

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

UNITED STATES OF AMERICA,))	CRIMINAL ACTION NO.
)	
Plaintiff,)	02-50024-02
)	
v.)	SENIOR JUDGE XXX XXX
)	MAGISTRATE JUDGE XXX
XXXXXXX XXX,)	
)	
Defendant.)	
<hr/>)	

**MOTION TO DISQUALIFY DISTRICT JUDGE AND MEMORANDUM OF LAW IN
SUPPORT THEREOF**

Defendant, XXXXXX XXX, hereby moves Judge XXX XXX, pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455, to immediately disqualify himself from all future proceedings in this manner. In support of this motion, Mr. XXX sets for the following facts and argument.

I. BACKGROUND

This case was remanded to this Court by the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit’s remand focused on four areas. First, this Court, on remand, was directed to reconsider Mr. XXX’ new trial motion under an “interest of justice standard.” *See United States v. XXX (XXX I)*, 379 F.3d 233, 253-58 (5th Cir. 2004). In connection with that ruling, the Fifth Circuit noted that, because this Court did not allow Mr. XXX to fully develop the record concerning the substance of the testimony from the new trial motion witnesses, “the district court may need to hold a further hearing (if timely and properly requested to do so by either party).” *Id.* at 258. Next, the Fifth Circuit required this

Court to review the Presentence Reports of key witnesses which it previously refused to do, in order to determine if the failure to review the reports for *Giglio* and *Brady* material justified a new trial. *Id.* at 263-64. Third, the Court of Appeals required that, if a new trial motion was denied, that this Court resentence Mr. XXX “with respect to the quantity of crack cocaine” because its previous sentencing determination was based upon inconsistent information. *Id.* at 266-69. Finally, in *United States v. XXX (XXX II)*, 411 F.3d 572 (5th Cir. 2005), the Fifth Circuit held that, in the event a resentencing was necessary, it was to be done in accordance with the United States Sentencing Guidelines now being “advisory” and “with XXX and counsel present and having, *inter alia*, an opportunity to speak under Fed. R. Crim. P. 32(i)(4)(A).”

Instead of following the mandate of the United States Court of Appeals for the Fifth Circuit, this Court, on remand and without giving counsel an opportunity to request a hearing as the Court of Appeals suggested would be appropriate, simply denied the new trial motion without hearing the testimony that it previously refused to allow Mr. XXX’ trial counsel to present. Next, it never addressed the questions surrounding the PSR. Instead, without giving any indication as to how it reevaluated the drug amounts and without considering the comments of Mr. XXX and counsel as the Fifth Circuit indicated would be required prior to resentencing, the Court simply decided to impose another life sentence on a man who had no previous criminal history. *See* Declaration of F. Clinton Broden (“Broden Dec.”) (attached hereto as Attachment A) at ¶ 3. Indeed, the Court apparently requested its law clerk to call undersigned counsel in order to determine if the government could be spared the expense of bringing Mr. XXX back to Shreveport simply to be resentenced to life. *Id.* In other words, the Court had prejudged Mr. XXX sentence without the benefit of hearing Mr. XXX and his counsel address arguments now made available under *Booker v. United States*, 125 S.Ct. 738 (2005).

Possibly relevant to his motion is also the fact that this Court imposed a \$10,000 fine against Mr. XXX' trial counsel for being late to his sentencing- a fine that the Fifth Circuit characterized as "extremely large." *In re. Victoria M. Cranford*, 75 Fed. Appx. 964 (5th Cir. 2004). Ultimately the Fifth Circuit concluded that the Court improperly imposed this "extremely large" fine without affording Ms. Cranford due process.

II. DISCUSSION

28 U.S.C. § 144, provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding_____.

28 U.S.C. § 455 provides:

Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

"[I]t is apparent that the two sections are not redundant but are complementary...." *United States v. Silba*, 624 F.2d 864, 868 (9th Cir. 1980). "[A] movant under section 144 must allege facts to convince a reasonable person that bias exists, while under the broader language of section 455, he must show only that a reasonable person 'would harbor doubts about the judge's impartiality.'" *Phillips v. Join Legislative Committee on Performance & Expenditure Review*, 637 F.2d 1014, 1019 (5th Cir. 1981), *cert denied*, 456 U.S. 960 (1982). In the instant case, based upon the declarations attached hereto, a "reasonable person" would be convinced that bias existed and, certainly, that person "would harbor doubts" about the Court's impartiality.

First, the Court simply denied Mr. XXX' new trial motion without holding a hearing after originally denying Mr. XXX an opportunity to develop the "probably would have made a

difference” standard. While it is true that the Fifth Circuit spoke about the parties requesting a hearing, the Court never announced its intention to simply rule on the new trial motion following the remand of this case without any further input of the parties, nor did it issue any type of scheduling order, nor was Mr. XXX brought back to the district where he could confer with counsel on how to proceed. Therefore, counsel had no indication that a hearing had to be requested prior to the time he was informed, by telephone, of the order denying the motion as a fait accompli.

Second, the Court appears to have ignored the mandate of the United States Court of Appeals for the Fifth Circuit to review the Presentence Reports of key witnesses which it previously refused to do, in order to determine if the failure to review the reports for *Giglio* and *Brady* material justified a new trial. Likewise, if a new trial motion was denied, the Court appears to have failed to make a new determination “with respect to the quantity of crack cocaine” attributed to Mr. XXX as required on remand.

Third, and most important, the Court has predetermined Mr. XXX sentence in this matter. Despite the fact that the Fifth Circuit explicitly stated that Mr. XXX sentence was to be reconsidered in light of *Booker* and that such reconsideration was to be done in connection with “XXX and counsel present and having, *inter alia*, an opportunity to speak under Fed. R. Crim. P. 32(I)(4)(A),” the Court, through his law clerk, has already announced a life sentence. Indeed, while the Court’s concern should have been following the Fifth Circuit’s mandate and ensuring that Mr. XXX was afforded his full panoply of due process rights, it appears that the Court’s *only* concern was saving the executive branch of the United States government the money it

would cost in transporting Mr. XXX.¹ The courts have made clear, in different contexts, that a judge must be disqualified when a judge predetermines an individual's guilt or sentence without allowing that individual to be heard. *See, e.g., United States v. Clements*, 634 F.2d 183, 186-87 (5th Cir. 1981); *United States v. Sciuto*, 531 F.2d 842, 844-47 (7th Cir. 1976); *United States v. Thompson*, 483 F.2d 527 (3rd Cir. 1973); *United States v. Townsend*, 478 F.2d 1072 (3rd Cir. 1973); *United States v. Womack*, 454 F.2d 1337, 1340-41. (5th Cir. 1972). Indeed, in *Clements*, the Fifth Circuit noted that it "will carefully scrutinize the judicial process by which the punishment was imposed." *Clements*, 634 F.2d at 186. Here, by predetermining Mr. XXX' sentence in hopes of saving money for one of the parties, the Court has rendered Mr. XXX' rights under *Booker* and Fed. R. Crim. P. 32 useless. Certainly this would cause a reasonable person to, at the very least, "harbor doubts" about the Court's impartiality in this case.

Finally, while not dispositive, the Court's imposition of an "extremely large" fine on Mr. XXX' trial counsel without any of the benefits of due process would give a reasonable person pause as to the Court's impartiality in this matter.

III. CONCLUSION

Given the allegations contained in the attached declarations, which the Court must presume to be true and which hopefully should be undisputed, as well as the totality of the facts (especially the predetermination of Mr. XXX's sentence), it would appear that a reasonable person would conclude that bias exists in this case and, therefore, the Court must recuse itself under 28 U.S.C. § 144. Nevertheless, putting aside the question of whether actual prejudice exists, there can be no doubt that a reasonable person looking at the totality of the circumstances

¹ In fact, the Court's law clerk never suggested that the Court was concerned about the impact being transported while in custody and/or being removed from his institution would have

would harbor doubts” about the Court’s impartiality and, therefore, Judge XXX should certainly recuse himself under 28 U.S.C. § 144.

Respectfully submitted,

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2707 Hibernia
Dallas, Texas 75204
214-720-9552
214-720-9594 (facsimile)

Attorney for Defendant
XXXXXX

on Mr. XXX but simply expressed a concern about the cost to one party in affording Mr. XXX his due process rights.

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on August 3, 2005 I cause the foregoing document to be served by first class mail, postage prepaid, on the United States Attorney's Office, 300 Fannin Street, Shreveport, Louisiana 71101-3083.

F. Clinton Broden

CERTIFICATE OF CONFERENCE

I, F. Clinton Broden, certify that, on August 3, 2005, a telephone conference was held regarding the above motion with XXX Hathaway, the Assistant United States Attorney currently assigned to this case, and it was determined that:

The government OPPOSES the motion.

F. Clinton Broden

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<hr style="border-top: 1px solid black;"/>)	

ORDER

_____ Upon consideration of Defendant's Motion to Disqualify District Judge, said motion is this ____ day of _____, 2005 GRANTED.

ORDERED Judge XXX XXX recuses himself from any further involvement in the proceedings in this case.

FURTHER ORDERED the case shall be referred to the United States District Clerk's Office for the Western District of Louisiana for reassignment in accordance with its normal procedures.

XXX XXX
SENIOR UNITED STATES DISTRICT JUDGE