

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANNAMALAI ANNAMALAI, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

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QUESTION PRESENTED

- I. Whether the district court abused its discretion by failing to recuse itself due to the appearance of impartiality when the court's remarks at sentencing reflected such a deep-seated antagonism that made fair judgment impossible, including calling the defendant evil and stating that the court's contempt for Mr. Annamalai was "without affectation."

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PETITION FOR WRIT OF CERTIORARI

Petitioner Annamalai Annamalai respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the Eleventh Circuit affirming the decision of the district court is reproduced in the Appendix at Appendix A. The Eleventh Circuit's final opinion was not published, but it can be found at *United States v. Annamalai*, Case No. 21-13002, manuscript op. (11th Cir. Jan. 19, 2023).

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on January 19, 2023. Mr. Annamalai filed a Petition for Panel Rehearing and for En Banc Consideration on February 9, 2023. The Petition was denied on March 17, 2023; that order is included as Appendix B. This Petition is being filed within 90 days of that Order, pursuant to Supreme Court Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

28 U.S.C. § 455(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.

28 U.S.C. § 455(b)(1)

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

I. Procedural History

Mr. Annamalai was charged with various fraud crimes related to the operation of a Hindu temple, and after a two-week trial, he was convicted on all counts. (Doc. 86; Doc. 391 at 2181, 2184). The district court sentenced Mr. Annamalai to 327 months in prison. (Doc. 355).

In Mr. Annamalai's first direct appeal, the Eleventh Circuit vacated Mr. Annamalai's convictions for bankruptcy fraud, money laundering, and conspiracy to harbor a fugitive due to insufficient evidence, and remanded for resentencing after finding that the loss amount had been improperly calculated. *United States v. Annamalai*, 939 F.3d 1216, 1238-39 (11th Cir. 2019) [hereinafter "*Annamalai I*"]. On remand, the district court confined the sentencing hearing to simply substituting the loss amount, then varied upward from the resulting guideline range to impose a 216-month sentence. (Doc. 982).

Relevant here, Mr. Annamalai argued on appeal that the district court had abused its discretion by failing to recuse itself from sentencing Mr. Annamalai. The Eleventh Circuit affirmed Mr. Annamalai's convictions and sentences. (App. A).

II. Statement of the Facts

In *Annamalai I*, the Eleventh Circuit vacated Mr. Annamalai's convictions for bankruptcy fraud, money laundering, and conspiracy to conceal a person from arrest, finding that there was insufficient evidence to support the convictions. *Annamalai I*, 939 F.3d at 1231-32. Further, the Court rejected the loss amount, concluding that the government had not met its burden to show that Mr. Annamalai was responsible for \$536,982.89 in loss and remanding for sentencing based on a loss amount of approximately \$100,000. *Id.* at 1237-38.

In so holding, the Court rejected the district court's statement that it had "no difficulty at all in finding that . . . [Mr. Annamalai] operated a total fraud, so that every penny that ever came into the temple should be included in computing the loss." *Id.* at 1236-38. Instead, the Court concluded that "a finding of absolute fraud is not supported by the record." *Id.* at 1238. The Court noted that several followers had explained "that they received some genuine religious services from the Hindu Temple," and included several examples. *Id.* Therefore, the Court held that "[t]his is not a case in which all of an entity's transactions were shown to be fraudulent." *Id.*

Although the Court ultimately rejected Mr. Annamalai's argument that his prosecution and sentencing violated his constitutional rights, the Court agreed that the government "went too far" by referring to "so-called priests" during the trial and by arguing that "every dollar that was deposited into the [Hindu Temple] was in fact a fraud." *Id.* at 1225. In so noting, the Court held that "it is not for the government to pass on religious qualifications." *Id.* Further, the Court emphasized that "some of the followers who testified at trial acknowledged that certain services they paid for – such as horoscope readings and prayers – were performed as requested and promised." *Id.*

On remand, Mr. Annamalai argued that his guideline range should be 63 to 78 months, and that a time-served sentence of 93 months was appropriate, while the government argued for a 216 month sentence—a significant increase from the 135-168 month guideline range calculated by probation. (Doc. 979-1; Doc. 898; Sealed Sentencing Memorandum at 3-4).

Before imposing sentence, the district court then stated as follows:

The over-arching theme of Mr. Annamalai's shocking misconduct involved his **holding himself out as a high priest to victims, registering his temples as nonprofit corporations with the Georgia Secretary of State** and seeking payments from victims with reference to donations to the temple, building new temples, and deducting payments to him as charitable

contributions for tax purposes, yet Mr. Annamalai used the temples as mere vessels through which he moved cash for his benefit. . . He used marketing materials to identify and deceive individuals most susceptible to his strategians, falsely advertising that he would assist in marital, family, health, and legal problems.

...

In the initial sentencing I stated that Mr. Annamalai used false lawsuits to inflict pain and extort payment. He enjoyed preying on weak and vulnerable people. **He, as a so-called man of the cloth, is a fraud. He is heartless, and ruthless, he is not a holy man. I find that he is a veritable sociopath, a manipulative liar,** swearing out multiple outrageous false affidavits, and repeatedly testifying falsely.

At the original sentencing I stated that this was the worst obstruction of justice I had seen. **And despite that fact, the defendant was unrepentant and incorrigible. None of this has changed.** In fact, his just-described behavior following his original sentencing solidifies, if not intensifies, my views. I can almost hear the cries of the victims who we heard from for two weeks and the defendant treated mercilessly. **He is not entitled to mercy now, nor would mercy be just.**

One of the victims testified at trial how the defendant responded when she resisted his misconduct. This is the one to whom Mr. Annamalai said, quote, once you are in my clutches, only I can release you, closed quote. This man is the opposite of remorseful. He committed crimes to cover up his fraud, and he intimidated witnesses, and obstructed justice. And he has filed scores of lengthy and frivolous motions and other documents in the case swelling the docket to almost a thousand filings. And from these, and everything else in the case, the great weight of other evidence, I can say colloquially he doesn't get it. **The bottom line is that this man is evil.**

...

And while Mr. Annamalai argues that most fraudsters receive lower sentences than the government seeks here, **most fraudsters' schemes are not nearly as so brazen, wicked, and ruthless as Mr. Annamalai's. In this case the driving factor for this sentence is not the amount of the loss, it is the evil character of the defendant.**

To summarize, as for the 3535(a) factors, **the defendant's character and the vicious nature of his crimes are evident from his modus operandi. He simply has no respect for the law. He needs to be punished severely for his ruthless lawlessness.** He needs both specific and general deterrence, and the public needs to be protected.

And I just want to conclude by saying that this sentence is the product of careful, solemn, and prolonged deliberation. **While my contempt for Mr. Annamalai is without affectation, I have had ample opportunity for sedate reflection to consider what the sentence should be.**

(Doc. 1001 at 47-55 (emphases added)).

Prior to the imposition of sentence, Mr. Annamalai moved the district court to recuse itself from the case to allow another court to impose sentence, arguing that the court's comments had failed to reflect the Eleventh Circuit's holding in its initial opinion and that the district court had expressed such contempt for Mr. Annamalai that another judge needed to impose sentence. (*Id.* at 56-57). The court denied that motion. (*Id.*). The district court then imposed a sentence of 216 months. (*Id.* at 57).

Mr. Annamalai objected to being sentenced “in accordance with the Court’s contempt, and any questioning of the sincerity of his beliefs.” (*Id.* at 59). When Mr. Annamalai stated that the court had emphasized that he was not a man of the cloth and that he was evil, the court denied saying that. (*Id.* at 59-60). The court stated that it did not “really give a damn whether he was or [was] not” a “genuine Hindu high priest.” (*Id.* at 60). The court further responded to the objections by stating that:

Let me say about the contempt comment, that I hold him in contempt. I do hold him in contempt. Not in contempt of court in the sense of him being punished for contempt of court, but what he did to these victims. What he did to these victims, I am offended by. And part of my job here is to vindicate the interest of the public. And there is nothing wrong with a trial judge being irritated at a criminal defendant who has caused untold amounts of misery to innocent victims. That is what I mean when I say I have this contempt for him.

(*Id.* at 60-61).

III. Appellate Proceedings

On appeal from his resentencing hearing, Mr. Annamalai argued that the district court had abused its discretion by failing to recuse itself from sentencing Mr. Annamalai, both because of the Court’s contempt and hatred for Mr. Annamalai and because the Court had persisted in stating facts that had been rejected by the Eleventh Circuit in *Annamalai I*.

The Eleventh Circuit rejected that argument and affirmed Mr. Annamalai's convictions and sentences. In so holding, the Court agreed that, "at times the judge was unwisely hostile toward Annamalai and disapproving of his character," but determined that, "in context, the comments did not display a deep-seated antagonism that would make fair judgment impossible." (App. A at 16). Instead, the Court concluded that the comments reflected "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." (*Id.* at 16-17). The Court relied on some out-of-circuit decisions to determine that recusal was not required, and then, in a footnote, dismissed Mr. Annamalai's concerns that the district court had ignored the factual conclusions from *Annamalai I.* (*Id.* at 17-18 & n. 7).

Mr. Annamalai filed a Petition for Panel Reconsideration or Rehearing En Banc. This petition was denied on March 17, 2023. (App. B).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari pursuant to Supreme Court Rule 10(c) because the Eleventh Circuit has decided Petitioner's case, which involves important federal questions, in a way that conflicts with this Court's precedents regarding the recusal statute, 28 U.S.C. § 455.

ARGUMENT AND AUTHORITY

- II. The district court should have recused itself due to the appearance of impartiality when the court's remarks at sentencing reflected such a deep-seated antagonism that made fair judgment impossible, including calling the defendant evil and stating that the court's contempt for Mr. Annamalai was "without affectation."**

"Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The statute also requires recusal where the judge "has a personal bias or prejudice concerning a party." *Id.* § 455(b)(1).¹ "The guarantee to the defendant of a totally fair and impartial tribunal, and the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." *United States v. Columbia Broadcasting Sys.*, 497 F.2d 107, 109

¹ This statute creates a lower standard for recusal than the Due Process Clause, which requires recusal only where the judge has an actual bias against the defendant or interest in the outcome of his particular case. *Norris v. United States*, 820 F.3d 1261, 1265 (11th Cir. 2016).

(5th Cir. 1974). “The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.” *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1523 (11th Cir. 1988) (quotation omitted).

Partiality under § 455(a) is evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance. *Liteky v. United States*, 510 U.S. 540, 548 (1994). “The test is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge’s impartiality.” *Parker*, 855 F.2d at 1524; *see also Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980) (“A judge ought to consider how his participation in a given case looks to the average person on the street. Use of the word ‘might’ in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge’s impartiality.”).

Although disqualification is often mandated because of a bias created by an “extrajudicial source,” it is not the exclusive reason for recusal. *Liteky*, 510 U.S. at 552. Instead, an unfavorable predisposition “can also deserve to be characterized as ‘bias’ or ‘prejudice’ because, even though it springs from

the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment.” *Id.* at 551. The Fifth Circuit has noted that this exception applies “where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party.” *United States v. Holland*, 655 F.2d 44, 47 (5th Cir. 1981) (remanding where the district court judge’s “remarks also reflect a personal prejudice against Holland for successfully appealing his conviction on the basis of the judge’s actions during the prior trial”).

In *Liteky*, this Court elaborated on when opinions formed by the judge while he presided over a case can give rise to the need to disqualify himself:

opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion **unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible**. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and **they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible**. An example of the latter (and perhaps of the former as well) is the statement that was alleged to have been made by the District Judge in *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921), a World War I espionage case against German-American defendants: “One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans” because their “hearts are reeking with disloyalty.”

Id., at 28 (internal quotation marks omitted). Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.

Liteky, 510 U.S. at 555-56 (emphases added).

This Court should consider this issue because the Eleventh Circuit's decision does not fully acknowledge the Court's decision in *Liteky*. The Eleventh Circuit's failure to acknowledge the plain appearance of partiality against Mr. Annamalai risks causing the public to lose confidence in the judicial system.

Specifically, the Eleventh Circuit acknowledges that the district court “was unwisely hostile” toward Mr. Annamalai and “was disapproving of his character,” but concludes that these comments did not display a deep-seated antagonism that would make fair judgment impossible. But a fair review of the district court's “unwisely hostile” comments reveals that the court thoughtfully and deliberately repeated the comments from the first sentencing hearing—including that that Mr. Annamalai “as a so-called man of the cloth, is a fraud” and that he is a heartless, ruthless, a veritable sociopath, and a manipulative liar. (Doc. 1001 at 50). Then, the court

doubled down on the statements, declaring that “[n]one of this has changed” and that therefore, Mr. Annamalai was “not entitled to mercy now, nor would mercy be just.” (*Id.*). The district court then emphasized that the “bottom line is that this man is evil.” (*Id.*).

Addressing Mr. Annamalai’s argument that most fraud cases receive much lower sentences, the district court stated that, “most fraudsters’ schemes are not nearly as so brazen, wicked, and ruthless as Mr. Annamalai’s,” before stating that **“the driving factor for this sentence is not the amount of the loss, it is the evil character of the defendant.”** (*Id.* (emphasis added)).

The court concluded by noting that its **“contempt for Mr. Annamalai is without affectation,”** indicating that the contempt was real and true. (*Id.* at 55 (emphasis added)). Contempt is defined as “the act of despising; the state of mind of one who despises: disdain.”² In turn, despising is defined as “to look down on with disrespect or aversion,” or “to regard as negligible, worthless, or distasteful,” while disdain is “a feeling of contempt for someone or something regarded as unworthy or inferior: scorn.”³ It is

² *Contempt*, Merriam-Webster, available at <https://www.merriam-webster.com/dictionary/contempt> (last accessed March 8, 2022).

³ *Despise* Merriam-Webster, available at <https://www.merriam-webster.com/dictionary/despise> (last accessed March 8, 2022); *Disdain*, Merriam-

difficult to imagine how anyone could believe that the district court was fair and impartial where it openly professed to looking down on Mr. Annamalai with disrespect or aversion, or regarding him as unworthy or inferior.

The Eleventh Circuit held that these shocking comments simply reflected “expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.” (App. A at 16-17). However, this is not a case in which the judge was frustrated with counsel during the heat of trial. Instead, the district court had prepared the remarks ahead of time, read directly from them during the sentencing hearing, and expressly affirmed that it “had ample opportunity for sedate reflection to consider what the sentence should be.” (Doc. 1001 at 55).

The Opinion’s reliance on the statement from *Liteky* that “judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge,” is plainly misplaced. (See App. A at 15). *Liteky* noted that a “judge’s efforts at courtroom administration – even a stern and

Webster, available at <https://www.merriam-webster.com/dictionary/disdain> (last accessed March 8, 2022).

short-tempered judge's ordinary efforts at courtroom administration" did not require recusal, but that is plainly *not* what caused Mr. Annamalai to move for recusal here. Instead, it was the deliberate and intentional comments by the district court judge that expressly evinced pure contempt for Mr. Annamalai, who the court labeled as evil, repeatedly.

Moreover, the Eleventh Circuit insisted that recusal was not required because the court's antagonism toward Mr. Annamalai was based on information that it had gathered during the course of the criminal proceedings, not based on outside knowledge. (App. A at 17). However, *Liteky* plainly recognizes that there can be an appearance of impartiality based on information learned during the litigation if it reflects such deep-seated antagonism that would make fair judgment impossible. *Liteky*, 510 U.S. at 555. Here, as discussed above, these comments—that the court was sentencing Mr. Annamalai based on his evil character and more—plainly reflected such a deep-seated antagonism that any objective observer would believe that the court not exercise fair judgment.

The Eleventh Circuit also did not address various other arguments made by Mr. Annamalai, including that it was not just the district court's comments that gave rise to the recusal issue. The district court refused to

allow Mr. Annamalai to present various information that would have demonstrated his post-sentencing rehabilitation, including by allowing Mr. Annamalai to issue subpoenas and to allow Mr. Annamalai's family – who are in India – to participate in the sentencing hearing and to speak on behalf of their father and husband. This evidence was especially critical because much of the government's argument—which the district court ultimately adopted – relied on a span of six months after Mr. Annamalai was sentenced in which he filed several lawsuits against people associated with the Temple. Yet, the district court refused to take steps to allow Mr. Annamalai to present evidence of the remaining five years of post-sentencing conduct—which would have shown his rehabilitation.

The Panel concluded that its opinion was in line with the opinions of its sister circuits. (App. A at 17-18 (citing *United States v. McTiernan*, 695 F.3d 882 (9th Cir. 2012), and *United States v. Pearson*, 203 F.3d 1243 (10th Cir. 2000)). However, that conclusion ignored other out-of-circuit decisions which supported the opposite conclusion, including *United States v. Holland*, 655 F.2d 44, 47 (5th Cir. 1981), (district court noted its anger that defendant had appealed his case), and *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006) (emphasizing that, like here, “objective observer is left with the overall

impression that the district court's professed hostility . . . has become so extreme to display clear inability to render fair judgment." (cleaned up)). Further, none of the decisions relied upon by the Eleventh Circuit included comments that the Court was sentencing the defendant not based on the Sentencing Guidelines or other 18 U.S.C. § 3553(a) factors, but instead was sentencing him based on the "evil character of the defendant." The Eleventh Circuit's opinion therefore reflects a departure from the decisions of other cases—not a decision in conformity with them.

Finally, the district court should have recused itself because its comments plainly indicated that it did not believe or wish to comply with the facts as described by this Court in *Annamalai I*. First, the Eleventh Circuit expressly stated that it was inappropriate to refer to Mr. Annamalai as a "so-called priest" in its prior decision. See *Annamalai I*, 939 F.3d at 1225. Yet, the district court repeated its prior comments where it stated that "as a so-called man of the cloth," Mr. Annamalai was a fraud and was not a holy man. (Doc. 1001 at 50). The appellate decision relied on the district court's comments that—after Mr. Annamalai objected—it did not care if Mr. Annamalai was a priest or not and that it was not the court's place to decide that. (App. A at 18 & n.7). Even if the district court belatedly tried to disavow its comments—

where it plainly stated that Mr. Annamalai was not a holy man – that does not affect the fact that a neutral observer would not believe that the district court could be an impartial and fair decisionmaker.

Second, while the district court started off the sentencing hearing by stating that the temple was not a total fraud, its later comments immediately prior to imposing sentence plainly reflect that the district court continues to believe that Mr. Annamalai has defrauded anyone that has ever sought out his services as a Hindu priest. The court stated that the “over-arching theme of Mr. Annamalai’s shocking misconduct involved his holding himself out as a high priest to victims,” and using the temples “as mere vessels through which he moved cash for his benefit.” (Doc. 1001 at 47). The court emphasized its findings from Mr. Annamalai’s prior sentencing hearing – as though the Eleventh Circuit did not vacate the findings from that hearing – and then stated, “[n]one of this has changed.” (*Id.* at 50). This flies in the face of *Annamalai I*. Although the Eleventh Circuit relied on the court’s finding that, even without the bankruptcy fraud and money laundering convictions, there was still a “mountain of fraud,” (App. A at 18 n.7), that does not address the district court’s comments that plainly assert that the Temple was just a fraud through which Mr. Annamalai moved funds.

CONCLUSION

This issue is one of exceptional importance: the Eleventh Circuit’s opinion allows a district court to impose a significantly above-guideline sentence despite the fact that the court expressly stated that it had contempt for Mr. Annamalai and that it was basing its sentence on the fact that Mr. Annamalai had an evil character—not the guidelines or the 18 U.S.C. § 3553(a) factors. Any neutral observer would not believe that the district court was an impartial arbiter of justice. This issue is critical to the function of the judiciary. Indeed, this Court has emphasized that the appearance of impartiality is a “vital state interest” noting that, “[t]he power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen’s respect for judgments depends in turn upon the issuing court’s absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.” *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009) (quotations omitted). This Court should not countenance the result here: a district court with unaffected hatred for the defendant who imposed a significant above-guideline range sentence.

In light of the arguments advanced in this Petition, Mr. Annamalai respectfully requests this Court grant his petition and vacate his conviction and sentence.

Dated: This 15th day of June, 2023.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

This document contains 5,163 words, in compliance with all rules of this Court.

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing
petition upon opposing counsel by United States Mail to:

Solicitor General of the United States
Room 5616, Department of Justice
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530-0001

U.S. Attorney's Office
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Dated: This 15th day of June, 2023.

Respectfully submitted,

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