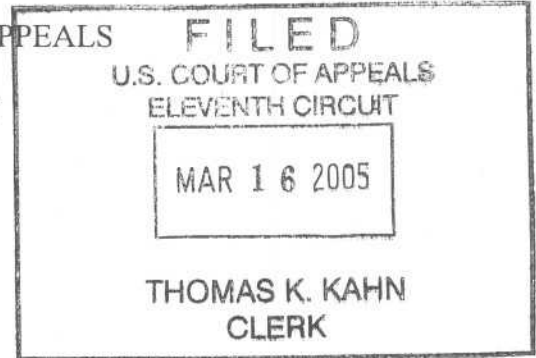


IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

\_\_\_\_\_  
No. 05-10623-I  
\_\_\_\_\_

Dist. Ct. Docket No. 99-10427-CV-DLG



IN RE:

MARCELLUS M. MASON, JR.,

Petitioner.

\_\_\_\_\_  
On Petition for Writ of Prohibition  
to the United States District Court for the  
Southern District of Florida  
\_\_\_\_\_

**ORDER:**

Marcellus M. Mason, Jr., proceeding pro se, filed the instant petition for a writ of mandamus, requesting that this Court (1) disqualify Judge Donald Graham from his civil suit against his former employer, retroactive to February 2001; (2) vacate all decisions and rulings by Judge Graham in this case since February 1999, including the September 20, 2001 order enjoining him from filing any pleadings or additional related lawsuits without court permission; (3) order Judge Graham to file a response to the allegations in this petition; (4) publicly rebuke Judge Graham for his misconduct; and (5) order Judge Graham to rule in Mason's favor on his pending requests to file Rule 60(b) motions and then rule on the merits of those motions.

Any court of the United States may authorize the commencement of a proceeding without prepayment of fees by a person who submits an affidavit that includes a statement of assets the

person possesses and that the person is unable to pay such fees. 28 U.S.C. § 1915(a). The court, however, may dismiss the case at any time if it determines that the allegation of poverty is untrue, or the action or appeal is frivolous. See 28 U.S.C. § 1915(e)(2)(A) & (B). Mason has established poverty by way of an affidavit of indigency. As discussed below, however, his mandamus petition is frivolous.

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 he has no other avenue of relief and that his right to relief is clear and indisputable. See Mallard v. United States Dist. Court, 490 U.S. 296, 309, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989).

The question of disqualification of a trial judge is reviewable on mandamus, but the writ will issue only in drastic situations, when no other adequate means are available to remedy a clear usurpation of power or abuse of discretion. See In re Lopez-Lukis, 113 F.3d 1187, 1187-88 (11th Cir. 1997); Jackson, 130 F.3d at 1004. In this case, Mason is not entitled to the recusal of Judge Graham because final judgment has been entered in his employment discrimination case, and he raised Judge Graham’s denial of his recusal motion on appeal. See Jackson, 130 F.3d at 1004.

Furthermore, Mason appealed the dismissal of his case as well as the district court’s injunction order of September 20, 2001, which required Mason to seek the court’s permission to file any motions in his case, including Rule 60(b) motions. Therefore, he had adequate alternative remedies as to his requests that this Court (1) vacate all decisions by Judge Graham entered after

February 1999, including the September 20, 2001 order, and (2) order Judge Graham to file and rule on the merits of Mason's Rule 60(b) motions. Finally, because recusal is not warranted and Mason already has appealed the denial of his recusal motion, he has shown no basis for this Court either to require Judge Graham to respond to this petition or to publicly rebuke Judge Graham. Accordingly, the mandamus petition is frivolous, and the motion to proceed in forma pauperis is **DENIED**. See 28 U.S.C. § 1915(e)(2)(B)(i).

/s/ Rosemary Barkett  
UNITED STATES CIRCUIT JUDGE