

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2007

4 (Argued: May 27, 2008 Decided: September 17, 2008
5 Errata Filed: October 10, 2008)
6 Docket No. 08-2157-op

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8 In re VINCENT BASCIANO,
9 Petitioner.
10 -----

11 Before: KEARSE, LEVAL, and SACK, Circuit Judges.

12 The United States District Court for the Eastern
13 District of New York (Nicholas G. Garaufis, Judge) denied the
14 petitioner's motions seeking the judge's recusal based on
15 government-furnished evidence suggesting that the petitioner had
16 plotted to have the judge murdered. The petitioner then filed a
17 petition for a writ of mandamus in this Court asking us to order
18 Judge Garaufis to recuse himself.

19 Petition denied.

20 JANE SIMKIN SMITH (Ephraim Savitt,
21 Richard Jasper, Ying Stafford, New York,
22 NY, of counsel), Millbrook, NY, for
23 Petitioner;

24 JOHN BURETTA, Assistant United States
25 Attorney (Benton J. Campbell, United
26 States Attorney for the Eastern District
27 of New York, Peter A. Norling, Amy Busa,
28 Winston Chan, Assistant United States
29 Attorneys, of counsel), Brooklyn, NY,
30 for Respondent United States.

1 SACK, Circuit Judge:

2 Petitioner Vincent Basciano petitions for a writ of
3 mandamus requiring Judge Nicholas G. Garaufis of the United
4 States District Court for the Eastern District of New York to
5 recuse himself from presiding over Basciano's impending capital
6 trial. In an order dated June 11, 2008, we denied Basciano's
7 petition, stating that an opinion would follow. This is that
8 opinion.

9 **BACKGROUND**

10 Basciano, allegedly a highly placed member of the
11 Bonanno crime family, see United States v. Basciano, 369 F. Supp.
12 2d 344, 351 (E.D.N.Y. 2005) (Garaufis, J.) ("Basciano"), was
13 originally indicted on August 14, 2003 for various racketeering-
14 related offenses. Following several superseding indictments and
15 two trials on these indictments in 2006 and 2007, Basciano was
16 found guilty of charges in each. On March 31, 2008, he was
17 sentenced to life imprisonment. See Judgment as to Vincent
18 Basciano, United States v. Massino, No. 03-cr-0929 (E.D.N.Y. Apr.
19 8, 2008).

20 In January 2005, while awaiting trial, Basciano was
21 placed in the Special Housing Unit ("SHU") at the Metropolitan
22 Detention Center ("MDC") in Brooklyn. Basciano v. Lindsay, 530
23 F. Supp. 2d 435, 438 (E.D.N.Y. 2008) (Garaufis, J.) ("Lindsay").
24 In a separate indictment returned shortly thereafter, on January
25 26, 2005, Basciano was charged with, among other things, Murder
26 in Aid of Racketeering, 18 U.S.C. §§ 1959(a)(1)-(2), 3551 et

1 seq., based on the 2004 death of Randolph Pizzolo. See
2 Indictment, United States v. Basciano, No. 05-cr-060 (E.D.N.Y.
3 Jan. 26, 2005). The indictment alleges that Basciano conspired
4 to murder the Assistant United States Attorney, Greg Andres, who
5 had been the lead prosecutor in the earlier cases. See Lindsay,
6 530 F. Supp. 2d at 438. The government has stated its intent to
7 seek the death penalty on these still-pending charges. See
8 Letter Regarding Attorney General's Death Penalty Decision,
9 Basciano, No. 05-cr-060 (E.D.N.Y. Apr. 2, 2007). It is trial on
10 these charges for which Basciano has sought to have Judge
11 Garaufis recuse himself.

12 Two months after this indictment was filed, in March
13 2005, Basciano was moved from the MDC to Unit 10 South¹ at the
14 Metropolitan Correctional Center ("MCC") in Manhattan. See
15 Lindsay, 530 F. Supp. 2d at 438.

16 While housed in Unit 10 South, Basciano's
17 contact with visitors, including his
18 attorneys, was sharply curtailed based on the
19 Government's contention that the conditions
20 were necessary to prevent Basciano from
21 directing the affairs of the Bonanno crime
22 family from prison, including ordering acts
23 of violence. Specifically, the Government
24 argued that, in addition to his involvement
25 in the plot to kill Andres, Basciano had
26 ordered the Pizzolo murder from the MDC.

27 Id. (citations omitted).

¹ "[Unit 10 South] at the [MCC] is considered the most secure housing unit available at any Bureau of Prisons ("BOP") facility in the New York City Metropolitan Area and is generally reserved for terrorism suspects and other inmates considered to be a danger to other inmates and/or prison guards." Lindsay, 530 F. Supp. 2d at 438.

1 In May 2005, however, the district court "f[ound] that
2 Basciano's detention in the SHU [was] not reasonably related to
3 the government's legitimate objective of curtailing [his] alleged
4 criminal activities, and that less restrictive means of doing so
5 [were] available to the government." Basciano, 369 F. Supp. 2d
6 at 353. Basciano was therefore released by order of the district
7 court into the general prison population of the MCC subject to
8 "such restrictions as the government deem[ed] necessary to
9 prevent him from communicating with other Bonnano family members
10 and associates." Id.²

11 In July 2006, however, Basciano was transferred by the
12 Bureau of Prisons from the general prisoner population at the MCC
13 back to Unit 10 South. At the end of the following month, the
14 government disclosed to the district court, under seal, the
15 reasons for the transfer.

16 In its sealed filing, the government asserted that in
17 April or May 2006, Basciano had composed a handwritten list with

² The district court also noted that the earlier conditions of confinement imposed by the government were hampering Basciano's ability to fight the government's efforts to have the death penalty imposed against him. The court remarked that, "[a]s a practical matter, the security restrictions in place in the SHU ma[d]e it much more difficult for Basciano to have productive meetings with his counsel," and that "long periods of solitary confinement can have devastating effects on the mental well-being of a detainee." Lindsay, 530 F. Supp. 2d at 439 (quoting Basciano, 369 F. Supp. 2d at 352-53) (internal quotation marks omitted). The court concluded that the "'nuclear option' of indefinite solitary confinement [in the SHU]" was inappropriate "until it [wa]s clear that less restrictive options ha[d] failed to constrain Basciano." Basciano, 369 F. Supp. 2d at 353.

1 the names of Judge Garaufis, Assistant United States Attorney
2 Andres, and three cooperating witnesses who had testified at
3 trial. According to the government, Basciano gave this list to
4 another inmate and indicated that he wanted to have the listed
5 individuals murdered. The second inmate took no further action
6 regarding the list, however, and eventually turning it over to
7 the government on June 30, 2006.

8 The government later produced a transcript of a
9 telephone conversation between Basciano and his wife, which the
10 government had intercepted on June 8, 2006. It took place
11 sometime after the putative "hit list" had been prepared and
12 delivered, but before it had been disclosed to the government by
13 the inmate recipient. The transcript reads, in part:

14 **Basciano:** I'm going to try to get a different
15 judge. I'm gonna see if I can get a different
16 judge. . . . [H]e's just so predisposed
17 because the government brought in so many
18 witnesses. [The government] can't handle the
19 fact that I might get acquitted. . . .
20 [T]hey brought in so many witnesses and spent
21 so much money. I have to pull all the
22 rabbits out of my hat for this one. . . . I
23 gotta pull all the rabbit[s], I have to fight
24 the same way they fight, honey. . . .

25 **Angela Basciano:** Try to get a different
26 judge.

27 **Basciano:** Yeah, well I don't know if it's
28 going to be possible. But I thought this
29 judge was okay Al[l] right listen to
30 me, I'm pulling every rabbit out of the hat,
31 and, uh, I gotta fight fire with fire with
32 these people.

33 **Angela Basciano:** Yeah, well that's what
34 you've got to do.

1 Exhibit B to Memorandum of Law in Opposition to the Motions To
2 Recuse by Defendants, Basciano, Nos. 03-cr-0929, 05-cr-0060
3 (E.D.N.Y. Nov. 1, 2006).

4 Basciano disputed the government's characterization of
5 the list. At a status conference held August 28, 2006, he
6 contended that it was created for use in a Santeria ritual³ that
7 required the list to be placed in his right shoe and stomped on
8 five times per day during the course of trial. Basciano
9 requested an evidentiary hearing regarding the nature of the
10 list. The district court denied the request.⁴

11 On September 21, 2006, the government informed Basciano
12 and his counsel that it had received authorization from the
13 Attorney General to impose stringent Special Administrative
14 Measures ("SAMs") on Basciano. See Lindsay, 530 F. Supp. 2d at
15 439. Federal regulations provide that the Bureau of Prisons may
16 implement SAMs, "[u]pon direction of the Attorney General," when
17 "reasonably necessary to protect persons against the risk of
18 death or serious bodily injury." 28 C.F.R. § 501.3(a).

19 On January 30, 2007, Basciano filed a habeas corpus
20 petition pursuant to 28 U.S.C. § 2241 challenging his transfer
21 back to the SHU and the imposition of the SAMs. The district

³ Santeria is an Afro-Cuban religious cult. XIV Oxford English Dictionary 468 (2d ed. 1989).

⁴ If Basciano is correct that the list was part of a Santeria ritual and not a "hit list," there is simply no reason for the district court judge to recuse himself. Thus, the district court judge did not need to hold an evidentiary hearing on the nature of the "hit list" to decide the recusal himself.

1 court denied the petition in 2008, making no finding as to
2 whether Basciano's list was a "hit list." The court found
3 sufficient evidence, independent of the list, of "Basciano's
4 dangerousness to justify the Government's safety concerns"
5 underlying the government's decision both to impose the SAMs and
6 to assign Basciano to the SHU.⁵ Lindsay, 530 F. Supp. 2d at 447.

7 Recusal Motions

8 In the meantime, in October 2006, Basciano filed a
9 motion requesting that Judge Garaufis recuse himself from
10 presiding over Basciano's capital case. See Motion for Recusal,
11 Basciano, No. 05-cr-0060 (E.D.N.Y. Oct. 31, 2006) (the "2006
12 Motion"). He renewed this motion in June 2007, in connection
13 with his habeas petition, and again in February 2008, following
14 the government's notice that it intended to introduce Basciano's
15 list of names during a potential penalty phase of trial, and that
16 it might also introduce the list as evidence during the guilt
17 phase, see Motion for Hearing or Alternately for Recusal of the
18 Court, Basciano, No. 05-cr-0060 (E.D.N.Y. Feb. 12, 2008) (the
19 "2008 Motion").

20 The district court denied all of these motions. In an
21 order dated November 30, 2006, responding to the 2006 Motion, the
22 court determined that recusal under 28 U.S.C. § 455(a), which
23 provides that "[a]ny . . . [federal] judge . . . shall disqualify

⁵This evidence included testimony at Basciano's 2006 trial regarding his role in the Bonanno crime family, as well as evidence of his discussions of plans to murder three people, including Assistant United States Attorney Andres. See Lindsay, 530 F. Supp. 2d at 440-442, 446-447.

1 himself in any proceeding in which his impartiality might
2 reasonably be questioned," was not warranted. United States v.
3 Basciano, Nos. 03-cr-929, 05-cr-060, 2006 WL 3483924, at *1-*2,
4 2006 U.S. Dist. LEXIS 86533, at *5 (E.D.N.Y. Nov. 30, 2006)
5 (Garaufis, J.). Observing that Basciano was a "sophisticated
6 party" as evidenced by his regular replacement of counsel, and
7 that the first recusal motion followed both his racketeering
8 conviction and statement to his wife about seeking a "different
9 judge," id. at *2, 2006 U.S. Dist. LEXIS 86533, at *5-*6
10 (internal quotation marks omitted), the district court found that
11 Basciano had sought to "engineer" the judge's recusal, id., 2006
12 U.S. Dist. LEXIS 86533, at *6 (internal quotation marks omitted).
13 In the absence of actual bias manifested by the court, the court
14 concluded that a reasonable person "would not reasonably question
15 th[e] court's impartiality." Id., 2006 U.S. Dist. LEXIS 86533,
16 at *7.

17 In a memorandum and order dated March 24, 2008,
18 responding to a motion for a new trial, the district judge
19 reaffirmed his decision not to recuse himself and added that
20 neither that decision nor his denial of habeas relief created "an
21 appearance of partiality sufficient to call into question the
22 fairness of Basciano's retrial." United States v. Basciano, No.
23 03-CR-0929, 2008 WL 794945, at *10, 2008 U.S. Dist. LEXIS 23107,
24 at *36 (E.D.N.Y. Mar. 24, 2008) (Garaufis, J.). The court noted
25 that the defendant had pointed to decisions adverse to him, but
26 had failed to identify any pattern of actions by the court that

1 would contribute to an appearance of an absence of impartiality.
2 Id. at *11, 2008 U.S. Dist. LEXIS 23107, at *41.

3 The court reaffirmed its recusal decision yet again,
4 for substantially the same reasons, in an order dated April 3,
5 2008. See Order Denying Motion for Evidentiary Hearing and
6 Renewed Motion for Recusal as to Vincent Basciano, Basciano, No.
7 05-cr-0060 (E.D.N.Y. Apr. 3, 2008). Basciano then filed in this
8 Court the instant petition seeking a writ of mandamus.

9 **DISCUSSION**

10 I. Standard of Review

11 A petition for a writ of mandamus based on a district
12 judge's refusal to recuse himself requires that we consider both
13 the standard for issuance of the writ and the standard for review
14 of the recusal decision itself. See In re Drexel Burnham Lambert
15 Inc., 861 F.2d 1307, 1312 (2d Cir. 1988), cert. denied, 490 U.S.
16 1102 (1989).

17 "[I]t is well-settled that the exceptional remedy of
18 mandamus will only be invoked where the petitioner has
19 demonstrated that its right to such relief is 'clear and
20 indisputable.'" Id. (quoting Moses H. Cone Mem'l Hosp. v.
21 Mercury Constr. Corp., 460 U.S. 1, 18 (1983)) (emphasis omitted).
22 The district judge has discretion "in the first instance to
23 determine whether to disqualify himself." Id. We will overturn
24 the court's determination in that regard only if it constitutes
25 an abuse of discretion. Id. The recusal decision requires that
26 the district court "carefully weigh the policy of promoting

1 public confidence in the judiciary against the possibility that
2 those questioning his impartiality might be seeking to avoid" the
3 adverse consequences of his expected adverse decisions. Id.

4 In order for us to issue the writ, the petitioner
5 therefore "must 'clearly and indisputably' demonstrate that the
6 district court abused its discretion. Absent such a showing,
7 mandamus will not lie." Id. at 1312-13.

8 II. Whether the District Judge Abused His
9 Discretion By Refusing To Recuse Himself

10 A judge must recuse himself "in any proceeding in which
11 his impartiality might reasonably be questioned." 28 U.S.C.
12 § 455(a). "[T]his test deals exclusively with appearances. Its
13 purpose is the protection of the public's confidence in the
14 impartiality of the judiciary." United States v. Amico, 486 F.3d
15 764, 775 (2d Cir. 2007). In applying this test, we consider the
16 petitioner's allegations of bias as well as the judge's "rulings
17 on and conduct regarding them," id., and ask whether "an
18 objective, disinterested observer[,] fully informed of the
19 underlying facts, [would] entertain significant doubt that
20 justice would be done absent recusal," id. (quoting United States
21 v. Lovaglia, 954 F.2d 811, 815 (2d Cir. 1992)) (internal
22 quotation marks omitted).

23 Although a plot or threat, real or feigned, may create
24 a situation in which a judge must recuse himself, see United
25 States v. Greenspan, 26 F.3d 1001 (10th Cir. 1994), recusal is
26 not ordinarily or routinely required. See, e.g., United States
27 v. Holland, 519 F.3d 909, 915-916 (9th Cir. 2008) (concluding

1 recusal not required); United States v. Yousef, 327 F.3d 56, 170
2 (2d Cir.) cert. denied, 540 U.S. 933 (2003) (same); United States
3 v. Yu-Leung, 51 F.3d 1116, 1120 (2d Cir. 1995) (same); United
4 States v. Cooley, 1 F.3d 985, 993-94 (10th Cir. 1993) (same)
5 (listing among "matters . . . which will not ordinarily satisfy
6 the requirements for disqualification under 455(a)," "threats or
7 other attempts to intimidate the judge"); United States v.
8 Studley, 783 F.2d 934, 940 (9th Cir. 1986) (concluding recusal
9 not required); United States v. Grismore, 564 F.2d 929, 934 (10th
10 Cir. 1977) (same), cert. denied, 435 U.S. 954 (1978). Even where
11 a threat is serious, then, a judge may appropriately decline to
12 recuse himself, at least in some circumstances.

13 To determine whether a trial judge must recuse himself
14 on learning of evidence that the defendant has plotted or
15 threatened to kill the judge (or someone close to him), we must
16 focus first on whether "an objective, disinterested observer[,]
17 fully informed of the underlying facts, [would] entertain
18 significant doubt that justice would be done absent recusal."
19 Amico, 486 F.3d at 775. Depending on the facts, it might
20 reasonably be argued that a judge who becomes aware of a
21 defendant's credible plot or threat to kill him is likely to be
22 adversely influenced in further rulings in that defendant's case.
23 Cf. Greenspan, 26 F.3d at 1005-06.⁶ And in some circumstances

⁶ We are wary of the approach taken by the Tenth Circuit in Greenspan, which focused largely on the seriousness of the threat rather than the evidence of resulting bias. That would suggest that a person awaiting trial must mount not only a threat, but a serious one, in order to obtain a new trial judge. Even so, the

1 that might counsel recusal. If, for example, a judge was
2 assigned to hear a criminal case involving a defendant who had
3 previously threatened the judge, the judge might well be required
4 to recuse himself.

5 But in the situation here, where there is a significant
6 possibility that the defendant's purpose in at least appearing to
7 plot against the judge was to change judges either through
8 physical attack or recusal, additional serious concerns arise.
9 Requiring a judge to recuse himself because the defendant, in an
10 attempt to change judges, has plotted or threatened to kill him
11 would provide any defendant who wanted a new judge with an

Court noted that the threat at issue had apparently resulted in questionable actions taken by the trial court with respect to the sentencing of the defendant.

The trial [judge who was the subject of the defendant's threat] was aware of the allegations at the sentencing hearing, and in fact expedited the hearing in order to "get [the defendant] into the federal penitentiary system immediately, where he can be monitored more closely." [And] the trial court refused to continue the sentencing hearing at the request of defendant's counsel, who had been appointed only two days before the expedited sentencing date.

Greenspan, 26 F.3d at 1005.

We should not be misunderstood as suggesting that the nature of a plot or threat is irrelevant. An idle malicious comment by a person awaiting trial is worlds away from a full-fledged conspiracy to assassinate a judge. We would expect the judicial behavior of a judge to be more likely to be affected by the latter than the former. It is, however, but one factor. The principal indicium of whether a judge's "impartiality might reasonably be questioned," we think, is whether judicial action subsequently taken by the judge with respect to the defendant in the wake of his or her discovery of the plot or threat does or does not appear to be impartial.

1 effective, if in some cases dreadful, method to achieve that end.
2 A defendant cannot be permitted to use such a plot or threat as a
3 judge-shopping device. See In re Aguinda, 241 F.3d 194, 201-02
4 (2d Cir. 2001) (civil action); see also Holland, 519 F.3d at 915
5 ("Such blatant manipulation would subvert our processes,
6 undermine our notions of fair play and justice, and damage the
7 public's perception of the judiciary."). In the circumstance
8 presented here, we therefore give particular deference to the
9 decision of the district judge.

10 In this case, then, we look first to the manner in
11 which the district judge decided not to recuse himself, employing
12 an "abuse of discretion" standard of review. The district judge
13 came to his decision meticulously. As noted, Basciano made or
14 renewed his motion for recusal on three separate occasions. On
15 each, the court explained precisely why the motion was being
16 denied. We have no reason to doubt the manner in which the judge
17 came to his conclusion.

18 Second, we review the actions of the district court to
19 see whether the defendant's behavior has resulted in actions by
20 the judge which might be viewed by "an objective, disinterested
21 observer" as evidencing bias. The only actions identified by
22 Basciano here are the district court's rulings refusing to hold
23 an evidentiary hearing as to the alleged plot, denying the
24 petitioner's motions to recuse, and declining to decide whether
25 the list of persons ostensibly identified as targets reflected a
26 serious threat. That evidence establishes no more than that the

1 court ruled against Basciano; it does not reveal partiality. See
2 Yousef, 327 F.3d at 170 ("[W]ere we to hold that [the district
3 court judge] had an inherent conflict of interest as a result of
4 his prior ruling, we would essentially be requiring district
5 judges to recuse themselves anytime they were asked to revisit a
6 prior decision. . . . [And] the Supreme Court has held that
7 judicial rulings and the opinions formed by judges on the basis
8 of facts introduced in the course of proceedings almost never
9 constitute a valid basis for a bias or partiality motion . . .
10 unless they display a deep-seated favoritism or antagonism that
11 would make fair judgment impossible." (citation and internal
12 quotation marks omitted)).

13 We conclude that the district judge did not abuse his
14 discretion by declining to recuse himself.

15 III. Whether Recusal Is Required If
16 the List Is Admitted as Evidence

17 The petitioner also insists that we direct the district
18 judge to recuse himself because of the possibility that the
19 admission of the list into evidence in a trial presided over by
20 the judge may prejudice the jury. We decline to address this
21 argument for lack of ripeness.

22 "Two factors inform our analysis of prudential
23 ripeness: 1) the fitness of the issues for judicial decision;
24 and 2) the hardship to the parties of withholding court
25 consideration." Ehrenfeld v. Mahfouz, 489 F.3d 542, 546 (2d Cir.
26 2007) (citation and internal quotation marks omitted). Although
27 the government has indicated its intent to introduce the list as

1 evidence during one or more phases of trial, the defendant has
2 not yet challenged the admissibility of this evidence, nor has
3 the district court made any ruling in this regard. And the
4 hardships identified by petitioner arising from our withholding
5 consideration of this question at this time -- his potential
6 interest in questioning jurors regarding the list during voir
7 dire and the potential use of the list as part of his defense --
8 are too speculative for us to act upon the assertion now. The
9 degree and nature of the difficulties Basciano might face are
10 themselves dependent on, among other things, the admissibility of
11 Basciano's list as evidence and the government's actual use
12 thereof at trial. The factors bearing on this issue can be
13 understood only in the fullness of time.

14 The district court has not determined, moreover,
15 whether it would recuse itself if the list were admitted as
16 evidence. In the absence of a decision by the district court on
17 this issue, there is no exercise of discretion before us that we
18 may examine for abuse. We need not and do not express any view,
19 or intend to imply one, as to whether recusal might then,
20 depending on the circumstances, be appropriate or necessary.⁷

21 **CONCLUSION**

⁷ The district court may wish to consider ruling on the admissibility of the "hit list" in limine so as to explore, before trial begins, all available options including, but not limited to, disallowing the use of the list, recusal, or redacting the potentially prejudicial portions of the list, such as the names of the judge and the prosecutor.

1 For the foregoing reasons, on June 11, 2008, we denied
2 Basciano's petition for a writ of mandamus.