

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 9, 2015

Elisabeth A. Shumaker
Clerk of Court

In re: GEORGE DAVID GORDON,

Petitioner.

No. 15-5075
(D.C. No. 4:09-CR-00013-JHP-1)
(N.D. Okla.)

ORDER

Before **GORSUCH**, **MATHESON**, and **BACHARACH**, Circuit Judges.

George David Gordon, proceeding pro se,¹ seeks a writ of mandamus compelling a district court judge to recuse from Gordon's proceedings filed under 28 U.S.C. § 2255. Because Gordon fails to demonstrate an entitlement to mandamus relief, we deny his petition.

Gordon was convicted of federal fraud crimes and other, related crimes in 2010. He subsequently filed a § 2255 motion to vacate, set aside, or correct his sentence. While that motion was pending, Gordon filed a motion asking the district court judge to recuse from the case. On July 13, 2015, the district court denied Gordon's recusal motion, denied his § 2255 motion, and entered a final judgment. Gordon filed a timely post-judgment motion under Fed. R. Civ. P. 60, which the

¹ Gordon is an attorney.

district court denied on August 18, 2015. Gordon filed this petition for a writ of mandamus on August 20, 2015. He has not filed a notice of appeal.

We have held that mandamus is an appropriate vehicle to seek review of the district court's denial of a recusal motion. *See Nichols v. Alley*, 71 F.3d 347, 350 (10th Cir. 1995) (per curiam). But "a writ of mandamus 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). We consider several factors in determining whether a writ of mandamus should issue, one of which is a "requirement that the party seeking the writ has no other adequate means to secure the relief desired." *United States v. Gundersen*, 978 F.2d 580, 582 (10th Cir. 1992) (internal quotation marks omitted). "[More s]pecifically, mandamus cannot be used as a substitute for appeal." *Id.* Thus, if an appeal is available, mandamus relief is not appropriate. *See id.*

Gordon fails to demonstrate an entitlement to mandamus relief because he can appeal the district court's denial of his recusal motion. As the district court has entered a final judgment in his § 2255 proceedings, Gordon can pursue an appeal of the final judgment and any previous order that merged into the final judgment. *See Koch v. City of Del City*, 660 F.3d 1228, 1237 (10th Cir. 2011) ("[O]nce a district court enters a final order, its earlier interlocutory orders merge into the final

judgment and are reviewable on appeal.” (internal quotation marks and brackets omitted)). Accordingly, mandamus relief is not available in this case.²

The petition for a writ of mandamus is denied. Gordon’s application to proceed in this matter without prepayment of fees and costs is granted.

Entered for the Court

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

ELISABETH A. SHUMAKER, Clerk

² In appropriate circumstances, we will consider whether to construe a petition for a writ of mandamus as a notice of appeal. *See Gundersen*, 978 F.2d at 583-84. But we decline to do so here because time still remains for Gordon to file a notice of appeal. *See United States v. Cruz*, 774 F.3d 1278, 1284 (10th Cir. 2014) (holding notice of appeal filed in § 2255 proceeding was timely when filed within 60 days of entry of final order); *see also* Fed. R. App. P. 4(a)(1)(B). Gordon’s notice of appeal will be timely if filed by October 19, 2015.