No. 21-6630

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL A. RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

SOFIA M. VICKERY
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's unconditional guilty plea relinquished his right to challenge on appeal the district court's denial of his motion for recusal under 28 U.S.C. 455(a).

ADDITIONAL RELATED PROCEEDING

United States District Court (W.D. Va.):

Rodriguez v. Streeval, No. 20-cv-589 (Nov. 16, 2020) (order denying petition for writ of habeas corpus)

IN THE SUPREME COURT OF THE UNITED STATES

No. 21-6630

DANIEL A. RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is not published in the Federal Reporter but is available at 2021 WL 3745337. The order of the district court (Pet. App. 60a-65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2021. A petition for rehearing was denied on December 10, 2021 (Pet. App. 22a). The petition for a writ of certiorari was filed on December 14, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to possess with the intent to distribute controlled substance analogues, in violation of 21 U.S.C. 841(a)(1) and 846; conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); possessing a controlled substance analogue with the intent to distribute it, in violation 21 U.S.C. 841(a)(1) and (b)(1)(C); 17 counts of possessing a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and four counts of money laundering, in violation of 18 U.S.C. 1957. Judgment 1-3; Superseding Indictment 1-5; see Pet. App. 2a. He was sentenced to 400 months of imprisonment, to be followed by three years of supervised release. Judgment 4, 6. The court of appeals affirmed. Pet. App. 1a-21a.

1. Between approximately October 2016 and February 2018, petitioner organized and led a drug-trafficking and money-laundering operation to provide ADB-FUBINACA, a Schedule I synthetic cannabinoid, to federal inmates in detention facilities throughout the United States. Presentence Investigation Report (PSR) ¶¶ 4, 33. Petitioner saturated papers, photographs, and books with liquid ADB-FUBINACA, disguised the drug-laden documents as legitimate mail, and sent them to inmates using the United States Postal Service. PSR ¶ 5. Petitioner also created and professionally bound documents purporting to be case law and

attorney-client communications, saturated them with liquid ADB-FUBINACA, and mailed them to prisoners in envelopes that appeared to be from legitimate criminal defense attorneys. PSR ¶ 9. He did the same with fictitious funeral and obituary notices, which purported to be about individuals related to the recipient inmate and appeared to be mailed from a local church, and with books purchased at Barnes and Noble, which appeared as if they had been shipped from that store. PSR ¶¶ 10, 11. The inmates receiving these drug-infused documents paid petitioner through their commissary accounts, and petitioner then used a company that he co-owned to launder the illegal proceeds. PSR ¶¶ 27, 28.

A grand jury in the Southern District of Florida returned a superseding indictment charging petitioner with conspiring to possess with the intent to distribute controlled substance analogues, in violation of 21 U.S.C. 841(a)(1) and 846; conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); possessing a controlled substance analogue with the intent to distribute it, in violation 21 U.S.C. 841(a)(1) and (b)(1)(C); 17 counts of possessing a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(C); and four counts of money laundering, in violation of 18 U.S.C. 1957. Superseding Indictment 1-5.

In August 2018, petitioner pleaded guilty to all counts of the superseding indictment without a plea agreement. Pet. App. 23a-44a. At his plea hearing, the district court informed

petitioner of his right to a jury trial, his right to counsel, his right to remain silent, his right to confront witnesses called against him and to call witnesses on his own behalf, and his right to require the government to prove him guilty beyond a reasonable doubt. Id. at 34a-36a. Petitioner confirmed that he understood those rights. See ibid. He also confirmed his understanding of his right, following a guilty plea, to appeal his sentence. Id. at 34a. Petitioner then informed the court that he understood that he was waiving his trial-related rights by pleading guilty, and that he wanted to plead guilty. Id. at 35a-36a.

2. a. After entering his guilty plea, and prior to sentencing, petitioner filed motions to recuse the district judge, Judge Ursula Ungaro, as well as all other judges in the Southern District of Florida. D. Ct. Doc. 277 (Feb. 15, 2019); D. Ct. Doc. 280 (Feb. 19, 2019). Petitioner argued that recusal was required by an order that had been entered in a previous criminal case, see D. Ct. Doc. 277-1 (No. 94-402 (S.D. Fla.)), in which petitioner had been charged with assaulting a then-sitting judge in the Southern District of Florida (Judge Highsmith), as well as various firearms offenses. D. Ct. Doc. 277, at 5-10. A 1994 order in that prior case stated that "all District Judges in the Southern District of Florida are recused from consideration of this cause." D. Ct. Doc. 277-1, at 2. Petitioner argued that the 1994 order required Judge Ungaro, who had overlapped with Judge Highsmith, to recuse from petitioner's separate drug case two decades later.

D. Ct. Doc. 277, at 5-8. He further asserted that all judges in the Southern District of Florida should be recused under 28 U.S.C. 455(a) because no judge in the district could appear impartial in light of petitioner's "notoriety" as the defendant who had "'pistol-whipped'" and "robbed" Judge Highsmith. D. Ct. Doc. 280, at 1, 6-10; see D. Ct. Doc. 277, at 2.

Petitioner's recusal motions additionally invoked the fact that, in 2010, in response to a letter from the Federal Bureau of Prisons (BOP), then-Chief Judge Moreno had sent a letter (with copies to other local district and magistrate judges) expressing his view that petitioner should not receive credit for time served. D. Ct. Doc. 280, at 2-3 (noting that the BOP had addressed its letter to the sentencing judge in petitioner's 1994 case, but inadvertently mailed it to the Southern District of Florida); see D. Ct. Doc. 277-2. On collateral review, the Ninth Circuit had found that the BOP should not have considered Judge Moreno's letter because he was recused from petitioner's 1994 case, and moreover was not the sentencing judge. 823 F.3d 1238, 1242-1243.

b. The district court denied petitioner's recusal motions. Pet. App. 60a-65a. The court explained that the 1994 "district-wide recusal order applied only to the alleged-assault case involving Judge Highsmith," not "to any and all causes involving [petitioner] for all time." Id. at 63a. The court also rejected petitioner's argument that all Southern District of Florida judges should be recused as a result of his "notoriety" within the

district. Id. at 63a-65a. The court explained that "[m]ore than 22 years have passed since judgment in the Judge Highsmith case and the indictment in this case," and "[n]othing in this case implicates any threats or attacks upon a federal Judge." Id. at 65a. Judge Ungaro accordingly found no basis to reasonably question her impartiality. Ibid. The court also determined that, in any event, petitioner had relinquished the right to bring a recusal motion by entering an unconditional guilty plea and delaying in making the motion. Id. at 65a n.1.

Prior to sentencing, petitioner filed two petitions for a writ of mandamus, arguing, inter alia, that all Southern District of Florida judges should be recused from his case. See 19-11084 Order (9th Cir. Mar. 25, 2019); 19-11081 Order (9th Cir. Apr. 16, 2019). The court of appeals denied those petitions. See ibid. The district court then sentenced petitioner to a term of 400 months of imprisonment, to be followed by three years of supervised release. Judgment 4, 6.

3. The court of appeals affirmed. Pet. App. 1a-21a. The court observed that "the plain wording of the 1994 recusal order * * * demonstrates that the order applied only to the proceeding for which it was issued." Id. at 8a. And the court additionally observed that, under Eleventh Circuit precedent, petitioner's unconditional guilty plea waived his right to appeal the district court's denial of his motions for recusal under Section 455(a). Ibid.

ARGUMENT

Petitioner contends (Pet. 10-23) that he is entitled to appeal the district court's denial of his recusal motions under 28 U.S.C. 455(a) notwithstanding his unconditional guilty plea. That contention lacks merit, and the lower-court disagreement asserted by petitioner does not warrant this Court's review. The question presented arises infrequently and has little practical significance, and this case would be a poor vehicle for addressing it. This Court has denied petitions for writs of certiorari in prior cases presenting the same issue, Patti v. United States, 540 U.S. 1149 (2004) (No. 03-575); Shearer v. United States, 528 U.S. 827 (1999) (No. 98-9096), and the same result is warranted here.

1. The court of appeals correctly determined that petitioner's unconditional guilty plea relinquished his right to appeal the district court's denial of his Section 455(a) recusal motions.

With certain exceptions not applicable here, an unconditional guilty plea relinquishes all nonjurisdictional defenses to a prosecution. See United States v. Broce, 488 U.S. 563, 569 (1989); Tollett v. Henderson, 411 U.S. 258, 267 (1973); United States v. Brizan, 709 F.3d 864, 866-867 (9th Cir.), cert. denied, 571 U.S. 861 (2013). In Class v. United States, 138 S. Ct. 798 (2018), this Court held that a guilty plea by itself does not bar an appeal in which the defendant claims that the statute of conviction is unconstitutional, reasoning that such a claim "call[s] into

question the Government's power to 'constitutionally prosecute'" the defendant. Id. at 805 (citation omitted); see id. at 803-805. The Court made clear, however, that an unconditional guilty plea does relinquish alleged defects "that 'occurred prior to the entry of the guilty plea'" or that might "'have been "cured" through a new'" and error-free proceeding. Id. at 804-805 (citation omitted). Because a defendant who pleads guilty "has admitted the charges against him, a guilty plea makes the latter kind of" claim "'irrelevant to the constitutional validity of the conviction.'" Id. at 805 (citation omitted); see ibid. (explaining that a guilty plea "relinquishes any claim that would contradict the admissions necessarily made upon entry of a voluntary plea of guilty") (citation and internal quotation marks omitted). That is the type of claim at issue here.

"Section 455 creates two primary reasons for recusal." United States v. Patti, 337 F.3d 1317, 1321 (11th Cir. 2003), cert. denied, 540 U.S. 1149 (2004). Subsection (a) "sets forth a general rule requiring recusal in those situations that cannot be categorized neatly, but nevertheless raise concerns about a judge's impartiality." Ibid. Subsection (b) "sets forth specific circumstances requiring recusal, which establish the fact of partiality." Ibid. The statute permits a party to waive recusal under subsection (a), but not under subsection (b). 28 U.S.C. 455(e). As the court of appeals has explained, those "differences," "particularly Congress's express provision for

waiver of recusal under subsection (a)," make clear that "'denial of recusal is a pretrial defect which is sublimated within a guilty plea and thereafter unavailable as an issue for appeal.'" Patti, 337 F.3d at 1322 (citation omitted); see United States v. Gipson, 835 F.2d 1323, 1324-1325 (10th Cir.), cert. denied, 486 U.S. 1044 (1988).

Petitioner observes (Pet. 19-22) that waiver under 28 U.S.C. 455(e) requires "a full disclosure on the record of the basis for disqualification." That observation does not suggest any infirmity in the decision below. The court of appeals' finding that petitioner's unconditional guilty plea waived his right to appeal the denial of his recusal motions is not itself the waiver of a recusal under Section 455(e). Pet. App. 8a. And contrary to petitioner's suggestion (Pet. 21), the district court had no obligation to advise petitioner of every potential claim, such as recusal, that would be relinquished by the entry of an unconditional guilty plea. Even if such an onerous burden were possible to shoulder, petitioner identifies nothing in Federal Rule of Criminal Procedure 11 or otherwise that requires a district court to affirmatively discuss every possible claim during a plea colloquy, irrespective of whether it has previously been raised.

Petitioner also argues (Pet. 22) that his guilty plea did not waive his right to an impartial judge during sentencing. But petitioner did not argue below that he was seeking recusal only for the purpose of sentencing (but not for withdrawal of the plea).

See, e.g., D. Ct. Doc. 280, at 11 (requesting as relief that the "court * * * recuse itself nunc pro tunc"). The court of appeals accordingly did not address that argument.

2. The Fifth, Tenth, and Eleventh Circuits have all relied on well-settled plea-preclusion principles to recognize that a defendant who has pleaded guilty, like petitioner, may not thereafter appeal a judge's earlier denial of a motion to recuse under Section 455(a). See Patti, 337 F.3d at 1322 (11th Cir.); United States v. Hoctel, 154 F.3d 506, 507 (5th Cir. 1998); Gipson, 835 F.2d at 1324-1325 (10th Cir.). By contrast, the First and Second Circuits have viewed the denial of a Section 455(a) motion as appealable notwithstanding entry of a guilty plea. See United States v. Brinkworth, 68 F.3d 633, 638 (2d Cir. 1995); United States v. Chantal, 902 F.2d 1018, 1021 (1st Cir. 1990).

That decades-old disagreement does not warrant this Court's review, and this Court has previously declined to address it. The rule applied by the Eleventh Circuit in this case does not create insuperable barriers to appellate review for petitioner or other persons in a similar position. All of the courts of appeals that have considered the appealability of a recusal decision -- regardless of whether the court permits an appeal of a denied Section 455(a) motion following an unconditional guilty plea -- permit a defendant to obtain review of a district court judge's refusal to recuse herself by petitioning for a writ of mandamus. See, e.g., In re Gibson, 950 F.3d 919, 922 (7th Cir. 2019) ("We

have long recognized that a petition for writ of mandamus is an appropriate method to seek recusal of a district judge under 28 U.S.C. § 455(a)."); Patti, 337 F.3d at 1322 (11th Cir.) (stating that the defendant could have "obtain[ed] review of the denial of his motion for recusal" by "immediately * * * petition[ing] [the court of appeals] for a writ of mandamus"); Nichols v. Alley, 71 F.3d 347, 350 (10th Cir. 1995) (per curiam); In re School Asbestos Litig., 977 F.2d 764, 774-778 (3d Cir. 1992); In re Aetna Cas. & Sur. Co., 919 F.2d 1136, 1143 (6th Cir. 1990); In re Faulkner, 856 F.2d 716, 720-721 (5th Cir. 1988) (per curiam). That view has been described as the "consensus position" of the courts of appeals. School Asbestos Litigation, 977 F.2d at 775.

Courts of appeals have granted such mandamus petitions when the circumstances have warranted. See, e.g., In re Nettles, 394 F.3d 1001, 1003 (7th Cir. 2005); Nichols, 71 F.3d at 352; Faulkner, 856 F.2d at 720-721. And because litigants in any circuit have a mechanism to challenge the denial of a recusal motion, whether or not a guilty plea constitutes a waiver, this Court has no need to resolve differences in the courts of appeals' approaches to the plea-preclusion issue. Indeed, the facts here demonstrate the availability of the alternative remedial process: the Eleventh Circuit reviewed, and denied, two mandamus petitions following the district court's denial of petitioner's recusal motions. See p. 6, supra. Petitioner provides no basis for concluding that the

court would have denied relief, had his recusal claim warranted it.

Petitioner's claim does not warrant further review for the additional reason that, as he acknowledges (Pet. 19), cases raising the question presented are "rare." And even among those cases, petitioner's recusal claim is sui generis, stemming from the atypical facts involving his 1994 criminal case -- his alleged assault on a sitting federal district judge, the resulting district-wide recusal order, a misaddressed letter from the Bureau of Prisons, and a response letter that copied the district judge in this case. See pp. 4-5, supra. Petitioner does not identify another decision addressing an analogous scenario, and his own case does not present an issue of recurring significance warranting this Court's review.

3. Even if the question presented warranted further review, this case would not be a suitable vehicle, because resolution of the question presented in petitioner's favor would not be likely to affect the ultimate outcome of this case.

As an initial matter, under circuit precedent, petitioner's failure to timely move for the district court judge's recusal in itself may have forfeited any entitlement to such relief. See Phillips v. Amoco Oil Co., 799 F.2d 1464, 1472 (11th Cir. 1986) ("Counsel, knowing the facts claimed to support a § 455(a) recusal for appearance of partiality may not lie in wait, raising the recusal issue only after learning the court's ruling on the

merits."), cert. denied, 481 U.S. 1016 (1987); see also Pet. App. 65a n.1. In any event, petitioner was not entitled to recusal under Section 455(a). As the court of appeals explained, the "plain wording of the 1994 recusal order" clearly limited it to that proceeding. Pet. App. 8a. And the fact that petitioner was alleged to have assaulted a federal judge does not require recusal of all judges in that district in an unrelated drug case more than two decades later. See id. at 64a (district court explaining that petitioner's current case had a "non-existent" "connection" to his prior case involving an "alleged attack on Judge Highsmith").*

Petitioner's contrary contentions are factbound and without merit. The court of appeals found that the district court properly accepted petitioner's guilty plea, did not err in rejecting his request to withdraw the plea, and properly sentenced him. Pet.

* Petitioner's assertion (Pet. 18-19) that the district judge's actual conduct appeared biased lacks merit. The court's references to "Judge Highsmith's case" and the "Judge Highsmith robbery" were appropriate, first, to clarify what 1994 case defense counsel was discussing, Pet. App. 47a, and then in discussing an entry in petitioner's presentence report about that robbery, D. Ct. Doc. 633, at 27 (June 13, 2019). And the court's remark that recusal would be a "gift," Pet. App. 48a, appears in context to have been referring to petitioner's previous failed attempts to delay sentencing, ibid., and withdraw his guilty plea, D. Ct. Doc. 222 (Dec. 10, 2018). Nor is it relevant that the judges in the Southern District of Florida recused themselves in a different case in which petitioner sued Judge Moreno for his 2010 letter to the Bureau of Prisons. See 20-cv-24729 D. Ct. Doc. 1 (Aug. 21, 2020) (complaint); 20-cv-24729 D. Ct. Doc. 20 (Dec. 23, 2020) (recusal order). This case, unlike that one, does not involve a federal judge as a party or victim.

App. 2a-6a, 9a-18a, 20a-21a. No substantial basis exists for further review of the judgment below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

SOFIA M. VICKERY
Attorney

MARCH 2022