

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

IN RE UNITED STATES OF AMERICA,
Petitioner.

On Petition for a Writ of Mandamus to the United States District Court
for the Eastern District of Wisconsin

Case No. 05 CR 145
The Honorable J.P. Stadtmueller

**RESPONDENT JUDGE J.P. STADTMUELLER'S OPPOSITION TO
PETITION FOR WRIT OF MANDAMUS**

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ISSUE PRESENTED

Whether the extraordinary remedy of mandamus should be granted to determine whether a reasonable person apprised of all relevant facts would doubt the impartiality of United States District Judge J.P. Stadtmueller under the recusal standard of 28 U.S.C. § 455(a) because he criticized the four-year litigation of a case alleging a single count of gun possession during a meeting with the United States Attorney and the Federal Defender, neither of whom had any personal involvement in this case, and suggested that they explore resolving the case without a trial.

INTRODUCTION

The government has filed a petition for a writ of mandamus to disqualify Judge Stadtmueller from further participation in *United States v. Salahuddin*, No. 05 CR 145 (E.D. Wis. filed June 7, 2005). On May 15, 2009, this Court invited a response from Judge Stadtmueller.

The government bases its petition on an in-chambers meeting convened by Judge Stadtmueller with the U.S. Attorney and the Federal Defender, neither of whom were directly involved in this case. At that meeting, Judge Stadtmueller informed the U.S. Attorney and the Federal Defender about this protracted, four-year-old gun possession case, now before its third judge; noted his intention to grant in part the defendant's motion to suppress certain evidence that might require a retrial; and suggested that they consider facilitating a resolution without the need for further litigation. After learning of Judge Stadtmueller's intention to grant in part the defendant's motion to suppress, the government moved for recusal. But

neither the in-chambers meeting nor any of the subsequent proceedings in this case requires recusal.

First, contrary to the government's assertion, the in-chambers meeting did not violate Federal Rule of Criminal Procedure 11(c)(1), which prevents a judge from coercively intruding in plea negotiations. The parties had not engaged in plea negotiations since this Court vacated the defendant's conviction; no plea negotiations were conducted in Judge Stadtmueller's presence; he expressly advised the U.S. Attorney and the Federal Defender that they were free to reject his suggestions; the defendant—whose right to be free from coercive plea bargaining underlies Rule 11(c)(1)—has waived recusal and stated that he did not feel coerced; and the parties never entered into a plea bargain.

Second, no reasonable observer with knowledge of the relevant facts could question Judge Stadtmueller's impartiality. The government disagrees with the tenor of some of Judge Stadtmueller's comments, but the Supreme Court and this Court repeatedly have held that even harsh criticisms by judges about litigants do not warrant recusal. Judge Stadtmueller's comments about the government and this litigation are nothing out of the ordinary and, if they required recusal, would allow disappointed litigants everywhere to engage in judge-shopping. Nothing in the record suggests that Judge Stadtmueller—who has served as a district court judge for 22 years, and previously served as an Assistant U.S. Attorney for 10 years and as the U.S. Attorney for six years—is biased against the government or unwilling to faithfully apply the law to the facts of this case.

Finally, contrary to the government's request, Judge Stadtmueller's ruling on the motion to suppress should not be affected by this petition. The government sought to disqualify Judge Stadtmueller only after it learned that he would be issuing an adverse ruling. But it has not appealed the suppression order and has not identified any errors therein. The risk of judge-shopping counsels strongly against allowing the government to collaterally challenge the order through the extraordinary remedy of mandamus.

STATEMENT OF FACTS

The case in which this petition arises has a long history. In January 2003, after Defendant Rashid Abdullah Salahuddin failed to report to a corrections facility while on work release, detectives in Milwaukee, Wisconsin, sought him on an escape warrant. R.9 at 3.¹ The officers went to his residence, searched it, and found two firearms in a closet. R.107 at 11-15. The officers later arrested Salahuddin and, before they administered *Miranda* warnings, Salahuddin admitted that two weapons were in the apartment. *Id.* at 12-15.

In June 2005—more than two years after his arrest—Salahuddin was indicted on one count of possessing firearms as a felon in violation of 18 U.S.C. § 922(g)(1). R.1 at 1. The parties entered into plea negotiations. Both the government and Salahuddin concluded that he was not subject to the 15-year mandatory minimum sentence for armed career criminals, as evidenced by a

¹ Citations to the record "R." correspond to entries on the district court's docket.

lengthy analysis of Salahuddin's criminal history that the government prepared and provided to Salahuddin's counsel. R.17-2 at 2. In that analysis, the Assistant U.S. Attorney determined that Salahuddin would face an advisory guidelines range of 46-57 months' imprisonment if he signed the plea agreement. *Id.* With this understanding, Salahuddin decided to plead guilty. R.9. During the plea hearing, District Judge Clevert told Salahuddin, among other things, that by pleading guilty, he was waiving his right to challenge the government's evidence. R.107 at 5. Salahuddin hesitated when he learned that he could no longer attempt to suppress certain evidence but eventually pleaded guilty. R.17-4 at 20-21, R.17-5.

Two days before sentencing, the government reversed course and decided that Salahuddin should be treated as an armed career criminal. R.107 at 6. In response, Salahuddin moved to withdraw his guilty plea. R.17. Judge Clevert granted the motion and then recused himself from further proceedings. R.26. The case was subsequently assigned to Chief Judge Randa. R.39 at 1.

Although the deadline for filing pretrial motions had expired, Salahuddin moved to suppress evidence in March 2006. R.35, 36. Because the delay stemmed from the parties' initial understanding that the sentencing enhancement was inapplicable, the magistrate judge determined that the motions to suppress should be heard in the "interests of justice." R.39. Chief Judge Randa reversed the magistrate judge's determination, R.49, and the contested evidence was admitted. After a two-day trial in August 2006, Salahuddin was convicted. R.61.

On appeal, this Court vacated the conviction, *United States v. Salahuddin*, 509 F.3d 858, 861 (7th Cir. 2007), agreeing with the magistrate judge that Salahuddin’s “failure to file [his motions to suppress] was due in large part to a mutual misapprehension by both the Government and the defense” as to whether Salahuddin would be sentenced as an armed career criminal. This Court found it “incongruous to permit a defendant to withdraw a guilty plea and go to trial while not permitting him to litigate the admissibility of significant evidence” in light of the “practical relationship between the uncertainty about the statute and the decision not to file.” *Id.* at 862. The case was therefore remanded to the district court with instructions to “grant the defendant a new trial” if Salahuddin’s motion to suppress had merit. *Id.* at 864.²

On remand, the magistrate judge recommended that Salahuddin’s motions be denied. R.101. After receiving the magistrate judge’s recommendation, Chief Judge Randa recused himself and the case was reassigned to Judge Stadtmueller. R.104. By October 2008, Judge Stadtmueller had reviewed the magistrate judge’s recommendation and concluded that one of Salahuddin’s motions to suppress should be granted. R.107 at 2-3 & n.1. Because this outcome would necessitate further litigation, the judge requested an in-chambers meeting with the U.S. Attorney and the Federal Defender, neither of whom was personally involved in the case. *Id.* at 2 n.1, R.117 at 2.

² Given this Court’s instruction, the government’s criticism of Judge Stadtmueller for ordering a new trial “without seeking the parties’ input,” Pet. at 24, is without merit.

At that meeting, which was held on October 9, 2008, Judge Stadtmueller recounted the procedural history of the case and advised the U.S. Attorney and the Federal Defender that the pending rulings on the motions to suppress would fully satisfy neither party. R.107 at 2 n.1. He reminded the respective Office heads that, before the confusion over the sentencing enhancement, the parties' original preference was to resolve the matter without a trial. *E.g.*, R.17-2. Although he cautioned that he could not participate in any plea negotiations, Judge Stadtmueller suggested that the Office heads consult with the attorneys of record in order to explore possible alternatives to further litigation. R. 117 at 3. After specifically foreclosing any plea discussion in his presence, Judge Stadtmueller bowed out, noting that the parties "were free to disagree" with his suggestion "and proceed in whatever manner they deemed appropriate." *Id.* at 3, 6.

In a two-paragraph motion filed by an assistant U.S. Attorney who was neither present at the October 9 meeting nor directly involved in the case, the government subsequently sought to disqualify Judge Stadtmueller, arguing that he had advised the parties of his "preferred disposition" of the case at the October 9 meeting. R.105. On January 8, 2009, Judge Stadtmueller issued an order denying the government's motion for recusal, granting Salahuddin's motion to suppress statements that he made before he was given *Miranda* warnings, and denying Salahuddin's other motion to suppress. R.107 at 17-31. Judge Stadtmueller held that recusal was unnecessary because the October 9 meeting lacked any element of coercion. *Id.* at 30-31. Because the government filed its recusal motion only after it

learned that retrial would be likely, Judge Stadtmueller characterized the motion as “an ill-considered, poorly-disguised, preemptive collateral attack” on his partial suppression order. *Id.* at 31.

The government moved for reconsideration of Judge Stadtmueller’s order denying recusal, arguing that the October 9 meeting violated Rule 11 and created the appearance of impropriety under 28 U.S.C. § 455(a). R.109 at 5-8. It also requested that Judge Stadtmueller vacate his order on the motion to suppress. *Id.* at 10. In response, Salahuddin rejected any suggestion that he had been coerced at the October 9 meeting and argued that an objective observer would not doubt Judge Stadtmueller’s impartiality. R.113-2 at 2. Salahuddin accompanied his filing with a waiver of recusal under 28 U.S.C. § 455(e). R.113. Although the local rules in the Eastern District of Wisconsin do not address whether the government was entitled to answer Salahuddin’s waiver of recusal, Judge Stadtmueller nevertheless gave the government an opportunity to respond. R.114. It declined to do so.³

In April 2009, Judge Stadtmueller denied the motion for reconsideration. R.117. Judge Stadtmueller explained that the October 9 meeting did not violate Rule 11(c)(1) because counsel of record were excluded from the meeting, no negotiations took place, and no plea agreement had been proposed. *Id.* at 5-6. Judge

³ The government is wrong in comparing this case to *In re National Union Fire Insurance Co.*, 839 F.2d 1226 (7th Cir. 1988). Pet. at 8, 23 n.9. In *National Union*, this Court stated that although not warranting recusal, the district judge should not have asked counsel, 20 law firms, and the Advisory Committee on Codes of Conduct of the Judicial Conference to express a view on whether he should recuse himself. 839 F.2d at 1227-28, 1230-31. Here, because it was unclear whether a response to Salahuddin’s waiver of recusal was required, Judge Stadtmueller thought it equitable to give the government a chance to respond.

Stadtmueller also determined that no reasonable observer would question his impartiality because he did not take sides in the dispute, and Salahuddin—who had a direct personal interest in the matter—did not question the court’s impartiality. *Id.* at 10. This petition for a writ of mandamus followed.

ARGUMENT

Standard of Review. A petition for a writ of mandamus is “an extraordinary remedy,” *Hook v. McDade*, 89 F.3d 350, 353 n.2 (7th Cir. 1996), which should be “reserved for extraordinary circumstances.” *In re Joint E. & S. Dists. Asbestos Litig.*, 22 F.3d 755, 764 (7th Cir. 1994). *See Ex parte Fahey*, 332 U.S. 258, 259-60 (1947) (extraordinary writs are “drastic” and “reserved for really extraordinary causes”). The Supreme Court also has made clear that the “power to issue [the writ] is discretionary and it is sparingly exercised.” *Parr v. United States*, 351 U.S. 513, 520 (1956). The party seeking the writ must show that his right is “clear and indisputable.” *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). In a case appropriate for mandamus, this Court reviews denials of motions to recuse on a de novo basis. *See Hook*, 89 F.3d at 353.

In determining whether recusal is necessary under 28 U.S.C. § 455(a), “the appropriate inquiry ... is whether an informed, reasonable observer would doubt the judge’s impartiality.” *In re Nat’l Union Fire Ins. Co.*, 839 F.2d 1226, 1229 (7th Cir. 1988); *see also Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (Rehnquist, C.J.) (the inquiry under § 455(a) “is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances”); *accord Cheney v. United States Dist. Court*, 541 U.S. 913, 924

(2004) (Scalia, J.). “An objective standard is essential when the question is how things appear to the well-informed, thoughtful observer rather than to a hypersensitive or unduly suspicious person.” *Hook*, 89 F.3d at 354. “Trivial risks are endemic, and if they were enough to require disqualification we would have a system of preemptory strikes and judge-shopping.” *Id.*

Indeed, “[j]udges have an obligation to litigants and their colleagues not to remove themselves needlessly, because a change of umpire in mid-contest may require a great deal of work to be redone ... and facilitate judge-shopping.” *Nat’l Union*, 839 F.2d at 1229 (citation omitted); *see also New York City Hous. Dev. Corp. v. Hart*, 796 F.2d 976, 981 (7th Cir. 1986) (“ready refusal” “may injure the judge who must take over the case and the litigant aggrieved by the substitution”). Therefore, “[i]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision.” S. Rep. No. 93-419, 93d Cong., 1st Sess. 5 (1973).

I. Judge Stadtmueller Did Not Violate Rule 11(c)(1).

Rule 11(c)(1) provides, in relevant part, that an “attorney for the government *and the defendant’s attorney* ... may discuss and reach a plea agreement. The court must not participate in these discussions.” Fed. R. Crim. P. 11(c)(1) (emphasis added). To determine whether a discussion is a plea negotiation, this Court focuses on “the accused’s subjective expectation of negotiating a plea at the time of the discussion” and “the reasonableness of that expectation.” *United States v. O’Brien*, 618 F.2d 1234, 1240-41 (7th Cir. 1980). In this case, the parties were not engaged in

plea discussions before the October 9 meeting. At the October 9 meeting, neither Mr. Salahuddin nor counsel of record were present, and no plea discussions took place. Therefore, the October 9 meeting was not an impermissible plea negotiation under Rule 11(c)(1). The government cites no authority whatsoever for its contention that Rule 11(c)(1) can be violated even though “the parties themselves were not engaged in plea negotiations.” Pet. at 14.

Although the government repeatedly refers to Judge Stadtmueller’s purported “preferred disposition,” Pet. at 5, 10, 11, it presents no evidence suggesting that Judge Stadtmueller attempted to pressure either party into any agreement. *See generally Nat’l Union*, 839 F.2d at 1231 (denying petition where district judge “did not try to bulldoze counsel into ‘approving’” his determination). And contrary to the government’s suggestion of coercion, it never even proposed a plea bargain following the October 9 meeting.

The government’s conclusory assertion that Judge Stadtmueller improperly interfered with its prosecutorial authority, Pet. at 20-21, is similarly unfounded. Judge Stadtmueller simply met with the U.S. Attorney and Federal Defender to discuss whether alternatives to litigation might be possible. The judge’s query was not unlike the usual and prudent inquiry by a trial judge at any arraignment or pre-trial conference where the judge asks the parties if the case is likely to proceed to trial or to be resolved prior to trial. Judge Stadtmueller took no steps that could reasonably be seen as interfering with the authority of the executive branch.

The cases on which the government relies, *United States v. O'Neill*, 437 F.3d 654 (7th Cir. 2006), and *In re United States*, 398 F.3d 615 (7th Cir. 2005), are plainly inapposite. In *O'Neill*, the district court rejected a plea agreement because it thought the defendant's limited assistance to the prosecution did not warrant a lenient sentence. 437 F.3d at 655-56. And in *In re United States*, the district judge threatened to hold the Assistant U.S. Attorney in contempt if she refused to reveal which person within the prosecutor's office was responsible for making an *ex parte* request to the previous judge. 398 F.3d at 617-18. Nothing remotely comparable occurred in this case.

As this Court explained in *United States v. Kraus*, 137 F.3d 447, 452 (7th Cir. 1998), the central goal of Rule 11(c)(1) is to prevent the district judge from "bring[ing] ... the full force and majesty of his office" to "bear" upon the defendant in a coercive manner. *See also United States v. Fountain*, 777 F.2d 351, 354 (7th Cir. 1985) ("Rule 11 is designed to provide protection for the rights of defendants"). Even the government concedes that "[t]he case law uniformly concerns the coercive effect on *defendants*." Pet. at 15 n.7 (emphasis added). Indeed, in each case cited by the government, *id.* at 13-14, the district judge *succeeded* in pressuring the *defendant* into accepting a plea bargain. In this case, by contrast, Salahuddin has consistently denied that Judge Stadtmueller sought to coerce him into pleading guilty, has expressly waived recusal under § 455(e), and has not entered into any plea bargain.

R. 113.

Finally, even if there had been a Rule 11 violation, that would not warrant granting the extraordinary remedy of mandamus to recuse Judge Stadtmueller and reassign this long-running gun possession case to a fourth judge. Tellingly, the government cites “no authority for the proposition that [a Rule 11] violation provides a basis for the remedy of recusal” on a petition for mandamus. *In re Larson*, 43 F.3d 410, 416 (8th Cir. 1994). Therefore, regardless of whether the October 9 meeting violated Rule 11, the government must show that the meeting created a substantial appearance of partiality under 28 U.S.C. § 455(a) in order to warrant mandamus and recusal—which, we show below, the government has not done.

II. No Reasonable Observer Would Question Judge Stadtmueller’s Impartiality.

Judges are “presumed to be impartial,” *United States v. Sidener*, 876 F.2d 1334, 1336 (7th Cir. 1989), and the party seeking recusal bears the heavy burden of showing a risk of bias that is “substantially out of the ordinary.” *Hook*, 89 F.3d at 354. Here, the government bases its claim of an appearance of bias on comments made at the October 9 meeting and “the manner in which” Judge Stadtmueller denied its recusal motion. Pet. at 16-23. Neither ground would allow a reasonable observer to question Judge Stadtmueller’s impartiality.

Nothing that took place at the October 9 meeting remotely suggests that Judge Stadtmueller is biased against the government. The government complains that during that meeting, Judge Stadtmueller questioned why the case was brought in federal court; suggested that the parties consider resolving the case without

further litigation; and called the lengthy litigation over a single count of gun possession an “embarrassment” and a “breakdown of justice.” Pet. at 20-23. But the Supreme Court has made clear that judicial comments “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.” *Liteky v. United States*, 510 U.S. 540, 555 (1994). To the contrary, “opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current 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.” *Id.*; accord *In re Huntington Commons Assocs.*, 21 F.3d 157, 158 (7th Cir. 1994); see also *Laird v. Tatum*, 409 U.S. 824, 830-36 (1972) (Rehnquist, J.).

Here, the government does not dispute that Judge Stadtmueller’s opinions were informed by the magistrate judge’s report and other evidence in the record—not from a source outside of the proceedings. Pet. at 4-5. And while critical of the dilatory pace of this litigation, none of Judge Stadtmueller’s comments show a “deep-seated favoritism” for either party. See *Liteky*, 510 U.S. at 555-56 (“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,” do not establish “bias or partiality”). Contrary to the government’s argument here, any judge who was not concerned about a long delay in the administration of justice would be abdicating his own responsibility.

Nor is there any evidence that Judge Stadtmueller is biased against the government as a result of its refusal to offer Salahuddin a plea bargain after the October 9 meeting. In fact, in the only opinion issued since that meeting, Judge Stadtmueller *agreed* with the government and denied one of Salahuddin's two motions to suppress. R.107 at 2. No reasonable observer apprised of these facts would doubt Judge Stadtmueller's impartiality based on the October 9 meeting.

Judge Stadtmueller's decision denying the government's motion for recusal also does not require disqualification. The government complains that Judge Stadtmueller called its motion "an ill-considered, poorly-disguised, preemptive collateral attack" on his decision addressing Salahuddin's motion to suppress after having purportedly "invited" the government to file such a motion. Pet. at 19. This Court has made clear, however, that a district judge's criticism of a motion for disqualification does not require his recusal. *See Hook*, 89 F.3d at 355-56 (no bias where district judge called recusal motion "offensive," and thought that it 'impugn[ed]' his integrity"); *Nat'l Union*, 839 F.2d at 1232 (no appearance of bias where district judge "reacted with asperity to the ... petition for mandamus"). "Visible annoyance is no reason for recusal, ... not unless we wish to encourage efforts to get under judges' skin." *Id.* Judge Stadtmueller's criticism of the government's meritless recusal motion is nothing out of the ordinary and does not require recusal.

III. Judge Stadtmueller's Ruling On The Motion To Suppress Should Not Be Disturbed.

Because Judge Stadtmueller was not required to recuse himself, his order granting Salahuddin's motion to suppress should not be vacated. *See Hart*, 796 F.2d at 976. As this Court has noted, "an appealable order can be challenged only by appealing from it; the possibility of appealing would be a compelling reason for denying mandamus." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1294 (7th Cir. 1995); *J. H. Cohn & Co. v. Am. Appraisal Assocs.*, 628 F.2d 994, 997 (7th Cir. 1980); *see also In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990) (motions for disqualification are sometimes filed improperly out of fear that "the judge will *apply* rather than disregard the law"). The government could have sought review of Judge Stadtmueller's order by appealing it, but failed to do so. *See* 18 U.S.C. § 3731 ("An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence ... in a criminal proceeding").

Moreover, the government has not articulated any basis for an appeal of the district court's order. The government does not contend that the court erred, and though it may prefer to try its luck with yet another district judge, no ground exists for overturning the court's grant of Salahuddin's motion to suppress through a writ of mandamus. It is well established that "mandamus is not a substitute for an appeal," *In re Ford Motor Co.*, 344 F.3d 648, 651 (7th Cir. 2003), and interlocutory review is disfavored in criminal cases generally. *United States v. Davis*, 1 F.3d 606, 607 (7th Cir. 1993). The government should not be permitted to evade the usual

appellate procedures for review of a district court's order through its petition for a writ of mandamus.⁴

CONCLUSION

The petition for a writ of mandamus should be denied.

Dated: May 29, 2009

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⁴ Contrary to the government's assertion (Pet. at 23), even if recusal were appropriate, that would not require vacating the district court's suppression order under *Hart*. Unlike *Hart*, in this case Judge Stadtmueller informed the parties *before* the government moved for recusal that he was ready to rule on the motions to suppress, that neither party would be fully satisfied with his ruling, and that he would delay issuing his ruling to allow the parties an opportunity to resolve the case without further litigation. Requiring another judge to decide the motion a second time would simply waste judicial resources.

CERTIFICATE OF SERVICE

The undersigned, an attorney for Respondent Judge J.P. Stadtmueller, hereby certifies that on May 29, 2009, she caused two hard copies of the foregoing Opposition to Petition for Writ of Mandamus to be served upon the counsel listed below by first class U.S. Mail, postage prepaid.

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