

Related Background Information:

This document is part of a series in which gross misconduct by Judge Donald L. Graham and Magistrate Frank Lynch Jr. is documented at <http://secretlaw.com>, <http://donaldlgraham.blogspot.com>, and <http://geocities.com/mcneilmason>, <http://mmason.freeshell.org>. These websites allege and **document** gross misconduct which would otherwise be incredulous and beyond belief. These websites demonstrate that federal judges will lie to protect themselves and each other and conceal their misconduct through the use of unpublished decisions. Please refer members of the legal community to the websites <http://secretlaw.com>, <http://donaldlgraham.blogspot.com>, and <http://geocities.com/mcneilmason>.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

MAY 20 2004

No. 04-11894-B

THOMAS K. KAHN
CLERK

Dist. Ct. Dkt. Nos. 02-14020-CR-KMM; 99-14027-CV-DLG

IN RE:

MARCELLUS M. MASON, JR.

Petitioner.

On Petition for Writ of Mandamus to the
United States District Court for the
Southern District of Florida

BEFORE: CARNES and HULL, Circuit Judges

BY THE COURT:

In his mandamus petition, Mason wants (1) Judge Graham to retroactively recuse himself from case number 99-14027-CV-DLG as of February 13, 2001; (2) vacatur of all of the decisions Judge Graham made in his case, including a September 20, 2001 order; (3) this Court to direct Judge Moore to dismiss his contempt case, number 02-14020-CR-KMM; and (4) this Court to issue an "emergency stay" with respect to the contempt case. Mason also requests that this Court order Judge Graham to file a brief responding to the allegations in his mandamus petition and publicly rebuke Judge Graham for his "misconduct and contempt for well established law." Mason adds that an appeal of his contempt case "hardly makes sense" because the case never should have been filed, and any appeal will be "of gargantuan proportions."

Mandamus is available “only in drastic situations, when no other adequate means are available to remedy a clear usurpation of power or abuse of discretion.” Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1004 (11th Cir. 1997). Mandamus may not be used as a substitute for appeal, or to control decisions of the district court in discretionary matters. Id. The petitioner has the burden of showing that the claimed right to issuance of the writ is clear and indisputable. In re Lopez-Lukis, 113 F.3d 1187, 1188 (11th Cir. 1997).

Recusal, Public Reprimand, and Response to Mandamus by Judge Graham

Mason is not entitled to relief as to his request that Judge Graham be retroactively recused and his prior decisions voided. Title 28 of the United States Code Section 455(a) provides: “Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” Matters arising out of the course of judicial proceedings, however, are not a proper basis for recusal. Disqualification under § 455(a) is required only when the alleged bias is personal in nature, that is, stemming from an extra-judicial source. Liteky v. United States, 510 U.S. 540, 553, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); Loranger v. Stierheim, 10 F.3d 776, 780 (11th Cir. 1994). Generally, a judge’s rulings in a case are not valid grounds for recusal. Liteky, 510 U.S. at 555, 114 S.Ct. at 1157; Loranger, 10 F.3d at 780. In rare cases, recusal may be required when “such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party.” Loranger, 10 F.3d at 780 (internal quotation omitted).

Mason has not demonstrated bias stemming from an extra-judicial source, nor has he made a showing of “pervasive bias” that might necessitate recusal. Mason merely asserts that Judge Graham was not impartial because (1) he allowed many of Mason’s motions to languish, and

(2) would not let Mason file a § 1981 claim, but did let another plaintiff with similar claims do so. As to the alleged languishing, a review of the district court docket sheet shows that the court ruled upon his motions in a timely manner. Moreover, a review of Mason's complaint and the other plaintiff's complaint reveal that their claims are not similar. Mason's complaint alleges that county entities and employees violated his First Amendment rights, which is actually a 42 U.S.C. §1983 claim. The plaintiff to which Mason compares himself, however, brought racial and national origin discrimination and retaliation claims under 42 U.S.C. § 2000e (Title VII) and § 1981. Both Title VII and § 1981 can be used to bring race discrimination claims. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-01, 93 S.Ct. 1817, 1823-24, 36 L.Ed.2d 668 (1973) (pointing out, in relevant part, that Title VII's language plainly reveals that Congress intended to eliminate racially discriminatory job practices); Brown v. American Honda Motor Co., Inc., 939 F.2d 946, 949 (11th Cir. 1991) (holding that the aim of § 1981 is to "remove the impediment of discrimination from a minority citizen's ability to participate fully and equally in the marketplace"). Thus, Mason has not shown bias stemming from an extra-judicial source or "pervasive bias" that places Judge Graham's impartiality in question. Accordingly, because there is no evidence of partiality, there is no need for this Court to vacate Judge Graham's orders or consider issuing a "public rebuke" of Judge Graham as Mason requests.

Mason also requests that this Court order Judge Graham to file a brief responding to Mason's mandamus petition. However, pursuant to Fed.R.App.P. 21(b), this Court may deny a petition for writ of mandamus without an answer from the respondent. See Fed.R.App.P. 21(b)(1).

September 20, 2001 Order

Mason also contends that Judge Graham did not have jurisdiction to enter the September 20,

2001 order enjoining Mason's future filings. This assertion is without merit and does not entitle him to relief.

[A]s a general rule, the filing of a notice of appeal divests the district court of jurisdiction over those aspects of the case that are the subject of the appeal. However, it may not divest the district court of jurisdiction over collateral matters not affecting the questions presented on appeal.

Doe v. Bush, 261 F.3d 1037, 1064 (11th Cir. 2001) (internal citations omitted). In Mason's case, he filed a notice of appeal as to the dismissal of his civil case. The September 20, 2001 order did not relate to the issue on appeal, but instead enjoined Mason from filing any further pleadings in the district court without permission. Because the order related to collateral issues, the district court had jurisdiction to issue it. See Doe at 1064; see also Copeland v. Green, 949 F.2d 390, 391 (11th Cir. 1991) (holding that a district court can place certain filing restrictions on litigants to protect itself from abuses). Moreover, Mason had an adequate alternative remedy to mandamus relief in that he could have timely appealed the September 20, 2001 order, but did not do so.

Dismissal of Contempt Action

Mason also argues that his criminal contempt case should be dismissed. He is entitled to no relief in this area because he has an adequate alternative remedy. Once judgment is entered on Mason's contempt offense, he can appeal the conviction and sentence. See United States v. Bernardine, 237 F.3d 1279, 1283-84 (11th Cir. 2001) (affirming a criminal contempt conviction on appeal). As to Mason's assertion that an appeal does not make sense because of the size it allegedly will be, the potential size of a criminal appeal does not make it nonsensical.

This Court's Resolution of Mason's Appeal

Mason next challenges the resolution of his appeal of the dismissal of his civil case. In that

appeal, Mason included arguments relating to the September 20, 2001 order entered after the notice of appeal was filed. This Court granted, in part, the appellees' motion to strike Mason's brief, holding that the portions of the brief that related to the September 20, 2001 order were beyond the scope of appeal. Mason is entitled to no relief on this issue because he is attempting to relitigate an issue that this Court already has resolved.

Emergency Stay of Contempt Case

As to the "emergency stay," Mason contends that it should be issued because the "void" September 20, 2001 order wrongfully is being used to support the contempt proceedings. As addressed above, however, the September 20, 2001 order is not void because the district court had both jurisdiction to issue the order and the authority to protect itself from Mason's abuses. See Doe 261 F.3d at 1064; Copeland, 949 F.2d at 391. Moreover, as noted above, Mason's suggestion that an appeal of his contempt conviction is not an adequate alternative remedy is baseless. See Jackson, 130 F.3d at 1004; Bernardine, 237 F.3d at 1283-84.

For the above-discussed reasons, the mandamus petition is **DENIED**.