NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

CLARENCE LEE
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 21-60666

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1) Whether the district court erred by denying defense counsel's oral motion for recusal of the district judge.

2) Whether the district court erred by refusing to lower Mr. Lee's sentence to the term of imprisonment agreed upon the prosecution, the probation officer and defense counsel.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

On October 18, 2011, the Grand Jury for the Southern District of Mississippi returned an Indictment charging Mr. Lee with: Count 1, conspiracy to distribute five kilograms or more of cocaine hydrochloride, as prohibited by 21 U.S.C. § 841(a)(1), in violation of 21 U.S.C. § 846; and Count 2, possession with intent to distribute 500 grams or more of cocaine hydrochloride, in violation of 21 U.S.C. § 841(a)(1). The district court dismissed Count 1 on the motion of the prosecution. The district court case number is 3:11cr89-HTW-LGI.

Mr. Lee accepted responsibility for his actions by pleading guilty to Count 2. The district court sentenced him to serve 236 months in prison. The court entered a Final Judgment on April 18, 2014. The Final Judgment is attached hereto as Appendix 1.

Mr. Lee filed the subject *pro se* Motion for Sentence Reduction on November 10, 2014, *almost eight years ago*. Through the Motion he sought a sentence reduction, as allowed by 18 U.S.C. § 3582(c)(2), because of retroactive amendments to the cocaine-related provisions of the United States Sentencing Guidelines (hereinafter "Sentencing Guidelines" or "Guidelines").

After Mr. Lee filed the *pro se* Motion, the district court appointed the undersigned to represent him. The undersigned filed an Entry of Appearance on

May 4, 2017. On the same day, the undersigned filed a Supplemental Motion for Sentence Reduction on Mr. Lee's behalf.

Even though the prosecution, the probation officer and the defense all agreed that Mr. Lee's prison sentence should be reduced to 188 months, the district court refused to follow that recommendation. Instead, it ordered a sentence reduction to 210 months in prison. The court entered an Order Regarding Motion for Sentence Reduction on August 6, 2021. The Order is attached hereto as Appendix 2.

Mr. Lee filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on August 19, 2021. The Fifth Circuit case number is 21-60666. The court of appeals entered an Opinion affirming the district court's rulings on May 18, 2022. It entered a Judgment on the same day. The Fifth Circuit's Opinion and Judgment are attached hereto as composite Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on May 18, 2022. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. STATUTES INVOLVED

> (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;

28 U.S.C. § 455(a) and (b)(1).

> (c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that--
> * * * * *
> (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c(2).

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a criminal conviction entered against Mr. Lee for possession with intent to distribute 500 grams or more of cocaine hydrochloride, in violation of 21 U.S.C. § 841(a)(1). The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charge levied against Mr. Lee arose from the laws of the United States of America.

B. Statement of material facts.

1. Mr. Lee's background.

Mr. Lee, an African American man, was born in Magee, Mississippi in 1974. He was the second of eleven children, and the family struggled financially. Mr. Lee described his childhood as "rough."

Mr. Lee achieved a high school diploma. However, the school system placed him in special education. In fact, pursuant to a court ordered psychiatric evaluation, the psychologist "found that Lee suffered from symptoms associated with a major mental disorder, Mild Mental Retardation[.]" Nevertheless, the psychologist found that Mr. Lee was competent to stand trial.

Before going to prison, Mr. Lee was in an over ten-year relationship with Lasonya Norwood-Easterling. They have four children together. Ms. Norwood-

Easterling described Mr. Lee "as a good father and nice person with a kind heart." She stated that Mr. Lee could return to her home after his prison term. She described their relationship as "good."

Ms. Norwood-Easterling provided good insight into Mr. Lee's mental capabilities. She explained that he "is not able to function at his age level." "She recalled that she often has to explain things to the defendant at 'a second grade level[.]'" Notwithstanding Mr. Lee's mental deficiencies, Ms. Norwood-Easterling "denied that the defendant had a history of violence."

Even though Mr. Lee had a sub-optimum upbringing and even though he suffers from intellectual shortcomings, he worked as a productive member of society as an adult. He was self-employed as a logger from 2003 through 2011.

Additionally, Mr. Lee has bettered himself while in prison. He completed a course offered by Howard College titled Wind Turbine Materials & Electro-Mech Equipment. He also completed a Bureau of Prisons course titled Drug Education.

2. Mr. Lee's criminal history.

Mr. Lee is serving prison time on a conviction for possession with intent to distribute 500 grams or more of cocaine hydrochloride, in violation of 21 U.S.C. § 841(a)(1). Regarding this conviction, an officer with the Drug Enforcement Agency described Mr. Lee as a "local-level" drug dealer. The court's original sentence for this conviction was 236 months in prison. This was the precise

midpoint of the then recommended Guidelines sentence range of 210 months to 262 months in prison.

Mr. Lee has no prior convictions for crimes of violence. He had a check forgery conviction in 1999, a DUI conviction in 2001, and a felon in possession of a firearm conviction in 2011.

3. Procedural history relevant to the recusal issue.

One of the issues in this Petition is whether the district court erred by denying the defense's oral motion for recusal of the district court judge. Much of the procedural history of this case is relevant to deciding that issue.

In 2014, the district court initially sentenced Mr. Lee to serve 236 months in prison. Mr. Lee filed at *pro se* Motion for Sentence Reduction on November 10, 2014, *almost eight years ago*. As described above, he sought a sentence reduction under 18 U.S.C. § 3582(c)(2). The district court appointed the undersigned to represent Mr. Lee on the sentence reduction issue, and on May 4, 2017, the undersigned filed a Supplemental Motion for Sentence Reduction.

The defense had several email communications with the court, attempting to set the Motion for Sentence Reduction for a hearing. The attempts were unsuccessful, so the undersigned filed a Motion to Set Hearing on Motion for Sentence Reduction. The undersigned filed the Motion to Set Hearing on July 16, 2021, *over five and one-half years* after Mr. Lee filed his *pro se* Motion for

Sentence Reduction. Attached as Exhibits to the Motion were the email communications between the undersigned and the district court, in which the undersigned continuously asked for a hearing date.

In the Motion to Set Hearing, the undersigned stated that he would file a Petition for Writ of Mandamus with the Fifth Circuit if no hearing date was set on or before Friday, July 23, 2021. July 23 came and went, and the district court failed to set a hearing on the Motion for Sentence Reduction. Therefore, to bring this issue to a final resolution, the undersigned filed a Petition for Writ of Mandamus in the Fifth Circuit on August 4, 2021. The Fifth Circuit assigned the Petition Case Number 21-60615.

The Petition for Writ of Mandamus stated in Part:

> Through this Petition for Writ of Mandamus, Mr. Lee seeks an order from this Court directing the district court to either set a hearing on his Supplemental Motion for Sentence Reduction Pursuant to 18 U.S.S. § 3582 and Retroactive Amendment 782, U.S.S.G (hereinafter "Motion for Sentence Reduction"), or grant the Motion as unopposed. Mr. Lee filed the Motion for Sentence Reduction *four years and three months* ago, on May 4, 2017,[1] in *United States v. Clarence Lee*, Criminal Number 3:11cr89-HTW-LGI, in the United States District Court for the Southern District of Mississippi.

Petition for Writ of Mandamus, p. 3 (bracketed footnote added).

[1] The undersigned filed the Supplemental Motion for Sentence Reduction on May 4, 2017. However, as stated above, Mr. Lee filed the initial *pro se* Motion for Sentence Reduction on November 10, 2014.

After learning about the Petition for Writ of Mandamus, the district court sent an email to all counsel of record at 7:03 p.m., on August 4, 2021, the same day the Petition for Writ of Mandamus was filed. The email instructed the parties to be prepared for a telephonic conference the following morning, August 5, 2021, at 9:30 a.m.

During the August 5 telephone conference, the district court announced that it was ready to take up the Motion for Sentence Reduction. For reasons set forth below, the undersigned moved for the district judge to recuse himself from the case. The court denied the oral motion.

4. The instant Motion for Sentence Reduction and the hearing on the Motion.

a. The Motion.

The district court sentenced Mr. Lee on the underlying conviction on April 3, 2014, *before* passage of Amendment 782 to the Sentencing Guidelines. As presented in the Arguments section below, the Sentencing Commission enacted Amendment 782, which amended § 2D1.1 of the Sentencing Guidelines to allow a two-level reduction to offense level based on the drug quantity.

At the time of Mr. Lee's sentencing in 2014, his Offense Level under the Guidelines was 36. After Amendment 782, his Offense Level decreased from 36 to 34. This decreased his Guidelines range from 210 to 262 months in prison, to 168 to 210 months in prison.

Based on Amendment 782, Mr. Lee filed a *pro se* Motion for Sentence Reduction on November 10, 2014, about *seven years ago*. After that, the court appointed the undersigned to represent Mr. Lee on the sentence reduction issue, and the undersigned filed a Supplemental Motion for Sentence Reduction on May 4, 2017, *about four and one-half years ago*. Through the Supplemental Motion, the undersigned asked the court to resentence Mr. Lee at the lower end of the Guidelines range, as amended by Amendment 782.

b. Events leading up to the motion hearing.

At some point in late 2020 or early 2021, the government, the probation officer and the defense agreed that the amended Guidelines sentence range was 168 to 210 months, and that Mr. Lee should be resentenced to 188 months in prison. Accordingly, the defense made the following fruitless efforts to set the Motion for a hearing or resolve the issue without a hearing:

Date:	Event:
10-27-20	The defense sent an email to the district court asking if the defense should send a proposed order granting the Motion for Sentence Reduction since the prosecution did not respond to the Motion. The court did not respond to this email.
01-14-21	Probation Officer Lee Grubbs sent an email to the district court and the parties that included a recommendation letter and a proposed Order granting the Motion for Sentence Reduction.
01-21-21	The defense sent an email to the district court asking about the status of the Order.

01-21-21 Carmen Castilla of the district court responded to the above email stating, "I will make sure Judge Wingate reviews it as soon as possible."

03-04-21 The defense sent an email to Ms. Castilla asking if "the Judge had an opportunity to review this case?" Ms. Castilla did not respond to this email.

03-30-21 The defense sent an email to Ms. Castilla asking, "if the Judge has had an opportunity to review this case yet?" Ms. Castilla did not respond to this email.

04-13-21 The defense sent an email to Ms. Castilla stating: "Just checking on the status of this order and if the Judge has had a chance to review it."

04-14-21 Ms. Castilla responded to the above email and stated: "Judge Wingate is presently reviewing this matter and will hopefully have a decision very shortly."

05-04-21 The defense sent Ms. Castilla an email asking if "the Judge had a chance to look at this case yet?"

05-05-21 Ms. Castilla responded to the above email and stated: "Judge Wingate is reviewing this matter. I will ask him about it today."

06-22-21 The defense sent Ms. Castilla an email asking if "the Judge had a chance to look at this matter?"

06-22-21 Ms. Castilla responded to the above email and stated: "I will present it to him again today and see if he has made a decision. Is there any time urgency that I should tell him about?"

06-22-21 The defense sent Ms. Castilla a responsive email stating: "He will be getting a significant amount of time off his sentence with the new calculation and with a reduction it can change the programming made available to him, his halfway house date and other issues. Additionally, this has been with Judge Wingate since January of this year and the motion was filed back in 2017 without a ruling."[2]

[2] *See supra*, footnote 1.

07-12-21 The defense sent Ms. Castilla an email stating in part: "Has the Judge had a chance to look at the order and mak[e] a ruling? As you are aware, our motion for a reduction was filed in this case over 4 years ago and the proposed agreed order was sent by Probation to the Judge back in January of this year."[3]

None of the above efforts resulted in resolving or getting Mr. Lee a hearing on the Motion for Sentence Reduction that he filed many years ago in 2014. Therefore, the undersigned resorted to filing a formal Motion to Set Hearing on the Motion for Sentence Reduction. The last paragraph of the Motion to Set Hearing stated: "If no definitive hearing date is set or no ruling on the Motion for Sentence Reduction is made on or before **Friday, July 23, 2021**, then the undersigned will file a Petition for Writ of Mandamus with the United States Court of Appeals for the Fifth Circuit."

Again, the defense's efforts to resolve or set a hearing on the Motion for Sentence Reduction were fruitless. Therefore, the undersigned filed a Petition for Writ of Mandamus with the Fifth Circuit on August 4, 2021.[4] Through the Petition, the defense sought "an order from this Court directing the district court to either set a hearing on his Supplemental Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582 and Retroactive Amendment 782, U.S.S.G. … or grant the Motion as unopposed."

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[3] *See supra*, footnote 1.

[4] The Fifth Circuit assigned the Petition for Writ of Mandamus Case Number 21-60615.

Apparently, the Petition for Writ of Mandamus finally got the district court's attention. On the same day the Petition was filed – August 4, 2021 – the court sent an email to the parties at 7:04 p.m. The email stated:

> Before this court is a motion for reduction of sentence. The court can address this motion either by written order or by a written order following a hearing where the defendant may appear and be allowed the opportunity to make allocution before the court sentences. *The court now asks the parties whether they can agree on a course of proceeding*. Accordingly *the attorneys are directed to stand by for a conference call August 5, 2021 at 9:30 a.m. to answer this question*. Before defense counsel answers, he should be prepared to announce that his client has no objection to not being present in the call tomorrow morning.

The undersigned responded via email at 7:12 p.m., stating that he had a conflict on the morning of August 5, and scheduling the conference call in the morning did not allow enough time to consult with Mr. Lee.

At 8:36 p.m., the court responded stating that a telephonic or zoom hearing would be conducted at 11:30 a.m. on August 5. The undersigned responded at 9:30 p.m. stating in part, "scheduling a hearing at such a late hour for tomorrow morning does not give me adequate time to arrange a legal call with [Mr. Lee.] The undersigned went on to state, "[a]s such, it is unlikely that I will be able to answer that question which the Court has directed me to answer."

The following day, August 5, the undersigned emailed the court at 9:07 a.m. and informed it that defense counsel had not been able to contact Mr. Lee within

the Bureau of Prisons yet. At 10:22, the court responded and stated the call-in hearing would go forward at 11:30 a.m.

c. The motion hearing.

At the beginning of the telephonic conference, defense counsel stated that Mr. Lee is "waiving his appearance for this phone call." The undersigned went on to state, "I will contact him afterwards to let him know what was going on. There was some confusion about what the Court wanted to do with this hearing today." The court asked, "[w]hat confusion is there?" Defense counsel explained that the court's initial email asked whether the parties preferred a written order or a hearing followed by a written order, and whether Mr. Lee waived his appearance for the telephonic conference. Defense counsel went on to state, "[a]nd so my conversation with him is that I would have this hearing with the Court and then follow up with him on how we would move forward." The court stated, "I'm denying that course of proceeding[.]"

Defense counsel sensed that the court intended to go forward with sentencing during the telephone conference, rather than merely establish a course for the proceeding to go forward, as the court directed the parties to agree upon in the initial August 4 email. In that context, the undersigned stated: "I want it done with the course of action where I have an opportunity to discuss what is going on today and whether or not he wants to appear and come to Jackson to be before the

Court." In response, the court stated, "you filed a writ of mandamus saying that you wanted immediate sentencing. I am giving you that opportunity now for immediate sentencing. Apparently, you don't want that[.]" Defense counsel stated, "I object to this course of action," to which the court responded, "I understand. You want to play games with the Fifth Circuit?" At this point, Mr. Lee joined the telephone conference via connection with the Bureau of Prisons.

After a lengthy exchange between defense counsel and the court, the undersigned moved for recusal of the district judge. The undersigned stated:

> Your Honor, under 28 United States Code Section 455, "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. He shall also disqualify himself in the following circumstances: Where he has a personal bias or prejudice concerning a party."
>
> Your Honor, the Court has repeatedly talked while trying to make a record in this case. The motion has been pending for almost four and a half years.[5] The agreed order has been pending for over eight months. And the Court seems angry that a mandamus was filed and even referred to it as the undersigned counsel making – "playing games with the Fifth Circuit."
>
> Under that scenario, it would seem that the Court has a personal bias or prejudice or has a question of impartiality in this case, and I *ore tenus* move that the Court recuse itself at this time.

The court denied the Motion for Recusal.

After that, the court moved to the resentencing issue. The prosecutor stated that after consulting with the probation officer, both she (the prosecutor), the

[5] *See supra*, footnote 1.

probation officer and defense counsel agreed on a recommendation for resentencing. Specifically, the prosecutor stated:

> It is our consensus that [this case] does fit under the 782 Section of the First Step Act. And if the defendant were to be resentenced today, with the amount of 24 kilograms of cocaine hydrochloride that were found attributable to him when Your Honor sentenced him in April of 2014, his offense level would now be adjusted to an offense level of 34, where it was a level of 36 back in 2014, thereby resulting in a new guideline range of 168 to 210. And based upon the sentence of the Court of 236 months in 2014, *we felt it appropriate to be in the middle of the guideline range* of the amended total offense level, which would be a level 34, with the guideline range of 168 to 210; and, thereby, *we agreed on a -- on the recommendation to the Court of a sentence -- of a new sentence of 188 months imprisonment*, if the Court were to agree.

She went on to state:

> Following that discussion, Mr. Grubbs with the United States Probation Office prepared a letter that was dated January 14th, 2021, as well as a new AO Form for the Court to sign, thereby resentencing the defendant pursuant to 18 U.S.C. 3582(c)(2), that would reduce his sentence from 236 months to 188 months, to run concurrent with a previously imposed sentence in Case No. 2:12-cr-15, for the Court's signature, and those documents were forwarded to the Court on January 14th of 2021.

The court then grilled the prosecutor on how she came up with the 188-month recommended prison term.[6] She did not change the 188-month recommendation.

[6] We note that this particular judge has arguably developed a reputation for cross-examination-like questioning. For example, another district judge in Southern District of Mississippi characterized questioning of a criminal defendant by the judge in this case as "cross-examination." *See United States v. Donald Ray Quinn*, Criminal No. 3:92cr121-DPJ-FKB, in the United States District Court for the Southern District of Mississippi. The other judge stated:

The court rejected the 188-month recommendation of the prosecutor, the probation officer and defense counsel. The adjusted Guidelines range after application of Amendment 782 was 168 to 210 months in prison. It ordered a sentence at the top of that range – 210 months in prison. Defense counsel objected to the sentence.

> I do want to say for the record – I meant to say it early on – that I obviously read the order of recusal and, Ms. Stewart, your motion to try to get some context of what was going on.
>
> I started to read the first transcript. And as *I sort of got into what sounded like a cross-examination*, I decided to stop reading it. And this may be overly cautious, but I didn't want – *I didn't want there to be any suggestion that any bias for recusal by the prior judge might taint my review of the case so I elected not to read that*, I guess it was a 95-page transcript. I read your motion, but I tried to separate my thought process from that of the original judge. I did want to put that on the record.

Hearing Transcript, pp. 21-22 (emphasis added). The hearing transcript is available for this Court's review under docket entry number 31 in *Quinn*, Case No. 3:92cr121, in the Southern District of Mississippi.

V. ARGUMENT

A. Introduction.

Mr. Lee presents two arguments on appeal. First is whether the district court erred by denying his oral motion for recusal of the district judge. Because a reasonable person would believe that the district judge harbored animosity toward defense counsel and/or the defendant, the district court should have granted the motion.

The second issue is whether the district court erred by ignoring the well-reasoned recommendation of the government, the probation officer and the defense that Mr. Lee should be resentenced to 188 months in prison. The facts and law pertaining to the resentencing issue indicate that ordering a 188-month prison term was reasonable, and the 210-month term ordered by the district court was not.

B. Review on certiorari should be granted in this case.

Rule 10 of the Supreme Court Rules states, "[r]eview on writ of certiorari is not a matter of right, but of judicial discretion." This case presents two important issues that warrant review on certiorari. First is the recusal issue, which focuses on fairness of the judicial system, as well as the public's perception of the judicial system. Second is the sentencing issue. This issue deserves review to ensure equality and fairness in the sentencing process.

C. The district court erred by denying defense counsel's oral motion for recusal of the district judge.

Recusal of a district judge is governed by 28 U.S.C. § 455. Section 455(a) states, "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Section 455(b)(1) states in part that a judge should recuse himself or herself "[w]here he has a personal bias or prejudice concerning a party[.]" "This standard is *objective* and is not based 'on the subjective view of a party.'" *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993) (citation omitted; emphasis in original).

In *United States v. Bremers*, the Fifth Circuit found that the district judge abused his discretion by denying a defendant's motion for recusal. 195 F.3d 221, 228 (5th Cir. 1999). The Court held, "[s]ince the goal of section 455(a) is to avoid even the appearance of impropriety ... recusal may well be required even where no actual partiality exists." *Id.* at 226 (internal and end citations omitted). In other words, "if a reasonable man, cognizant of the relevant circumstances surrounding a judge's failure to recuse, would harbor legitimate doubts about that judge's impartiality, then the judge should find that section 455(a) requires his recusal." *Id.* (citations omitted).

The *Bremers* Court recognized that "section 455(a) claims are fact driven." 195 F.3d at 226. "[A]s a result, the analysis of a particular section 455(a) claim

must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue." *Id.* (citation omitted). "Where the question is close, the judge must recuse himself." *Dandy*, 998 F.2d at 1349 (citation omitted).

In Mr. Lee's case, a reasonable person "would harbor legitimate doubts about [the] judge's impartiality[.]" *See Bremers*, 195 F.3d at 226. This is apparent from the district judge's obvious dissatisfaction with the defense's Petition for Writ of Mandamus filed with the Fifth Circuit. The district court referred to this as "playing games" with the Fifth Circuit, even though the *pro se* Motion for Sentence Reduction had been pending since 2014, and the undersigned's Supplemental Motion for Sentence Reduction had been pending since 2017.

Clearly, the defense was not "playing games" with anyone. Based on the email communications in which the defense made numerous attempts to set the Motion for a hearing, and based on the Motion to Set Hearing, the defense was merely making reasonable efforts to bring a years old Motion for Sentence Reduction to a final decision.

But the district court's reference to "playing games" with the Fifth Circuit did not end its comments about the Petition for Writ of Mandamus. The court mentioned either the Mandamus Petition or the defense's desire for a "speedy

disposition" of the matter no fewer than five additional times during the hearing. This further supports a conclusion that a reasonable person "would harbor legitimate doubts about [the] judge's impartiality[.]" *See Bremers*, 195 F.3d at 226.

Another factor that we must consider is the timing and the manner with which the district court set the subject motion hearing after it learned of the Petition for Writ of Mandamus. The docket in Fifth Circuit Case Number 21-60505, the case in which the Petition was filed, indicates that it was filed on August 4, 2021, at 2:31 p.m. Even though several years had passed without any court action since Mr. Lee filed his *pro se* Motion for Sentence Reduction in 2014, the district court saw fit to email the parties at 7:04 p.m. on the day the Petition was filed, and direct the parties to be available for a telephonic "conference" at 9:30 the following morning. The email stated:

> Before this court is a motion for reduction of sentence. The court can address this motion either by written order or by a written order following a hearing where the defendant may appear and be allowed the opportunity to make allocution before the court sentences. *The court now asks the parties whether they can agree on a course of proceeding*. Accordingly the attorneys are directed to stand by for a conference call August 5, 2021 at 9:30 a.m. to answer this question. Before defense counsel answers, *he should be prepared to announce that his client has no objection to not being present in the call tomorrow morning*.

Based on the content of the email, it is clear that the court was asking two questions. First is whether the parties could agree on a course for the proceedings

to go forward. Second is whether Mr. Lee would waive his appearance at the "conference."

In response to the court's email, the undersigned responded stating, "a hearing scheduled at this late date for tomorrow morning does not give me time to consult with my client[.]" In an email to the court later that evening at 9:30 p.m., the undersigned reiterated, "scheduling a hearing at such a late hour for tomorrow morning does not give me adequate time to establish a legal call with [Mr. Lee]."

Notwithstanding the defense's legitimate concerns, the district court went forward with the "conference" on the morning of August 5. The defense objected to deciding the sentencing issues because the district court's 7:30 p.m. email clearly stated that the only questions that would be answered at the "conference" would be whether the parties could agree on a course of action for the proceeding and whether Mr. Lee waived his appearance at the "conference." After repeated interruptions by the court while defense was attempting to make this point, defense counsel made the *ore tenus* Motion for Recusal described above. After denying the Motion for Recusal, the court proceeded with resentencing Mr. Lee.

In summary, the defense acknowledges that it was attempting to bring the Motion for Sentence Reduction to a final conclusion by filing the Petition for Writ of Mandamus with the Fifth Circuit. However, no less than five hours after the Petition was filed, the district court, at 7:30 p.m., sent a vague email to the parties

to appear for a telephonic "conference" the following morning to answer two specific questions. Then, rather than addressing the two questions at the "conference" the following morning, the court proceeded with the resentencing hearing, even though defense counsel specifically objected based on lack of time to confer with Mr. Lee about the issue.

The way the district court scheduled and handled the "conference," which ultimately turned out to be the sentencing hearing, is further evidence that it was unhappy with the defense's Petition for Writ of Mandamus. It is also evidence that a reasonable person "would harbor legitimate doubts about [the] judge's impartiality[.]" *See Bremers*, 195 F.3d at 226. Under these facts, this Court should grant certiorari to determine whether the district court erred by denying the defense's Motion for Recusal.

D. The district court erred by refusing to lower Mr. Lee's sentence to the term of imprisonment agreed upon the prosecution, the probation officer and defense counsel.

1. Introduction and summary of facts relevant to the sentencing issue.

A motion for sentence reduction pursuant to Amendment 782 is under the statutory authority of 18 U.S.C. § 3582(c)(2), which allows a defendant "who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission" to move the district court for a sentence reduction. Amendment 782 reduced the Sentencing

Guidelines offense level by 2 levels for many drug offenses. As all parties and the district court agreed, Mr. Lee was eligible for a two-level reduction of his base offense level under Amendment 782.

At his original sentencing hearing in 2014, the court adopted a Guidelines offense level of 36. His criminal history category, which remained unchanged both then and now, was II. At an offense level of 36 and a criminal history category of II, Mr. Lee's Guidelines sentence range in 2014 was 210 to 262 months in prison. The court ordered a 236-month prison sentence, *which was the exact midpoint of the 210-to-262-month Guidelines range*.

Post Amendment 782, Mr. Lee's offense level decreased from 36 to 34. At an offense level of 34 and a criminal history category of II, his Guidelines sentence range was 168 to 210 months in prison. The prosecution, the probation officer and defense counsel all agreed that a sentence of 188 months would be appropriate. *188 months is the exact midpoint of the new 168-to-210-month Guidelines range*. The court ignored this reasonable recommendation, and ordered a sentence of 210 months in prison.

2. Legal test.

A court must conduct a two-stage analysis when deciding whether to reduce a sentence under 18 U.S.C. § 3582(c)(2). First, it must decide whether a reduction is warranted under U.S.S.G. § 1B1.10. *United States v. Torres*, 856 F.3d 1095,

1098 (5th Cir. 2017) (citation omitted). If that condition is met, then the court must consider whether a reduction is warranted under 18 U.S.C. § 3553(a). *Id.* (citations omitted).

Torres, a case reversed by the Fifth Circuit on a finding that the district court erred by denying the defendant's motion to recuse, provides other law applicable to Mr. Lee's issue. "[I]f if the range under which the defendant was originally sentenced has been amended, the court should substitute the amended range for the original and leave everything else unchanged." *Torres*, 856 F.3d at 1098. Also, as a general rule, when a court decides a resentencing issue under § 3582, it may also "consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment." *United States v. Larry*, 632 F.3d 933, 936 (5th Cir. 2011) (citation omitted).

3. The district court abused its discretion by refusing to resentence Mr. Lee to a 188-month term of imprisonment.

The district court agreed that Mr. Lee's Guidelines range should be adjusted under the provisions of § 3582(c)(2) and U.S.S.G. § 1B1.10. That satisfies the first step in our sentence reduction analysis. *See Torres*, 856 F.3d at 1098 (citation omitted). Under the second step, we must consider the § 3553(a) factors. *Torres*, 856 F.3d at 1098 (citation omitted). However, since the only § 3553(a) related fact that changed between the 2014 sentencing hearing and the 2021 sentencing hearing

was Mr. Lee's post-sentencing conduct, that is the only fact that should be considered. *See id.*

In Mr. Lee's case, the defense presented evidence of his achievements in prison. While in prison, he completed a course offered by Howard College titled Wind Turbine Materials & Electro-Mech Equipment. He also completed a Bureau of Prisons course titled Drug Education. Obviously, these are positive post-sentencing aspects of Mr. Lee's life.

The only potentially negative post-sentencing facts pertain to two disciplinary infractions while in prison. However, the court specifically stated, "I do not know the details of those matters." The court went on to state, "[s]o the Court is not going to take that into consideration. So I'm not going to take those infractions into consideration." Since the court opted not to consider the prison infractions based on a lack of information, they were not negative post-sentencing facts that could be factored into the sentencing decision.

This leads us to the crux of the matter. That is, *after adjusting the Guidelines sentence range and setting all facts aside other than post-sentencing conduct*, did the district court abuse its discretion by refusing to abide by the parties' 188-month sentence recommendation? Based on the following analysis, it did.

As stated above, the Sentencing Guidelines range at the 2014 sentencing hearing was 210 to 262 months in prison. The court ordered a 236-month prison sentence, *which was the exact midpoint of the 210-to-262-month Guidelines range*. The post Amendment 782 Guidelines range was 168 to 210 months in prison. The prosecution, the probation officer and defense counsel all agreed that a sentence of 188 months would be appropriate. *188 months is the exact midpoint of the post Amendment 782 Guidelines range of 168-to-210-months*.

Since the only § 3553(a) related facts that changed between the first and second sentencing hearings were positive changes, the district court should have resentenced Mr. Lee to a comparable position within the adjusted Guidelines range that it sentenced him to at the initial sentencing hearing. Mr. Lee was sentenced to the mid-point of the Guidelines range in 2014. Accordingly, he should have been resentenced to the midpoint of the adjusted Guidelines range in 2021. That midpoint was 188 months in prison. Instead of ordering the 188-month prison term, the district court abused its discretion by resentencing Mr. Lee to 210 months in prison. The only apparent reason for not ordering a midpoint sentence was the Court's anger over the Petition for Writ of Mandamus. This Court should grant certiorari to address the issue.

VI. CONCLUSION

Based on the arguments presented above, Mr. Lee asks the Court to grant his Petition for Writ of Certiorari.

Submitted August 11, 2022 by:

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

CLARENCE LEE
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

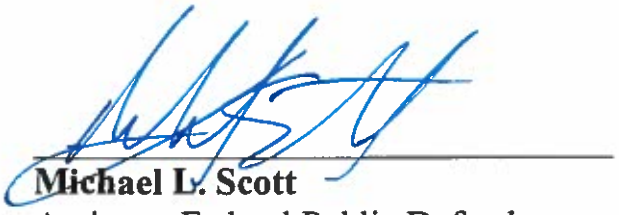
On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 21-60666

CERTIFICATE OF SERVICE

I, Michael L. Scott, appointed under the Criminal Justice Act, certify that today, August 11, 2022, pursuant to Rule 29.5 of the Supreme Court Rules, a copy of the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis was served on Counsel for the United States by Federal Express, No. 777633574736, addressed to:

The Honorable Elizabeth B. Prelogar
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.



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