

May 17, 2011

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**Elisabeth A. Shumaker
Clerk of Court

In re:

GWEN BERGMAN,

Petitioner.

No. 11-1115

(D.C. No. 1:04-CR-00180-WDM)

(D. Colo.)

ORDERBefore **MURPHY, EBEL**, and **O'BRIEN**, Circuit Judges.

Gwen Bergman filed a petition for a writ of mandamus asking that we direct the United States District Court for the District of Colorado to issue a ruling in Case No. 1:04-CR-00180-WDM as to whether she was competent to stand trial in October 2007 and also that we direct the Honorable Walker Miller to recuse from the case. Ms. Bergman subsequently supplemented her petition with requests that this court reinstate certain previously dismissed appeals, that this court direct the district court to hold a hearing on various motions the district court struck because Ms. Bergman filed them pro se while represented by counsel, and that this court order the district court to vacate her conviction and sentence and order her released from custody.

By order entered April 20, 2011, we invited the district court to respond to Ms. Bergman's petition solely as it related to the delay in issuing an order on her

competency. The district court responded on April 21, 2011, stating its intention to issue a ruling on or before May 9, 2011. Ms. Bergman filed a reply insisting that she should be released from custody immediately.

“The peremptory writ of mandamus has traditionally been used in federal courts to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has a duty to do so.” *Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990) (internal quotation marks omitted). Thus, mandamus has been used to review a judge’s refusal to disqualify himself, *see Lopez v. Behles (In re Am. Ready Mix, Inc.)*, 14 F.3d 1497, 1499 (10th Cir. 1994), and to compel a district court to rule on a pending criminal matter in a timely fashion, *cf. Johnson*, 917 F.2d at 1285 (directing district court to rule on pending habeas petition as expeditiously as possible).

Mandamus is not a substitute for appeal, however. *Weston v. Mann (In re Weston)*, 18 F.3d 860, 864 (10th Cir. 1994). It is “a drastic remedy, and is to be invoked only in extraordinary circumstances.” *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (internal quotation marks omitted). “For mandamus to issue, there must be a clear right to the relief sought, a plainly defined and peremptory duty on the part of [the district court] to do the action in question, and no other adequate remedy available. Petitioner must also show that [her] right to the writ is clear and indisputable.” *Johnson*, 917 F.2d at 1285 (citation and internal quotation marks omitted). Further, this court, “in the

exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.” *In re Cooper Tire & Rubber Co.*, 568 F.3d at 1187 (internal quotation marks omitted).

Based upon our review, we conclude that mandamus relief is not appropriate under the circumstances here. The district court entered written findings and conclusions on May 5, 2011, determining that Ms. Bergman was competent when she stood trial, and Ms. Bergman has not shown that she is entitled to mandamus relief with respect to her other requests.

Ms. Bergman’s motion to proceed in forma pauperis in this matter is granted. The petition for writ of mandamus, as supplemented, is denied.

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish line.

ELISABETH A. SHUMAKER, Clerk