No. 23-5774
23A239

IN THE

ORIGINAL

SUPREME COURT OF THE UNITED STATES

Andres Fernando Cabezas — PETITIONER
(Your Name)

vs.

United States District Court
for the Middle District of Florida — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For the Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Andres Fernando Cabezas
Reg. No. 68854-018, Unit A-1
(Your Name)

Federal Correctional Complex
P.O. Box 1031 (Low Custody)
(Address)

Coleman, Florida 33521-1031
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Several federal appellate circuits have endorsed the view that a federal district court's refusal to recuse is better resolved earlier in interlocutory appellate proceedings in order to protect the public's confidence in the judicial system. The Eleventh Circuit generally by policy and specifically in Cabezas's case rejects petitions for a writ of mandamus involving serious recusal questions on the basis of an appeal being an adequate remedy, with no consideration given to the harm in public confidence in the judiciary. Is the Eleventh Circuit's policy of refusing review of facially valid mandamus petitions for recusal causing irreparable harm to the public's perception of the courts?

LIST OF PARTIES

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

[X] 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

United States v. Cabezas, No. 6:17-cr-00148 (M.D. Fla.)

Cabezas v. United States, No. 6:22-cv-00045 (M.D. Fla.)

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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

[X] 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,
[X] is unpublished.

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

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[X] is unpublished.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

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Mar. 1, 2023.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Jun. 6, 2023, and a copy of the order denying rehearing appears at Appendix C.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including Oct. 4, 2023 (date) on Sep. 23, 2023 (date) in Application No. 23 A 239.

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 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. [¶] (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. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

In January 2022, Andres Cabezas filed a motion under 28 U.S.C. § 2255 to vacate his criminal conviction and sentence. Shortly thereafter, Cabezas filed a motion for the district court to recuse itself from the proceedings under 28 U.S.C. § 455(b)(1). Cabezas argued that the record demonstrated that the district court had learned facts outside the record and then used this personal knowledge against Cabezas at sentencing. See Appx. E at 7-8. Cabezas followed up this motion with a second recusal motion under 28 U.S.C. § 455(a), this time citing to appearance of bias. See id. at 8-9.

Nearly six months after the first recusal motion, the court denied both motions. The district court's reasoning hinged on its continuing to rely on or defending its use of extra-record facts. See Appx. B; Appx. E at 9-10. Cabezas motioned for reconsideration. The district court denied the reconsideration motion. See Appx. D; Appx. E at 12.

Cabezas petitioned the Eleventh Circuit for a writ of mandamus to conduct an interlocutory review of the recusal motion. Appx. E. The appellate court denied the request, stating that Cabezas had the "adequate alternate remedy of attempting to raise the recusal issue in an appeal once a final judgment is entered in his 2255 proceedings." Appx. A at 3. The court also stated that Cabezas had not raised any "exceptional circumstances." Id.

Cabezas petitioned the appellate court for reconsideration, arguing that he had shown exceptional circumstances by the plain record demonstrating that the district was obligated to recuse based on its extra-judicial knowledge, and its failure to do so was judicial usurpation. See Appx. D at 2. The appellate court denied the reconsideration motion, stating that they had not misapprehended or overlooked any point of law or fact in denying the petition. Id. at 5.

REASONS FOR GRANTING THE PETITION

Over a hundred years ago, this Court stated that a party required to complete judicial proceedings overseen by a biased judicial offices is by its nature irreparable:

> The remedy by appeal is inadequate. It comes after the trial and, if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."

Berger v. United States, 255 U.S. 22, 36 (1921). This warning has not been heeded by the Eleventh Circuit who have not in practice or policy justly utilized interlocutory review of recusal motions in this case or others. The response to mandamus, in this case or others, is that appeal after a final order is an adequate alternative remedy, mandamus denied. E.g. In re Akel, 2022 U.S. App. LEXIS 4026 (11th Cir. 2022); In re Annamalai, 2022 U.S. App. LEXIS 6930 (11th Cir. 2022); In re Puckett, 2022 U.S. App. LEXIS 34550 (11th Cir. 2022); In re Clements, 2020 U.S. App. LEXIS 15734 (11th Cir. 2020); In re McCollum, 2019 U.S. App. LEXIS 3317 (11th Cir. 2019).

This controversy is seek interlocutory review of a denial of a facially valid recusal motion at the earliest possible opportunity, through mandamus. This is a pragmatic approach, both in potentially conserving judicial resources (by preventing do-overs), but also because "public confidence in the courts requires that such a question [of recusal] be disposed of at the earliest possible opportunity." In re United States, 666 F.2d 690, 694 (1st Cir. 1981). Indeed, "ordinary appellate review fails to restore 'public confidence in the integrity of the judicial process." In re Al-Nashir, 791 F.3d 71, 79 (D.C. Cir. 2015)(quoting Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860 (1988)).

Multiple circuits have not only found mandamus to be an appropriate vehicle for interlocutory review of recusal denials, they have issued the writ for the express purpose of reassigning the case. See In re Boston's Children First, 244 F.3d 164 (1st Cir. 2002); In re IBM Corp., 45 F.3d 641 (2d Cir. 1995); In re Antar, 71 F.3d 97 (3d Cir. 1995); In re Sch. Asbestos Litig., 977 F.2d 764 (3d Cir. 1992); In re Rodgers, 537 F.2d 1196 (4th Cir. 1976); In re Faulkner, 856 F.2d 716 (5th Cir. 1988); In re Aetna Cas. & Sur. Co., 919 F.2d 1136 (6th Cir. 1990)(en banc); In re Hatcher, 150 F.3d 631 (7th Cir. 1998); In re Edgar, 93 F.3d 256 (7th Cir. 1996); Nichols v. Alley, 71 F.3d 347 (10th Cir. 1995).

Upon searching the cases, it appears that the Eleventh Circuit, while recognizing that mandamus could theoretically be used to reassign a judge that must recuse, has never actually issued the writ for these purposes. The difference lies in how the Eleventh Circuit approaches the mandamus/recusal issue; they rely on a definition of "extraordinary circumstances" threshold that is exceedingly high—if not impossible—to meet. See In re Moody, 755 F.3d 891, 897 (11th Cir. 2014). This is because the Eleventh Circuit does not presume that a judge's failure to recuse is a threat to the public's confidence in the judiciary, and therefore the appellate court is not compelled to act until after the damage has been done. See In re Corrugated Container Antitrust Litig., 614 F.2d 958, 960-62 (5th Cir. 1980). The failure to consider this public confidence factor as a reason (extraordinary or otherwise) to conduct mandamus review then becomes the justification for finding appellate review "adequate."

Other circuits, however, do consider the public confidence factor in their consideration of whether to undertake interlocutory review and to grant the petition. In re United States, 66t F.3d at 694; Madden v. Myers, 102 F.3d 74, 78 (3d Cir. 1996)("Mandamus in these instances [recusal] serves not only to correct a harm to a litigant, but to preserve judicial integrity and public confidence.

Review after final judgment might cure harm to the litigant, but it would not cure the additional separate harm to the public confidence."); Union Carbide Corp. v. U.S. Cutting Serv., Inc., 782 F.2d 710, 713 (7th Cir. 1986)("But where a serious question [of recusal] is raise, we shall interpret generously our power to issue the writ, in order that we may lay the question to rest at the earliest possible time."); In re Al-Nashiri, 791 F.3d at 79.

Cabezas's recusal claims were under 28 U.S.C. § 455(a), (b)(1), which respectively demand recusal for apparent bias and "[w]here [the judge] has a personal bias or prejudice concerning a party[.]" 28 U.S.C. § 455(b)(1). The latter were claims based on obvious record examples that facially supported Cabezas's claim that the district court had extra-judicial knowledge. See Appx. E at 14-17. Notably, Cabezas demonstrating the validity of the § 455(b)(1) claim would have required the district to recuse under Eleventh Circuit precedent. See United States v. Patti, 337 F.3d 1317, 1321 (11th Cir. 2003). Essentially, the claim, if accepted, would demonstrate "a clear and indisputable right to relief," a prerequisite for granting mandamus. Cobell v. Norton, 334 F.3d 1128, 1139 (D.C. Cir. 2003).

Despite Cabezas arguing on rehearing the district court's usurping of its authority and thereby the risk of loss in public confidence, the Eleventh Circuit would not even partake in interlocutory review. For facially valid claims (like Cabezas's), Mandmus review is appropriate.

This is not to say that any policy enforced by this court should include a required review, as the Seventh Circuit now-abrogated rule of mandatory mandamus given in United States v. Balistrieri, 779 F.2d 1191, 1205 (7th Cir. 1985). Rather, a superficial review should determine if there are serious questions for reassignment, with invalid or frivolous claims being struck down early. The other extreme as adopted by the Eleventh Circuit, not to review claims at all

until appeal, does not do enougn to dispel doubt with the public that proceedings are held before impartial tribunals. Interlocutory review then, for any kind of recusal claim, is vital to this public perception.

It is no secret that the public is currently concerned about this issue, even at the level of this Honorable Court, the highest in the land. See also 168 Long. Rec. H4522 (daily ed. Apr. 22, 2022)(statement of Rep. Hakeem Jeffries)("Failure to recuse can cause real harm to parties seeking fair and impartial justice and leaves a cloud of doubt over any decision that is made once the conflicts are subsequently uncovered."). This Court's guidance could conform the appellate courts to a standard and policy of undertaking interlocutory review of plausible claims on mandamus, and root out the issues of prejudice or appearance of bias before they cause irreparable harm to the public's perception of the judiciary as a whole.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: Oct. 4, 2023