

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

v.

RICHARD F. SCRUGGS and THE
SCRUGGS LAW FIRM, P.A.

Case No. 2:07-cr-00325-LSC-HGD

**MOTION TO DISQUALIFY THE JUDGES OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA**

Undersigned counsel have great respect for all the judges and magistrate judges in the Northern District of Alabama, so it is with trepidation but out of great concern that we raise the issue of recusal. Simply put, how can any one of the Honorable William M. Acker's colleagues, in a case in which he has taken a great personal interest, including signing the charging document "on behalf of the United States of America," decide the issues involved -- including the request to dismiss charges and/or to set aside the appointment of prosecutors -- without thinking about the effect the rulings will have on the esteemed Senior Judge with whom he or she serves? Because the answer to this question is perhaps unknowable, even to the judge who is making the decision, we request the disqualification from this case of all district and magistrate judges of the United States District Court for the Northern District of Alabama. We further request that the Court decide the present motion prior to making any decisions on whether to void the appointment of private counsel, whether to dismiss the allegations of criminal contempt, or assuming the challenged allegations are not dismissed, whether to require Defendants to plead to the challenged allegations.

I. ARGUMENT

Defendants request disqualification on two grounds. First, the impartiality of the judges of this Court might reasonably be questioned by an objective observer given the totality of the circumstances that now give rise to this prosecution -- namely (i) the complainant is a sitting judge of this Court, (ii) the complainant judge drafted the preliminary injunction at issue in the case, (iii) the complainant judge appointed the private counsel who are prosecuting this case, (iv) the complainant judge signed and accepted the Allegations that give rise to this case, (v) the complainant judge continues to discuss the case with private counsel; and (vi) the complainant judge is likely to be a material witness in the case. *See* 28 U.S.C. § 455(a). Second, the judges of this Court should also be disqualified because they all have at least a professional, and likely personal, relationship with Judge Acker, that could be substantially affected by the outcome of this case. *See id.* at § 455(b)(4).

Pursuant to 28 U.S.C. § 455(a), any judge or magistrate judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” The standard under § 455(a) is not subjective; it requires the Court to ask “whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge’s impartiality.” *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990) (citation omitted). Thus, under § 455(a), “what matters is not the reality of bias or prejudice but its appearance,” and “quite simply and quite universally, recusal [is] required whenever ‘impartiality might reasonably be questioned.’” *Liteky v. United States*, 510 U.S. 540, 548 (1994) (citation omitted). Close questions as to the appearance of impropriety are to be decided in favor of recusal. *See United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989).

An objective, disinterested, lay observer who is fully informed of the facts of this case would harbor significant doubt about the impartiality of any judge of this Court to adjudicate this unique case. The complainant is Judge Acker, a Senior District Judge and a colleague of the Court for over twenty-five years. Judge Acker is at the center of this case. Judge Acker drafted the preliminary injunction that will be at issue should there be a criminal contempt trial. Judge Acker previously issued an order to Defendants to show cause why they should not be held in contempt, and he conducted a hearing on his show cause order. Following that hearing, Judge Acker found cause to charge Defendants with criminal contempt. When the U.S. Attorney declined to prosecute the case, Judge Acker appointed private counsel to draft the Allegations. Only after accepting the Allegations did Judge Acker recuse himself. As private counsel's Reply to Defendants Response to the Order to Show Cause demonstrates, they intend to rely upon Judge Acker's impressions of what his injunction meant in prosecuting this case. *See* Document 11 at 5 ("This becomes clear with additional facts known to Judge Acker"). Moreover, private counsel have identified Judge Acker as a witness in the case. *See id.* at 18 ("Judge Acker is . . . a witness Discussions with Judge Acker have been, and will be had by the prosecutors in the same light and given the same weight as those of victims and witnesses.").

In sum, although he has recused himself, Judge Acker is intimately involved with this case, and his conduct and rulings will be subjected to considerable scrutiny. An objective, lay observer who is aware of all these facts and the professional and collegial relationship of Judge Acker to all the judges of this Court could not but harbor substantial doubt about the impartiality of any judge of this Court to adjudicate this case.

The disqualification of the judges of this Court is also required under 28 U.S.C. § 455(b)(4), which provides for mandatory disqualification where a judge knows that he or she has any “interest that could be substantially affected by the outcome of the proceeding.” Unlike disqualification under § 455(a), disqualification pursuant to § 455(b)(4) is required regardless of whether or not the judge’s interest actually creates an appearance of impropriety. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859 n.8 (1988). As explained above, Judge Acker is the center of this case. His present and future involvement with this case challenges the professional and personal relationships that the judges of this Court have with Judge Acker, and warrants the disqualification of all the judges of this Court. *See Kelly*, 888 F.2d at 732 (trial judge improperly failed to recuse himself where a close personal friend was key defense witness); *United States v. Gordon, et al.*, 354 F. Supp. 2d 524 (D. Del. 2005) (finding disqualification of the whole court where another judge was likely to be a witness); *Shaw Group Inc. v. Next Factors, Inc. (In re Shaw Group Inc.)*, 2006 Bankr. LEXIS 1841 (Bankr. D. Del. 2006) (same).

The extent of intimacy at issue here is unusual. Courts rarely confront a case where a sitting judge of the court is the alleged victim, conducted a hearing on the conduct at issue, appointed the prosecutor, participated in the drafting of the charging document, instituted the criminal proceedings, and is likely to be a witness in the case. Given the cumulative effect of the relevant facts and the professional and personal interests that are at stake, this is precisely the kind of case where recusal of the entire Court is required.

II. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court disqualify all judges of the United States District Court for the Northern District of

Alabama from adjudicating this case. Pursuant to 28 U.S.C. § 292(b), Defendants further request that the case be referred to the Chief Judge of the Eleventh Circuit so that he may reassign it to a district judge of another district court.¹

RESPECTFULLY SUBMITTED this the 13th day of November, 2007.

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Counsel for Defendants

¹ Because Defendants are located in Oxford, Mississippi, and have no office in Alabama or indeed anywhere in the Eleventh Circuit, they have no objection to changing the venue of this action to the district where the newly appointed district court judge sits in due course.

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2007, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the following:

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