No. 12-7100

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TY CLEVENGER,

Appellant / Intervenor

v.

WILLIAM C. CARTINHOUR, JR.,

Appellee / Defendant

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CASE NO. 11-cv-01919 (ESH)

APPELLANT'S PETITION FOR REHEARING *EN BANC*

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Pursuant to Rule 35 of the Federal Rules of Appellate Procedure and also Circuit Rule 35, Appellant Ty Clevenger petitions for rehearing *en banc* of the January 22, 2014 panel decision (Garland, Henderson and Edwards).

I. Fed. R. App. P. 35(b)(1) Statement for Petition for Rehearing En Banc.

This proceeding involves two issues of exceptional importance, namely (1) whether the federal appellate courts have any Constitutional or practical obligations to explain their decisions, and (2) whether a judge may bypass the local rules regarding random case assignments. For many years, legal academics (and several appellate judges) have criticized appellate courts' increasing tendency to issue judgments with little or no explanation. This practice is not just a disservice to the litigants and the general public but, as set forth hereinafter, a violation of the Constitution. Moreover, even though the panel's judgment is unexplained, it implicitly contradicts *Ligon v. City of New York*, where the Second Circuit disqualified a district judge *sua sponte* after she bypassed the local process for random assignment of judges. 736 F.3d 118, 124-126 (2013). That decision was so consequential that the U.S. District Court for the Southern District of New York subsequently changed its local rules to prevent tampering with the random assignment process. *See* Benjamin Weiser and Joseph Goldstein, "Federal Court Alters Rule on Judge Assignments," December 23, 2013, *New York Times* (attached as Exhibit).

II. Statement of the Case and Factual Background

This appeal arose from a $123,802.17 sanction assessed against the Appellant (Appx. 3:1101-1103), who was the attorney for Plaintiff Wade A. Robertson in the case below. (Appx. 1:6). The Plaintiff alleged a racketeering conspiracy involving his former business partner, Defendant William C. Cartinhour, Jr., and some of Defendant Cartinhour's attorneys and associates. *See* Original Complaint (Appx. 1:25-63). In particular, the complaint alleged that Defendant Cartinhour and his attorneys had perpetrated various frauds on the court in a related proceeding, *i.e.*, *Wade A. Robertson v. William C. Cartinhour, Jr.*, Case No. 09-cv-01642 (D.D.C.)(hereinafter "*Robertson I*"), which was assigned to Judge Ellen S. Huvelle. Defendant Cartinhour filed counter-claims in *Robertson I* against the Plaintiff, and he was represented by three attorneys: Defendants Patrick Kearney, Michael Bramnick, and Carlton Obecny (collectively the "Attorney Defendants"). Original Complaint at ¶¶79-80 (Appx. 1:45). Early in those proceedings, Defendant Cartinhour testified that his signature had been forged onto a fabricated affidavit that had been filed by the Attorney Defendants. *Id*. at ¶¶91-94 (Appx. 1:50-51); *see also* March 26, 2010 Transcript Excerpt (Appx. 1:372-377). The Plaintiff also learned that the Attorney Defendants suborned perjury and knowingly filed false discovery responses in order to conceal the identity of Larry Ash, an adverse witness. *Id*. at ¶¶82-83, 90, 95-100 (Appx. 1:46, et seq.).

On November 9, 2010, the Appellant filed the underlying case on behalf of the Plaintiff in the Southern District of New York, where it was assigned to Judge Laura Taylor Swain. *See* Docket (Appx. 1:6-7). The claims arose in part from the misconduct perpetrated by Defendant Cartinhour and the Attorney Defendants in *Robertson I*. *See, generally*, Complaint. On November 17, 2010, the Attorney Defendants asked Judge Huvelle to enjoin the Plaintiff from proceeding with this case in New York, alleging that it interfered with *Robertson I*. *See* Cartinhour's Emergency Motion for Injunction Against Abuse of Federal Courts (Appx. 1:389-390) and supporting memorandum (Appx. 2:391-398). Judge Huvelle denied the request and proceeded with the trial in *Robertson I,* (Appx. 2:418-423) and, on February 9, 2011, the Appellant tried to enter an appearance in *Robertson I* for the purpose of seeking default judgment against Defendant Cartinhour based on forgery, fabrication of evidence, perjury, and subornation of perjury by Defendant Cartinhour and/or his attorneys, particularly Defendants Kearney and Bramnick. *See* Transcript (Appx. 2:441-444). Judge Huvelle refused to allow the Appellant to appear in that case, and she refused to consider the evidence that the Attorney Defendants had committed crimes in her courtroom. *Id*. On February 25, 2011, Judge Huvelle entered judgment in favor of Defendant Cartinhour's counter-claims, awarding him $7 million in damages. *See* August 10, 2012 Memorandum Opinion at 11 (Appx. 3:1045), citing Judgment in *Robertson I*. Mr. Cartinhour's

attorneys soon demanded that the Appellant dismiss this case, citing the verdict in *Robertson I*. *See* February 24, 2011 Letter from Cherish O'Donnell to Ty Clevenger (Appx. 1031-1033).

Rather than dismiss this case, the Appellant asked Judge Swain on March 16, 2011 to stay the case pending the outcome of appeals in *Robertson I*. *See* Corrected Motion for Stay (Appx. 1:139-142). Seven months later, on October 28, 2011, Judge Swain transferred this case to the D.C. District, *see* Memorandum Order (Appx. 1:243), where it was randomly assigned to Judge John Bates. (Appx. 1:255). The Plaintiff notified Judge Bates that a related case was pending before Judge Royce Lamberth. *See* Notice of Related Case (Appx. 1:260-261). On November 17, 2011, the Defendants moved to transfer this case to either Judge Huvelle or Judge Lamberth, and they notified the Court that they had conferred with the Plaintiff. *See* Motion to Reassign Case (Appx. 1:262-268). The Defendants informed the court that they had consulted with the Plaintiff, and he consented to transferring the case to Judge Lamberth, but he objected to any transfer to Judge Huvelle. *Id*. at 1:262. Under Local Rule 7(b), the Plaintiff had 14 days to file a response in opposition that motion. Before he could respond, however, Judge Huvelle used her position as chair of the assignments committee to assign this case to herself. (Appx. 1:269). It does not appear that the case was considered by the full committee, it is doubtful that Judge Huvelle revealed her

conflicts, and it is certain that the Plaintiff was never allowed to voice his objections to her conflicts.

The Appellant, on behalf of the Plaintiff, filed a motion to recuse Judge Huvelle on February 12, 2012, as well as a supporting memorandum. (Appx. 1:328-2:487). The Appellant argued, among other things, that Judge Huvelle was conflicted because this case implicated her in judicial misconduct, namely, failing to protect the integrity of the court in *Robertson I* when Defendants Kearney and Bramnick fabricated evidence, forged a signature, suborned perjury, etc., even going so far as to prevent the Appellant from bringing these matters to her attention. *Id*. The Appellant further objected on the grounds of bias insofar as it appeared that Judge Huvelle sidestepped the local rules and sought the case out, notwithstanding her conflict. *Id*. In support of that motion, the Appellant submitted transcripts and documents proving that Defendants Kearney and Bramnick had committed the foregoing crimes. *See, e.g.*, Exhibit B (Appx. 1:372-377) and Exhibits I-K (Appx. 2:428-444). Judge Huvelle denied the motion on March 16, 2012 (Appx. 2:672-679). The Defendants presented motions to dismiss this case on January 10, 2012, (Appx. 1:280-281), which the Plaintiff opposed. (Appx. 1:286-327). Judge Huvelle dismissed the case on March 16, 2012 (Appx. 2:712).

On April 13, 2012, Defendants Kearney and Bramnick purported to enter appearances on behalf of their co-defendant, Defendant Cartinhour. (Appx. 2:713-

716). On the same day, they moved for sanctions against the Appellant under the authority of 28 U.S.C. §1927 (Appx. 2:717-779), and Judge Huvelle ultimately sanctioned the Appellant $123,802.17 (Appx. 3:1101). In her sanctions order, Judge Huvelle falsely accused the Appellant of filing a bankruptcy case for an improper purpose, specifically, to interfere with proceedings in *Robertson I*. (Appx. 3:1051). The Appellant filed a motion to revise that order pursuant to Fed. R. Civ. P. 59, noting, among other things, that he did not file the bankruptcy case at all – another attorney (William Wooten) had filed the bankruptcy case *against* the Appellant's client. (Appx. 1104-1153).

Notwithstanding the objective falsity of her accusation against the Appellant, Judge Huvelle refused to correct the order, (Appx. 3:1163-1165), and the Appellant filed this appeal. (Appx. 3:1166). After briefing was completed, the Second Circuit issued *Ligon v. City of New York*, 538 Fed.Appx. 101 (Oct 31, 2013), then revised that decision two weeks later. 736 F.3d 118. In that case, the Second Circuit disqualified a judge *sua sponte* because that judge bypassed the random assignment process set forth in the local rules. *Id*. The Appellant brought these cases to the Court's attention pursuant to Fed. R. App. P. 28(j) in a letter dated December 9, 2013. (Doc. No.1469633). Nonetheless, the panel affirmed the judgment of the district court without explanation on January 22, 2014. *See* Judgment (Doc. No. 1476103).

III. Argument

> "*If we are to keep our democracy, there must be one commandment: Thou shall not ration justice*." – Judge Learned Hand (1951).

The litigants, the public, and even the Court itself would be much better served by a written explanation of its decision to affirm the lower court. Legal scholars and some appellate judges, including Senior Judge Harry T. Edwards and former Chief Judge Patricia Wald of this Court, have long lamented the growing trend toward conclusory opinions and/or unexplained judgments,[2] variously noting that the practice implies that some litigants are unworthy of an appellate court's full attention, or even that a court is trying to hide something.

> However poor the quality of unpublished opinions, they are Cardozoesque in comparison to the practice of issuing mere "Orders" - dispositions that contain no explanation at all. Orders fail any quality test. Their proffered justification is that it is unnecessary "to explain even to the loser, why he lost." That statement is dead-wrong, even for the most frivolous cases. *Explanation is fundamental to our system of justice*. Its absence in the one-word Orders effectively converts the statutory appeal of right into a denial of a petition for certiorari; in both cases the decision maker has declined to explain its decision. The difference, of course, is that the Supreme Court has

[2] Judge Edwards long ago observed that the circuit courts were deciding a significant number of cases without opinion, even though two decades before those cases would surely have led to published opinions. *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 Iowa L. Rev. 871, 895 (1983). Judge Wald later agreed: "Due to the pressure of accelerating caseloads, the majority of federal cases now get this unpublished treatment. Many would have been the subject of full-fledged opinions a few decades ago." *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1373 (1995). *See also Re: Rules of U.S. Court of Appeals for Tenth Circuit Adopted Nov. 18, 1986*, 955 F.2d 36, 38 (10th Cir. 1992)(C.J. Holloway, dissenting)("[T]he basic purpose for stating reasons within an opinion or order should never be forgotten - that the decision must be able to withstand the scrutiny of analysis, against the record evidence, as to its soundness under the Constitution and the statutory and decisional law we must follow, and as to its consistency with our precedents. Our orders and judgments, like our published opinions, should never be shielded from searching examination.").

> been given statutory discretion to deny certiorari without explanation, while the circuit courts are under a statutory duty to hear every appeal.

William M. Richman and William L. Reynolds, *Elitism, expediency, and the new certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 284 (1996)(emphasis added). According to the late Judge Richard S. Arnold, "the temptation exists" that if "a precedent is cited, and the other side then offers a distinction, and the judges on the panel cannot think of a good answer to the distinction, but nevertheless, for some extraneous reason, wish to reject it, they can easily do so through the device of an abbreviated, unpublished opinion, and no one will ever be the wiser." Penelope Pether, *Inequitable injunctions: the scandal of private judging in the U.S. courts*, 56 Stanford L. Rev. 1438, 1485 (May 2004), quoting Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219 (1999). That is all the more true if the judges on the panel issue no opinion at all.

In this case, a district judge violated the assignment process set forth in the local rules in order to assign herself to a case that implicated her in judicial misconduct, thus creating the unavoidable appearance of bias. She summarily dismissed the case, then sanctioned the Plaintiff's Attorney (*i.e.*, the Appellant) more than $100,000.00, some of that for actions that occurred in another judge's court*, even though the other judge had no objection to the Appellant's actions in that court.* Meanwhile, during the pendency of this appeal, the Second Circuit

acted *sua sponte* to disqualify a judge who had no such conflict, but who nonetheless bypassed the random assignment process in the local rules. *See Ligon*, 736 F.3d at 124-126. The Appellant brought that case to the Court's attention in a Rule 28(j) letter, yet the panel did not address *Ligon* or otherwise explain its decision. This creates the *exact* appearance that the foregoing judges and scholars wrote about, *i.e.*, that some appeals get only limited attention, ergo justice is being rationed. And that, in turn, erodes confidence in the judiciary.

> Publication… serves to hold judges accountable for their opinions. Accountability encourages well-reasoned decisions. When a judge makes no attempt to provide a satisfactory explanation of the result, neither the actual litigants nor subsequent readers of an opinion can know whether the judge paid careful attention to the case and decided the appeal according to the law or whether the judge relied on impermissible factors such as race, sex, political influence, or merely the flip of a coin. Perhaps few losing litigants will be persuaded by a carefully reasoned explanation, but that explanation will often reveal whether the judge treated the case seriously.

Richman and Reynolds, 81 Cornell L. Rev. at 282-283.

In 2000, Judge Arnold authored the opinion in *Anastasoff v. U.S.*, which famously held that all judgments and opinions of a court are precedential, like it or not, and that contrary rules are unconstitutional. 223 F.3d 898, 904 (8th Cir. 2000), *vacated on other grounds*, 235 F.3d 1054 (2000)(*en banc*). He added the following observation:

> Another point about the practicalities of the matter needs to be made. It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain

> language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.

Id. at 904. The Appellant avers that the widespread practice of issuing conclusory opinions and unexplained judgments is not merely unwise, but unconstitutional. A common-law legal system operates according to precedent, and precedent requires a reasoned explanation of a court's decision. According to the most recent evidence found by the Appellant, roughly 80 percent of decisions in the federal appellate courts are conclusory, unpublished, or decided without explanation. *See, e.g.*, Kenneth F. Hunt, *Note: Saving Time or Killing Time: How the use of Unpublished Opinions Accelerates the Drain on Federal Judicial Resources*, 61 Syracuse L. Rev. 315 (2011). As Professor Pether explains, this practice is effectively transitioning the federal courts from a common-law system toward a civil-law system. 56 Stanford L. Rev. 1438 (May 2004). As such, the practice is unconstitutional.

Article III, Section II of the Constitution explains that the judicial power of the federal courts "shall extend to all cases, in law and equity..." The Supreme Court long ago recognized the significance of those three words, "law and equity," *i.e.*, that the legal system of the United States would mirror the legal system of England, if not its particular laws:

> The Constitution of the United States and the acts of Congress, recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law or in equity, not according to the practice of State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles.

Thompson v. Central Ohio R. Co., 73 U.S. 134, 137 (1867) citing *Robinson v. Campbell*, 16 U.S. 212, 213 (1818). In other words, the Constitution mandates a common-law system in the federal courts. That is relevant here because a common-law system, in turn, necessitates reasoned, written explanations from the courts.

In the *Anastasoff* opinion, Judge Arnold explained that judicial precedent is an inherent part of the system of law adopted in Article III. *See* 223 F.3d at 899, *et seq*. Although he did not discuss the significance of the "law and equity" phrase (or *Thompson* or *Robinson*), Judge Arnold very amply demonstrated that precedent was essential to the understanding of the Framers and the early members of this Court. *Id*. The Appellant submits that the issue he proffers herein is equally essential to Article III and perhaps more so, because precedent does not develop (or even exist) in the absence of explanations. In other words, a common-law legal system necessitates reasoned opinions from the appellate courts.

If Article III mandates a legal system based on precedent and the common law, how does that limit the discretion of the federal appellate courts? May the appellate courts, as a matter of routine, resolve most cases by perfunctory opinions

or unexplained orders? The Appellant has not found a single case discussing this subject, and he is not so naïve as to think that this case could render a bright-line answer to that question, but then neither could any other case. Instead, the Appellant submits that this case, as well as any other, would allow the Court to consider what obligation, if any, it or its panels have to explain themselves. The Appellant further submits that conclusory or unexplained decisions should be the rarest of exceptions – perhaps for the incoherent ramblings of a deranged *pro se* litigant – rather than the rule for 80 percent of litigants. *But see* Richman and Reynolds, 81 Cornell L. Rev. at 284 (arguing that *all* appeals deserve an explanation because "[e]xplanation is fundamental to our system of justice."). Even if the Court chooses not to address that question, the underlying appeal nonetheless presents serious and substantive questions, some of which have not been addressed in this Circuit, *e.g.*, whether a judge in this district may sanction an attorney for actions that occurred in another judge's courtroom in another district (and even though the judge in the other district did not object to that attorney's actions in her courtroom). Accordingly, the panel decision should be reversed and a substantive opinion should issue.

IV. Conclusion

For the foregoing reasons, the petition for rehearing *en banc* should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2014, a true and correct copy of the above and foregoing pleading was filed with the Court's electronic filing system, which should automatically provide copies to the individual(s) below:

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