

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiffs,)	
)	
v.)	Case No. EP-06-CR-1369FM
)	
JOHN TRAVIS KETNER,)	
ELIZABETH "BETTI" FLORES)	
)	
Defendants.)	

**MARTIE JOBE’S REPLY TO GOVERNMENT’S RESPONSE TO MOTION TO
RECUSE**

Comes now Martie Jobe, and replies to the Government’s response to her motion to recuse, and in support thereof shows as follows.

**UNDER SECTION 455, A COURT IS REQUIRED TO EXAMINE RECUSAL AND
DISQUALIFICATION ISSUES *SUA SPONTE***

In its response, the United States argues that Martie Jobe’s motion should be denied because she “(l)acks standing” and the motion lacks “ripeness” because Jobe has not and may never be charged with any criminal offense. What the United States fails to recognize and address, however, is that Martie Jobe’s motion is brought not under Section 144, but under Section 455. Section 455 “is self-enforcing on the part of the judge..(but) *it may also be asserted by a party by motion in the trial court...through assignment of error on appeal...by interlocutory appeal, as here, or by mandamus.*” *Davis v. Board of School Comm’rs*, 517 F.2d 1044, 1051 (5th Cir. 1975)(citations omitted)(emphasis added), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed. 188 (1976). In other words, even though a Section 455 disqualification or recusal motion “may” be filed, no motion is

necessary at all to engage a judge's self-enforced duty to examine whether he should recuse himself as provided under the law. *United States v. Sibla*, 864, 867-869 (9th Cir. 1980). Once the issues are before the Court, the judge is duty-bound to conduct a recusal analysis regardless of how the issues are presented to the Court.

Moreover, in the Fifth Circuit, if a Section 455 disqualification or recusal basis is not raised or addressed at the trial court level, the appellate court may address the issue for the first time on appeal. In such circumstances, if the Fifth Circuit deems that recusal or disqualification was mandated below, the appellate court can *retroactively vacate the entirety of the underlying proceedings*. In *Mixon v. United States*, the issue of whether a Magistrate Judge's participation in an earlier criminal proceeding proscribed his presiding over a subsequent habeas matter was never raised at the trial court level. *Mixon v. United States*, 620 F.2d 486, 487 (5th Cir. 1980). The issue was presented to the Fifth Circuit for the first time on appeal, and the appellate court held that the Magistrate Judge should have been recused under Section 455. *Mixon*, 620 F.2d at 487. Section 455 having been violated, the appellate court retroactively vacated the entirety of the underlying case and deemed it a "nullity." *Id.*

Although the United States cited boilerplate caselaw on the elementary concepts of ripeness, standing, and subject matter jurisdiction, it failed to locate and cite *a single case* standing for the proposition that Martie Jobe is precluded from raising and presenting to this Court the Section 455 disqualification and recusal issues contained in her motion. Moreover, that a Section 455 recusal analysis need not even arise by motion at all because of the "self-enforcing" analysis a judge is mandated to employ *sua sponte*, the absence of any caselaw supporting the United States' argument was a foregone conclusion, and testament to the extent to which the argument is baseless.

EVEN IF STANDING WERE REQUIRED, THE UNITED STATES' REFERENCE TO MARTIE JOBE IN THE TRAVIS KETNER INFORMATION IS AN ACTIONABLE CONSTITUTIONAL VIOLATION, CONFERRING UPON HER STANDING IN THIS PROCEEDING

In its response, the United States does not dispute it is Martie Jobe that it describes as JaneCC-1, in Count Three of the Travis Ketner Information (Travis Ketner Information, 06CR-1369FM, Doc. 1, at 11-15.). In the Information, the United States Attorney refers to Martie Jobe as a "co-conspirator," and refers on page 12 to those who allegedly sought to manipulate the settlement of a lawsuit over which this Court presided as "uncharged co-defendants." Having affirmatively undertaken to smear Martie Jobe in this fashion, the United States has conferred upon Jobe an actionable ground for a violation of her Due Process rights *in this action*, and is thus collaterally estopped from arguing Jobe has no standing.

In *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975), the United States sought and obtained the return of a federal grand jury indictment which named ten persons of which only seven were made defendants. The other three, although accused of participation in a criminal conspiracy, were described in the indictment as "unindicted coconspirators." The Fifth Circuit found that the "unindicted coconspirators" constitutional rights had been violated. The Court found that the liberty and property concepts of the Fifth Amendment protect an individual from being publicly and officially accused of having committed a serious crime, particularly where the accusations gain wide notoriety. *Id.*, at 798-99. The Fifth Circuit held that no legitimate governmental interests could be served by stigmatizing private citizens as criminals while not naming them as defendants. *Briggs*, 514 F.2d at 805 and 802, n. 13, and held that the due process rights of the individuals involved had been violated. *Id.*, at 806. Their constitutional rights having been violated, the Fifth Circuit

conferred on the unindicted individuals standing to seek the expungement of the pleadings smearing them in criminal case.

Six years later, the Fifth Circuit reviewed a case in a non-grand jury context in which an Assistant United States Attorney “smear(ed)” another uncharged individual in unnecessarily referencing the individual in a criminal case in which he was never charged. *In re Smith*, 656 F.2d 1101 (5th Cir. 1981). In again finding a violation of the uncharged individual’s constitutional rights and conferring upon him standing in the criminal case to affect the pleadings therein, the Fifth Circuit observed,

Despite all of this, the Assistant United States Attorney in preparing the factual resumes required by the Court decided to include in such resumes a statement accusing the Petitioner of criminal conduct. Why? What possible legitimate purpose could have been served by these official condemnations? Certainly the purposes of Rule 11 were not advanced by the attack on the Petitioner's good name. Regardless of what criminal charges may have been contemplated by the Assistant United States Attorney against the Petitioner for the future, we completely fail to perceive how the interests of criminal justice were advanced at the time of the plea hearings by such an attack on the Petitioner's character. *The presumption of innocence, to which every criminal defendant is entitled, was forgotten by the Assistant United States Attorney in drafting and reading aloud in open court the factual resumes which implicated the Petitioner in criminal conduct without affording him a forum for vindication.*

Id., at 1106-07(emphasis added).

In its opinion referencing the Fifth Amendment’s Due Process clause and alleged violations of the Disciplinary Rules of the State Bar of Texas, the *Smith* court held that the inclusion of Mr. Smith's name in the case was a violation of his liberty and property rights guaranteed by the Constitution, and held that Smith had standing to affect the pleadings in the case below. *Id.*, at 1107.

In this case, the Government in its response did not deny that the person to whom it referred in the Ketner Information as a co-conspirator is Martie Jobe. The United States also responded that

Jobe has not yet been charged, and may never be charged, placing her squarely in the shoes of those on whom the Fifth Circuit conferred standing in the *Briggs* and *Smith* cases. It has been more than thirty years since the issuance of these cases, but the import of the Constitutional provisions and Texas Attorney Disciplinary Rules still apply. Moreover, the United States Attorney Manual, to which all United States Attorneys and Assistant United States Attorneys must adhere, provides as follows:

9-27.760 Limitation on Identifying Uncharged Third-Parties Publicly

In all public filings and proceedings, federal prosecutors should remain sensitive to the privacy and reputation interests of uncharged third-parties. In the context of public plea and sentencing proceedings, this means that, in the absence of some significant justification, it is not appropriate to identify (either by name or unnecessarily-specific description), or cause a defendant to identify, a third-party wrongdoer unless that party has been officially charged with the misconduct at issue. In the unusual instance where identification of an uncharged third-party wrongdoer during a plea or sentencing hearing is justified, the express approval of the United States Attorney or his designee should be obtained prior to the hearing absent exigent circumstances. *See* USAM 9-16.500. In other less predictable contexts, federal prosecutors should strive to avoid unnecessary public references to wrongdoing by uncharged third-parties. With respect to bills of particulars that identify unindicted co-conspirators, prosecutors generally should seek leave to file such documents under seal. Prosecutors shall comply, however, with any court order directing the public filing of a bill of particulars.

As a series of cases make clear, there is ordinarily "no legitimate governmental interest served" by the government's public allegation of wrongdoing by an uncharged party, and this is true "[r]egardless of what criminal charges may . . . b[e] contemplated by the Assistant United States Attorney against the [third-party] for the future." *In re Smith*, 656 F.2d 1101, 1106-07 (5th Cir. 1981). Courts have applied this reasoning to preclude the public identification of unindicted third-party wrongdoers in plea hearings, sentencing memoranda, and other government pleadings. *See Finn v. Schiller*, 72 F.3d 1182 (4th Cir. 1996); *United States v. Briggs*, 513 F.2d 794 (5th Cir. 1975); *United States v. Anderson*, 55 F.Supp.2d 1163 (D. Kan 1999); *United States v. Smith*, 992 F. Supp. 743 (D.N.J. 1998); see also USAM 9-11.130.

In all but the unusual case, any legitimate governmental interest in referring to uncharged third-party wrongdoers can be advanced through means other than those

condemned in this line of cases. For example, in those cases where the offense to which a defendant is pleading guilty requires as an element that a third-party have a particular status (*e.g.*, 18 U.S.C. § 203(a)(2)), the third-party can usually be referred to generically ("a Member of Congress"), rather than identified specifically ("Senator Jones"), at the defendant's plea hearing. Similarly, when the defendant engaged in joint criminal conduct with others, generic references ("another individual") to the uncharged third-party wrongdoers can be used when describing the factual basis for the defendant's guilty plea.

The *Briggs* and *Smith* cases remain good law, and have been buttressed by the United States Attorney's Manual which directly proscribed the naming of Jobe as has occurred in this case. Having undertaken the conduct specifically proscribed in the *Briggs* and *Smith* cases, and having violated its own governing rules in naming Jobe in the Ketner information, the United States is collaterally estopped from now asserting that Jobe has no standing to apprise this Court of the recusal and disqualification issues raised in her motion.

THE GUILTY PLEAS OF KETNER AND FLORES NEGATE THE UNITED STATES' ARGUMENT THAT THE RECUSAL ISSUES ARE MERELY HYPOTHETICAL AND SPECULATIVE

The Informations to which Travis Ketner and Elizabeth "Betti" Flores have pled guilty negate the United States' contention that the recusal/disqualification issues that Jobe raises in her motion are conditional, speculative, and/or hypothetical. Both Ketner and Flores pled guilty to counts in their respective Informations alleging malfeasance in connection with the class action lawsuit over which this Court presided. Accordingly, the same disqualification and recusal issues that Jobe raised with respect to herself apply equally to the Ketner and Flores.

More specifically, in generating its Presentence Report for Ketner and Flores, the United States Probation Office will need to calculate and gauge the extent to which there was any "loss" as that term is used in United States Sentencing Guideline Section 2B1.1. That calculation will have

a direct bearing on the sentencing ranges Ketner and Flores will be facing at the time of their sentencings - the higher the “loss,” the longer the imprisonment range each faces. Of course, if their counsel are astute, Ketner and Flores will argue at sentencing that there is no “loss” meriting any sentencing enhancement because Judge Montalvo found the settlement amount of the class action lawsuit at issue “reasonable,” and undertook an extensive and meticulous analysis in this regard. In other words, Judge Montalvo having found the class action settlement amount “reasonable,” Ketner and Flores may argue there was no loss to any governmental entity or the public so as to merit any sentencing enhancement.

The United States Probation Officer who generates the presentence report will have free reign to generate a “loss” figure, which may be a figure that comports with or nullifies this Court’s findings in the class action case. Moreover, the United States Attorney may argue that this Court’s findings in the class action lawsuit were unjustified, and that the sentence was indeed too high - for purposes of increasing “loss” and any corresponding sentence. Finally, for purposes of the evidentiary hearing on sentencing, Ketner, Flores, and the United States may hire their own respective experts to gauge, evaluate, confirm, and/or criticize this Court’s findings with respect to the settlement amount. In the end, Judge Montalvo and his findings will be at issue on sentencing. If this Court remains as presiding judge in the criminal case, the Court (not a jury) will render the final decision on “loss” and impose a sentencing accordingly. As Judge Montalvo’s findings and his testimony will be at issue for purposes of sentencing, his presiding over the Ketner and Flores sentencings would be incompatible with his position as a witness under Section 455(b), and would certainly cause a reasonable position to question the *appearance* of impartiality under Section 455(a).

As the pleadings in this case are sealed, it is unclear whether Ketner, Flores, and/or their counsel had actual knowledge of the recusal and disqualification issues raised in the Jobe motion. As explained above, however, these Section 455 analyses are Court-driven, not party driven. They are now before the Court, and presumably will be communicated to Ketner, Flores, and their counsel.

28 U.S.C. Section 455(e) provides that Ketner and Flores may not waive any ground for disqualification under Section 455(b), and may only waive disqualification under 455(a) only if the waiver is “*preceded by a full disclosure on the record of the basis for disqualification.*” 28 U.S.C. 455(e).

**THE LAW REQUIRES A COURT TO CONDUCT A DISQUALIFICATION AND
RECUSAL ANALYSIS, AND ACT ON SUCH ANALYSIS, AT THE EARLIEST
POSSIBLE OPPORTUNITY**

Again, in its response, the United States argues that even though Martie Jobe has not been charged and may never be charged with any criminal offense, this Court need not conduct any disqualification and/or recusal analysis because the issue is not “ripe.” Of course, the Fifth Circuit mandates that “a judge faced with a *potential* ground for disqualification” engage its disqualification analysis. *Potashinick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980). Moreover, “a litigant who is aware of a *potential* ground of recusal should not be permitted to ‘sandbag’ that ground, hoping for a satisfactory resolution, but retaining a ground of attack on the judge’s rulings.” 7 James W. Moore & Jo D. Lucas, *Moore’s Federal Practice* P. 63.07[2.-2](2d ed. 1993).

Martie Jobe has alerted this Court to actual grounds for disqualification, and she timely did so immediately after this Court held that it exercised the power and jurisdiction to disqualify a counsel who sought to represent unindicted individuals not parties in this case. Jobe has thus complied with the mandate that she alert this Court of any actual and/or *potential* grounds for

disqualification, the resolution of which need be made at the earliest possible opportunity.

THE UNITED STATES' CITATION OF INAPPOSITE CIVIL AND ADMINISTRATIVE CASES DOES NOT OVERCOME THE LEGAL REALITY THE JUDGES MAY BE CALLED AS WITNESSES IN CRIMINAL CASES

In a scant three paragraphs, the United States makes a feeble argument that judges may not be called as witnesses in criminal cases. In the very *Dowdy* case that the United States cites, the Court held,

While a judge enjoys no special privilege from being subpoenaed as a witness, it is imperative when he is called to testify as to action taken in his judicial capacity, to carefully scrutinize the grounds set forth for requiring his testimony. United States v. Dowdy, 440 F.Supp. 894, 896 (W.D.Va. 1977).

The United States then goes on to cite an inapposite case regarding whether an administrative agency head can be called to testify, and conclusorily avers that the *Wilson* case that Jobe cites is unhelpful. The *Wilson* case unequivocally establishes that in the criminal context, a trial judge may be called to testify in a later proceeding with respect to actual *subjective* conclusions (i.e., whether trial counsel was effective). *Wilson v. Lash, 457 F.2d 106, 110 (7th Cir. 1972)*. Moreover, in the *Wilson case*, the trial judge was apparently testifying against the habeas petitioner and for the government. As previously asserted, if a trial judge can testify against a defendant in a criminal proceeding, that he can later testify on behalf of a criminal defendant is beyond challenge. There can be no other reading of the case or the conclusions rendered therein.

Martie Jobe has defined explicitly the contours of any examination required of Judge Montalvo, all of which derive from the reasoned conclusions Judge Montalvo rendered in the class action lawsuit. Moreover, to the extent that the United States argues that the “mental processes” of Judge Montalvo’s conclusions with respect to the class action lawsuit settlement cannot be probed,

the United States has cited no such support for this assertion (especially in the criminal context). Judge Montalvo's testimony with respect to his conclusions on possible ranges of recovery, on whether the settlement amount was reasonable, on whether he undertook to verify the absence of fraud, the actual absence of fraud, measures taken to reach his conclusions, materials and representations upon which he relied to reach these conclusions, orders he issued with respect to the timing and content of settlement demands, and his opinions with respect to Martie Jobe's professionalism, veracity, and candor to the Court in the subject litigation are all areas Jobe would be entitled to explore, and are subjects that do not impinge on the Court's "mental processes," if indeed any Court decides that mental processes may not be probed.

THE UNITED STATES CONCEDES THAT JUDGE MONTALVO'S OVERSIGHT OF ANY CRIMINAL CASE REGARDING THE CLASS ACTION LAWSUIT WOULD IMPLICATE THIS COURT'S APPEARANCE OF IMPARTIALITY

In her motion Martie Jobe took pains to explain to this Court the very scenarios that would create the *appearance* of partiality mandating recusal under Section 455(a). The United States did not even address these arguments in its response, effectively conceding the issue, and understandably so. The effect of this Court presiding over what would appear to a reasonable person (or reasonable juror, for that matter) to be an inquiry about whether Jobe participated in a scheme to illegally manipulate a lawsuit settlement that this Court was duty bound to evaluate for reasonableness and for the absence of fraud would create an appearance of partiality. The United States' silence in responding to this argument is deafening.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10TH of August, 2007, I electronically filed the foregoing with the Clerk of the Court for the Western District of Texas, El Paso, Texas using the CM/ECF system which will send notification of such filing to the following:

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