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U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
2012 APR 13 AM 11:30

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE MAGISTRATE JUDGES
CRIMINAL DUTY AND CASE DOCKET

MAGISTRATE JUDGE
JOSEPH C. WILKINSON, JR.

ORDER AND REASONS

More than two (2) years ago, I voluntarily disqualified myself from handling any and all matters on this court's entire criminal docket, because at that time it appeared that my brother, among others, was involved in a grand jury investigation being conducted by the Office of the United States Attorney. I did so under 28 U.S.C. § 455(a), which is mirrored in Canons 2A and 3C of the Code of Conduct for United States Judges. My intent was to avoid any conceivable appearance of lack of impartiality in handling matters that were also being conducted by lawyers and others working in or with the Criminal Section of the United States Attorney's Office.

My disqualification decision was voluntary. Neither the United States Attorney's Office nor any other party to any criminal or civil case asked me to do so. I am not personally involved in any pending investigation or case involving my brother. I did not recuse myself from any case on the civil docket. That includes any civil case in which the United States is a party (of which I currently have a dozen or so, in addition to the scores that are part of the In re Katrina Canal Breaches Consolidated Litigation, C.A. No. 05-4182 "K"(2)). Neither the United States nor any other party has ever moved for my disqualification from any case on this ground.

I disqualified myself from the entire criminal docket for several reasons involving avoidance of the appearance of lack of impartiality. Judges of this court generally are not privy to the details, direction or staffing of investigations undertaken by federal law enforcement agencies and the United States Attorney's Office. At the time of my recusal and continuing until recently, the scope and specific subject matter of the investigation involving my brother were unclear. No particular case or other proceeding resulting from the investigation had then been filed. I did not know and – again, to avoid even the appearance of any impropriety – did not ask Justice Department personnel to identify who was conducting or the scope of the investigation.

The nature of magistrate judge criminal duty in this court does not exclusively involve assignment to pending criminal cases. It consists largely of being “on call” 24 hours a day for designated one-week periods. During that time, Assistant United States Attorneys and/or federal law enforcement officers routinely appear before the criminal duty magistrate judge ex parte for pre-case matters relating to pending investigations when no case has yet been filed and no opposing counsel has yet appeared. These include but are not limited to applications for or returns on warrants of all kinds, criminal complaints and affidavits, grand jury returns, representation issues or motions of any kind. One concern was that during my assignment to 24-hour criminal duty, I might inadvertently and unknowingly be presented with some matter relating, even tangentially, to an investigation involving my brother. Throughout my 17 years as a magistrate judge, the lion's share of

magistrate judge criminal duty in this court has been handled by another magistrate judge, with my own involvement limited to two or three weeks per year in relief of him. The overwhelming majority of matters that I have handled in this court have been and are on the civil docket. Thus, I anticipated that my recusal from the entire criminal docket would not work a substantial hardship on the court's ability to address it.

After my recusal but before my brother was indicted, I requested an Advisory Opinion concerning my situation from the Committee on Codes of Conduct of the Judicial Conference of the United States. The Committee's views are non-binding and advisory only, but nevertheless much respected, thoroughly considered and generally persuasive. In response to my inquiry, the Committee noted that the disqualification requirements of Canon 3(C), like the language of Section 455(a), focus on the appearance of impartiality – not as to an entire docket or category of cases – but only within a given “proceeding.”

The Committee opined in pertinent part:

Impartiality is of paramount concern when a potential conflict of interest exists *within* a given proceeding. . . . Canon 3C(3)(d) defines “proceeding” to include “pretrial, trial, appellate review, or other stages of litigation,” but does not reference pre-indictment investigations. Concerns about impartiality are more remote when their source is outside a given proceeding. . . . We believe that your present [pre-indictment] recusal [from the entire criminal docket] is not required by the Code. . . . [E]ven if your brother were involved in such a proceeding [as he now is], recusal from unrelated cases in which the United States Attorney's Office also appears would not be necessarily required because such cases would not be part of the same “proceeding” under the Code.

Though the Code may not explicitly prescribe recusal, circumstances may still arise where your impartiality may be questioned, and thereby

warrant continued recusal from some cases on the criminal docket. For example, you might consider recusal from a case involving an AUSA [Assistant United States Attorney] who is simultaneously also participating in any case involving your brother even though the two cases may not be the same “proceeding.” Similarly, caution may call for your recusal in specific cases involving any unit of DOJ [Department of Justice] that is tasked with investigating or prosecuting your brother. . . . Beginning to hear criminal cases . . . will require the same heightened awareness and attention to appearance of impropriety concerns you showed when you decided to recuse from the entire criminal docket under your March 8, 2010 order. (Emphasis by the Committee).

My independent research indicates that courts addressing judicial disqualification have also focused overwhelmingly on recusal only from particular cases or proceedings, not from an entire docket or category of cases. See, e.g., In re Faulkner, 856 F.2d 716, 718, 721 (5th Cir. 1988) (judge was required to recuse himself from a particular criminal fraud case involving the judge’s cousin, with whom he had a close relationship “more like that of ‘brother and sister,’” on grounds of appearance of lack of impartiality, despite the lack of a showing of actual bias; decision includes no indication that broader recusal from any entire docket may be necessary).

Circumstances relevant to my disqualification have recently changed. First, particular proceedings involving my brother are now pending and identifiable in the public record. One case has been filed against my brother; United States v. Broussard et al., Crim. No. 11-299; another involving him is pending, United States v. Whitmer, Crim. No. 12-46; and the scope of the criminal investigation in which he may be involved as a witness or otherwise has been outlined in a parallel civil case. Waste Management of Louisiana, LLC

v. River Birch, Inc. et al, C.A. No. 11-2405, Record Doc No. 1 at ¶ 25; Record Doc. Nos. 24, 25, 26. I had hoped that the proceedings involving my brother might be resolved expeditiously, so that I might end my recusal from the entire criminal docket shortly after they concluded, with all appearance issues relating to my impartiality clearly at an end. It now appears that those proceedings will not end soon. Record Doc. Nos. 67-73 in Crim. No. 11-299; Record Doc. Nos. 48, 54 in C.A. No. 11-2405.

Second, in a recent, unrelated civil case pending before me that involves parallel criminal proceedings, I independently raised my possible disqualification on these grounds, without prompting by the parties. All parties, including the United States, acting through one of the Assistant United States Attorneys who is actively prosecuting my brother, waived my disqualification in writing pursuant to 28 U.S.C. § 455(e) and consented to proceed before me for all purposes pursuant to 28 U.S.C. § 636(c). Southeast Recovery Group, LLC v. BP America, Inc., C.A. No. 11-823, Record Doc. Nos. 6, 67 and 68.

Third, the magistrate judge who has handled the vast bulk of the criminal docket has announced his retirement effective in June 2012. The substantial burden of magistrate judge criminal duty must then be spread among the remaining magistrate judges of this court. The identifiable proceedings involving my brother will apparently not be concluded before his retirement.

Under the foregoing circumstances and considering the Advisory Committee's opinion, I now conclude that my continuing and indefinite recusal from the entire criminal

docket is unnecessary and should instead be limited to specific proceedings. My original disqualification decision was prompted by the uncertain nature of then-existing circumstances, my overarching and, perhaps, overly cautious desire to comply with the Judicial Code of Conduct and its Canons by avoiding even the slightest appearance of any lack of impartiality in criminal matters, and the knowledge that the court's magistrate judge resources were then sufficient to cover my comparatively small contributions to addressing the criminal docket. Under current circumstances, however,

IT IS ORDERED that my order dated March 8, 2010, disqualifying myself from the entire criminal docket is hereby VACATED. The Clerk of Court is directed to reassign criminal cases to me and to return me to the weekly 24-hour criminal duty magistrate judge rotation and schedule, subject to the following restrictions and conditions:

(1) I remain recused from United States v. Broussard et al., Crim No. 11-299, and United States v. Whitmer, Crim. No. 12-46, pursuant to 28 U.S.C. § 455(a) and (b)(5)(i), (iii) and (iv). In realloiting criminal cases, the Clerk must not assign these cases to me.

(2) I hereby recuse myself from any particular case or proceeding that might be filed after entry of this order and any preliminary or pre-case matter (including but not limited to applications for or returns on warrants of any kind, criminal complaints and affidavits, grand jury returns, representation issues or motions of any kind) that might arise in connection with any investigation, criminal pre-indictment matters or proceedings

described in Waste Management of Louisiana, LLC v. River Birch, Inc. et al., C.A. No. 11-2405, Record Doc Nos. 24, 25, 26, 48, 54.

(3) The Clerk of Court is directed to (a) transmit a copy of this order electronically to the United States Attorney and the Federal Public Defender (both of whom must circulate the order to their assistants) and to all members of this court's Criminal Justice Act Panel of Attorneys; (b) post this order for public review in the Clerk's Office and on the court's website for a period of two (2) weeks; and (c) docket and file this order in the record of every criminal case to which I am reassigned.

(4) The rights of any party to move for my recusal at any time on any ground in any particular case or proceeding and/or to invoke the remittal procedures of Canon 3D of the Code of Conduct for United States Judges and 28 U.S.C. § 455(e) are specifically preserved. In particular, any Assistant United States Attorney who is counsel of record in any of the matters identified above is hereby provided with the opportunity at any time either to move for my disqualification, invoke the applicable remittal procedures or exercise the waiver option provided in 28 U.S.C. § 455(e) in any matter allotted to me as to which he or she may also be assigned.

New Orleans, Louisiana, this 13~~th~~ day of April, 2012.



JOSEPH C. WILKINSON, JR.
UNITED STATES MAGISTRATE JUDGE

CLERK TO NOTIFY:

ALL E.D.L.A. JUDGES

UNITED STATES ATTORNEY JIM LETTEN

FEDERAL PUBLIC DEFENDER VIRGINIA SCHLUETER

ALL CJA PANEL ATTORNEYS