to try and suppress the Government's 16-month abandonment of Cox's prosecution -- clearly shows actual bias in the form of preferential treatment and deep-seated favoritism for the Government.

Second, even if the standard for recusal was "indication that substantive advice was either solicited or offered," as inexplicably required by the Third Circuit in its opinion (Attachment A-3), there is no possible way for Cox to know if substantive advice was either solicited or offered because he was not a party to the secret, ex parte communications between Judge Cecchi and the United States -- and thus the basis of why ex parte communications are explicitly disallowed in our adversarial system.

The Third Circuit described ex parte communications as "anathema in our system of justice." *In re Sch. Asbestos Litig.*, 977 F2d 764, 789 (3d Cir. 1992).

"One leading reason is that ex parte meetings are often, as they were here, unrecorded.

Consequently, there is no official record of what was said during those meetings.

Of even greater concern is the argument urged upon us by the Petitioner[] who, without knowledge of what was discussed at these meetings, contended that [he] could not respond to these 'silent' facts."

In re Kensington, 368 F3d at 309.

"The other problem is that ex parte communications run contrary to our adversarial trial system. The adversary process plays an indispensable role in our system of justice because a debate between adversaries is often essential to the truth-seeking function of trials." *Id* at 310.

See *Polk County v. Dodson*, 454 US 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness").

"If judges engage in ex parte conversations with the parties ... the adversary process is not allowed to function properly and there is an increased risk of an incorrect result." *In re Kensington*, 368 F3d at 310.

Attuned to that concern, the Code of Conduct for United States Judges cautions that a judge shall "neither initiate nor consider ex parte communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." Code of Conduct for U.S. Judges Canon 3 A(4)(2003).

The rule is designed to prevent all of the evils of ex parte communications: "bias, prejudice, coercion, and exploitation." Jeffrey M. Shaman et al, *Judicial Conduct and Ethics* 5.03 (3d ed 2000).

Thus, Judge Cecchi's "ex parte meetings with the [Government] are flawed because, as we have explained, no opportunity existed for their adversaries to know precisely what was said, when it was said, by whom, and what effect could be drawn from their offerings." *In re Kensington*, 368 F3d at 311.

Finally, if the situation had been reversed, and Cox had defaulted on an order from the District Court because he intentionally abandoned his case for 16-months, Judge Cecchi would NEVER have "reached out" to Cox to follow up, or pressured Cox to return and attempt to suppress his lengthy abandonment in a secret, ex parte teleconference. And if Judge Cecchi did initiate secret, ex parte communications with Cox, the United States would surely be the party filing this appeal to disqualify Judge Cecchi instead of Cox.

Therefore, since the "appearance of impartiality" is easily met with Judge Cecchi's actual bias, ex parte communications are explicitly disallowed in our adversarial system, and if the situation had been reversed the United States would be the party litigating to disqualify Judge Cecchi -- 28 USC 455(a) requires USDJ Claire C. Cecchi to recuse herself for initiating multiple secret, ex parte communications with the United States regarding its 16-month abandonment of Cox's prosecution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Andrew Fox

Date: 01 July 2021